UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Case No. 17-cv-03263-VC

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Dkt. Nos. 32, 33

The motion for partial summary judgment by the Electronic Frontier Foundation is granted, and the government's motion for partial summary judgment is denied. Pursuant to the Freedom of Information Act, the government must disclose the names of companies that have received "termination letters" – that is, letters by which the FBI lifts the requirement that companies refrain from disclosing their prior receipt of a particular national security letter, based on the FBI's determination that nondisclosure of that national security letter is no longer necessary to protect an investigation or national security.

The government invokes Exemption 7(E) of the Freedom of Information Act, which provides that the government need not turn over information that "would disclose techniques and procedures for law enforcement investigations…." 5 U.S.C. § 552(b)(7)(E). The "technique" the government alleges could be revealed by aggregate disclosure of terminations is a potential trend regarding the overall issuance of national security letters – that is, which companies are receiving more national security letters and which companies are receiving fewer. This matters, according to the government, because criminals could then use this information to migrate to the communication platforms of companies that the criminals believe are less likely to receive national security letters. But the government's assertion that aggregate disclosure of terminations

would reveal any trend in the issuance of national security letters is dubious, for several reasons.

As an initial matter, the number of termination letters is minute compared to the overall number of national security letters. From 2015 to 2017, the FBI issued over 37,000 national security letters, but issued termination letters lifting nondisclosure requirements for only 750 national security letters. *See* Seidel Decl. ¶ 9, Dkt. No. 32-2. This alone casts doubt on whether disclosure of the terminations will reveal any sort of technique or procedure – at least beyond the already well-known technique of using national security letters.

Perhaps if the terminations were issued for a random sampling of national security letters, such a small sample size could still shed light on the overall universe. But these are particular investigations, of particular people, for which the FBI has determined it is not a problem to lift the nondisclosure requirement. There's no reason to expect that company usage patterns for that unique subset of people would reflect the company usage patterns for everyone being investigated, either now or in the future.

Relatedly, the terminations merely shed light on past decisions made by the FBI to issue national security letters, as opposed to decisions the FBI is currently making. Under the procedures adopted following passage of the USA Freedom Act, the FBI does not even consider whether a nondisclosure requirement can be lifted in an active investigation until three years have passed (and even at the three-year mark, it may well determine that the nondisclosure requirement must remain in effect). *See* Termination Procedures for National Security Letter Nondisclosure Requirement at 1-2, Dkt. No. 32-3. In a world where technology and communication methods are changing rapidly, there's no basis for assuming that a tiny sampling of decisions the FBI made several years prior will shed meaningful light on the decisions it's making today.

What's more, many companies already regularly disclose to the public their receipt of national security letters once nondisclosure requirements are lifted. Thus, to the extent criminals wish to identify which companies have had nondisclosure requirements lifted (which does not seem useful for the reasons discussed above), much of this information is already publicly

available. And theoretically, all of it could be available, because any company whose nondisclosure requirement has been lifted can, by definition, disclose its receipt of the associated national security letter. This is the natural result of Congress's judgment that the use of national security letters should not be concealed from the public once concealment is no longer necessary to protect an investigation or national security, which further undermines the government's assertion that aggregate disclosure of this information would fall within Congress's definition of "disclos[ing] techniques and procedures for law enforcement investigations."

Because the government's allegation that aggregate disclosure of termination letters would reveal a law enforcement trend is so dubious, it was incumbent on the government to illustrate in a classified document – perhaps using specific examples – how requiring the government to turn over this seemingly stale and harmless information would constitute disclosure of a law enforcement technique or procedure, or why it would risk assisting criminals in avoiding FBI detection. But the declaration of Alan Kohler, which the Court reviewed in camera, does not accomplish that.[1]

A telephonic case management conference is scheduled for May 29, 2019, at 9:30 a.m. to discuss further proceedings in this case, including setting a deadline for the disclosure of the information covered by this ruling. A case management statement is due by May 22, 2019. The plaintiff should provide the Court and all other parties a conference line and applicable access code to use during the hearing no later than three court days prior to the case management conference by way of email to the Court (vccrd@cand.uscourts.gov) with a Cc to opposing counsel.

IT IS SO ORDERED.

Dated: May 14, 2019

VINCE CHHABRIA
United States District Judge

[1] Incidentally, the Electronic Frontier Foundation contends the government has waived its right to invoke the 7(E) Exemption, but the Court disagrees.