


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK


AMERICAN CIVIL LIBERTIES UNION;
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States;
ROBERT MUELLER, in his official
capacity as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

04 Civ. 2614 (VM)

SEALED

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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May 17, 2004

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I.

[REDACTED]

II. The FBI has served NSLs on [REDACTED] businesses.

- A. The government has refused to provide information to the public on the number of NSLs served. Beeson Decl. ¶31; Beeson Decl. Exh. 9.
- B. The ACLU obtained a document through a Freedom of Information Act (FOIA) request entitled "Transactional Records NSLs Since 10/26/2001." The document appears to be a list of National Security Letters issued by the FBI between October 26, 2001 and January 21, 2003. Beeson Decl. Exh. 9.
- C. The ACLU obtained another document through a FOIA request, entitled "New Legislation / Revisions to FCI/IT Legal Authorities / National Security Letters," which is an internal FBI memorandum dated October 26, 2001, discussing the FBI's power to issue NSLs. Beeson Decl. Exh. 10.
- D. The ACLU obtained another document through a FOIA request, entitled "National Security Letter Matters," which is an internal FBI memorandum dated November 28, 2001, discussing the FBI's power to issue NSLs. Beeson Decl. Exh. 11.

III. The FBI may use NSLs to obtain information from a wide range of electronic communication service providers.

- A. The FBI may use NSLs to obtain information from Internet Service Providers, such as America Online, who connect individuals and businesses to the Internet for a fee. Garfinkel Decl. ¶22.
- B. The FBI may use NSLs to obtain information from any business or organization which has a web site that enables users to send messages through the web site. *Id.* ¶23.
- C. The FBI may use NSLs to obtain information from advocacy organizations such as the American Arab Anti-Discrimination Committee, the National Rifle Association, and Moveon.org, which enable users of their web sites to send e-mails to public officials and others. *Id.*
- D. The FBI may use NSLs to obtain information from any organization or business that provides Internet connectivity to its employees. *Id.* ¶24

- E. The FBI may use NSLs to obtain information from schools, colleges, and universities, most of which operate both web sites and computer networks that enable users to access the Internet. *Id.* ¶25.
- F. The FBI may use NSLs to obtain information from companies such as Google and Yahoo that operate search engines and online directories. *Id.* ¶26.
- G. In its response to questions submitted by the House Judiciary Committee to the Attorney General on USA Patriot Act Implementation, the Justice Department indicated that NSLs may be used to obtain information from public libraries, bookstores, or newspapers. Beeson Decl. Exh. 12.

IV. The FBI may use NSLs to obtain a wide range of records about Internet users from electronic communication service providers.

[REDACTED]

[REDACTED]

- C. The FBI may use NSLs to obtain information about Internet users including a subscriber's name, address, telephone number, account name, e-mail addresses, and dates of service. Garfinkel Decl. ¶¶31-32; [REDACTED] Decl. Exh. 1.
- D. The FBI may use NSLs to obtain credit card and billing information about Internet users. Garfinkel Decl. ¶¶32-33; [REDACTED] Decl. Exh. 1.
- E. The FBI may use NSLs to obtain log files that keep track of every e-mail message that is sent or received. The logs can include the "to", "from," and "subject" lines of every message. The information contained in log files can include the name of the organization associated with the sender or recipient's e-mail address, the subject matter of the e-mails, the name of the web site, chat group or list-serve to which the message is being posted, and any descriptive message that the user puts into his or her e-mail name. Garfinkel Decl. ¶33; [REDACTED] Decl. Exh. 1.
- F. The FBI may use NSLs to obtain information about an Internet user's web transactions, including the name of every web page accessed, and information about the page's content. Garfinkel Decl. ¶34; [REDACTED] Decl. Exh. 1.

V. Internet users commonly use pseudonyms to communicate anonymously on the Internet.

- A. On the Internet, it is common for users to use pseudonyms rather than their true identities. Garfinkel Decl. ¶20.
- B. Anonymity encourages the uninhibited exchange of ideas and opinions among Internet users. *Id.*; [REDACTED] Decl. ¶4.
- C. Using a pseudonym allows speakers to discuss embarrassing, sensitive or controversial subjects without fear of retaliation or reprisal. [REDACTED] Decl. ¶4.

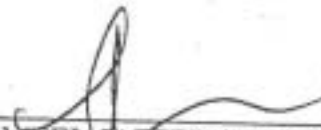
VI. Electronic communication service providers and their agents have no way to know what the gag provision prohibits them from saying.

[REDACTED]

- B. The government has provided no clear guidance [REDACTED] regarding what the gag provision prohibits [REDACTED] disclosing. [REDACTED] Decl. ¶¶20-21; Beeson Decl. ¶11.
- C. The government has taken inconsistent positions on the scope of the gag provision. Beeson Decl. ¶¶12-15; Beeson Decl. Exhs. 6-8; Romero Decl. ¶19.
- VII. The gag provision prohibits the disclosure of a great deal of non-sensitive information.
- A. Plaintiffs filed the complaint in this case under seal to avoid violating the gag provision. Beeson Decl. ¶2; Beeson Decl. Exh. 1.
- B. [REDACTED]
- C. [REDACTED]
- D. The gag provision has prevented the plaintiffs from disclosing information already available to the public. Romero Decl. ¶¶19, 23, Romero Decl. Exh. 1; Beeson Decl. ¶¶7-8, 11-14, 17; Beeson Decl. Exhs. 2-8.
- E. The gag provision has prevented the plaintiffs from disclosing that this case [REDACTED] Beeson Decl. ¶18; Beeson Decl. Exhs. 2-8.
- F. The gag provision has prevented the plaintiffs from disclosing the fact that the case involves [REDACTED] information or implicates [REDACTED] *Id.* ¶¶19-20; Beeson Decl. Exhs. 2-8.
- G. [REDACTED]
- H. The gag provision has prevented [REDACTED] from disclosing non-sensitive information to the press and the public. [REDACTED] Decl. ¶¶11, 21-30; Beeson Decl. ¶¶7-11, 19-26; Beeson Decl. Exhs. 2-8, 13.
- I. The gag provision has prevented the ACLU and ACLUF from providing non-sensitive information to the public, the press, members of Congress, and ACLU staff, members, and donors. Romero Decl. ¶¶17-27; Romero Exh. 2-3; Beeson Decl. ¶¶7-11, 19-26; Beeson Decl. Exhs. 2-8, 13.
- J. [REDACTED]
- VIII. The gag provision undermines the business relationships between electronic communication service providers and their clients and colleagues.
- A. [REDACTED]
- B. The gag provision has undermined the guaranty of privacy that [REDACTED] makes to its clients. *Id.* ¶¶22-25.

- C. The gag provision has prevented [REDACTED] from communicating with other electronic communication service providers about [REDACTED] NSLs. *Id.* ¶¶26-27.
- IX. The gag provision prevents the public, the press, and Congress from obtaining facts essential to the ongoing debate about the legitimacy of government powers under the NSL power and the Patriot Act. Romero Decl. ¶18, 20-22, 26-27; [REDACTED] Decl. ¶¶23-30.

Respectfully submitted,



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