

██████████ The on-site Company A analyst told us that he therefore began to provide records in response to a letter from the FBI – called an “exigent letter” – which stated that exigent circumstances had prompted the request and that

subpoenas requesting this information have been submitted to the U.S. Attorney’s Office who will process and serve them formally to Company A as expeditiously as possible.

According to the SSA who signed the first of these exigent letters in November 2002, the exigent letters were issued as “placeholders” to enable the FBI to secure the records promptly. However, the letters still committed the FBI to serve grand jury subpoenas on Company A after the records were provided, which the FBI did.

We identified a total of 37 exigent letters issued by the New York Field Division between November 2002 and April 2003.<sup>15</sup> The SSA who signed the first exigent letter and 11 other exigent letters issued on New York Field Division letterhead said that he signed these letters because he understood that the concept had been approved by Company A attorneys and he never thought about the legal authority for the letters. A Company A analyst told us that the exigent letter was drafted by someone in the FBI, and that Company A thereafter accepted the letters. However, we were not able to determine who initially drafted or approved the New York Field Division’s use of these first exigent letters.

In 2002, the FBI reassigned several SSAs who had been working in the New York Field Division to temporary duty assignments at FBI Headquarters to help set up the CAU as a new unit in the FBI Headquarters’ Counterterrorism Division (CTD). In 2003, one of the Company A analysts who had worked at the FBI’s New York Field Division’s offices was also reassigned to work in the CAU. The overlap in Company A personnel who worked in the New York Field Division and later at FBI Headquarters contributed to the migration of the exigent letter practice to FBI Headquarters in 2003.

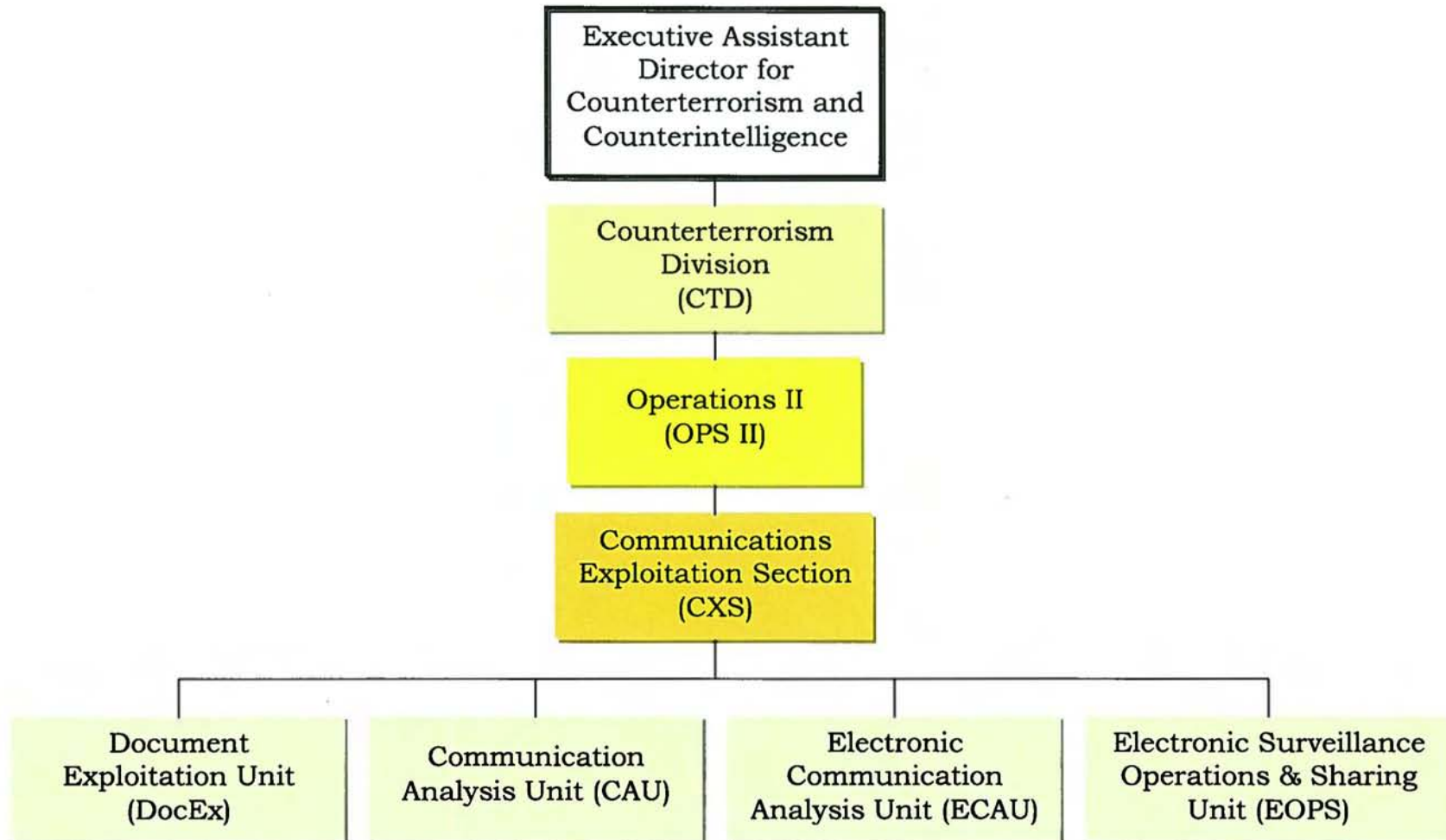
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<sup>15</sup> New York Field Division personnel issued at least 20 additional exigent letters from October 2004 to September 2006. Although an SSA assigned to work in the New York Field Division estimated that he signed at least 50 to 60 exigent letters, the OIG identified only 19 exigent letters signed by this SSA. Based on this statement and other information developed in our investigation, we believe more exigent letters than the 798 we identified in our investigation were issued by the FBI. However, because of the FBI’s inadequate record keeping practices, we could not determine how many more were issued.

**B. The Work of the Communications Analysis Unit (CAU) and the FBI's Contracts with the Three Communications Service Providers**

As part of a reorganization of the CTD following the September 11 attacks, the FBI created the Communications Exploitation Section (CXS) in 2002. The mission of the CXS was to support the FBI's investigative and intelligence missions by analyzing terrorist communications. As noted in Chart 2.1, one of the four units created within the CXS was the CAU.

**CHART 2.1**  
**Organizational Chart of Communications Exploitation Section**



\*The Document Exploitation Unit became the Digital Media Exploitation Unit (DMX) on March 26, 2006.

In 2003, the FBI entered into a contract with Company A pursuant to which a Company A analyst was located in the CAU's office space. The FBI also entered into separate contracts in 2003 with Company C and in 2004 with Company B to locate one of their analysts in the CAU's office space.

We determined that a CAU SSA issued the CAU's first exigent letter to the Company A analyst, then still located at the New York Field Division, on March 14, 2003. When the three communications service providers' employees were located in the CAU, CAU personnel issued similar exigent letters to these individuals. These exigent letters issued by CAU personnel were for the most part identical to the exigent letters issued by the New York Field Division in its criminal investigations after the September 11 attacks. As described below, we determined that from March 14, 2003, through November 13, 2006, CAU personnel issued a total of 722 exigent letters to the 3 on-site communications service providers.

### **1. The CAU's Mission and Organizational Structure**

The CAU's mission is to analyze telephone communications and provide actionable intelligence to the appropriate operational units in the FBI.<sup>16</sup> The CAU was established as an "operational support unit" rather than an operational unit. Under FBI internal policy, as operational support components, neither the CXS nor CAU personnel could initiate national security investigations or sign NSLs.

From 2003 through 2006, the CAU was organized into teams, each of which was led by an SSA and included other SSAs, Supervisory Intelligence Analysts, Intelligence Analysts, and Technical Information Specialists. Each team supported specific FBI field and Headquarters operational divisions, legal attachés, and classified special projects.

Following its establishment in late 2002, the CAU initially was supervised by Acting Unit Chiefs. Two SSAs served as the Acting Unit Chiefs from September 2002 to March 2003. In March 2003, Glenn Rogers was appointed as the first permanent CAU Unit Chief.

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<sup>16</sup> The CAU's mission was described in a January 6, 2003, FBI Electronic Communication (EC). This EC, which was drafted by the CAU's Acting Unit Chief and sent to all FBI divisions, described the CAU's mission:

CAU facilitates the prevention and prosecution of international and domestic terrorism activities through the relevant collation, incisive analysis, and timely dissemination of high-quality intelligence identified through telephone calling activity.

In November 2004, Rogers was promoted to Assistant Section Chief for the CXS.<sup>17</sup> Bassem Youssef succeeded Rogers as the CAU Unit Chief and remained the CAU's Unit Chief throughout the period covered by our review.

Chart 2.2 shows the personnel who held key positions in the FBI's senior leadership, the FBI Office of the General Counsel (FBI OGC), and the Counterterrorism Division during the period covered by our review.

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<sup>17</sup> Rogers retired from the FBI in November 2006.

**CHART 2.2**  
**FBI OGC, Senior Leadership, and Counterterrorism Division Officials Management**  
**(2003 through 2007)**

Counterterrorism Division (CTD)	2003				2004				2005				2006				2007																		
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N
FBI General Counsel	Valerie Caproni Aug 03 through 2007																																		
Deputy General Counsel	Julie Thomas Oct 2004 through 2007																																		
Executive Assistant Director (EAD)	Pasquale D'Amuro Nov 02 - Aug 03				L. M. Aug 03 - Oct 03				John Pistole Dec 03 - Oct 04				Gary Bald Nov 04 - Jun 06				Willie Hulon Jun 06 through 2007																		
Assistant Director of CTD	Larry Mefford Apr 02 - Aug 03				J. P. Nov Dec 2003				Gary Bald Mar 04 - Nov 04				Willie Hulon Dec 04 - Jun 05				Joseph Billy Oct 06 through 2007																		
Deputy Assistant Director (DAD)	John Pistole June 02 - Nov 03				Gary Bald Nov 03 - Mar 04				Willie Hulon Jun 04 - Dec 04				J. B. Dec 04 - Mar 05				Joseph Billy Apr 05 - Oct 06				Arthur Cummings Aug 06 through 2007														
Section Chief of Communications Exploitation Section (CXS)	Michael Fedarcyk Mar 03 - Jan 04								Laurie Bennett Aug 04 - Apr 06				Jennifer Smith Love Apr 06 - Dec 06				John Hess Feb 07 through 07																		
Assistant Section Chief of CXS					John Chaddic Jun 03 - Oct 04				Glenn Rogers Nov 04 - Feb 06				Thomas Wall Apr 06 - Sep 07																						
Unit Chief Communication Analysis Unit (CAU)					Glenn Rogers Mar 03 - Oct 04				Bassem Youssef Nov 04 through 07																										
Section Chief International Terrorism Operations Section (ITOS) I					Arthur Cummings Mar 03 - Nov 04				Michael Heimbach Mar 05 - Jan 06				James McJunkin Feb 07 through 07																						

Acting    
  Data NOT Provided    
 L.M. = Larry Mefford     J.P. = John Pistole     J.B. = James Bernazzani

We interviewed 15 SSAs and 10 Intelligence Analysts who were assigned to the CAU beginning in March 2003. They stated that their duties consisted chiefly of responding to requests from field divisions, legal attachés, and operational Headquarters units. These requests included asking the CAU to obtain and analyze telephone numbers related to ongoing FBI investigations and to report back to the requester with telephone records and analysis.

CAU personnel analyzed the telephone numbers by obtaining information from numerous databases and other resources, including information from the three on-site communications service providers. One SSA from a CTD operational unit who frequently requested CAU support characterized the CAU's role as having "a phone database on steroids; to identify 'good' versus 'bad' numbers; to provide [REDACTED] charts and analysis; and to get numbers in a usable format for the field."

Nearly all of the 15 SSAs we interviewed who worked in the CAU told us that when they arrived at the CAU they had little or no experience in national security investigations.<sup>18</sup> In addition, all but 2 of the 29 FBI employees we interviewed who were assigned to work in the CAU said they had limited or no prior experience working with NSLs. None of the SSAs we interviewed said that the FBI provided them training on the legal and internal FBI requirements for issuing NSLs until after the OIG's first NSL report was issued in March 2007.<sup>19</sup>

## **2. Terminology Used in this Report for Non-Content Telephone Transactional Records**

As described above, the ECPA generally prohibits communications service providers from divulging "a record or other information pertaining to a subscriber to or a customer of" their services.<sup>20</sup> However, in authorized

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<sup>18</sup> Virtually all of these SSAs had extensive experience in conducting or supporting criminal investigations, which were governed by a different set of Attorney General Guidelines than the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines), which applied to the conduct of national security investigations.

<sup>19</sup> In response to the OIG's recommendations in our first NSL report, the FBI is now providing mandatory NSL training to FBI employees involved in the use of NSLs. This training, as well as the NSL guidance and other corrective actions implemented by the FBI and the Department in response to our first NSL report, is described in Chapter Four of our second NSL report.

<sup>20</sup> 18 U.S.C. § 2702(a)(3).

international terrorism and espionage investigations, the ECPA created an exception to this general prohibition, which allows the FBI to request “the name, address, length of service, and local and long distance toll billing records of a person or entity” upon written certification by the FBI Director or his designee that the records sought are relevant to an authorized international terrorism investigation, provided that any investigation of a United States person “is not conducted solely on the basis of activities protected by the first amendment.”<sup>21</sup>

In this report we generally use the term “toll records” to refer to the non-content records of telephone calls that the three communications service providers provided to the FBI in response to exigent letters and other informal requests.<sup>22</sup>

Toll records in this context are the date, time, duration, and the originating and terminating numbers to a telephone call. These records are also sometimes referred to as “transactional” records, as distinguished from the content of telephone calls. The FBI is not authorized to collect the content of any telephone calls through NSLs.

### **3. FBI Contracts with the Three Communications Service Providers**

In 2003 and 2004 the FBI entered into contracts with three communications service providers requiring the communications service providers to place their employees in the CAU’s office space and to give these employees access to their companies’ databases so they could immediately service FBI requests for telephone records.<sup>23</sup> These employees were also on call to the FBI after business hours. The contracts required

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<sup>21</sup> 18 U.S.C. § 2709(b)(1).

<sup>22</sup> FBI personnel and employees of the on-site communications service providers sometimes referred to these records by using other industry terms such as “call records,” “call detail records,” “calling activity information,” or “tolls.” In addition, the terminology used in the contract documents to describe records provided to the FBI by the communications service providers varied, and there were some differences among the three providers as to the types of records available to the FBI. Accordingly, while we generally use the term “toll records,” we use other terminology when quoting from contract documents or witness interviews.

<sup>23</sup> During the period covered by our review, Company B and Company C each assigned one full-time employee to service their respective contracts with the FBI. Company A rotated four analysts through two full-time positions.



the providers to deliver the toll records to the FBI in a specific electronic format that was compatible with the FBI's databases.<sup>24</sup>

CTD officials told us that the ability to have requests for toll records serviced immediately by the communications service providers and to receive the records in an electronic format that could be immediately uploaded into FBI databases improved the CAU's ability to support FBI counterterrorism investigations in a timely fashion. A CTD memorandum requesting approval to obligate funds for the contract with Company A described the contract as providing for "near real-time servicing" of legal process by Company A analysts.

In 2003, the FBI entered into a contract with Company A. Pursuant to its contract, Company

[REDACTED]

<sup>25</sup>

Company A documents also stated that

[REDACTED]

In addition to providing toll records, the Company A analysts could [REDACTED] the telephone toll data for the FBI.<sup>26</sup> According to the Company A

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<sup>24</sup> A May 28, 2003, EC from the CAU described problematic delays with toll records received through conventional channels that were "often via hard copy reports that had to be retyped into FBI databases."

<sup>25</sup>

[REDACTED]

<sup>26</sup> Company B and Company C did not perform [REDACTED] of the records they provided to the CAU.

employees, the types of [REDACTED] that Company A analysts performed for the FBI were: (S)

- [REDACTED] community of interest [REDACTED] (described later in this chapter), when requested;
- alerting CAU requesters if the Company A analysts noticed that the data reflected indicators that might make it a priority (such as calls to or from a [REDACTED]);
- evaluating telephone data to eliminate unnecessary follow-up on telephone numbers that were of no investigative value; and
- preparing visual presentations such as [REDACTED] charts showing communication [REDACTED] between telephone numbers of interest.

The FBI's contract with Company A significantly exceeded the scope of the services that were provided to the FBI by Company B and Company C. From 2003 to March 2007, the FBI paid Company A more than [REDACTED] under this contract.

In 2003, the FBI entered into a contract with Company C under which an on-site Company C employee assigned exclusively to service the CAU's requests provided toll records to the FBI on an expedited basis. From April 2004 to September 2008, the FBI has paid Company C over [REDACTED] under this contract. Similar to the Company A contract, the Company C

[REDACTED]

In addition, the on-site Company C employee told us that he could provide to the FBI subscriber data, which consisted of names and addresses of Company C customers. Company C's contract proposal stated that it would maintain [REDACTED] of telephone data storage.<sup>27</sup>

In 2004, the FBI entered into a contract with Company B, under which Company B agreed to provide the CAU with the same types of records it would provide to the FBI in response to an NSL. These records included: (1) subscriber and billing information, which included telephone numbers

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<sup>27</sup> The on-site Company C employee told us in 2007 that in some instances Company C could provide records [REDACTED]

and subscriber names and addresses for both listed and non-published numbers; and (2) calling records for numbers dialed long distance, collect, or third party and, if available, local calls and calling card information. The Company B contract provided for making records available [REDACTED]

[REDACTED] As of March 2007, the FBI had paid Company B more than [REDACTED] under this contract.

In most instances, the toll records delivered by the three communications service providers to the FBI consisted of the originating and terminating telephone numbers and the date, time, and duration of the telephone calls. In addition, Company A and Company C could provide the [REDACTED]

Company A did not provide subscriber data as part of its services under its contract with the CAU.<sup>28</sup> Companies B and C were able to, and sometimes did, provide the CAU with subscriber data for their customers. However, the FBI typically did not obtain subscriber data from Companies B and C.

Glenn Rogers, the CAU's Unit Chief from March 2003 to November 2004, told us that a significant reason for the three contracts was the speed with which the on-site employees of the three communications service providers could respond to the CAU's requests.

Documents associated with the Company A and Company C contracts described additional resources and capabilities of the on-site providers, some of which were relevant to our review. For example, Company A's description of its capabilities in a March 2004 contract proposal stated that its database could "be customized specifically for the FBI based upon input data such as hot target list, significant numbers, secure data, etc." This contract proposal also referred [REDACTED] "Community of Interest." Company C's cost assessment proposal, dated May 23, 2003, stated that Company C [REDACTED]

[REDACTED] The FBI's Electronic Communication (EC) seeking approval to obligate funds for the Company C

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<sup>28</sup> The on-site Company A employees told us that they referred FBI personnel seeking subscriber information to a Company A subpoena management centers.

contract in 2003 noted that the statement of work for the contract would allow for [REDACTED]

29

As described in Chapters Three, Four, and Five of this report, we found that the only FBI attorneys who reviewed the three contracts prior to late 2006 were FBI OGC attorneys who specialized in procurement law. Marion Bowman, who served as Deputy General Counsel for the FBI OGC National Security Law Branch (NSLB) when the contracts were executed, told us that he was unaware of and never reviewed the contracts. Julie Thomas, who was the NSLB Deputy General Counsel from October 2004 until December 2008, told us that she first reviewed the contracts in late 2006 after she reviewed a draft of the OIG's first NSL report.

#### **4. Location of the Three Communications Service Providers**

From April 2003 through January 2008, employees of one or more of the three communications service providers were located in the CAU's office space. The CAU's office space was arranged in an open manner, with no walls or partitions to set these employees apart from CAU personnel. The work stations for the providers' employees consisted of a desk, at which the employee had access to an FBI computer, an FBI telephone, and a separately networked computer that provided access to the records of the communications service provider. These work stations were located nearest the entry door to the CAU and were immediately adjacent to the CAU Unit Chief's office. The work stations of CAU's SSAs and Intelligence Analysts were located further inside the CAU's suite. All of the work stations in the CAU's suite, including the work stations for the three communications service providers, were integrated in one common area.

The FBI issued FBI e-mail accounts to employees of the three communications service providers for their use at the FBI. The providers' employees also had access to the CAU computer share drive.<sup>30</sup> The FBI e-mail accounts enabled them to communicate with FBI employees inside

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<sup>29</sup> As described later in this chapter, we believe that the FBI's community of interest [REDACTED] practices were inappropriate under the ECPA and FBI policy. Further, as described in Chapter Three of this report, we found that, pursuant to the FBI's contracts with Company A and Company C, the FBI improperly obtained ECPA-protected calling activity information through the use of hot number [REDACTED]

<sup>30</sup> Employees from Company A and Company B told us that they accessed the CAU's share drive to review the exigent letter template because they were often asked about the template by FBI personnel who wanted to request records.

and outside the CAU. The providers' employees also communicated [REDACTED] As described below, many requests for telephone records were conveyed to the communications service providers through e-mails sent on the FBI e-mail accounts.

### **5. Relationship between CAU Personnel and the Providers' Employees**

We found that the on-site providers' employees regularly attended CAU unit meetings and were treated by CAU personnel as "team" members. This team identification also was evidenced by the on-site employees' e-mail communications. When the FBI established FBI e-mail accounts for the providers' employees, one of the Company A analysts created a folder entitled "TEAM USA," and many of his outgoing e-mails began with a greeting to "Team," or "Team CAU."<sup>31</sup> CAU personnel and the on-site providers also socialized outside the office such as at "happy hour" celebrations for CAU SSAs who were transferring out of the unit.

To some degree, the collegial relationship between the providers' employees and CAU personnel fostered a productive working relationship. If the FBI had properly trained its personnel on the lawful methods for obtaining telephone records from the on-site providers and if the interactions between CAU personnel and the providers' employees were properly supervised, our observations about the team identity and informal social interactions would not be remarkable. However, we found that the proximity of the on-site providers' employees to CAU personnel, combined with the lack of guidance, supervision, and oversight of their interactions with FBI employees (which we discuss in Chapters Three and Four of this report), contributed to some of the serious abuses identified in this review.

### **III. Exigent Letters Issued by CAU Personnel**

We determined that CAU personnel issued at least 722 exigent letters to the 3 on-site communications service providers from March 14, 2003,

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<sup>31</sup> One on-site Company A analyst signed his e-mails with the following signature block: [Name], CTD/FBIHQ, Communications Analysis Unit.

through November 13, 2006, the date of the last exigent letter that we found.<sup>32</sup>

Table 2.1 shows the number of exigent letters we identified as issued by the CAU from 2003 through 2006.

**TABLE 2.1**  
**Exigent Letters Issued by CAU Personnel by Calendar Year**  
**(2003 through 2006)**

<b>CALENDAR YEAR</b>	<b>NUMBER OF EXIGENT LETTERS</b>
2003	70
2004	323
2005	294
2006	35
<b>TOTAL</b>	<b>722</b>

Source: Company A, Company B, and Company C

Most of these letters were identical to the exigent letters that were first issued by the New York Field Division beginning in November 2002, discussed above.

Table 2.2 shows the number of exigent letters CAU personnel issued to each of the three communications service providers during the 4-year period.

**TABLE 2.2**  
**Exigent Letters Issued by CAU Personnel to the**  
**Three On-Site Communications Service Providers**  
**(2003 through 2006)**

<b>COMMUNICATIONS PROVIDER</b>	<b>NUMBER OF EXIGENT LETTERS</b>
Company A	514
Company B	146
Company C	62
<b>TOTAL</b>	<b>722</b>

Source: Company A, Company B, and Company C

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<sup>32</sup> As described below, the use of exigent letters that promised future legal process was formally barred (in a directive issued by the FBI's Deputy Director) in March 2007, when the OIG issued our first NSL report.

In addition to the CAU personnel who signed these 722 exigent letters, from 2002 to 2006, 76 other exigent letters were signed by FBI personnel not assigned to the CAU. Fifty-eight of these exigent letters were signed by FBI personnel assigned to the FBI's New York Field Division. The remaining 18 exigent letters were signed by FBI personnel in FBI Headquarters and field divisions who told us they learned about CAU's resources either through briefings, previous assignment in the CAU, or their own initiative. Because exigent letters were primarily issued by the CAU, however, our review focused on the CAU's use of the 722 exigent letters and other informal methods of obtaining non-content telephone records from the on-site providers, rather than the use of exigent letters by other FBI offices.

#### **A. Text of the CAU Exigent Letters**

The 722 CAU exigent letters were all drafted on official FBI letterhead. All but 17 of the 722 exigent letters signed by CAU personnel contained the following two sentences:

Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided. Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally to [the communications service provider] as expeditiously as possible.

Of the 17 exigent letters that did not contain this language, 11 promised a follow-up NSL rather than a subpoena, 2 promised to follow up with either a subpoena or an NSL, and 4 did not mention any follow-up legal process. The appendix to this report includes examples of two exigent letters issued by CAU personnel during the period covered by our review.

Of the 722 exigent letters, 75 specified in either the body of the letter or in an attachment to the letter the types of records sought – either toll billing or subscriber records, or both. Most of the other exigent letter requests included only the generic request for “records” quoted above.

Some of the 722 exigent letters also instructed the recipient to conduct a “community of interest” or “calling circle” [REDACTED] A community of interest [REDACTED]

Some of the 722 exigent letters also had an attachment listing various categories of records requested, such as subscriber information, data, and community of interest reports. However, we found that, as with the case with NSLs that had similar attachments, the FBI did not consistently obtain all records listed on the attachments to the exigent letters.

Of the 722 exigent letters issued by the CAU, only 77 letters included the date range for the request, which ranged . . . . Several CAU SSAs and intelligence analysts told us that they sometimes requested whatever records the communications service provider had on a particular telephone number, regardless of the time period.

In addition, employees of the on-site communications service providers told us that CAU requesters would often come to their work stations and tell them the specific records they needed and the date parameters for their requests. When they did so, CAU personnel sometimes provided exigent letters to cover the request at that time or at a later time if responsive records were located. For example, we reviewed entries in the on-site Company C employee's log in which he noted references to . . . . requested. However, the log also noted that the Company C employee only needed an exigent letter for those instances in which he located responsive records, not for all . . . . he . . . .

#### **B. Counterterrorism Division's and CAU's Recognition of the Use of Exigent Letters**

The first document we identified relating to the FBI's ability to obtain telephone records from the three on-site communications service providers without first serving legal process was a January 6, 2003, EC from the Acting Unit Chief of the CAU that was distributed to all FBI divisions.<sup>34</sup> It described the CAU's mission and processes, and stated that the CAU could obtain telephone records in "exigent circumstances" and that "[a]ppropriate legal authority (Grand Jury subpoena or NSL) must follow these requests."

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<sup>33</sup> We describe community of interest requests in more detail below.

<sup>34</sup> This EC predated the contracts between the FBI and the three communications service providers.



This EC was approved by the CXS's Section Chief, the CTD's Deputy Assistant Director, and the CTD's Assistant Director. The EC made no explicit reference to exigent letters.

The first EC we identified that mentioned exigent letters was an EC to CAU personnel dated November 18, 2003, approved by CAU Unit Chief Glenn Rogers. The EC described how CAU personnel processed records received from the on-site Company A analyst in response to exigent letters. The EC stated:

[REDACTED]

Neither the CTD nor the CAU EC provided guidance regarding the circumstances in which these exigent letters were appropriate.

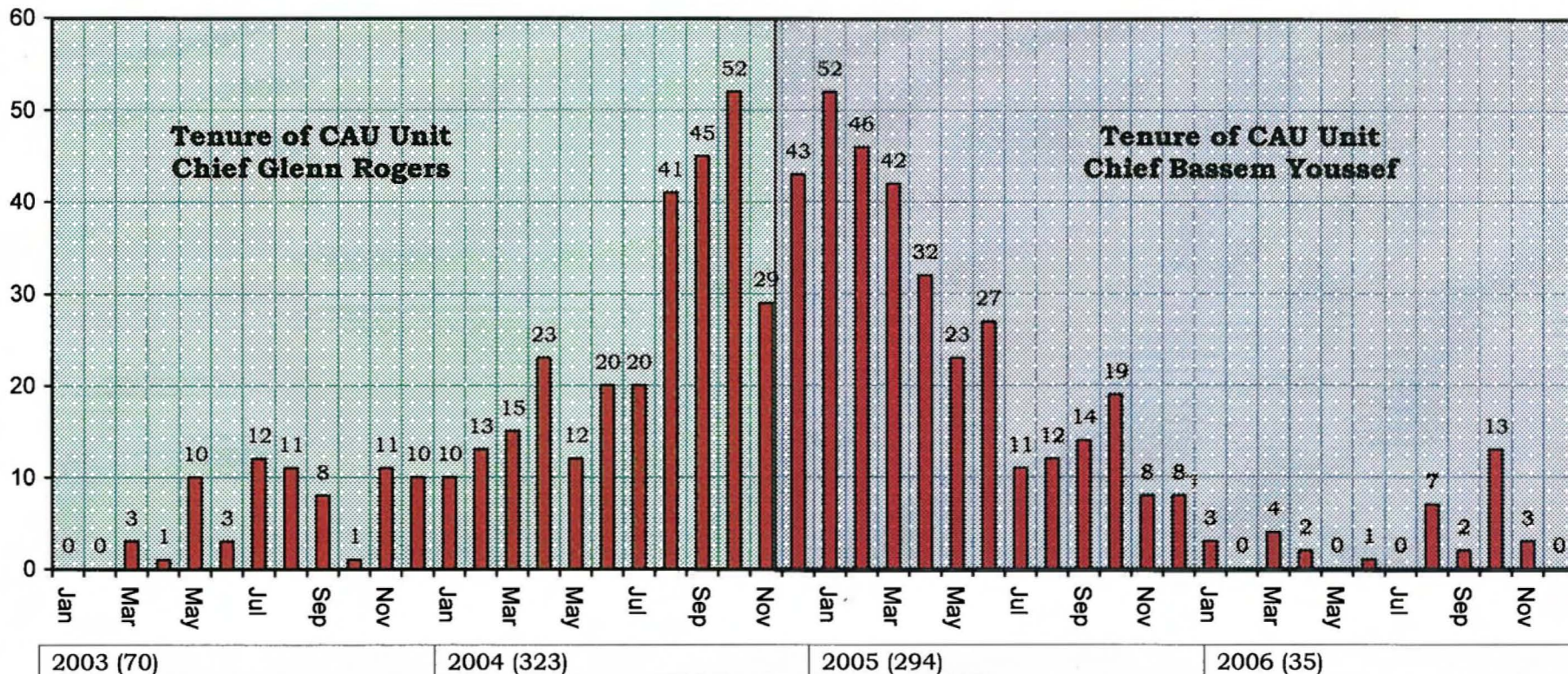
### **C. CAU's Exigent Letters Practice**

This section provides further details on the exigent letters used by CAU personnel and their explanations for issuing these letters.

Of the 722 exigent letters issued by CAU personnel from March 14, 2003, through November 13, 2006, 1 was signed by an Assistant Section Chief, 12 were signed by 2 CAU Unit Chiefs, 706 were signed by 15 SSAs, and 3 were signed by 3 Intelligence Analysts.

**CHART 2.3**

**Exigent Letters Issued by CAU Personnel to the Three On-Site Communications Service Providers  
(2003 through 2006)**



Rogers, the CAU's first permanent Unit Chief, acknowledged to us that he was aware of and approved the use of exigent letters. He said that before he became the CAU Unit Chief in March 2003 he did not know about exigent letters. He said he first learned about exigent letters from an on-site Company A analyst on May 27, 2003, while the CAU was working on an investigation of a bomb threat.<sup>35</sup> Rogers said that the Company A analyst told him that exigent letters had been previously approved by Company A and government attorneys for use in the New York Field Division for emergency situations. Rogers said he was not sure whether the attorneys referred to by the Company A analyst were from the FBI's New York Field Division or possibly from the U.S. Attorney's Office. Rogers said he did not seek any further details about the identity of any FBI attorneys who may have approved the use of exigent letters.

Rogers said that based on what the Company A analyst told him about the prior use of exigent letters by the New York Field Division, he signed the exigent letter that requested records for four telephone numbers in the bomb threat matter. We determined that Rogers personally signed 10 more exigent letters while serving as the CAU's Unit Chief and 1 exigent letter after he was promoted to Assistant Section Chief for the CXS in November 2004. In addition, we identified a total of 355 other exigent letters that were issued by CAU personnel, listing 1,375 telephone numbers, while Rogers was the CAU Unit Chief.<sup>36</sup>

Rogers acknowledged that he was responsible for the use of exigent letters at the CAU. He said that he never established any unit policy for the use of exigent letters, and he provided only very general verbal guidance to CAU employees. Rogers stated that he told CAU personnel that if requesters "state that it's exigent," or "have circumstances they describe as 'exigent' and they promise the grand jury subpoena or NSL," then the exigent letter was authorized. Rogers said that incoming CAU employees usually learned about exigent letters when they received on-the-job training from more senior CAU employees.

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<sup>35</sup> We determined that after Rogers became the Unit Chief in March 2003, CAU personnel issued eight exigent letters, dated between May 14 and May 27, 2003, that had Rogers's name typed in the signature block. The first exigent letter Rogers signed was dated May 27, 2003.

<sup>36</sup> The 1,375 total includes some duplicate telephone numbers. We identified 15 telephone numbers that were listed on exigent letters sent to more than one of the on-site providers.

Rogers distinguished exigent letters from the FBI's so-called "Patriot Act" letters requesting voluntary disclosure pursuant to the ECPA emergency voluntary disclosure provision.<sup>37</sup> Rogers told the OIG that he had used "Patriot Act letters" to obtain voluntary disclosures in other circumstances, and that the exigent letters used by the CAU were not Patriot Act letters. He said that exigent letters were used for "something that was not routine and needed immediate attention. When asked whether he was referring to instances in which there was an emergency that involved a threat of immediate death or serious injury, he responded, "No, no it just meant . . . that these were rapidly moving events . . . that required immediate attention."

Rogers told us that he was aware from the time he first learned about exigent letters from the on-site Company A analyst that follow-up legal process would be required whenever exigent letters were used. Rogers told us that he regularly reminded CAU personnel who issued exigent letters to stay current on securing the after-the-fact legal process owed to the providers. He also said he sometimes spoke with personnel assigned to CTD operational units and at least one field division about the importance of issuing after-the-fact legal process. Rogers asserted that he regularly checked with CAU personnel and with the on-site providers' employees to ensure that the after-the-fact legal process was being provided.

In November 2004, Rogers was promoted to be Assistant Section Chief of the CTD's Communications Exploitation Section (CXS), and Bassem Youssef was appointed as the CAU Unit Chief replacing Rogers. Youssef signed 1 exigent letter, and, while he was the CAU Unit Chief, 367 exigent letters listing 2,046 telephone numbers were issued under his name.<sup>38</sup>

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<sup>37</sup> "Patriot Act letters" was the name FBI personnel used to refer to letters requesting emergency disclosure pursuant to the ECPA. As noted previously, from April 20, 2003, to March 8, 2006, 18 U.S.C. § 2702(c)(4) authorized a provider to voluntarily release customers' records to a governmental entity if the provider "reasonably believe[d] that an emergency involving immediate danger of death or serious physical injury to any person justify[ed] disclosure of the information." As discussed in Chapter Four, the FBI issued detailed guidance in August 2005 concerning the FBI's authority to request emergency voluntary disclosures.

<sup>38</sup> Company A records show that the CAU issued 11 exigent letters to Company A in 2006 and a total of 239 exigent letters to Company A during Youssef's tenure as CAU Unit Chief. We identified 367 exigent letters issued under Youssef's name as CAU Unit Chief and 1 signed by him.

The total of 2,046 telephone numbers in the 367 exigent letters includes some duplicate telephone numbers. We identified 97 telephone numbers that were listed on exigent letters sent to more than one of the on-site providers. We also identified 224 (Cont'd.)

Youssef told us that when he became the CAU Unit Chief he inherited the exigent letter practice from Rogers and that since Rogers was still his immediate supervisor as the Assistant Section Chief of CXS, Youssef felt he was not in a position to change the exigent letters practices then in place.

We asked Youssef about the one exigent letter he personally signed in November 2005. He stated that when he signed the letter he was unaware that the exigent letter he signed referred to an after-the-fact grand jury subpoena instead of an NSL, and he told us that it was not until April 2006 that he closely reviewed any exigent letter and learned of the reference to subpoenas.

CAU SSAs told us that most of the exigent letters signed by CAU personnel related to international terrorism investigations.<sup>39</sup> As discussed in Chapter Four of this report, the FBI has determined that a majority of these record requests were covered by NSLs, not by grand jury subpoenas.

The on-site providers' employees told us they were concerned only that the requests were followed up by some legal process – subpoenas or NSLs – and did not care about what type of process the letter promised.

The on-site providers' employees also told us that they sometimes generated the exigent letters themselves and gave them to CAU personnel to sign and provide back to them. One of the Company A on-site analysts told us that to facilitate his preparation of exigent letters for the FBI to use, he established a short-cut in the form of an icon on his FBI-issued computer desktop that enabled him to quickly generate exigent letters, which he gave to the CAU employees to sign.<sup>40</sup>

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additional telephone numbers that were submitted to the same provider on multiple exigent letters.

<sup>39</sup> These statements by CAU SSAs were confirmed by the FBI's review team that researched, under the direction of the FBI OGC, all of the telephone numbers in exigent letters and 11 blanket NSLs in order to determine whether the FBI will retain records. As described in detail in Chapter Four of this report, the review team determined that nearly all of the 4,379 telephone numbers were relevant to national security investigations, while 266 were relevant to criminal or domestic terrorism investigations.

<sup>40</sup> None of the employees of the three on-site communications service providers or any FBI employees we interviewed said they could estimate the total number of exigent letters prepared by the three providers.

For much of the period when exigent letters were used, we found that there was no written guidance for CAU personnel regarding the circumstances under which exigent letters could be used. We found that there was only a general understanding among CAU employees that there had to be “exigent” or emergency circumstances for them to use an exigent letter. We also found that there was no process whereby a supervisor reviewed and approved the issuance of the exigent letters. Further, there was no requirement to document the circumstances under which the exigent letters were issued or the investigation to which the requested telephone number was related. In fact, CAU personnel were not even required to retain copies of the exigent letters and, as described below and in Chapter Four, for the most part were not required to track or otherwise account for the exigent letters issued to the on-site communications service providers.

### **1. Signers of Exigent Letters in the CAU**

We determined that three SSAs assigned to the CAU from 2003 to 2005 signed nearly 50 percent of the 722 exigent letters issued by CAU personnel. One of these 3, an SSA who signed 139 exigent letters, told us that the communications service providers’ employees often gave him exigent letters to sign after he had already been given the requested records – and he simply signed the letters. This SSA also said that while he realized the exigent letters inaccurately stated that grand jury subpoenas had been submitted, he signed the letters because he “thought it was all part of the program coming from the phone companies themselves,” and he assumed the letters were approved by the communications service providers’ attorneys. This SSA said that each time he issued an exigent letter, it was in response to a request from a field division or headquarters unit for records, and he believed that exigent circumstances were present.

Another SSA, who signed 115 exigent letters, said he learned about the letters from the same Company A analyst who initially had told Rogers about the letters. This SSA said the Company A analyst told him that the letter had been approved for use by both Company A and FBI OGC attorneys. The SSA said he went to Rogers and asked about the exigent letters, and Rogers told him that they were “standard operating procedure.” This SSA also said that he knew that subpoenas had not been requested but signed the exigent letters anyway, based on the assurances of the Company A analyst and Rogers as well as his awareness that the letters were a standard practice in the CAU when he began his assignment there in September 2003. The SSA said that while most of the exigent letters he signed related to counterterrorism investigations, some were related to criminal and counterintelligence investigations. He also told us that in some instances, due to the exigent nature of the request, he did not believe there were open investigations when he issued an exigent letter.

A third SSA, who signed 98 exigent letters, said he learned of exigent letters from the Company A analyst shortly after he arrived at the CAU in September 2003. The SSA said he read the exigent letter but was not concerned with the reference to a subpoena being requested from the U.S. Attorney's Office. He said he assumed that the letter was a legitimate document because he saw other CAU personnel using exigent letters. The SSA also said that at one point either Rogers or a Company A analyst told him not to change the language in the exigent letter because attorneys for both Company A and the FBI had already agreed to the wording. This SSA told us that exigent letters were typically prepared by employees of the on-site communications service providers, who would forward the exigent letters to him by e-mail for his signature at the same time they furnished him the requested telephone data.<sup>41</sup> He said that on other occasions one of the intelligence analysts on his team would prepare the exigent letters. The SSA told us that he was not concerned with whether an incoming request was made pursuant to an open FBI investigation, because a case would eventually be opened even if it lagged behind the exigent letter process.

This SSA also told us that he used exigent letters only under exigent circumstances and that he would not sign his name to letters containing false statements. When we asked him about the inaccurate statements in the exigent letters that subpoenas had been submitted to the U.S. Attorney's Office, he said the language "did not make sense" since that language did not reflect how the process to obtain records and to issue after-the-fact legal process actually worked in the CAU. Yet, although he said he thought at the time that the language in the exigent letters did not make sense, he said he nevertheless signed the letters because he thought the letter was accepted by the providers and was an established practice in the CAU. He said his overriding concern was the fear that "something would blow up in the U.S." if he did not aggressively respond to requests for telephone data in support of FBI terrorism investigations.

While most SSAs told us they believed exigent circumstances were present when they signed the letters, we found contrary evidence regarding some of these letters. For example, an SSA who signed 34 exigent letters told us that he was "pretty sure" that some of the exigent letters he signed when he first joined the CAU "could be questionable" in terms of whether there were exigent circumstances. Another SSA who signed 61 exigent letters said that Intelligence Analysts on this team would sometimes describe the situations prompting the requests, but if he was busy, "they'll

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<sup>41</sup> Other CAU personnel, documents, and e-mails confirmed that telephone records were often provided to the FBI before exigent letters were issued.

just hand me the letter, and . . . I'll sign it." We also identified an e-mail dated April 26, 2005, in which an FBI OGC National Security Law Branch (NSLB) Assistant General Counsel (the Assistant General Counsel) who was the NSLB point of contact for NSL-related policies and issues, expressed to Youssef that "on occasion, CAU is presuming that someone who comes to them [seeking records from the on-site providers] has an emergency."

The CAU SSAs who signed exigent letters gave us various descriptions about the matters for which exigent letters were used. Some said an exigent circumstance involved a life-threatening matter. Others described it as an important, pressing, or high-priority matter. Others said it was a matter related to an important case or one in which a high-level FBI official demanded the information.

Most of the CAU SSAs and Intelligence Analysts who signed exigent letters also said they were unconcerned about the letters' reference to subpoenas. Some SSAs asserted that they broadly read the reference of subpoenas in the exigent letters to include grand jury subpoenas, administrative subpoenas, or NSLs. One SSA stated that "for me everything was a subpoena." Other SSAs stated that they were unaware of the type of legal process that would follow because it was the responsibility of the FBI requester, not CAU personnel, to follow up with appropriate process. A few signers, including Youssef, told us that they did not closely read the exigent letters when they signed them.

Almost all of the SSAs who signed exigent letters told us that they did not give much thought to the underlying legal authority for the exigent letters. Rather, they said that they assumed the exigent letter was a legal instrument that had been reviewed by the appropriate authorities, including CTD management and attorneys from both the FBI and from the communications service providers. They stated that they used the exigent letters because they assumed that the letter was an authorized tool for requesting records from the on-site communications service providers. For example, one SSA stated that exigent letters were the "business process" in place when he came to the CAU.

CAU Unit Chief Glenn Rogers (who later served as Assistant Section Chief of the Communications Exploitation Section (CXS), which supervised the CAU) told us that he signed exigent letters even though he recognized at the time that subpoenas requesting the records had not been submitted to the U.S. Attorney's Office, as the letters stated. When we asked Rogers to explain this statement in the exigent letters, Rogers said that the exigent letter was "poorly worded" and should have been revised earlier to state that NSLs would be the after-the-fact legal process to be served on the providers. Rogers also stated that nothing was done "to hide the fact that we were



getting stuff in advance of NSLs” and that “nobody ever told me to cease” using exigent letters.

We found that the practice of obtaining records and providing after-the-fact legal process was so common in the FBI that it was mentioned in a CTD training video created in 2004. In the video, a CAU SSA speaks with a field agent by telephone and makes arrangements to provide telephone records that the SSA had already received from a communications service provider. The SSA says to the field agent, “I’ll just need you to send me an NSL to cover the books.”

As discussed in Chapter Three of this report, we found other irregular practices concerning the CAU’s interaction with the on-site providers. One of our findings in that chapter has a bearing on the issue whether signers of exigent letters knew that exigent circumstances were present. In one of three instances involving subpoenas or other requests for the toll billing records of news reporters, a CAU SSA signed an exigent letter seeking toll billing records for reporters for the Washington Post and The New York Times. Yet, the case agent told us he did not inform either the CAU SSA who signed the exigent letter or anyone in his management chain that exigent circumstances existed. Similarly, the CAU SSA said he did not recall anyone informing him that exigent circumstances were present.

None of the CAU SSAs or Intelligence Analysts who signed the exigent letters received training on NSLs upon entering the CAU. In addition, these SSAs did not have prior national security investigation experience. Many told us that in their prior experience in criminal investigations field-based SSAs were authorized to sign administrative subpoenas for telephone toll billing records, and they therefore did not believe the exigent letter practice to be extraordinary.

Three of the SSAs who together signed 114 of the 722 exigent letters issued by the CAU told us that they were concerned with the use of exigent letters and separately brought their concerns to Rogers when he was the CAU Unit Chief.<sup>42</sup> Two of these SSAs said that Rogers assured them that the exigent letters were proper and had been approved by “lawyers.” The three SSAs told us they were directed by Rogers to continue using the exigent letters. One SSA said he had also expressed concern to Rogers about the reference in the exigent letters to follow-up subpoenas when he became aware that after-the-fact process was more often NSLs than

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<sup>42</sup> These SSAs are not the same SSAs described above who together had signed nearly 50 percent of the exigent letters signed by CAU personnel.

subpoenas. This SSA said Rogers told him not to change “a single word” in the letter because it had previously been reviewed and approved.<sup>43</sup>

Rogers told us that he did not recall any of the SSAs in the CAU coming to him with concerns about the wording of the exigent letter. Rogers also said that he never spoke to any attorneys from either the FBI or the communications service providers about the use of exigent letters. Rogers said that he accepted the validity of the exigent letter based on the briefing he received from the Company A analyst who told him in May 2003 that the letter had previously been approved for use in the New York Field Division in 2002. Rogers, who signed 12 exigent letters, told us that he took “full responsibility for that letter – that it wasn’t worded properly, [and] that it took so long to change the wording” to refer to NSLs rather than subpoenas.

## **2. CTD Supervisors**

In addition to our interviews of CAU personnel and supervisors, we also interviewed supervisors in the CTD who served during the 2003 through 2006 time period about the use of exigent letters. These officials included FBI Assistant Section Chiefs, Section Chiefs, Deputy Assistant Directors, and Assistant Directors who had responsibility either for oversight of the CAU or the other CTD units whose frequent requests for telephone records resulted in the CAU’s issuance of the exigent letters. All but one of them told us they were unaware before the OIG’s first NSL investigation that the CAU was using exigent letters to obtain telephone records from the three on-site communications service providers.

The one FBI official who told us that he knew about exigent letters at the time they were used was John Chaddic, the Assistant Section Chief of CXS from June 2003 to October 2004.<sup>44</sup> Chaddic told us that in approximately June 2003 Rogers briefed him about exigent letters and described them as a “placeholder so that we could get the toll records and analyze them while we waited on the NSL.” Chaddic said he never saw an exigent letter but “wasn’t surprised” when he learned about the exigent letter process because the FBI could not afford to wait for the appropriate legal process in emergency situations when lives might be at risk. Chaddic also told us that he had assumed the use of exigent letters was addressed in the FBI’s contracts with the communications service providers. He also said

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<sup>43</sup> None of the other SSAs we interviewed who signed exigent letters said they brought concerns about the use of exigent letters to either Rogers or Youssef.

<sup>44</sup> Chaddic is currently a Unit Chief in the FBI’s Counterintelligence Division.

that the concept seemed consistent with at least one classified FBI program ongoing at the time. Chaddic added that since Rogers and most of the SSAs assigned to the CAU had previous experience with FBI drug investigations for which SSAs were authorized to obtain telephone records by signing administrative subpoenas, the exigent letter tool would not be a departure from their prior FBI experience in securing telephone records.

Other CTD officials told us they were not aware of the use of exigent letters until the OIG's investigation. For example, Laurie Bennett and Jennifer Smith Love, two of the FBI officials who served as the Section Chief of the CXS from 2004 through 2006, told us that they did not know about the letters until the details of the practice emerged during the OIG's first NSL investigation in 2006.<sup>45</sup> Bennett, who was the CXS Section Chief from August 2004 to April 2006, told us that she expected that information from the communications service providers was obtained legally and that the CAU would have informed her if they could not obtain the information legally. Love, who was the CXS Section Chief from April 2006 to December 2006, told us that she did not know about exigent letters, although she was aware that the CAU had obtained records from the providers prior to issuing legal process, and that the CAU had ongoing problems obtaining NSLs to cover telephone records that the FBI had previously received from the on-site providers.

Similarly, former CTD Deputy Assistant Directors John Lewis, Thomas Harrington, and Arthur Cummings III told us that they did not know about the exigent letters practice.<sup>46</sup> However, Lewis said he was "not surprised that [the FBI] [was] dealing with the phone companies in as aggressive a manner as possible." Cummings told us that he believed the use of the letters must have been approved by the FBI.

Former Assistant Directors in charge of the CTD also told us they were unaware of the exigent letter practice. Larry Mefford served as Assistant Director of the CTD from July 2002 until July 2003 and as Executive Assistant Director of the FBI National Security Branch from July 2003 until his retirement in October 2003. Mefford said that he was

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<sup>45</sup> The official who served as the first Section Chief of CXS from 2002 until April 2004 has retired from the FBI and declined our request for an interview.

<sup>46</sup> Lewis served as a Deputy Assistant Director in the CTD from April 2004 to June 2006, and retired from the FBI in February 2009. Harrington served as a Deputy Assistant Director in the CTD from December 2002 until March 2008. Harrington currently serves as the Executive Assistant Director of the FBI's Cyber Division. Cummings, who served as a Deputy Assistant Director in the CTD from August 2006 to November 2007, is currently the FBI's Executive Assistant Director for the National Security Branch.