

109TH CONGRESS
1ST SESSION

S. 340

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9, 2005

Mr. LUGAR introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Free Flow of Informa-
5 tion Act of 2005”.

6 **SEC. 2. CONDITIONS FOR COMPELLED DISCLOSURE.**

7 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—No
8 Federal entity may compel a covered person to testify or

1 produce any document in any proceeding or in connection
2 with any issue arising under Federal law unless a court
3 determines by clear and convincing evidence, after pro-
4 viding notice and an opportunity to be heard to the cov-
5 ered person—

6 (1) that the entity has unsuccessfully attempted
7 to obtain such testimony or document from all per-
8 sons from which such testimony or document could
9 reasonably be obtained other than a covered person;
10 and

11 (2) that—

12 (A) in a criminal investigation or prosecu-
13 tion, based on information obtained from a per-
14 son other than a covered person—

15 (i) there are reasonable grounds to be-
16 lieve that a crime has occurred; and

17 (ii) the testimony or document sought
18 is essential to the investigation, prosecu-
19 tion, or defense; or

20 (B) in a matter other than a criminal in-
21 vestigation or prosecution, based on information
22 obtained from a person other than a covered
23 person, the testimony or document sought is es-
24 sential to a dispositive issue of substantial im-
25 portance to that matter.

1 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

2 The content of any testimony or document that is com-
3 pelled under subsection (a) shall, to the extent possible—

4 (1) be limited to the purpose of verifying pub-
5 lished information or describing any surrounding cir-
6 cumstances relevant to the accuracy of such pub-
7 lished information; and

8 (2) be narrowly tailored in subject matter and
9 period of time covered.

10 **SEC. 3. COMMERCIAL OR FINANCIAL INFORMATION.**

11 The provisions of section 2 do not apply to a request
12 by a Federal entity for any testimony or document that
13 consists of only commercial or financial information unre-
14 lated to newsgathering or news and information dissemi-
15 nation by a covered person.

16 **SEC. 4. COMPELLED DISCLOSURE PROHIBITED.**

17 Notwithstanding any provision of section 2, in any
18 proceeding or in connection with any issue arising under
19 Federal law, no Federal entity may compel a covered per-
20 son to disclose—

21 (1) the identity of a source of information—

22 (A) from whom the covered person ob-
23 tained information; and

24 (B) who the covered person believes to be
25 a confidential source; or

1 (2) any information that could reasonably be
2 expected to lead to the discovery of the identity of
3 such a source.

4 **SEC. 5. COMPELLED DISCLOSURE FROM THIRD PARTIES.**

5 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—

6 The provisions of sections 2, 3, and 4 shall apply to any
7 testimony or document that a Federal entity seeks from
8 a third party if such testimony or document consists of
9 any record, information, or other communication that re-
10 lates to a business transaction between such third party
11 and a covered person. Such record, information, or other
12 communication includes any telephone record or other
13 record held by a telecommunications service provider,
14 Internet service provider, or operator of an interactive
15 computer service for a business purpose.

16 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
17 ERED PERSONS.—A court may compel the testimony or
18 disclosure of a document under this section only after the
19 party seeking such a document provides the covered per-
20 son who is a party to the business transaction described
21 in subsection (a)—

22 (1) notice of the subpoena or other compulsory
23 request for such testimony or disclosure from the
24 third party not later than the time at which such
25 subpoena or request is issued to the third party; and

1 (2) an opportunity to be heard before the court
2 before the time at which the testimony or disclosure
3 is compelled.

4 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
5 under subsection (b)(1) may be delayed only if the court
6 determines by clear and convincing evidence that such no-
7 tice would pose a substantial threat to the integrity of a
8 criminal investigation.

9 **SEC. 6. ACTIVITIES NOT CONSTITUTING A WAIVER.**

10 The publication or dissemination of any testimony or
11 document (or portion of such testimony or document)
12 sought under section 2 shall not waive the requirements
13 of such section. The publication or dissemination of any
14 testimony or document (or portion of such testimony or
15 document), identity, or information described in section 4
16 shall not waive the prohibition described in such section.

17 **SEC. 7. DEFINITIONS.**

18 In this Act:

19 (1) COVERED PERSON.—The term “covered
20 person” means—

21 (A) an entity that disseminates informa-
22 tion by print, broadcast, cable, satellite, me-
23 chanical, photographic, electronic, or other
24 means and that—

1 (i) publishes a newspaper, book, mag-
2 azine, or other periodical;

3 (ii) operates a radio or television
4 broadcast station (or network of such sta-
5 tions), cable system, or satellite carrier, or
6 a channel or programming service for any
7 such station, network, system, or carrier;
8 or

9 (iii) operates a news agency or wire
10 service;

11 (B) a parent, subsidiary, or affiliate of
12 such an entity; or

13 (C) an employee, contractor, or other per-
14 son who gathers, edits, photographs, records,
15 prepares, or disseminates news or information
16 for such an entity.

17 (2) DOCUMENT.—The term “document” means
18 writings, recordings, and photographs, as those
19 terms are defined by Federal Rule of Evidence 1001
20 (28 U.S.C. App.).

21 (3) FEDERAL ENTITY.—The term “Federal en-
22 tity” means an entity or employee of the judicial,
23 legislative, or executive branch of the Federal Gov-
24 ernment with the power to issue a subpoena or pro-
25 vide other compulsory process.

- 1 (4) THIRD PARTY.—The term “third party”
2 means a person other than a covered person.

