

## Center for Democracy & Technology Transition Memo

### Theme: Balancing Security and Liberty

### *Issue: Access to Business Records for Intelligence and Anti-Terrorism Purposes - National Security Letters and Section 215 of the USA PATRIOT Act*

★ **Issue/Problem.** The FBI has misused its power to issue National Security Letters to obtain access to sensitive information maintained by businesses. National Security Letters (NSLs) are issued by officials of the FBI and other agencies, with no prior judicial approval, compelling disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others.

Another overbroad authority is found in Section 215 of the PATRIOT Act, which authorizes the FISA court to require any entity to produce any document or tangible item upon a minimal showing of relevance to an intelligence investigation.

The low standards for NSLs and Section 215 orders are of particular concern because the advance of technology has meant that more transactions of ordinary life leave behind “digital fingerprints” in the form of records maintained by businesses. These records are useful to intelligence agencies and the government should have access to them, but only with reasonable checks and balances to protect civil liberties.

★ **Policy History.** Prior to the PATRIOT Act, the FBI could issue NSLs for records pertaining to a particular person if the FBI had specific and articulable facts giving reason to believe that the person was a terrorist or other “agent of a foreign power.” The PATRIOT Act eliminated any effective standard for issuing NSLs. It wiped away the requirement that the information being sought “pertain to” a foreign power or the agent of a foreign power. The PATRIOT Act also eliminated the requirement that agents have some factual basis for seeking the records. Instead, today it is sufficient for the FBI merely to assert that the records are “relevant to” an investigation to protect against international terrorism or foreign espionage. Essentially, the FBI makes this claim to itself; no Justice Department official, let alone a judge, reviews NSLs before they are issued.

In 2003, Congress dramatically expanded the types of “financial institutions” on which an NSL can be served to include travel agencies, real estate agents, jewelers, the Postal Service, insurance companies, casinos, car dealers, and other businesses not normally considered “financial institutions.”

DOJ Inspector General reports in 2007 and 2008 revealed widespread abuses and misuses by the FBI of its NSL authorities. The IG found that the FBI:

- Issued NSLs when it **had not even opened an investigation;**
- Used “**exigent letters**” **not authorized by law** to obtain information and never followed up with an actual NSL;
- Used a **single NSL to obtain records about thousands** of individuals; and
- **Retains almost indefinitely the information** it obtains with an NSL, even after it determines that the subject of the NSL is not suspected of any crime and is not of any

continuing intelligence interest;

- Makes the information it receives with NSLs **widely available to thousands** of people in law enforcement and intelligence agencies.

Section 215 of the USA PATRIOT Act (the “library records” provision) greatly expanded an existing statute that authorized the FBI to obtain a court order for disclosure of material from businesses for counterterrorism and anti-espionage purposes. Section 215 eliminated the prior requirement that the information sought had to pertain to an agent of a foreign power. It expanded the kind of material that could be sought and the entities that could be required to provide it. Under Section 215, the government can, with a minimal showing to a judge, obtain an order requiring any person or entity to turn over any documents or objects. The government can bar the recipient from disclosing the existence of the order. For the most part, all the government has to do is show that the information sought is relevant to an investigation to protect against international terrorism or espionage. The minimal factual showing combined with the broad scope of records that can be obtained makes this power ripe for abuse.

**★What the Obama Administration Should Do.** (1) President Obama should direct agency heads to sharply curtail use of NSLs to seek sensitive information about Americans not suspected of involvement in terrorism. He should direct his Attorney General to require the FBI to come up with a plan to minimize the collection and retention of personal information about Americans that is obtained with NSLs and Section 215 orders.

(2) President Obama should support legislation like the National Security Letters Reform Act (S. 2088 in the 110<sup>th</sup> Congress). The legislation should:

- Promote uniform practices by allowing only the FBI (not agencies like the DoD) to issue NSLs;
- Limit the scope of NSLs to less sensitive information, such as information that identifies a person or reveals a person’s home or email address;
- Authorize use of an NSL to obtain that less sensitive information when specific facts show that the information sought pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities;
- Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and financial records;
- Tighten the standard for issuing an order under Section 215 to require a showing to a judge that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;
- Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government proves to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended; and
- Require adoption of minimization procedures.

The text of the National Security Letter Reform Act in the 110<sup>th</sup> Congress (S. 2088) contains legislative language to implement these statutory reforms. It should be supplemented with Section Four of the companion bill in the House (H.R. 3189), which establishes a private right of action in favor of individuals aggrieved by NSLs issued illegally.

Section 215 of the USA PATRIOT Act will sunset on December 31, 2009. Any reauthorizing legislation should contain these reforms.

★ **Campaign Platform and Senate Record.** This proposal is consistent with the PATRIOT Act framework in President-elect Obama's campaign platform and with the positions he took as a Senator. His platform "Fact Check" of January 5, 2008 indicates that Obama supports a PATRIOT Act that would strengthen civil liberties without sacrificing the tools that law enforcement needs to keep us safe. Obama co-sponsored the National Security Letters Reform Act in 2007 – which had the provisions outlined above – and the SAFE Act, S. 737, in 2005, which had similar provisions.

★ **Other Voices.** Some elements of the intelligence community may oppose these changes because they would require more judicial oversight of their activities, and the FBI may assert that an internal guidance addresses the abuses of NSLs identified in the IG reports. While FBI bureaucratic reforms can address some of the abuses of NSLs, there is no substitute for reestablishing traditional checks and balances, including judicial approval of governmental access to sensitive information. Since intelligence investigations are broader, more secretive and subject to less probing after-the-fact scrutiny than are criminal investigations, protections must be built in at the front end.

Reforms advocated here have been widely supported by civil liberties, civil rights, open government and religious organizations, as is indicated in this sign-on letter to Congress: <http://www.cdt.org/security/NSLSenateSignOnLtr.pdf>.

★ **For More Information.**

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#### **Resources:**

- CDT policy post on National Security Letters (2008): <http://cdt.org/publications/policyposts/2008/5>
- CDT Testimony on National Security Letters (2008): [http://cdt.org/testimony/20080421\\_nsl\\_testimony.pdf](http://cdt.org/testimony/20080421_nsl_testimony.pdf)
- DOJ Inspector General's Report on National Security Letters: <http://www.usdoj.gov/oig/special/s0703b/final.pdf>
- Congressional Research Service Report on NSLs (March 2008): <http://www.fas.org/sgp/crs/intel/RS22406.pdf>

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