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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States; ROBERT MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants.

MEMORANDUM IN OPPOSITION TO FBI'S CONTINUED SUPPRESSION OF THE CONTENTS OF THE NSL ATTACHMENT

04 Civ. 2614 (VM)

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INTRODUCTION

For six years the FBI has prohibited Doe and Doe's counsel from disclosing a wide-array of information about the national security letter ("NSL") it served on Doe but withdrew nearly three years ago. The narrow question now before the Court is whether the FBI has met its constitutional burden to show that there is good reason to believe that disclosure of only the types of records the FBI long-ago demanded – without identification of the NSL recipient or target – is likely to result in an enumerated harm. The FBI's main contention is that disclosure *might* harm its amorphous "investigative interests" in the future because it *might* reveal something about FBI investigatory methods that *could* possibly cause future NSL targets, including this target, to alter their behavior to avoid NSL surveillance.

This "justification" is constitutionally insufficient for three reasons. First, it is undermined by the fact that the FBI has already permitted disclosure of some of the types of records it demanded through this particular NSL. Second, it rests on the erroneous premise that disclosure would reveal anything at all about the FBI's *current* NSL practices. Third, and more

fundamentally, it is based on an entirely speculative risk of harm that the government has failed to show is even a conceivable possibility, let alone reasonably likely to occur.

Moreover, there is a significant value to pubic disclosure here. Suppression of the types of records the FBI sought through this NSL has hindered public debate by preventing Congress and the public from learning vital information about the scope of, as well as the FBI's abuse of, the NSL authority during two periods of legislative reform of the NSL statute. Accordingly, plaintiffs respectfully request that the Court promptly modify the gag order to permit disclosure of the types of records the FBI sought through this NSL.

ARGUMENT

I. THE FBI HAS NOT MET ITS BURDEN TO SHOW THAT SUPPRESSION OF THE KINDS OF RECORDS THE FBI DEMANDED IS NECESSARY.

A. The FBI Must Demonstrate More Than a Speculative, Merely Conceivable, Harm.

As the government itself recognizes, Govt. Br. 3, the FBI bears the constitutional burden to justify the need for nondisclosure of the general types of personal records the FBI sought but never obtained through this NSL six years ago. Specifically, the FBI must show that there is good reason to believe that disclosure of this particular information is likely to result in one of harms enumerated in 18 U.S.C. § 2709(c), that the enumerated harm the FBI fears is related to an authorized terrorism or intelligence investigation, and that the link between disclosure of this particular information and the risk of harm is substantial. *Doe v. Mukasey*, 549 F.3d 861, 881 (2d Cir. 2008) (hereinafter "*Doe IV*"); *Doe v. Holder*, --- F. Supp. 2d ----, 2009 WL 3378524, *3 (S.D.N.Y. Oct. 20, 2009) (hereinafter "*Doe V*").

Thus, the narrow question before the Court is whether the FBI has demonstrated that disclosure of only the types of records the FBI demanded – without identification of the NSL recipient or target – is actually likely to result in an enumerated harm. The Court must assure itself that there is more than just a "conceivable possibility" of harm, *Doe IV*, 549 F.3d at 875,

"substantial[y]" linked to disclosure of this particular information, *Doe V*, 2009 WL 3378524 at *3. Rank speculation and "conclusory assurance[s]" that harm is possible is not enough. *Doe V*, 2009 WL 3378524 at *3; *Doe IV*, 549 F.3d at 881.

The Court must make this assessment with regard to each aspect of the gag order and must do so even though it has found other aspects of the gag order constitutional. Whereas the FBI may have, in the Court's view, demonstrated a compelling justification for nondisclosure of the NSL target and recipient, if it has failed to provide a compelling justification for suppressing the types of records the FBI tried to obtain, the Court must modify the scope of the NSL gag order accordingly. *See* 18 U.S.C. § 3511(b)(2) ("the court may modify . . . a nondisclosure requirement"); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76-77 (D. Conn. 2005) (hereinafter "*Library Connection*") (finding nondisclosure of "each piece of information" suppressed through an NSL gag order must be justified, and lifting part of gag because the court was unconvinced the FBI had a "compelling interest in barring . . . disclosure of Doe's identity" or that it would result in the harm asserted). As this Court thoughtfully explained in a prior opinion in this case, each category of information suppressed through an NSL gag order must be evaluated separately because the "possible threat to national security" and the "value to the national debate," if disclosed, varies depending on the content of the information. *Doe v. Gonzales*, 500 F. Supp. 2d 379, 420 (S.D.N.Y. 2007) (hereinafter "*Doe III*"). For this reason, the Court concluded that "the scope of . . . nondisclosure [must] be decided on a case-by-case basis." *Id.*[1]

[1] The mere fact that the information at issue is located in an Attachment to the NSL is irrelevant to the Court's analysis. The relevant question is not the location of the information but whether the FBI has sufficiently justified suppressing the specific content in question. If the Court were required to accept or reject nondisclosure of *all* information merely because it was located in or appended to the NSL, Congress would not have given courts the authority to modify gag orders. 18 U.S.C. § 3511(b)(2). Indeed, the whole point of the 2006 amendments (and the Circuit's interpretation of them) was to abandon categorical approaches to NSL gag orders and to permit courts to engage in case-by-case First Amendment scrutiny, which includes ensuring that each aspect of a gag order is justified and that it is not overbroad in scope. *See Library Connection*, 386 F. Supp. 2d at 80 (rejecting portion of NSL gag order where it was "not narrowly tailored in its scope to serve the government's interest."); *Carroll v. President*

B. The FBI Has Not Met Its Constitutional Burden.

The FBI has not met its weighty constitutional burden to justify suppression of the types of records the FBI unsuccessfully sought through this NSL six long years ago. The government has not demonstrated that disclosure is reasonably likely to result in harm to an ongoing investigation or to national security.[2]

The government's primary argument is that disclosure of the records sought through this old NSL may harm the FBI's "investigative interests," Summary of Cummings Decl. ¶ 3, because it would reveal "what particular items of information are deemed important for investigative purposes," *id.* ¶ 2, or FBI "methods," Cummings Decl. ¶ 16, and that this might cause "this, or any, target of an NSL to change behavior when dealing with internet service providers," Summary of Cummings Decl. ¶ 2. This rationale does not withstand scrutiny.

As an initial matter, the government's argument is undermined by its own actions because the FBI has already permitted disclosure of some of the types of records sought through this particular NSL. Just recently, the FBI permitted disclosure of the fact that the FBI sought "existing transaction/activity logs," that it sought "email header information," and that Doe was to provide "[a]ny other information which you consider to be an electronic communication

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and Com'rs of Princess Anne, 393 U.S. 175, 183 (1968) (holding speech restraints must be "couched in the narrowest terms that will accomplish the [government's] pin-pointed objective"); *United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (rejecting gag order that was not narrowly tailored in scope); Pl. Br. in Support of Mot.. for Recon. 2-5.

[2] It is unclear whether the FBI argues only that disclosure may "interfere[ ] with . . . a[n] investigation," or whether it also asserts that disclosure may result in "a danger to the national security." 18 U.S.C. § 2709(c)(1). Nowhere in the material accessible to plaintiffs does the government state specifically which enumerated harms it invokes. Although the FBI makes reference to its concern that disclosure might reveal information about "national security investigations," Cumming Decl. ¶ 16, neither the summary or un-redacted portions of the FBI declaration, nor the government's brief explicitly argues that disclosure would endanger national security. Moreover the redacted portions of the declaration are not classified; they are marked "law enforcement sensitive." Nor is the Attachment a classified document. Thus, the most obvious indication that the FBI fears disclosure of the Attachment would truly cause harm to national security – its classification as confidential, secret, or top-secret – is lacking.

transactional record." Goodman Decl., Exh. A (current public version of the NSL).[3] It is far from clear why certain types of records the FBI sought from Doe can be made public but the other records listed in the Attachment cannot.

The government has not only permitted disclosure of certain records sought through this particular NSL, it has also disclosed information about the types of records the FBI can obtain through NSLs more generally. For example, the Office of Legal Counsel ("OLC") opinion the Justice Department publicly released in January 2009 discusses how the FBI is permitted to demand only the electronic equivalent of name, address, length of service, and toll billing information – the four types of information listed in the NSL statute. *See* Goodman Decl., Exh. C at 2; *see also* Pl. Memo. in Opp. to Continuation of the NSL Gag Order 14-15. The recent Department of Justice Inspector General ("IG") report concerning the FBI's use of "exigent letters" to illegally obtain records about approximately 3,000 people publicly discusses types of telephone transactional records and the kinds of records listed in Attachments to the "exigent letters." U.S. Dept. of Justice Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, January 2010 at 2, 20 (stating that "transactional" records include "the date, time, duration, and the originating and terminating numbers to a telephone call"); *id.* at 28, 54 (explaining that some letters had "attachment[s] listing various categories of records requested" including "community of interest" or "calling circle" records).[4] There is no obvious reason that this kind of information about what records the FBI can demand, the definition of transactional records, and other record demand Attachments can be disclosed but the list in this Attachment cannot.

[3] This declaration was submitted in support of Plaintiffs' Opposition to Continuation of the NSL Gag Order on August 21, 2009.

[4] This report is available at http://www.justice.gov/oig/special/s1001r.pdf.

The OLC opinion lays bare another faulty premise in the government's argument: that disclosure of the list of records sought through this NSL would reveal information about the FBI's *current* NSL practices. Summary of Cummings Decl. ¶ 1 (asserting that Attachment provides detail about information "that may be available to the FBI" in its investigations). Again, the OLC found that the information listed in the NSL statute – name, address, length of service, and toll billing records – was an "exhaustive" list of the types of records the FBI could permissibly obtain, whether electronic or telephonic records. Goodman Decl., Exh. C at 2; *see also id.* at 3 n.3, 4. Thus, the OLC opinion makes clear that the FBI no longer has the authority to demand, for example, [redacted] [redacted] or other records listed in the Attachment beyond the electronic equivalent of name, address, length of service, and toll billing records. Goodman Decl., Exh. A (public version of NSL). Unless the FBI continues to use NSLs unlawfully, disclosure of these aspects of the Attachment would not reveal *current* techniques at all.

In any event, even assuming that the government's past disclosures do not entirely undermine its risk of harm argument, and even assuming that this Attachment might actually reveal something – however minimal – about the FBI's current practices, the FBI's justification here is constitutionally insufficient for a more fundamental reason. The FBI has not adequately demonstrated that the hypothetical harm it asserts – that individuals might deduce enough about the FBI's investigatory practices to enable them to evade surveillance – is even a conceivable possibility, let alone reasonably likely to occur. Although the government need not show that the harm it fears is "immine[nt]" or "certain[ ]" to occur, the government must show more than a "conceivable possibility" of harm. *Doe IV*, 549 F.3d at 875; *see also New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J. concurring) ("[T]he First Amendment tolerates absolutely no . . . restraints . . . predicated upon surmise or conjecture that untoward

consequences may result."); *Turner Broad. Sys. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 664 (1994) ("[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured."); *see also Doe IV*, 549 F.3d at 881 ("conclusory assurance[s]" insufficient to satisfy "strict scrutiny standards").

Courts have rejected gag orders based on precisely the kind speculative law enforcement concerns the government advances here. *See, e.g.*, *Library Connection*, 386 F. Supp. 2d at 77 (rejecting gag on NSL recipient's identity based on government's argument that disclosure "'may' or 'could' harm investigations related to national security generally" and finding that gag could not be imposed on such a "speculative record"); *id.* at 78 (rejecting government's conclusory "mosaic" argument). As a district court in Texas recently explained in rejecting the government's argument that recipients of pen register and trap and trace orders must be subject to an indefinite gag order, suppression of information about law enforcement investigatory methods is not always warranted and, in fact, disclosure is often necessary to serve higher democratic ends:

> [T]he argument that disclosure of this 'sensitive' investigative technique would somehow jeopardize other investigations, now or in the future, simply proves too much. Muzzling telecoms to prevent disclosure of pen/trap orders might in the odd case deprive a fugitive of useful information, but it would also deprive the law-abiding public of significant data about the frequency of compelled Government access to individual e-mail and phone records. If that sort of trade-off were legally acceptable, then the Government would be free to cloak in secrecy *any* investigative technique, from the most mundane search warrant to the most sophisticated electronic surveillance, thereby avoiding the disinfecting rays of public scrutiny. That result might seem felicitous to zealous and well-meaning officers of the law, but it misconceives the indispensable role of daylight in our system of justice . . . .

In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876 (S.D.Tex. 2008).[5]

Even if such speculative justifications were acceptable, the FBI's claim that criminals or terrorists are likely to alter meaningfully their behavior as a result of disclosure of a six-year-old NSL Attachment is particularly unpersuasive. The FBI's use of NSLs is a generally-known surveillance method. The face of the NSL statute itself reveals that the FBI can demand from ISPs name, address, billing, phone, Internet, and email use records about anyone merely relevant to an investigation. 18 U.S.C. § 2709; *see also Doe III*, 500 F. Supp. 2d at 387 (discussing how the FBI could potentially obtain through NSLs "the 'to,' 'from,' 'date,' and 'time' fields of all emails sent or received, activity logs indicating dates and times that the target accessed the internet, the contents of queries made to search engines . . . histories of websites visited . . . the identity of an internet user associated with a certain email address, Internet Protocol address, or screen name"). As a result of previous disclosures in this case, ISP customers already know that the FBI once used NSLs to obtain "transaction/activity logs" and "email header" information. *See supra* at 4. Indeed, ISP customers know that the FBI has instructed NSL recipients to turn over any records they might, in their own discretion "consider to be an electronic communication transactional record." *Id.* at 4-5.

More importantly, however, it is no secret to individuals engaged in wrongdoing that the FBI can obtain any type of Internet or email record it desires through a grand jury subpoena or, upon a showing of probable cause, a traditional search warrant. Thus, it is quite difficult to imagine that the small amount of additional detail the Attachment provides about the

[5] The government emphasizes that it is owed deference here, Govt. Br. 4, but "deference is not equivalent to acquiescence." *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). The Court should not give deference to wholly speculative, conclusory, or implausible arguments. *See, e.g., In re Washington Post Co v. Soussoudis*., 807 F.2d 383, 392 (4th Cir. 1986) ("[a] blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.").

government's surveillance capabilities would inspire anyone engaged in wrongdoing to alter meaningfully their behavior in a way they would not have done already in light of knowledge about other surveillance authorities available to the FBI. Suppression of the Attachment would not prevent wrongdoers from evading surveillance but would prevent the public from learning about the FBI's use, and abuse, of its NSL power in the past.

In sum, the FBI has not shown that disclosure of the Attachment is reasonably likely to result in an enumerated harm. All the Attachment reveals is the general types of records the FBI unsuccessfully sought six long years ago from an unknown ISP about an unknown email address, some of which the FBI was not even authorized to demand in first place.[6]

II. THE UNNECESSARY SUPPRESSION OF THE TYPES OF RECORDS THE FBI SOUGHT THROUGH THIS NSL IS HINDING PUBLIC DEBATE.

In assessing the government's weak justification for secrecy, the Court should consider the value of public disclosure here. Suppression of the Attachment is preventing the public and Congress from learning valuable information that would inform the legislative debate about NSL reform – a debate that is expected to end in one month. *See* Norman Oder, *Patriot Act Renewal Process Extended Until the End of February*, Libr. J., Jan. 12, 2010.

The excessive secrecy that continues to shroud the kinds of records the FBI can, or has in the past, demanded through NSLs has severely hindered the national debate about the appropriate scope of the FBI's NSL authority. Suppression of information like that contained in

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[6] Nowhere in the record available to plaintiffs does the government argue that disclosure here would substantially risk harm to this particular investigation. The summary of the FBI declaration asserts in a conclusory fashion that disclosure "could compromise this investigation," Summary of Cummings Decl. ¶ 1, but the only specific reference to this particular investigation in the material available to plaintiffs is the speculative assertion that disclosure could cause "this, or any, target" of an NSL to change their behavior. *Id.* ¶ 2. In any event, nothing in the Attachment describes the nature, scope, or focus of the FBI's current investigation. Nothing in the Attachment reveals anything about the NSL target's identity, Doe's identity, or the identity of any other person under investigation. The Attachment reveals nothing about the actual records the FBI may have obtained in the course of its investigation because the FBI never actually obtained these records. Nor does the Attachment reveal anything about information the FBI is *still* trying to obtain because the FBI abandoned this demand for records nearly three years ago.

this Attachment has kept Americans unnecessarily uninformed about the kinds of personal records the FBI unilaterally can force ISPs to turn over about customers who are not even suspected of any wrongdoing. The portion of the gag order that encompasses the information contained in the Attachment has prevented plaintiffs from disclosing concrete evidence that NSLs can be much more intrusive than the government often claims.

Perhaps more disturbingly, this aspect of the gag order has prevented plaintiffs from disclosing concrete evidence of the FBI's abuse of its NSL authority. As the recent IG Report concerning the illegal collection of thousands of people's personal records demonstrates, the FBI's abuse of its NSL power remains a vital matter of public concern. *See supra* at 5; *see also* Charlie Savage, *F.B.I. Violated Rules in Obtaining Phone Records, Report Says*, N.Y. Times, Jan. 20, 2010. The Attachment reveals that the FBI, at least at one point, interpreted the scope of its record demand power very broadly, and much more broadly than the OLC recently said was appropriate. *See supra* at 4, 6. The Attachment also reveals that the FBI used this particular NSL to demand records it was not authorized to obtain under the statute. *See supra* at 6.

Thus, the Attachment suggests that, prior to the issuance of the OLC opinion, the FBI may have systematically abused its NSL power by interpreting it too broadly. As a result, the FBI may have obtained – and may still improperly retain – thousands of Americans' personal records it was never authorized to demand. Without the ability to disclose the Attachment, however, plaintiffs cannot demonstrate that this concern is real, not just hypothetical. *See* Goodman Decl. ¶¶ 5-10, 14 (discussing how suppression of the Attachment has interfered with ACLU's ability to explain the significance of the OLC opinion and to substantiate its concern that the FBI has not purged improperly obtained records from its databases with members of Congress, the Executive branch, and the public).

Without disclosure of information about the types of records the FBI can demand through NSLs, past and present, an informed debate about the appropriate scope of this intrusive surveillance power is nearly impossible. The public should have the opportunity to make an informed decision whether the FBI's power to demand personal records without prior judicial approval and without suspicion of any kind should be legislatively narrowed or more closely monitored for abuse. As the district court in Texas that recently rejected permanent pen register and trap and trace gag orders observed:

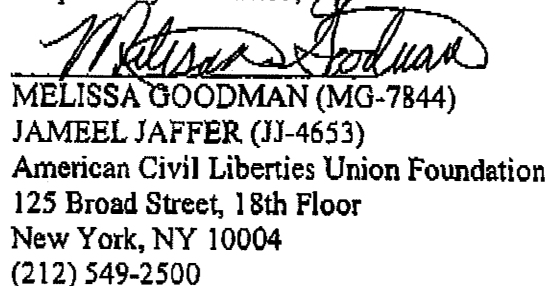
> Cumulatively considered, these secret orders, issued by the thousands year after year . . . may conceal from the public the actual degree of government intrusion that current legislation authorizes. It may very well be that, given full disclosure of the frequency and extent of these orders, the people and their elected representatives would heartily approve without a second thought. But then again, they might not.

In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d at 886. This sentiment applies with equal force to public's assessment of the scope of the FBI's NSL power.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court modify the gag order to permit disclosure of the types of records the FBI sought through this NSL, and that it do so promptly, before the legislative debate about reform of the NSL statute ceases in one month.

Respectfully submitted,



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January 27, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010 I delivered by hand a true and correct copy of the foregoing: Memorandum in Opposition to FBI's Continued Suppression of the Contents of the NSL Attachment, to:

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