

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

**(September 9, 2009 Manager’s Amendment, incorporating
September 17, 2009 Manager’s Technical Amendment)**

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.

SECTION 1. SHORT TITLE.

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

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

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

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

(2) that—

(A) in a criminal investigation or prosecution, based on **public information or** information obtained from a source other than the covered person, **there are reasonable grounds to believe—**

(i) that a crime has occurred **if the party seeking to compel production is the Federal government;**

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; and

iii) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified information, such disclosure has caused or will cause significant and articulable harm to the national security; or

(B) in a matter other than a criminal investigation or prosecution, based on **public information or** information obtained from a source other than the covered person, the testimony or

document sought is essential to the resolution of the matter; and

(3) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure (including the extent of any harm to national security) and the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information.

(b) LIMITATIONS ON CONTENT OF INFORMATION.—

The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible, be narrowly tailored in purpose, subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. EXCEPTION RELATING TO CRIMINAL CONDUCT.

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

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

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

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

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

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

Section 2 shall not apply to any protected information that a Federal court has found by a preponderance of the evidence would materially assist in preventing or mitigating, or identifying the perpetrator of—

- (1) an act of terrorism; or
- (2) other significant and articulable harm to national security that would outweigh the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information.

SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) **CONDITIONS FOR COMPELLED DISCLOSURE.—**
With respect to testimony that relates to a communication to

which a covered person is a party or any document that consists of any record or other information relating to a communication to which a covered person is a party, or that contains the contents of a communication to which a covered person is a party, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED PERSONS.—A Federal court may compel the testimony or disclosure of a document described in this section only after the party seeking such testimony or document provides the covered person who is a party to the communication described in subsection (a)—

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

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

(c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under subsection (b)(1) may be delayed for not more than 45 days if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of

a criminal investigation, a national security investigation, or intelligence gathering, or that exigent circumstances exist. This period may be extended by the court for an additional period of not more than 45 days each time the court makes such a determination.

(d) NOTICE TO COMMUNICATIONS SERVICE PROVIDER.—In all cases in which notice is required to be provided to the covered person under this section, a copy of such notice shall be provided simultaneously to the communications service provider from whom disclosure is sought. Once it has received such notice, the communications service provider shall not comply with the request for disclosure unless and until disclosure is either ordered by the court or authorized in writing by the covered person.

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

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

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

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

SEC. 8. PROCEDURES FOR REVIEW AND APPEAL.

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

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

(c) **TO PROVIDE FOR TIMELY DETERMINATION.**—

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

(d) **EXPEDITED APPEAL PROCESS.**—

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

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

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

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

SEC. 9. RULE OF CONSTRUCTION.

Nothing in this Act may be construed to—

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

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

(3) create new obligations, or affect or modify the authorities or obligations of a Federal entity with respect to

the acquisition or dissemination of information pursuant to the Foreign Intelligence

Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); or

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

SEC. 10. DEFINITIONS.

In this Act:

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

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

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

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

(A) means a person that a Federal court finds, by a preponderance of the evidence, is, or is reasonably likely to be—

(i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national,

or international events or other matters of public interest, regularly **gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing** on such matters by—

(I) conducting interviews;

(II) making direct observation of events; or

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

(ii) has such intent at the inception of the newsgathering process; **and**

(iii) obtains the information sought while working as a salaried employee of, or independent contractor for, an entity—

(I) that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means; and

(II) that—

(aa) publishes a newspaper, book, magazine, or other periodical;

(bb) operates a radio or television broadcast station, network, cable system, or satellite carrier, or a channel or programming service for such station, network, system or carrier;

(cc) operates a programming service; or

(dd) operates a news agency or wire service;

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

(C) does not include any person who is—

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

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

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

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

(v) a terrorist organization, as that term is defined in section

212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II));

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

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

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

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

(4) FEDERAL ENTITY.—The term “Federal entity” means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

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

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

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

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

(i) as part of engaging in journalism;

and

(ii) upon a promise or agreement that such records, contents of a communication, documents, or information would be confidential.