U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7231
DNL:SRM:JHLevy Washington, D.C. 20530-0001
Tel: (202) 353-0169
Fax: (202) 514-7964

November 6, 2014

Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526
Attn: Susan Soong

RE: In re National Security Letter, Nos. 13-15957, 13-16731, & 13-16732
[Argued before Judges Ikuta, N.R. Smith, and Murguia on October 8, 2014]

Dear Ms. Dwyer:

Oral argument in the above-referenced appeals was held before Judges Ikuta, N.R. Smith, and Murguia on October 8, 2014. Counsel for the NSL recipients in these cases has recently brought to our attention an inadvertent misstatement by government counsel during the rebuttal portion of the argument. We are submitting this letter to correct that error.

The misstatement occurred during a discussion regarding the disclosures that are permitted under the Government's discretionary enforcement decisions as set forth in a letter from the Deputy Attorney General dated January 27, 2014. That letter, which is attached hereto, states that a company may report in bands of 250 (starting with 0-249) its receipt of total national security processes during a specified period, or, alternatively, in bands of 1000 (starting with 0-999) its receipt of certain individual processes, including NSLs, during such a period. See Gov't Reply Br. Nos. 13-15957/13-16731, at 23 n.8. In the course of discussing disclosures described in this letter, approximately 49 minutes into the Court's recording of the argument, government counsel indicated that if a company

discloses that it is in one of these two bands starting with zero, it could publicly discuss the fact that it had received one or more NSLs and could discuss the quality of the specific NSL(s) that it had received.

That suggestion was mistaken. The district court correctly noted that "the NSL nondisclosure provisions . . . apply, without distinction, to both the content of the NSLs and to the very fact of having received one." ER 21 in No. 13-15957. This has always been the government's position. See, e.g., Gov't Opening Br. Nos. 13-15957/13-16731, at 14-15, 29; Gov't Answering Br. No. 13-16732, at 13-14, 27; Gov't Reply Br. Nos. 13-15957/13-16731, at 11-12, 20, 23. The NSL recipients here have likewise taken the position in this Court that § 2709(c) "permits the FBI to gag recipients about not only the content of the NSL but also as 'to the very fact of having received one.'" Appellee Answering Brief in No. 13-15957/Appellant Opening Brief in No. 13-16731, at 46 (quoting In re Nat'l Sec. Letter, 930 F. Supp. 2d at 1075); Appellant Opening Br. No. 13-16732, at 47 (quoting In re Nat'l Sec. Letter, 930 F. Supp. 2d at 1075). The fact that a company may disclose that it has received 0-249 national security processes or 0-999 NSLs in a given period does not, by itself, allow that company to disclose that it has actually received one or more NSLs; the lower end of these bands was set at 0, rather than 1, in order to avoid such disclosures. A company can, however, disclose that it has actually received NSLs if it employs one of the NSL-specific bands as described in the Deputy Attorney General's letter starting at 1000 or above.[1]

[1] The Deputy Attorney General's letter also addresses the disclosure, in bands of 1000, of "[t]he number of customer accounts affected by NSLs." These disclosures are similar to the banded disclosures of the actual number of NSLs received; a company's disclosure that 0-999 of its customer accounts were affected by NSLs would not, by itself, allow that company to disclose that it has actually received one or more NSLs, but a company's disclosure, as described in the Deputy Attorney General's letter, that 1000 or more of its customer accounts were affected by NSLs would necessarily disclose the receipt of one or more NSLs.

We regret this inadvertent inaccuracy and apologize for any confusion that may have been caused. Please bring this letter to the prompt attention of the panel.

Sincerely,

/s/ Jonathan H. Levy
Jonathan H. Levy
Attorney, Appellate Staff
Civil Division

CC: Cindy Cohn (ECF and email)

Office of the Deputy Attorney General
Washington, D.C. 20530

January 27, 2014

Sent via Email

Colin Stretch, Esquire
Vice President and General Counsel
Facebook Corporate Office
1601 Willow Road
Menlo Park, CA 94025

Kent Walker, Esquire
Senior Vice President and General Counsel
Google Corporate Office Headquarters
1600 Amphitheater Parkway
Mountain View, CA 94043

Erika Rottenberg, Esquire
Vice President, General Counsel/Secretary
LinkedIn Corporation
2029 Stierlin Court
Mountain View, CA 94043

Brad Smith, Esquire
Executive Vice President and General Counsel
Microsoft Corporate Office Headquarters
One Microsoft Way
Redmond, WA 98052-7329

Ronald Bell, Esquire
General Counsel
Yahoo Inc. Corporate Office and Headquarters
701 First Avenue
Sunnyvale, CA 94089

Dear General Counsels:

Pursuant to my discussions with you over the last month, this letter memorializes the new and additional ways in which the government will permit your company to report data concerning requests for customer information. We are sending this in connection with the Notice we filed with the Foreign Intelligence Surveillance Court today.

In the summer of 2013, the government agreed that providers could report in aggregate the total number of all requests received for customer data, including all criminal process, NSLs,

and FISA orders, and the total number of accounts targeted by those requests, in bands of 1000. In the alternative, the provider could separately report precise numbers of criminal process received and number of accounts affected thereby, as well as the number of NSLs received and the number of accounts affected thereby in bands of 1000. Under this latter option, however, a provider could not include in its reporting any data about FISA process received.

The government is now providing two alternative ways in which companies may inform their customers about requests for data. Consistent with the President's direction in his speech on January 17, 2014, these new reporting methods enable communications providers to make public more information than ever before about the orders that they have received to provide data to the government.

Option One.

A provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.

2. The number of NSLs received, reported in bands of 1000 starting with 0-999.

3. The number of customer accounts affected by NSLs, reported in bands of 1000 starting with 0-999.

4. The number of FISA orders for content, reported in bands of 1000 starting with 0-999.

5. The number of customer selectors targeted under FISA content orders, in bands of 1000 starting with 0-999.

6. The number of FISA orders for non-content, reported in bands of 1000 starting with 0-999.[1]

7. The number of customer selectors targeted under FISA non-content orders, in bands of 1000 starting with 0-999.

A provider may publish the FISA and NSL numbers every six months. For FISA information, there will be a six-month delay between the publication date and the period covered

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[1] As the Director of National Intelligence stated on November 18, 2013, the Government several years ago discontinued a program under which it collected bulk internet metadata, and no longer issues FISA orders for such information in bulk. See http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence. With regard to the bulk collection of telephone metadata, the President has ordered a transition that will end the Section 215 bulk metadata program as it currently exists and has requested recommendations about how the program should be restructured. The result of that transition will determine the manner in which data about any continued collection of that kind is most appropriately reported.

by the report. For example, a report published on July 1, 2015, will reflect the FISA data for the period ending December 31, 2014.

In addition, there will be a delay of two years for data relating to the first order that is served on a company for a platform, product, or service (whether developed or acquired) for which the company has not previously received such an order, and that is designated by the government as a "New Capability Order" because disclosing it would reveal that the platform, product, or service is subject to previously undisclosed collection through FISA orders. For example, a report published on July 1, 2015, will not reflect data relating to any New Capability Order received during the period ending December 31, 2014. Such data will be reflected in a report published on January 1, 2017. After data about a New Capability Order has been published, that type of order will no longer be considered a New Capability Order, and the ordinary six-month delay will apply.

The two-year delay described above does not apply to a FISA order directed at an enhancement to or iteration of an existing, already publicly available platform, product, or service when the company has received previously disclosed FISA orders of the same type for that platform, product, or service.

A provider may include in its transparency report general qualifying language regarding the existence of this additional delay mechanism to ensure the accuracy of its reported data, to the effect that the transparency report may or may not include orders subject to such additional delay (but without specifically confirming or denying that it has received such new capability orders).

Option Two.

In the alternative, a provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.

2. The total number of all national security process received, including all NSLs and FISA orders, reported as a single number in the following bands: 0-249 and thereafter in bands of 250.

3. The total number of customer selectors targeted under all national security process, including all NSLs and FISA orders, reported as a single number in the following bands, 0-249, and thereafter in bands of 250.

* * *

I have appreciated the opportunity to discuss these issues with you, and I am grateful for the time, effort, and input of your companies in reaching a result that we believe strikes an appropriate balance between the competing interests of protecting national security and furthering transparency. We look forward to continuing to discuss with you ways in which the

government and industry can similarly find common ground on other issues raised by the surveillance debates of recent months.

Sincerely,

James M. Cole
Deputy Attorney General