

FBI compounds mystery with secret justification of gag order

The FBI continues its secrecy binge by filing a classified justification of its use of a gag order on an ISP in the ongoing *Doe v. Holder* battle.

By Jon Stokes | Last updated June 25, 2009 10:08 PM CT

When the FBI uses a national security letter (NSL) to force the cooperation of an ISP or phone company in the surveillance of a suspect, the agency typically slaps a gag order on the service provider to prevent it from revealing the existence of the NSL. Civil liberties groups have successfully challenged the DOJ on these gag orders in the ongoing *Doe v. Holder*, and last month the Obama administration decided not to appeal a federal court ruling that the FBI must justify these gag orders by meeting a relatively high First Amendment standard.

The implication of the court's ruling was that the FBI would finally have to justify the gag order that it had placed on the John Doe in the *Doe v. Holder* case, so that the plaintiff could talk about the NSL. The FBI has now cooperated, and has given the court a justification of the gag order, *in secret*.

The classified declaration that justifies the gag order can't even be seen by Doe's attorneys at the ACLU. In a statement, the ACLU elaborated on the move: "The government did not even file a redacted version of its secret affidavit or even an unclassified summary of what the secret affidavit says. Basically, the government is asking us just to trust that the gag is justified."

The group further explained that its attorneys "obviously can't respond meaningfully to arguments that we're not even allowed to see," so they're trying to get some form of access to the document. This would come in the form of either limited attorney access, or a summary of the filing's contents.

To add insult to injury, it's not even clear that the investigation that sparked the five-year legal battle is still going on. The FBI quit asking Doe for records over two years ago, but it still maintains that revealing the identify of the ISP would result in various harms.

Clearly, the FBI isn't ready to give up its Bush-era secrecy addition just yet. As we reported earlier, the EFF is also on the Bureau's case over fact that the internal guidelines that govern its domestic surveillance practices are also secret.

So in the case of *Doe v. Holder*, the FBI is carrying out a secret investigation using secret guidelines on what is and is not constitutional, and as part of that investigation they've compelled the secrecy of a service provider and are using a secret justification to argue that nobody's First Amendment rights are being violated. "Just trust us," indeed.

For more information on the *Holder* case, and on the ACLU's ongoing legal battle against the FBI's, see this page.

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