

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—113th Cong., 1st Sess.

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.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

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

6 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
7 **SONS.**

8 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In
9 any proceeding or in connection with any issue arising
10 under Federal law, a Federal entity may not compel a cov-
11 ered person to comply with a subpoena, court order, or

1 other compulsory legal process seeking to compel the dis-
2 closure of protected information, unless a judge of the
3 United States in the jurisdiction where the subpoena,
4 court order, or other compulsory legal process has been
5 or would be issued determines, after providing notice and
6 an opportunity to be heard to such covered person—

7 (1) that the party seeking to compel disclosure
8 of the protected information has exhausted all rea-
9 sonable alternative sources (other than a covered
10 person) of the protected information; and

11 (2) that—

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

14 (i) if the party seeking to compel dis-
15 closure is the Federal Government, based
16 on public information or information ob-
17 tained from a source other than the cov-
18 ered person, there are reasonable grounds
19 to believe that a crime has occurred;

20 (ii) based on public information or in-
21 formation obtained from a source other
22 than the covered person, there are reason-
23 able grounds to believe that the protected
24 information sought is essential to the in-

1 investigation or prosecution or to the defense
2 against the prosecution;

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

12 (iv) the covered person has not estab-
13 lished by clear and convincing evidence
14 that disclosure of the protected informa-
15 tion would be contrary to the public inter-
16 est, taking into account both the public in-
17 terest in gathering and disseminating the
18 information or news at issue and maintain-
19 ing the free flow of information and the
20 public interest in compelling disclosure (in-
21 cluding the extent of any harm to national
22 security); or

23 (B) in a matter other than a criminal in-
24 vestigation or prosecution, based on public in-

1 formation or information obtained from a
2 source other than the covered person—

3 (i) the protected information sought is
4 essential to the resolution of the matter;
5 and

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

13 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

14 A subpoena, court order, or other compulsory legal process
15 seeking to compel the disclosure of protected information
16 under subsection (a) shall, to the extent possible, be nar-
17 rowly tailored in purpose, subject matter, and period of
18 time covered so as to avoid compelling disclosure of pe-
19 ripheral, nonessential, or speculative information.

20 (c) RULE OF CONSTRUCTION FOR COMPELLED DIS-
21 CLOSURE FROM COVERED PERSONS.—Nothing in this
22 section shall be construed to preclude, in addition to the
23 procedures required under this section—

24 (1) the requirement that a Federal or govern-
25 mental entity shall obtain a warrant for certain com-

1 munications, as set forth in section 2703 of title 18,
2 United States Code (commonly known as the Elec-
3 tronic Communications Privacy Act); or

4 (2) the requirements and procedures regarding
5 search and seizure set forth in Rule 41 of the Fed-
6 eral Rules of Criminal Procedure.

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

8 (a) **IN GENERAL.**—Section 2 shall not apply to any
9 information, record, document, or item obtained as the re-
10 sult of the eyewitness observations of, or obtained during
11 the course of, alleged criminal conduct by the covered per-
12 son, including any physical evidence or visual or audio re-
13 cording of the conduct.

14 (b) **EXCEPTION.**—This section shall not apply, and,
15 subject to sections 4 and 5, section 2 shall apply, if the
16 alleged criminal conduct is the act of communicating the
17 documents or information at issue.

18 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING,**
19 **SUBSTANTIAL BODILY INJURY, SEX OF-**
20 **FENSES AGAINST MINORS, OR INCAPACITA-**
21 **TION OR DESTRUCTION OF CRITICAL INFRA-**
22 **STRUCTURE.**

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

1 (1) death;

2 (2) kidnapping;

3 (3) substantial bodily harm;

4 (4) conduct that constitutes a criminal offense
5 that is a specified offense against a minor (as those
6 terms are defined in section 111 of the Adam Walsh
7 Child Protection and Safety Act of 2006 (42 U.S.C.
8 16911)), or an attempt or conspiracy to commit
9 such a criminal offense; or

10 (5) incapacitation or destruction of critical in-
11 frastructure (as defined in section 1016(e) of the
12 USA PATRIOT Act (42 U.S.C. 5195c(e))).

13 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
14 **HARM TO THE NATIONAL SECURITY.**

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

17 (1) the party seeking to compel disclosure is the
18 Federal Government; and

19 (2)(A) in a criminal investigation or prosecution
20 of the allegedly unlawful disclosure of properly clas-
21 sified information, the court finds by a preponder-
22 ance of the evidence that the protected information
23 for which compelled disclosure is sought would mate-
24 rially assist the Federal Government in preventing
25 or mitigating—

1 (i) an act of terrorism; or

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

5 (B) in any other criminal investigation or pros-
6 ecution, the court finds by a preponderance of the
7 evidence that the protected information for which
8 compelled disclosure is sought would materially as-
9 sist the Federal Government in preventing, miti-
10 gating, or identifying the perpetrator of—

11 (i) an act of terrorism; or

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

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

20 (c) RELATIONSHIP TO SECTION 2.—Subsection (a)
21 shall not apply, and, subject to sections 3 and 4, section
22 2 shall apply, to any criminal investigation or prosecution
23 of the allegedly unlawful disclosure of properly classified
24 information other than one in which the protected infor-
25 mation is sought by the Federal Government to prevent

1 or mitigate the harm specified in subsection (a)(2)(A). In
2 considering the extent of any harm to national security
3 when applying section 2 to such cases, a Federal court
4 shall give appropriate deference to any specific factual
5 showing submitted to the court by the head of any execu-
6 tive branch agency or department concerned.

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

15 (1) an act of terrorism; or

16 (2) other acts that are reasonably likely to
17 cause significant and articulable harm to national
18 security.

19 **SEC. 6. COMPELLED DISCLOSURE FROM COVERED SERV-**
20 **ICE PROVIDERS.**

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

22 (1) **IN GENERAL.**—Except as provided in para-
23 graph (2), if any document or other information
24 from the account of a person who is known to be,
25 or reasonably likely to be, a covered person is sought

1 from a covered service provider, sections 2 through
2 5 shall apply in the same manner that such sections
3 apply to any document or other information sought
4 from a covered person.

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

17 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
18 ERED PERSONS.—A judge of the United States may com-
19 pel the disclosure of a document or other information de-
20 scribed in this section only after the covered person from
21 whose account the document or other information is
22 sought has been given—

23 (1) notice from the party seeking the document
24 or other information through a subpoena or other
25 compulsory request, not later than the time at which

1 such subpoena or request is issued to the covered
2 service provider; and

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

6 (c) EXCEPTION TO NOTICE REQUIREMENT.—

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

16 (2) EXTENSION.—The 45-day period described
17 in paragraph (1) may be extended by the court for
18 1 additional period of not more than 45 days if the
19 judge of the United States involved makes a new
20 and independent determination by clear and con-
21 vincing evidence that providing notice to the covered
22 person would pose a clear and substantial threat to
23 the integrity of a criminal investigation, would risk
24 grave harm to national security, or would present an

1 imminent risk of death or serious bodily harm under
2 current circumstances.

3 (3) SUBSTANTIAL THREAT TO THE INTEGRITY
4 OF A CRIMINAL INVESTIGATION.—For purposes of
5 this subsection, a substantial threat to the integrity
6 of a criminal investigation exists when the judge of
7 the United States involved finds, by clear and con-
8 vincing evidence, that the target of the investigation
9 may learn of the investigation and destroy evidence
10 if notice is provided.

11 (4) PROTECTIVE ORDERS.—For purposes of a
12 determination under this subsection, the judge of the
13 United States involved shall consider whether pro-
14 viding notice pursuant to a protective order to the
15 covered person may mitigate any clear and substan-
16 tial threat to the integrity of a criminal investiga-
17 tion, any risk of grave harm to national security, or
18 any imminent risk of death or serious bodily harm.

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

1 closure is either ordered by the court or authorized in writ-
2 ing by the covered person.

3 (e) **RULE OF CONSTRUCTION FOR DELAYED NO-**
4 **TICE.**—The delayed notice requirements in this section
5 shall be construed to supersede the requirements for de-
6 layed notice set forth in sections 2703 and 2705(a) of title
7 18, United States Code.

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

11 Nothing in this Act shall supersede, dilute, or pre-
12 clude any law or court decision compelling or not compel-
13 ling disclosure by a covered person or covered service pro-
14 vider of—

15 (1) information identifying a source who pro-
16 vided information without a promise or agreement of
17 confidentiality made by the covered person 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 con-
22 tents 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
5 necessary, ex parte.

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

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

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 judge
25 of the United States under this Act; and

1 (B) in an appeal of a final decision of a
2 judge of the United States by a Federal entity
3 or covered person, to review any determination
4 of a judge of the United States 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
8 to expedite to the greatest possible extent the dis-
9 position 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
22 with respect to the acquisition or dissemination of
23 information pursuant to the Foreign Intelligence
24 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.);
25 or

1 (4) preclude voluntary disclosure of information
2 to a Federal entity in a situation that is not gov-
3 erned 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
9 31, 2016. The audit shall include an examination of each
10 instance in which a court failed to compel the disclosure
11 of protected information under this Act, and whether this
12 Act has created any procedural impediments that have had
13 a detrimental operational impact on the activities of the
14 Federal Bureau of Investigation.

15 (b) REPORT.—Not later than June 30, 2017, the In-
16 specter 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
19 on the Judiciary and the Permanent Select Committee on
20 Intelligence 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

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

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

10 **SEC. 11. DEFINITIONS.**

11 In this Act:

12 (1) 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 (2) COVERED SERVICE PROVIDER.—The term
15 “covered service provider” means—

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

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

21 (C) an interactive computer service or an
22 information content provider, as defined in sec-
23 tion 230 of the Communications Act of 1934
24 (47 U.S.C. 230);

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

3 (E) an electronic communications service,
4 as defined in section 2510 of title 18, United
5 States Code; or

6 (F) any commercial entity that maintains
7 records related to a covered person.

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) JUDGE OF THE UNITED STATES.—The term
18 “judge of the United States” includes judges of the
19 courts of appeals, district courts, Court of Inter-
20 national Trade and any court created by Act of Con-
21 gress, the judges of which are entitled to hold office
22 during good behavior, as defined in section 451 of
23 title 28, United States Code.

24 (6) PROPERLY CLASSIFIED INFORMATION.—
25 The term “properly classified information” means

1 information that is classified in accordance with any
2 applicable Executive orders, statutes, or regulations
3 regarding classification of information.

4 (7) PROTECTED INFORMATION.—The term
5 “protected information” means—

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

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

13 (i) as part of engaging in journalism;

14 and

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