

May 8, 2008

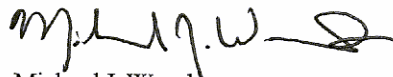
Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Leahy:

Please find attached my responses to the questions forwarded with your letter of May 1, 2008. These responses are meant to supplement the testimony that I gave on April 23, 2008 during the Committee on the Judiciary hearing regarding "National Security Letters: The Need for Greater Accountability and Oversight."

I would like to thank you, and the other members of the Committee, for inviting me to provide testimony on this complex and highly relevant issue. Having worked with national security letters and similar intelligence authorities while in government, I particularly valued the opportunity to share my perspective with the people who will shape the law in this area. If there is anything I can do to assist you, the other members of the Committee, or your staff as you work with these issues, please do not hesitate to contact me.

Sincerely,


Michael J. Woods

**Senate Judiciary Committee
Hearing on “National Security Letters:
The Need for Greater Accountability and Oversight”
Wednesday, April 23, 2008**

**Response of Michael J. Woods to Questions
Submitted by U.S. Senator Russell D. Feingold**

- 1. In the USA PATRIOT Act, Congress added a new national security letter statute, 15 U.S.C. § 1681v, which permits any government agency involved in counter-terrorism investigations to compel the production of full credit reports. This was in addition to a pre-existing authority, found in 15 U.S.C. § 1681u, which already provided the FBI with NSL authority to obtain some portions of credit reports. But Section 1681u, even as expanded by the Patriot Act, only permitted the FBI to obtain limited information from a credit reporting company with an NSL, and it required a court order for the FBI to obtain a full credit report. You were at the FBI at the time of the Patriot Act. To your knowledge, did the FBI propose or advocate for adding the new Section 1681v?**

Response: To the best of my knowledge, the FBI did not propose or advocate adding the new Section 1681v at the time of the USA PATRIOT Act of 2001. Given the role that I played in preparing the FBI’s proposals for the legislation that would become the USA PATRIOT Act, I believe I would have been aware if the FBI had sought the language that became Section 1681v. The FBI proposals that I worked on were all grouped together in Section 505 of the USA PATRIOT Act. The language that established Section 1681v is to be found in Section 358(g) of the Act, among provisions relating to finance and money-laundering.

In fact, I was not aware of the existence of Section 1681v until well after the passage of the USA PATRIOT Act in October of 2001. After the Act was passed, I drafted guidance to all FBI components that summarized the changes made by the USA PATRIOT Act. The document that I drafted describing the new national security letter authorities has been declassified and is appended to my response. As you can see, the document, dated November 28, 2001, describes the changes in the ECPA and RFPA national security letters. However, in describing the revisions to the FCRA national security letter, the document references only Section 1681u (the “FBI only”

national security letter). I believe I only became aware of Section 1681v at some point after I left FBIHQ in February 2002.

2. **Government officials, as well as declassified documents issued in response to a FOIA request, have recently confirmed that both the CIA and the Pentagon have issued National Security Letters for financial records.**
 - a. **Do you think that agencies other than the FBI should have the authority to issue National Security Letters domestically?**
 - b. **What are the disadvantages to allowing multiple agencies, including those whose focus is not on domestic investigations, to issue NSLs?**

Response: I think that the domestic collection of intelligence (regardless of whether it is foreign intelligence or counterintelligence/counter-terrorism information) should occur only under the direct supervision of the Attorney General. I believe that this arrangement offers the best hope of keeping domestic intelligence collection limited and within Constitutional boundaries. This is the manner in which we have regulated domestic intelligence collections since the era of the Church Committee. Executive Order 12,333 mandates that domestic operations, which are primarily conducted by the FBI, conform to guidelines issued by the Attorney General. The Attorney General also approves the Executive Order 12,333 guidelines applicable to other agencies (like the DoD) that have a limited domestic counterintelligence function. Similarly, the Foreign Intelligence Surveillance Act makes the Justice Department responsible for the FISA process and the handling of all requests to the Foreign Intelligence Surveillance Court.

I believe that National Security Letters should be treated in much the same way. Restricting the authority to issue NSLs to the FBI ensures that the letters are issued from an organization that is clearly subject to the Attorney General Guidelines, the DOJ intelligence oversight process, and Congressional reporting requirements. The FBI is unique among U.S. intelligence gathering organizations in that its operational culture is shaped primarily by the criminal law enforcement process. While many see this as inefficiency and argue that domestic collection could be better accomplished by components with a primarily foreign intelligence or military culture, I believe that the criminal law enforcement environment supplies a critical perspective that has contributed to the proper

governance of domestic intelligence collection since the late 1970s. That perspective would be lost if the authority to issue NSLs or other forms of compulsory process for domestic collection were distributed outside of the DOJ.

In addition to that broad concern, I see three specific disadvantages to allowing agencies other than the FBI to issue NSLs. First, the production of NSLs outside the FBI increases the likelihood that counterintelligence and counter-terrorism operations will be pursued in an uncoordinated and inefficient manner. At present, those agencies which have limited domestic collection roles (such as the counterintelligence elements of the DoD) have to coordinate their domestic activities with the FBI, which the primary responsibility for domestic counterintelligence and counter-terrorism. The fact that NSLs and other operational authorities are only available through the FBI gives teeth to the policy of coordination, and transforms it into a practical requirement.

Second, the potential for confusion and duplication of effort with respect to the recipients of NSLs increases if the authority is dispersed to other agencies. At present, the FBI is the principal point of contact for the telecommunications providers and financial institutions that are the most common recipients of NSLs. With dispersion of authority to other agencies, these recipients could face multiple requests for the same information and could be confronted with interpretations of the statutory requirements that vary with the agency issuing the NSL. A significant portion of the problems identified by the DOJ Inspector General involved misunderstandings by NSL recipients, and these problems would likely increase if multiple agencies were generating NSLs.

Third, I think the effectiveness of oversight and reporting mechanisms would decline with the dispersion of NSL authority. This is already an issue posed by the present form of Section 1681v, which extends authority broadly to any agency “authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism.” The text of the statute does not define “authorized” (as, for example, meaning authorized by Executive Order 12,333) and does not restrict the authority to those agencies that are subject to Attorney General guidelines. There is, to my knowledge, no entity that oversees the implementation of Section 1681v throughout the Executive Branch or collects data on the use of that particular authority. It is difficult to see how real oversight by either the Executive or Congress could occur under these conditions. The 2007 and 2008 Inspector General reports demonstrate how difficult effective oversight is to maintain even within a single agency. I believe that issues such as those noted by the DOJ Inspector General would be likely to multiply were the authority to issue NSLs more broadly distributed.

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 11/28/2001

To: All Field Offices

Attn: ADIC;
SAC;
CDC
FCI/IT Supervisors
AD Watson;
DADs;
Section Chiefs
AD Gallagher;
DADs;
Section Chiefs

Counterterrorism

National Security

From: General Counsel

National Security Law Unit, Room 7975

Contact: [REDACTED]

Approved By: Mueller Robert S III
Pickard Thomas J
Parkinson Larry R
Bowman M E

b7C

Drafted By: [REDACTED] :mjw
R Jr:jrl

Case ID #: 66F-HQ-A1255972

Title: NATIONAL SECURITY LETTER MATTERS

Synopsis: Provides guidance on the preparation, approval, and service of National Security Letters (NSLs).

Reference: 66F-HQ-A1255972 Serial 15

Enclosure(s):

- 1) Subscriber Information NSL Model
- 2) Toll Billing Records NSL Model
- 3) Electronic Subscriber Information NSL Model
- 4) Electronic Communication Transactional Records NSL Model
- 5) Financial Records NSL Model
- 6) Identity of Financial Institutions NSL Model
- 7) Consumer Identifying Information NSL Model
- 8) Subscriber/Electronic Subscriber (EC) Model
- 9) Toll/Transactional Records EC Model
- 10) Financial Records EC Model
- 11) Financial Institutions/Consumer Identity EC Model
- 12) ECPA NSL Checklist
- 13) RFPA NSL Checklist

11-6-02
ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11-6-02 BY 60267 NDS/EP/CLT
#966750

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Re: 66F-HQ-A1255972, 11/28/2001

14) FCRA NSL Checklist

Details: In the referenced communication, dated 11/09/2001, the Director of the FBI delegated the authority to certify NSLs to the following officials: (1) the Deputy Director; (2) The Assistant Directors (ADs) and all Deputy Assistant Directors (DADs) of the Counterterrorism Division (CTD) and the National Security Division (NSD); (3) the General Counsel and the Deputy General Counsel for National Security Affairs (DGC), Office of the General Counsel (OGC); (4) the Assistant Director in Charge (ADIC), and all Special Agents in Charge (SACs), of the New York, Washington, D.C., and Los Angeles field divisions; and (5) the SACs in all other field divisions. The purpose of this electronic communication is to provide comprehensive guidance on the preparation, approval, and service of NSLs.

1. Introduction to National Security Letters

NSLs are administrative subpoenas that can be used to obtain several types of records. There are three types of NSLs. First, pursuant to the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709, the FBI can issue NSLs for: (1) telephone subscriber information (limited to name, address, and length of service); (2) telephone local and long distance toll billing records; and (3) electronic communication transactional records. Second, pursuant to the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414(a)(5), the FBI can issue NSLs to obtain financial records from banks and other financial institutions. Finally, pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681u, the FBI can issue NSLs to obtain consumer identifying information and the identity of financial institutions from credit bureaus.

NSLs are tools available in investigations conducted under the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). The FCIG currently provide that an NSL can be issued during the course of a full international terrorism or foreign counterintelligence investigation. **NSLs cannot be used in criminal investigations unrelated to international terrorism or clandestine intelligence activities.** Given the new statutory language, the OGC and DOJ have taken the position that NSLs also may be authorized in foreign counterintelligence (FCI) and international terrorism (IT) preliminary inquiries (PIs), with prior coordination through the relevant NSD or CTD unit at FBIHQ. This position is based on the conclusion that all investigations authorized under the FCIG, including PIs, are to "protect against international terrorism or clandestine intelligence activities," as required by the NSL statutory authorities. At present, however, issuing an NSL in the context of a PI will require a

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waiver or modification of the FCIG. Obtaining such a waiver currently is possible only in international terrorism cases. The FCIG are being revised, but this revision may take some time. Thus, whenever the information sought is relevant to an established full investigation, the field likely will find it more efficient to issue an NSL out of the related full investigation than to request one in a PI.

2. General Policy on the Use of NSL Authority

NSLs are powerful investigative tools, in that they can compel the production of substantial amounts of relevant information. However, they must be used judiciously. The USA PATRIOT Act greatly broadened the FBI's authority to gather this information. However, the provisions of the Act relating to NSLs are subject to a "sunset" provision that calls for the expiration of those provisions in four years. In deciding whether or not to re-authorize the broadened authority, Congress certainly will examine the manner in which the FBI exercised it. Executive Order 12333 and the FCIG require that the FBI accomplish its investigations through the "least intrusive" means. Supervisors should keep this in mind when deciding whether or not a particular use of NSL authority is appropriate. The greater availability of NSLs does not mean that they should be used in every case.

In addition, the removal of any requirement for FBIHQ coordination in the issuing of NSLs creates the possibility of duplicate requests for the same information by different field offices. Field offices must take steps to avoid this. In particular, the field should check FBI databases (ACS, Telephone Application, etc.) and open sources to see if the information sought has already been obtained by the FBI or whether it is publically available. This is particularly important when considering issuing NSLs for telephone or electronic communications data under the Electronic Communications Privacy Act (ECPA). Unlike the criminal authorities in ECPA, the NSL authority does not require the government to reimburse carriers or Internet Service Providers (ISPs) for the cost of producing the requested information. A dramatic increase in duplicate NSLs will only augment existing pressure to require governmental reimbursement.

Individual field offices have the responsibility for establishing and enforcing an appropriate review and approval process for the use of NSL authorities.

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3. The Mechanics of Producing NSLs

For all types of NSLs, the issuing office needs to prepare two documents: (1) the NSL itself; and (2) an EC approving the NSL and documenting the predication. Model NSLs and ECs for all variations of the three types of NSLs are included as attachments to this communication. These materials will also be placed on the NSLU Intranet Website and will be distributed by GroupWise e-mail. Once the initial implementation of these new authorities is accomplished, NSLU will work to develop a macro or form to further streamline the NSL process.

A. The NSL

There are presently seven variations of the three NSL types: 1) subscriber information; 2) toll billing records; 3) electronic subscriber information; 4) electronic communication transactional records; 5) financial records; 6) identity of financial institutions; and 7) consumer identifying information. This section will discuss the features that these variations share in common and highlight the differences.

All NSLs must be addressed to an appropriate company point of contact. NSLU will place a list of known points of contact on its intranet website. However, the responsibility for ensuring that the company point of contact is up to date belongs to the drafting field division. Field divisions should advise NSLU of any new points of contact, or when a particular point of contact is no longer valid. Please note that the company point of contact address does not include a zip code, because NSLs must be hand-delivered.

The first paragraph of every NSL provides the appropriate statutory authority for the request, identifies the types of records requested, and provides available identifying information so that the company can process the NSL request. It is this first paragraph that contains the differences that warrant the seven NSL varieties.

Subscriber and electronic subscriber NSLs should have a specific date for each of the phone numbers/e-mail addresses requested. Typically, the specific date is going to be the date that the phone number or e-mail address was used in communication with the subject of the investigation. Any phone numbers identified in a subscriber request should contain all ten digits of the phone number, including the area code.

Toll billing record and electronic communication transactional record requests should have a range of dates for

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each of the phone numbers/e-mail addresses requested. The date range may be from inception to present, or some other specified date range relevant to the investigation. Any phone numbers identified in a toll billing record request should contain all ten digits of the phone number, including the area code.

Financial record requests should include all available identifying information to facilitate the financial institution's records search. Typically, such identifying information includes: name, account numbers, social security number, and date of birth. The time period for financial record requests is typically from inception of account(s) to present, although a more specific date range may be used.

Credit record requests are similar to financial requests in that they should include available identifying information to facilitate the credit agency's records search. Typically, such identifying information includes: name, social security number, and date of birth. There is no need to specify a date range for credit record requests because these requests seek all records where the consumer maintains or has maintained an account.

The second paragraph of every NSL contains the statutorily required certification language. The certification language is virtually identical for every NSL. However, please note that the certification language used in the financial records NSLs is slightly different than the others in that it states "the records are sought for foreign counterintelligence purposes" Financial records also contain an additional certification that the FBI has complied with all applicable provisions of the RFPA. Use of the model NSLs will ensure that the proper certifications are made.

The next paragraph contains an admonition for the phone company, ISP, financial institution, or credit agency receiving the NSL. The paragraph warns that no officer, employee, or agent of the company may disclose that the FBI has sought or obtained access to the requested information or records.

The last substantive paragraph instructs the company point of contact to provide the records personally to a representative of the delivering field division. It also states that any questions should be directed to the delivering field division. This last paragraph requires the person preparing the NSL to input the appropriate delivering field division in two places.

The model NSLs for financial records and electronic communication transactional records each have a separate attachment. These attachments provide examples of information

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which the company might consider to be financial or electronic communication transactional records.

Finally, the NSL is an unclassified document because it does not detail the specific relevance of the requested records to an authorized FBI investigation. There is no need to classify the NSL when attaching it to the cover EC.

B. The Cover EC

The Cover EC serves four essential functions in the NSL process: (1) it documents the predication for the NSL by recording why the information sought is relevant to an investigation; (2) it documents the approval of the NSL by relevant supervisors and the legal review of the document; (3) it contains the information needed to fulfill the Congressional reporting requirements for each type of NSL; and (4) it transmits the NSL to the requesting squad or delivering field division for delivery to the appropriate telecommunications carrier, ISP, financial institution, or credit agency. There are four varieties of model ECs provided with this communication: (1) subscriber/electronic subscriber information; (2) toll billing/electronic communication transactional records; (3) financial records; and (4) credit information. When preparing an NSL request, the field should use one of these model ECs, giving special consideration to the elements discussed in this section.

1) Field Descriptors

This section will generally explain how most of the EC field descriptors should be completed. The "**Precedence**" descriptor will typically be "ROUTINE." The "**Date**" descriptor should reflect the date the NSL and the EC were approved. The "**To**" descriptor will always include "General Counsel" and the requesting squad's field division. It may also include the name of the delivering field division (always Los Angeles in the case of FCRA NSLs) and the office of origin, if applicable. The "**Attn**" descriptor should include the name of the Chief, NSLU, and the squad supervisors and case agents from the requesting squad, delivering field division, and office of origin, if applicable and if known. The credit model EC identifies the FBI personnel working on Squad 4, Santa Ana RA, who are currently responsible for the service of FCRA NSLs. The "**From**" descriptor should identify the certifying official's field division, and include the title of the certifying official. The "**Contact**" descriptor should reflect the name and phone number of the requesting squad case agent. The "**Drafted By**" descriptor should reflect the name of the person who prepared the NSL package. The "**Case ID #**" descriptor must contain the case file number relevant to the

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request, and the case file numbers indicated in the model EC. The "Title" descriptor should list the subject's name, any known aliases, whether the investigation is an FCI or IT investigation directed at a particular foreign power, and identify the office of origin, e.g., WILLIAM BADGUY, AKA BILL BADGUY, FCI-IRAQ, OO: NEW YORK. The "Synopsis" descriptor should use the standard boilerplate contained in the appropriate model EC. The "Derived From" descriptor should be "G-3" in bold typeface. The "Declassify On" descriptor should be "X1" in bold typeface. the "Full Investigation Instituted" descriptor should contain the date the full FCI or IT investigation was opened on the subject and indicate whether the subject is a U.S. person. Please note that the word "Field" has been deleted from the field descriptor contained in the standard EC macro. In the unlikely event that an NSL is issued during a PI with prior FBIHQ approval, the field descriptor should be edited to state "Preliminary Inquiry Instituted." The remaining descriptors can be filled in according to the model EC being used.

2) Predication and Relevance

The USA PATRIOT Act has greatly simplified the NSL process. The FBI official authorizing the issuance of an NSL is no longer required to certify that there are specific and articulable facts giving reason to believe that the information sought pertains to a foreign power, or an agent of a foreign power. NSLs may now be issued upon a certification of relevance to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

Accordingly, the first paragraph in the "Details" section of the EC should contain the predication for the full investigation and identify the relevance of the requested records to the investigation. Both the predication and relevance should be stated clearly and concisely. The predication should track with the predicates contained in FCIG, Section III.C.1. For example, the predication might state, "A full foreign counterintelligence investigation of subject, a Non-U.S. person, was authorized in accordance with the Attorney General Guidelines because he may be a suspected intelligence officer for the Government of Iraq." Another example might state, "A full international terrorism investigation of subject, a U.S. person, was authorized in accordance with the Attorney General Guidelines because he may be engaged in international terrorism activities by raising funds for HAMAS."

The relevance requirement ties the requested records to the appropriate full investigation. For example, relevance could be established by stating, "This subscriber information is being

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requested to determine the individuals or entities that the subject has been in contact with during the past six months." Another example might state, "The subject's financial records are being requested to determine his involvement in possible HAMAS fund raising activities."

3) Approval

The second paragraph in the "Details" section and the "Approved By" descriptor field of the EC should reflect the level of the official approving the issuance of the EC and signing the NSL's certification. Prior to certification, every NSL and cover EC issued by the field division should be reviewed by the squad supervisor, the Office of the Chief Division Counsel, and the ASAC. Lawyers reviewing NSL packages should use the checklists provided with this communication to ensure legal sufficiency. The last step in the approval process occurs when the certifying official (Deputy Director, ADs, General Counsel, ADICs, DADs, DGC, or SACs) personally signs the NSL and initials the EC. Certifying officials may not further delegate signature authority.

4) Reporting Requirements

NSLU will continue to prepare the mandatory reports to Congress required for each NSL type. To ensure that NSLU receives sufficient information to prepare these reports, it is critical that the person preparing the NSL package follow the NSL and EC models very carefully. The second lead in every model EC requests NSLU to "record the appropriate information needed to fulfill the Congressional reporting requirements for NSLs." NSLU will be able to compile the reporting data provided that the cover EC includes the case file number, the subject's U.S. person status, the type of NSL issued, and the number of phone numbers, e-mail addresses, account numbers, or individual records being requested in the NSL. Once NSLU has entered this reporting data into its NSL database, it will clear the lead set in the cover EC.

5) Transmittal

Often, the squad requesting the NSL will be able to hand-carry the NSL locally to the appropriate company point of contact. However, in many situations, the field division drafting the NSL will have to get it delivered by another field division. In these situations, the drafting division should attempt to identify the squad and personnel at the delivering field division who will be responsible for delivering the NSL. In the event that the office of origin is different than either

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the drafting division or delivering division, the person drafting the NSL package should ensure that the case agent from the office of origin receives a copy of the package. The first lead in the model ECs should direct the requesting squad or delivering field division to deliver the attached NSL. If the delivering division is different than the drafting division or the office of origin, then this first lead should also request the delivering division to submit the results to the drafting division and/or the office of origin.

4. NSL Preparation Assistance

Some field divisions may, for a variety of reasons, opt not to exercise their delegated authority to issue NSLs. Other field divisions may exceed their capacity to issue NSLs and seek assistance in handling the overflow. NSLU will continue to process any NSL request that it receives. Field divisions should send their requests directly to NSLU, with information copies to the FBIHQ substantive unit. Such requests must contain all the information identified in this communication as necessary to prepare the NSL package. NSLU anticipates that it will be able to process such requests within one to three business days.

Any questions regarding this communication may be directed to [REDACTED] NSLU, OGC, at [REDACTED]
[REDACTED]

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