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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 ELECTRONIC FRONTIER FOUNDATION,)
12)
13 Plaintiff,)
14 v.)
15 UNITED STATES DEPARTMENT)
OF JUSTICE,)
16 Defendant.)
17

**COMPLAINT FOR INJUNCTIVE
RELIEF FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552**

18 1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for
19 injunctive and other appropriate relief. Plaintiff seeks the release of records that Plaintiff requested
20 from Defendant United States Department of Justice (DOJ) concerning the review of National
21 Security Letter (NSL) nondisclosure orders under the Federal Bureau of Investigation’s (FBI)
22 termination procedures.

23 **PARTIES**

24 2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation
25 established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco,
26 California and Washington, D.C. EFF is a donor-supported membership organization that works to
27 inform policymakers and the general public about civil liberties issues related to technology and to
28

1 act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and
2 disseminate information concerning the activities of federal agencies.

3 3. Defendant Department of Justice (DOJ) is an agency of the Executive Branch of the
4 United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f). The
5 Federal Bureau of Investigation (FBI) is a component of Defendant DOJ.

6 **JURISDICTION**

7 4. This Court has both subject matter jurisdiction over this action and personal
8 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court
9 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

10 **VENUE AND INTRADISTRICT ASSIGNMENT**

11 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
12 § 1391(e).

13 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c) and
14 (d) because a substantial portion of the events giving rise to this action occurred in this district and
15 division, where Plaintiff is headquartered.

16 **FACTUAL ALLEGATIONS**

17 **The USA Freedom Act Requires FBI Review of NSL Nondisclosure Orders**

18 7. The NSL statutes¹ authorize the FBI (and other authorized agencies) to send NSLs
19 requesting information relevant to national security investigations. NSLs generally prohibit the
20 recipient from disclosing any information about the request, including that the recipient received an
21 NSL, based on a certification by an FBI official that “that the absence of a prohibition of disclosure”
22 may result in one of several enumerated harms. *See, e.g.*, 18 U.S.C. § 2709(c)(1)(B). NSL
23 nondisclosure orders have no fixed duration and may last indefinitely. Since 2001, the government
24 has issued almost 500,000 NSLs, and continues to issue more than 12,000 each year.²

25 _____
26 ¹ 12 U.S.C. § 3414; 15 U.S.C. § 1681u-v; 18 U.S.C. §§ 2709, 3511; 50 U.S.C. § 3162.

27 ² DOJ, Office of the Inspector General (“OIG”), *A Review of the Federal Bureau of Investigation’s*
28 *Use of National Security Letters: Assessment of Progress in Implementing Recommendations and*
Examination of Use in 2007 through 2009 at 65 (2014), available at <https://oig.justice.gov/reports/2014/s1408.pdf> (“2014 OIG Report”) (chart showing NSLs issued 2003-2011); *Liberty and Security*

1 8. NSLs are a matter of significant public controversy. This Court has recognized that
 2 the gag orders that accompany NSLs are “especially problematic in light of the active, continuing
 3 public debate over NSLs, which has spawned a series of Congressional hearings, academic
 4 commentary, and press coverage.” *In re National Sec. Letter*, 930 F. Supp. 2d 1064, 1076 (N.D. Cal.
 5 2013). Furthermore, NSL nondisclosure orders prevent recipients from participating in the public
 6 dialogue on governmental surveillance and from making true and complete reports to customers,
 7 investors, and legislators. *See, e.g., Twitter v. Sessions*, No. 14-cv-4480 (N.D. Cal.) (Twitter seeking
 8 to publish transparency report including number of NSLs received).

9 9. Prior to 2015, the NSL statutes had no requirement that the FBI review NSL
 10 nondisclosure orders after any length of time to determine whether the FBI still believed recipients
 11 should remain gagged.

12 10. NSL nondisclosure orders have been subject to several constitutional challenges, and
 13 at least three courts have held that the nondisclosure orders authorized by prior versions of the NSL
 14 statute violated the First Amendment.³

15 11. In response to public pressure and adverse court rulings, Congress enacted the USA
 16 FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015) (USA FREEDOM). The Act included
 17 reforms designed to address constitutional defects in the NSL statutes.⁴ The constitutionality of the

18 *in a Changing World: Report and Recommendations from the President’s Review Group on*
 19 *Intelligence and Communications Technologies* at 91-93 (2013) (“President’s Review Group”)

(number of NSLs issued in 2012), available at

20 http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; 2013: ODNI

21 Transparency Report (June 26, 2014),

https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2013

22 (NSLs issued in 2013); ODNI Transparency Report 2014 (Apr. 22, 2015),

https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2014

23 (NSLs issued in 2014); ODNI Transparency Report 2015 (May 2, 2016):

https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2015

24 (NSLs issued in 2015); ODNI Transparency Report 2016 (May 2, 2017):

https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016

25 (NSLs issued in 2016).

26 ³ *See, e.g., Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), *aff’d in part Doe v. Gonzales*, 500 F. Supp.
 27 2d 379 (S.D.N.Y. 2007); *In re National Sec. Letter*, 930 F. Supp. 2d at 1076.

28 ⁴ *See* H.R. Rep. No. 114-109, at 24 (2015) (stating that changes to NSL nondisclosure order
 procedures in the Act were intended address constitutional deficiencies in the NSL statutes noted by
Doe v. Mukasey, 549 F.3d 861 (2d Cir. 2008)).

1 amended statutes is the subject of ongoing litigation. *See Under Seal v. Sessions*, Nos. 16-16067, 16-
2 16081, 16-16082 (9th Cir.).

3 12. One such reform required the FBI to “review at appropriate intervals” NSL
4 nondisclosure orders to determine whether the underlying facts still supported preventing the NSL
5 recipient from disclosing the nature or existence of the NSL, and to “[terminate] such a
6 nondisclosure requirement if the facts no longer support nondisclosure.” USA FREEDOM, §502(f).

7 13. Pursuant to this mandate, the FBI developed procedures (NSL Review Procedures)
8 that “govern the review of the nondisclosure requirement in NSLs and termination of the
9 requirement when the facts no longer support nondisclosure.”⁵ The NSL Review Procedures require
10 the FBI to terminate nondisclosure at the three-year anniversary of the initiation of a full
11 investigation involving an NSL and/or the close of such an investigation “unless the FBI determines
12 that one of the statutory standards for nondisclosure is satisfied.”⁶ The FBI published the NSL
13 Review Procedures in November 2015, and they became effective in February 2016.

14 14. The DOJ has argued that the NSL Review Procedures remedy constitutional defects
15 in the NSL statutes.⁷ The nature and efficacy of these procedures is therefore of great importance to
16 the public debate surrounding NSLs.

17 15. According to the NSL Review Procedures, records related to the FBI’s review of
18 NSLs under the NSL Review Procedures are stored “in the FISA Management System (FISAMS)
19 and the FBI’s central recordkeeping system and any successor systems.”⁸ The FBI developed the
20 National Security Letter subsystem (NSLS), part of FISAMS, in response to findings by the DOJ’s
21 Office of the Inspector General that the FBI’s recordkeeping about NSLs was inaccurate and
22 incomplete.⁹ According to Inspector General reports, NSLS automatically generates emails and other
23

24
25 ⁵ Termination Procedure for National Security Letter Nondisclosure Requirement, FBI, *available at*
26 <https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf/view> (“NSL Review Procedures”).

27 ⁶ *Id.* at 2.

28 ⁷ Gov’t Br. at 46-47, *Under Seal v. Lynch*, Dkt. No. 52, No. 16-16082 (9th Cir. Dec. 9, 2016).

⁸ NSL Review Procedures at 4.

⁹ DOJ, Office of the Inspector General (“OIG”), A Review of the Federal Bureau of Investigation’s
Use of National Security Letters: Assessment of Progress in Implementing Recommendations and

1 records, including “automatically captur[ing] all data points necessary for congressional reporting.”¹⁰

2 16. According to the NSL Review Procedures, whenever an investigation involving an
3 NSL that includes a nondisclosure order closes or reaches the three-year anniversary of its initiation,
4 the FBI’s recordkeeping system will generate an electronic notice for the agent assigned to the
5 investigation.¹¹ The electronic notice indicates that the investigating FBI agent must review whether
6 the nondisclosure order accompanying the NSL remains necessary. The electronic communications
7 documenting NSL nondisclosure determinations generated by FISAMS are later “serialized” into the
8 FBI’s central recordkeeping system.¹² The NSL Review Procedures call for annual audits of
9 compliance with NSL Review Procedures, including recordkeeping requirements.¹³

10 17. Since 2015, the FBI’s NSL Review Procedures have resulted in termination of
11 nondisclosure orders associated with several NSLs. Recipients of these NSLs, including Google,
12 Yahoo, Twitter, CREDO Mobile, and Cloudflare, received and later published notices from the FBI
13 stating that the Bureau reached a decision to terminate an NSL nondisclosure requirement in whole
14 or in part pursuant to its termination procedures.¹⁴

15 **Plaintiff’s FOIA Requests**

16 18. In an email dated September 7, 2016, Plaintiff filed a FOIA request with the FBI, a
17 component of Defendant DOJ, for records related to the NSL Review Procedures (Sept. 7 FOIA).

19 Examination of Use in 2007 through 2009, at 12 (2014) (“2014 OIG Report”), available at
20 <https://info.publicintelligence.net/DoJ-NationalSecurityLetters-2007-2009.pdf>.

21 ¹⁰ *Id.* at 19, 38.

22 ¹¹ NSL Review Procedures at 2-3.

23 ¹² *Id.* at 4.

24 ¹³ *Id.*

25 ¹⁴ See Richard Salgado, *Sharing National Security Letters with the public*, Google (Dec. 13, 2016),
26 <https://blog.google/topics/public-policy/sharing-national-security-letters-public>; Chris Madsen,
27 *Yahoo Announces Public Disclosure of National Security Letters*, Yahoo (June 1, 2016),
28 <https://yahoopolicy.tumblr.com/post/145258843473/yahoo-announcespublic-disclosure-of-national>;
Elizabeth Banker, *#Transparency update: Twitter discloses national security letters*, Twitter (Jan.
27, 2017), [https://blog.twitter.com/2017/transparency-update-twitter-discloses-national-](https://blog.twitter.com/2017/transparency-update-twitter-discloses-national-securityletters)
securityletters; Notice Concerning National Security Letter, *In re NSLs*, Dkt No. 77, No. 1616067
(9th Cir. Mar. 20, 2017); Kenneth R. Carter, *Cloudflare’s Transparency Report for Second Half*
2016 and an Additional Disclosure for 2013, Cloudflare (Jan. 10, 2017),
[https://blog.cloudflare.com/cloudflares-transparency-report-for-second-half-2016-and-anadditional-](https://blog.cloudflare.com/cloudflares-transparency-report-for-second-half-2016-and-anadditional-disclosure-for-2013-2/)
disclosure-for-2013-2/.

1 19. The Sept. 7 FOIA request sought records created pursuant to the published
2 procedures and recordkeeping protocols described in paragraphs 15-16.

3
4 20. Specially, the request sought:

- 5 • The total number of NSLs reviewed under the termination
6 procedures, including the number of NSLs reviewed upon the close
7 of an investigation and the number of NSLs reviewed on the three-
8 year anniversary of the initiation of a full investigation.
- 9 • The number of notifications issued by the FBI's case management
10 system indicating that a review of an NSL is required by the
11 termination procedures.
- 12 • The number of NSLs reviewed under the termination procedures for
13 which the FBI has determined to continue the nondisclosure
14 requirement.
- 15 • The number of NSLs reviewed under the termination procedures for
16 which the FBI has determined to terminate the nondisclosure
17 requirement.
- 18 • Any and all records showing the length of time between when the
19 FBI's case management system notifies agents that an NSL must be
20 reviewed under the termination procedures and the date upon which
21 such review is completed.
- 22 • The number of termination notifications the FBI has issued to NSL
23 recipients, officers, employees, or agents thereof, or any applicable
24 court upon finding that the nondisclosure of an NSL is no longer
25 necessary.
- 26 • Guidance, directives, memoranda, or other instructions for using the
27 NSLS, the FISAMS, or any other systems to review NSL
28 nondisclosure orders pursuant to the FBI's termination procedures.

1 32. Plaintiff has exhausted applicable administrative remedies with respect to
2 Defendant's wrongful withholding of the requested records.

3 33. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the
4 requested documents.

5 **REQUESTED RELIEF**

6 WHEREFORE, Plaintiff prays that this Court:

7 34. order Defendant and its components to process immediately the requested records in
8 their entirety;

9 35. order Defendant to disclose the requested records in their entirety and make copies
10 available to Plaintiff;

11 36. order Defendant to waive all fees associated with the processing and release of the
12 requested records;

13 37. provide for expeditious proceedings in this action;

14 38. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and

15 39. grant such other relief as the Court may deem just and proper.

16 DATED: June 7, 2017

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