that the only documentation of a request for these records sent to the carrier prior to the date of the application was an "exigent situation" letter dated [redacted] that was signed by a Special Agent assigned to the FBI office in [redacted] The letter stated that the request was made pursuant to an emergency situation and that the FBI would provide "required legal process by the end of the next business day."[156] However, the subsequent NSL was dated [redacted] over 2 months after the FISA order had been issued.

In August 2008, as a result of this review, the NSD notified the FISA Court of the inaccurate statement in the declaration, stating that the NSD and the FBI considered the inaccurate statement to be "non-material" for purposes of Rule 10(b) of the FISA Court Rules of Procedure."

C. FISA Case No. 3

In this case, the Department filed an emergency application with the FISA Court on [redacted] for electronic surveillance in connection with a counterterrorism investigation. The supporting declaration by an FBI SSA stated that the FBI had verified the subscriber information through information obtained in response to an NSL served on a carrier. The FISA Court's order was issued on [redacted]

However, working with the NSD and the FBI, we determined that the FBI had obtained the subscriber information from the carrier, prior to the filing of the FISA application for electronic surveillance, in response to an FBI field agent's oral request for telephone records, not in response to an NSL as was asserted in the application to the FISA Court. FBI records showed that the NSL seeking subscriber information for the telephone number was not drafted until [redacted] and was served on the carrier on [redacted] – 2 weeks after the inaccurate FISA application was filed. On [redacted] in response to this NSL, the carrier gave the FBI the identical information that had been described in the declaration supporting the application.

In August 2008, as a result of this review, the NSD notified the FISA Court of the inaccurate statement in the declaration, stating that the NSD and the FBI considered the statement to be "non-material" for purposes of Rule 10(b) of the FISA Court Rules of Procedure."

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[156] The letter was a form from the carrier that contained a recital tracking the standard for emergency voluntary disclosure of non-content telephone records in 18 U.S.C. § 2702(c)(4). We were unable to determine the identity of the employee who signed the letter.

D. FISA Case No. 4

In this case, the Department filed an emergency application with the FISA Court for electronic surveillance on four telephone numbers in connection with a counterterrorism investigation.

First Inaccurate Statement: The supporting declaration by an FBI SSA stated that the FBI had obtained telephone calling activity information from records obtained in response to NSLs served on a carrier. The FISA Court's order was issued on [redacted]

However, working with the NSD and the FBI, we determined that the only NSL served on the carrier seeking records on three telephone numbers connected to a target of the investigation referenced in the application was dated [redacted] the day after the FISA Court had issued its order, and the only NSL served on the carrier for a fourth telephone number also connected to the target was dated [redacted] 2 months after the FISA Court issued its order. We determined that the calling activity information on which the Department relied in its FISA Court application was obtained in response to an exigent letter to the carrier dated [redacted]

In November 2008, as a result of this review, the NSD notified the FISA Court of the inaccurate statement in the declaration, noting that the NSD and the FBI considered the statement to be "non-material for purposes of Rule 10(b) of the FISA Court Rules of Procedure."

Second Inaccurate statement: The declaration in this application inaccurately stated that pursuant to a grand jury subpoena the FBI had received records from a communications carrier on an unspecified date confirming subscriber information for two telephone numbers. In response to our inquiry, the FBI located a grand jury subpoena to the carrier dated [redacted] for one of the telephone numbers, but said that neither the FBI nor the pertinent U.S. Attorney's Office could locate any grand jury subpoena for the second telephone number.[157] However, the declaration also stated that the

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[157] The declaration also stated that the FBI had received subscriber information on an unspecified date for two of the four telephone numbers discussed in Case No. 4 above from a carrier, but did not specify the legal process or other basis for this assertion. We found that the FBI served an exigent letter on the carrier dated [redacted] seeking records for the four telephone numbers discussed above in Case No. 4, including a request for a [redacted] community of interest [redacted] for a 24-month period. The only NSL or other legal process we identified that was served on the carrier for this information was an NSL dated [redacted] seeking toll billing records and subscriber information, and included a request for a [redacted] community of interest [redacted] for two of the four telephone (Cont'd.)

FBI had obtained subscriber information for the second telephone number (the one for which a grand jury subpoena could not be located) from a trash cover.

In November 2008, as a result of this review, the NSD notified the FISA Court of the inaccurate statement in the declaration regarding the second telephone number, stating that the NSD and the FBI considered the statement to be "non-material" for purposes of Rule 10(b) of the FISA Court Rules of Procedure."

E. OIG Analysis

Based on our concern that the FBI may have used records obtained from exigent letters and other informal methods to seek FISA Court orders, we examined a small sample of the FISA Court applications that referred to telephone numbers for which records had been requested from the on-site communications service providers. Our investigation showed that FBI personnel had filed inaccurate sworn declarations with the FISA Court about the source of subscriber or calling activity information referenced in applications seeking electronic surveillance or pen register/trap and trace orders. While the declarations signed by 4 FBI SSAs in the 37 applications the NSD and the FBI reviewed stated that the information relied upon in seeking Court orders had been obtained in response to NSLs or a grand jury subpoena, in fact the information was obtained in response to exigent letters, an emergency disclosure letter, and a verbal request to the communications service providers.[158] Moreover, as detailed above, several of the NSLs referred to in the four applications were served at least 2 months after the FISA Court issued the requested orders. (U)

The NSD asserted that the inaccurate statements made in these FBI declarations were non-material because there is no exclusionary rule for statutory violations of the ECPA.[159]

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numbers listed in the [redacted] exigent letter. We were not able to determine how many days or weeks after the date of the NSL that the NSL was served on the carrier.

[158] According to the NSD's letter to the FISA Court, the FBI obtained the subscriber information underlying the fifth misstatement through a trash cover.

[159] See 18 U.S.C. § 2708 ("the remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter"); see also *United States* v. *Perrine*, 518 F.3d 1196, 1202 (10th Cir. 2008); *United States* v. *Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003).

After reviewing a draft of this report, NSD officials stated that in addition to concluding that the ECPA did not provide for exclusion of evidence for violations of the statute, the NSD also examined each of the applications addressed in FISA Cases 1, 2, 3, and 4 and determined that the inaccurate information was not substantive in nature but rather concerned only the manner in which information was obtained. The NSD officials stated that they concluded that the misstatements were non-material because the underlying substantive information provided in the misstatements was correct and that only the procedural manner in which it was obtained was misstated (e.g., in FISA Case 1 the declaration stated that subscriber information was obtained from an NSL rather than from an exigent letter). We agree with the NSD that the inaccurate statements were non-material for purposes of Rule 10(b) of the FISA Court Rules of Procedure.

However, while the NSD deemed these statements "non-material" for purposes of the FISA Court Rules of Procedure, we believe that inaccurate statements to the FISA Court are serious matters. They also affect the credibility of representations made by the government.

It is also important to note that we reviewed only a small percentage of the FISA Court applications that may have relied upon information derived from exigent letters or other informal means. Based on our results in these cases we believe there are likely to be other similar inaccurate statements in other applications. Moreover, no one in the FBI and the NSD who reviewed these applications prior to their submission to the Court had identified the inaccurate statements. Thus, our review also concluded that the FBI and the NSD failed to provide adequate supervision and oversight to ensure the accuracy of the FBI's declarations filed in support of applications seeking FISA Court orders.

After reviewing a draft of this report, NSD officials told us that they believe that even non-material representations to the Court are very serious matters. They also said that, to address these types of issues, the FBI instituted procedures in February 2006 to verify the factual accuracy of information contained in FISA applications. To ensure that these procedures are being followed, the NSD conducts on-site reviews of FBI field offices.

In Chapter Six of this report we provide recommendations to address the issues identified in this portion of our review.

We recommend that the FBI, in conjunction with the NSD, should determine whether any FISA Court orders for electronic surveillance or pen register/trap and trace devices currently in place relied upon declarations containing FBI statements as to the source of subscriber information for telephone numbers listed in exigent letters or the 11 blanket NSLs. If the FBI and the NSD identify any such pending orders, we recommend that the FBI

and the NSD determine if any of the statements characterizing the source of subscriber information are inaccurate or incomplete. If any declarations are identified as containing inaccurate or incomplete statements, we recommend that the FBI and the NSD determine whether any of these matters should be referred to the FBI Inspection Division or the Department's Office of Professional Responsibility for further review.

IV. Improper Administrative Subpoenas Issued to the On-site Providers

Our investigation also uncovered abuses in the FBI's use of administrative subpoenas.[160] In some instances, the FBI received records in response to exigent letters or other informal requests prior to service of administrative subpoenas. In addition, we determined that some administrative subpoenas served on the on-site communications service providers were preceded by "sneak peek" requests through which the on-site providers' employees would first check their databases to determine if records of interest were contained in the databases, and in some cases provided information prior to the service of administrative subpoenas.

We also found that in 2005 an FBI SSA in the CAU signed seven administrative subpoenas pursuant to 21 U.S.C. § 876 for toll billing records as part of the fugitive investigation conducted by the FBI's [redacted] Field Division regarding [redacted] This statute authorizes the use of administrative subpoenas in connection with an active narcotics investigation to which the records sought are relevant. However, some subpoenas were issued when the FBI's [redacted] Field Division had no active narcotics investigation to which the requested records were relevant. Rather, the [redacted] Field Division wanted these records because they were relevant to locating [redacted]

Additionally, we determined that all seven of these administrative subpoenas were signed by a CAU SSA who was not authorized to sign these administrative subpoenas. Moreover, three of the seven subpoenas were issued after the FBI already had obtained the records through exigent letters.

We also found that two additional administrative subpoenas related to a separate case were issued by the FBI's [redacted] Field Division after the FBI had

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[160] An administrative subpoena is a judicially enforceable demand for records issued by a government authority.

obtained the records. The FBI received the records prior to issuing the subpoenas, which violated the ECPA.

In the sections that follow, we describe these improper uses of the FBI's administrative subpoena authority.

A. The FBI's Administrative Subpoena Authority

The Attorney General is authorized to issue administrative subpoenas in connection with the investigation of certain controlled substances (narcotics) offenses and offenses involving sexual abuse or exploitation of children and health care fraud.[161] Title 21, Section 876(a), of the U.S.C. provides that "in any investigation relating to his functions under this chapter with respect to controlled substances . . . the Attorney General may . . . require the production of any records . . . which the Attorney General finds relevant or material to the investigation."[162]

The Attorney General has delegated authority to issue Title 21 administrative subpoenas to the FBI Director, who in turn has delegated the authority to FBI Special Agents in Charge, Assistant Special Agents in Charge, Senior Supervisory Resident Agents, and "those FBI Special Agent Squad Supervisors who have management responsibilities over Organized Crime/Drug Program investigations."[163] This authority may not ordinarily be re-delegated.[164]

Finally, the ECPA recognizes an exception to the prohibition against divulging "a record or other information pertaining to a subscriber to or customer of such service . . . when the governmental entity uses an administrative subpoena authorized by a Federal or State statute . . . ."[165]

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[161] See 21 U.S.C. § 876 (narcotics) and 18 U.S.C. § 3486 (sexual abuse or exploitation of children and health care).

[162] 21 U.S.C. § 876(a). The FBI's Manual of Investigative Operations and Guidelines (MIOG) has a corresponding provision stating that any Title 21 subpoena for the production of records must be relevant to a controlled substances investigation. MIOG, Pt. I § 281-7.1

[163] See 28 C.F.R. § 0.85; see also Criminal Investigative Division, electronic communication to all field divisions, Procedure and Operational Issuances, Criminal Investigative Division; Administrative Subpoenas; Proposed Change in the Manual of Investigative Operations and Guidelines, May 1, 2007.

[164] Id.

[165] 18 U.S.C. § 2703(c)(2).

B. Administrative Subpoenas Served on the On-Site Providers

We found that the FBI served over 200 administrative subpoenas for telephone records on the on-site communications service providers from 2003 to 2006. Most of these subpoenas were signed by FBI field division personnel, but some were signed by a CAU SSA. As was the case with NSLs issued after records were provided to the FBI (as described in Chapter Four), a CAU SSA told us that in some instances the communications service providers' employees gave records to the FBI in response to exigent letters prior to service of administrative subpoenas.

Documentation we reviewed from the FBI and the on-site providers showed that some of the administrative subpoenas served on the on-site providers relating to the [redacted] investigation were preceded by "sneak peek" requests through which the on-site providers' employees would first check their databases to determine if records of interest were contained in the databases. In response to sneak peeks, the on-site providers in most instances informed CAU personnel that records existed on the telephone numbers of interest, and the FBI sometimes issued administrative subpoenas for any records the FBI wanted. However, in some instances the on-site providers gave the CAU specific information about calling activity, such as the date of the last call, how many calls were found, and the date range of calls identified, before any legal process was issued.[166]

C. Improper Administrative Subpoenas Issued in Two FBI Investigations

In two FBI criminal investigations, we found that SSAs signed administrative subpoenas that were issued to the on-site providers in circumstances that violated 21 U.S.C. § 876 and the FBI regulation governing the delegation of signature authority for Title 21 administrative subpoenas. In these instances the ECPA prohibition against divulging "a record or other information pertaining to a subscriber to or customer of such service" was also violated.

1. Issuing FBI Administrative Subpoenas in the Absence of an Active Narcotics Investigation

From December 2003 to September 2006, the FBI served at least 54 administrative subpoenas related to the [redacted] Field Division's fugitive

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[166] We describe our finding that sneak peeks violated the ECPA in Chapter Two of this report.

investigation of [redacted] on the on-site communications service providers located in the CAU. Of that total a CAU SSA signed seven FBI administrative subpoenas for telephone toll billing records between January 2005 and June 2005. At the time, this SSA served as the manager of the CAU's operational support to the FBI's [redacted] investigation.

The CAU SSA told us that no one on the [redacted] task force told him that any of the telephone numbers listed in the seven administrative subpoenas was relevant to any drug investigation. Rather, he said he understood from the [redacted] task force case agent and a task force Intelligence Analyst that the records were relevant to the FBI's attempts to locate [redacted] The SSA also said that he knew that the [redacted] investigation was classified by the FBI as a "drug case" and told us "that is what [redacted] is wanted for."

In August 2008, the OIG asked FBI OGC attorneys responsible for guidance on administrative subpoenas to describe if they believed it was appropriate to issue Title 21 FBI administrative subpoenas in a fugitive investigation where the underlying racketeering acts in the indictment included narcotics offenses. Elaine N. Lammert, FBI Deputy General Counsel for the Investigative Law Branch and Chief of Staff for the FBI OGC, told us that in order to use Title 21 administrative subpoena authority, FBI agents must have an active narcotics investigation at the time the subpoenas are issued and believe in good faith that the records requested are relevant to that investigation.

FBI OGC attorneys asked the [redacted] Field Division to provide information indicating that it had an active narcotics investigation to which telephone numbers listed in administrative subpoenas issued in the [redacted] investigation were relevant. On March 4, 2009, following review of information provided by the [redacted] Field Division, the FBI OGC notified the OIG that "while appropriate in certain aspects of the case at certain times, widespread use of administrative subpoenas in this investigation without a clear nexus to an active investigation of violations of the Controlled Substances Act could not be supported."

2. Administrative Subpoenas were Signed by Unauthorized Personnel

In addition, we determined that the CAU SSA who signed the seven administrative subpoenas in the [redacted] case was not among the FBI officials to whom the Attorney General delegated authority to sign Title 21 administrative subpoenas. The SSA told us he believed he was authorized to sign the subpoenas because CAU Unit Chief Glenn Rogers had designated him to be the CAU program manager assigned to support the [redacted] Field Division's [redacted] investigation. The SSA said he would not have signed the administrative subpoenas unless he believed he was authorized. He also said that he recalled

that the [redacted] task force members agreed that he could sign them. However, he said he did not recall any specific conversations with CAU Unit Chiefs Rogers or Youssef, or any FBI attorneys in which he was told he was authorized to sign the subpoenas.

The CAU SSA told us that he was [redacted] by an on-site Company A analyst when there was calling activity from [redacted] telephone numbers associated with [redacted] family, friends, or attorneys. The CAU SSA told us that he used Company A's hot number [redacted] capability in the [redacted] investigation. Once the CAU SSA was [redacted] to calling activity by those telephone numbers, Company A typically performed a sneak peek [redacted] to determine if the telephone number calling or receiving a call from the "hot number" was a real telephone number [redacted] If it was a relevant telephone number, the Company A analyst notified the CAU SSA, who then signed either an exigent letter or issued an administrative subpoena addressed to Company A seeking records for those telephone numbers. The SSA subsequently issued Title 21 administrative subpoenas to cover some of the records obtained through exigent letters.

FBI records show that the data provided by Company A in response to the exigent letters were uploaded into an [redacted] database before the date of the administrative subpoenas issued by the SSA to cover the records.

3. Two Additional After-the-Fact Administrative Subpoenas

We identified two additional after-the-fact administrative subpoenas in a different investigation in which the subpoenas were provided from 1 to 6 weeks after the records had already been obtained by the FBI through exigent letter or an informal request.

In an organized crime/narcotics investigation conducted by the FBI's [redacted] Field Division, another CAU SSA signed 2 exigent letters addressed to Company A dated August 9, 2004, seeking toll billing records for a total of 24 telephone numbers. Responsive records were uploaded in an [redacted] database on August 10, 2004. A [redacted] SSA issued an administrative subpoena to Company A, dated August 17, 2004, to cover these records.[167]

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[167] As an SSA assigned to the FBI's Criminal Enterprise Program, this SSA was authorized to sign Title 21 administrative subpoenas.

In connection with the same investigation, on August 11, 2004, the CAU SSA asked the on-site Company C employee whether Company C had telephone records on the 24 telephone numbers listed on the 2 August 9, 2004, exigent letters to Company A (and 46 additional numbers). In response to this verbal request, the Company C employee delivered a CD with responsive records to the FBI on August 17, 2004. The field-based SSA who had signed the August 17, 2004, administrative subpoenas to Company A also signed an administrative subpoena to Company C dated September 30, 2004, to cover records for 4 of the 70 telephone numbers for which Company C had already provided records in response to the informal request.[168]

4. Knowledge of the Use of The Title 21 Administrative Subpoenas

We determined that the FBI OGC and CAU management were unaware of these inappropriate uses of administrative subpoenas to cover records obtained through exigent letters and other informal requests. FBI General Counsel Caproni told us that she did not know that the FBI had issued administrative subpoenas to cover records obtained in response to exigent letters. NSLB Deputy General Counsel Julie Thomas also said she did not recall being informed about administrative subpoenas in these cases. CAU Unit Chief Bassem Youssef told us that he never discussed with the CAU SSA who signed the seven administrative subpoenas, Assistant Section Chief Glenn Rogers, or NSLB attorneys the SSA's authority to sign administrative subpoenas to cover records acquired from exigent letters. Moreover, he said he did not know that administrative subpoenas were used to cover records acquired through exigent letters.

D. OIG Analysis

After the OIG raised questions about the FBI's use of administrative subpoenas in the [redacted] Field Division's [redacted] investigation, the FBI OGC responded that, in its view, in the absence of an active narcotics investigation to which the telephone numbers in the administrative subpoenas were relevant the FBI is not authorized to issue Title 21 administrative subpoenas. Further, when the FBI OGC reviewed the [redacted] Field Division's basis for issuing Title 21 administrative subpoenas in the [redacted] case, the FBI OGC concluded that the [redacted] Field Division did not demonstrate that it had an active narcotics investigation to which the records sought in all of the administrative subpoenas were relevant. Accordingly, the FBI concluded that the [redacted] Field

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[168] We did not locate administrative subpoenas for the remaining telephone numbers referenced in the informal request.

Division had at times improperly issued administrative subpoenas in that investigation. Following the FBI OGC's review, in March 2009, the FBI General Counsel ordered the [redacted] Field Division to

> immediately conduct a comprehensive review of the use of each administrative subpoena issued in this case to determine whether it was authorized pursuant to the above discussion, and if not, to purge these records from FBI systems and the case file.

We agree with the FBI OGC's analysis and conclusion regarding the issuance of administrative subpoenas in the [redacted] investigation.

During this investigation we also found that the FBI did not establish sufficient internal controls of the use of administrative subpoenas in the CAU. A CAU SSA who was not authorized to issue Title 21 administrative subpoenas signed seven such subpoenas, and no one in the CAU or the [redacted] Field Division recognized the improper use of this authority. Moreover, the FBI OGC and CAU management were unaware that the CAU was using administrative subpoenas to cover records acquired from exigent letters.

We found that the ECPA was violated when the FBI obtained ECPA-protected telephone records in these matters without first issuing appropriate legal process. The ECPA requires communications service providers to disclose local and long distance non-content telephone records "when [the FBI] uses an administrative subpoena authorized by a Federal . . . statute . . . ." 18 U.S.C. § 2703(c)(2). However, the ECPA does not authorize the FBI to obtain ECPA-protected records and then serve an administrative subpoena. Accordingly, we believe that the FBI's receipt of records obtained prior to issuance of administrative subpoenas violated the ECPA[169].

In Chapter Six of this report we provide recommendations designed to ensure that all FBI personnel receive training and periodic guidance on the FBI's administrative subpoena authorities and the relationship between those authorities and other federal statutes, including the ECPA, that govern the FBI's authority to seek telephone records.

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[169] The FBI has not asserted, and we found no evidence to support, that these were emergency voluntary disclosures pursuant to 18 U.S.C. § 2702(c)(4).

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CHAPTER FOUR
THE FBI'S ATTEMPTS AT CORRECTIVE ACTIONS REGARDING EXIGENT LETTERS

In this chapter we describe the FBI's efforts at corrective action to address the use of exigent letters, including the FBI's efforts to provide legal process to cover records [redacted] and often acquired in response to exigent letters or other informal requests. The chapter is divided into two time periods: (1) the initial efforts from 2003 through October 2006; and (2) the efforts, beginning in November 2006, after attorneys in the FBI Office of the General Counsel (FBI OGC) National Security Law Branch (NSLB) learned about "blanket NSLs" that Communications Analysis Unit (CAU) personnel had drafted and Counterterrorism Division (CTD) officials had signed to cover previously acquired telephone records.[170]

I. The FBI's Attempts at Corrective Actions From 2003 through October 2006

We determined that CAU personnel who issued exigent letters to the on-site communications service providers for records or calling activity information, or used other informal means for requesting records without legal process, sometimes obtained after-the-fact legal process, such as NSLs, to "cover" the original requests. However, as described in Chapter Three of this report, the *Electronic Communications Privacy Act* (ECPA) does not authorize the FBI to obtain such records unless it first serves compulsory legal process, such as an NSL, or the provider makes a voluntary production pursuant to Section 2702's emergency disclosure provision.[171] There is no provision in the ECPA authorizing the issuance of

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[170] FBI personnel first used the term "blanket NSL" in August 2006 to describe certain after-the-fact NSLs prepared by CAU personnel and signed by CTD officials. We also use that term in this report.

[171] The ECPA NSL statute requires communications service providers to comply with requests for telephone subscriber and toll billing records information if the Director or his designee

> certifies in writing . . . that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

(Cont'd.)

retroactive legal process.[172] Therefore, after-the-fact NSLs would not cure a prior improper receipt of records under the ECPA.

As described below, from 2003 through October 2006 CAU Unit Chief Glenn Rogers and his successor Bassem Youssef took steps to request the issuance of after-the-fact NSLs from FBI operating divisions to cover these records. Because the CAU was an operational support unit, CAU personnel did not conduct investigations. CAU personnel were not authorized to issue NSLs. The unit therefore depended on field or Headquarters divisions to prepare and issue the after-the-fact NSLs. However, the operating divisions often did not respond quickly and sometimes did not respond at all to the CAU's requests for after-the-fact NSLs. As a result, during Rogers's tenure as CAU Unit Chief, a backlog developed of requests for legal process for records that had been provided by the on-site communications service providers at the CAU's request. We determined that Rogers did little to address the backlog. After Rogers left and Youssef became the Unit Chief in November 2004, Youssef began taking steps in approximately April 2005 to address the backlog of legal process owed to one provider, but did not recognize or begin to address the backlog for the other providers until October 2005.

The FBI OGC also became involved in addressing the exigent letters practice during this time period. We found that in December 2004, NSLB attorneys in the FBI OGC became aware of the CAU's use of exigent letters and its difficulty in obtaining prompt after-the-fact NSLs from the operating divisions. However, NSLB attorneys failed to direct that the CAU end the practice of issuing exigent letters with the promise of legal process until March 2007, following release of the OIG's first NSL report.

Moreover, beginning in January 2005, NSLB attorneys themselves became involved with the CAU in issuing after-the-fact NSLs to cover the records acquired in response to exigent letters. The NSLB attorneys also attempted to initiate a process that would ensure prompt issuance of after-the-fact NSLs predicated on open national security investigations. However, this effort was ineffective because the issuance of after-the-fact legal process would not retroactively validate an improper disclosure of records under the ECPA, even if the legal process was served a short time after receipt of the records. In any event, the proposal was never

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18 U.S.C. § 2709(b).

[172] See *In re Application of U.S. for Nunc Pro Tunc Order*, 353 F. Supp. 45, 46 (D. Mass. 2005).

implemented. While NSLB attorneys focused during this period on the issuance of NSLs for ongoing CAU exigent letter requests, they did not recognize and address in a timely manner the legal flaw with issuing after-the-fact NSLs.

We also describe the actions of the CAU Unit Chiefs and the NSLB attorneys regarding the CAU's use of exigent letters, the backlog of promised legal process, and the actions taken to address the backlog.

A. A Backlog First Develops During Rogers's Tenure as CAU Unit Chief

Rogers told us that during his tenure as CAU Unit Chief from March 2003 to November 2004, he regularly reminded CAU personnel to stay current on NSLs that were owed to the providers. He also said he sometimes spoke with personnel assigned to CTD operational units about the importance of issuing after-the-fact legal process for telephone records, and on one occasion spoke with a field division about providing an after-the-fact NSL to the CAU. However, Rogers did not require CAU personnel to maintain lists of telephone numbers for which the CAU had requested information from the on-site providers, or otherwise to keep track of exigent letters to ensure that legal process followed the exigent letters. Instead, CAU personnel relied on the three on-site communications service providers to tell them whether legal process had been provided to cover the records acquired in response to exigent letters.

We determined that by November 2004, the CAU had made requests for records to the on-site providers for hundreds of telephone numbers for which legal process had not been provided. The on-site Company B employee, who first came to the CAU in September 2004, told us that by November 2004 he was concerned that Company B was not receiving after-the-fact legal process for records he had provided to CAU personnel in response to exigent letters. He said he spoke to Rogers about the backlog of records requiring legal process before Rogers left the CAU in November 2004 to become the Assistant Section Chief for the CTD's Communications Exploitation Section (CXS) (the CTD Section that oversaw the CAU). According to the Company B employee, Rogers told him "these take a little time" and "you need to stay after the guys." The Company B employee said that he was surprised by Rogers's response because he did not think he should be responsible for following up with CAU personnel.

Although a backlog of record requests requiring legal process developed in the CAU, CAU personnel continued to sign and issue exigent letters to satisfy the operational support requests from FBI headquarters, the CTD's operational units, and field divisions. A significant number of these requests came from the International Terrorism Operations Section 1

(ITOS-I), which was responsible for addressing many of the international terrorism threats directed at the United States during this period.

ITOS-I managers told us that they did not know about any CAU backlog in obtaining follow-up legal process in 2004 and 2005. Several ITOS managers told us that CAU personnel attended the daily ITOS briefings at which major terrorism investigations were discussed. At the conclusion of these briefings, the CAU was often directed to analyze telephone numbers identified in the course of these investigations to determine whether they had any U.S. connections. ITOS-I managers told us they did not know the mechanics of how the CAU accomplished its work, although most of these managers told us they were generally aware that the CAU used the resources available from the on-site communications service providers and various FBI databases, [redacted] to respond to these taskings.[173]

ITOS-I witnesses also told us that while they were unfamiliar with the procedures used by the CAU to analyze telephone numbers, they assumed that CAU personnel followed appropriate legal requirements. For example, Michael Heimbach, who was the CTD Assistant Section Chief over ITOS-I from February 2003 to March 2004 and the ITOS-I Section Chief from March 2005 to January 2007, told us:

> . . . it's their lane. It's the operational support's lane, meaning this is their job. This is their business. How, what relationships they had with Company A, Company C, and [redacted], I have no clue. I mean I . . . wasn't in the weeds with them on it . . . . How they did it, what they were doing, what the process . . . wasn't my lane of traffic.

Shortly before Rogers left the CAU in November 2004 to become the CXS Assistant Section Chief, he instructed a CAU Intelligence Analyst to implement a tracking system for records requests so that the CAU would not have to rely on the on-site providers to know whether after-the-fact legal process had been served. As discussed below, the tracking system was developed and later abandoned after Rogers left the CAU.

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[173] As described in Chapter Two of this report, CAU personnel had access to a [redacted] database that CAU analysts regularly queried for records and used to perform analytical work. CAU personnel sometimes responded to requests for assistance through data analysis in this database. At other times, CAU personnel obtained data from the on-site providers, then analyzed the results once the records were uploaded into this database.

Rogers told us that when he left the CAU he was not aware that there were any record requests that still required legal process. By contrast, as described above, the Company B employee told us that he discussed the backlog with Rogers before Rogers's departure from the CAU. In addition, the Assistant General Counsel who was the NSLB point of contact for NSL-related policies and issues told us that in late 2004 or early 2005, Rogers told her that there were about 80 NSLs or telephone numbers for which after-the-fact NSLs had not been served. The Assistant General Counsel said that she was also informed at that time that the CAU was implementing a new tracking system for exigent letters and she believed that when the system was implemented the CAU would be better able to track telephone numbers requiring NSLs.

We also determined that the CAU Intelligence Analyst who was responsible for implementing the tracking system requested and received lists from Company B and Company C in January 2005 identifying a total of 188 telephone numbers requiring legal process that the providers had previously [redacted] in response to the CAU requests. These 188 telephone numbers represented approximately two-thirds of the total number of telephone numbers that CAU personnel had included in exigent letters or other informal requests to Company B and Company C in 2004.[174]

Thus, when Youssef succeeded Rogers as the CAU Unit Chief in November 2004, there was a significant backlog of telephone records requests for which legal process had been promised but not delivered.

As we describe below, shortly after Rogers was promoted and Youssef became CAU Unit Chief, the Assistant General Counsel alerted her supervisors in the NSLB about the CAU's practice of using exigent letters. We determined that NSLB attempted to institute a process for issuing NSLs quickly – albeit still after-the-fact – to cover future CAU requests for records from the on-site providers in exigent circumstances. However, months passed before Youssef and the NSLB attorneys recognized and addressed the issue of the large backlog of requests for which the providers had [redacted] or provided the FBI records but were still awaiting legal process.

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[174] The Company C employee first arrived at the CAU in April 2004, and the Company B employee arrived in September 2004. Company A did not give CAU personnel a list of telephone numbers requiring legal process in January 2005; however, we have no reason to believe that the CAU was any more successful in obtaining after-the-fact legal process for Company A than for the other providers.

B. NSLB Knowledge of Exigent Letters and Involvement in Issuing After-the-Fact NSLs

We determined that although the CAU began using exigent letters in March 2003, FBI attorneys were not alerted to the practice until July 2004. On July 19, 2004, a CAU Intelligence Analyst sent an e-mail to the Assistant General Counsel stating that the CAU had a Company A analyst on-site. The e-mail described the services that Company A provided, noting that in time-sensitive threat matters the CAU could obtain information from the on-site Company A analyst by using "an exigent letter" and following up later with an NSL.

However, the Assistant General Counsel told us she believed she first became aware of the use of exigent letters in December 2004. She said that she must have overlooked the reference to exigent letters in the July 19 e-mail from the CAU analyst.

The Assistant General Counsel said that she recalled learning about exigent letters in December 2004 in connection with a specific request from the CAU that NSLB prepare an after-the-fact NSL. FBI e-mails reflect that in mid-December 2004, a CAU SSA asked the NSLB to prepare an NSL to cover records for telephone numbers that had been previously obtained. The CAU SSA told the Assistant General Counsel that the telephone numbers included numbers that had been previously [redacted] by Company A pursuant to the CAU "form letter" requests that promised future legal process.

The Assistant General Counsel reported the CAU request to her immediate supervisor and to NSLB Deputy General Counsel Julie Thomas, in an e-mail dated December 17, 2004.[175] In that e-mail, the Assistant General Counsel informed them that in connection with the request, the CAU SSA had told her the following:

- The CAU was regularly obtaining records without legal process from the on-site communications service providers.

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[175] In this section of the report, we rely significantly on e-mails to and from the Assistant General Counsel. She told us that because many of the issues we interviewed her about happened more than 3 years earlier, she could not recall the events with certainty. However, she stated that the e-mails accurately depicted her understanding of events at the time.

- The CAU often received emergency requests for records from senior FBI officials and used a "form letter" to obtain these records that promised after-the-fact legal process.
- The CAU attempted to obtain after-the-fact legal process from field divisions.
- Field divisions often would not respond to the CAU's requests for follow-up legal process.
- The CAU was starting a "tickler system" to track follow-up legal process requests.

However, at this time the Assistant General Counsel did not ask to see a copy of the "form letter" promising future legal process that the CAU SSA told her had been used to obtain records. However, she told us, and her contemporaneous e-mails confirm, that from the time she was told about the CAU obtaining records with exigent letters through late 2006 she consistently told CAU personnel that the exigent letters practice should be limited to emergency situations and that after-the-fact NSLs must follow promptly.

The Assistant General Counsel said she believed that in emergency situations, after-the-fact NSLs were appropriate as long as they were issued within 24 to 48 hours of the exigent letter request. She told us that she recognized that there was "no specific provision" in the ECPA authorizing issuance of after-the-fact NSLs, but she said she believed that the legislative intent of the statute would permit prompt issuance of after-the-fact NSLs in "real emergencies . . . where peoples' lives are at issue." She said that during this period, she sought to ensure that the follow-up NSLs were issued quickly, but assumed that the CAU was issuing exigent letters only in true emergencies. She also told us that she understood that her supervisors were in agreement with her analysis that after-the-fact NSLs were appropriate in emergency situations.

Although the Assistant General Counsel did not object to drafting the after-the-fact NSL for the previously obtained records, in a follow-up e-mail dated December 23, 2004, to her supervisor and Thomas, the Assistant General Counsel stated that because the NSLB knew the records had already been received she thought they should phrase the NSL to reflect that fact. She also stated in the e-mail that she was "real uncomfortable doing it any other way" and that she did not think she could issue the NSL as if she were unaware the FBI already had the information. She also noted that the CAU SSA was unhappy with her suggestion that the NSL state that records had been previously provided and the SSA told her the provider was expecting "a regular NSL."

Thomas replied to the Assistant General Counsel's e-mail, stating that she would discuss the issue with NSLB supervisory attorneys. Thomas also asked the Assistant General Counsel for proposed language for the after-the-fact NSL. However, Thomas also did not ask to see the exigent letter that had been used to obtain the records, did not at that time (or at any time until late 2006) review the contracts with the providers, and did not ask anyone in NSLB to do so.

Ultimately, Thomas signed an after-the-fact NSL dated January 18, 2005, addressed to Company A. We determined that this NSL included some telephone numbers that were listed in exigent letters dated July 13, 14, and 15, 2004, that were given to an on-site Company A analyst. Despite the misgivings expressed by the Assistant General Counsel to her supervisors about signing NSLs that did not disclose that the FBI had already received the records, the NSL and accompanying approval EC did not state that Company A had previously provided the records to the FBI.

We found that Thomas signed six additional after-the-fact NSLs over the next 4 months in which the NSLs themselves and the accompanying approval ECs did not disclose that these records had previously been requested and received by the FBI. Thomas signed an NSL dated February 2, 2005, addressed to Company A, which included a list of 63 telephone numbers related to Operation "W."[176] We determined that this NSL included some telephone numbers that were listed in exigent letters given to the on-site Company A analysts as early as [redacted] Thomas also signed an after-the-fact NSL dated February 2, 2005, addressed to Company B, which related to Operation W and listed one telephone number. The FBI had previously requested records for this telephone number in an exigent letter dated [redacted]

Thomas signed two NSLs dated June 28, 2005, addressed to Company A and Company C. These NSLs sought records from each provider for 163 telephone numbers related to another major FBI operation. All of these telephone numbers had previously been [redacted] and records for many of them had been provided to the CAU as early as [redacted] On June 30, 2005, Thomas signed at least two more after-the-fact NSLs in connection with another counterterrorism investigation. These two NSLs covered records for telephone numbers that the CAU had requested from the providers in October 2004. E-mails show that the Assistant General Counsel had informed Thomas prior to her signing the NSLs that these

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[176] The name of this operation is classified.

records had been provided to the FBI 8 months earlier. Thomas told us that she did not recall the e-mails or these two NSLs, but she characterized the investigation to which the NSLs were related as "the greatest of emergencies."

In an interview in August 2008, Thomas acknowledged that she signed these seven after-the-fact NSLs, although she told us that she did not have a specific recollection of any of the NSLs themselves. Thomas said she has signed thousands of NSLs and therefore could not recall specific NSLs. She said that the CAU was one of nearly 100 FBI units that NSLB supported, and she noted that these NSLs were dated up to 3½ years ago. She also said she relied on the accompanying approval ECs, which are reviewed by at least one and sometimes two NSLB attorneys, for the facts relating to the NSLs she signed.

Thomas also said she did not recall being told that the telephone numbers listed in the NSLs had been previously [redacted] and that records already had been provided to the CAU. When we showed her the December 23, 2004, e-mail exchange between her and the Assistant General Counsel described above, in which the Assistant General Counsel raised her concern that the NSL should document that the FBI already had the records, Thomas said she did not recall the exchange and also did not recall having any discussions about that issue with NSLB supervisors.

In August 2008, Thomas also told the OIG that she did not believe that follow-up NSLs were required regarding this information because she believed during the period when these NSLs were signed that the CAU's requests to the on-site providers "were likely all emergency circumstances." Thomas said she therefore concluded that the requests the CAU made to the on-site providers fell within the emergency voluntary disclosure statute, 18 U.S.C. § 2702(c)(4), and that "follow-on NSLs would not be required." However, when probed on whether she and other FBI OGC attorneys relied on Section 2702 in 2004 and 2005, Thomas stated that she could not separate what she knew at the time of her interview from what she knew then.[177] Thomas said the reason the FBI provided follow-up NSLs in these cases was because the on-site providers wanted them.

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[177] As noted, prior to March 2006, 18 U.S.C. § 2702(c)(4) provided that a communications service provider could voluntarily provide telephone records to the FBI if the provider "reasonably believes that an emergency involving danger of death or serious physical injury justifies disclosure of the information." We discuss in Chapter Six of this report our conclusion regarding the applicability of the emergency voluntary disclosure (Cont'd.)

Thomas also said that since the follow-up NSLs she signed were not legally required, she saw no need for the NSLs to document that the records requested had been previously provided. She said she was confident that the on-site providers were aware that the records had been previously provided and were not misled by the absence of any reference to this fact in the follow-up NSLs.

C. NSLB Attorney Meets with CAU Personnel Regarding Exigent Letters

In addition to learning about the problems in obtaining after-the-fact NSLs and addressing the request for an after-the-fact NSL, the Assistant General Counsel learned in early 2005 that in some instances CAU personnel had issued exigent letters to communications service providers in the absence of any authorized and open national security investigation.[178] The Assistant General Counsel was concerned about this practice because the ECPA NSL statute and the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines) required that information sought in NSLs be relevant to an "authorized investigation to protect against international terrorism or clandestine intelligence activities . . . ."[179] The Assistant General Counsel believed that after-the-fact NSLs could not be issued unless they were relevant to an open, authorized national security investigation.

On January 6, 2005, the Assistant General Counsel met with CXS Assistant Section Chief Rogers and a CAU SSA to discuss the CAU's process for obtaining records from the on-site providers.[180] E-mail records show

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statute to the CAU's acquisition of ECPA-protected records from the on-site providers pursuant to exigent letters or other informal requests.

As discussed below, FBI General Counsel Caproni and the Assistant General Counsel told us that they did not discuss amongst themselves or conclude in 2004, 2005, or 2006 that the acquisition of subscriber and toll billing records in response to exigent letters qualified as emergency voluntary disclosures pursuant to 18 U.S.C. § 2702(c)(4).

[178] Many of the signers of these exigent letters told us that in these instances they were concerned about addressing the exigency and did not consider whether an investigation had yet been opened. One signer told us that he anticipated an investigation would be opened shortly after the exigent letter was issued.

[179] NSI Guidelines, Section V(12)("use of National Security Letters in conformity with . . . 18 U.S.C. § 2709 (relating to subscriber information, toll billing records . . . . " See 18 U.S.C. § 2709(b).

[180] Youssef's attorney has asserted to the OIG that Youssef was "excluded" from or "not invited to" this meeting. However, Youssef's FBI e-mails show that he was invited to the meeting and that the time of the meeting was changed at his request in order to (Cont'd.)

that they discussed issues concerning the emergency records requests CAU personnel had been receiving, including the fact that CAU personnel were given little information about the requests. In an e-mail to Thomas on January 6 shortly after the meeting, the Assistant General Counsel reported that Rogers and the SSA told her they were "inundated" with emergency requests, including requests from Gary Bald, the Executive Assistant Director of the FBI's National Security Branch. She stated they told her that in response to Bald's requests, the CAU would obtain records from the on-site providers "with very little background as to why the telephone number is important." The Assistant General Counsel informed Thomas that she told Rogers and the SSA that they should tell Bald that they needed more information about the requests and that they could tell Bald that NSLB attorneys required predication for obtaining the information. The Assistant General Counsel added in her e-mail, "But I know that's not going to happen."[181]

Bald confirmed to us that he often requested information regarding telephone numbers from the CAU. He said that the CAU provided valuable information and that he had repeatedly encouraged his subordinates in CTD operational units to utilize the CAU and the on-site providers' resources. However, he said he was unaware of the procedures the CAU used to comply with his requests. He said he did not know that the CAU used exigent letters and assumed that NSLs were issued to the providers prior to release of information to the FBI. He also said he was never told that the on-site providers were providing information to the CAU before they received an NSL.

In her January 6 e-mail to Thomas, the Assistant General Counsel proposed that NSLB personnel be made available to the CAU to help get NSLs signed quickly after the FBI acquired records from the on-site providers in emergency situations. She acknowledged that under her proposal the CAU would still receive records prior to issuance of the NSLs, but stated that her plan would ensure that NSLs would be issued "very shortly after" any information was provided.[182]

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facilitate his attendance. However, Youssef did not attend and later apologized for missing the meeting.

[181] Thomas told us that while she did not recall this particular e-mail and did not speak with Bald about this issue, she agreed with the Assistant General Counsel's advice. She said that on numerous occasions she has provided similar advice to FBI personnel so that "they can use the lawyers as the 'fall guy'."

[182] The Assistant General Counsel also informed Marion Bowman, who had previously served as NSLB Deputy General Counsel, of her concern that the CAU was not (Cont'd.)

In mid-January 2005, Thomas agreed to a proposal from the Assistant General Counsel's supervisor that two NSLB attorneys and a paralegal serve as the NSLB points-of-contact for the CAU to prepare after-the-fact NSLs to cover records obtained through exigent letters.

Also in January 2005, the Assistant General Counsel proposed a solution to her NSLB supervisors, including Thomas, which she believed would ensure that telephone numbers listed in exigent letter requests would be relevant to open national security investigations. She proposed that CTD operational units open generic preliminary national security investigations (called "umbrella files") for various types of recurring threats to the United States.[183] The Assistant General Counsel suggested that when CAU personnel were asked by field divisions or FBI Headquarters to request telephone records from the on-site providers in cases where there was no open national security investigation to which the records were relevant, CAU personnel would associate the telephone number with one of the open umbrella files based upon the nature of the threat. As discussed below, however, this umbrella file proposal was never implemented.[184]

On January 26, 2005, the Assistant General Counsel and the two NSLB attorneys designated as the points of contact met with CAU personnel to discuss their proposed assistance to the CAU. Both point-of-contact attorneys told us that the umbrella file idea was discussed at the meeting

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obtaining predication information from FBI requesters. In a November 2006 e-mail, the Assistant General Counsel informed Caproni that Bowman had spoken to "higher ups to make sure they understood that CAU needed more information when doing a request in order for the request to allow for an NSL." Bowman told us that he spoke with CTD DAD John Lewis about the Assistant General Counsel's concern, but did not raise the issue with other FBI officials.

[183] When the FBI opens an investigation, each investigation is assigned a unique file number. If implemented, the Assistant General Counsel's proposal would have resulted in the assignment of a unique file number for each type of generic threat, such as threats against transportation facilities, infrastructure, or special events. This file number would then serve as the authorized national security investigation referred to by FBI personnel in preparing the Electronic Communication (EC) seeking approval of after-the-fact NSLs.

[184] The umbrella file proposal would have addressed only one aspect of the exigent letter problem – the ECPA requirement that records sought in NSLs be relevant to authorized national security investigations. See 18 U.S.C. § 2709(b). However, as discussed in Chapter Six of this report, the core legal problem with exigent letters was that the ECPA does not authorize the FBI to obtain telephone toll records unless it first serves compulsory legal process such as an NSL, or the provider makes a voluntary production pursuant to Section 2702's emergency disclosure provision. Thus, even if there were authorized investigations to which the records sought in exigent letters were relevant, this legal problem would remain.

and both said they understood that they would be assisting the CAU in issuing NSLs quickly in emergency situations. They both said they understood that the NSLs they would facilitate would be issued prior to the CAU obtaining records, not after the records had already been obtained. In addition, they said that they understood that they would be working on future requests for records and that they were not aware of any backlog of requests for which legal process had been promised. One of the attorneys stated that when she left the meeting she did not expect to receive any NSL requests from the CAU until the umbrella file proposal was implemented.[185]

CAU Unit Chief Youssef did not attend this meeting. He told us he did not know until 2007 that the NSLB had designated points of contact to assist the CAU with NSLs.[186] However, FBI e-mails reflect that Youssef was informed in advance about the proposed NSLB assistance and about the January 26, 2005, meeting with NSLB personnel, and that he had instructed CAU personnel to attend the meeting.

Both of the point-of-contact attorneys told us that in the months following the January 26 meeting they did not receive any requests for assistance from the CAU although they were included on various e-mails addressing the umbrella file issue. FBI e-mails also reflect that several months after the January meeting the Assistant General Counsel notified her supervisors that the NSLB attorneys had not received any requests for assistance from the CAU.

In connection with the January 26, 2005, meeting, Youssef told us that beginning in November 2004 (when he became Unit Chief), and continuing through mid-April 2005, Rogers "specifically kept me out of several communications, several e-mails between [Rogers] and NSLB." Youssef said that, "Rogers knew about the fact that I was going to be at another meeting that day . . . . This was an indication that I was not needed at this meeting." Youssef stated that Rogers generally kept him "out of the loop" and that Youssef was not able to raise concerns he had about how the CAU was being run to Rogers because Rogers was not willing to listen to his suggestions.

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[185] We also reviewed various e-mails between the Assistant General Counsel and NSLB supervisors in which she expressed her opinion that without open umbrella files the two point-of-contact attorneys and the paralegal could not assist the CAU with preparing NSLs.

[186] FBI records reflect that Youssef was on sick leave the day of the meeting.

D. CAU Begins Implementing then Abandons a Tracking System for Legal Process

In early February 2005, CAU personnel began using a new tracking system for requests to the on-site providers that Rogers had asked to be implemented. The system, known as the "Tracker Database," was designed to collect information about each records request to the on-site communications service providers. The database contained fields to identify the:

- communications service provider;
- request date;
- CAU requester;
- pertinent telephone numbers;
- whether an exigent letter was issued;
- type of legal process to follow (NSL or grand jury subpoena);
- records receipt date;
- contact information for the field or headquarters requester; and
- date the CAU received legal process and served it on the provider.

In an e-mail message to all CAU personnel dated February 2, 2005, the CAU Intelligence Analyst who was responsible for managing the Tracker Database wrote that at Rogers's direction all CAU personnel were required to use the database. The Intelligence Analyst also wrote that there were "about 100 pending NSL[s]" for which legal process had not yet been issued to 2 of the 3 on-site providers, Company B and Company C.[187] The Intelligence Analyst added, "using the [Tracker Database] is not optional and it's a way for us to cover ourselves in case anyone starts asking questions."

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[187] The e-mail message stated that a Company A analyst had not yet provided a list of record requests (telephone numbers) that required legal process. The e-mail also listed the number of "pending NSLs," not the number of telephone numbers awaiting follow-up legal process. As stated above, in January 2005 the Intelligence Analyst responsible for the tracking system had received a list of 188 telephone numbers which Company B and Company C had identified as still requiring legal process.

The Intelligence Analyst told us that CAU personnel showed little enthusiasm for using the Tracker Database because they did not want the responsibility for inputting the data. The Intelligence Analyst said that after she reported to Youssef several months later that the database was not being used by CAU personnel, she halted her efforts to implement the Tracker Database and no other CAU-wide tracking system for identifying the need for after-the-fact legal process was implemented.

Rogers told us that when Youssef became the CAU's Unit Chief he did not provide Youssef with any guidance or instructions on how to use exigent letters or on how to track exigent letters to ensure they were followed up with after-the-fact legal process. Rogers said he never discussed exigent letters with Youssef.

Youssef told us that he did not require CAU personnel to use the Tracker Database. He said that after he received the February 2, 2005, e-mail from the Intelligence Analyst, he held an "all-hands" meeting at which the Tracker Database was discussed. He said that at the meeting there was an "outcry" and that nobody in the CAU (other than the Intelligence Analyst who designed it) wanted to use the database because it was too cumbersome. He said that the database "died instantly" because he told Rogers no one wanted to use it, and Rogers did not instruct him that it had to be used.

Youssef also told us that when the Tracker Database issue arose in February 2005 he did not yet know that the CAU was obtaining records prior to service of legal process. We therefore asked Youssef what he was thinking at the time about the reference in the Intelligence Analyst's February 2 e-mail to "100 pending NSLs." Youssef said he could not remember, but he may have thought "there are NSLs that we still have to serve. I mean, I did not see it as pending as in NSLs we never got. That was not my understanding and frankly I do not remember much of this here."

E. CAU Unit Chief Youssef Learns that the CAU has Obtained Records in Advance of Legal Process

Youssef told us that he first learned that the CAU was obtaining records before service of legal process shortly before his first meeting with the Assistant General Counsel, which we determined occurred on March 11, 2005. On that date, Youssef and two other CAU SSAs met with the Assistant General Counsel at the off-site location where she was assigned. He said that he and the SSAs were at the off-site location for another purpose, and he decided that while there he would introduce himself to her. Youssef informed Rogers in a contemporaneous e-mail that he had discussed "streamlining the NSL process" at the March 11 meeting.

Youssef said that some time before that meeting, a Company A analyst told him "in passing" of an instance in which Rogers had requested records from the analyst prior to service of legal process. The analyst informed Youssef that Rogers had told the analyst it was an emergency and that Executive Assistant Director Bald wanted the records. Youssef told us that based on this information, he informed the Assistant General Counsel at the March 11 meeting that the CAU "may be in the practice" of obtaining records without legal process and that he thought it was wrong. Youssef said that the Assistant General Counsel told him she understood that the CAU sometimes received emergency requests and obtained information before serving a legal instrument. Youssef stated that based on the Assistant General Counsel's comments at the meeting, it was clear to him that she was already aware that the CAU was obtaining records prior to the issuance of legal process.

Youssef told us that he did not discuss with the Assistant General Counsel at the March 11 meeting the CAU's use of exigent letters or the backlog of records for which legal process had not been issued because he said that at the time he was unaware of these issues. He told us that he also was unaware at the time of the frequency of requests to the CAU from FBI upper management related to telephone records.

Youssef said that sometime after meeting with the Assistant General Counsel, the on-site Company B employee told Youssef that he had not received NSLs that were "owed" to him. Youssef told us that he believed this conversation "probably" occurred right after his meeting with the Assistant General Counsel, in late March or early April 2005, but that it could have happened in May 2005. Youssef said that the Company B employee told him that he was owed over 100 NSLs and that the conversation alarmed him.

The Company B employee confirmed that he discussed with Youssef Company B's backlog of records requiring legal process. The Company B employee said he believed that they had discussed the backlog in early 2005, shortly after Youssef arrived at the CAU. The Company B employee said that soon after speaking with Youssef about the backlog, at Youssef's request he began to send e-mails directly to CAU personnel asking for NSLs to cover the backlog. The Company B employee also said that he went back to Youssef approximately a month later because he still was not receiving legal process. He said that in response, Youssef held a unit meeting and told CAU personnel to get the proper documentation to the on-site providers.

Youssef told us that after speaking with the Company B employee he asked CAU personnel about the issue and several of them said they used exigent letters to obtain records in advance of legal process. Youssef told us

that he had heard the term "exigent letters" before, but this was the first time he was told such letters were used to obtain records from the on-site providers. He said that the first time he actually saw an exigent letter was when he signed one in November 2005.[188]

Youssef told us that within "a day or two" after learning that the CAU was using exigent letters and obtaining records prior to issuance of legal process, he had a conversation with Rogers, who at the time was his supervisor as the CXS Assistant Section Chief. Youssef said that in this conversation he told Rogers the practice was "a major issue." According to Youssef, Rogers was "nonchalant" about the matter. Youssef said that Rogers told him, "No, this is the procedure. This is how we do it. We can go get the requests from the phone companies and then we will get the NSLs later." Youssef said that after the conversation with Rogers, he concluded that, "if that is what he is telling me . . . if I went against it and said we are not going to use exigent letters for example, I would have been insubordinate."

Youssef told us that he did not bring his concern about the CAU obtaining records from the on-site providers with exigent letters rather than legal process to anyone else in his supervisory chain of command, other than Rogers.[189]

Rogers told us that Youssef never spoke with him about exigent letters or the backlog of NSLs. He said Youssef probably learned about exigent letters, like Rogers did, "when somebody came to him and . . . told him it existed." Rogers said that he never provided any oversight or guidance to Youssef about the letters.

Youssef also told us that he did not feel he could go above Rogers with his concerns to CXS Section Chief Laurie Bennett or to the Deputy Assistant

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[188] Youssef also told us that he did not closely read the exigent letter he signed in November 2005, and that the first time that he "really scrutinized" an exigent letter was in May 2006 when he was asked by a CAU Intelligence Analyst to sign another exigent letter. Youssef said that he then read the exigent letter and realized that it referenced a follow-up subpoena. He said because the exigent letter referenced a subpoena, he did not sign the May 2006 letter.

[189] In a letter to Senator Charles E. Grassley, dated March 17, 2007, Youssef's attorney stated that in a CXS Unit Chiefs' meeting, Youssef raised the issue of the CAU's use of exigent letters to the CXS Section Chief who "was dismissive of the concern." Youssef told us that Rogers was the Acting CXS Section Chief at this meeting.

Director (DAD) for CTD, John Lewis.[190] He said that shortly after Bennett came to the CXS in August 2004, she expressed her dissatisfaction with his performance as a Unit Chief for the CXS Document Exploitation Unit and that "within three weeks [of her arrival at CXS], everything I did was wrong." Youssef also asserted that Bennett began expressing her dissatisfaction with his performance "within the same week" of when his attorney provided a list of FBI witnesses to be deposed in an connection with an Equal Employment Opportunity Commission complaint Youssef filed against the FBI. Further, Youssef said that Bennett's supervisor, DAD John Lewis, also "was after" him and was "retaliating after me mercilessly." Youssef added that he believed Lewis was "not going to pay attention to anything that I am saying." Youssef stated that he never brought his concerns about the exigent letters practice to anyone else in his chain of command because he "really did not have access to talk to anybody."

F. NSLB Attorney Provides Incorrect Advice to the CAU About the Use of Exigent Letters

On April 26, 2005, the Assistant General Counsel sent an e-mail to Youssef expressing concern that "on occasion, CAU is presuming that someone who comes to them [seeking records from the on-site providers] has an emergency." She instructed Youssef "not [to] assume that all people who come to you are in an emergency situation" and to ensure that CAU personnel were "instructed to ask for an NSL." She also reminded Youssef that if exigent letters were used, the CAU could ask the designated NSLB attorneys to draft the after-the-fact NSLs. She wrote that the NSLB could do the NSLs quickly and that she personally would do whatever it took to get NSLs done in a day or two. Finally, she wrote that "we are willing to allow these requests when there really are exigent circumstances . . . only if it is clear . . . that the requestor cannot await an NSL."

The Assistant General Counsel told us that she could not recall the circumstances surrounding this e-mail. However, we determined from her contemporaneous e-mails that her concern arose from an instance in which a Headquarters operational unit obtained toll billing records from the Company C on-site analyst using the exigent letter process and then sought an after-the-fact NSL from the NSLB.[191] The Assistant General Counsel was

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[190] Laurie Bennett was the CXS Section Chief from August 2004 to April 2006. John Lewis was the CTD DAD from May 2004 to June 2006.

[191] After reviewing a draft of this report, Youssef's attorney suggested that the Assistant General Counsel's April 26, 2005, e-mail was in response to a request from Youssef for guidance. However, as described above, we determined through (Cont'd.)

initially uncertain about why the exigent letter process was used in this matter, and the Headquarters operational unit subsequently explained to her the exigent circumstances that led to the request.

Youssef responded by e-mail on April 27, 2005, that the Assistant General Counsel was "absolutely right" and that he would instruct the CAU staff as she had requested.[192] On April 27, Youssef also forwarded the Assistant General Counsel's e-mail to all CAU personnel and the on-site communications service providers' employees, directing them to review the e-mail. Youssef added in his forwarding e-mail, "We all need to differentiate between what is an exigent request and what is not."

We determined that after Youssef forwarded the Assistant General Counsel's e-mail to CAU personnel there was a decrease in the number of exigent letters issued by the CAU, as reflected in Chart 2.3 in Chapter Two of this report. However, as described in this chapter and in Chapter Two, field and Headquarters requests to the CAU for records or calling activity information continued, many of which were communicated to the on-site providers by informal means other than exigent letters, such as by sneak peek requests and requests communicated by telephone, e-mail, in-person, and on post-it notes.

As also discussed below and in Chapter Six, we concluded that the Assistant General Counsel's statement that an exigent letter was appropriate when "the requester cannot await an NSL" is inconsistent with both the ECPA NSL statute and the ECPA emergency voluntary disclosure statute.

G. NSLB Fails to Recognize Applicability of the ECPA's Authority for Emergency Voluntary Disclosures to Requests Sent to the CAU

On August 25, 2005, the FBI OGC issued a guidance memorandum to all FBI personnel, which described the circumstances in which the ECPA authorized the disclosure of the content and records of communications under 18 U.S.C. § 2702(b)(8) and 2702 (c)(4) in emergency circumstances. The guidance recognized that emergency voluntary disclosures were "outside of the compulsory process" and stated that such disclosures

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contemporaneous e-mails that the Assistant General Counsel's guidance was prompted by a request from another Headquarters unit, not from Youssef.

[192] On April 27, 2005, the Assistant General Counsel forwarded her advice and Youssef's response to her immediate supervisor and Thomas.