

Union Calendar No. 26

111TH CONGRESS
1ST SESSION

H. R. 985

[Report No. 111-61]

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.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2009

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. GOODLATTE, Mr. YARMUTH, Mr. WALDEN, Ms. ZOE LOFGREN of California, Mr. COBLE, Mr. WEXLER, Mr. BLUNT, Ms. BERKLEY, Mr. WU, Ms. SCHAKOWSKY, Ms. LEE of California, Mr. DELAHUNT, Mr. MACK, Mr. MCCAUL, Ms. NORTON, Mr. WOLF, Ms. WOOLSEY, Mr. MURPHY of Connecticut, Mr. UPTON, Ms. SLAUGHTER, Mr. BERRY, Ms. GIFFORDS, Mr. GONZALEZ, Mr. PUTNAM, Mr. WEINER, Mr. PAYNE, Mr. COHEN, Mr. KENNEDY, Mr. RADANOVICH, Mr. COOPER, Mr. DOYLE, Ms. BALDWIN, Ms. WASSERMAN SCHULTZ, Ms. ESHOO, Mr. BUTTERFIELD, and Mr. REHBERG) introduced the following bill; which was referred to the Committee on the Judiciary

MARCH 30, 2009

Additional sponsors: Mr. MCDERMOTT, Mr. CLAY, Mr. BRADY of Texas, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. KIND, Mr. OBERSTAR, Mr. LEE of New York, Mr. ROONEY, Ms. JACKSON-LEE of Texas, Mr. POE of Texas, Mr. BOOZMAN, and Mr. MAFFEI

MARCH 30, 2009

Committed to the Committee of the Whole House on the State of the Union
and ordered to be printed

1 (A) in a criminal investigation or prosecu-
2 tion, based on information obtained from a per-
3 son other than the covered person—

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

6 (ii) the testimony or document sought
7 is critical to the investigation or prosecu-
8 tion or to the defense against the prosecu-
9 tion; or

10 (B) in a matter other than a criminal in-
11 vestigation or prosecution, based on information
12 obtained from a person other than the covered
13 person, the testimony or document sought is
14 critical to the successful completion of the mat-
15 ter;

16 (3) in the case that the testimony or document
17 sought could reveal the identity of a source of infor-
18 mation or include any information that could reason-
19 ably be expected to lead to the discovery of the iden-
20 tity of such a source, that—

21 (A) disclosure of the identity of such a
22 source is necessary to prevent, or to identify
23 any perpetrator of, an act of terrorism against
24 the United States or its allies or other signifi-

1 cant and specified harm to national security
2 with the objective to prevent such harm;

3 (B) disclosure of the identity of such a
4 source is necessary to prevent imminent death
5 or significant bodily harm with the objective to
6 prevent such death or harm, respectively;

7 (C) disclosure of the identity of such a
8 source is necessary to identify a person who has
9 disclosed—

10 (i) a trade secret, actionable under
11 section 1831 or 1832 of title 18, United
12 States Code;

13 (ii) individually identifiable health in-
14 formation, as such term is defined in sec-
15 tion 1171(6) of the Social Security Act (42
16 U.S.C. 1320d(6)), actionable under Fed-
17 eral law; or

18 (iii) nonpublic personal information,
19 as such term is defined in section 509(4)
20 of the Gramm-Leach-Bliley Act (15 U.S.C.
21 6809(4)), of any consumer actionable
22 under Federal law; or

23 (D)(i) disclosure of the identity of such a
24 source is essential to identify in a criminal in-
25 vestigation or prosecution a person who without

1 authorization disclosed properly classified infor-
2 mation and who at the time of such disclosure
3 had authorized access to such information; and

4 (ii) such unauthorized disclosure has
5 caused or will cause significant and articulable
6 harm to the national security; and

7 (4) that the public interest in compelling disclo-
8 sure of the information or document involved out-
9 weighs the public interest in gathering or dissemi-
10 nating news or information.

11 (b) AUTHORITY TO CONSIDER NATIONAL SECURITY
12 INTEREST.—For purposes of making a determination
13 under subsection (a)(4), a court may consider the extent
14 of any harm to national security.

15 (c) LIMITATIONS ON CONTENT OF INFORMATION.—
16 The content of any testimony or document that is com-
17 pelled under subsection (a) shall—

18 (1) not be overbroad, unreasonable, or oppres-
19 sive and, as appropriate, be limited to the purpose
20 of verifying published information or describing any
21 surrounding circumstances relevant to the accuracy
22 of such published information; and

23 (2) be narrowly tailored in subject matter and
24 period of time covered so as to avoid compelling pro-

1 duction of peripheral, nonessential, or speculative in-
2 formation.

3 (d) RULE OF CONSTRUCTION.—Nothing in this Act
4 shall be construed as applying to civil defamation, slander,
5 or libel claims or defenses under State law, regardless of
6 whether or not such claims or defenses, respectively, are
7 raised in a State or Federal court.

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

1 is the act of transmitting or communicating the informa-
2 tion, record, document, or item sought for disclosure.

3 **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
4 **SERVICE PROVIDERS.**

5 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—
6 With respect to testimony or any document consisting of
7 any record, information, or other communication that re-
8 lates to a business transaction between a communications
9 service provider and a covered person, section 2 shall apply
10 to such testimony or document if sought from the commu-
11 nications service provider in the same manner that such
12 section applies to any testimony or document sought from
13 a covered person.

14 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
15 ERED PERSONS.—A court may compel the testimony or
16 disclosure of a document under this section only after the
17 party seeking such a document provides the covered per-
18 son who is a party to the business transaction described
19 in subsection (a)—

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

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

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

9 **SEC. 4. DEFINITIONS.**

10 In this Act:

11 (1) COMMUNICATIONS SERVICE PROVIDER.—

12 The term “communications service provider”—

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

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

22 (2) COVERED PERSON.—The term “covered
23 person” means a person who regularly gathers, pre-
24 pares, collects, photographs, records, writes, edits,
25 reports, or publishes news or information that con-

1 cerns local, national, or international events or other
2 matters of public interest for dissemination to the
3 public for a substantial portion of the person's liveli-
4 hood or for substantial financial gain and includes a
5 supervisor, employer, parent, subsidiary, or affiliate
6 of such covered person. Such term shall not in-
7 clude—

8 (A) any person who is a foreign power or
9 an agent of a foreign power, as such terms are
10 defined in section 101 of the Foreign Intel-
11 ligence Surveillance Act of 1978 (50 U.S.C.
12 1801);

13 (B) any organization designated by the
14 Secretary of State as a foreign terrorist organi-
15 zation in accordance with section 219 of the
16 Immigration and Nationality Act (8 U.S.C.
17 1189);

18 (C) any person included on the Annex to
19 Executive Order No. 13224, of September 23,
20 2001, and any other person identified under
21 section 1 of that Executive order whose prop-
22 erty and interests in property are blocked by
23 that section;

24 (D) any person who is a specially des-
25 ignated terrorist, as that term is defined in sec-

1 tion 595.311 of title 31, Code of Federal Regu-
2 lations (or any successor thereto); or

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

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

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

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

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