

1 **Purpose: In the nature of a substitute.**

2  
3  
4 **S. 448**

5  
6 **To maintain the free flow of information to the public by**  
7 **providing conditions for the federally compelled disclosure**  
8 **of information by certain persons connected with the news**  
9 **media.**

10  
11 **Referred to the Committee on \_\_\_\_\_ and ordered to be**  
12 **printed**

13 **Ordered to lie on the table and to be printed**

14 **AMENDMENT IN THE NATURE OF A SUBSTITUTE INTENDED TO**  
15 **BE PROPOSED BY MR. SPECTER (for himself, Mr. SCHUMER,**  
16 **and Mr. LEAHY)**

17 **Viz:**

18 **Strike all after the enacting clause and insert the following:**

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

21 **SECTION 1. SHORT TITLE.**

22 This Act may be cited as the “Free Flow of Information Act of 2009”.

23 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED**  
24 **PERSONS.**

25 (a) Conditions for Compelled Disclosure.—In any proceeding or in connection with any issue  
26 arising under Federal law, a Federal entity may not compel a covered person to ~~provide~~  
27 ~~testimony, or produce any document, relating to~~ **comply with a subpoena, court order, or**  
28 **other compulsory legal process seeking to compel the disclosure of** protected information,  
29 unless a Federal court ~~determines in the jurisdiction of the subpoena, court order, or other~~  
30 **compulsory legal process has been or would be issued** ~~determines~~, by a preponderance of the  
31 evidence, after providing notice and an opportunity to be heard to such covered person—

32 (1) that the party seeking to compel production of such testimony or document has  
33 exhausted all reasonable alternative sources (other than a covered person) of the testimony

1 or document;

2 (2) that—

3 (A) in a criminal investigation or prosecution, based on information obtained from a  
4 source other than the covered person—

5 (i) there are reasonable grounds to believe that a crime has occurred;

6 (ii) the testimony or document sought is essential to the investigation or  
7 prosecution or to the defense against the prosecution; and

8 (iii) in a criminal investigation or prosecution of an unauthorized disclosure of  
9 properly classified information ~~by a person with authorized access to such~~  
10 ~~information, such unauthorized, such~~ disclosure has caused or will cause  
11 significant and articulable harm to the national security; or

12 (B) in a matter other than a criminal investigation or prosecution, based on  
13 information obtained from a source other than the covered person, the testimony or  
14 document sought is essential to the resolution of the matter; and

15 (3) that nondisclosure of the information would be contrary to the public interest, taking  
16 into account both the public interest in compelling disclosure and the public interest in  
17 gathering ~~news and disseminating the information or news at issue~~ and maintaining the  
18 free flow of information.

19 (b) Limitations on Content of Information.—The content of any testimony or document that is  
20 compelled under subsection (a) shall, to the extent possible—

21 (1) be limited to the purpose of verifying published information or describing any  
22 surrounding circumstances relevant to the accuracy of such published information; and

23 (2) be narrowly tailored in subject matter and period of time covered so as to avoid  
24 compelling production of peripheral, nonessential, or speculative information.

### 25 **SEC. 3. EXCEPTION RELATING TO CRIMINAL ~~OR~~** 26 **~~TORTIOUS~~ CONDUCT.**

27 (a) In General.—Section 2 shall not apply to any information, record, document, or item  
28 obtained as the result of the eyewitness observations of ~~alleged criminal conduct or commitment~~  
29 ~~of, or obtained during the course of, alleged criminal or tortious~~ conduct by the covered  
30 person, including any physical evidence or visual or audio recording of the ~~observed~~ conduct.

31 (b) Exception.—This section shall not apply, and section 2 shall apply, if the alleged criminal  
32 ~~or tortious~~ conduct is the act of communicating the documents or information at issue.

### 33 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING,** 34 **OR SUBSTANTIAL BODILY INJURY.**

35 Section 2 shall not apply to any protected information that is reasonably necessary to stop,  
36 prevent, or mitigate a specific case of—

37 (1) death;

- 1 (2) kidnapping; or
- 2 (3) substantial bodily harm.

## 3 SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY 4 OR HARM TO THE NATIONAL SECURITY.

5 Section 2 shall not apply to any protected information that a Federal court has found by a  
6 preponderance of the evidence would ~~assist in preventing~~— **materially assist in preventing or**  
7 **mitigating, or identifying the perpetrator of—**

- 8 (1) an act of terrorism; or
- 9 (2) other significant and articulable harm to national security that would outweigh the  
10 public interest in ~~newsgathering and maintaining a~~ **gathering and disseminating the**  
11 **information or news at issue and maintaining the** free flow of information ~~to citizens~~.

## 12 SEC. 6. COMPELLED DISCLOSURE FROM 13 COMMUNICATIONS SERVICE PROVIDERS.

14 (a) Conditions for Compelled Disclosure.—With respect to testimony that relates to a  
15 communication to which a covered person is a party or any document that consists of any record  
16 or other information relating to a communication to which a covered person is a party, or that  
17 contains the contents of a communication to which a covered person is a party, section 2 shall  
18 apply to such testimony or document if sought from the communications service provider in the  
19 same manner that such section applies to any testimony or document sought from a covered  
20 person.

21 (b) Notice and Opportunity Provided to Covered Persons.—A Federal court may compel the  
22 testimony or disclosure of a document described in this section only after the party seeking such  
23 testimony or document provides the covered person who is a party to the communication  
24 described in subsection (a)—

25 (1) notice of the subpoena or other compulsory request for such testimony or disclosure  
26 from the communications service provider not later than the time at which such subpoena or  
27 request is issued to the communications service provider; and

28 (2) an opportunity to be heard before the court before compelling testimony or the  
29 disclosure of a document.

30 (c) Exception to Notice Requirement.—Notice under subsection (b)(1) may be delayed for not  
31 more than 45 days if the court involved determines by clear and convincing evidence that such  
32 notice would pose a substantial threat to the integrity of a criminal investigation. This period may  
33 be extended by the court for an additional period of not more than 45 days each time the court  
34 makes such a determination.

35 (d) Notice to Communications Service Provider.—**In all cases in which notice is required**  
36 **to be provided to the covered person under this section, a copy of such notice shall be**  
37 **provided simultaneously to the communications service provider from whom disclosure is**  
38 **sought. Once it has received such notice, the communications service provider shall not**  
39 **comply with the request for disclosure unless and until disclosure is either ordered by the**

1 court or authorized in writing by the covered person.

2 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED**  
3 **WITHOUT PROMISE OR AGREEMENT OF**  
4 **CONFIDENTIALITY.**

5 Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling  
6 or not compelling disclosure by a covered person or communications service provider of—

7 (1) information identifying a source who provided information without a promise or  
8 agreement of confidentiality made by the covered person as part of engaging in journalism;  
9 or

10 (2) records, other information, or contents of a communication obtained without a  
11 promise or agreement that such records, other information, or contents of a communication  
12 would be confidential.

13 **SEC. 8. PROCEDURES FOR REVIEW AND APPEAL.**

14 (a) **Conditions for Ex Parte Review or Submissions Under Seal.**—With regard to any  
15 determination made by a Federal court under this Act, upon a showing of good cause, that  
16 Federal court may receive and consider submissions from the parties in camera or under  
17 seal, and if the court determines it is necessary, ex parte.

18 (b) **Contempt of Court.**—With regard to any determination made by a Federal court  
19 under this Act, a Federal court may find a covered person to be in civil or criminal  
20 contempt if the covered person fails to comply with an order of a Federal court compelling  
21 disclosure of protected information.

22 (c) **To Provide for Timely Determination.**—With regard to any determination to be  
23 made by a Federal court under this Act, that Federal court, to the extent practicable, shall  
24 make that determination not later than 30 days after the date of receiving a motion  
25 requesting the court make that determination.

26 (d) **Expedited Appeal Process.**—

27 (1) **IN GENERAL.**—The courts of appeal shall have jurisdiction—

28 (A) of appeals by a Federal entity or covered person of an interlocutory order  
29 of a Federal court under this Act; and

30 (B) in an appeal of a final decision of a Federal court by a Federal entity or  
31 covered person, to review any determination of a Federal court under this Act.

32 (2) **EXPEDITATION OF APPEALS.**—It shall be the duty of a Federal court to which an  
33 appeal is made under this subsection to advance on the docket and to expedite to the  
34 greatest possible extent the disposition of that appeal.

35 **SEC. 9. RULE OF CONSTRUCTION.**

36 Nothing in this Act may be construed to—

37 (1) preempt any State law relating to defamation, slander, or libel;

1           **(2) modify the requirements of section 552a of title 5, United States Code, or Federal**  
2 **laws or rules relating to grand jury secrecy (except that this Act shall apply in any**  
3 **proceeding and in connection with any issue arising under that section or the Federal**  
4 **laws or rules relating to grand jury secrecy);**

5           **(3) create new obligations, or affect or modify the authorities or obligations of a**  
6 **Federal entity with respect to the acquisition or dissemination of information pursuant**  
7 **to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); or**

8           **(4) preclude voluntary disclosure of information to a Federal entity in a situation**  
9 **that is not governed by this Act.**

## 10 **SEC. 10. DEFINITIONS.**

11 In this Act:

12           (1) **COMMUNICATIONS SERVICE PROVIDER.**—The term “communications service  
13 provider”—

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

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

20           (2) **COVERED PERSON.**—The term “covered person”—

21                   (A) means a person ~~who is engaged in journalism; who—~~

22                           **(i) with the primary intent to investigate events and procure material in**  
23 **order to disseminate to the public news or information concerning local,**  
24 **national, or international events or other matters of public interest, regularly**  
25 **gathers, prepares, collects, photographs, records, writes, edits, reports, or**  
26 **publishes on such matters by—**

27                                   **(I) conducting interviews;**

28                                   **(II) making direct observation of events; or**

29                                   **(III) collecting, reviewing, or analyzing original writings, statements,**  
30 **communications, reports, memoranda, records, transcripts, documents,**  
31 **photographs, recordings, tapes, materials, data, or other information**  
32 **whether in paper, electronic, or other form; and**

33                   **(ii) has such intent at the inception of the newsgathering process;**

34                   (B) includes a supervisor, employer, parent company, subsidiary, or affiliate of a  
35 ~~person described in subparagraph (A)~~ **such person; and**

36                   (C) does not include any person who is—

37                           (i) a foreign power or an agent of a foreign power, as those terms are defined in  
38 section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.  
39 1801);

1 (ii) **a member or affiliate of** a foreign terrorist organization designated under  
2 section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

3 (iii) designated as a Specially Designated Global Terrorist by the Department  
4 of the Treasury under Executive Order Number 13224 (50 U.S.C. 1701);

5 (iv) a specially designated terrorist, as that term is defined in section 595.311 of  
6 title 31, Code of Federal Regulations (or any successor thereto); ~~or~~

7  
8 (v) a terrorist organization, as that term is defined in section  
9 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C.  
10 1182(a)(3)(B)(vi)(II));

11 ;

12 (vi) **committing or attempting to commit the crime of terrorism, as that**  
13 **offense is defined in section 2331(5) or 2332b(g)(5) of title 18, United States**  
14 **Code;**

15 (vii) **committing or attempting the crime of providing material support, as**  
16 **that term is defined in section 2339A(b)(1) of title 18, United States Code, to a**  
17 **terrorist organization; or**

18 (viii) **aiding, abetting, or conspiring in illegal activity with a person or**  
19 **organization defined in clauses (i) through (vii).**

20 (3) DOCUMENT.—The term “document” means writings, recordings, and photographs, as  
21 those terms are defined by rule 1001 of the Federal Rules of Evidence (28 U.S.C. App.).

22 (4) FEDERAL ENTITY.—The term “Federal entity” means an entity or employee of the  
23 judicial or executive branch or an administrative agency of the Federal Government with  
24 the power to issue a subpoena or issue other compulsory process.

25 (5) JOURNALISM.—~~THE TERM “JOURNALISM” MEANS THE REGULAR GATHERING,~~  
26 ~~PREPARING, COLLECTING, PHOTOGRAPHING, RECORDING, WRITING, EDITING, REPORTING, OR~~  
27 ~~PUBLISHING OF NEWS OR INFORMATION THAT CONCERNS LOCAL, NATIONAL, OR~~  
28 ~~INTERNATIONAL EVENTS OR OTHER MATTERS OF PUBLIC INTEREST FOR DISSEMINATION TO THE~~  
29 ~~PUBLIC.~~ **PROPERLY CLASSIFIED INFORMATION.—The term “properly classified**  
30 **information” means information that is classified in accordance with any applicable**  
31 **Executive Orders, statutes, and regulations regarding classification of information.**

32 (6) PROTECTED INFORMATION.—The term “protected information” means—

33 (A) information identifying a source who provided information under a promise or  
34 agreement of confidentiality made by a covered person as part of engaging in  
35 journalism; or

36 (B) any records, contents of a communication, documents, or information that a  
37 covered person obtained or created—

38 (i) as part of engaging in journalism; and

39 (ii) upon a promise or agreement that such records, contents of a  
40 communication, documents, or information would be confidential.