

AMENDMENT NO. _____ Calendar No. _____

Purpose: To provide a complete substitute.

IN THE SENATE OF THE UNITED STATES—110th Cong., 2d Sess.

S. 2035

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. LUGAR)

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 2008”.

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 pro-
8 duction of protected information, unless a Federal court
9 in the jurisdiction in which the subpoena, court order, or
10 other compulsory legal process has been or would be issued
11 determines, 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 protected information has exhausted all rea-
16 sonably known alternative sources of the protected
17 information; and

18 (2) that—

19 (A) in a criminal investigation or prosecu-
20 tion—

21 (i) there are reasonable grounds to be-
22 lieve, based on information obtained from
23 a source other than the covered person,
24 that a crime has occurred;

25 (ii) there are reasonable grounds to
26 believe, based on information obtained

1 from a source other than the covered per-
2 son, that the protected information sought
3 is essential to the investigation or prosecu-
4 tion or to the defense against the prosecu-
5 tion; and

6 (iii) nondisclosure of the information
7 would be contrary to the public interest,
8 taking into account both the interest in
9 compelling disclosure (including the extent
10 of any harm to national security) and the
11 public interest in gathering and dissemi-
12 nating the information or news conveyed
13 and maintaining the free flow of informa-
14 tion; or

15 (B) in a matter other than a criminal in-
16 vestigation or prosecution—

17 (i) based on information obtained
18 from a source other than the covered per-
19 son, the protected information sought is
20 essential to the resolution of the matter;
21 and

22 (ii) the interest in disclosure clearly
23 outweighs the public interest in gathering
24 and disseminating the information or news

1 (2) CLASSIFIED INFORMATION.—Notwith-
2 standing paragraph (1), this section shall not apply,
3 and section 5 shall apply, if the alleged criminal or
4 tortious conduct is an unauthorized release of prop-
5 erly classified information.

6 **SEC. 4. EXCEPTION TO PREVENT AN ACT OF TERRORISM,**
7 **DEATH, KIDNAPPING, SEXUAL ABUSE OF A**
8 **MINOR, OR SUBSTANTIAL BODILY INJURY.**

9 (a) IN GENERAL.—Section 2 shall not apply to any
10 protected information that a Federal court finds is reason-
11 ably likely to stop, prevent, or mitigate, or identify the
12 perpetrator of, an act of international terrorism or domes-
13 tic terrorism, as those terms are defined in section 2331
14 of title 18, United States Code.

15 (b) OTHER ACTIVITIES.—Section 2 shall not apply
16 to any protected information that a Federal court finds
17 is reasonably likely to stop, prevent, or mitigate a specific
18 case of—

19 (1) death;

20 (2) kidnapping;

21 (3) substantial bodily harm;

22 (4) conduct that would violate section 2251 or
23 section 2252 of title 18, United States Code (relat-
24 ing to the sexual exploitation of children and child
25 pornography); or

1 (5) incapacitation or destruction of critical in-
2 frastructure (as defined in section 1016(e) of the
3 USA PATRIOT Act (42 U.S.C. 5195c(e))).

4 **SEC. 5. EXCEPTION TO PREVENT HARM TO THE NATIONAL**
5 **SECURITY.**

6 Section 2 shall not apply to any protected informa-
7 tion, and a Federal court shall compel the disclosure of
8 such protected information, if the court—

9 (1) finds that the protected information—

10 (A) would assist in stopping or preventing
11 significant and articulable harm to national se-
12 curity; or

13 (B) relates to an unauthorized release of
14 properly classified information that has caused
15 or will cause significant and articulable harm to
16 the national security; and

17 (2) takes into account the balancing of the
18 harm described in paragraph (1) against the public
19 interest in gathering and disseminating the informa-
20 tion or news conveyed.

21 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
22 **SERVICE PROVIDERS.**

23 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—If
24 any document or other information from the account of
25 a person who is known to be, or reasonably likely to be,

1 a covered person is sought from a communications service
2 provider, sections 2 through 5 shall apply in the same
3 manner that such sections apply to any document or infor-
4 mation sought from a covered person.

5 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
6 ERED PERSONS.—A Federal court may compel the dislo-
7 sure of a document or other information described in sub-
8 section (a) only after the covered person from whose ac-
9 count such document or other information is sought has
10 been given—

11 (1) notice of the subpoena, court order, or other
12 compulsory legal process for such document or other
13 information from the communications service pro-
14 vider not later than the time at which such sub-
15 poena, court order, or other compulsory legal process
16 is issued to the communications service provider;
17 and

18 (2) an opportunity to be heard by the court.

19 (c) EXCEPTION TO NOTICE REQUIREMENT.—Upon
20 motion by a Federal entity, notice and opportunity to be
21 heard under subsection (b) may be delayed for not more
22 than 45 days if the court determines that there is substan-
23 tial basis for believing that such notice would pose a sub-
24 stantial threat to the integrity of a criminal or national
25 security investigation or intelligence gathering, or that exi-

1 gent circumstances exist. This period may be extended by
2 the court for an additional period of not more than 45
3 days each time the court makes such a determination.

4 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**
5 **OUT PROMISE OR AGREEMENT OF CON-**
6 **FIDENTIALITY.**

7 Nothing in this Act shall supersede, dilute, or pre-
8 empt any law or court decision regarding a subpoena,
9 court order, or other compulsory legal process relating to
10 disclosure by a covered person or communications service
11 provider of—

12 (1) information identifying a source who pro-
13 vided information without a promise or agreement of
14 confidentiality made by the covered person; or

15 (2) records or other information, or contents of
16 a communication obtained without a promise or
17 agreement that such records, other information, or
18 contents of a communication would be confidential.

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

20 (a) **CONDITIONS FOR EX PARTE REVIEW OR SUBMIS-**
21 **SIONS UNDER SEAL.**—With regard to any determination
22 made by a Federal court under this Act, upon a showing
23 of good cause, that Federal court may receive and consider
24 submissions from the parties in camera or under seal, and
25 if the court determines it is necessary, ex parte.

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

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

13 (d) EXPEDITED APPEAL PROCESS.—

14 (1) IN GENERAL.—The courts of appeal shall
15 have jurisdiction—

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

19 (B) in an appeal of a final decision of a
20 Federal court by a Federal entity or covered
21 person, to review any determination of a Fed-
22 eral court under this Act.

23 (2) EXPEDITION OF APPEALS.—It shall be the
24 duty of a Federal court to which an appeal is made
25 under this subsection to advance on the docket and

1 to expedite to the greatest possible extent the dis-
2 position of that appeal.

3 **SEC. 9. RULE OF CONSTRUCTION.**

4 Nothing in this Act may be construed to—

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

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

13 (3) preclude a plaintiff from asserting a claim
14 of defamation against a covered person, regardless
15 of whether the claim is raised in a State or Federal
16 court; or

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

22 **SEC. 10. DEFINITIONS.**

23 In this Act:

24 (1) COMMUNICATIONS SERVICE PROVIDER.—

25 The term “communications service provider”—

1 (A) means a person that transmits infor-
2 mation of the customer's choosing by electronic
3 means; and

4 (B) includes a telecommunications carrier,
5 an information service provider, an interactive
6 computer service provider, and an information
7 content provider (as such terms are defined in
8 sections 3 or 230 of the Communications Act of
9 1934 (47 U.S.C. 153 and 230)).

10 (2) COVERED PERSON.—The term “covered
11 person”—

12 (A) means a person who—

13 (i) with the primary intent to inves-
14 tigate events and procure material in order
15 to disseminate to the public news or infor-
16 mation concerning local, national, or inter-
17 national events or other matters of public
18 interest, regularly gathers, prepares, col-
19 lects, photographs, records, writes, edits,
20 reports, or publishes on such matters by—

21 (I) conducting interviews;

22 (II) making direct observation of
23 events; or

24 (III) collecting reviewing or ana-
25 lyzing original writings, statements,

1 Order Number 13224 (50 U.S.C. 1701
2 note);

3 (iv) who is a specially designated ter-
4 rorist, as that term is defined in section
5 595.311 of title 31, Code of Federal Regu-
6 lations (or any successor thereto); or

7 (v) who is a terrorist organization, as
8 that term is defined in section
9 212(a)(3)(B)(vi)(II) of the Immigration
10 and Nationality Act (8 U.S.C.
11 1182(a)(3)(B)(vi)(II)).

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

16 (4) FEDERAL ENTITY.—The term “Federal en-
17 tity” means an entity or employee of the judicial or
18 executive branch or an administrative agency of the
19 Federal Government with the power to issue a sub-
20 poena, court order, or issue other compulsory legal
21 process.

22 (5) PROPERLY CLASSIFIED INFORMATION.—
23 The term “properly classified information” means
24 information or documents that have been classified
25 in accordance with Executive Orders, statutes, appli-

1 cable procedures, and regulations regarding classi-
2 fication of information or documents.

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

5 (A) information identifying a source who
6 provided information under a promise or agree-
7 ment of confidentiality made by a covered per-
8 son; or

9 (B) any records, contents of a communica-
10 tion, documents, or information that a covered
11 person obtained or created upon a promise or
12 agreement that such records, contents of a com-
13 munication, documents, or information would
14 be confidential.

Amend the title so as to read: “A bill to maintain the free flow of information to the public by prescribing conditions under which Federal entities may compel disclosure of confidential information from journalists.”.