

Termination Procedures for National Security Letter Nondisclosure Requirement

I. References

- a. Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422.
- b. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x.
- c. Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2701-2712.
- d. Domestic Investigations and Operations Guide, Federal Bureau of Investigation, 2015.
- e. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

II. Introduction

The FBI is statutorily authorized to issue NSLs only in connection with investigations to protect against international terrorism or clandestine intelligence activities and to obtain one of only four types of basic records: (i) telephone subscriber information, toll records, and other non-content electronic communication transactional records, *see* 18 U.S.C. § 2709; (ii) consumer-identifying information possessed by consumer reporting agencies (names, addresses, places of employment, and institutions at which a consumer has maintained an account), *see* 15 U.S.C. § 1681u; (iii) full credit reports, *see* 15 U.S.C. § 1681v; and (iv) financial records, *see* 12 U.S.C. § 3414. An NSL may issue for these records only if the information being sought is relevant to an investigation to protect against international terrorism or clandestine intelligence activities, except that NSLs may not be used to obtain a full credit report in counterintelligence investigations unless there is an international terrorism nexus.

The FBI may impose a nondisclosure requirement on the recipient of an NSL only after certification by the head of an authorized investigative agency, or an appropriate designee, that one of the statutory standards for nondisclosure is satisfied; that is, where there is good reason to believe disclosure 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 any person. *See, e.g.*, 18 U.S.C. § 2709(c). The nondisclosure requirement prohibits the recipient of an NSL from disclosing information protected by the nondisclosure requirement to anyone other than: (i) those persons to whom disclosure is necessary in order to comply with the request; (ii) an attorney in order to obtain legal advice or assistance regarding the request; or (iii) other persons as permitted by the head of the authorized investigative agency, or a designee, described in the respective statute.

An NSL may issue, and a nondisclosure requirement may be imposed, only after rigorous review and approval at a high level. With respect to the NSL itself, an agent must justify in writing why the NSL is needed, i.e., the agent must provide a detailed explanation of the predication for the investigation as well as the relevance of the information sought. That written explanation, as well as the proposed NSL itself and any associated nondisclosure requirement, must be reviewed and approved by the Supervisory Special Agent, Chief or Associate Division Counsel, Assistant Special Agent in Charge, and Special Agent in Charge, or the equivalent-level officials at FBI Headquarters (FBIHQ).

The procedures set forth below (the “NSL Procedures”) govern the review of the nondisclosure requirement in NSLs and termination of the requirement when the facts no longer support nondisclosure. These NSL Procedures also ensure that such reviews are initiated at established points in the life cycle of an investigation, and that such reviews and determinations are documented in the FISA Management System (FISAMS) and the FBI’s central recordkeeping system, and any successor systems.

These NSL Procedures recognize and incorporate by reference existing limits mandated by statute on the imposition of the nondisclosure requirement in NSLs. The agent or analyst, Supervisory Special Agent, Chief or Associate Division Counsel, Assistant Special Agent in Charge, and Special Agent in Charge must assess whether the facts no longer support the nondisclosure requirement included in an NSL. If the facts no longer support the nondisclosure requirement, the FBI will provide notice to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, when the nondisclosure requirement has been terminated.

III. Review Procedures

A. Timeframe for Review

Under these NSL Procedures, the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied. The FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied.¹ When, after the effective date of these procedures, an investigation closes and/or reaches the three-year anniversary of the initiation of the full investigation, the agent assigned to

¹ Among other things, the USA FREEDOM Act requires the FBI to “review at appropriate intervals” the nondisclosure requirement of an NSL to assess whether facts supporting nondisclosure continue to exist. In the legislative history accompanying the Act, Congress indicated that:

[t]hese procedures are based upon nondisclosure reforms proposed by President Obama in January 2014. In remarks accompanying the issuance of PPD-28, President Obama directed the Attorney General ‘to amend how we use National Security Letters so that [their] secrecy will not be indefinite, and will terminate within a fixed time unless the government demonstrates a real need for further secrecy.’ In January 2015, as part of its Signals Intelligence Reform 2015 Anniversary Report, the Director of National Intelligence announced that: In response to the President’s new direction, the FBI will now presumptively terminate National Security Letter nondisclosure orders at the earlier of 3 years after the opening of a fully predicated investigation or the investigation’s close. Continued nondisclosure 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.

the investigation will receive notification, automatically generated by FBI's case management system, indicating that a review is required of the continued need for nondisclosure for all NSLs issued in the case that included a nondisclosure requirement. Thus, for cases that close after the three-year anniversary of the full investigation, the NSLs that continue to have nondisclosure requirements will be reviewed on two separate occasions; cases that close before the three-year anniversary of the full investigation will be reviewed on one occasion. Moreover, NSL nondisclosure requirements will be reviewed only if they are associated with investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures.

B. Review Requirements

The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe disclosure 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 any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Every determination to continue or terminate the nondisclosure requirement will be subject to the same review and approval process that NSLs containing a nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the case agent will review the NSL, the original written justification for nondisclosure, and any investigative developments to determine whether nondisclosure should continue; (ii) the case agent will document the reason for continuing or terminating the nondisclosure requirement; (iii) the case agent's immediate supervisor will review and approve the case agent's written justification for continuing or terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or Associate Division Counsel in the relevant field office or an attorney with the National Security Law Branch at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; (v) higher-level supervisors—either the Assistant Special Agent in Charge in the field or the Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; and (vi) a Special Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make the final determination regarding the case agent's written justification for continuing or terminating nondisclosure. In addition, those NSLs for which the nondisclosure requirement is being terminated will undergo an additional review at FBIHQ for consistency across field offices and programs. This review process must be completed within 30 days from the date of the review notice given by the FBI's case management system.

C. Notification of Termination

Upon a decision that nondisclosure of an NSL is no longer necessary, written notice will be given to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, that the nondisclosure requirement has been terminated and the information contained in the NSL may be disclosed. Any continuing restrictions on disclosure will be noted in the written notice. If such a termination notice is to be provided to a court, the FBI field office or FBIHQ Division that issued the NSL, in conjunction with FBI's Office of General Counsel, shall coordinate with the Department of Justice to ensure that notice concerning termination of the NSL nondisclosure requirement is provided to the court and any other appropriate parties.

D. Use of FBI Recordkeeping Systems

FBI will use its FISAMS system, or any successor system, to facilitate and document the review process described above. Once the decision to continue or terminate a nondisclosure requirement has been approved under the above review process, FISAMS will generate an electronic communication ("EC") that documents the justification and determination that will be serialized into the FBI's central recordkeeping system, unless otherwise exempted from being serialized. The FBI will also use FISAMS and its central recordkeeping system, and any successor systems, to facilitate the creation and transmittal of termination notices to NSL recipients and any court, as appropriate.

Audits to ensure compliance with these procedures will be included during the annual NSL reviews conducted by FBI's Inspection Division, as well as during periodic National Security Reviews conducted by the Department of Justice at each of FBI's 56 field offices.

E. Administrative Matters

This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The NSL Procedures will be effective 90 days from the date of the Attorney General's approval.

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