

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. GRAHAM)

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 where the subpoena, court order, or
10 other compulsory legal process has been or would be issued
11 determines, after providing notice and an opportunity to
12 be heard to such covered person—

13 (1) that the party seeking to compel disclosure
14 of the protected information has exhausted all rea-
15 sonable alternative sources (other than a covered
16 person) of the protected information; and

17 (2) that—

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

20 (i) if the party seeking to compel dis-
21 closure is the Federal Government, based
22 on public information or information ob-
23 tained from a source other than the cov-
24 ered person, there are reasonable grounds
25 to believe that a crime has occurred;

1 (ii) based on public information or in-
2 formation obtained from a source other
3 than the covered person, there are reason-
4 able grounds to believe that the protected
5 information sought is essential to the in-
6 vestigation or prosecution or to the defense
7 against the prosecution, particularly with
8 reference to directly establishing guilt or
9 innocence;

10 (iii) the Attorney General certifies
11 that the decision to request compelled dis-
12 closure was made in a manner consistent
13 with section 50.10 of title 28, Code of Fed-
14 eral Regulations, if compelled disclosure is
15 sought by a member of the Department of
16 Justice in circumstances governed by sec-
17 tion 50.10 of title 28, Code of Federal
18 Regulations; and

19 (iv) the covered person has not estab-
20 lished by clear and convincing evidence
21 that disclosure of the protected informa-
22 tion would be contrary to the public inter-
23 est, taking into account both the public in-
24 terest in gathering and disseminating the
25 information or news at issue and maintain-

1 ing the free flow of information and the
2 public interest in compelling disclosure (in-
3 cluding the extent of any harm to national
4 security); or

5 (B) in a matter other than a criminal in-
6 vestigation or prosecution, based on public in-
7 formation or information obtained from a
8 source other than the covered person—

9 (i) the protected information sought is
10 essential to the resolution of the matter;
11 and

12 (ii) the party seeking to compel disclo-
13 sure of the protected information has es-
14 tablished that the interest in compelling
15 disclosure clearly outweighs the public in-
16 terest in gathering and disseminating the
17 information or news at issue and maintain-
18 ing the free flow of information.

19 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

20 A subpoena, court order, or other compulsory legal process
21 seeking to compel the disclosure of protected information
22 under subsection (a) shall, to the extent possible, be nar-
23 rowly tailored in purpose, subject matter, and period of
24 time covered so as to avoid compelling disclosure of pe-
25 ripheral, nonessential, or speculative information.

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

2 (a) IN GENERAL.—Section 2 shall not apply to any
3 information, record, document, or item obtained as the re-
4 sult of the eyewitness observations of, or obtained during
5 the course of, alleged criminal conduct by the covered per-
6 son, including any physical evidence or visual or audio re-
7 cording of the conduct.

8 (b) EXCEPTION.—This section shall not apply, and,
9 subject to sections 4 and 5, section 2 shall apply, if the
10 alleged criminal conduct is the act of communicating the
11 documents or information at issue.

12 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR**
13 **SUBSTANTIAL BODILY INJURY.**

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

- 17 (1) death;
18 (2) kidnapping; or
19 (3) substantial bodily harm.

20 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
21 **HARM TO THE NATIONAL SECURITY.**

22 (a) IN GENERAL.—Section 2 shall not apply to any
23 protected information if—

- 24 (1) the party seeking to compel disclosure is the
25 Federal Government; and

1 (2)(A) in a criminal investigation or prosecution
2 of the allegedly unlawful disclosure of properly clas-
3 sified information, the court finds by a preponder-
4 ance of the evidence that the protected information
5 for which compelled disclosure is sought would mate-
6 rially assist the Federal Government in preventing
7 or mitigating—

8 (i) an act of terrorism; or

9 (ii) other acts that are reasonably
10 likely to cause significant and articulable
11 harm to national security; or

12 (B) in any other criminal investigation or pros-
13 ecution, the court finds by a preponderance of the
14 evidence that the protected information for which
15 compelled disclosure is sought would materially as-
16 sist the Federal Government in preventing, miti-
17 gating, or identifying the perpetrator of—

18 (i) an act of terrorism; or

19 (ii) other acts that have caused or are rea-
20 sonably likely to cause significant and
21 articulable harm to national security.

22 (b) DEFERENCE.—In assessing the existence or ex-
23 tent of the harm described in subsection (a), a Federal
24 court shall give appropriate deference to a specific factual

1 showing submitted to the court by the head of any execu-
2 tive branch agency or department concerned.

3 (c) RELATIONSHIP TO SECTION 2.—Subsection (a)
4 shall not apply, and, subject to sections 3 and 4, section
5 2 shall apply, to any criminal investigation or prosecution
6 of the allegedly unlawful disclosure of properly classified
7 information other than one in which the protected infor-
8 mation is sought by the Federal Government to prevent
9 or mitigate the harm specified in subsection (a)(2)(A). In
10 considering the extent of any harm to national security
11 when applying section 2 to such cases, a Federal court
12 shall give appropriate deference to any specific factual
13 showing submitted to the court by the head of any execu-
14 tive branch agency or department concerned.

15 (d) SUBSEQUENT UNLAWFUL DISCLOSURE.—The
16 potential for a subsequent unlawful disclosure of informa-
17 tion by the source sought to be identified shall not, by
18 itself and without any showing of additional facts beyond
19 such potential disclosure, be sufficient to establish that
20 compelled disclosure of the protected information would
21 materially assist the Federal Government in preventing or
22 mitigating—

23 (1) an act of terrorism; or

1 (iii) of section 2(a)(2)(A) and the phrase “particu-
2 larly with reference to directly establishing guilt or
3 innocence” in section 2(a)(2)(A)(ii) shall not apply.

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

10 (1) notice from the party seeking the document
11 or other information through a subpoena or other
12 compulsory request, not later than the time at which
13 such subpoena or request is issued to the commu-
14 nications service provider; and

15 (2) an opportunity to be heard before the court
16 before compelling testimony or the disclosure of a
17 document.

18 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
19 under subsection (b)(1) may be delayed for not more than
20 45 days if the Federal court involved determines by clear
21 and convincing evidence that such notice would pose a sub-
22 stantial threat to the integrity of a criminal investigation,
23 a national security investigation, or intelligence gathering,
24 or that exigent circumstances exist. This period may be
25 extended by the court for an additional period of not more

1 than 45 days each time the court makes such a determina-
2 tion.

3 (d) NOTICE TO COMMUNICATIONS SERVICE PRO-
4 VIDER.—In all cases in which notice is required to be pro-
5 vided to the covered person under this section, a copy of
6 such notice shall be provided simultaneously to the com-
7 munications service provider from whom disclosure is
8 sought. Once it has received such notice, the communica-
9 tions service provider shall not comply with the request
10 for disclosure unless and until disclosure is either ordered
11 by the court or authorized in writing by the covered per-
12 son.

13 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**
14 **OUT PROMISE OR AGREEMENT OF CON-**
15 **FIDENTIALITY.**

16 Nothing in this Act shall supersede, dilute, or pre-
17 clude any law or court decision compelling or not compel-
18 ling disclosure by a covered person or communications
19 service provider of—

20 (1) information identifying a source who pro-
21 vided information without a promise or agreement of
22 confidentiality made by the covered person as part
23 of engaging in journalism; or

24 (2) records, other information, or contents of a
25 communication obtained without a promise or agree-

1 ment that such records, other information, or con-
2 tents of a communication would be confidential.

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

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

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

16 (c) **TO PROVIDE FOR TIMELY DETERMINATION.**—
17 With regard to any determination to be made by a Federal
18 court under this Act, that Federal court, to the extent
19 practicable, shall make that determination not later than
20 30 days after the date of receiving a motion requesting
21 the court make that determination.

22 (d) **EXPEDITED APPEAL PROCESS.**—

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

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

4 (B) in an appeal of a final decision of a
5 Federal court by a Federal entity or covered
6 person, to review any determination of a Fed-
7 eral court under this Act.

8 (2) EXPEDITION OF APPEALS.—It shall be the
9 duty of a Federal court to which an appeal is made
10 under this subsection to advance on the docket and
11 to expedite to the greatest possible extent the dis-
12 position of that appeal.

13 **SEC. 9. RULE OF CONSTRUCTION.**

14 Nothing in this Act may be construed to—

15 (1) preempt any law or claim relating to defa-
16 mation, slander, or libel;

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

23 (3) create new obligations, or affect or modify
24 the authorities or obligations of a Federal entity
25 with respect to the acquisition or dissemination of

1 information pursuant to the Foreign Intelligence
2 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.);
3 or

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

7 **SEC. 10. DEFINITIONS.**

8 In this Act:

9 (1) COMMUNICATIONS SERVICE PROVIDER.—

10 The term “communications service provider”—

11 (A) means any person that transmits infor-
12 mation of the customer’s choosing by electronic
13 means; and

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

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

22 (A) means a person who—

23 (i) with the primary intent to inves-
24 tigate events and procure material in order
25 to disseminate to the public news or infor-

1 mation concerning local, national, or inter-
2 national events or other matters of public
3 interest, regularly gathers, prepares, col-
4 lects, photographs, records, writes, edits,
5 reports or publishes on such matters by—

6 (I) conducting interviews;

7 (II) making direct observation of
8 events; or

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

17 (ii) has such intent at the inception of
18 the process of gathering the news or infor-
19 mation sought; and

20 (iii) obtains the news or information
21 sought in order to disseminate the news or
22 information by means of print (including
23 newspapers, books, wire services, news
24 agencies, or magazines), broadcasting (in-
25 cluding dissemination through networks,

1 cable, satellite carriers, broadcast stations,
2 or a channel or programming service for
3 any such media), mechanical, photo-
4 graphic, electronic, or other means;

5 (B) includes a supervisor, employer, parent
6 company, subsidiary, or affiliate of a person de-
7 scribed in subparagraph (A); and

8 (C) does not include any person who is or
9 is reasonably likely to be—

10 (i) a foreign power or an agent of a
11 foreign power, as those terms are defined
12 in section 101 of the Foreign Intelligence
13 Surveillance Act of 1978 (50 U.S.C.
14 1801);

15 (ii) a member or affiliate of a foreign
16 terrorist organization designated under
17 section 219(a) of the Immigration and Na-
18 tionality Act (8 U.S.C. 1189(a));

19 (iii) designated as a Specially Des-
20 ignated Global Terrorist by the Depart-
21 ment of the Treasury under Executive
22 Order Number 13224 (50 U.S.C. 1701);

23 (iv) a specially designated terrorist, as
24 that term is defined in section 595.311 of

1 title 31, Code of Federal Regulations (or
2 any successor thereto);

3 (v) a terrorist organization, as that
4 term is defined in section
5 212(a)(3)(B)(vi)(II) of the Immigration
6 and Nationality Act (8 U.S.C.
7 1182(a)(3)(B)(vi)(II));

8 (vi) committing or attempting to com-
9 mit the crime of terrorism, as that offense
10 is defined in section 2331(5) or
11 2332b(g)(5) of title 18, United States
12 Code;

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

18 (viii) aiding, abetting, or conspiring in
19 illegal activity with a person or organiza-
20 tion defined in clauses (i) through (vii).

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

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

6 (5) PROPERLY CLASSIFIED INFORMATION.—
7 The term “properly classified information” means
8 information that is classified in accordance with any
9 applicable Executive Orders, statutes, or regulations
10 regarding classification of information.

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

13 (A) information identifying a source who
14 provided information under a promise or agree-
15 ment of confidentiality made by a covered per-
16 son as part of engaging in journalism; or

17 (B) any records, contents of a communica-
18 tion, documents, or information that a covered
19 person obtained or created—

20 (i) as part of engaging in journalism;

21 and

22 (ii) upon a promise or agreement that
23 such records, contents of a communication,
24 documents, or information would be con-
25 fidential.