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FILED

AUG 12 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE MATTER OF NATIONAL SECURITY
LETTERS

No. C 13-1165 SI

**ORDER DENYING PETITION TO SET
ASIDE AND GRANTING CROSS-
PETITION TO ENFORCE**

FILED UNDER SEAL

Currently before the Court is a petition to modify or set aside two National Security Letters (NSLs) that were issued to petitioner by the Federal Bureau of Investigation on [REDACTED] 2013, under 18 U.S.C. §§ 3511(a) and (b). Petition, filed 3/14/13. The government, in addition to opposing the petition, filed a cross-petition to enforce the two NSLs under 18 U.S.C. § 3511(c).¹ Cross-Petition, filed 4/26/13. These matters were scheduled for a hearing on August 2, 2013. Pursuant to Civil Local Rule 7-1(b), the Court determined that these matters are appropriate for resolution without oral argument, and VACATED the hearing and the case management conference scheduled for the same day. Having considered the papers submitted, including the classified

¹ On July 23, 2013, the FBI filed a Notice Regarding Withdrawal of a National Security Letter. The notice states that on July 23, 2013, the FBI sent petitioner, through counsel, a letter informing petitioner that the FBI withdraws the information demand portion of the NSL issued by the FBI's Washington Field Office (the "WFO NSL"). The record reflects that the government obtained the information sought by the WFO NSL by filing an application pursuant to 18 U.S.C. § 2703(d) in the United States District Court for the Eastern District of Virginia. Docket No. 31. Thus, the government no longer seeks in this case to enforce the information request portion of the WFO NSL. However, the FBI has not withdrawn the nondisclosure requirement of the WFO NSL, and continues to seek this Court's enforcement of that nondisclosure requirement as applied to petitioner here. The government seeks to enforce both the information request and nondisclosure requirement of the other NSL, which was issued by the FBI's Philadelphia Field Office (the "PFO NSL").

1 declaration of Joseph M. Demarest, Jr. submitted *ex parte* for the Court's review, the Court rules as
2 follows.

3 In a separate case brought by a different recipient of NSLs, this Court found unconstitutional
4 portions of the NSL statute governing nondisclosure orders issued in conjunction with NSLs. *See In*
5 *re NSL*, No. 3:11-cv-2173 SI (March 14, 2013) (finding 18 U.S.C. § 2709(c), 18 U.S.C.
6 §§ 3511(b)(2), (b)(3)) facially unconstitutional). The Court's judgment – as to the enforcement of
7 the particular NSL at issue in that case – was stayed pending appeal. Whether the challenged
8 nondisclosure provisions are, in fact, facially unconstitutional will be determined in due course by
9 the Ninth Circuit.

10 On March 29, 2013, a third recipient of NSLs filed a petition in this Court challenging 19
11 NSLs, and the government filed a cross-petition to enforce those same NSLs. *See In re NSLs*, No.
12 3:13-mc-80063-SI. The petitioner in that case requested, as petitioner does here, that the Court set
13 aside the NSLs and enjoin the FBI from issuing future NSLs, on the ground that the portions of the
14 NSL statute governing nondisclosure orders are facially unconstitutional. In orders filed on May 21
15 and May 23, 2013, the Court found, in light of the pending appeal and stay of the judgment in *In re*
16 *NSL*, No. 3:11-cv-2173 SI, that it was appropriate to review the arguments and evidence on an NSL-
17 by-NSL basis. The Court concluded that the government had met its burden to enforce the NSLs,
18 granted the government's cross petition to enforce, and denied the petitioner's petition to set aside the
19 NSLs. *See In re NSLs*, No. 3:13-mc-80063-SI (May 21, 2013 and May 23, 2013).

20 The petitioner in this case mounts the same facial constitutional challenge to the NSL statute
21 that the previous petitioners brought in the two cases discussed *supra*. For the same reasons that the
22 Court found it appropriate to review the arguments and evidence on an NSL-by-NSL basis in *In re*
23 *NSLs*, No. 3:13-mc-80063-SI, the Court finds it appropriate to do so here.

24 The Government has submitted evidence – both unclassified and classified – intended to
25 demonstrate that the two NSLs were issued in full compliance with the procedural and substantive
26 requirements imposed by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Those
27 requirements include: (1) notifying NSL recipients that the government will initiate judicial review
28 of the nondisclosure order and underlying NSL if the recipient objects to compliance; (2) certifying

1 that the nondisclosure order is necessary to prevent interference with an authorized investigation to
2 protect against international terrorism or clandestine intelligence agencies; (3) upon a challenge in
3 Court, the government submits evidence to show the District Court judge there is a “good reason”
4 to believe that absent nondisclosure, some reasonable likelihood of harm to an authorized investigation
5 to protect against international terrorism or clandestine intelligence agencies will result; and (4) the
6 District Court is not expected to treat the FBI’s certification as to the necessity of the nondisclosure
7 as conclusive, but to conduct a searching review of the evidence submitted. *Id.* at 883-84.

8 Although not privy to the classified information, petitioner does not dispute that the FBI has
9 complied with the strictures imposed by the Second Circuit. The government has, therefore,
10 complied with procedural and substantive requirements that the Court and petitioner in the Court’s
11 prior case recognized could result in a constitutional application of the nondisclosure and judicial
12 review provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. §§ 3511(b)(2), (b)(3). *See In re NSL*, No.
13 3:11-2173 (March 14, 2013) at 7, 21-23. In these circumstances – given the as-applied showings,
14 given that the constitutionality of the statute as written is under review at the Ninth Circuit, and given
15 that petitioner did not raise arguments *specific* to the two NSLs at issue why the nondisclosure orders
16 should not be enforced – the Court DENIES the petition to modify or set aside the two NSLs.

17 Turning to the government’s cross-petition to enforce, the government argues that in
18 determining whether to enforce administrative subpoenas (like the NSLs at issue), the Court must
19 consider: (1) whether Congress has granted the FBI the authority to investigate; (2) whether
20 procedural requirements have been followed; and (3) whether the evidence sought is relevant and
21 material to the investigation. *See EEOC v. Children’s Hospital Medical Center*, 719 F.2d 1426, 1428
22 (9th Cir. 1983). Having reviewed the Government’s arguments and evidence submitted, the Court
23 finds that as to the PFO NSL, Congress has authorized the FBI to seek the information requested, the
24 procedural requirements set both by the statute and by the Second Circuit’s *Doe v. Mukasey* decision
25 have been followed, and the evidence sought is relevant and material to the investigation. In
26 particular, as disclosed in the Government’s pleadings, a senior FBI official has certified that the
27 information sought is relevant to an authorized investigation to protect against international terrorism
28 or clandestine intelligence activities; and the investigations, where aimed at a “United States person,”

1 are not conducted solely on the basis of activities protected by the First Amendment. *See* Cross-
2 Petition at 17-19 (citing classified Demarest Declaration). The government's declarant also explains
3 what information is being sought in the PFO NSL and how that information is relevant to a pending
4 national security investigation. *Id.* at 18-19.

5 As to both the PFO NSL and the WFO NSL, the government has shown through the
6 unclassified Demarest Declaration that senior FBI officials certified, pursuant to the NSL statute, that
7 the nondisclosure requirement was imposed because "otherwise there may result a danger to the
8 national security of the United States, interference with a criminal, counterterrorism, or
9 counterintelligence investigation, interference with diplomatic relations, or danger to the life or
10 physical safety of any person." 18 U.S.C. § 2709(c)(1). The government has also submitted evidence
11 explaining further the need for continued nondisclosure of both NSLs. *See* Cross-Petition at 17-19
12 (citing classified Demarest Declaration). Accordingly, having reviewed the arguments and
13 evidentiary showing made, the Court finds that the government has met its burden to enforce these
14 NSLs and therefore GRANTS the government's cross-petition to enforce.

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16 **IT IS SO ORDERED.**

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18 Dated: August 12, 2013



19 SUSAN ILLSTON
20 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

IN RE: MATTER OF NATIONAL
SECURITY LETTERS,

Plaintiff,

v.

Defendant.

Case Number: 13-1165 SI

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 13, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Cindy Ann Cohn
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109

Steven Yale Bressler
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044

August 13, 2013

Richard W. Wieking, Clerk

By:

