

112TH CONGRESS
1ST SESSION

H. R. 2932

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 14, 2011

Mr. PENCE introduced the following bill; which was 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 2011”.

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

3 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In
4 any matter arising under Federal law, a Federal entity
5 may not compel a covered person to provide testimony or
6 produce any document related to information obtained or
7 created by such covered person as part of engaging in
8 journalism, unless a court determines by a preponderance
9 of the evidence, after providing notice and an opportunity
10 to be heard to such covered person—

11 (1) that the party seeking to compel production
12 of such testimony or document has exhausted all
13 reasonable alternative sources (other than the cov-
14 ered person) of the testimony or document;

15 (2) that—

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

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

21 (ii) the testimony or document sought
22 is critical to the investigation or prosecu-
23 tion or to the defense against the prosecu-
24 tion; or

25 (B) in a matter other than a criminal in-
26 vestigation or prosecution, based on information

1 obtained from a person other than the covered
2 person, the testimony or document sought is
3 critical to the successful completion of the mat-
4 ter;

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

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

16 (B) disclosure of the identity of such a
17 source is necessary to prevent imminent death
18 or significant bodily harm with the objective to
19 prevent such death or harm, respectively;

20 (C) disclosure of the identity of such a
21 source is necessary to identify a person who has
22 disclosed—

23 (i) a trade secret, actionable under
24 section 1831 or 1832 of title 18, United
25 States Code;

1 (ii) individually identifiable health in-
2 formation, as such term is defined in sec-
3 tion 1171(6) of the Social Security Act (42
4 U.S.C. 1320d(6)), actionable under Fed-
5 eral law; or

6 (iii) nonpublic personal information,
7 as such term is defined in section 509(4)
8 of the Gramm-Leach-Bliley Act (15 U.S.C.
9 6809(4)), of any consumer actionable
10 under Federal law; or

11 (D)(i) disclosure of the identity of such a
12 source is essential to identify in a criminal in-
13 vestigation or prosecution a person who without
14 authorization disclosed properly classified infor-
15 mation and who at the time of such disclosure
16 had authorized access to such information; and

17 (ii) such unauthorized disclosure has
18 caused or will cause significant and articulable
19 harm to the national security; and

20 (4) that the public interest in compelling disclo-
21 sure of the information or document involved out-
22 weighs the public interest in gathering or dissemi-
23 nating news or information.

24 (b) AUTHORITY TO CONSIDER NATIONAL SECURITY
25 INTEREST.—For purposes of making a determination

1 under subsection (a)(4), a court may consider the extent
2 of any harm to national security.

3 (c) LIMITATIONS ON CONTENT OF INFORMATION.—

4 The content of any testimony or document that is com-
5 pelled under subsection (a) shall—

6 (1) not be overbroad, unreasonable, or oppres-
7 sive and, as appropriate, be limited to the purpose
8 of verifying published information or describing any
9 surrounding circumstances relevant to the accuracy
10 of such published information; and

11 (2) be narrowly tailored in subject matter and
12 period of time covered so as to avoid compelling pro-
13 duction of peripheral, nonessential, or speculative in-
14 formation.

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

20 (e) EXCEPTION RELATING TO CRIMINAL OR
21 TORTIOUS CONDUCT.—The provisions of this section shall
22 not prohibit or otherwise limit a Federal entity in any
23 matter arising under Federal law from compelling a cov-
24 ered person to disclose any information, record, document,
25 or item obtained as the result of the eyewitness observa-

1 tion by the covered person of alleged criminal conduct or
2 as the result of the commission of alleged criminal or
3 tortious conduct by the covered person, including any
4 physical evidence or visual or audio recording of the con-
5 duct, if a Federal court determines that the party seeking
6 to compel such disclosure has exhausted all other reason-
7 able efforts to obtain the information, record, document,
8 or item, respectively, from alternative sources. The pre-
9 vious sentence shall not apply, and subsections (a) and
10 (b) shall apply, in the case that the alleged criminal con-
11 duct observed by the covered person or the alleged crimi-
12 nal or tortious conduct committed by the covered person
13 is the act of transmitting or communicating the informa-
14 tion, record, document, or item sought for disclosure.

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

16 **SERVICE PROVIDERS.**

17 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—
18 With respect to testimony or any document consisting of
19 any record, information, or other communication that re-
20 lates to a business transaction between a communications
21 service provider and a covered person, section 2 shall apply
22 to such testimony or document if sought from the commu-
23 nications service provider in the same manner that such
24 section applies to any testimony or document sought from
25 a covered person.

1 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
2 ERED PERSONS.—A court may compel the testimony or
3 disclosure of a document under this section only after the
4 party seeking such a document provides the covered per-
5 son who is a party to the business transaction described
6 in subsection (a)—

7 (1) notice of the subpoena or other compulsory
8 request for such testimony or disclosure from the
9 communications service provider not later than the
10 time at which such subpoena or request is issued to
11 the communications service provider; and

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

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

20 **SEC. 4. DEFINITIONS.**

21 In this Act:

22 (1) COMMUNICATIONS SERVICE PROVIDER.—
23 The term “communications service provider”—

1 (A) means any person that transmits infor-
2 mation of the customer's choosing by electronic
3 means; and

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

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

21 (A) any person who is a foreign power or
22 an agent of a foreign power, as such terms are
23 defined in section 101 of the Foreign Intel-
24 ligence Surveillance Act of 1978 (50 U.S.C.
25 1801);

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

6 (C) any person included on the Annex to
7 Executive Order No. 13224, of September 23,
8 2001, and any other person identified under
9 section 1 of that Executive order whose prop-
10 erty and interests in property are blocked by
11 that section;

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

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

20 (3) DOCUMENT.—The term “document” means
21 writings, recordings, and photographs, as those
22 terms are defined by Federal Rule of Evidence 1001
23 (28 U.S.C. App.).

24 (4) FEDERAL ENTITY.—The term “Federal en-
25 tity” means an entity or employee of the judicial or

1 executive branch or an administrative agency of the
2 Federal Government with the power to issue a sub-
3 poena or issue other compulsory process.

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

○