

S 2831 IS

109th CONGRESS

2d Session

S. 2831

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

IN THE SENATE OF THE UNITED STATES

May 18, 2006

Mr. LUGAR (for himself, Mr. SPECTER, Mr. DODD, Mr. GRAHAM, and Mr. SCHUMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2006'.

SEC. 2. PURPOSE.

The purpose of this Act is to guarantee the free flow of information to the public through a free and active press as the most effective check upon Government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.

SEC. 3. DEFINITIONS.

In this Act--

- (1) the term 'attorney for the United States' means the Attorney General, any United States Attorney, Department of Justice prosecutor, special prosecutor, or other officer or employee of the United States in the

executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process;

(2) the term `communication service provider'--

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153 and 230)); and

(3) the term `journalist' means a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as 1 of its regular functions the processing and researching of news or information intended for dissemination to the public.

SEC. 4. COMPELLED DISCLOSURE AT THE REQUEST OF ATTORNEYS FOR THE UNITED STATES IN CRIMINAL PROCEEDINGS.

(a) In General- Except as provided in subsection (b), in any criminal investigation or prosecution, a Federal court may not, upon the request of an attorney for the United States, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

- (1) the attorney for the United States has exhausted alternative sources of the information;
- (2) to the extent possible, the subpoena--
 - (A) avoids requiring production of a large volume of unpublished material; and
 - (B) is limited to--
 - (i) the verification of published information; and
 - (ii) surrounding circumstances relating to the accuracy of the published information;
- (3) the attorney for the United States has given reasonable and timely notice of a demand for documents;
- (4) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens;
- (5) there are reasonable grounds, based on an alternative, independent source, to believe that a crime has occurred, and that the information sought is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence; and
- (6) the subpoena is not being used to obtain peripheral, nonessential, or speculative information.

SEC. 5. COMPELLED DISCLOSURE AT THE REQUEST OF CRIMINAL DEFENDANTS.

- (a) In General- Except as provided in subsection (b), a Federal court may not, upon the request of a criminal defendant, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--
 - (1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or
 - (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and under a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

(1) the criminal defendant has exhausted alternative sources of the information;

(2) there are reasonable grounds, based on an alternative source, to believe that the information sought is directly relevant to the question of guilt or innocence or to a fact that is critical to enhancement or mitigation of a sentence;

(3) the subpoena is not being used to obtain peripheral, nonessential, or speculative information; and

(4) nondisclosure of the information would be contrary to the public interest, taking into account the public interest in compelling disclosure, the defendant's interest in a fair trial, and the public interest in newsgathering and in maintaining the free flow of information.

SEC. 6. CIVIL LITIGATION.

(a) In General- Except as provided in subsection (b), in any civil action, a Federal court may not compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

(1) the party seeking the information has exhausted alternative sources of the information;

(2) the information sought is critical to the successful completion of the civil action;

(3) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and in maintaining the free flow of information to the widest possible degree about all matters that enter the public sphere;

(4) the subpoena is not being used to obtain peripheral, nonessential, or speculative information;

(5) to the extent possible, the subpoena--

(A) avoids requiring production of a large volume of unpublished material; and

(B) is limited to--

(i) the verification of published information; and

(ii) surrounding circumstances relating to the accuracy of the published information; and

(6) the party seeking the information has given reasonable and timely notice of the demand for documents.

SEC. 7. EXCEPTION FOR JOURNALIST'S EYEWITNESS OBSERVATIONS OR PARTICIPATION IN CRIMINAL OR TORTIOUS CONDUCT.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider has no privilege against disclosure of any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the journalist, including any physical evidence or visual or audio recording of the observed conduct, if a court determines by clear and convincing evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources. This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.

SEC. 8. EXCEPTION TO PREVENT DEATH OR SUBSTANTIAL BODILY INJURY.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any information to the extent such information is reasonably necessary to stop or prevent reasonably

certain--

- (1) death; or
- (2) substantial bodily harm.

SEC. 9. EXCEPTION FOR NATIONAL SECURITY INTEREST.

(a) In General- Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any records, communication data, documents, information, or items described in sections 4(a), 5(a), or 6(a) sought by an attorney for the United States by subpoena, court order, or other compulsory process, if a court has provided the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, and determined by clear and convincing evidence, that--

- (1) disclosure of information identifying the source is necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security, and the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure; or
- (2) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified Government information by an employee of the United States, such unauthorized disclosure has seriously damaged the national security, alternative sources of the information identifying the source have been exhausted, and the harm caused by the unauthorized disclosure of properly classified Government information clearly outweighs the value to the public of the disclosed information.

(b) Rule of Construction- Nothing in this Act shall be construed to limit any authority of the Government under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.).

SEC. 10. JOURNALIST'S SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a journalist, any person who employs or has an independent contract with a journalist, or a communications service provider of--

- (1) information identifying a source who provided information without a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) records, communication data, documents, or information obtained without a promise or agreement that such records, communication data, documents, or information would be confidential.

END

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