

**Calendar No. 225**111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION**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.

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**IN THE SENATE OF THE UNITED STATES**

FEBRUARY 13, 2009

Mr. SPECTER (for himself, Mr. SCHUMER, Mr. LUGAR, Mr. GRAHAM, Mrs. GILLIBRAND, Mrs. McCASKILL, Mrs. MURRAY, Ms. KLOBUCHAR, Mrs. HAGAN, Mr. KAUFMAN, and Mr. UDALL of New Mexico) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

DECEMBER 11, 2009

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

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**A BILL**

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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Free Flow of Informa-  
3 tion Act of 2009”.

4 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**  
5 **SONS.**

6 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In  
7 any proceeding or in connection with any issue arising  
8 under Federal law, a Federal entity may not compel a cov-  
9 ered person to provide testimony, or produce any docu-  
10 ment, relating to protected information, unless a Federal  
11 court determines by a preponderance of the evidence, after  
12 providing notice and an opportunity to be heard to such  
13 covered person—

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

18 (2) that—

19 (A) in a criminal investigation or prosecu-  
20 tion, based on information obtained from a  
21 source other than the covered person—

22 (i) there are reasonable grounds to be-  
23 lieve that a crime has occurred;

24 (ii) the testimony or document sought  
25 is essential to the investigation or prosecu-

1           tion or to the defense against the prosecu-  
2           tion; and

3                   (iii) in a criminal investigation or  
4           prosecution of an unauthorized disclosure  
5           of properly classified information by a per-  
6           son with authorized access to such infor-  
7           mation, such unauthorized disclosure has  
8           caused or will cause significant and  
9           articulable harm to the national security;  
10          or

11                   (B) in a matter other than a criminal in-  
12          vestigation or prosecution, based on information  
13          obtained from a source other than the covered  
14          person, the testimony or document sought is es-  
15          sential to the resolution of the matter; and

16                   (3) that nondisclosure of the information would  
17          be contrary to the public interest, taking into ac-  
18          count both the public interest in compelling disclo-  
19          sure and the public interest in gathering news and  
20          maintaining the free flow of information.

21          (b) LIMITATIONS ON CONTENT OF INFORMATION.—

22          The content of any testimony or document that is com-  
23          pelled under subsection (a) shall, to the extent possible—

24                   (1) be limited to the purpose of verifying pub-  
25          lished information or describing any surrounding cir-

1        circumstances relevant to the accuracy of such pub-  
 2        lished information; and

3            (2) be narrowly tailored in subject matter and  
 4        period of time covered so as to avoid compelling pro-  
 5        duction of peripheral, nonessential, or speculative in-  
 6        formation.

7        **SEC. 3. EXCEPTION RELATING TO CRIMINAL OR TORTIOUS**  
 8            **CONDUCT.**

9            (a) IN GENERAL.—Section 2 shall not apply to any  
 10       information, record, document, or item obtained as the re-  
 11       sult of the eyewitness observations of alleged criminal con-  
 12       duct or commitment of alleged criminal or tortious con-  
 13       duct by the covered person, including any physical evi-  
 14       dence or visual or audio recording of the observed conduct.

15          (b) EXCEPTION.—This section shall not apply, and  
 16       section 2 shall apply, if the alleged criminal or tortious  
 17       conduct is the act of communicating the documents or in-  
 18       formation at issue.

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

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

24            (1) death;

25            (2) kidnapping; or

1           ~~(3)~~ substantial bodily harm.

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

4           Section 2 shall not apply to any protected information  
 5 that a Federal court has found by a preponderance of the  
 6 evidence would assist in preventing—

7           ~~(1)~~ an act of terrorism; or

8           ~~(2)~~ other significant and articulable harm to  
 9           national security that would outweigh the public in-  
 10          terest in newsgathering and maintaining a free flow  
 11          of information to citizens.

12   **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**  
 13                           **SERVICE PROVIDERS.**

14          ~~(a)~~ CONDITIONS FOR COMPELLED DISCLOSURE.—

15 With respect to testimony that relates to a communication  
 16 to which a covered person is a party or any document that  
 17 consists of any record or other information relating to a  
 18 communication to which a covered person is a party, or  
 19 that contains the contents of a communication to which  
 20 a covered person is a party, section 2 shall apply to such  
 21 testimony or document if sought from the communications  
 22 service provider in the same manner that such section ap-  
 23 plies to any testimony or document sought from a covered  
 24 person.

1           (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-  
2 ERED PERSONS.—A Federal court may compel the testi-  
3 mony or disclosure of a document described in this section  
4 only after the party seeking such testimony or document  
5 provides the covered person who is a party to the commu-  
6 nication described in subsection (a)—

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

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

15           (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice  
16 under subsection (b)(1) may be delayed for not more than  
17 45 days if the court involved determines by clear and con-  
18 vincing evidence that such notice would pose a substantial  
19 threat to the integrity of a criminal investigation. This pe-  
20 riod may be extended by the court for an additional period  
21 of not more than 45 days each time the court makes such  
22 a determination.

1 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**  
 2 **OUT PROMISE OR AGREEMENT OF CON-**  
 3 **FIDENTIALITY.**

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

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

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

16 **SEC. 8. DEFINITIONS.**

17 In this Act:

18 (1) **COMMUNICATIONS SERVICE PROVIDER.—**

19 The term “communications service provider”—

20 (A) means any person that transmits infor-  
 21 mation of the customer’s choosing by electronic  
 22 means; and

23 (B) includes a telecommunications carrier,  
 24 an information service provider, an interactive  
 25 computer service provider, and an information  
 26 content provider (as such terms are defined in

1 section 3 or 230 of the Communications Act of  
2 1934 (47 U.S.C. 153 and 230)).

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

5 (A) means a person who is engaged in  
6 journalism;

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

10 (C) does not include any person who is—

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

16 (ii) a foreign terrorist organization  
17 designated under section 219(a) of the Im-  
18 migration and Nationality Act (8 U.S.C.  
19 1189(a));

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

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



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

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

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

17 (5) JOURNALISM.—The term “journalism”  
18 means the regular gathering, preparing, collecting,  
19 photographing, recording, writing, editing, reporting,  
20 or publishing of news or information that concerns  
21 local, national, or international events or other mat-  
22 ters of public interest for dissemination to the pub-  
23 lic.

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

1           (A) information identifying a source who  
 2           provided information under a promise or agree-  
 3           ment of confidentiality made by a covered per-  
 4           son as part of engaging in journalism; or

5           (B) any records, contents of a communica-  
 6           tion, documents, or information that a covered  
 7           person obtained or created—

8                     (i) as part of engaging in journalism;  
 9                     and

10                    (ii) upon a promise or agreement that  
 11                    such records, contents of a communication,  
 12                    documents, or information would be con-  
 13                    fidential.

14 **SECTION 1. SHORT TITLE.**

15           *This Act may be cited as the “Free Flow of Informa-*  
 16 *tion Act of 2009”.*

17 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**  
 18 **SONS.**

19           (a) *CONDITIONS FOR COMPELLED DISCLOSURE.—In*  
 20 *any proceeding or in connection with any issue arising*  
 21 *under Federal law, a Federal entity may not compel a cov-*  
 22 *ered person to comply with a subpoena, court order, or other*  
 23 *compulsory legal process seeking to compel the disclosure*  
 24 *of protected information, unless a Federal court in the juris-*  
 25 *isdiction where the subpoena, court order, or other compul-*

1 *sory legal process has been or would be issued determines,*  
2 *after providing notice and an opportunity to be heard to*  
3 *such covered person—*

4 *(1) that the party seeking to compel disclosure of*  
5 *the protected information has exhausted all reasonable*  
6 *alternative sources (other than a covered person) of*  
7 *the protected information; and*

8 *(2) that—*

9 *(A) in a criminal investigation or prosecu-*  
10 *tion—*

11 *(i) if the party seeking to compel dis-*  
12 *closure is the Federal Government, based on*  
13 *public information or information obtained*  
14 *from a source other than the covered person,*  
15 *there are reasonable grounds to believe that*  
16 *a crime has occurred;*

17 *(ii) based on public information or in-*  
18 *formation obtained from a source other than*  
19 *the covered person, there are reasonable*  
20 *grounds to believe that the protected infor-*  
21 *mation sought is essential to the investiga-*  
22 *tion or prosecution or to the defense against*  
23 *the prosecution;*

24 *(iii) the Attorney General certifies that*  
25 *the decision to request compelled disclosure*

1           *was made in a manner consistent with sec-*  
2           *tion 50.10 of title 28, Code of Federal Regu-*  
3           *lations, if compelled disclosure is sought by*  
4           *a member of the Department of Justice in*  
5           *circumstances governed by section 50.10 of*  
6           *title 28, Code of Federal Regulations; and*

7                   *(iv) the covered person has not estab-*  
8           *lished by clear and convincing evidence that*  
9           *disclosure of the protected information*  
10          *would be contrary to the public interest,*  
11          *taking into account both the public interest*  
12          *in gathering and disseminating the infor-*  
13          *mation or news at issue and maintaining*  
14          *the free flow of information and the public*  
15          *interest in compelling disclosure (including*  
16          *the extent of any harm to national secu-*  
17          *rity); or*

18                   *(B) in a matter other than a criminal in-*  
19          *vestigation or prosecution, based on public infor-*  
20          *mation or information obtained from a source*  
21          *other than the covered person—*

22                   *(i) the protected information sought is*  
23                   *essential to the resolution of the matter; and*

24                   *(ii) the party seeking to compel disclo-*  
25                   *sure of the protected information has estab-*

1                   lished that the interest in compelling disclo-  
 2                   sure clearly outweighs the public interest in  
 3                   gathering and disseminating the informa-  
 4                   tion or news at issue and maintaining the  
 5                   free flow 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 nar-  
 10 rowly tailored in purpose, subject matter, and period of  
 11 time covered so as to avoid compelling disclosure of periph-  
 12 eral, nonessential, 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 re-  
 16 sult of the eyewitness observations of, or obtained during  
 17 the course of, alleged criminal conduct by the covered per-  
 18 son, including any physical evidence or visual or audio re-  
 19 cording of the conduct.

20           (b) *EXCEPTION.*—This section shall not apply, and,  
 21 subject to sections 4 and 5, section 2 shall apply, if the al-  
 22 leged criminal conduct is the act of communicating the doc-  
 23 uments or information at issue.

1 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, SUB-**  
 2 **STANTIAL BODILY INJURY, SEX OFFENSES**  
 3 **AGAINST MINORS, OR INCAPACITATION OR**  
 4 **DESTRUCTION OF CRITICAL INFRASTRUC-**  
 5 **TURE.**

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

9 (1) *death;*

10 (2) *kidnapping;*

11 (3) *substantial bodily harm;*

12 (4) *conduct that constitutes a criminal offense*  
 13 *that is a specified offense against a minor (as those*  
 14 *terms are defined in section 111 of the Adam Walsh*  
 15 *Child Protection and Safety Act of 2006 (42 U.S.C.*  
 16 *16911)), or an attempt or conspiracy to commit such*  
 17 *a criminal offense; or*

18 (5) *incapacitation or destruction of critical in-*  
 19 *frastructure (as defined in section 1016(e) of the USA*  
 20 *PATRIOT Act (42 U.S.C. 5195c(e))).*

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

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

25 (1) *the party seeking to compel disclosure is the*  
 26 *Federal Government; and*

1           (2)(A) *in a criminal investigation or prosecution*  
2           *of the allegedly unlawful disclosure of properly classi-*  
3           *fied information, the court finds by a preponderance*  
4           *of the evidence that the protected information for*  
5           *which compelled disclosure is sought would materially*  
6           *assist the Federal Government in preventing or miti-*  
7           *gating—*

8                     *(i) an act of terrorism; or*

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

12           (B) *in any other criminal investigation or pros-*  
13           *ecution, the court finds by a preponderance of the evi-*  
14           *dence that the protected information for which com-*  
15           *pelled disclosure is sought would materially assist the*  
16           *Federal Government in preventing, mitigating, or*  
17           *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 extent*  
23           *of the harm described in subsection (a), a Federal court*  
24           *shall give appropriate deference to a specific factual show-*

1 *ing submitted to the court by the head of any executive*  
2 *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 in-*  
7 *formation other than one in which the protected informa-*  
8 *tion is sought by the Federal Government to prevent or*  
9 *mitigate the harm specified in subsection (a)(2)(A). In con-*  
10 *sidering the extent of any harm to national security when*  
11 *applying section 2 to such cases, a Federal court shall give*  
12 *appropriate deference to any specific factual showing sub-*  
13 *mitted to the court by the head of any executive branch*  
14 *agency or department concerned.*

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

22               (1) *an act of terrorism; or*

23               (2) *other acts that are reasonably likely to cause*  
24 *significant and articulable harm to national security.*



1 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**

2 **SERVICE PROVIDERS.**

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

4 *(1) IN GENERAL.—Except as provided in para-*  
5 *graph (2), if any document or other information from*  
6 *the account of a person who is known to be, or reason-*  
7 *ably likely to be, a covered person is sought from a*  
8 *communications service provider, sections 2 through 5*  
9 *shall apply in the same manner that such sections*  
10 *apply to any document or other information sought*  
11 *from a covered person.*

12 *(2) EXCEPTION.—If any document or other in-*  
13 *formation from the account of a person who is known*  
14 *to be, or reasonably likely to be, a covered person is*  
15 *sought from a communications service provider under*  
16 *section 2709 of title 18, United States Code, the pro-*  
17 *visions of sections 2 through 5 governing criminal in-*  
18 *vestigations and prosecutions shall apply in the same*  
19 *manner that such sections apply to any document or*  
20 *other information sought from a covered person in the*  
21 *course of a criminal investigation or prosecution, ex-*  
22 *cept that clauses (i) and (iii) of section 2(a)(2)(A)*  
23 *and the phrase “particularly with reference to di-*  
24 *rectly establishing guilt or innocence” in section*  
25 *2(a)(2)(A)(ii) shall not apply.*

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

7           (1) *notice from the party seeking the document*  
8 *or other information through a subpoena or other*  
9 *compulsory request, not later than the time at which*  
10 *such subpoena or request is issued to the communica-*  
11 *tions service provider; and*

12           (2) *an opportunity to be heard before the court*  
13 *before compelling testimony or the disclosure of a doc-*  
14 *ument.*

15           (c) *EXCEPTION TO NOTICE REQUIREMENT.*—*Notice*  
16 *under subsection (b)(1) may be delayed for not more than*  
17 *45 days if the Federal court involved determines by clear*  
18 *and convincing evidence that such notice would pose a sub-*  
19 *stantial threat to the integrity of a criminal investigation,*  
20 *a national security investigation, or intelligence gathering,*  
21 *or that exigent circumstances exist. This period may be ex-*  
22 *tended by the court for an additional period of not more*  
23 *than 45 days each time the court makes such a determina-*  
24 *tion.*

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

10 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**  
 11 **OUT PROMISE OR AGREEMENT OF CONFIDEN-**  
 12 **TIALITY.**

13           *Nothing in this Act shall supersede, dilute, or preclude*  
 14 *any law or court decision compelling or not compelling dis-*  
 15 *closure by a covered person or communications service pro-*  
 16 *vider of—*

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

21           (2) *records, other information, or contents of a*  
 22 *communication obtained without a promise or agree-*  
 23 *ment that such records, other information, or contents*  
 24 *of a communication would be confidential.*

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

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

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

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

20 (d) *EXPEDITED APPEAL PROCESS.*—

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

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

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

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

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

20           (3) create new obligations, or affect or modify  
21           the authorities or obligations of a Federal entity with  
22           respect to the acquisition or dissemination of infor-  
23           mation pursuant to the Foreign Intelligence Surveil-  
24           lance Act of 1978 (50 U.S.C. 1801 et seq.); or

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

4 **SEC. 10. AUDIT.**

5           (a) *IN GENERAL.*—*The Inspector General of the De-*  
6 *partment of Justice shall perform a comprehensive audit*  
7 *of the use of this Act during the period beginning on the*  
8 *date of enactment of this Act and ending on December 31,*  
9 *2012. The audit shall include an examination of each in-*  
10 *stance in which a court failed to compel the disclosure of*  
11 *protected information under this Act, and whether this Act*  
12 *has created any procedural impediments that have had a*  
13 *detrimental operational impact on the activities of the Fed-*  
14 *eral Bureau of Investigation.*

15           (b) *REPORT.*—*Not later than June 30, 2013, the In-*  
16 *spector General of the Department of Justice shall submit*  
17 *to the Committee on the Judiciary and the Select Com-*  
18 *mittee on Intelligence of the Senate and the Committee on*  
19 *the Judiciary and the Permanent Select Committee on In-*  
20 *telligence of the House of Representatives a report con-*  
21 *taining the results of the audit conducted under subsection*  
22 *(a).*

23           (c) *REVIEW.*—*Not later than 30 days before the sub-*  
24 *mission of the report under subsection (b), the Inspector*  
25 *General of the Department of Justice shall provide the re-*

1 port to the Attorney General and the Director of National  
 2 Intelligence. The Attorney General or the Director of Na-  
 3 tional Intelligence may provide such comments to be in-  
 4 cluded in the report submitted under subsection (b) as the  
 5 Attorney General or the Director of National Intelligence  
 6 may consider necessary.

7 (d) *FORM.*—The report submitted under subsection (b)  
 8 and any comments included under subsection (c) shall be  
 9 in unclassified form, but may include a classified annex.

10 **SEC. 11. DEFINITIONS.**

11 *In this Act:*

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

14 (A) means any person that transmits infor-  
 15 mation of the customer’s choosing by electronic  
 16 means; and

17 (B) includes a telecommunications carrier,  
 18 an information service provider, an interactive  
 19 computer service provider, and an information  
 20 content provider (as such terms are defined in  
 21 section 3 or 230 of the Communications Act of  
 22 1934 (47 U.S.C. 153 and 230)).

23 (2) *COVERED PERSON.*—The term “covered per-  
 24 son”—

25 (A) means a person who—

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

9                   (I) *conducting interviews;*

10                   (II) *making direct observation of*  
11 *events; or*

12                   (III) *collecting, reviewing, or ana-*  
13 *lyzing original writings, statements,*  
14 *communications, reports, memoranda,*  
15 *records, transcripts, documents, photo-*  
16 *graphs, recordings, tapes, materials,*  
17 *data, or other information whether in*  
18 *paper, electronic, or other form;*

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

22           (iii) *obtains the news or information*  
23 *sought in order to disseminate the news or*  
24 *information by means of print (including*  
25 *newspapers, books, wire services, news agen-*



1           cies, or magazines), broadcasting (including  
2           dissemination through networks, cable, sat-  
3           ellite carriers, broadcast stations, or a chan-  
4           nel or programming service for any such  
5           media), mechanical, photographic, elec-  
6           tronic, or other means;

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

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

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

16           (ii) a member or affiliate of a foreign  
17           terrorist organization designated under sec-  
18           tion 219(a) of the Immigration and Nation-  
19           ality Act (8 U.S.C. 1189(a));

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

24           (iv) a specially designated terrorist, as  
25           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 2332b(g)(5)*  
11           *of title 18, United States Code;*

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

17           *(viii) aiding, abetting, or conspiring*  
18           *in illegal activity with a person or organi-*  
19           *zation defined in clauses (i) through (vii).*

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

24           (4) *FEDERAL ENTITY.*—*The term “Federal enti-*  
25           *ty” means an entity or employee of the judicial or ex-*

1        *ecutive branch or an administrative agency of the*  
2        *Federal Government with the power to issue a sub-*  
3        *poena or issue other compulsory process.*

4            (5) *PROPERLY CLASSIFIED INFORMATION.*—*The*  
5        *term “properly classified information” means infor-*  
6        *mation that is classified in accordance with any ap-*  
7        *plicable Executive Orders, statutes, or regulations re-*  
8        *garding classification of information.*

9            (6) *PROTECTED INFORMATION.*—*The term “pro-*  
10        *ected information” means—*

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

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

18            (i) *as part of engaging in journalism;*

19            *and*

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

**Calendar No. 225**

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> Session

**S. 448**

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**A BILL**

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.

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DECEMBER 11, 2009

Reported with an amendment