

National Security Letters: Abuse and Reform **March 12, 2007**

The Inspector General for the Department of Justice has found widespread errors and violations in the FBI's use of National Security Letters to obtain bank, credit and communications records of US citizens. These violations are the natural, predictable outcome of the PATRIOT Act, which dramatically weakened the rules under which FBI agents issue these demands for sensitive information without judicial approval. Use of NSLs skyrocketed after the PATRIOT Act. According to DOJ, the FBI issued 47,000 NSL requests in 2005, compared with 8,500 in 2000. In the wake of the Inspector General's report, the FBI and DOJ have promised a series of internal, administrative reforms. However, the only way to truly address the problem is to change the law and reestablish traditional checks and balances, under which a judge must approve governmental access to sensitive information.

What Is a National Security Letter?

A National Security Letters (NSL) is a form letter signed by an FBI agent, with no judicial approval, compelling disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet service providers, among others.¹ NSLs are issued in intelligence investigations, which are highly secretive and generally broader than criminal investigations. Before the PATRIOT Act, the FBI could issue NSLs only if there was a factual basis for believing that the records pertained to an "agent of a foreign power."

¹ In total, there are five NSL provisions:

- (1) Section 2709(a) of title 18, United States Code (access to certain communication service provider records);
- (2) Section 1114(a)(5)(A) of the Right to Financial Privacy Act (12 U.S.C. 3414(a)(5)(A)) (to obtain financial institution customer records);
- (3) Section 802 of the National Security Act of 1947 (50 U.S.C. 436) (to obtain financial information, records, and consumer reports);
- (4) Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) (to obtain certain financial information and consumer reports); and
- (5) Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) (to obtain credit agency consumer records for counterterrorism investigations).

How Did the PATRIOT Act Weaken Standards for NSLs?

In the PATRIOT Act, the standard for issuing NSLs was greatly weakened. Under prior law, agents were required to state (internally to their supervisor) that they had some facts indicating that the records being sought related to a suspected spy or possible terrorist. The PATRIOT Act eliminated both prongs of that standard, so that now, FBI agents do not have to state, even to senior officials in the Bureau, a factual basis for seeking the records, and the records sought can be about *any* person, even someone not suspected of being a terrorist or spy. The only requirement is that the FBI must state for internal purposes that the records are “relevant to” or “sought for” foreign counter intelligence or terrorism purposes. Since foreign counterintelligence and terrorism investigations can investigate lawful, even political conduct, and since the FBI conducts wide-ranging investigations on an ongoing basis of many terrorist groups, the requirement that the agents state that the records are sought in connection with some investigation is not a meaningful limit. (Remarkably, the DOJ Inspector General found that FBI agents issued NSLs without complying even with this minimal administrative requirement.)

Making Matters Worse: Expanding the Sweep of NSLs so a Travel Agent is a Bank

The Intelligence Authorization Act for FY 2004 significantly expanded the reach of the NSLs that the FBI could issue for financial records pursuant to 12 U.S.C. § 3414. Under the authorization language, the definition of “financial institution” was expanded to include travel agencies, Western Union, real estate agents, the Postal Service, insurance companies, casinos, and car dealers. Under the new definition, “financial records” are defined as “any record held by a financial institution pertaining to a customer's relationship with the financial institution.” Thus, the new authority permits the use of NSLs for any record held by travel agents or car dealer, even if it doesn't relate to financial matters. See Pub. L. 108-177 (Dec. 13, 2004), sec. 374.

What Happened with the PATRIOT Reauthorization Process?

NSLs were not subject to the original PATRIOT Act “sunsets” and therefore they received little attention in the 2005-2006 debate on reauthorization of the PATRIOT Act. Indeed, the PATRIOT Act reauthorization law² actually expanded the NSL power. The reauthorization act gave the government the power to compel record holders to comply with a NSL with a court order and created a new crime, punishable by up to five years in prison, of willful disclosure of an NSL with intent to obstruct an investigation.

The reauthorization act also made it clear that businesses that receive NSLs can challenge them, but few have the incentive to do so: the cost of providing the records is far less than the cost of hiring a lawyer to challenge the request, the requests are secret, so customers never learn of them and companies cooperating with the government do not have to justify compliance, and the companies that comply have immunity, so even if a customer

² Pub. L. 109-177 (March 9, 2006), secs. 115-119.

found out, there would be no statutory remedy against the company that disclosed the records.

The reauthorization act clarified that libraries are not subject to NSLs except to the extent they provide email access. (However, bookstores and sites like Amazon.com are still covered.) The act also required the Inspector General audit that has revealed the problems and further directed the Attorney General and Director of National Intelligence to submit a report on the feasibility of applying minimization procedures to NSLs.

After the PATRIOT Act was reauthorized, Sen. Arlen Specter (R-PA) introduced a bill that would have added a much-needed sunset to the NSL provisions, making them expire on December 31, 2009. The Specter bill died in December 2006 at the end of the 109th Congress.

How Can NSL Authority This Be Fixed?

Over the past 2-3 years, the FBI swore that it had NSLs under control. It is very hard to control something internally, without the checks and balances normally applied in a democratic system – especially judicial control for demands to seize or compel disclosure of personal information. Now the FBI is swearing again that it will adopt further internal procedures to bring NSLs under control. The endeavor is fundamentally flawed.

CDT is urging Congress to take up H.R. 4570, legislation introduced in the House in the 109th Congress by Rep. Jane Harman (D-CA)

<http://www.cdt.org/legislation/109/4#H.R.4570>. This legislation would --

- require NSLs to be approved by the FISA court or a federal magistrate judge;
- require the government to show a connection between the records sought with an NSL and a terrorist or foreign power;
- create an expedited electronic filing system for NSL applications;
- require the government to destroy information obtained through NSL requests that is no longer needed; and
- mandate more robust congressional oversight, requiring semi-annual reports to both the Congressional Intelligence and Judiciary Committees on all NSLs issued, minimization procedures, any court challenges and an explanation of how NSLs have helped investigations and prosecutions.

Additional reforms might also be considered, including --

- Requiring disclosure to individuals when their records are obtained by the government in violation of the law and providing a civil remedy for disclosures that are clearly outside the law's standards;
- Expressly limiting the use of "exigent letters."

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