

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, Mr. LEAHY, Mr. GRAHAM, and Ms. KLOBUCHAR)

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-

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.