

1 **IN THE SENATE OF THE UNITED STATES**
2 **111th Cong., 1st Sess.**
3 **S. 448**

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

8 **SECTION 1. SHORT TITLE.**

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

11 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.**

12 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In any
13 proceeding or in connection with any issue arising under
14 Federal law, a Federal entity may not compel a covered person
15 to comply with a subpoena, court order, or other compulsory
16 legal process seeking to compel the disclosure of protected
17 information, unless a Federal court in the jurisdiction where the
18 subpoena, court order, or other compulsory legal process has
19 been or would be issued determines, after providing notice and
20 an opportunity to be heard to such covered person—

21 (1) that the party seeking to compel disclosure of
22 such testimony or document has exhausted all reasonable

1 alternative sources (other than a covered person) of the
2 testimony or document;

3 (2) that—

4 (A) in a criminal investigation or prosecution —

5 (i) based on public information or
6 information obtained from a source other than
7 the covered person, there are reasonable
8 grounds to believe that a crime has occurred, if
9 the party seeking to compel disclosure is the
10 Federal government;

11 (ii) based on public information or
12 information obtained from a source other than
13 the covered person, there are reasonable
14 grounds to believe that the testimony or
15 document sought is essential to the
16 investigation or prosecution or to the defense
17 against the prosecution, particularly with
18 reference to directly establishing guilt or
19 innocence;

20 (iii) the Attorney General certifies that
21 the decision to request compelled disclosure
22 was made in a manner consistent with 28

1 C.F.R. § 50.10, if compelled disclosure is
2 sought by a member of the Department of
3 Justice in circumstances governed by 28 C.F.R.
4 § 50.10; and

5 (iv) the covered person has not
6 established by clear and convincing evidence
7 that disclosure of the information would be
8 contrary to the public interest, taking into
9 account both the public interest in gathering
10 and disseminating the information or news at
11 issue and maintaining the free flow of
12 information and the public interest in
13 compelling disclosure (including the extent of
14 any harm to national security).

15 (B) in a matter other than a criminal
16 investigation or prosecution, based on public
17 information or information obtained from a source
18 other than the covered person—

19 (i) the testimony or document sought is
20 essential to the resolution of the matter; and

21 (ii) the party seeking to compel
22 disclosure of such testimony or document has

1 established that the interest in compelling
2 disclosure clearly outweighs the public interest
3 in gathering and disseminating the information
4 or news at issue and maintaining the free flow
5 of information.

6 (b) LIMITATIONS ON CONTENT OF INFORMATION.—A
7 subpoena, court order, or other compulsory legal process
8 seeking to compel the disclosure of protected information
9 under subsection (a) shall, to the extent possible, be narrowly
10 tailored in purpose, subject matter and period of time covered
11 so as to avoid compelling disclosure of peripheral, nonessential,
12 or speculative information.

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

14 (a) IN GENERAL.—Section 2 shall not apply to any
15 information, record, document, or item obtained as the result
16 of the eyewitness observations of, or obtained during the
17 course of, alleged criminal conduct by the covered person,
18 including any physical evidence or visual or audio recording of
19 the conduct.

20 (b) EXCEPTION.—This section shall not apply, and section
21 2 shall apply (subject to sections 4 and 5), if the alleged

1 criminal conduct is the act of communicating the documents or
2 information at issue.

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

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

- 8 (1) death;
- 9 (2) kidnapping; or
- 10 (3) substantial bodily harm.

11 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR HARM**
12 **TO THE NATIONAL SECURITY.**

13 (a) Section 2 shall not apply to any protected
14 information when the party seeking to compel disclosure
15 is the Federal government and—

- 16 (1) in a criminal investigation or prosecution of
- 17 allegedly unlawful disclosure of properly classified
- 18 information, the court finds by a preponderance of the
- 19 evidence that the protected information for which
- 20 compelled disclosure is sought would materially assist the
- 21 Federal government in preventing or mitigating—
 - 22 (A) an act of terrorism; or

1 (B) other acts that are reasonably likely to cause
2 significant and articulable harm to national
3 security; or

4 (2) in any other criminal investigation or
5 prosecution, the court finds by a preponderance of the
6 evidence that the protected information for which
7 compelled disclosure is sought would materially assist the
8 Federal government in preventing, mitigating, or
9 identifying the perpetrator of—

10 (A) an act of terrorism; or

11 (B) other acts that have caused or are reasonably
12 likely to cause significant and articulable harm to
13 national security.

14 (b) In assessing the existence or extent of the harm
15 described in subsection (a), the court shall give appropriate
16 deference to a specific factual showing submitted to the court
17 by the head of any executive branch agency or department
18 concerned.

19 (c) Subsection 5(a) shall not apply, and section 2 shall
20 apply (subject to sections 3 and 4), to any criminal
21 investigation or prosecution of allegedly unlawful disclosure of
22 properly classified information other than one in which the
23 protected information is sought by the Federal government to

1 prevent or mitigate the harm specified in section 5(a)(1). In
2 considering the extent of any harm to national security when
3 applying section 2 to such cases, the court shall give
4 appropriate deference to any specific factual showing
5 submitted to the court by the head of any executive branch
6 agency or department concerned.

7 (d) The potential for a subsequent unlawful disclosure of
8 information by the source sought to be identified shall not, by
9 itself and without any showing of additional facts beyond such
10 potential disclosure, be sufficient to establish that compelled
11 disclosure of the protected information would materially assist
12 the Federal government in preventing or mitigating—

13 (1) an act of terrorism; or

14 (2) other acts that are reasonably likely to cause
15 significant and articulable harm to national security.

16 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
17 **SERVICE PROVIDERS.**

18 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.—**

19 (1) Except as provided in subsection (a)(2), if any
20 document or other information from the account of a
21 person who is known to be, or reasonably likely to be, a
22 covered person is sought from a communications service

1 provider, then sections 2 through 5 shall apply in the
2 same manner that such sections apply to any document
3 or other information sought from a covered person.

4 (2) If any document or other information from the
5 account of a person who is known to be, or reasonably
6 likely to be, a covered person is sought from a
7 communications service provider pursuant to 18 U.S.C. §
8 2709, then the provisions of sections 2 through 5
9 governing criminal investigations and prosecutions shall
10 apply in the same manner that such sections apply to any
11 document or other information sought from a covered
12 person in the course of a criminal investigation or
13 prosecution, except that subsections 2(a)(2)(A)(i),
14 2(a)(2)(A)(iii) and the phrase “particularly with reference
15 to directly establishing guilt or innocence” in subsection
16 2(a)(2)(A)(ii) shall not apply.

17 (b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED
18 PERSONS.—A Federal court may compel the disclosure of a
19 document or other information described in this section only
20 after the covered person from whose account the document or
21 other information is sought has been given—

1 (1) notice from the party seeking the document or
2 other information through subpoena or other compulsory
3 request, not later than the time at which such subpoena
4 or request is issued to the communications service
5 provider; and

6 (2) an opportunity to be heard before the court
7 before compelling testimony or the disclosure of a
8 document.

9 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under
10 subsection (b)(1) may be delayed for not more than 45 days if
11 the court involved determines by clear and convincing evidence
12 that such notice would pose a substantial threat to the
13 integrity of a criminal investigation, a national security
14 investigation, or intelligence gathering, or that exigent
15 circumstances exist. This period may be extended by the court
16 for an additional period of not more than 45 days each time
17 the court makes such a determination.

18 (d) NOTICE TO COMMUNICATIONS SERVICE PROVIDER.—In
19 all cases in which notice is required to be provided to the
20 covered person under this section, a copy of such notice shall
21 be provided simultaneously to the communications service
22 provider from whom disclosure is sought. Once it has received

1 such notice, the communications service provider shall not
2 comply with the request for disclosure unless and until
3 disclosure is either ordered by the court or authorized in
4 writing by the covered person.

5 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITHOUT**
6 **PROMISE OR AGREEMENT OF CONFIDENTIALITY.**

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

10 (1) information identifying a source who provided
11 information without a promise or agreement of
12 confidentiality made by the covered person as part of
13 engaging in journalism; or

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

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

19 (a) **CONDITIONS FOR EX PARTE REVIEW OR SUBMISSIONS**
20 **UNDER SEAL.**—With regard to any determination made by a
21 Federal court under this Act, upon a showing of good cause,
22 that Federal court may receive and consider submissions from

1 the parties in camera or under seal, and if the court determines
2 it is necessary, ex parte.

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

9 (c) TO PROVIDE FOR TIMELY DETERMINATION.—

10 With regard to any determination to be made by a Federal
11 court under this Act, that Federal court, to the extent
12 practicable, shall make that determination not later than 30
13 days after the date of receiving a motion requesting the court
14 make that determination.

15 (d) EXPEDITED APPEAL PROCESS.—

16 (1) IN GENERAL.—The courts of appeal shall
17 have jurisdiction—

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

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

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

10 **SEC. 9. RULE OF CONSTRUCTION.**

11 Nothing in this Act may be construed to—

12 (1) preempt any law or claim relating to defamation,
13 slander, or libel;

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

20 (3) create new obligations, or affect or modify the
21 authorities or obligations of a Federal entity with respect
22 to the acquisition or dissemination of information

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

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

6 **SEC. 10. DEFINITIONS.**

7 In this Act:

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

10 (A) means any person that transmits
11 information of the customer’s choosing by electronic
12 means; and

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

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

21 (A) means a person who—

1 (i) with the primary intent to investigate
2 events and procure material in order to disseminate
3 to the public news or information concerning local,
4 national, or international events or other matters of
5 public interest, regularly gathers, prepares, collects,
6 photographs, records, writes, edits, reports or
7 publishes on such matters by—

8 (I) conducting interviews;

9 (II) making direct observation of events; or

10 (III) collecting, reviewing, or analyzing original
11 writings, statements, communications, reports,
12 memoranda, records, transcripts, documents,
13 photographs, recordings, tapes, materials, data, or
14 other information whether in paper, electronic, or
15 other form;

16 (ii) has such intent at the inception of the
17 process of gathering the news or information
18 sought; and

19 (iii) obtains the news or information sought in
20 order to disseminate it by means of print (including,
21 but not limited to, newspapers, books, wire services,
22 news agencies, or magazines), broadcasting

1 (including, but not limited to, dissemination through
2 networks, cable, satellite carriers, broadcast
3 stations, or a channel or programming service for
4 any such media), mechanical, photographic,
5 electronic, or other means.

6 (B) includes a supervisor, employer, parent
7 company, subsidiary, or affiliate of such person; and

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

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

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

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

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

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

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

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

13 (viii) aiding, abetting, or conspiring in illegal
14 activity with a person or organization defined in
15 clauses (i) through (vii).

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

20 (4) FEDERAL ENTITY.—The term “Federal entity”
21 means an entity or employee of the judicial or executive
22 branch or an administrative agency of the Federal

1 Government with the power to issue a subpoena or issue
2 other compulsory process.

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

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

10 (A) information identifying a source who
11 provided information under a promise or
12 agreement of confidentiality made by a
13 covered person as part of engaging in
14 journalism; or

15 (B) any records, contents of a
16 communication, documents, or information
17 that a covered person obtained or created—

18 (i) as part of engaging in journalism;

19 and

20 (ii) upon a promise or agreement
21 that such records, contents of a

1

communication, documents, or

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information would be confidential.