

November 7, 2003

The Honorable Pat Roberts  
Chairman  
Senate Select Committee on Intelligence  
211 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV  
Ranking Member  
Senate Select Committee on Intelligence  
211 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Roberts and Ranking Member Rockefeller:

We are writing to express our concern about a provision of both the House- and Senate-passed versions of the Intelligence Authorization bill that significantly expands the reach of the FBI's power to obtain information using "National Security Letters." As you know, National Security Letters are unusual devices. They are issued to businesses by FBI agents to compel the disclosure of personal information without judicial approval. National Security Letter authority has for some years been available for three specific categories of information deemed particularly useful to foreign intelligence, counterintelligence and international terrorism investigations: financial records, credit reports, and communications transactional/billing information. Each one of these categories was separately justified by the Executive Branch and in each case the reach of the NSLs was fairly narrowly defined by Congress.

The pending authorization bills would greatly expand the National Security Letter provision of 12 U.S.C. §3414, the section of the Right to Financial Privacy Act that authorizes the FBI to issue National Security Letters to banks to obtain financial records.

The sections at issue are Section 334 of the House version (H.R. 2417) and Section 354 of the Senate version (S. 1025) of the Intelligence Authorization Act for FY 2004. These sections amend the definition of "financial institution" for purposes of 12 U.S.C. §3414.<sup>1</sup> The proposed new definition is not crafted for intelligence purposes. Instead, the changes sought would incorporate the far broader definition of "financial institution" that is used in the money laundering laws, 31 U.S.C. §312(a)(2). That definition includes many entities that are not strictly "financial" institutions, such as:

- a broker or dealer in securities or commodities;

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<sup>1</sup> The current definition of "financial institution" for purposes of the NSL authority in the Right to Financial Privacy Act includes banks, savings banks, card issuers as defined in 15 U.S.C. §1602(n), industrial loan companies, trust companies, savings associations, building and loans, homestead association, credit unions, consumer finance institutions. 12 U.S.C. §3401(1).

- a currency exchange;
- an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
- an insurance company;
- a dealer in precious metals, stones, or jewels;
- a pawnbroker;
- a travel agency;
- a telegraph company;
- a business engaged in vehicle sales, including automobile, airplane, and boat sales;
- persons involved in real estate closings and settlements;
- the United States Postal Service;
- a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than \$ 1,000,000;
- any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

Moreover, because of the way the definitions work, the records that would have to be disclosed would not be limited to actual financial records. Under the Right to Financial Privacy Act, "financial records" are defined as "any record held by a financial institution pertaining to a customer's relationship with the financial institution." 12 U.S.C. §3401(2). Thus, if a travel agency is a financial institution, the new authority would cover *any* records held by the travel agency, even if the records do not relate to financial matters.

Accordingly, under the proposed language, National Security Letters could be used to compel disclosure of *any* records – not just truly financial records – from such entities as travel agencies, Western Union, real estate agents, the Postal Service, insurance companies, casinos, and car dealers.

The new proposed definition is too broad and essentially grants the FBI part of the administrative subpoena authority it has been seeking, in the leaked "PATRIOT II" draft as well as other proposed legislation, but without the public debate that we believe should occur before granting that expanded power. If it can be shown that there are additional financial entities that need to be added to the definition of "financial institution" for purposes of tracing the financial transactions of suspected spies or terrorists, we would have no objection. However, we do not believe that the NSL authority in the Right to Financial Privacy Act should be expanded as broadly as it would be if the definition were amended by reference to the money laundering law. In addition, whatever other institutions are added, the definition of financial records should be limited to documents that are truly financial in nature.

We are particularly concerned about this expansion of the National Security Letter authority because Section 505 of the USA PATRIOT Act has already loosened the standard for issuing NSLs. Before the PATRIOT Act, NSLs could be issued only if the government had specific facts giving reason to believe that the records being sought pertained to an agent of a foreign power. The particularized suspicion requirement was eliminated by the PATRIOT Act. After the PATRIOT Act, records can be compelled on the ground that they are "relevant to" or "sought for" foreign counter intelligence purposes, and as we read the language the FBI does not even

have to specify whose records they want. Given that NSLs are issued under a low standard with no judicial approval, we believe any expansion of NSL authority beyond the existing categories of records – financial, credit, and communications transactional/billing – is inappropriate.

We urge you to remove or modify the proposal to expand the definition of “financial institution” for purposes of the National Security Letter authority in the Right to Financial Privacy Act. In particular, we recommend that you:

- (1) add to the definition of financial institutions for NSL purposes under the Right to Financial Privacy Act only those specific entities that the government shows have financial records of particular use to foreign intelligence, counterintelligence or international terrorism investigations; and
- (2) limit the disclosure of records to those that relate to the financial relationship between the individual and the business.

We would be happy to discuss this matter further with you or your staff. Thank you for your consideration.

Sincerely,

James X. Dempsey  
Executive Director

Lara M. Flint  
Staff Counsel