

111TH CONGRESS
1ST SESSION

H. R. 985

IN THE SENATE OF THE UNITED STATES

APRIL 1, 2009

Received; read twice and referred to the Committee on the Judiciary

AN ACT

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 matter arising under Federal law, a Federal entity
8 may not compel a covered person to provide testimony or
9 produce any document related to information obtained or
10 created by such covered person as part of engaging in
11 journalism, unless a court determines by a preponderance
12 of the evidence, after providing notice and an opportunity
13 to be heard to such 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 the cov-
17 ered 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 per-
21 son other than the covered person—

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

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

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

3 (B) in a matter other than a criminal in-
4 vestigation or prosecution, based on information
5 obtained from a person other than the covered
6 person, the testimony or document sought is
7 critical to the successful completion of the mat-
8 ter;

9 (3) in the case that the testimony or document
10 sought could reveal the identity of a source of infor-
11 mation or include any information that could reason-
12 ably be expected to lead to the discovery of the iden-
13 tity of such a source, that—

14 (A) disclosure of the identity of such a
15 source is necessary to prevent, or to identify
16 any perpetrator of, an act of terrorism against
17 the United States or its allies or other signifi-
18 cant and specified harm to national security
19 with the objective to prevent such harm;

20 (B) disclosure of the identity of such a
21 source is necessary to prevent imminent death
22 or significant bodily harm with the objective to
23 prevent such death or harm, respectively;

1 (C) disclosure of the identity of such a
2 source is necessary to identify a person who has
3 disclosed—

4 (i) a trade secret, actionable under
5 section 1831 or 1832 of title 18, United
6 States Code;

7 (ii) individually identifiable health in-
8 formation, as such term is defined in sec-
9 tion 1171(6) of the Social Security Act (42
10 U.S.C. 1320d(6)), actionable under Fed-
11 eral law; or

12 (iii) nonpublic personal information,
13 as such term is defined in section 509(4)
14 of the Gramm-Leach-Bliley Act (15 U.S.C.
15 6809(4)), of any consumer actionable
16 under Federal law; or

17 (D)(i) disclosure of the identity of such a
18 source is essential to identify in a criminal in-
19 vestigation or prosecution a person who without
20 authorization disclosed properly classified infor-
21 mation and who at the time of such disclosure
22 had authorized access to such information; and

23 (ii) such unauthorized disclosure has
24 caused or will cause significant and articulable
25 harm to the national security; and

1 (4) that the public interest in compelling disclo-
2 sure of the information or document involved out-
3 weighs the public interest in gathering or dissemi-
4 nating news or information.

5 (b) **AUTHORITY TO CONSIDER NATIONAL SECURITY**
6 **INTEREST.**—For purposes of making a determination
7 under subsection (a)(4), a court may consider the extent
8 of any harm to national security.

9 (c) **LIMITATIONS ON CONTENT OF INFORMATION.**—
10 The content of any testimony or document that is com-
11 pelled under subsection (a) shall—

12 (1) not be overbroad, unreasonable, or oppres-
13 sive and, as appropriate, be limited to the purpose
14 of verifying published information or describing any
15 surrounding circumstances relevant to the accuracy
16 of such published information; and

17 (2) be narrowly tailored in subject matter and
18 period of time covered so as to avoid compelling pro-
19 duction of peripheral, nonessential, or speculative in-
20 formation.

21 (d) **RULE OF CONSTRUCTION.**—Nothing in this Act
22 shall be construed as applying to civil defamation, slander,
23 or libel claims or defenses under State law, regardless of
24 whether or not such claims or defenses, respectively, are
25 raised in a State or Federal court.

1 (e) EXCEPTION RELATING TO CRIMINAL OR
2 TORTIOUS CONDUCT.—The provisions of this section shall
3 not prohibit or otherwise limit a Federal entity in any
4 matter arising under Federal law from compelling a cov-
5 ered person to disclose any information, record, document,
6 or item obtained as the result of the eyewitness observa-
7 tion by the covered person of alleged criminal conduct or
8 as the result of the commission of alleged criminal or
9 tortious conduct by the covered person, including any
10 physical evidence or visual or audio recording of the con-
11 duct, if a Federal court determines that the party seeking
12 to compel such disclosure has exhausted all other reason-
13 able efforts to obtain the information, record, document,
14 or item, respectively, from alternative sources. The pre-
15 vious sentence shall not apply, and subsections (a) and
16 (b) shall apply, in the case that the alleged criminal con-
17 duct observed by the covered person or the alleged crimi-
18 nal or tortious conduct committed by the covered person
19 is the act of transmitting or communicating the informa-
20 tion, record, document, or item sought for disclosure.

21 **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS**

22 **SERVICE PROVIDERS.**

23 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—
24 With respect to testimony or any document consisting of
25 any record, information, or other communication that re-

1 lates to a business transaction between a communications
2 service provider and a covered person, section 2 shall apply
3 to such testimony or document if sought from the commu-
4 nications service provider in the same manner that such
5 section applies to any testimony or document sought from
6 a covered person.

7 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
8 ERED PERSONS.—A court may compel the testimony or
9 disclosure of a document under this section only after the
10 party seeking such a document provides the covered per-
11 son who is a party to the business transaction described
12 in subsection (a)—

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

18 (2) an opportunity to be heard before the court
19 before the time at which the testimony or disclosure
20 is compelled.

21 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
22 under subsection (b)(1) may be delayed only if the court
23 involved determines by clear and convincing evidence that
24 such notice would pose a substantial threat to the integrity
25 of a criminal investigation.

1 **SEC. 4. DEFINITIONS.**

2 In this Act:

3 (1) COMMUNICATIONS SERVICE PROVIDER.—

4 The term “communications service provider”—

5 (A) means any person that transmits infor-
6 mation of the customer’s choosing by electronic
7 means; and

8 (B) includes a telecommunications carrier,
9 an information service provider, an interactive
10 computer service provider, and an information
11 content provider (as such terms are defined in
12 sections 3 and 230 of the Communications Act
13 of 1934 (47 U.S.C. 153, 230)).

14 (2) COVERED PERSON.—The term “covered
15 person” means a person who regularly gathers, pre-
16 pares, collects, photographs, records, writes, edits,
17 reports, or publishes news or information that con-
18 cerns local, national, or international events or other
19 matters of public interest for dissemination to the
20 public for a substantial portion of the person’s liveli-
21 hood or for substantial financial gain and includes a
22 supervisor, employer, parent, subsidiary, or affiliate
23 of such covered person. Such term shall not in-
24 clude—

25 (A) any person who is a foreign power or
26 an agent of a foreign power, as such terms are

1 defined in section 101 of the Foreign Intel-
2 ligence Surveillance Act of 1978 (50 U.S.C.
3 1801);

4 (B) any organization designated by the
5 Secretary of State as a foreign terrorist organi-
6 zation in accordance with section 219 of the
7 Immigration and Nationality Act (8 U.S.C.
8 1189);

9 (C) any person included on the Annex to
10 Executive Order No. 13224, of September 23,
11 2001, and any other person identified under
12 section 1 of that Executive order whose prop-
13 erty and interests in property are blocked by
14 that section;

15 (D) any person who is a specially des-
16 ignated terrorist, as that term is defined in sec-
17 tion 595.311 of title 31, Code of Federal Regu-
18 lations (or any successor thereto); or

19 (E) any terrorist organization, as that
20 term is defined in section 212(a)(3)(B)(vi)(II)
21 of the Immigration and Nationality Act (8
22 U.S.C. 1182(a)(3)(B)(vi)(II)).

23 (3) DOCUMENT.—The term “document” means
24 writings, recordings, and photographs, as those

1 terms are defined by Federal Rule of Evidence 1001
2 (28 U.S.C. App.).

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

8 (5) JOURNALISM.—The term “journalism”
9 means the gathering, preparing, collecting,
10 photographing, recording, writing, editing, reporting,
11 or publishing of news or information that concerns
12 local, national, or international events or other mat-
13 ters of public interest for dissemination to the pub-
14 lic.

Passed the House of Representatives March 31,
2009.

Attest: LORRAINE C. MILLER,
Clerk.