



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

December 17, 2007

Special Agent [REDACTED]
Federal Bureau of Investigation
[REDACTED]

Re: National Security Letter Dated November 26, 2007 to Internet Archive

Dear Special Agent [REDACTED]

This letter is in response to the National Security Letter ("NSL") you served upon the Internet Archive through its counsel, the Electronic Frontier Foundation ("EFF"), on November 26, 2007.

As explained below, the Archive is voluntarily providing responsive public information, but is not providing the non-public information requested by the NSL because the statutes governing the NSL, 18 U.S.C. §§ 2709 and 3511, are unconstitutional and because the Archive is not subject to the NSL statute under either 18 U.S.C. § 2709(a) or under 18 U.S.C. § 2709(f).

As an initial matter, we are voluntarily enclosing all the publicly available information responsive to your request. While this material is available to you directly through the Internet on the Archive's website, the Archive has voluntarily printed out the enclosed copies for your convenience and to save you the trouble of finding and printing your own copies.

We have also determined that the Archive has an extremely limited amount of non-public information responsive to the NSL. As you may know, the only identifying information the Archive collects is the email address supplied by the patron, [REDACTED]. The Archive does not collect the IP addresses used to upload or download files.

After reviewing the information available to the Archive, it appears the responsive non-public information is the [REDACTED]

The Archive is unable to provide the information pursuant to the NSL for two reasons.

First and foremost, the statute under which this NSL was issued is unconstitutional. As the United States District Court for the Southern District of New York determined:

Special Agent [REDACTED]
December 17, 2007
Page 2

§ 2709(c) is unconstitutional under the First Amendment because it functions as a licensing scheme that does not afford adequate procedural safeguards, and because it is not a sufficiently narrowly tailored restriction on protected speech. Because the Court finds that § 2709(c) cannot be severed from the remainder of the statute, the Court finds the entirety of § 2709 unconstitutional.

Doe v. Gonzales, 500 F. Supp. 2d 379, 425 (S.D.N.Y. 2007). While the *Doe v. Gonzales* court stayed its decision pending the government's appeal, the reasoning in the decision remains sound.

Second, we believe that 18 U.S.C. § 2709 is inapplicable to the Archive in this matter. The Archive is a library. Under section 2709(f), the FBI cannot demand records from libraries, unless they are providers of wire or electronic communication services. The Archive is not a provider of a wire or electronic communication service in the context of its [REDACTED] library.

Accordingly, on Friday the Archive filed a complaint in the United States District Court for the Northern District of California asking the court to declare sections 2709 and 3511 unconstitutional. It also filed a petition pursuant to 18 U.S.C. § 3511(a) asking the court to set aside the NSL. Since the unconstitutional disclosure provisions of the letter also apply to the Archive's counsel, the counsel are also plaintiffs in the complaint.

Although the Archive has filed these papers to preserve its position and rights, it has not served them because it remains willing to discuss this matter further. If the government is willing to withdraw the NSL, including the non-disclosure order, the Archive will voluntarily dismiss the lawsuit. If you wish to discuss to the possibility of reaching a mutually agreeable resolution without the need for this litigation to proceed, please contact me at your earliest convenience, or let me know the appropriate person to talk to at the Department of Justice.

We are enclosing courtesy copies of the papers that we have filed with the court. If we are unable to reach an amicable resolution by December 21, 2007, we will formally serve the documents upon the government.

Sincerely,



Kurt B. Opsahl, Esq.
Senior Staff Attorney
Electronic Frontier Foundation