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1ST SESSION

S. 987

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 and Mr. GRAHAM) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Free Flow of Informa-
5 tion Act of 2013”.

1 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
2 **SONS.**

3 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
4 any proceeding or in connection with any issue arising
5 under Federal law, a Federal entity may not compel a cov-
6 ered person to comply with a subpoena, court order, or
7 other compulsory legal process seeking to compel the dis-
8 closure of protected information, unless a Federal court
9 in the jurisdiction where the subpoena, court order, or
10 other compulsory legal process has been or would be issued
11 determines, after providing notice and an opportunity to
12 be heard to such covered person—

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

17 (2) that—

18 (A) in a criminal investigation or prosecu-
19 tion—

20 (i) if the party seeking to compel dis-
21 closure is the Federal Government, based
22 on public information or information ob-
23 tained from a source other than the cov-
24 ered person, there are reasonable grounds
25 to believe that a crime has occurred;

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

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

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

1 cluding the extent of any harm to national
2 security); or

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

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

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

17 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

18 A subpoena, court order, or other compulsory legal process
19 seeking to compel the disclosure of protected information
20 under subsection (a) shall, to the extent possible, be nar-
21 rowly tailored in purpose, subject matter, and period of
22 time covered so as to avoid compelling disclosure of pe-
23 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. 5195c(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 igned 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.

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