



**The Secretary of Energy**  
Washington, DC 20585

April 7, 2008

The Honorable Carl Levin  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

This letter provides the views of the Department of Energy ("DOE") on S. 2035, the "Free Flow of Information Act of 2007" (FFIA), which was reported by the Senate Judiciary Committee in October 2007. I am writing because this bill is of significant concern to DOE, and we request that you and other members of the Armed Services Committee strongly oppose the bill if it is brought up for consideration on the Senate floor.

The FFIA would provide a legal privilege for certain journalists against Federal entities seeking to obtain information that identifies a confidential source or was provided to the journalist under a promise that the information would be kept confidential. DOE joins with the Department of Justice (DOJ), the Department of Defense, the Department of Homeland Security, and other Executive Branch agencies, including the Director of National Intelligence and the other leaders of the Federal Intelligence Community, in opposing the FFIA because its passage would curtail the ability of Federal authorities to contain and prosecute breaches of national security and to protect the citizens of the United States. We concur with the legal analysis contained in the DOJ letter of September 26, 2007, attached hereto, and would like to call special attention to the potential consequences of the FFIA as they relate to DOE's unique role in safeguarding some of our Nation's most important classified material and information. DOE also shares the specific national security concerns expressed by the Federal Intelligence Community in its January 23, 2008, letter, which is attached.

DOE is responsible for maintaining "Restricted Data," defined by the Atomic Energy Act of 1954 to include all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. Additionally, through its National Nuclear Security Administration, DOE is an integral part of the United States' efforts to reduce global dangers from weapons of mass destruction through (1) protecting or eliminating weapons and weapons-useable nuclear material or infrastructure, and redirecting excess foreign weapons expertise to civilian enterprises; (2) preventing and reversing the proliferation of weapons of mass destruction; (3) reducing the risk of accidents in nuclear fuel cycle



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facilities worldwide; and (4) enhancing the capability to detect weapons of mass destruction, including nuclear, chemical and biological systems. Simply put, DOE is in possession of some of the Nation's most important and highly sensitive information.

As the Committee is well aware, DOE and its National Laboratories and other facilities have been the locus of several serious security breaches. When these unfortunate situations do occur despite our best efforts to prevent them, it is vital that our investigators and other Federal authorities have access to as much information as possible relating to the breach in order to determine the level of damage that has been caused and to contain any further dissemination of classified information. The FFIA could frustrate these efforts by allowing "covered persons" to avoid revealing the source of a breach and to avoid providing to Federal authorities any testimony or any documents relating to the breach. In fact, the FFIA could make the situation worse: encouraging dissemination of classified information by giving leakers a formidable shield behind which they can hide.

Regardless of who bears responsibility for the occurrence of the initial security breach or loss of classified data, there can be no doubt that once such a breach has occurred, it is in the national security interest of the United States to ascertain how, when, and why the breach or loss occurred, to ascertain and limit the damage caused, and to prevent such breaches or losses in the future. Members of this Committee have made it clear that such remedial steps are a critical priority. However, the FFIA would frustrate these objectives.

The FFIA purports to deal with these issues by providing an exception to the privilege that is created by the FFIA, in order to assist in preventing terrorist activity or significant damage to national security, but we believe this exception would be ineffectual. In order to overcome the privilege, the Government would bear the burden of showing by a preponderance of the evidence that the evidence sought will assist in preventing "an act of terrorism" or "other significant and articulable harm to national security." This is a heavy burden to overcome, the proof of which might in fact depend on the very information that is sought and yet foreclosed, and could require the Government to release yet more protected information in attempting to make its case. Even if the Government is successful in showing that the information would prevent significant damage to national security, judges would have the discretion to block disclosure to the Government if they felt that the "public interest" in maintaining a "free flow of information" would "outweigh" that damage. And even if the Government overcomes all these hurdles, the delay in obtaining the identity of the source and in securing the breach could cement and exacerbate the damage done to the national security interests of the United States.

The Administration and Congress have consistently agreed that one of the gravest threats faced by our Nation is nuclear material or information relating to nuclear material in the possession of global terrorist organizations or hostile regimes. History tells us that when security breaches occur, DOE and other Federal authorities must be able to react quickly and with the benefit of all available information to protect the citizens of this country.

The Office of Management and Budget advises that there is no objection to the submission of this letter to the Committee from the standpoint of the President's program.

In summary, we urge you and the other members of the Committee to oppose this legislation. If you have any additional questions on this matter, please contact me or Ms. Lisa E. Epifani, Assistant Secretary for Congressional and Intergovernmental Affairs, at 202-586-5450.

Sincerely,



Samuel W. Bodman

Enclosures

cc: The Honorable John McCain  
Ranking Member, Senate Armed Services Committee

The Honorable Patrick Leahy  
Chairman, Senate Judiciary Committee

The Honorable Arlen Specter  
Ranking Member, Senate Judiciary Committee

The Honorable Harry Reid  
Majority Leader

The Honorable Mitch McConnell  
Minority Leader



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**Washington, D.C. 20585**

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The Honorable Jeff Bingaman  
Chairman  
Committee on Energy and Natural Resources  
United States Senate  
Washington, DC 20510

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