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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Case No.: 17-cv-03263-VC **NOTICE OF MOTION AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: December 20, 2018 Time: 10:00 AM Courtroom: 4, 17th Floor Hon. Vince Chhabria

NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 20, 2018 at 10:00 AM in Courtroom 4, 17th Floor, at the United States Courthouse at San Francisco, California, Plaintiff, Electronic Frontier Foundation ("EFF"), will, and hereby does, cross move this Court for partial summary judgment.

Pursuant to Federal Rule of Civil Procedure 56, EFF seeks a court order requiring the government to release records under the Freedom of Information Act, 5 U.S.C. § 552. EFF respectfully asks that this Court issue an order requiring the government to process and release all records improperly withheld from the public. This cross motion is based on this notice of motion, the memorandum of points and authorities in support of this cross motion, and all papers and records on file with the Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence which may be offered.

DATED: October 29, 2018

Respectfully submitted,

/s/ Aaron Mackey

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INTRODUCTION

National Security Letters ("NSLs") permit the FBI to demand information from private parties while simultaneously prohibiting recipients from telling anyone about receiving them. As Judge Cardamone of the Second Circuit described them, NSLs combine "a ban on speech and a shroud of secrecy" in ways that are "antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens." *Doe v. Gonzales*, 449 F.3d 415, 422 (2d Cir. 2006) (Cardamone, J. concurring). The FBI's use of NSLs and their accompanying speech-restricting nondisclosure orders have been consistently controversial, leading to increased public scrutiny of when and how often the FBI uses them and prompting a series of constitutional challenges and successive congressional amendments.

The Electronic Frontier Foundation ("EFF") is a nonprofit that has long been concerned with the FBI's use of NSLs and represents NSL recipients in First Amendment challenges to the NSL statute. EFF filed the FOIA request at issue in this case to better understand the FBI's implementation of a new law that required the agency to terminate nondisclosure orders when they were no longer justified. The request sought documents that would show how the FBI was complying with Congress' command in the USA FREEDOM Act that it "review at appropriate intervals" the nondisclosure orders accompanying NSLs to "assess whether the facts supporting nondisclosure continue to exist." Pub. L. 114-23, § 502(f), 129 Stat. 268 (2015) ("USA FREEDOM"). Public oversight of the operation of USA FREEDOM's review requirements is critical because courts have explicitly relied on the review requirements to hold that the amended NSL statutes satisfy the First Amendment. *See, e.g.*, *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1126-27 (9th Cir. 2017) ("*In re NSL 2017*"). EFF's FOIA request sought information that would show how frequently the FBI terminates nondisclosure orders and allows recipients to speak, which will shed light on whether the process is working as Congress intended.

The majority of the records the FBI produced in this case document the Bureau's conclusions, pursuant to both USA FREEDOM and its own NSL Termination Procedures, that the nondisclosure orders it previously issued could be lifted and recipients of those original NSLs could disclose the fact

that they had received them. Bound up in those decisions were findings by senior FBI officials that allowing particular NSL recipients to speak about receiving an NSL would not, among other things, pose a risk to national security or potentially harm an ongoing investigation.

Despite the FBI's conclusions that NSL recipients could speak without harming investigations or national security, the Bureau has withheld the names of NSL recipients in the termination letters and other documents it produced in response to EFF's request under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) protects records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

The FBI is improperly withholding the names of NSL recipients in documents at issue in this motion. Because the FBI has released the vast majority of these documents to third parties with no strings attached, the government has waived its invocation of FOIA Exemption 7(E) to withhold them. Additionally, the names of companies that have been released from NSL nondisclosure orders are not properly subject to Exemption 7(E) in the first place. For both of these reasons, EFF is entitled to partial summary judgment and it respectfully asks this Court to order the FBI to disclose that information.[1]

[1] After reviewing the FBI's brief and supporting declaration, EFF is not challenging withholding of other information that does not concern the names and other identifying information of NSL recipients reflected in the documents produced to EFF. The FBI has withheld the names of employees of NSL recipients under Exemptions 6 and 7(C). Declaration of Michael G. Seidel ("Seidel Decl.") (ECF No. 32-2) ¶ 53, n.6. EFF does not challenge those withholdings to the extent that they are used to withhold the names and identifying information of individual persons. The FBI initially claimed Exemptions 6 and 7(C) permitted it to withhold the *company* names of NSL recipients. EFF understands that the agency no longer makes that claim and, as a result, does not raise it here. Regardless, such claims are improper in light of the Supreme Court holding that Exemptions 6 and 7(C) only applies to individuals, rather than corporate or other entities. *FCC v. AT&T*, 562 U.S. 397, 409 (2011) (holding that FOIA's privacy exemptions do not extend to corporations).

BACKGROUND

I. National Security Letter Statutes Authorize Information Collection and Silence.

The National Security Letter statutes[2] allow the FBI and other authorized agencies to request information relevant to national security investigations from a wide range of businesses and individuals, including electronic communications service providers, banks, consumer reporting agencies, and other financial institutions. NSLs prohibit recipients from disclosing any information about the request—including that the recipient received an NSL—based on a certification by an FBI official that "that the absence of a prohibition of disclosure" may result in one of several enumerated harms. *See, e.g.,* 18 U.S.C. § 2709(c)(1)(B). The enumerated harms that permit nondisclosure by an NSL recipient are "(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." *Id*.

In practice, the government unilaterally imposes an NSL nondisclosure order or "gag" in nearly every case—97% of the time by one estimate. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013)("*In re NSL 2013*").

Although the first NSL statute was enacted in 1986,[3] the use and scope of NSLs expanded dramatically with the passage of the USA PATRIOT Act in 2001.[4] Since 2001, the government has issued almost 500,000 NSLs and continues to issue more than 12,000 each year.[5]

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[2] 12 U.S.C. § 3414; 15 U.S.C. § 1681u-v; 18 U.S.C. §§ 2709, 3511; 50 U.S.C. § 3162.

[3] *See* 12 U.S.C. § 3414(a)(5)(A) (1986); 18 U.S.C. § 2709 (1986).

[4] Among other changes, Section 505 of the PATRIOT Act significantly broadened the range of officials who could issue NSLs and lowered the standard for their issuance to allow the FBI to obtain information that is "relevant" to an "authorized investigation," 18 U.S.C. § 2709 (b) (2001).

[5] 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 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 in a Changing World: Report and Recommendations from the President's Review Group on Intelligence and Communications Technologies* at 91-93 (2013) ("President's Review Group") (number of NSLs issued in 2012), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12- 12_rg_final_report.pdf; ODNI, *Statistical Transparency Report Regarding Use of National Security Authorities Calendar Year 2017* at 26 (May 2, 2017),

NSLs have also long been a matter of significant public controversy. In a series reports issued between 2007 and 2014, the DOJ Office of the Inspector General (OIG) documented the agency's systematic and extensive misuse of NSLs. The OIG concluded that, left to itself to ensure that legal limits were respected, "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies."[6]

This Court has recognized that the gag orders that accompany NSLs are "especially problematic in light of the active, continuing public debate over NSLs, which has spawned a series of Congressional hearings, academic commentary, and press coverage." *In re NSL 2013*, 930 F. Supp. 2d at 1076. NSL nondisclosure orders shape discourse by preventing recipients themselves from participating in the public dialogue on governmental surveillance and from making true and complete reports to customers, investors, and legislators. Internet companies have employed a number of methods to bring transparency to the government's use of NSLs, including so-called warrant canaries,[7] transparency reports, and lawsuits to challenge the enforcement of NSL gag orders. *See, e.g., Twitter v. Sessions*, 263 F. Supp. 3d 803, 808 (N.D. Cal. 2017) (Twitter seeking to publish transparency report including number of NSLs received); *In re Nat'l Sec. Letter*, 165 F. Supp. 3d 352 (D. Md. 2015) (provider contending NSL gag no longer needed).

Prior to 2015, the NSL statutes had no requirement that the FBI review NSL nondisclosure orders after any length of time to determine whether the FBI still believed recipients should remain gagged, meaning that the orders were often de facto permanent. At least three courts held that the nondisclosure orders authorized by prior versions of the NSL statute violated the First Amendment, only for Congress to amend the statute during the course of litigation. *See, e.g.*, *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), *aff'g in part Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *In re*

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https://www.dni.gov/files/documents/icotr/2018-ASTR----CY2017----FINAL-for-Release-5.4.18.pdf (chart showing NSLs issued 2013-2017).

[6] DOJ, OIG, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* 125 (2007, rereleased with some previously redacted information unredacted 2016), available at https://oig.justice.gov/reports/2016/o1601b.pdf ("2007 OIG Report"); see also 2014 OIG Report 187.

[7] *See* Wendy Knox Everette, *The FBI Has Not Been Here (Watch Very Closely for the Removal of this Sign) Warrant Canaries and First Amendment Protection for Compelled Speech*, 23 George Mason L. Rev. 377 (2016).

NSL 2013, 930 F. Supp. 2d at 1076; *In re NSL 2017*, 863 F.3d at 1119-20.

II. The USA FREEDOM Act Requires FBI to Review NSL Nondisclosure Orders.

In response to public pressure and adverse court rulings, Congress enacted the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015) (USA FREEDOM). USA FREEDOM included reforms designed to address constitutional defects in the NSL statutes.[8] The constitutionality of the amended statutes is the subject of ongoing litigation. *See Under Seal v. Sessions*, Nos. 16-16067, 16-16081, 16-16082 (9th Cir.), *petition for rehearing en banc pending*.

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

Pursuant to this mandate, the FBI developed procedures that "govern the review of the nondisclosure requirement in NSLs and termination of the requirement when the facts no longer support nondisclosure." Termination Procedure for National Security Letter Nondisclosure Requirement at 1, ECF No. 32-3 (citing 18 U.S.C. § 2709(c)) ("NSL Termination Procedures"). The NSL Termination Procedures require the FBI to terminate nondisclosure at the three-year anniversary of the initiation of a full investigation involving an NSL and/or the close of such an investigation "unless the FBI determines that one of the statutory standards for nondisclosure is satisfied." *Id.* at 2. The NSL Termination Procedures also require FBI officials to individually review each NSL issued in an investigation "to determine if the facts no longer support nondisclosure under the statutory standard for imposing a nondisclosure requirement when an NSL is issued." *Id*. at 3. That is, agents reviewing NSLs under the Termination Procedures must once again assess whether permitting an NSL recipient to discuss the fact of receiving an NSL "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

[8] *See* H.R. Rep. No. 114-109, at 26 (2015) (stating that changes to NSL nondisclosure order procedures in the Act were intended address constitutional deficiencies in the NSL statutes noted by *Mukasey*, 549 F.3d 861 (2d Cir. 2008)).

of any person." 18 U.S.C. § 2709(c)(1)(B). When an FBI official determines that "nondisclosure of an NSL is no longer necessary," *i.e.*, the statutory factors permitting the issuance of a nondisclosure order are no longer present, the FBI provides written notice to the NSL recipient that the nondisclosure provision has been terminated ("NSL termination letters").[9] NSL Termination Procedures at 4. The FBI published the NSL Termination Procedures in November 2015, and they became effective in February 2016.

Pursuant to the procedures, the FBI has determined that the nondisclosure requirements accompanying a number of NSLs should no longer remain in effect. Released from the FBI's nondisclosure requirements, a number of recipients, including Google, Microsoft, Twitter, Yahoo, Facebook, Cloudflare and CREDO Mobile have published the underlying NSLs as well as the accompanying termination letter. *See* Crocker Decl. Exs. D (NSL termination letters published by Yahoo); E (termination letter published by Google); F (termination letter published by CloudFlare); G (termination letter published by Facebook).

The government has argued that the NSL Termination Procedures remedy constitutional defects in the NSL statutes, and the Ninth Circuit agreed in part. *In re NSL 2017*, 863 F.3d at 1126.[10] The court acknowledged that even the amendments to the NSL statute in USA FREEDOM raised significant concerns that NSL gag orders of indefinite duration would not be narrowly tailored under the First Amendment, but it found that the NSL Termination Procedures "largely address this concern." *Id.* Given the weight placed by the court on the NSL Termination Procedures, their nature and efficacy is a matter of constitutional significance and of great importance to the public debate surrounding NSLs.

[9] Examples of NSL termination letters produced in response to EFF's FOIA request are included as Exhibits A, B, and C of the Declaration of Andrew Crocker ("Crocker Decl.").

[10] *See also* Gov't Br. at 46-47, *Under Seal v. Lynch*, ECF No. 52, No. 16-16082 (9th Cir. Dec. 9, 2016).

ARGUMENT

I. FOIA Establishes a Presumption of Disclosure, and the Government Bears the Burden of Demonstrating Withheld Information Is Clearly Exempt.

FOIA safeguards the American public's right to know "what their government is up to." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989). "[D]isclosure, not secrecy, is the dominant objective of the Act." Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

FOIA requires disclosure of all agency records at the request of the public unless the records fall within one of nine narrow exemptions. *See* 5 U.S.C. § 552(b). Although FOIA has always presumed that government records are open to public inspection, the recently enacted FOIA Improvement Act of 2016, Pub. L. 114-185, prohibits agencies from withholding records unless (i) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in the statute, or (ii) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A). Thus, not only does FOIA favor disclosure and require exemptions to be narrowly construed, but Section 552(a)(8)(A) also prohibits agencies from using their discretion to broadly withhold records merely because they believe an exemption could technically apply.

Once the agency has received the request, it is obligated to search for and process responsive records, and to disclose any information that does not fall within one of the Act's exemptions. *See* 5 U.S.C. § 552(a)(3), (a)(6). The exemptions "have been consistently given a narrow compass," and agency records that "do not fall within one of the exemptions are 'improperly' withheld." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

In FOIA cases, a court reviews the government's decision to withhold records *de novo*, and the government bears the burden of proving records have been properly withheld. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. Even national security claims do not alter a court's "independent responsibility" to undertake a thorough *de novo* evaluation of the government's withholdings. *Goldberg v. Dep't of State*, 818 F.2d 71, 76-77 (D.C. Cir. 1987) (noting Congress amended FOIA to clarify its "intent that courts act as an independent check on challenged classification decisions").

FOIA disputes involving the propriety of agency withholdings are commonly resolved on motions for summary judgment. *See Animal League Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc). As with any case, summary judgment is proper when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a); *see also Feshbach v. SEC*, 5 F. Supp. 2d 774, 779 (N.D. Cal. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

II. The Government Has Waived Any Reliance on Exemption 7(E) to Withhold Recipients' Names in NSL Termination Letters and Memoranda Determining that an NSL Nondisclosure Order Can Be Terminated.

The names of companies that have been released from NSL nondisclosure orders cannot be withheld under Exemption 7(E) because the FBI has waived the exemption. In the Ninth Circuit, an agency can waive FOIA exemption claims in two distinct ways.

First, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999); *ACLU of N. Cal. v. DOJ*, 880 F.3d 473, 491 (9th Cir. 2018). This includes information withheld under Exemption 7(E), as "FOIA exemptions do not apply once the information is in the public domain." *Hall v. Dep't of Justice*, 552 F. Supp. 2d 23, 30-31 (D.D.C. 2008).

Second, "when an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information[,] then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information." *Watkins v. U.S. Bureau of Customs and Border Protection*, 643 F.3d 1189, 1198 (9th Cir. 2011).

Both waiver circumstances are present here and require the disclosure of company names that the FBI has withheld under Exemption 7(E).

Regarding the public domain waiver, the names of the companies addressed in NSL termination letters are in the public domain for the simple reason that the letters are self-disclosing: the letters inform recipients that they may identify themselves by disclosing "[t]he fact that you received the NSL on a certain date." Crocker Decl. Exs. A, at 1; B, at 1; C, at 1. The termination letters

also explicitly permit recipients to publish the underlying NSL they received. *Id.* Notably, although the FBI routinely requests that recipients who choose to publish NSLs redact the "name and telephone number of the FBI Special Agent included on the NSL," it places no conditions, voluntary or otherwise, on publication of recipient company names. *Id*. at 2.

The names of companies in the letters are preserved in a permanent public record. Each termination letter has been sent to the NSL recipient, a member of the public. As described *supra*, several companies have republished NSL termination letters on their websites. *See, e.g.*, Crocker Decl. Ex. D, at 1, 3, 5 (Yahoo termination letters). Nevertheless, the FBI continues to redact the names of companies in these letters. Other recipients who have not yet republished NSLs and termination letters are free to do so at any time.

Additionally, the FBI has also waived withholding company names under Exemption 7(E) because it has already publicly released the same information, without any legal restrictions, to third parties. *Watkins*, 643 F.3d at 1198. In *Watkins*, a FOIA requester sought notices sent to trademark owners by the Bureau of Customs and Border Protection (CBP) of the seizure of counterfeit goods infringing the recipients' trademarks. *Id*. at 1192. Even though sending a notice to an affected trademark owner is mandated by statute, and the government "imposes no restrictions on the owner's use of the information in the Notice," CBP withheld recipients' names pursuant to FOIA Exemption 4, which protects "privileged and confidential" trade secrets or financial information. *Id*. at 1194, 1197. However, the Ninth Circuit found that the withholding was improper and that CBP had waived its exemption claims because it freely disclosed the notices to third parties without any strings attached to the third parties' ability to further disseminate the information. *Id*. at 1198.

That is the very situation here: Having determined that none of the harms enumerated in the NSL statue are likely to result if NSL recipients reveal their names publicly, the FBI has disclosed this information to third parties (the NSL recipients themselves) without placing limitations on the third parties' ability to further disseminate the information. Under Ninth Circuit law, that is all that is required to waive a FOIA exemption.

The government argues that "to the best of the FBI's knowledge, the majority of the recipients

of those letters have not made the letters public, and those letters have not been aggregated in any publicly available place." Gov't Br. at 21. But this basis for withholding the recipients' names is irrelevant and contrary to binding circuit law in *Watkins*. The relevant action is the Bureau's disclaimer of any interest in continuing to prohibit recipients from speaking when it determines it can terminate the nondisclosure order and transmit the termination letters to recipients, not the recipients' subsequent actions.

The government will likely point to out-of-circuit law regarding the application of waiver doctrine to information covered by Exemption 7(E), such as *Students Against Genocide (SAGE) v. Dep't of State,* 257 F.3d 828 (D.C. Cir. 2001). But even if these cases were applicable and not foreclosed by *Watkins*, they would not alter the analysis. As the Ninth Circuit explained in *Watkins*, "none of these cases presented a scenario in which the government had already provided a no-strings-attached disclosure of the confidential information to a private third party." 643 F.3d at 1197. In *SAGE*, for example, "the government revealed certain classified photos documenting Bosnian Serb atrocities committed in 1995 to the U.N. Security Council. . . . but [the photos] were neither distributed to nor turned over to members' possession for further analysis." *Id.* (citing *SAGE*, 257 F.3d at 836-37). Hence the government retained control over the further dissemination of the photos, unlike *Watkins* where the trademark seizure notices were provided to recipients who could further disseminate them with no strings attached.[11] *Id.* For the same reasons, *SAGE* is unlike the present case, in which the Bureau has determined that public disclosure by NSL recipients would not be harmful and has expressly disclaimed any interest in keeping the information secret by sending the termination letters to NSL recipients.

It is thus irrelevant that that this case involves law enforcement material allegedly covered by Exemption 7(E), rather than the information subject to Exemption 4 in *Watkins*. If the FBI truly wanted to preserve the confidentiality of the company names in the NSL termination letters, it could have imposed restrictions on the further dissemination of this information, as in *SAGE*. It did not. Instead,

[11] Notably, the D.C. Circuit has clarified that its test for waiver is not intended to "establish a uniform, inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought-after material." *Cottone*, 193 F.3d at 555 (D.C. Cir. 1999) (government's playing tapes of wiretaps in open court resulted in waiver).

it left that decision to individual members of the public. Under these circumstances, the FBI must be found to have waived its exemption claims.[12]

III. The FBI Cannot Rely on Exemption 7(E) to Withhold Names of NSL Recipients That It Has Released from Previously Issued Non-Disclosure Orders.

A. The Names of NSL Recipients Cannot Be Withheld Because They Reflect Applications of a Well-Known Law Enforcement Technique.

Even if the FBI had not waived Exemption 7(E), it cannot withhold the names of NSL recipients that it has determined can be released from earlier nondisclosure orders because the documents in which they are identified reflect applications of a well-known law enforcement technique. The Ninth Circuit has repeatedly affirmed that Exemption 7(E) does not apply to publicly known or well-known law enforcement techniques and procedures. *Hamdan v. DOJ*, 797 F.3d 759, 777 (9th Cir. 2015); *Rosenfeld v. DOJ*, 57 F.3d 803, 815 (9th Cir. 1995). The rule also includes records that describe applications of well-known techniques to particular events or investigations. *Hamdan*, 797 F.3d at 777 (rejecting the government's argument that particular use of a well-known technique could be withheld because "accepting it would allow anything to be withheld under Exemption 7(E) because any specific *application* of a known technique would be covered") (emphasis added). Because the FBI's termination of NSLs that it no longer deems necessary is a well-known law enforcement technique, the application of that technique to particular third parties who received NSLs cannot be withheld under Exemption 7(E).

1. NSLs Are a Well-Known Law Enforcement Technique.

The FBI's use of NSLs—and its lifting of nondisclosure orders pursuant to the NSL Termination Procures—are a well-known law enforcement technique. In 2014, then-President Barack Obama discussed how the government uses NSLs in its investigations, how NSLs prohibit recipients from disclosing that they have received them, and how the government was going to "amend how we use national security letters so that this secrecy will not be indefinite." *See* Transcript, *Obama's Speech*

[12] At minimum, the FBI has waived its claims with respect to specific NSL recipients that have published the fact that they received an NSL termination letter, along with copies of the letters themselves and the underlying NSLs. *See* Crocker Decl. ¶¶ 5-11, Exs. D, E, F, G. As explained further below, the Bureau's failure to do so calls into question their duty to segregate and disclose non-exempt records. *See, infra*, at 23-24.

on N.S.A. Phone Surveillance, The New York Times (January 17, 2014).[13] Long before President Obama's speech, the FBI's use of NSLs was well known. As described above, multiple recipients of NSL nondisclosure orders had brought First Amendment challenges in response to receiving them and being gagged, with courts holding that the statutes authorizing NSLs at the time were unconstitutional. *In re NSL 2013*, 930 F. Supp. 2d at 1066 ("the Court finds that the NSL nondisclosure and judicial review provisions suffer from significant constitutional infirmities"); *Mukasey*, 549 F.3d 861 (2d Cir. 2008). This Court has already recognized that NSLs are subject to "active, continuing public debate . . . which has spawned a series of Congressional hearings, academic commentary, and press coverage." *In re NSL 2013*, 930 F. Supp. 2d at 1076; *see also* Charlie Savage, *Justice Dept. Apologizes for Inaccuracy in National Security Letter Case*, The New York Times (Nov. 14, 2014).[14] Thus, the controversy surrounding the FBI's use of NSLs has in part led to them becoming well-known techniques.

Further, the government's own discussions of NSLs shows that they are a well-known law enforcement technique. As described above, the DOJ's Office of Inspector General issued a series of reports between 2007 and 2014 that describe how FBI personnel used and misused NSLs. *See supra* at 3-5. The Bureau in this case largely confirms that NSLs are well-known law enforcement techniques, describing them as "fundamental building blocks in multiple facets of the FBI's work." Gov't Br. at 1. Moreover, the FBI's practice of lifting NSL nondisclosure orders pursuant to the NSL Termination Procedures is well-known; the FBI published the procedures publicly, and the Ninth Circuit pointed to NSL termination letters received by two providers in its decision upholding the post-USA FREEDOM version of the NSL statute. *In re NSL*, 863 F.3d at 1127.

Finally, public efforts by companies and other service providers to discuss receiving NSLs also demonstrate that the technique is well known. Because recipients are initially barred from even revealing the fact that they have received an NSL, many have pushed to be more transparent with their customers, clients, and the general public. This includes litigation seeking to be able to report

[13] Available at https://www.nytimes.com/2014/01/18/us/politics/obamas-speech-on-nsa-phone-surveillance.html.

[14] Available at https://www.nytimes.com/2014/11/15/us/justice-apology-national-security-letters-case.html.

aggregate information about receiving NSLs. *See Twitter*, 263 F. Supp. 3d at 808. Other companies have also published transparency reports that seek to report information about receiving NSLs, as well as publishing specific updates when the FBI terminates nondisclosure orders associated with particular NSLs. Crocker Decl. ¶¶ 5-11, Exs. D, E, F, G.[15]

Because the termination of NSL nondisclosure orders pursuant to the Termination Procedures is an application of a well-known law enforcement technique, the names of the recipients subject to now-terminated nondisclosure orders are themselves an application of the technique. The FBI's withholdings here are similar to the Exemption 7(E) withholdings that the Ninth Circuit rejected in *Rosenfeld*. In that case, the government argued that despite the fact that it was well known that law enforcement used pretext phone calls, Exemption 7(E) could still permit withholding of the application of the technique in a specific instance referenced in withheld documents. *Rosenfeld*, 57 F.3d at 815. The Ninth Circuit rejected the government's argument, recognizing that it "proves too much," and would allow the government to:

> withhold information under Exemption 7(E) under any circumstances, no matter how obvious the investigative practice at issue, simply by saying that the 'investigative technique' at issue is not the practice but the application of the practice to the particular facts underlying that FOIA request.

Id. The Ninth Circuit recently reaffirmed that application of a well-known investigative technique cannot be withheld under Exemption 7(E). *Hamdan*, 797 F.3d at 777.

The Bureau in effect makes the same argument here that the Ninth Circuit has previously rejected. Gov't Br. at 21-22; Seidel Decl. ¶ 52. By withholding the names of particular NSL recipients identified in the termination letters, the government is arguing that the application of the NSL Termination Procedures technique to particular companies can nonetheless be withheld under Exemption 7(E). But just as the specific use of a pretext phone call could not be withheld in *Rosenfeld*, so too the government cannot withhold the specific terminations of NSL nondisclosure orders to

[15] *See*, *e.g.*, United States National Security Letters, Twitter, https://transparency.twitter.com/en/countries/us.html (last visited Oct. 17, 2018); National Security Process, Cloudflare, https://www.cloudflare.com/transparency/ (last visited Oct. 17, 2018); Steve Lippman, *Microsoft releases biannual transparency reports*, Microsoft (April 13, 2017), https://blogs.microsoft.com/on-the-issues/2017/04/13/microsoft-releases-biannual-transparency-reports/#sm.0000851atg8s9fdupjb20xjpmn3ss.

particular providers.

2. The FBI's Mosaic Theory Cannot Be Used to Withhold Application of NSL Termination Letters to Specific Recipients Because It Is a Well-Known Technique.

Because the termination letters at issue here reflect applications of a well-known investigative technique, the Bureau cannot withhold the records on the theory that aggregate disclosure of those records will allow criminals to frustrate law enforcement investigations. Gov't Br. at 21-22; Seidel Decl. ¶ 53. Multiple courts have held that when a technique is well known, agencies cannot use an aggregation, or mosaic, theory for continuing to withhold records describing those techniques.[16] In *Raimondo v. FBI*, 2016 WL 2642038 (N.D. Cal. May 10, 2016), the FBI sought to withhold file numbers under 7(E) on the theory that, even though they were publicly known, under a mosaic theory, suspects could use the numbers in conjunction with other public information to frustrate law enforcement investigations. *Id*. at *9-10. The court rejected the argument, holding that because the FBI did not show that the techniques at issue were secret, it could not withhold the records under a mosaic theory. *Id*. at *10. In *EFF v. CIA*, 2013 WL 5443048 (N.D. Cal. Sept. 30, 2013), the court similarly rejected a mosaic theory claim regarding disclosure of field offices conducting national security investigations, holding that the FBI failed to show "that the information withheld goes beyond a generally known technique." *Id*. at *23. *See ACLU v. FBI*, 2013 WL 3346845, *9 (N.D. Cal. July 1, 2013) ("[T]he FBI's 'mosaic' theory fails to delineate how, in this case, a technique unknown by the public will be revealed. The mere application of a known technique to a particular set of facts is not enough to withhold information under Exemption 7(E).").

Because NSL termination letters are well-known investigative techniques, the potential harm of criminals piecing together the information to frustrate the FBI's activities is insufficient to withhold the records under Exemption 7(E).

Moreover, this is not case in which the FBI can claim that disclosure of the names of NSL

[16] The FBI's mosaic theory is described by Mr. Seidel: "Indeed, disclosure of the rich mosaic of information contained in these documents could reveal the FBI's investigative focus to a target or subject of surveillance, and result in the loss of valuable intelligence and even endanger FBI agents engaged in that investigation on the ground." Seidel Decl. ¶ 47.

recipients released from nondisclosure requirements would reveal the specific means of conducting a technique or would disclose detailed technical analysis of the techniques. *See Hamdan*, 797 F.3d at 777-78 (holding that records describing a specific means of conducting credit searches and surveillance could be withheld under Exemption 7(E)); *Bowen v. FDA*, 925 F.2d 1225, 1229 (9th Cir. 1991). First, the specific means of how the FBI uses NSLs would not be revealed by disclosing the names of recipients that are no longer subject to the statute's nondisclosure order. Because NSLs, their nondisclosure orders, and the requirement that such gag orders be reviewed periodically are authorized by statutes, there is nothing secret about the specific means by which the FBI deploys NSLs and terminates NSL nondisclosure orders that would be revealed by disclosing the third parties' names. *See Hamdan*, 797 F.3d. at 778 (contrasting the specific means of conducting surveillance with application of a well-known technique).

3. The FBI's Reliance on Freedom of the Press Foundation is Misplaced.

Although the FBI relies in large part on the decision in *Freedom of the Press Foundation v. DOJ*, 241 F. Supp. 3d 986 (N.D. Cal. 2017) to support its withholdings under Exemption 7(E), it does not support withholding the names of NSL recipients names that have received termination notices. *See* Gov't Br. at 18, 25.

The case is easily distinguishable because the records withheld by the court concerned non-public means of using NSLs, non-public details on how to analyze information obtained via NSLs, and information that would reveal the *current* investigative focus of the FBI. *Freedom of the Press Foundation*, 241 F. Supp. 3d at 1003. Specifically, the records concerned when and how the FBI can use NSLs in investigations that involve or target journalists. *Id*. at 993, 1003. Those records, however, constitute non-public means of using NSLs or detailed analysis of how to use NSLs in investigations. *Id*. at 1003.

Here, by contrast, the termination letters reveal applications of a well-known technique, *i.e*. removing NSL nondisclosure orders when there is no risk that disclosure would harm a criminal investigation. These applications of NSLs are publicly known, particularly given that the FBI has informed recipients of termination letters that they can speak publicly about receiving an NSL. As

described above, many have. The records at issue here are thus fundamentally different than those withheld in *Freedom of the Press Foundation*.

B. Names of Entities That Received NSL Termination Letters Are Not the Type of Information That Qualifies as Law Enforcement Techniques and Procedures Under Exemption 7(E).

The Bureau cannot withhold the names of NSL recipients in the documents at issue here for another reason: their names do not qualify as techniques or procedures that can be withheld under Exemption 7(E).

This Court and the District Court for the District of Columbia have both held that the names of third parties who actively participate in law enforcement surveillance programs do not qualify for withholding under Exemption 7(E). In *EFF v. DOJ*, 2016 WL 7406429 (N.D. Cal. Dec. 22, 2016), the Court held that the Drug Enforcement Agency could not withhold the names of companies that were "instrumental" to the telephone metadata program known as Hemisphere. *Id*. at *17. The Court in *EFF* largely adopted the reasoning in another case concerning records about Hemisphere, *EPIC v. DEA*, 192 F. Supp. 3d 92, 112-114 (D.D.C. 2016). The *EPIC* court held that company names could not be withheld for a variety of reasons, including that it was already publicly known that AT&T partnered with the government in the program and that the government had failed to show how further disclosure of the information would harm law enforcement. *Id*. at 112-14. Both the *EFF* and *EPIC* courts required disclosure of the company names that the government had withheld despite the fact that the agencies characterized the companies' involvement in the Hemisphere program as instrumental. In short, the documents disclosed in those cases show that the law enforcement program relied on partnering directly with AT&T to facilitate access to telephone call detail records. *See Hemisphere: Law Enforcement's Secret Call Records Deal With AT&T*, EFF.[17]

Because courts have held that the names of private companies directly partnering with law enforcement in surveillance programs cannot be withheld, the Bureau's withholding of the names of NSL recipients are even less justified. NSL recipients are not partners with law enforcement; rather, the NSL statute compels recipients to provide information and remain silent about having received an

[17] *Available at* https://www.eff.org/cases/hemisphere (last visited Oct. 18, 2018).

NSL. If the government cannot withhold the names of companies that are currently partnering with it in a sweeping law enforcement surveillance program, it cannot withhold the names of companies that are *no longer subject* to an NSL nondisclosure order when the FBI has determined that there is no longer a justification to prevent the recipient from identifying that it received an NSL.

Moreover, a survey of the caselaw confirms that company names are not the type of information that Exemption 7(E) was designed to protect. Although the Ninth Circuit has not defined what constitutes a technique or procedure under Exemption 7(E), other courts have defined techniques and procedures as "how law enforcement officials go about investigating a crime." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). Examples of techniques and procedures that reveal how law enforcement investigates crimes include:

- Agency internal numbering and coding that reveals the specific types of crimes being investigated. *Pickard v. DOJ*, 217 F. Supp. 3d 1081 (N.D. Cal. 2016); *McKneely v. U.S. DOJ*, 132 F. Supp. 3d 44 (D.D.C. 2015); *Petrucelli v. DOJ*, 106 F. Supp. 3d 129 (D.D.C. 2015); *Ortiz v. United States*, 67 F. Supp. 3d 109 (D.D.C. 2014); *McRae v. U.S. DOJ*, 869 F. Supp. 2d 151 (D.D.C. 2012).
- Documents that describe particular types of law enforcement investigations. *Freedom of the Press Foundation*, 241 F. Supp. 3d 986; *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005); *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66 (D.D.C. 2012).
- Documents describing methods of law enforcement investigations. *Blackwell v. FBI*, 680 F. Supp. 2d 79 (D.D.C. 2010); *Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C. 2003); *Shapiro v. U.S. DOJ*, 893 F.3d 796 (D.C. Cir. 2018).
- Law enforcement notes or other materials generated as part of investigating crime. *Holt v. U.S. DOJ*, 734 F. Supp. 2d 28 (D.D.C. 2010); *George v. IRS*, 2007 WL 1450309 (N.D. Cal. May 14, 2007).
- Acceptable settlement ranges to close tax investigations. *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009).

The above examples underscore how a private company's name is not a technique or procedure in any sense of the terms. Because the names of companies withheld here do not themselves disclose a method of law enforcement investigation or how the Bureau goes about investigating crime, they cannot qualify for withholding under Exemption 7(E).

C. The FBI Has Failed to Meet Its Burden to Show that Disclosing the Identities of NSL Recipients that the Bureau Itself Determined Should Be Released from Gag Orders Would be Harmful.

Finally, the Bureau has failed to meet its burden to withhold the names of NSL recipients under Exemption 7(E) for two additional reasons.

First, the Bureau fails to explain how the potential harm from disclosing NSL recipients' names remains even after agency officials have determined that the reasons it previously prevented recipients from disclosing receipt of an NSL are no longer present. The FBI's failure to account for its own officials' conclusions regarding the lack of harm that would result from public disclosure of the NSL recipients' identities renders its exemption claim insufficient. *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998) (holding that a declaration's insufficiency can stem from a "failure to account for contrary record evidence").

Second, the FBI's declarations fail to logically show how harm would result from disclosure and fall within the reach of Exemption 7(E) in light of Bureau officials' determinations in the records at issue here that NSL recipients can publicly disclose the fact that they received an NSL. *See King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987) (holding agencies must demonstrate that material withheld "is logically within the domain of the exemption claimed"); *see also Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) ("To justify withholding, the government must provide tailored reasons in response to a FOIA request").

1. The FBI Has Failed to Justify Nondisclosure in Light of Its Own Determinations that NSL Recipients' Speaking Would Not Be Harmful.

As explained above, before including a nondisclosure order with an NSL, senior FBI personnel must certify that a recipient's disclose of the letter might pose a danger to national security, interfere with an ongoing investigation, interfere with diplomatic relations, or pose a danger to the life and safety of any person. 18 U.S.C. § 2709(c)(1)(B). Under USA FREEDOM and the NSL Termination

Procedures, the FBI reviews previously issued nondisclosure orders and determines whether those potential harms still exist and continue to justify nondisclosure. *See* NSL Termination Procedures at 4. And when FBI personnel determine that they can terminate a nondisclosure order, they are concluding that the statutory factors that originally supported nondisclosure are no longer present. *Id*. The Bureau then notifies the NSL recipient that it is terminating the nondisclosure order. *Id*.

This process can be seen in a document released in response to EFF's FOIA request. In an Electronic Communication ("EC") the FBI produced that memorializes a conclusion that a particular NSL nondisclosure order can be terminated, a senior FBI official states:

> I, the senior official approving this EC, certify that disclosure of the fact that the FBI has sought or obtained access to certain records [redacted] will not result in one or more of the following:
>
> - 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.

Crocker Decl. Ex. H, at 2. The senior FBI official authoring the EC goes on to state, "I understand that by terminating the NSL nondisclosure requirement, [. . .] the NSL recipient may release a copy of the NSL to the public, for example, by posting a copy of the NSL on the Internet, thus exposing the name of the person and the facility targeted." *Id*. The FBI officials concludes, "[n]onetheless, the nondisclosure requirement [redacted] is no longer necessary." *Id*. EFF understands that similar memoranda are issued in every case in which the FBI determines it will terminate an NSL nondisclosure order, *i.e.*, FBI officials are making similar conclusions that nondisclosure will not be harmful in every instance prior to the FBI issuing the termination letters at issue here.

Despite FBI officials making individualized determinations regarding the *absence* of a risk of the enumerated harms described above, including by having the NSL recipients publicly disclose receiving an NSL, the Bureau here withholds the names of NSL recipients that have received termination notices.

The Bureau's brief and its declarant make no mention of the fact that in issuing all of the termination letters at issue, its personnel have previously made a determination regarding the absence

of harm from disclosure. This silence alone demonstrates the FBI's failure to meet its burden to withhold the records. *Campbell v. DOJ*, 164 F.3d at 30. The closest the FBI gets to making such a claim is when its declarant states that "[a]lthough the function of such letters is to discontinue nondisclosure requirements, to the best of the FBI's knowledge, the majority of the recipients of those letters have not made the letters public, and those letters have not been aggregated in any publicly available place." Seidel Decl. ¶ 53.

Again, the fact that some recipients of NSL termination letters have not made them public is irrelevant because the FBI has already determined that there is no longer a need to maintain nondisclosure. At the moment the FBI determined that nondisclosure for particular NSL recipients was no longer justified and notified them of that fact, the Bureau was also determining that harm to its investigations and functions was not likely to occur.

In other words, the senior FBI officials' determinations to release NSL recipients from their nondisclosure prohibitions are necessarily determinations that the public disclosure of those recipients' identities would not be harmful. As FOIA courts have recognized in other contexts, once the FBI decided that nondisclosure was no longer justified and informed NSL recipients of that fact, "[t]he horse has already left the barn." *Freeman v. Bureau of Land Management*, 526 F.Supp.2d 1178, 1193 (D. Or. 2007). The Bureau thus cannot provide after-the-fact justifications premised on potential harm to its investigative efforts when its officials have already determined that no such harm exists in permitting NSL recipients to disclose that the letters were used in investigations.

The Bureau's argument that the aggregate disclosure of all of the NSL recipients' identities would be harmful similarly fails because the FBI has already, in aggregate, told the recipients that there is no longer a justification under section 2709(c) that prevents them from disclosing their identities. *See* Gov't Br. at 21-23; Seidel Decl. ¶¶ 52-53. Mr. Seidel states that disclosure of the identities of the more than 700 providers that have received termination notices "would be a powerful tool for those seeking to learn the FBI's methods in using NSLs." *Id* at ¶ 53. The FBI, however, has already determined that it would not be harmful to allow these exact providers who received termination notices to speak.

2. The Bureau Fails to Logically Demonstrate that the Names of NSL Recipients Can Be Withheld Under Exemption 7(E).

The Bureau's arguments regarding withholding the names of NSL recipients who received termination notices is illogical. Although in the Ninth Circuit, agencies claiming Exemption 7(E) to withhold law enforcement techniques and procedures do not have to demonstrate a risk of circumvention of law, *Hamdan*, 797 F.3d at 778, their declarations and other evidence must still logically demonstrate that the withheld information falls within Exemption 7(E). *King*, 830 F.2d at 217; *Wiener v. FBI*, 943 F.2d 972, 977-78 (9th Cir. 1991) (holding that to meet its burden under FOIA, an agency must provide a detailed explanation showing how disclosure of the particular document would damage the interest protected by the FOIA exemption).

The FBI has not met the logical and detailed showing required by FOIA. The Bureau claims that if the names of NSL recipients who received termination notices are disclosed in this case, "the totality of the data could be used to piece together the method by which the FBI chooses to employ NSLs, and therefore could be used by criminals to circumvent the FBI's investigative techniques." Seidel Decl. ¶ 53; *see also* Gov't Br. 21-23. Mr. Seidel then provides a hypothetical example in which the aggregated disclosure of NSL recipients who received termination notices would allow a criminal to "deduce that provider A of a service is more frequently targeted by the FBI for NSLs than provider B, and would utilize the information compiled to avoid detection." Seidel Decl. ¶ 53.

The argument ignores what information is actually being disclosed by the termination letters and how little they reveal regarding the FBI's overall use of NSLs. The statutes authorizing NSLs and the NSL Termination Procedures permit the FBI to maintain nondisclosure orders for NSLs in which they believe at least one of the enumerated harms may result should the recipient not be barred from identifying that it received a particular NSL. The termination letters thus reveal *only* circumstances in which the FBI believes nondisclosure is no longer harmful, a very small subset of the total NSLs the FBI issues.

The FBI's argument that disclosure of the identities of NSL termination notice recipients will disclose "the frequency with which different companies receive NSLs," which "could inform criminals and adversaries which companies they should (or should not) do business with in order to avoid

heightened scrutiny by the FBI" is similarly unsupported. Seidel Decl. ¶ 53.

First, the FBI's claims are quite similar to those made in another case involving an NSL that the court rejected, holding that "the Government has not demonstrated a good reason to believe that potential targets of national security investigations will change their behavior to evade detection." *Merrill v. Lynch*, 151 F. Supp. 3d 342, 353 (S.D.N.Y. 2015). This Court should also reject them.

Second, the argument assumes that providers subject to NSLs can decide for themselves whether they can respond to the NSLs they receive, such that a criminal learning that some providers received NSLs must mean that other providers have not. But the NSL statutes compel a variety of third parties to respond to FBI demands, meaning that any provider is subject to receiving one, and thus the public is generally aware of the fact that, for example, communications service providers can receive NSLs. *See EPIC*, 192 F. Supp. 3d at 112 (describing how the "government's use of telephone interception and data collection for law enforcement purposes is known to the public").

Third, the argument entails that a criminal could infer based on the public disclosure of a subset of NSL recipients that the past data bears on the likelihood that those same parties will receive another NSL, or that other providers are unlikely to receive similar requests in the future. This assumes that the FBI targets particular providers in its investigations, rather than seeking data from providers that might have information about the targets of their national security investigations. Mr. Seidel confirms that the FBI issues NSLs to investigate targets, not specific providers, when he describes the Bureau's use of NSLs as helping to develop "communication or financial links between subjects of FBI investigations and between those subjects and others." Seidel Decl. ¶ 13. The *Merrill* court recognized the illogic of a similar claim the FBI made in that case: disclosing the specific time periods in which an NSL can seek certain records would allow a potential target to modify its behavior to potentially evade an NSL. Rejecting the argument as unpersuasive, the court held that a "'potential terrorist' does not know when, if ever, the FBI will issue a related NSL." *Merrill*, 151 F. Supp. 3d at 352, n. 8.[18]

Given the FBI's failures to demonstrate that the names of NSL recipients logically fall within

[18] The reported version of the *Merrill* decision contains redactions to this particular footnote that were subsequently lifted. A complete version of the opinion is available at https://www.aclu.org/legal-document/merrill-v-lynch-decision-vacating-gag-order.

Exemption 7(E), it cannot withhold that information here.

IV. The FBI Has Failed to Segregate and Release Non-Exempt Materials as Required by FOIA Because It Has Not Released the Identities of Any NSL Recipients That Have Received Termination Letters.

The FBI's refusal to release a single name of a provider that has received an NSL termination letter—especially the names of providers that have publicly stated that they received such notice from the Bureau—demonstrates that it has failed to comply with FOIA's segregability requirement. Because the "focus of the FOIA is information, not documents," FOIA ensures that agencies do not use exemption claims to broadly shield otherwise releasable information from disclosure, even in otherwise exempt records. *Mead Data Cent., Inc. v. Dep't of the Air Force,* 566 F.2d 242, 260 (D.C. Cir. 1977). FOIA thus requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). This prevents agencies from relying on "sweeping, generalized claims of exemption for documents," even if some portions of those documents could be disclosed. *Mead Data Cent., Inc.*, 566 F.2d at 260.

The FBI has failed to comply with this FOIA requirement in at least two ways.

First, the FBI has withheld the names of NSL termination letter recipients that have made public the fact that they are no longer bound by an NSL nondisclosure order. *See*, *supra* at 11, n. 12; Crocker Decl. ¶¶ 5-11, Exs. D, E, F, G. The Bureau's failure to acknowledge that some of the material it withholds has been published and distributed widely, and to explain why that information was not similarly disclosed here, renders its conclusory claims insufficient. Gov't Br. at 25; Seidel Decl. ¶¶ 19, 62. Moreover, the oversight, intentional or not, rebuts the presumption that the FBI has complied with its segregability obligations and demonstrates that the FBI's declaration is not sufficiently detailed as required by FOIA. *Hamdan*, 797 F.3d 779 (holding that the presumption of good faith applies only when agency affidavits are sufficiently detailed).

Second, the FBI's claims regarding its compliance with FOIA's segregability requirements are far too conclusory in light of its withholding of every single provider name in the documents at issue here. *Pacific Fisheries, Inc. v. U.S.*, 539 F.3d 1143 (9th Cir. 2008). The FBI does not explain why it

cannot release a single provider name in the withheld termination letters or other documents that describe providers which the FBI has determined it no longer needs to gag. That is, even if the FBI's arguments regarding the aggregate disclosure of NSL recipients' identities were justified (which it is not) those concerns do not by themselves justify completely withholding *all* provider identities in the withheld records. Because the FBI's declaration does not explain how disclosure of even a single identity—including those providers that have themselves disclosed receiving an NSL—would constitute exempt information under FOIA, its declarations fall short of meeting its segregability obligations.

CONCLUSION

For the foregoing reasons, EFF respectfully requests that this Court grant its cross-motion for partial summary judgment, deny the FBI's motion for partial summary judgment, and order the Bureau to disclose the names of NSL recipients that have received termination letters.

DATED: October 29, 2018

Respectfully submitted,

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