

Vote YES on the Free Flow of Information Act (S. 987)!

“Some of our long-trusted sources have become nervous and anxious about talking to us – even on stories that aren’t about national security. In some cases, government employees that we once checked in with regularly will no longer speak to us by phone and some are reluctant to meet in person.”

– Associated Press President and CEO Gary Pruitt (June 19, 2013)

The Free Flow of Information Act (S. 987) is a federal shield bill that would protect the public’s right to know by protecting the identities of journalists’ confidential sources. The bill is expected to be brought to the [Senate floor in January or February 2014](#). The legislation has strong bipartisan support. On September 12, 2013 the Senate Judiciary Committee passed S. 987 by a 13-5 vote. The bill’s original co-sponsors are Sen. Charles Schumer (D-NY) and Sen. Lindsey Graham (R-SC), and it has a total of 20 co-sponsors from both parties.

The Free Flow of Information Act is necessary to prevent government overreach and protect the public’s right to know. In 2013, the Associated Press learned that the Justice Department, while investigating a leak of classified information, secretly subpoenaed phone records for more than 20 lines, including home and cell phones, affecting over 100 journalists across three different cities. The AP received no notice before the Justice Department obtained its records and so could not challenge the subpoena in court. The subpoena was so broad that it swept up information that had absolutely nothing to do with the leak, including journalists’ phone calls with members of Congress. It was also revealed that the FBI secretly obtained a search warrant, also in a leak investigation, for the email content of James Rosen from Fox News. Another journalist and book author (James Risen of the New York Times) is appealing to the Supreme Court after the Fourth Circuit Court of Appeals rejected his motion to quash a subpoena, issued in a leak prosecution, seeking the name of a confidential source. *If potential sources, including government whistleblowers, fear that journalists will be forced to reveal their identities, these sources will not come forward, and the public will lose the ability to hold the government accountable.*

The Free Flow of Information Act would create clear and reasonable standards for judicial review but not create new procedures in federal court. While the Act would create a default notice requirement for records requests to journalists’ service providers, whether a request goes to a service provider or the journalist directly, the Act would simply provide judges with clear and reasonable standards for reviewing a motion to quash a subpoena or other compulsory process, which is a common procedure within the judicial system. All federal judges would have straightforward guidance for determining when journalists can be compelled to testify about confidential sources, which would help ensure that the Justice Department does not use a broadly worded subpoena to conduct a fishing expedition for information that is entirely irrelevant to an investigation.

The Free Flow of Information Act would protect national security. The privilege the bill creates would be qualified, not absolute. In a leak investigation, a federal judge could compel disclosure by the journalist to prevent or mitigate an act of terrorism or other acts reasonably likely to cause significant and articulable harm to national security. In other criminal investigations and prosecutions, the judge could compel disclosure to prevent, mitigate, or identify the perpetrator of an act of terrorism or other acts that have caused or are reasonably likely to cause significant and articulable harm to national security.

The Free Flow of Information Act includes a balanced definition of “covered journalist.” The person invoking the shield law must have had the primary intent to gather news or information and disseminate it to the public. The person must also have (or had when engaging with the confidential source) some current relationship with a news entity, or have a track record of doing freelance journalism, regardless of the medium of distribution; the definition is meant to be technology-neutral. Importantly, the bill includes a safety valve, giving federal judges the discretion to protect the source of someone who does not fit precisely into the definition of “covered journalist” if the judge finds that doing so would be in the interest of justice.

The Free Flow of Information Act would have benefits far beyond cases such as AP and Fox News. The vast majority of requests for confidential source information are issued in civil cases and in criminal cases that do not involve leaks of classified information. Unlike the forty-eight states and the District of Columbia that provide some legal protection for journalists and their sources, Congress has provided no such protection in federal court. Statutory standards are desperately needed to provide uniformity in light of conflicting federal court opinions.

The Free Flow of Information Act’s careful balancing of interests has drawn support from law enforcement officials. In June 2008, the Attorneys General from 41 states warned that the lack of a federal shield law is “producing inconsistency and uncertainty” for journalists and sources and “frustrates the purposes” of state shield laws. Former Solicitor General Theodore Olson wrote in October 2007 that shield legislation is “long overdue, and it should be enacted.”