

Changes Made to Strengthen the Terrorism / National Security Exception

The Free Flow of Information Act has changed dramatically to address concerns about national security and terrorism since the legislation was first introduced by Sens. Lugar and Dodd five years ago.

| <u>Original Lugar/Dodd (109th)</u> | <u>Specter/Schumer/Graham (S.448, as introduced)</u> | <u>Specter/Schumer/Graham (Managers' Amendment, as Modified by Agreement with White House)</u> |
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| <p><u>Absolute privilege</u> to protect identities of confidential sources.</p> | <p><u>Qualified privilege</u>, even for confidential sources.</p> | <p><u>Qualified privilege</u>, even for confidential sources.</p> |
| <p>Also protected <u>non-confidential</u> information.</p> | <p>Protects only information obtained under a promise of confidentiality.</p> | <p>Protects only information obtained under a promise of confidentiality.</p> |
| <p>Limited exception if "<i>clear and convincing evidence</i>" that disclosure is "<i>necessary</i>" to "prevent <i>imminent and actual</i> harm" to national security.</p> | <p>Exception where a party demonstrates by a "<i>preponderance</i>" of evidence that disclosure would "assist" in preventing an act of terrorism or other significant and articulable harm to national security.</p> <p>No provision for deference to submissions from Executive Branch.</p> | <p>Broader exception for information that the government demonstrates by a "preponderance" of evidence "would materially assist the Federal Government in preventing, mitigating, or identifying perpetrator of—(i) an act of terrorism; or (ii) other acts that have caused or are reasonably likely to cause significant and articulable harm to national security."</p> <p><i>In applying this exception, moreover, the court "shall give appropriate deference to a specific factual showing submitted to the court by the head of any executive branch agency or department concerned."</i></p> |
| <p>No disclosure in prosecution for leaks of classified information.</p> | <p>Disclosure permitted when "unauthorized disclosure of properly classified information" has caused or will cause significant and articulable harm to national security.</p> <p>No provision for deference to submissions from Executive Branch.</p> | <p>Disclosure permitted when, during an investigation or prosecution of an "allegedly unlawful disclosure of properly classified information," the information at issue "would materially assist the Federal Government in preventing or mitigating—(i) an act of terrorism; or (ii) other acts that are reasonably likely to cause significant and articulable harm to national security."</p> |

In applying this exception, moreover, the court “shall give appropriate deference to a specific factual showing submitted to the court by the head of any executive branch agency or department concerned.”

No exceptions in definition of “covered person” to exclude terrorists.

Definition of a “covered person” excludes any entity that:

(1) is a foreign power or agent of a foreign power, as defined in 50 U.S.C. § 1801;

(2) has been designated a foreign terrorist organization, by the State Department, pursuant to 8 U.S.C. § 1189(a);

(3) has been designated as a Specially Designated Global Terrorist, by the Department of the Treasury, pursuant to Executive Order Number 13224;

(4) is a specially designated terrorist, as defined by 31 C.F.R. § 595.311; or

(5) a terrorist organization, as defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(II).

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(5) a terrorist organization, as defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(II);

(6) is committing or attempting the crime of terrorism, as defined in 18 U.S.C. §§ 2331(5) or § 2332b(g)(5);

(7) is committing or attempting the crime of providing material support to a terrorist organization, as defined in 18 U.S.C. § 2339A(b)(1); or

(8) is aiding, abetting, or conspiring in illegal activity with any person or organization defined in exceptions (1)–(7).

National security exception required exhaustion of alternative sources before disclosure and narrow tailoring.

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Provisions applied fully to national-security letters.

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The provision governing subpoenas to communications

service providers contains relaxed requirements for National Security Letters, to take into account the unique posture of national-security investigations.

No provision preserving status quo in FISA cases.

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Rule of construction provides that Act does not “affect or modify the authorities or obligations of a Federal entity with respect to the acquisition or dissemination of information pursuant to [FISA].”

No provision for review in camera/ex parte of information related to national security.

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Submissions to the court, including national security-related submissions by the Government, can be submitted under seal and ex parte when appropriate.