

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 providing
5 conditions for the federally compelled disclosure of
6 information by certain persons connected with the news
7 media.

8 **SECTION 1. SHORT TITLE.**

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

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

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

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

25 (2) that—

1 (A) in a criminal investigation or prosecution —

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

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

16 (iii) the Attorney General certifies that the
17 decision to request compelled disclosure was
18 made in a manner consistent with 28 C.F.R. §
19 50.10, if compelled disclosure is sought by a
20 member of the Department of Justice in
21 circumstances governed by 28 C.F.R. § 50.10; and

22 (iv) the covered person has not established
23 by clear and convincing evidence that disclosure
24 of the information would be contrary to the public
25 interest, taking into account both the public

1 interest in gathering and disseminating the
2 information or news at issue and maintaining the
3 free flow of information and the public interest in
4 compelling disclosure (including the extent of any
5 harm to national security).

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

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

12 (ii) the party seeking to compel disclosure
13 of such testimony or document has established
14 that the interest in compelling disclosure clearly
15 outweighs the public interest in gathering and
16 disseminating the information or news at issue
17 and maintaining the free flow of information.

18 (b) LIMITATIONS ON CONTENT OF INFORMATION.—A
19 subpoena, court order, or other compulsory legal process seeking
20 to compel the disclosure of protected information under subsection
21 (a) shall, to the extent possible, be narrowly tailored in purpose,
22 subject matter and period of time covered so as to avoid
23 compelling disclosure of peripheral, nonessential, or speculative
24 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 result of
4 the eyewitness observations of, or obtained during the course of,
5 alleged criminal conduct by the covered person, including any
6 physical evidence or visual or audio recording of the conduct.

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

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

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

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

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

3 (a) Section 2 shall not apply to any protected
4 information when the party seeking to compel disclosure is
5 the Federal government and—

6 (1) in a criminal investigation or prosecution of
7 allegedly unlawful disclosure of properly classified
8 information, the court finds by a preponderance of the
9 evidence that the protected information for which compelled
10 disclosure is sought would materially assist the Federal
11 government in preventing or mitigating—

12 (A) an act of terrorism; or

13 (B) other acts that are reasonably likely to cause
14 significant and articulable harm to national
15 security; or

16 (2) in any other criminal investigation or prosecution,
17 the court finds by a preponderance of the evidence that the
18 protected information for which compelled disclosure is
19 sought would materially assist the Federal government in
20 preventing, mitigating, or identifying the perpetrator of—

21 (A) an act of terrorism; or

22 (B) other acts that have caused or are reasonably
23 likely to cause significant and articulable harm to
24 national security.

25 (b) In assessing the existence or extent of the harm

1 described in subsection (a), the court shall give appropriate
2 deference to a specific factual showing submitted to the court by
3 the head of any executive branch agency or department concerned.

4 (c) Subsection 5(a) shall not apply, and section 2 shall
5 apply (subject to sections 3 and 4), to any criminal investigation or
6 prosecution of allegedly unlawful disclosure of properly classified
7 information other than one in which the protected information is
8 sought by the Federal government to prevent or mitigate the harm
9 specified in section 5(a)(1). In considering the extent of any harm
10 to national security when applying section 2 to such cases, the
11 court shall give appropriate deference to any specific factual
12 showing submitted to the court by the head of any executive
13 branch agency or department concerned.

14 (d) The potential for a subsequent unlawful disclosure of
15 information by the source sought to be identified shall not, by
16 itself and without any showing of additional facts beyond such
17 potential disclosure, be sufficient to establish that compelled
18 disclosure of the protected information would materially assist the
19 Federal government in preventing or mitigating—

20 (1) an act of terrorism; or

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

1 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
2 **SERVICE PROVIDERS.**

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

4 (1) Except as provided in subsection (a)(2), if any
5 document or other information from the account of a person
6 who is known to be, or reasonably likely to be, a covered
7 person is sought from a communications service provider,
8 then sections 2 through 5 shall apply in the same manner
9 that such sections apply to any document or other
10 information sought from a covered person.

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

23 (b) **NOTICE AND OPPORTUNITY PROVIDED TO**
24 **COVERED PERSONS.—**A Federal court may compel the
25 disclosure of a document or other information described in this

1 section only after the covered person from whose account the
2 document or other information is sought has been given—

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

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

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

18 (d) NOTICE TO COMMUNICATIONS SERVICE
19 PROVIDER.—In all cases in which notice is required to be
20 provided to the covered person under this section, a copy of such
21 notice shall be provided simultaneously to the communications
22 service provider from whom disclosure is sought. Once it has
23 received such notice, the communications service provider shall
24 not comply with the request for disclosure unless and until

1 disclosure is either ordered by the court or authorized in writing
2 by the covered person.

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

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

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

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

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

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

23 (b) **CONTEMPT OF COURT.**—With regard to any
24 determination made by a Federal court under this Act, a Federal

1 court may find a covered person to be in civil or criminal contempt
2 if the covered person fails to comply with an order of a Federal
3 court compelling disclosure of protected information.

4 (c) TO PROVIDE FOR TIMELY DETERMINATION.—

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

10 (d) EXPEDITED APPEAL PROCESS.—

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

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

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

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

1 **SEC. 9. RULE OF CONSTRUCTION.**

2 Nothing in this Act may be construed to—

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

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

11 (3) create new obligations, or affect or modify the
12 authorities or obligations of a Federal entity with respect to
13 the acquisition or dissemination of information pursuant to
14 the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
15 1801 et seq.); or

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

18 **SEC. 10. DEFINITIONS.**

19 In this Act:

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

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

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

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

8 (A) means a person who—

9 (i) with the primary intent to investigate events
10 and procure material in order to disseminate to the
11 public news or information concerning local, national,
12 or international events or other matters of public
13 interest, regularly gathers, prepares, collects,
14 photographs, records, writes, edits, reports or
15 publishes on such matters by—

16 (I) conducting interviews;

17 (II) making direct observation of events; or

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

1 (ii) has such intent at the inception of the process
2 of gathering the news or information sought; and

3 (iii) obtains the news or information sought in
4 order to disseminate it by means of print (including,
5 but not limited to, newspapers, books, wire services,
6 news agencies, or magazines), broadcasting (including,
7 but not limited to, dissemination through networks,
8 cable, satellite carriers, broadcast stations, or a
9 channel or programming service for any such media),
10 mechanical, photographic, electronic, or other means.

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

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

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

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

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

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

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

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

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

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

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

22 (4) FEDERAL ENTITY.—The term “Federal entity”
23 means an entity or employee of the judicial or executive
24 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
4 term “properly classified information” means information
5 that is classified in accordance with any applicable
6 Executive Orders, statutes, or regulations regarding
7 classification of 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 covered
13 person as part of engaging in journalism; or

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

17 (i) as part of engaging in journalism;
18 and

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