

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—111th Cong., 1st Sess.

S. 448

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.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. SPECTER (for himself, Mr. SCHUMER, and Mr. LEAHY)

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Free Flow of Informa-
- 5 tion Act of 2009”.

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 comply with a subpoena, court order, or
7 other compulsory legal process seeking to compel the dis-
8 closure of protected information, unless a Federal court
9 in the jurisdiction of the subpoena, court order, or other
10 compulsory legal process has been or would be issued de-
11 termines, by a preponderance of the evidence, after pro-
12 viding notice and an opportunity to be heard to such cov-
13 ered person—

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

18 (2) that—

19 (A) in a criminal investigation or prosecu-
20 tion, based on information obtained from a
21 source other than the covered person—

22 (i) there are reasonable grounds to be-
23 lieve that a crime has occurred;

24 (ii) the testimony or document sought
25 is essential to the investigation or prosecu-

1 tion or to the defense against the prosecu-
2 tion; and

3 (iii) in a criminal investigation or
4 prosecution of an unauthorized disclosure
5 of properly classified information, such dis-
6 closure has caused or will cause significant
7 and articulable harm to the national secu-
8 rity; or

9 (B) in a matter other than a criminal in-
10 vestigation or prosecution, based on information
11 obtained from a source other than the covered
12 person, the testimony or document sought is es-
13 sential to the resolution of the matter; and

14 (3) that nondisclosure of the information would
15 be contrary to the public interest, taking into ac-
16 count both the public interest in compelling disclo-
17 sure and the public interest in gathering and dis-
18 seminating the information or news at issue and
19 maintaining the free flow of information.

20 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

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

23 (1) be limited to the purpose of verifying pub-
24 lished information or describing any surrounding cir-

1 cumstances relevant to the accuracy of such pub-
2 lished information; and

3 (2) be narrowly tailored in subject matter and
4 period of time covered so as to avoid compelling pro-
5 duction of peripheral, nonessential, or speculative in-
6 formation.

7 **SEC. 3. EXCEPTION RELATING TO CRIMINAL CONDUCT.**

8 (a) **IN GENERAL.**—Section 2 shall not apply to any
9 information, record, document, or item obtained as the re-
10 sult of the eyewitness observations of, or obtained during
11 the course of, alleged criminal conduct by the covered per-
12 son, including any physical evidence or visual or audio re-
13 cording of the conduct.

14 (b) **EXCEPTION.**—This section shall not apply, and
15 section 2 shall apply, if the alleged criminal conduct is the
16 act of communicating the documents or information at
17 issue.

18 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR**

19 **SUBSTANTIAL BODILY INJURY.**

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

23 (1) death;

24 (2) kidnapping; or

25 (3) substantial bodily harm.

1 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
2 **HARM TO THE NATIONAL SECURITY.**

3 Section 2 shall not apply to any protected information
4 that a Federal court has found by a preponderance of the
5 evidence would materially assist in preventing or miti-
6 gating, or identifying the perpetrator of—

7 (1) an act of terrorism; or

8 (2) other significant and articulable harm to
9 national security that would outweigh the public in-
10 terest in gathering and disseminating the informa-
11 tion or news at issue and maintaining the free flow
12 of information.

13 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
14 **SERVICE PROVIDERS.**

15 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.—**
16 With respect to testimony that relates to a communication
17 to which a covered person is a party or any document that
18 consists of any record or other information relating to a
19 communication to which a covered person is a party, or
20 that contains the contents of a communication to which
21 a covered person is a party, section 2 shall apply to such
22 testimony or document if sought from the communications
23 service provider in the same manner that such section ap-
24 plies to any testimony or document sought from a covered
25 person.

1 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
2 ERED PERSONS.—A Federal court may compel the testi-
3 mony or disclosure of a document described in this section
4 only after the party seeking such testimony or document
5 provides the covered person who is a party to the commu-
6 nication described in subsection (a)—

7 (1) notice of the subpoena or other compulsory
8 request for such testimony or disclosure from the
9 communications service provider not later than the
10 time at which such subpoena or request is issued to
11 the communications service provider; and

12 (2) an opportunity to be heard before the court
13 before compelling testimony or the disclosure of a
14 document.

15 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
16 under subsection (b)(1) may be delayed for not more than
17 45 days if the court involved determines by clear and con-
18 vincing evidence that such notice would pose a substantial
19 threat to the integrity of a criminal investigation. This pe-
20 riod may be extended by the court for an additional period
21 of not more than 45 days each time the court makes such
22 a determination.

23 (d) NOTICE TO COMMUNICATIONS SERVICE PRO-
24 VIDER.—In all cases in which notice is required to be pro-
25 vided to the covered person under this section, a copy of

1 such notice shall be provided simultaneously to the com-
2 munications service provider from whom disclosure is
3 sought. Once it has received such notice, the communica-
4 tions service provider shall not comply with the request
5 for disclosure unless and until disclosure is either ordered
6 by the court or authorized in writing by the covered per-
7 son.

8 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**
9 **OUT PROMISE OR AGREEMENT OF CON-**
10 **FIDENTIALITY.**

11 Nothing in this Act shall supersede, dilute, or pre-
12 clude any law or court decision compelling or not compel-
13 ling disclosure by a covered person or communications
14 service provider of—

15 (1) information identifying a source who pro-
16 vided information without a promise or agreement of
17 confidentiality made by the covered person as part
18 of engaging in journalism; or

19 (2) records, other information, or contents of a
20 communication obtained without a promise or agree-
21 ment that such records, other information, or con-
22 tents of a communication would be confidential.

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

24 (a) **CONDITIONS FOR EX PARTE REVIEW OR SUBMIS-**
25 **SIONS UNDER SEAL.**—With regard to any determination

1 made by a Federal court under this Act, upon a showing
2 of good cause, that Federal court may receive and consider
3 submissions from the parties in camera or under seal, and
4 if the court determines it is necessary, ex parte.

5 (b) CONTEMPT OF COURT.—With regard to any de-
6 termination made by a Federal court under this Act, a
7 Federal court may find a covered person to be in civil or
8 criminal contempt if the covered person fails to comply
9 with an order of a Federal court compelling disclosure of
10 protected information.

11 (c) TO PROVIDE FOR TIMELY DETERMINATION.—
12 With regard to any determination to be made by a Federal
13 court under this Act, that Federal court, to the extent
14 practicable, shall make that determination not later than
15 30 days after the date of receiving a motion requesting
16 the court make that determination.

17 (d) EXPEDITED APPEAL PROCESS.—

18 (1) IN GENERAL.—The courts of appeal shall
19 have jurisdiction—

20 (A) of appeals by a Federal entity or cov-
21 ered person of an interlocutory order of a Fed-
22 eral court under this Act; and

23 (B) in an appeal of a final decision of a
24 Federal court by a Federal entity or covered

1 person, to review any determination of a Fed-
2 eral court under this Act.

3 (2) EXPEDITION OF APPEALS.—It shall be the
4 duty of a Federal court to which an appeal is made
5 under this subsection to advance on the docket and
6 to expedite to the greatest possible extent the dis-
7 position of that appeal.

8 **SEC. 9. RULE OF CONSTRUCTION.**

9 Nothing in this Act may be construed to—

10 (1) preempt any State law relating to defama-
11 tion, slander, or libel;

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

18 (3) create new obligations, or affect or modify
19 the authorities or obligations of a Federal entity
20 with respect to the acquisition or dissemination of
21 information pursuant to the Foreign Intelligence
22 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.);
23 or

1 (4) preclude voluntary disclosure of information
2 to a Federal entity in a situation that is not gov-
3 erned by this Act.

4 **SEC. 10. DEFINITIONS.**

5 In this Act:

6 (1) COMMUNICATIONS SERVICE PROVIDER.—

7 The term “communications service provider”—

8 (A) means any person that transmits infor-
9 mation of the customer’s choosing by electronic
10 means; and

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

17 (2) COVERED PERSON.—The term “covered
18 person”—

19 (A) means a person who—

20 (i) with the primary intent to inves-
21 tigate events and procure material in order
22 to disseminate to the public news or infor-
23 mation concerning local, national, or inter-
24 national events or other matters of public
25 interest, regularly gathers, prepares, col-

11

1 lects, photographs, records, writes, edits,
2 reports, or publishes on such matters by—

3 (I) conducting interviews;

4 (II) making direct observation of
5 events; or

6 (III) collecting, reviewing, or
7 analyzing original writings, state-
8 ments, communications, reports,
9 memoranda, records, transcripts, doc-
10 uments, photographs, recordings,
11 tapes, materials, data, or other infor-
12 mation whether in paper, electronic,
13 or other form; and

14 (ii) has such intent at the inception of
15 the newsgathering process;

16 (B) includes a supervisor, employer, parent
17 company, subsidiary, or affiliate of such person;
18 and

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

20 (i) a foreign power or an agent of a
21 foreign power, as those terms are defined
22 in section 101 of the Foreign Intelligence
23 Surveillance Act of 1978 (50 U.S.C.
24 1801);

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

5 (iii) designated as a Specially Des-
6 ignated Global Terrorist by the Depart-
7 ment of the Treasury under Executive
8 Order Number 13224 (50 U.S.C. 1701);

9 (iv) a specially designated terrorist, as
10 that term is defined in section 595.311 of
11 title 31, Code of Federal Regulations (or
12 any successor thereto);

13 (v) a terrorist organization, as that
14 term is defined in section
15 212(a)(3)(B)(vi)(II) of the Immigration
16 and Nationality Act (8 U.S.C.
17 1182(a)(3)(B)(vi)(II));

18 (vi) committing or attempting to com-
19 mit the crime of terrorism, as that offense
20 is defined in section 2331(5) or
21 2332b(g)(5) of title 18, United States
22 Code;

23 (vii) committing or attempting the
24 crime of providing material support, as
25 that term is defined in section 2339A(b)(1)

1 of title 18, United States Code, to a ter-
2 rorist organization; or

3 (viii) aiding, abetting, or conspiring in
4 illegal activity with a person or organiza-
5 tion defined in clauses (i) through (vii).

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

10 (4) FEDERAL ENTITY.—The term “Federal en-
11 tity” means an entity or employee of the judicial or
12 executive branch or an administrative agency of the
13 Federal Government with the power to issue a sub-
14 poena or issue other compulsory process.

15 (5) PROPERLY CLASSIFIED INFORMATION.—
16 The term “properly classified information” means
17 information that is classified in accordance with any
18 applicable Executive Orders, statutes, and regula-
19 tions regarding classification of information.

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

22 (A) information identifying a source who
23 provided information under a promise or agree-
24 ment of confidentiality made by a covered per-
25 son as part of engaging in journalism; or

1 (B) any records, contents of a communica-
2 tion, documents, or information that a covered
3 person obtained or created—

4 (i) as part of engaging in journalism;
5 and

6 (ii) upon a promise or agreement that
7 such records, contents of a communication,
8 documents, or information would be con-
9 fidential.