



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 2009

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

This report is submitted pursuant to Sections 1807 and 1862 of the Foreign Intelligence Surveillance Act of 1978 (the "Act"), as amended, and Section 118 of USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177 (2006). In accordance with those provisions, this report covers all applications made by the Government during calendar year 2008 for authority to conduct electronic surveillance and physical search for foreign intelligence purposes under the Act, all applications made by the Government during calendar year 2008 for access to certain business records (including the production of tangible things) for foreign intelligence purposes, and certain requests made by the Federal Bureau of Investigation pursuant to national security letter authorities.

**Applications for Electronic Surveillance and Physical Search Made During
Calendar Year 2008 (50 U.S.C. § 1807)**

During calendar year 2008, the Government made 2,082 applications to the Foreign Intelligence Surveillance Court (hereinafter "FISC") for authority to conduct electronic surveillance and physical search for foreign intelligence purposes. The 2,082 applications include applications made solely for electronic surveillance, applications made solely for physical search, and combined applications requesting authority for electronic surveillance and physical search.

During calendar year 2008, the FISC approved 2,083 applications for authority to conduct electronic surveillance and physical search (two applications filed in calendar-year 2007 were not approved until calendar-year 2008). The FISC made substantive modifications to the Government's proposed orders in two of those applications. The FISC denied one application filed by the Government during calendar year 2008.

Applications for Access to Certain Business Records (Including the Production of Tangible Things) Made During Calendar Year 2008 (50 U.S.C. § 1862(c)(1))

During calendar year 2008, the Government filed and the FISC approved thirteen applications for access to certain business records (including the production of tangible things) for foreign intelligence purposes. The FISC did not deny, in whole or in part, any such application filed by the Government during calendar year 2008.¹

Requests Made for Certain Information Concerning Different United States Persons Pursuant to National Security Letter Authorities During Calendar Years 2007 and 2008 (USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, § 118 (2006))

Pursuant to Section 118 of the USA PATRIOT Improvement and Reauthorization Act, Pub. L. 109-177 (2006), the Department of Justice provides Congress with annual reports regarding requests made by the Federal Bureau of Investigation (FBI) pursuant to the National Security Letter (NSL) authorities provided in 12 U.S.C. § 3414, 15 U.S.C. § 1681u, 15 U.S.C. § 1681v, 18 U.S.C. § 2709, and 50 U.S.C. § 436.

As you may know, in March 2007, and again in March 2008, the Inspector General of the Department of Justice (OIG) released reports regarding the FBI's use of NSLs. One of the Inspector General's findings was that the manner in which the FBI tracked NSLs resulted in inaccuracies in the statistics reported to Congress. In response to the Inspector General's findings and recommendations, the FBI has taken substantial steps to correct the identified deficiencies in its statistical tracking of NSLs.

In order to improve the accuracy of NSL statistics, among other things, the FBI retired its Office of General Counsel (OGC) database and deployed the NSL subsystem of the FISA Management System (FISAMS) in all FBI field offices. The NSL subsystem is a web-enabled workflow manager that automatically tallies data points necessary for accurate and timely Congressional reporting. The entire FBI began utilizing the system on January 1, 2008, and the FBI has observed that its use has reduced errors in compiling statistics necessary for Congressional reporting.

¹ In its 2008 report, the Department reported to Congress that during Calendar year 2007, the Government made six applications to the FISC for access to certain business records (including the production of tangible things) for foreign intelligence purposes. Further review of the Government's records subsequently revealed that the Government had made seventeen applications to the FISC for access to certain business records. The FISC did not deny, in whole or in part, any such application filed by the Government during calendar year 2007.

Calendar year 2008 was the first full year that the FBI used the NSL subsystem. Although most NSLs issued during 2008 were entered into the system, a small number were manually created outside the system due to technical or operational considerations.

In addition to NSLs that were issued in the ordinary course of its national security investigations, in 2007 and 2008 the FBI issued certain other NSLs. Because the NSLs issued outside the ordinary course will cause an anomaly in the historic trend of the number of different U.S. persons about whom the FBI reports it has obtained information using NSLs, the out-of-the-ordinary course NSLs is discussed below at some length.

The FBI issued "corrective NSLs" to provide legal authority to retain information it had previously received in response to so-called "exigent letters." As discussed in the OIG's 2007 report on NSLs, exigent letters were letters provided to communications service providers requesting production of toll or subscriber records. The letters stated that exigent circumstances existed and that legal process would follow. Additionally, during 2006, eleven so-called "blanket NSLs" were issued in what appeared to be a good faith but ill-conceived attempt to provide the communications service providers with legal authority for records they had previously provided to the FBI based on oral requests and exigent letters (no new records were provided by the communications service providers when they received the "blanket NSLs"). Upon legal review of the so-called blanket NSLs, significant procedural and legal concerns were raised. Most notably, none of the blanket NSLs was accompanied by the required internal memorandum documenting the relevance of the information sought to a national security investigation and relaying statistics to FBI's Office of General Counsel for reporting to Congress. As a result, the statistics associated with the eleven blanket NSLs were not reported to Congress in 2007. (The exigent letter and blanket NSL issues and subsequent corrective actions have been briefed to Congress by the FBI and will be discussed in an upcoming OIG report on the FBI's use of exigent letters.)

Following the March 2007 OIG report, the FBI reviewed all telephone numbers that appeared to have been obtained from communications service providers without documented compliance with the Electronic Communications Privacy Act (i.e., without service of a legally and procedurally sufficient NSL, administrative subpoena, grand jury subpoena or a documented emergency). This process involved several analysts from the Counterterrorism Division and attorneys FBI OGC (collectively the "Review Team") researching and reviewing the facts surrounding 4,379 telephone numbers (this included the telephone numbers contained on all exigent letters to which the FBI had access and all of the numbers that had been included on the eleven blanket NSLs; many of these numbers were not United States telephone numbers).

If the Review Team located legal process (an NSL, grand jury subpoena, or administrative subpoena) for a given number, the legal process was examined by FBI OGC to determine whether it complied with all legal requirements (including the required Congressional Reporting for NSLs). If the Review Team could not locate previously-issued process (or if the legal process located was deficient in some way) but the Review Team determined that the

telephone number was relevant to a national security investigation at the time the associated telephone records were received and at the time of this subsequent review, a “corrective NSL” was issued. The corrective NSLs did not seek new records from the communications service providers. Instead the corrective NSLs explicitly stated that they were being issued to provide legal authority for the FBI to retain records that had previously been provided by the communications service providers.

If the Review Team could not locate previously-issued process and determined that, although a telephone number had been relevant to a national security investigation when the records were obtained but the relevant investigation had been closed, the Review Team then considered whether the records were obtained under circumstances that met the standard for voluntary emergency disclosure under 18 U.S.C. § 2702. If existing process could not be located, a corrective NSL could not be issued, and the circumstances surrounding the provision of records did not constitute an emergency as defined by 18 U.S.C. § 2702, then the FBI directed that subscriber or toll records for the number be purged from its databases and files.

Although the records contained on the corrective NSLs were obtained prior to 2008, all but one of the NSLs themselves were issued in 2008. Because of the volume and extent of the telephone numbers examined as part of this review, the Review Team did not attempt to determine whether the numbers that were included on corrective NSLs in fact belonged to a United States person. Instead, the FBI presumed that all numbers included on corrective NSLs belonged to United States persons. Put differently, the FBI erred on the side of over-reporting the number of United States persons about whom it obtained information using NSLs. Moreover, the statistical compilation of “different United States persons” will never be precise because one person could appear in different investigations or to different institutions using slightly different names (e.g., John R. Smith, Johnny Smith, J. Robert Smith and J.R. Smith could be the same person or different persons). When compiling statistics on the number of different persons, the FBI errs on the side of over reporting the number of persons about whom it has collected information using NSLs by assuming that persons with slightly different names are different persons.

In 2008, the FBI made 24,744 NSL requests (excluding requests for subscriber information only) for information concerning United States persons. These sought information pertaining to 7,225 different United States persons. Of the 24,744 NSL requests, 4,929 requests (approximately 20%) were through corrective NSLs that sought information regarding 1,643 different telephone numbers). The FBI has presumed each phone number contained in a corrective NSL (1,643) to be associated with a different United States person. The final statistics for calendar year 2008 could change slightly if additional data regarding previously issued NSLs is reported to the FBI OGC by the field offices.

Because of FBI efforts then underway to improve NSL statistics and its transition to the new automated NSL creation system, the Department did not provide annual NSL statistics for the year 2007. The 2007 NSL statistics have undergone significant review to provide the most

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accurate statistics possible. However, as the bulk of these figures are derived from the manual process pre-dating the automated system, there is still a possibility for some error.

In 2007, the FBI made 16,804 NSL requests (excluding requests for subscriber information only) for information concerning United States persons. These NSLs sought information pertaining to 4,327 different United States persons. Of the 16,804 NSL requests, 471 requests were through corrective NSLs (157 telephone numbers). As discussed above, the FBI has presumed each phone number contained on a corrective NSL (157) is associated with a different United States person. Because compilation of the numbers in 2007 could not be fully accomplished by computer, FBI personnel manually reviewed entries in the OGC NSL database, confirming, to the extent possible, that any given U.S. person was not reported more than once.

We hope this information is helpful. Please do not hesitate to contact this office if you need additional assistance regarding this matter.

Sincerely,



Ronald Weich
Assistant Attorney General