UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re NATIONAL SECURITY LETTERS	[redacted] **Civil Action No. 16-518 (JEB)**

MEMORANDUM OPINION AND ORDER

In [redacted] the Federal Bureau of Investigation issued two separate National Security Letters to Respondent [redacted] seeking limited information about two customer accounts in connection with a national-security investigation. Pursuant to the terms of those two NSLs, [redacted] was prohibited from disclosing their existence or contents to the two targets. Invoking its statutory right to judicial review of this prohibition, Respondent has now asked this Court to take an independent look at its continuing nondisclosure obligation. Agreeing that indefinite nondisclosure is not appropriate here, the Court will order the FBI to conduct triennial reviews going forward.

I. Background

The FBI may issue an NSL, a form of administrative subpoena, to a wire- or electronic-communications service provider seeking non-content information, as long as the Bureau certifies that the records sought are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b)(1). In addition, if the FBI certifies that "the absence of a prohibition of disclosure . . . may result in – (i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person," the service provider is prohibited from

disclosing the existence of the NSL. Id. § 2709(c)(1)(B). To avoid potential First Amendment concerns with such a restraint on speech, however, Congress last year, as part of the USA FREEDOM Act of 2015 (USAFA), provided: "If a recipient of [such an NSL] wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review . . . ." 18 U.S.C. § 3511(b)(1)(A).

In this case, the Bureau issued two NSLs to [redacted] in [redacted] seeking records relating to two subscribers. See Pet., Exhs. 2-3. These NSLs carried the requisite certification that nondisclosure was necessary to avoid the harms listed in the statute. See id. Although the judicial-review provision at that time differed from its current state, suffice it to say that [redacted] did not seek any court intervention for the ensuing [redacted]-plus years.

[redacted] however, changed its mind in 2016. In February of this year, it officially notified the government that it desired to exercise its rights under § 3511(b). See Pet., Exh. 4. More specifically, it sent a letter expressing its "wish[] to have a court individually review the nondisclosure requirements imposed in connection with" the NSLs. Id. Punctually observing its obligations under the statute, the government then filed this action asking this Court for such review. See ECF No. 1 (Petition). It simultaneously filed *in camera* the classified Declaration of Michael B. Steinbach, Executive Assistant Director of the FBI's National Security Branch, which explained the specific nature of the two NSLs and why the statutory harms articulated in § 2709 still applied. It thus maintained that the nondisclosure provisions should remain in force. See id., Exh. 1 at 2.

[redacted] responded that it did not doubt the legitimacy of such harms, nor did it seek to challenge the constitutionality of § 2709. See Resp. at 2. It argued only that the Court should

require some periodic review of the necessity of nondisclosure, as opposed to allowing it to operate indefinitely. Respondent took this position even though the government pointed out that the language of § 3511(b) appears to permit an NSL recipient to seek multiple reviews of the nondisclosure requirements by filing successive petitions. After a status hearing was unsuccessful in crafting a compromise solution, the Court directed the parties to submit further pleadings regarding the propriety of an order in this case that directed the FBI to conduct periodic reviews. See ECF No. 12 (Order). Now that the parties have complied, the matter is ripe for decision.

II. Analysis

Once a district court receives a petition for nondisclosure review, it "should rule expeditiously, and shall, subject to [the statutory bases for nondisclosure], issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C) (emphasis added); see also In re National Security Letters, No. 11-2173 at 30 (N.D. Cal. Mar. 29, 2016) (Order re: Renewed Petitions), attached as Exh. 1 to Gov't Notice of Supp. Auth. (ECF No. 7) (Section 3511(b)(1)(C) now amended to "provide[] that upon review, a district court 'may issue a nondisclosure order that includes conditions appropriate to the circumstances'"); [redacted] Opp. (ECF No. 18), Exh. E (Hearing Transcript) at 8 (government agreeing that Court may issue an order "appropriate under the circumstances"). The question this case poses, therefore, is what conditions, if any, are appropriate here. The government takes the position that an unconditional order maintaining nondisclosure should issue – subject to the Attorney General's recently issued procedures set forth below – while [redacted] seeks a requirement that the FBI periodically review the necessity of nondisclosure.

To determine the answer, the Court starts with the USAFA, which last year ordered the Attorney General, within 180 days of the statute's enactment, to "adopt procedures with respect to nondisclosure requirements" – under, *inter alia*, § 2709 – to mandate:

> (A) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;
> (B) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and
> (C) appropriate notice to the recipient of the national security letter, or officer, employee, or agent thereof, subject to the nondisclosure requirement, and the applicable court as appropriate, that the nondisclosure requirement has been terminated.

USA FREEDOM Act of 2015, Pub L. No. 11A-213, § 502(f)(1), 129 Stat. 268, 288 (emphasis added). The Attorney General complied, and in November 2015 the FBI published its Termination Procedures, which provide for Bureau review of any NSL nondisclosure prohibition at two distinct intervals: (1) at the close of any investigation in which an NSL containing a nondisclosure provision was issued; and (2) on the three-year anniversary of the initiation of the investigation for which an NSL was issued, unless previously closed. If such review determines that the statutory standards for nondisclosure are still met, then the gag order remains in place. See FBI Termination Procedures for National Security Letter Nondisclosure Requirement (Nov. 24, 2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf/view.

Such procedures, as [redacted] points out, leave several large loopholes. First, there is no further review beyond these two, meaning that where a nondisclosure provision is justified at the close of an investigation, it could remain in place indefinitely thereafter. See Resp. at 7. Second, these procedures by their own terms apply only to "investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures," FBI Term. Proc. at 3; as a result, "a large swath of NSL nondisclosure provisions [that predate the procedures] may never be reviewed and could remain unlimited in duration." Resp. at 7. Third, for long-running

investigations, there could be an extended period of time – indefinite for unsolved cases – between the third-year anniversary and the close date. Id.

These loopholes thus give the Court some pause as to whether the Termination Procedures clearly comply with the USAFA's mandate that requires "review at appropriate intervals." USAFA § 502(f)(1); see also H.R. Rep. No. 114-109, at 26 (2015) (Section 502 "also provides that the Attorney General shall adopt procedures for the review of nondisclosure requirements issued pursuant to an NSL. These procedures require the government to review at appropriate intervals whether the facts supporting nondisclosure continue to exist . . . .") (emphasis added).

In addition, in a case decided after the passage of the USAFA but before the Attorney General had implemented her Termination Procedures, Judge James Bredar of the District of Maryland concluded that the NSL in question, whose nondisclosure requirement had been implemented for an indefinite duration, was "problematic." Lynch v. Under Seal, No. 15-1180 at 4 (D. Md. Sept. 17, 2015). He thus held that, until the Attorney General implemented the new procedures, the government was required to review every 180 days the rationale for the nondisclosure requirement's continuation. Id.; see also In re National Security Letters, No. 11-2173 at 30 ("At the hearing, the government stated that 'conditions appropriate to the circumstances' could include a temporal limitation on nondisclosure . . . .").

It was against this backdrop that this Court ordered the government to explain why an annual review of the nondisclosure requirement in this case would not be appropriate. In response, the government submitted both a classified and an unclassified declaration from Michael Steinbach. The former, reviewed by the Court *in camera*, reasonably explains why the nondisclosure requirements in the two NSLs at issue are unlikely to be lifted by the FBI any time

soon. The latter offers more detail on the financial and logistical burdens the FBI would face if it had to adopt an annual review in all of its NSL cases. [redacted] responded that the only question relates to the burdens in this case, not generally.

The Court finds neither of these diametrically opposing views persuasive. On the one hand, it would be disingenuous for the Court to craft an order expecting that no other provider (or, for that matter, [redacted] itself) would seek similar conditions attached to the nondisclosure requirements in other cases. On the other, the Court would be precipitate in leaping to the conclusion that an order in this case would necessarily require a revamping of the FBI's procedure in relation to all 16,000 NSLs that are issued annually.

Where lies the middle ground? The Court believes that, given both the facts and circumstances of this particular case and the legal authority discussed above, a triennial review fairly balances the specific burdens on the FBI against the countervailing interest that [redacted] has in avoiding a lengthy and indefinite nondisclosure bar. An annual review in a case in which reasonably lengthy nondisclosure is likely would be unduly cumbersome, but an indefinite bar (absent further petitions by [redacted] seems inconsistent with the intent of the law. A review conducted every three years, furthermore, mirrors that timeframe set out in the Termination Procedures.

III. Conclusion

The Court, accordingly, finds, under 18 U.S.C. § 3511(b)(1)(C) and (b)(3), that there is good reason to believe that disclosure of the [redacted] and [redacted] NSLs served on [redacted] may result in a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person.

It therefore ORDERS that:

1. [redacted] remains bound by the nondisclosure provisions of 18 U.S.C. § 2709, including the requirement that it not disclose the fact or contents of the NSL to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request); and

2. The FBI shall, every three years from this date, review the need for such nondisclosure and inform [redacted] of its decision. Such obligation shall terminate upon the notification to [redacted] that nondisclosure is no longer prohibited.

IT IS SO ORDERED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: July 25, 2016