

Free Flow of Information Act of 2007 Explanation of Revisions

**Reps. Rick Boucher and Mike Pence
May 2, 2007**

The Free Flow of Information Act of 2007 (the “FFIA”) has been revised and updated prior to its introduction in the 110th Congress. The FFIA is about protecting the public’s right to know. It does so by putting into the law a federal “media shield” similar to shield laws in place in forty-nine states. The shield law prevents journalists from being compelled to testify, produce documents, or disclose sources in civil and criminal cases, unless certain standards and conditions are met. The FFIA, thereby, gives journalists certain rights and abilities to seek sources and report appropriate information to the public without fear of imprisonment.

In the 109th Congress, two versions of the FFIA were introduced: H.R. 581 on February 2, 2005, and H.R. 3323 on July 18, 2005. H.R. 3323 contained a new exception to allow for compelled disclosure of a source if disclosure is necessary to prevent imminent and actual harm to national security and such harm outweighs the public interest in protecting the free flow of information.

In the 110th Congress, the national security exception has been maintained, and the following additional changes have been made:

- The addition of an exception for compelled disclosure of sources if necessary to prevent imminent death or significant bodily harm.
- The addition of an exception for compelled disclosure of sources if necessary to identify a person who has disclosed trade secrets of significant value in violation of state or federal law.
- The addition of an exception for compelled disclosure of sources if necessary to identify a person who has disclosed personal medical or financial information.
- The inclusion of a balancing test in all instances that would determine whether nondisclosure 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.
- A change in the definition of a covered person under the FFIA to a person engaged in journalism, which is defined as the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.
- The use of a preponderance of the evidence standard for compelled testimony or document production by a journalist in court.

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(Original Signature of Member)

110TH CONGRESS
1ST SESSION

H. R.

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 HOUSE OF REPRESENTATIVES

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. COBLE, Mr. YARMUTH, and Mr. WALDEN) introduced the following bill; which was referred to the Committee on _____

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 2007”.

1 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
2 **SONS.**

3 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
4 any proceeding or in connection with any issue arising
5 under Federal law, a Federal entity may not compel a cov-
6 ered person to provide testimony or produce any document
7 related to information possessed by such covered person
8 as part of engaging in journalism, unless a court deter-
9 mines by a preponderance of the evidence, after providing
10 notice and an opportunity to be heard to such covered per-
11 son—

12 (1) that the party seeking to compel production
13 of such testimony or document has exhausted all
14 reasonable alternative sources (other than a covered
15 person) of the testimony or document;

16 (2) that—

17 (A) in a criminal investigation or prosecu-
18 tion, based on information obtained from a per-
19 son other than the covered person—

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

22 (ii) the testimony or document sought
23 is essential to the investigation or prosecu-
24 tion or to the defense against the prosecu-
25 tion; or

1 (B) in a matter other than a criminal in-
2 vestigation or prosecution, based on information
3 obtained from a person other than the covered
4 person, the testimony or document sought is es-
5 sential to the successful completion of the mat-
6 ter;

7 (3) in the case that the testimony or document
8 sought could reveal the identity of a source of infor-
9 mation or include any information that could reason-
10 ably be expected to lead to the discovery of the iden-
11 tity of such a source, that—

12 (A) disclosure of the identity of such a
13 source is necessary to prevent imminent and ac-
14 tual harm to national security with the objective
15 to prevent such harm;

16 (B) disclosure of the identity of such a
17 source is necessary to prevent imminent death
18 or significant bodily harm with the objective to
19 prevent such death or harm, respectively; or

20 (C) disclosure of the identity of such a
21 source is necessary to identify a person who has
22 disclosed—

23 (i) a trade secret of significant value
24 in violation of a State or Federal law;

1 (ii) individually identifiable health in-
2 formation, as such term is defined in sec-
3 tion 1171(6) of the Social Security Act (42
4 U.S.C. 1320d(6)), in violation of Federal
5 law; or

6 (iii) nonpublic personal information,
7 as such term is defined in section 509(4)
8 of the Gramm-Leach-Bliley Act (15 U.S.C.
9 6809(4)), of any consumer in violation of
10 Federal law; and

11 (4) that nondisclosure of the information would
12 be contrary to the public interest, taking into ac-
13 count both the public interest in compelling disclo-
14 sure and the public interest in gathering news and
15 maintaining the free flow of information.

16 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

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

19 (1) be limited to the purpose of verifying pub-
20 lished information or describing any surrounding cir-
21 cumstances relevant to the accuracy of such pub-
22 lished information; and

23 (2) be narrowly tailored in subject matter and
24 period of time covered so as to avoid compelling pro-

1 duction of peripheral, nonessential, or speculative in-
2 formation.

3 **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS**

4 **SERVICE PROVIDERS.**

5 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—

6 With respect to testimony or any document consisting of
7 any record, information, or other communication that re-
8 lates to a business transaction between a communications
9 service provider and a covered person, section 2 shall apply
10 to such testimony or document if sought from the commu-
11 nications service provider in the same manner that such
12 section applies to any testimony or document sought from
13 a covered person.

14 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-

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

20 (1) notice of the subpoena or other compulsory
21 request for such testimony or disclosure from the
22 communications service provider not later than the
23 time at which such subpoena or request is issued to
24 the communications service provider; 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 involved determines by clear and convincing evidence that
7 such notice would pose a substantial threat to the integrity
8 of a criminal investigation.

9 **SEC. 4. DEFINITIONS.**

10 In this Act:

11 (1) COMMUNICATIONS SERVICE PROVIDER.—

12 The term “communications service provider”—

13 (A) means any person that transmits infor-
14 mation of the customer’s choosing by electronic
15 means; and

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

22 (2) COVERED PERSON.—The term “covered
23 person” means a person engaged in journalism and
24 includes a supervisor, employer, parent, subsidiary,
25 or affiliate of such covered person.

1 (3) DOCUMENT.—The term “document” means
2 writings, recordings, and photographs, as those
3 terms are defined by Federal Rule of Evidence 1001
4 (28 U.S.C. App.).

5 (4) FEDERAL ENTITY.—The term “Federal en-
6 tity” means an entity or employee of the judicial or
7 executive branch or an administrative agency of the
8 Federal Government with the power to issue a sub-
9 poena or issue other compulsory process.

10 (5) JOURNALISM.—The term “journalism”
11 means the gathering, preparing, collecting,
12 photographing, recording, writing, editing, reporting,
13 or publishing of news or information that concerns
14 local, national, or international events or other mat-
15 ters of public interest for dissemination to the pub-
16 lic.

Congressman Mike Pence
Remarks at Introduction of Free Flow of Information Act Press Conference
May 2, 2007

I am honored to be here today alongside my colleague Rick Boucher, who is such a tireless advocate for the First Amendment. Also, we are pleased to have Chairman Conyers and Reps. Coble, Walden and Yarmuth as original cosponsors. This is truly a bipartisan issue. It is a First Amendment issue, and I thank not only Congressman Boucher for his leadership but also the senior senator from my home state, Dick Lugar, as well as Senator Chris Dodd from Connecticut for their leadership in the Senate. They are truly champions for a free press.

As a conservative who believes in limited government, I know the only check on government power in real time is a free and independent press. The Free Flow of Information Act is not about protecting reporters; it is about protecting the public's right to know. Our Founders did not enshrine the freedom of the press in the Constitution because they got good press. And, I am certainly not advocating a free and independent press because I always get good press.

Enshrined in the First Amendment are these words: "Congress shall make no law...abridging the freedom of speech, or of the press."

We all remember when not long ago a confidential source brought to light abuses at the highest levels of government in the long national nightmare of Watergate. History records that W. Mark Felt never would have come forward without the assurance made to him of confidentiality.

But, thirty years later the press cannot make that assurance to sources, and we face the real danger that there may never be another Deep Throat. The protections provided by the Free Flow of Information Act are necessary so that members of the media can bring forward information to the American public without fear of retribution or prosecution.

In recent years, we have famously seen reporters such as Judith Miller jailed and Mark Fainaru-Wada and Lance Williams threatened with jail sentences. They are a few names among many who have been subpoenaed for taking a stand for the First Amendment and refusing to reveal confidential sources.

Compelling reporters to testify, and in particular, compelling them to reveal the identity of their confidential sources, is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our government will be shut down. The dissemination of information by the media to the public on matters ranging from the operation of our government to events in our local communities is invaluable to the operation of our democracy. Without the free flow of information from sources to reporters, the public is ill-equipped to make informed decisions.

Thirty-two states and the District of Columbia have various statutes that protect reporters from being compelled to testify or disclose sources and information in court. Seventeen states have protections for reporters as a result of judicial decisions. The Free Flow of Information Act would set national standards similar to those that are in effect in the states.

The Free Flow of Information Act closely follows existing Department of Justice guidelines for issuing subpoenas to members of the news media. It simply makes the guidelines mandatory and provides protection against compelled disclosure of confidential sources. In doing so, this legislation strikes a balance between the public's need for information and the fair administration of justice.

Abraham Lincoln said, "Give the people the facts and the Republic will be saved." The Free Flow of Information Act is designed to ensure that the American people have the facts that they need to make choices as an informed electorate.

A free and independent press is the only agency in America that has complete freedom to hold government accountable. Integrity in government is not a Democratic or Republican issue, and corruption cannot be laid at the feet of one party. When scandal hits either party, any branch of government, or any institution in our society, it wounds our nation.

As a conservative, I believe that concentrations of power should be subject to great scrutiny. The longer I serve in Congress, the more firmly I believe in the wisdom of our Founders – especially as it pertains to the First Amendment and freedom of the press. It is imperative that we preserve the transparency and integrity of American government, and the only way to do that is by preserving a free and independent press.

Thomas Jefferson warned that, "Our liberty cannot be guarded but by the freedom of the press, nor that limited without danger of losing it."

This Congress would be wise to take those words to heart. Now is the time to heed the advice of Mr. Jefferson. It is time to repair this tear in the First Amendment. It is time to pass a federal media shield law, and I am pleased to stand with my colleagues today to introduce the Free Flow of Information Act."