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[Report No. 113-118]

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 SENATE OF THE UNITED STATES

MAY 16, 2013

Mr. SCHUMER (for himself, Mr. GRAHAM, Mr. TESTER, Ms. KLOBUCHAR, Mr. HARKIN, Mr. BENNET, Mrs. MURRAY, Mr. UDALL of New Mexico, Mr. BAUCUS, Ms. CANTWELL, Mrs. BOXER, Mr. ISAKSON, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BLUNT, Mrs. GILLIBRAND, Mrs. MCCASKILL, Mr. COONS, Ms. HIRONO, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 6, 2013

Reported by Mr. LEAHY, with an amendment

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

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 2013”.

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 comply with a subpoena, court order, or
10 other compulsory legal process seeking to compel the dis-
11 closure of protected information, unless a Federal court
12 in the jurisdiction where the subpoena, court order, or
13 other compulsory legal process has been or would be issued
14 determines, after providing notice and an opportunity to
15 be heard to such covered person—

16 (1) that the party seeking to compel disclosure
17 of the protected information has exhausted all rea-
18 sonable alternative sources (other than a covered
19 person) of the protected information; and

20 (2) that—

21 (A) in a criminal investigation or prosecu-
22 tion—

23 (i) if the party seeking to compel dis-
24 closure is the Federal Government, based
25 on public information or information ob-
26 tained from a source other than the cov-

1 ered person, there are reasonable grounds
2 to believe that a crime has occurred;

3 (ii) based on public information or in-
4 formation obtained from a source other
5 than the covered person, there are reason-
6 able grounds to believe that the protected
7 information sought is essential to the in-
8 vestigation or prosecution or to the defense
9 against the prosecution;

10 (iii) the Attorney General certifies
11 that the decision to request compelled dis-
12 closure was made in a manner consistent
13 with section 50.10 of title 28, Code of Fed-
14 eral Regulations, if compelled disclosure is
15 sought by a member of the Department of
16 Justice in circumstances governed by sec-
17 tion 50.10 of title 28, Code of Federal
18 Regulations; and

19 (iv) the covered person has not estab-
20 lished by clear and convincing evidence
21 that disclosure of the protected informa-
22 tion would be contrary to the public inter-
23 est, taking into account both the public in-
24 terest in gathering and disseminating the
25 information or news at issue and maintain-

1 ing the free flow of information and the
2 public interest in compelling disclosure (in-
3 cluding the extent of any harm to national
4 security); or

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

9 (i) the protected information sought is
10 essential to the resolution of the matter;
11 and

12 (ii) the party seeking to compel disclo-
13 sure of the protected information has es-
14 tablished that the interest in compelling
15 disclosure clearly outweighs the public in-
16 terest in gathering and disseminating the
17 information or news at issue and maintain-
18 ing the free flow of information.

19 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

20 A subpoena, court order, or other compulsory legal process
21 seeking to compel the disclosure of protected information
22 under subsection (a) shall, to the extent possible, be nar-
23 rowly tailored in purpose, subject matter, and period of
24 time covered so as to avoid compelling disclosure of pe-
25 ripheral, nonessential, or speculative 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 re-
 4 sult of the eyewitness observations of, or obtained during
 5 the course of, alleged criminal conduct by the covered per-
 6 son, including any physical evidence or visual or audio re-
 7 cording of the conduct.

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

12 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING,**
 13 **SUBSTANTIAL BODILY INJURY, SEX OF-**
 14 **FENSES AGAINST MINORS, OR INCAPACITA-**
 15 **TION OR DESTRUCTION OF CRITICAL INFRA-**
 16 **STRUCTURE.**

17 Section 2 shall not apply to any protected information
 18 that is reasonably necessary to stop, prevent, or mitigate
 19 a specific case of—

20 (1) death;

21 (2) kidnapping;

22 (3) substantial bodily harm;

23 (4) conduct that constitutes a criminal offense
 24 that is a specified offense against a minor (as those
 25 terms are defined in section 111 of the Adam Walsh
 26 Child Protection and Safety Act of 2006 (42 U.S.C.

1 16911)), or an attempt or conspiracy to commit
 2 such a criminal offense; or

3 ~~(5) incapacitation or destruction of critical in-~~
 4 ~~frastructure (as defined in section 1016(e) of the~~
 5 ~~USA PATRIOT Act (42 U.S.C. 5195e(e))).~~

6 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
 7 **HARM TO THE NATIONAL SECURITY.**

8 (a) IN GENERAL.—Section 2 shall not apply to any
 9 protected information if—

10 (1) the party seeking to compel disclosure is the
 11 Federal Government; and

12 (2)(A) in a criminal investigation or prosecution
 13 of the allegedly unlawful disclosure of properly clas-
 14 sified information, the court finds by a preponder-
 15 ance of the evidence that the protected information
 16 for which compelled disclosure is sought would mate-
 17 rially assist the Federal Government in preventing
 18 or mitigating—

19 (i) an act of terrorism; or

20 (ii) other acts that are reasonably
 21 likely to cause significant and articulable
 22 harm to national security; or

23 (B) in any other criminal investigation or pros-
 24 ecution, the court finds by a preponderance of the
 25 evidence that the protected information for which

1 compelled disclosure is sought would materially as-
2 sist the Federal Government in preventing, miti-
3 gating, or identifying the perpetrator of—

4 (i) an act of terrorism; or

5 (ii) other acts that have caused or are rea-
6 sonably likely to cause significant and articula-
7 ble harm to national security.

8 (b) DEFERENCE.—In assessing the existence or ex-
9 tent of the harm described in subsection (a), a Federal
10 court shall give appropriate deference to a specific factual
11 showing submitted to the court by the head of any execu-
12 tive branch agency or department concerned.

13 (c) RELATIONSHIP TO SECTION 2.—Subsection (a)
14 shall not apply, and, subject to sections 3 and 4, section
15 2 shall apply, to any criminal investigation or prosecution
16 of the allegedly unlawful disclosure of properly classified
17 information other than one in which the protected infor-
18 mation is sought by the Federal Government to prevent
19 or mitigate the harm specified in subsection (a)(2)(A). In
20 considering the extent of any harm to national security
21 when applying section 2 to such cases, a Federal court
22 shall give appropriate deference to any specific factual
23 showing submitted to the court by the head of any execu-
24 tive branch agency or department concerned.

1 (d) **SUBSEQUENT UNLAWFUL DISCLOSURE.**—The
 2 potential for a subsequent unlawful disclosure of informa-
 3 tion by the source sought to be identified shall not, by
 4 itself and without any showing of additional facts beyond
 5 such potential disclosure, be sufficient to establish that
 6 compelled disclosure of the protected information would
 7 materially assist the Federal Government in preventing or
 8 mitigating—

9 (1) an act of terrorism; or

10 (2) other acts that are reasonably likely to
 11 cause significant and articulable harm to national
 12 security.

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

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

16 (1) **IN GENERAL.**—Except as provided in para-
 17 graph (2), if any document or other information
 18 from the account of a person who is known to be,
 19 or reasonably likely to be, a covered person is sought
 20 from a communications service provider, sections 2
 21 through 5 shall apply in the same manner that such
 22 sections apply to any document or other information
 23 sought from a covered person.

24 (2) **EXCEPTION.**—If any document or other in-
 25 formation from the account of a person who is

1 known to be, or reasonably likely to be, a covered
2 person is sought from a communications service pro-
3 vider under section 2709 of title 18, United States
4 Code, the provisions of sections 2 through 5 gov-
5 erning criminal investigations and prosecutions shall
6 apply in the same manner that such sections apply
7 to any document or other information sought from
8 a covered person in the course of a criminal inves-
9 tigation or prosecution, except that clauses (i) and
10 (iii) of section 2(a)(2)(A) and the phrase “particu-
11 larly with reference to directly establishing guilt or
12 innocence” in section 2(a)(2)(A)(ii) shall not apply.

13 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
14 ERED PERSONS.—A Federal court may compel the disclo-
15 sure of a document or other information described in this
16 section only after the covered person from whose account
17 the document or other information is sought has been
18 given—

19 (1) notice from the party seeking the document
20 or other information through a subpoena or other
21 compulsory request, not later than the time at which
22 such subpoena or request is issued to the commu-
23 nications service provider; and

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

4 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
5 under subsection (b)(1) may be delayed for not more than
6 45 days if the Federal court involved determines by clear
7 and convincing evidence that such notice would pose a sub-
8 stantial threat to the integrity of a criminal investigation,
9 a national security investigation, or intelligence gathering,
10 or that exigent circumstances exist. This period may be
11 extended by the court for an additional period of not more
12 than 45 days each time the court makes such a determina-
13 tion.

14 (d) NOTICE TO COMMUNICATIONS SERVICE PRO-
15 VIDER.—In all cases in which notice is required to be pro-
16 vided to the covered person under this section, a copy of
17 such notice shall be provided simultaneously to the com-
18 munications service provider from whom disclosure is
19 sought. Once it has received such notice, the communica-
20 tions service provider shall not comply with the request
21 for disclosure unless and until disclosure is either ordered
22 by the court or authorized in writing by the covered per-
23 son.

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. PROCEDURES FOR REVIEW AND APPEAL.**

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

23 (b) **CONTEMPT OF COURT.**—With regard to any de-
24 termination made by a Federal court under this Act, a
25 Federal court may find a covered person to be in civil or
26 criminal contempt if the covered person fails to comply

1 with an order of a Federal court compelling disclosure of
2 protected information.

3 ~~(c) TO PROVIDE FOR TIMELY DETERMINATION.—~~

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

9 ~~(d) EXPEDITED APPEAL PROCESS.—~~

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

12 ~~(A)~~ of appeals by a Federal entity or cov-
13 ered person of an interlocutory order of a Fed-
14 eral court under this Act; and

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

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

24 **SEC. 9. RULE OF CONSTRUCTION.**

25 Nothing in this Act may be construed to—

1 (1) preempt any law or claim relating to defa-
2 mation, slander, or libel;

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

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

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

18 **SEC. 10. AUDIT.**

19 (a) **IN GENERAL.**—The Inspector General of the De-
20 partment of Justice shall perform a comprehensive audit
21 of the use of this Act during the period beginning on the
22 date of enactment of this Act and ending on December
23 31, 2016. The audit shall include an examination of each
24 instance in which a court failed to compel the disclosure
25 of protected information under this Act, and whether this

1 Act has created any procedural impediments that have had
2 a detrimental operational impact on the activities of the
3 Federal Bureau of Investigation.

4 (b) REPORT.—Not later than June 30, 2017, the In-
5 spector General of the Department of Justice shall submit
6 to the Committee on the Judiciary and the Select Com-
7 mittee on Intelligence of the Senate and the Committee
8 on the Judiciary and the Permanent Select Committee on
9 Intelligence of the House of Representatives a report con-
10 taining the results of the audit conducted under subsection
11 (a).

12 (c) REVIEW.—Not later than 30 days before the sub-
13 mission of the report under subsection (b), the Inspector
14 General of the Department of Justice shall provide the
15 report to the Attorney General and the Director of Na-
16 tional Intelligence. The Attorney General or the Director
17 of National Intelligence may provide such comments to be
18 included in the report submitted under subsection (b) as
19 the Attorney General or the Director of National Intel-
20 ligence may consider necessary.

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

24 **SEC. 11. DEFINITIONS.**

25 In this Act:

1 (1) COMMUNICATIONS SERVICE PROVIDER.—

2 The term “communications service provider”—

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

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

12 (2) COVERED PERSON.—The term “covered
13 person”—

14 (A) means a person who—

15 (i) with the primary intent to inves-
16 tigate events and procure material in order
17 to disseminate to the public news or infor-
18 mation concerning local, national, or inter-
19 national events or other matters of public
20 interest, regularly gathers, prepares, col-
21 lects, photographs, records, writes, edits,
22 reports or publishes on such matters by—

23 (I) conducting interviews;

24 (II) making direct observation of
25 events; or

1 (III) collecting, reviewing, or
2 analyzing original writings, state-
3 ments, communications, reports,
4 memoranda, records, transcripts, doc-
5 uments, photographs, recordings,
6 tapes, materials, data, or other infor-
7 mation whether in paper, electronic,
8 or other form;

9 (ii) has such intent at the inception of
10 the process of gathering the news or infor-
11 mation sought; and

12 (iii) obtains the news or information
13 sought in order to disseminate the news or
14 information by means of print (including
15 newspapers, books, wire services, news
16 agencies, or magazines), broadcasting (in-
17 cluding dissemination through networks,
18 cable, satellite carriers, broadcast stations,
19 or a channel or programming service for
20 any such media), mechanical, photo-
21 graphic, electronic, or other means;

22 (B) includes a supervisor, employer, parent
23 company, subsidiary, or affiliate of a person de-
24 scribed in subparagraph (A); and

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

3 (i) a foreign power or an agent of a
4 foreign power, as those terms are defined
5 in section 101 of the Foreign Intelligence
6 Surveillance Act of 1978 (50 U.S.C.
7 1801);

8 (ii) a member or affiliate of a foreign
9 terrorist organization designated under
10 section 219(a) of the Immigration and Na-
11 tionality Act (8 U.S.C. 1189(a));

12 (iii) designated as a Specially Des-
13 ignated Global Terrorist by the Depart-
14 ment of the Treasury under Executive
15 Order No. 13224 (50 U.S.C. 1701);

16 (iv) a specially designated terrorist, as
17 that term is defined in section 595.311 of
18 title 31, Code of Federal Regulations (or
19 any successor thereto);

20 (v) a terrorist organization, as that
21 term is defined in section
22 212(a)(3)(B)(vi)(II) of the Immigration
23 and Nationality Act (8 U.S.C.
24 1182(a)(3)(B)(vi)(II));

1 (vi) committing or attempting to com-
2 mit the crime of terrorism, as that offense
3 is defined in section 2331(5) or
4 2332b(g)(5) of title 18, United States
5 Code;

6 (vii) committing or attempting the
7 crime of providing material support, as
8 that term is defined in section 2339A(b)(1)
9 of title 18, United States Code, to a ter-
10 rorist organization; or

11 (viii) aiding, abetting, or conspiring in
12 illegal activity with a person or organiza-
13 tion defined in clauses (i) through (vii).

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

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

23 (5) PROPERLY CLASSIFIED INFORMATION.—
24 The term “properly classified information” means
25 information that is classified in accordance with any

1 applicable Executive orders, statutes, or regulations
 2 regarding classification of information.

3 (6) PROTECTED INFORMATION.—The term
 4 “protected information” means—

5 (A) information identifying a source who
 6 provided information under a promise or agree-
 7 ment of confidentiality made by a covered per-
 8 son as part of engaging in journalism; or

9 (B) any records, contents of a communica-
 10 tion, documents, or information that a covered
 11 person obtained or created—

12 (i) as part of engaging in journalism;

13 and

14 (ii) upon a promise or agreement that
 15 such records, contents of a communication,
 16 documents, or information would be con-
 17 fidential.

18 **SECTION 1. SHORT TITLE.**

19 *This Act may be cited as the “Free Flow of Informa-*
 20 *tion Act of 2013”.*

21 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED JOUR-**
 22 **NALISTS.**

23 (a) *CONDITIONS FOR COMPELLED DISCLOSURE.—In*
 24 *any proceeding or in connection with any issue arising*
 25 *under Federal law, a Federal entity may not compel a cov-*

1 *ered journalist to comply with a subpoena, court order, or*
2 *other compulsory legal process seeking to compel the disclo-*
3 *sure of protected information, unless a judge of the United*
4 *States in the jurisdiction where the subpoena, court order,*
5 *or other compulsory legal process has been or would be*
6 *issued determines, after providing notice and an oppor-*
7 *tunity to be heard to such covered journalist—*

8 (1) *that the party seeking to compel disclosure of*
9 *the protected information has exhausted all reasonable*
10 *alternative sources (other than a covered journalist) of*
11 *the protected information; and*

12 (2) *that—*

13 (A) *in a criminal investigation or prosecu-*
14 *tion—*

15 (i) *if the party seeking to compel dis-*
16 *closure is the Federal Government, based on*
17 *public information or information obtained*
18 *from a source other than the covered jour-*
19 *nalist, there are reasonable grounds to be-*
20 *lieve that a crime has occurred;*

21 (ii) *based on public information or in-*
22 *formation obtained from a source other than*
23 *the covered journalist, there are reasonable*
24 *grounds to believe that the protected infor-*
25 *mation sought is essential to the investiga-*

1 *tion or prosecution or to the defense against*
2 *the prosecution;*

3 *(iii) the Attorney General certifies that*
4 *the decision to request compelled disclosure*
5 *was made in a manner consistent with sec-*
6 *tion 50.10 of title 28, Code of Federal Regu-*
7 *lations, if compelled disclosure is sought by*
8 *a member of the Department of Justice in*
9 *circumstances governed by section 50.10 of*
10 *title 28, Code of Federal Regulations; and*

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

22 *(B) in a matter other than a criminal in-*
23 *vestigation or prosecution, based on public infor-*
24 *mation or information obtained from a source*
25 *other than the covered journalist—*

1 (i) the protected information sought is
2 essential to the resolution of the matter; and

3 (ii) the party seeking to compel disclo-
4 sure of the protected information has estab-
5 lished that the interest in compelling disclo-
6 sure clearly outweighs the public interest in
7 gathering and disseminating the informa-
8 tion or news at issue and maintaining the
9 free flow of information.

10 (b) *LIMITATIONS ON CONTENT OF INFORMATION.*—A
11 subpoena, court order, or other compulsory legal process
12 seeking to compel the disclosure of protected information
13 under subsection (a) shall, to the extent possible, be nar-
14 rowly tailored in purpose, subject matter, and period of
15 time covered so as to avoid compelling disclosure of periph-
16 eral, nonessential, or speculative information.

17 (c) *RULE OF CONSTRUCTION FOR COMPELLED DIS-*
18 *CLOSURE FROM COVERED JOURNALISTS.*—Nothing in this
19 section shall be construed to preclude, in addition to the
20 procedures required under this section—

21 (1) the requirement that a Federal or govern-
22 mental entity shall obtain a warrant for certain com-
23 munications, as set forth in section 2703 of title 18,
24 United States Code (commonly known as the Elec-
25 tronic Communications Privacy Act); or

1 (2) *the requirements and procedures regarding*
 2 *search and seizure set forth in Rule 41 of the Federal*
 3 *Rules of Criminal Procedure.*

4 **SEC. 3. EXCEPTION RELATING TO CRIMINAL CONDUCT.**

5 (a) *IN GENERAL.*—*Section 2 shall not apply to any*
 6 *information, record, document, or item obtained as the re-*
 7 *sult of the eyewitness observations of, or obtained during*
 8 *the course of, alleged criminal conduct by the covered jour-*
 9 *nalist, including any physical evidence or visual or audio*
 10 *recording of the conduct.*

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

15 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, SUB-**
 16 **STANTIAL BODILY INJURY, SEX OFFENSES**
 17 **AGAINST MINORS, OR INCAPACITATION OR**
 18 **DESTRUCTION OF CRITICAL INFRASTRUC-**
 19 **TURE.**

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

23 (1) *death;*

24 (2) *kidnapping;*

25 (3) *substantial bodily harm;*

1 (4) *conduct that constitutes a criminal offense*
2 *that is a specified offense against a minor (as those*
3 *terms are defined in section 111 of the Adam Walsh*
4 *Child Protection and Safety Act of 2006 (42 U.S.C.*
5 *16911)), or an attempt or conspiracy to commit such*
6 *a criminal offense; or*

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

10 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
11 **HARM TO THE NATIONAL SECURITY.**

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

14 (1) *the party seeking to compel disclosure is the*
15 *Federal Government; and*

16 (2)(A) *in a criminal investigation or prosecution*
17 *of the allegedly unlawful disclosure of properly classi-*
18 *fied information, the court finds by a preponderance*
19 *of the evidence that the protected information for*
20 *which compelled disclosure is sought would materially*
21 *assist the Federal Government in preventing or miti-*
22 *gating—*

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

1 (ii) other acts that are reasonably likely to
2 cause significant and articulable harm to na-
3 tional security; or

4 (B) in any other criminal investigation or pros-
5 ecution, the court finds by a preponderance of the evi-
6 dence that the protected information for which com-
7 pelled disclosure is sought would materially assist the
8 Federal Government in preventing, mitigating, or
9 identifying the perpetrator of—

10 (i) an act of terrorism; or

11 (ii) other acts that have caused or are rea-
12 sonably likely to cause significant and
13 articulable harm to national security.

14 (b) *DEFERENCE.*—In assessing the existence or extent
15 of the harm described in subsection (a), a Federal court
16 shall give appropriate deference to a specific factual show-
17 ing submitted to the court by the head of any executive
18 branch agency or department concerned.

19 (c) *RELATIONSHIP TO SECTION 2.*—Subsection (a)
20 shall not apply, and, subject to sections 3 and 4, section
21 2 shall apply, to any criminal investigation or prosecution
22 of the allegedly unlawful disclosure of properly classified in-
23 formation other than one in which the protected informa-
24 tion is sought by the Federal Government to prevent or
25 mitigate the harm specified in subsection (a)(2)(A). In con-

1 *sidering the extent of any harm to national security when*
 2 *applying section 2 to such cases, a Federal court shall give*
 3 *appropriate deference to any specific factual showing sub-*
 4 *mitted to the court by the head of any executive branch*
 5 *agency or department concerned.*

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

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

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

16 **SEC. 6. COMPELLED DISCLOSURE FROM COVERED SERVICE**
 17 **PROVIDERS.**

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

19 (1) *IN GENERAL.—Except as provided in para-*
 20 *graph (2), if any document or other information from*
 21 *the account of a person who is known to be, or reason-*
 22 *ably likely to be, a covered journalist is sought from*
 23 *a covered service provider, sections 2 through 5 shall*
 24 *apply in the same manner that such sections apply*

1 to any document or other information sought from a
2 covered journalist.

3 (2) *EXCEPTION.*—If any document or other in-
4 formation from the account of a person who is known
5 to be, or reasonably likely to be, a covered journalist
6 is sought from a covered service provider under sec-
7 tion 2709 of title 18, United States Code, the provi-
8 sions of sections 2 through 5 governing criminal in-
9 vestigations and prosecutions shall apply in the same
10 manner that such sections apply to any document or
11 other information sought from a covered journalist in
12 the course of a criminal investigation or prosecution,
13 except that clauses (i) and (iii) of section 2(a)(2)(A)
14 shall not apply.

15 (b) *NOTICE AND OPPORTUNITY PROVIDED TO COV-*
16 *ERED JOURNALISTS.*—A judge of the United States may
17 compel the disclosure of a document or other information
18 described in this section only after the covered journalist
19 from whose account the document or other information is
20 sought has been given—

21 (1) notice from the party seeking the document
22 or other information through a subpoena or other
23 compulsory request, not later than the time at which
24 such subpoena or request is issued to the covered serv-
25 ice provider; and

1 (2) *an opportunity to be heard before the judge*
2 *of the United States before compelling testimony or*
3 *the disclosure of a document.*

4 (c) *EXCEPTION TO NOTICE REQUIREMENT.—*

5 (1) *IN GENERAL.—Notice and opportunity to be*
6 *heard under subsection (b) may be delayed for not*
7 *more than 45 days if the judge of the United States*
8 *involved determines by clear and convincing evidence*
9 *that such notice would pose a clear and substantial*
10 *threat to the integrity of a criminal investigation,*
11 *would risk grave harm to national security, or would*
12 *present an imminent risk of death or serious bodily*
13 *harm.*

14 (2) *EXTENSION.—The 45-day period described in*
15 *paragraph (1) may be extended by the court for 1 ad-*
16 *ditional period of not more than 45 days if the judge*
17 *of the United States involved makes a new and inde-*
18 *pendent determination by clear and convincing evi-*
19 *dence that providing notice to the covered journalist*
20 *would pose a clear and substantial threat to the integ-*
21 *egrity of a criminal investigation, would risk grave*
22 *harm to national security, or would present an immi-*
23 *nent risk of death or serious bodily harm under cur-*
24 *rent circumstances.*

1 (3) *SUBSTANTIAL THREAT TO THE INTEGRITY OF*
2 *A CRIMINAL INVESTIGATION.*—For purposes of this
3 subsection, a substantial threat to the integrity of a
4 criminal investigation exists when the judge of the
5 United States involved finds, by clear and convincing
6 evidence, that the target of the investigation may
7 learn of the investigation and destroy evidence if no-
8 tice is provided.

9 (4) *PROTECTIVE ORDERS.*—For purposes of a de-
10 termination under this subsection, the judge of the
11 United States involved shall consider whether pro-
12 viding notice pursuant to a protective order to the
13 covered journalist may mitigate any clear and sub-
14 stantial threat to the integrity of a criminal inves-
15 tigation, any risk of grave harm to national security,
16 or any imminent risk of death or serious bodily
17 harm.

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

1 *ther ordered by the court or authorized in writing by the*
 2 *covered journalist.*

3 *(e) RULE OF CONSTRUCTION FOR DELAYED NOTICE.—*

4 *The delayed notice requirements in this section shall be con-*
 5 *strued to supersede the requirements for delayed notice set*
 6 *forth in sections 2703 and 2705(a) of title 18, United States*
 7 *Code.*

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

11 *Nothing in this Act shall supersede, dilute, or preclude*
 12 *any law or court decision compelling or not compelling dis-*
 13 *closure by a covered journalist or covered service provider*
 14 *of—*

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

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

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

24 *(a) CONDITIONS FOR EX PARTE REVIEW OR SUBMIS-*
 25 *SIONS UNDER SEAL.—With regard to any determination*

1 *made by a judge of the United States under this Act, upon*
2 *a showing of good cause, that judge of the United States*
3 *may receive and consider submissions from the parties in*
4 *camera or under seal, and if the court determines it is nec-*
5 *essary, ex parte.*

6 (b) *CONTEMPT OF COURT.*—*With regard to any deter-*
7 *mination made by a judge of the United States under this*
8 *Act, a judge of the United States may find a covered jour-*
9 *nalist to be in civil or criminal contempt if the covered jour-*
10 *nalist fails to comply with an order of a judge of the United*
11 *States compelling disclosure of protected information.*

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

18 (d) *EXPEDITED APPEAL PROCESS.*—

19 (1) *IN GENERAL.*—*The courts of appeal shall*
20 *have jurisdiction—*

21 (A) *of appeals by a Federal entity or cov-*
22 *ered journalist of an interlocutory order of a*
23 *judge of the United States under this Act; and*

24 (B) *in an appeal of a final decision of a*
25 *judge of the United States by a Federal entity or*

1 *covered journalist, to review any determination*
2 *of a judge of the United States under this Act.*

3 (2) *EXPEDITION OF APPEALS.—It shall be the*
4 *duty of a Federal court to which an appeal is made*
5 *under this subsection to advance on the docket and to*
6 *expedite to the greatest possible extent the disposition*
7 *of that appeal.*

8 **SEC. 9. RULE OF CONSTRUCTION.**

9 *Nothing in this Act may be construed to—*

10 (1) *preempt any law or claim relating to defa-*
11 *mation, slander, or libel;*

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

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

23 (4) *preclude voluntary disclosure of information*
24 *to a Federal entity in a situation that is not governed*
25 *by this Act.*

1 **SEC. 10. AUDIT.**

2 (a) *IN GENERAL.*—*The Inspector General of the De-*
3 *partment of Justice shall perform a comprehensive audit*
4 *of the use of this Act during the period beginning on the*
5 *date of enactment of this Act and ending on December 31,*
6 *2016. The audit shall include an examination of each in-*
7 *stance in which a court failed to compel the disclosure of*
8 *protected information under this Act, and whether this Act*
9 *has created any procedural impediments that have had a*
10 *detrimental operational impact on the activities of the Fed-*
11 *eral Bureau of Investigation.*

12 (b) *REPORT.*—*Not later than June 30, 2017, the In-*
13 *spector General of the Department of Justice shall submit*
14 *to the Committee on the Judiciary and the Select Com-*
15 *mittee on Intelligence of the Senate and the Committee on*
16 *the Judiciary and the Permanent Select Committee on In-*
17 *telligence of the House of Representatives a report con-*
18 *taining the results of the audit conducted under subsection*
19 *(a).*

20 (c) *REVIEW.*—*Not later than 30 days before the sub-*
21 *mission of the report under subsection (b), the Inspector*
22 *General of the Department of Justice shall provide the re-*
23 *port to the Attorney General and the Director of National*
24 *Intelligence. The Attorney General or the Director of Na-*
25 *tional Intelligence may provide such comments to be in-*
26 *cluded in the report submitted under subsection (b) as the*

1 *Attorney General or the Director of National Intelligence*
2 *may consider necessary.*

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

6 **SEC. 11. DEFINITIONS.**

7 *In this Act:*

8 (1) *COVERED JOURNALIST.—*

9 (A) *DEFINITION.—The term “covered jour-*
10 *nalist”—*

11 (i) *(I) means a person who—*

12 (aa) *is, or on the relevant date,*
13 *was, an employee, independent con-*
14 *tractor, or agent of an entity or service*
15 *that disseminates news or information*
16 *by means of newspaper; nonfiction*
17 *book; wire service; news agency; news*
18 *website, mobile application or other*
19 *news or information service (whether*
20 *distributed digitally or otherwise);*
21 *news program; magazine or other peri-*
22 *odical, whether in print, electronic, or*
23 *other format; or through television or*
24 *radio broadcast, multichannel video*
25 *programming distributor (as such term*

1 *is defined in section 602(13) of the*
2 *Communications Act of 1934 (47*
3 *U.S.C. 522(13)), or motion picture for*
4 *public showing;*

5 *(bb) with the primary intent to*
6 *investigate events and procure material*
7 *in order to disseminate to the public*
8 *news or information concerning local,*
9 *national, or international events or*
10 *other matters of public interest, en-*
11 *gages, or as of the relevant date en-*
12 *gaged, in the regular gathering, prepa-*
13 *ration, collection, photographing, re-*
14 *coding, writing, editing, reporting or*
15 *publishing on such matters by—*

16 *(AA) conducting interviews;*

17 *(BB) making direct observa-*
18 *tion of events; or*

19 *(CC) collecting, reviewing, or*
20 *analyzing original writings, state-*
21 *ments, communications, reports,*
22 *memoranda, records, transcripts,*
23 *documents, photographs, record-*
24 *ings, tapes, materials, data, or*

1 *other information whether in*
2 *paper, electronic, or other form;*

3 *(cc) had such intent at the incep-*
4 *tion of the process of gathering the*
5 *news or information sought; and*

6 *(dd) obtained the news or infor-*
7 *mation sought in order to disseminate*
8 *the news or information to the public;*
9 *or*

10 *(II) means a person who—*

11 *(aa) at the inception of the proc-*
12 *ess of gathering the news or informa-*
13 *tion sought, had the primary intent to*
14 *investigate issues or events and procure*
15 *material in order to disseminate to the*
16 *public news or information concerning*
17 *local, national, or international events*
18 *or other matters of public interest, and*
19 *regularly conducted interviews, re-*
20 *viewed documents, captured images of*
21 *events, or directly observed events;*

22 *(bb) obtained the news or infor-*
23 *mation sought in order to disseminate*
24 *it by means of a medium set out in*
25 *subclause (I)(aa) of this section; and*

1 (cc) either—

2 (AA) would have been in-
3 cluded in the definition in sub-
4 clause (I)(aa) of this section for
5 any continuous one-year period
6 within the 20 years prior to the
7 relevant date or any continuous
8 three-month period within the 5
9 years prior to the relevant date;

10 (BB) had substantially con-
11 tributed, as an author, editor,
12 photographer, or producer, to a
13 significant number of articles, sto-
14 ries, programs, or publications by
15 a medium set out in subclause
16 (I)(aa) of this section within 5
17 years prior to the relevant date;
18 or

19 (CC) was a student partici-
20 pating in a journalistic medium
21 at an institution of higher edu-
22 cation (as defined in section 102
23 of the Higher Education Act of
24 1965 (20 U.S.C. 1002)) on the rel-
25 evant date;

1 (ii) includes a supervisor, editor, em-
2 ployer, parent company, subsidiary, or af-
3 filiate of a person described in subclause (I)
4 or (II) of clause (i); and

5 (iii) does not include any person or en-
6 tity—

7 (I) whose principal function, as
8 demonstrated by the totality of such
9 person or entity's work, is to publish
10 primary source documents that have
11 been disclosed to such person or entity
12 without authorization; or

13 (II) who is or is reasonably likely
14 to be—

15 (aa) a foreign power or an
16 agent of a foreign power, as those
17 terms are defined in section 101
18 of the Foreign Intelligence Sur-
19 veillance Act of 1978 (50 U.S.C.
20 1801);

21 (bb) a member or affiliate of
22 a foreign terrorist organization
23 designated under section 219(a) of
24 the Immigration and Nationality
25 Act (8 U.S.C. 1189(a));

1 (cc) *designated as a Specially Designated Global Terrorist*
2
3 *by the Department of the Treasury under Executive Order 13224*
4 *(66 Fed. Reg. 49079);*

5
6 (dd) *a specially designated*
7 *terrorist, as that term is defined*
8 *in section 595.311 of title 31,*
9 *Code of Federal Regulations (or*
10 *any successor thereto);*

11 (ee) *a terrorist organization,*
12 *as that term is defined in section*
13 *12(a)(3)(B)(vi)(II) of the Immi-*
14 *gration and Nationality Act (8*
15 *U.S.C. 1182(a)(3)(B)(vi)(II));*

16 (ff) *committing or attempt-*
17 *ing to commit the crime of ter-*
18 *rorism, as that offense is defined*
19 *in section 2331(5) or 2332b(g)(5)*
20 *of title 18, United States Code;*

21 (gg) *committing or attempt-*
22 *ing the crime of providing mate-*
23 *rial support, as that term is de-*
24 *defined in section 2339A(b)(1) of*

1 title 18, United States Code, to a
2 terrorist organization; or

3 (hh) aiding, abetting, or con-
4 spiring in illegal activity with a
5 person or organization defined in
6 items (aa) through (gg).

7 (B) JUDICIAL DISCRETION.—In the case of
8 a person that does not fit within the definition
9 of “covered journalist” described in subclause (I)
10 or (II) of paragraph (A)(i), a judge of the
11 United States may exercise discretion to avail
12 the person of the protections of this Act if, based
13 on specific facts contained in the record, the
14 judge determines that such protections would be
15 in the interest of justice and necessary to protect
16 lawful and legitimate news-gathering activities
17 under the specific circumstances of the case.

18 (2) COVERED SERVICE PROVIDER.—The term
19 “covered service provider” means—

20 (A) any person that transmits information
21 of the customer’s choosing by electronic means;

22 (B) a telecommunications carrier or an in-
23 formation service, as defined in section 3 of the
24 Communications Act of 1934 (47 U.S.C. 153);

1 (C) an interactive computer service or an
2 information content provider, as defined in sec-
3 tion 230 of the Communications Act of 1934 (47
4 U.S.C. 230);

5 (D) a remote computing service, as defined
6 in section 2711 of title 18, United States Code;

7 (E) an electronic communications service,
8 as defined in section 2510 of title 18, United
9 States Code; or

10 (F) any commercial entity that maintains
11 records related to a covered journalist.

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

16 (4) *FEDERAL ENTITY*.—The term “Federal enti-
17 ty” means an entity or employee of the judicial or ex-
18 ecutive branch or an administrative agency of the
19 Federal Government with the power to issue a sub-
20 poena or issue other compulsory process.

21 (5) *JUDGE OF THE UNITED STATES*.—The term
22 “judge of the United States” includes judges of the
23 courts of appeals, district courts, Court of Inter-
24 national Trade and any court created by Act of Con-
25 gress, the judges of which are entitled to hold office

1 *during good behavior, as defined in section 451 of*
2 *title 28, United States Code.*

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

8 (7) *PROTECTED INFORMATION.*—*The term “pro-*
9 *tected information” means—*

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

14 (B) *any records, contents of a communica-*
15 *tion, documents, or information that a covered*
16 *journalist 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 con-*
22 *fidential.*

23 (8) *RELEVANT DATE.*—*The term “relevant date”*
24 *means the date on which the protected information*

1 *sought was obtained or created by the person assert-*
2 *ing protection under this Act.*

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113TH CONGRESS
1ST Session

S. 987

[Report No. 113-118]

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.

NOVEMBER 6, 2013

Reported with an amendment