

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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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 E. CAPRONI, in her official  
capacity as General Counsel of the Federal  
Bureau of Investigation.

Defendants.  
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04 Civ. 2614 (VM)

~~Under Seal~~ REDACTED

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION  
TO LIFT THE NONDISCLOSURE REQUIREMENT AS TO THE  
ATTACHMENT TO THE NATIONAL SECURITY LETTER**

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### **Preliminary Statement**

Defendants Eric Holder, Jr., Attorney General of the United States of America, Robert Mueller, III, Director of the Federal Bureau of Investigation ("FBI"), and Valerie Caproni, General Counsel of the FBI (collectively, the "Government"), respectfully submit this memorandum of law in opposition to plaintiffs' motion to lift the nondisclosure requirement with respect to the Attachment to the National Security Letter ("NSL") served upon plaintiff John Doe.

Through the Declaration of Arthur M. Cummings II, Executive Assistant Director of the National Security Branch of the FBI, the Government has met its burden of showing that continued secrecy is necessary with respect to the NSL Attachment. The Cummings Declaration details why release of the text in the NSL Attachment that provides guidance to the recipient as to the types of information that may be responsive to the NSL could compromise the specific investigation of the target of the NSL as well as other ongoing and future national security investigations. In particular, disclosing this information would reveal to current subjects of national security investigations and our adversaries the types of electronic transactional records sought by the NSL, as well as the particular items of information that are considered important by the FBI for investigative purposes. The information released thus would provide subjects of national security investigations with insight into the information that the FBI may have obtained pursuant to an NSL, would risk disclosure of intelligence methods used by the FBI in national security investigations, and could cause this, or any, target of an NSL to change his or her behavior when dealing with internet service providers to avoid providing the types of information that the Government can access.

Plaintiffs' unsupported surmise that release of the NSL Attachment would not provide any information useful to the target or any other person under investigation clearly fails in light of the FBI's considered, expert judgment. Accordingly, plaintiffs' motion should be denied.

### **Background**

In *John Doe, Inc. v. Mukasey*, the Second Circuit set forth the legal standards governing challenges to the nondisclosure requirements imposed by NSLs, and remanded this case to the Court "so that the Government may have an opportunity to sustain its burden of proof and satisfy the constitutional standards [the Circuit had] outlined for maintaining the disclosure requirement." 549 F.3d 861, 885 (2d Cir. 2008). Accordingly, on June 17, 2009, the Government filed a certification by the deputy assistant director of the FBI that disclosure of the NSL at issue in this case may result in harms enumerated in 18 U.S.C. § 2709(c). In support of that certification, the Government also filed a classified ex parte declaration by an FBI Supervisory Special Agent explaining why disclosure of the NSL may result in those harms.

Plaintiffs sought access to the classified ex parte declaration, an application the Court denied on August 5, 2009, except the Court directed the Government to provide plaintiffs with a redacted version and an unclassified summary of the declaration. On October 20, 2009, the Court issued a Decision and Order denying plaintiffs' motion to lift the nondisclosure requirement with respect to the NSL issued to plaintiff Doe, the Attachment to that NSL, and the identity of plaintiff Doe. Doe v. Holder, \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 3378524 (S.D.N.Y. Oct. 20, 2009). The Court ruled that the Government had "demonstrated that a good reason exists to believe that disclosure [of the NSL] may result in a harm related to an authorized ongoing investigation to protect against international terrorism or clandestine intelligence activities." Id.

at \*5. The Court further found that the Government had demonstrated that “the link between disclosure and the risk of harm is substantial.” Id.

On the basis of the in camera declaration, the Court also found that “there is a reasonable likelihood that knowledge of Doe’s identity could inform the Government’s target that he or she is still under active investigation.” Id. Finally, treating the NSL Attachment as part of the NSL issued to Doe, the Court denied plaintiffs’ request to unseal the Attachment. Id.

On November 3, 2009, plaintiffs moved to reconsider the portion of the Court’s order that pertained to the continued nondisclosure of the NSL Attachment. On December 23, 2009, the Court issued a Memo Endorsement granting plaintiffs’ motion for partial reconsideration and inviting the parties to submit additional arguments on the issue raised by plaintiffs.

**ARGUMENT**

**A. Governing Legal Standards**

To establish the continuing need for nondisclosure of the text of the NSL Attachment that sets forth the types of information that may be responsive to the NSL, the Government must demonstrate that there is “a good reason to believe that disclosure may risk one of the enumerated harms” in 18 U.S.C. § 2709. Doe, 549 F.3d at 876; accord Doe v. Holder, 2009 WL 3378524, at \*2-\*3. The enumerated harms are “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.” 18 U.S.C. § 2709(c). Moreover, the enumerated harm “must be related to an ‘authorized investigation to protect against international terrorism or clandestine intelligence activities.’” Doe, 549 F.3d at 876 (quoting 18 U.S.C. § 2709(b)(1), (2)).

To demonstrate why disclosure would risk an enumerated harm, “the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on in camera presentations where appropriate) that the link between disclosure and risk of harm is substantial.” Doe, 549 F.3d at 881; accord Doe v. Holder, 2009 WL 3378524, at \*3. While the Court may not uphold a nondisclosure requirement based solely on a conclusory assurance by the Government, it need only “requir[e] some elaboration” beyond the mere assertion of necessity. Doe, 549 F.3d at 881. In evaluating the need for nondisclosure, the district court must “normally defer to the Government’s considered assessment of why disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities.” Id.; see also id. at 871 (“The national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials.”). This deferential standard recognizes the Executive Branch’s expertise (and the judicial branch’s lack of expertise) in law enforcement and national security matters. Id. at 881; see also id. at 882 (the “Executive Branch’s judgment on matters of national security “is not to be second-guessed, but a court must receive some indication that the judgment has been soundly reached”); id. at 871 (“Courts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national affairs, and the Supreme Court has acknowledged that terrorism might provide the basis for arguments for heightened deference to the judgments of the political branches with respect to matters of national security.”) (internal quotation marks and citation omitted).

**B. The Cummings Declaration Demonstrates That Disclosure of the NSL Attachment Would Risk Harm to an Authorized Terrorism or Counterintelligence Investigation**

The Declaration of Arthur M. Cummings II clearly satisfies the Government's burden of demonstrating a good reason to believe that disclosure of the NSL Attachment may result in a harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activities. As explained by Director Cummings, the NSL Attachment provides specific detail as to the types of electronic communication transactional information that may be available to the FBI for the conduct of its national security investigations through a variety of investigative techniques. Declaration of Arthur M. Cummings II, dated January 15, 2009 ("Cummings Decl.") ¶¶ 16, 21. Stated differently, [REDACTED]

[REDACTED] Id. ¶¶ 17, 20. Critically, as explained by Director Cummings, the Attachment [REDACTED] Id. ¶ 19.

Accordingly, public disclosure of this list would provide the subjects of FBI investigations and our adversaries with insight into the types of information the FBI uses, and considers to be important, in connection with its on-line national security investigations. Id. It would also reveal to subjects of FBI investigations and our adversaries the types of records and other information that the FBI may have obtained pursuant to previously served NSLs. Id. ¶¶ 17, 19- 20. As well, release of this information would risk disclosure of intelligence methods used by the FBI in the course of national security investigations. Id. ¶ 16.

Indeed, as Director Cummings details, knowing exactly what information the FBI requested in the NSL served on Doe could cause the target of this NSL, or any target, to change his or her behavior when dealing with their Internet accounts. Id. ¶ 18. [REDACTED]

[REDACTED] Id. [REDACTED]

[REDACTED] Id. [REDACTED]

Id. ¶¶ 18, 21.

Plaintiffs' assertion that disclosure of the contents of the NSL Attachment would not reveal any "piece of information that could be useful to the target or any other person under investigation," Memorandum in Support of Plaintiffs' Motion for Partial Reconsideration of This Court's October 20, 2009 Order, dated November 3, 2009, at 6-7, is both conclusory and unpersuasive. The Cummings Declaration – to which the Court must accord deference – demonstrates that there is good reason to believe that release of this information may result in an enumerated harm and that the link between disclosure and the risk of harm is substantial. As the Supreme Court cautioned in an analogous context, "'bits and pieces' of data 'may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.'" CIA v. Sims, 471 U.S. 159, 178 (1985); see also Doe v. Holder, 2009 WL 3378524, at \*5 (quoting Sims). Accordingly, plaintiffs' argument should be rejected.

### Conclusion


For the foregoing reasons, plaintiffs' motion to lift the nondisclosure requirement with respect to the NSL Attachment should be denied.

Dated: New York, New York  
January 15, 2010

Respectfully submitted,

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