THE // INTERCEPT

FBI Flouts Obama Directive To Limit Gag Orders On National Security Letters

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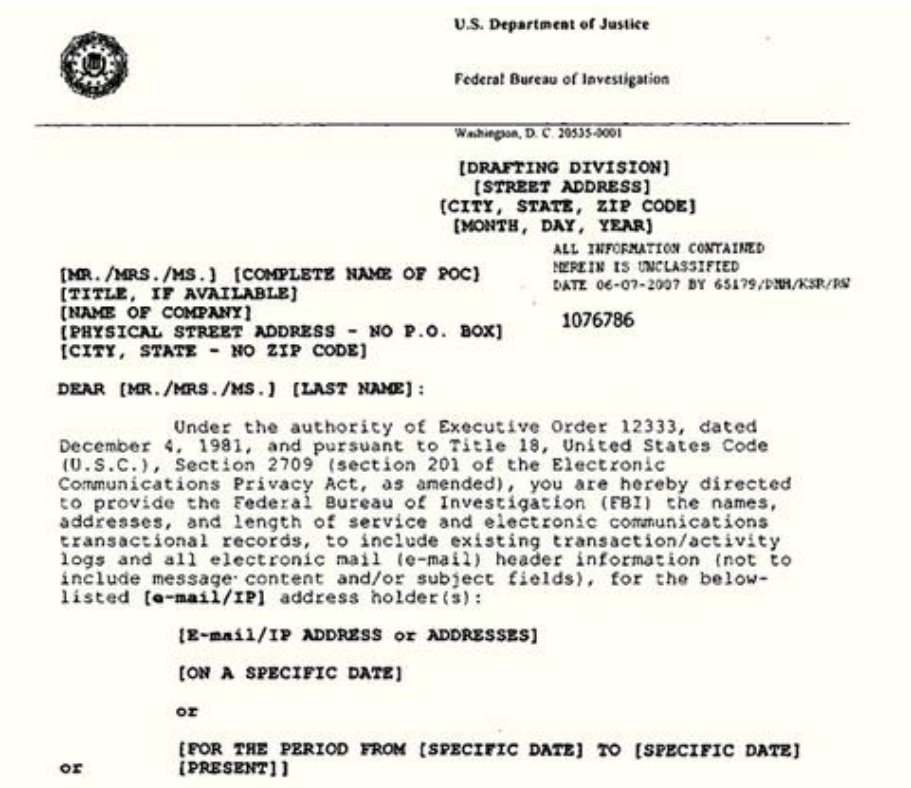
Despite the post-Snowden spotlight on mass surveillance, the intelligence community's easiest end-run around the Fourth Amendment since 2001 has been something called a National Security Letter.

FBI agents can demand that an Internet service provider, telephone company, or financial institution turn over its records on any number of people — without any judicial review whatsoever — simply by writing a letter that says the information is needed for national security purposes. The FBI at one point was cranking out over 50,000 such letters a year; by the latest count, it still issues about 60 a day.

The letters look like this:



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

[DRAFTING DIVISION]
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
[MONTH, DAY, YEAR]

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 06-07-2007 BY 65179/DMH/KSR/RW

[MR./MRS./MS.] [COMPLETE NAME OF POC]
[TITLE, IF AVAILABLE]
[NAME OF COMPANY]
[PHYSICAL STREET ADDRESS - NO P.O. BOX]
[CITY, STATE - NO ZIP CODE]

1076786

DEAR [MR./MRS./MS.] [LAST NAME]:

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (section 201 of the Electronic Communications Privacy Act, as amended), you are hereby directed to provide the Federal Bureau of Investigation (FBI) the names, addresses, and length of service and electronic communications transactional records, to include existing transaction/activity logs and all electronic mail (e-mail) header information (not to include message content and/or subject fields), for the below-listed [e-mail/IP] address holder(s):

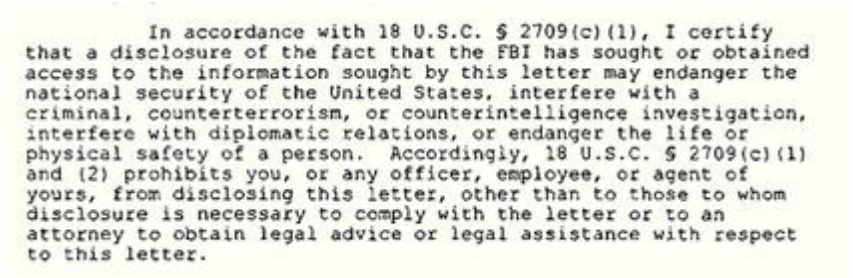
[E-mail/IP ADDRESS or ADDRESSES]

[ON A SPECIFIC DATE]

or

[FOR THE PERIOD FROM [SPECIFIC DATE] TO [SPECIFIC DATE]
or [PRESENT]]

Recipients are legally required to comply — but it doesn't stop there. They also aren't allowed to mention the order to anyone, least of all the person whose data is being searched. Ever. That's because National Security Letters almost always come with eternal gag orders. Here's that part:



In accordance with 18 U.S.C. § 2709(c)(1), I certify that a disclosure of the fact that the FBI has sought or obtained access to the information sought by this letter may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of a person. Accordingly, 18 U.S.C. § 2709(c)(1) and (2) prohibits you, or any officer, employee, or agent of yours, from disclosing this letter, other than to those to whom disclosure is necessary to comply with the letter or to an attorney to obtain legal advice or legal assistance with respect to this letter.

That means the NSL process utterly disregards the First Amendment as well.

More than a year ago, President Obama announced that he was ordering the Justice Department to terminate gag orders "within a fixed time unless the government demonstrates a real need for further secrecy".

And on Feb. 3, when the Office of the Director of National Intelligence announced a handful of baby steps resulting from its "comprehensive effort to examine and enhance [its] privacy and civil liberty protections" one of the most concrete was — finally — to cap the gag orders:

> *In response to the President's new direction, the FBI will now presumptively terminate National Security Letter nondisclosure orders at the earlier of three years after the opening of a fully predicated investigation or the investigation's close.*
>
> *Continued nondisclosures orders beyond this period are permitted only if a Special Agent in Charge or a Deputy Assistant Director determines that the statutory standards for nondisclosure continue to be satisfied and that the case agent has justified, in writing, why continued nondisclosure is appropriate.*

Despite the use of the word "now" in that first sentence, however, the FBI has yet to do any such thing. It has not announced any such change, nor explained how it will implement it, or when.

Media inquiries were greeted with stalling and, finally, a no comment — ostensibly on advice of legal counsel.

"There is pending litigation that deals with a lot of the same questions you're asking, out of the Ninth Circuit," FBI spokesman Chris Allen told me. "So for now, we'll just have to decline to comment."

FBI lawyers are working on a court filing for that case, and "it will address" the new policy, he said. He would not say when to expect it.

There is indeed a significant case currently before the federal appeals court in San Francisco. Oral arguments were in October. A decision could come any time.

But in that case, the Electronic Frontier Foundation (EFF), which is representing two unnamed communications companies that received NSLs, is calling for the entire NSL statute to be thrown out as unconstitutional – not for a tweak to the gag. And it has a March 2013 district court ruling in its favor.

"The gag is a prior restraint under the First Amendment, and prior restraints have to meet an extremely high burden," said Andrew Crocker, a legal fellow at EFF. That means going to court and meeting the burden of proof – not just signing a letter.

Or as the Cato Institute's Julian Sanchez put it, "To have such a low bar for denying persons or companies the right to speak about government orders they have been served with is anathema. And it is not very good for accountability."

In a separate case, a wide range of media companies (including First Look Media, the non-profit digital media venture that produces *The Intercept*) are supporting a lawsuit filed by Twitter, demanding the right to say specifically how many NSLs it has received.

But simply releasing companies from a gag doesn't assure the kind of accountability that privacy advocates are saying is required by the Constitution.

"What the public has to remember is a NSL is asking for your information, but it's not asking it from you," said Michael German, a former FBI agent who is now a fellow with the Brennan Center for Justice. "The vast majority of these things go to the very large telecommunications and financial companies who have a large stake in maintaining a good relationship with the government because they're heavily regulated entities."

So, German said, "the number of NSLs that would be exposed as a result of the release of the gag order is probably very few. The person whose records are being obtained is the one who should receive some notification."

A time limit on gags going forward also raises the question of whether past gag orders will now be withdrawn. "Obviously there are at this point literally hundreds of thousands of National Security Letters that are more than 3 years old," said Sanchez. Individual review is therefore unlikely, but there ought to be some recourse, he said. And the further back you go, "it becomes increasingly implausible that a significant percentage of those are going to entail some dire national security risk."

The NSL program has a troubled history. The absolute secrecy of the program and resulting lack of accountability led to systemic abuse as documented by repeated inspector-general investigations, including improperly authorized NSLs, factual misstatements in the NSLs, improper requests under NSL statutes, requests for information based on First Amendment protected activity, "after-the-fact" blanket NSLs to "cover" illegal requests, and hundreds of NSLs for "community of interest" or "calling circle" information without any determination that the telephone numbers were relevant to authorized national security investigations.

Obama's own hand-selected "Review Group on Intelligence and Communications Technologies" recommended in December 2013 that NSLs should only be issued after judicial review – just like warrants – and that any gag should end within 180 days barring judicial re-approval.

But FBI director James Comey objected to the idea, calling NSLs "a very important tool that is essential to the work we do." His argument evidently prevailed with Obama.

NSLs have managed to stay largely under the American public's radar. But, Crocker says, "pretty much every time I bring it up and give the thumbnail, people are shocked. Then you go into how many are issued every year, and they go crazy."