CHAPTER SIX
CONCLUSIONS AND RECOMMENDATIONS

I. Conclusions

The OIG conducted this review of the FBI's use of exigent letters and other informal requests for telephone records to examine the circumstances under which they were used and to assess the accountability of FBI senior officials, supervisors, and employees who were responsible for these practices. This report supplements our findings on exigent letters that were described in our first NSL report issued in March 2007, and our second NSL report issued in March 2008.

A. Exigent Letters and Other Informal Requests

In this report, we found widespread use of exigent letters and other informal requests for telephone records that did not comply with legal requirements or FBI policies governing acquisition of these records. We determined that this practice began in 2003, when the FBI Counterterrorism Division's (CTD) new Communications Analysis Unit (CAU) started using exigent letters to acquire subscriber and telephone toll billing records information from three on-site communications service providers. Glenn Rogers, the CAU Unit Chief at the time, said he approved the use of exigent letters in the CAU because the letters had previously been accepted by Company A during the FBI's New York Field Division's criminal investigations of the September 11 hijackers and because a Company A analyst had assured him they were "approved by the lawyers." However, Rogers did not consult with any attorneys in the FBI Office of the General Counsel's (FBI OGC) National Security Law Branch (NSLB) or other FBI Headquarters' attorneys about whether the letters could be used in national security investigations or other FBI investigations.

In 2003 and 2004, the FBI entered into contracts with Company A, Company B, and Company C that established arrangements whereby these companies placed their employees in the CAU's office space so they could expeditiously respond to FBI requests for telephone records. For example, pursuant to its contract with the FBI, Company A made available to the CAU, in a readily retrievable format, toll billing records [redacted] Company A [redacted] Prior to this contractual arrangement, Company A could easily retrieve telephone records [redacted] During the period of our review, the FBI paid the 3 providers a total of [redacted] under these contracts.

We found that from March 2003 to November 2006, CAU personnel issued 722 exigent letters for telephone records from these 3 communications service providers. One exigent letter was signed by a CXS Assistant Section Chief, 12 were signed by CAU Unit Chiefs, 706 were signed by CAU Supervisory Special Agents (SSA), and 3 were signed by CAU Intelligence Analysts.

Most of the 722 CAU exigent letters stated:

> 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 [Company A, Company B, or Company C] as expeditiously as possible.

However, in our investigation we determined that in some instances CAU SSAs signed exigent letters even though they believed that the factual statements in the letters were inaccurate. For example, CAU Unit Chief Rogers and several SSAs told us they signed exigent letters even though they recognized at the time that subpoenas requesting the records had not been submitted to the U.S. Attorney's Office, as the letters stated. Moreover, we found a few instances in which the signers of exigent letters did not know whether there were exigent circumstances or signed the letters even though they questioned the letter's accuracy about whether an emergency existed.

When we asked FBI supervisors and employees why they issued such letters when they knew that no subpoena had been requested, no one could satisfactorily explain their actions. Instead, they gave a variety of unpersuasive excuses, contending either that they thought someone else had reviewed or approved the letters, that they had inherited the practice and were not in a position to change it, that the communications service providers accepted the letters, or that it was not their responsibility to follow up with appropriate legal process.

In official memoranda distributed to all FBI personnel in January 2003, CTD managers referred to a practice whereby the CAU could obtain records from Company A prior to service of legal process. In November 2003, Rogers issued an electronic communication to CAU personnel that specifically mentioned exigent letters.

We determined that the FBI's use of exigent letters became so casual, routine, and unsupervised that employees of all three communications service providers told us that they – the company employees – sometimes generated the exigent letters for CAU personnel to sign and return to them.

In fact, one of the on-site Company A analysts established an icon on his computer desktop at the CAU so he could quickly generate exigent letters for CAU personnel to sign.

We also found that FBI personnel routinely uploaded telephone toll billing records obtained in response to exigent letters into a [redacted] database where the records were available for review and analysis by [redacted] employees throughout the government who were authorized to access the database.

Most of the exigent letters and other informal requests did not include date ranges for the records requested. Similarly, the CAU's other informal requests to the on-site communications service providers (such as those communicated by e-mail, in person, on pieces of paper, or by telephone) frequently did not have date parameters. As a result, the FBI often obtained substantially more telephone records, covering longer periods of time, than FBI agents typically obtain when serving NSLs with date restrictions. In addition, in cases where the date range established the relevance of the information sought to the investigation, its omission meant that records were received and uploaded into a [redacted] database in violation of the ECPA's requirement that the records sought be relevant to a national security investigation.

We also found that the FBI did not track its use of exigent letters or even keep copies of them. When the CAU first began using exigent letters in March 2003, it failed to establish procedures to track the letters or even ensure that legal process was promptly obtained and served on the providers. Instead, the CAU had to rely on the on-site providers to identify the records for which they were still owed legal process.

In addition to exigent letters, we determined that the FBI used other informal methods to request and obtain ECPA-protected records and calling activity information from the on-site providers. These informal methods included requests made by e-mail, face-to-face requests, requests on pieces of paper (including post-it notes), and telephonic requests made without first providing legal process or even exigent letters. As was the case with exigent letters, these requests were not approved or signed by FBI officials specially delegated to issue NSLs under the ECPA, were not accompanied by the certifications required for NSLs issued under the ECPA, and were not consistently documented or tracked in the CAU.

We concluded that the FBI's use of exigent letters and other informal requests for telephone toll billing records circumvented, and in many cases violated, the requirements of the ECPA statute.

As described in this report, the ECPA generally prohibits communications service providers from disclosing toll records information except in certain limited circumstances set forth in the statute. The relevant exceptions require providers to disclose such information in response to legal process such as NSLs, and permit voluntary disclosures in emergencies involving danger of death or serious physical injury.

Yet, the exigent letters and other informal requests were not valid legal process for compelling the disclosures pursuant to 18 U.S.C. § 2709. Section 2709 of the ECPA authorizes the FBI to compel the production of toll records through NSLs issued by statutorily designated high-level FBI officials who certify that the records sought are relevant to an authorized national security investigation. As we described in our report, the exigent letters and verbal, e-mail, or handwritten requests routinely used by CAU personnel to request toll billing or other calling activity information from the providers did not meet these requirements. For example, none of the individuals who signed exigent letters issued by the CAU were among those specially delegated officials authorized to sign NSLs.[271] Further, none of the exigent letters contained a certification that the records sought were relevant to an authorized national security investigation or that any investigation of a U.S. person was not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States.

In response to our findings, the FBI asserted that its use of exigent letters and other informal requests may have been justified under the emergency voluntary disclosure provision of the ECPA, Section 2702(c)(4). During 2003 through March 2006 – the period when most of the exigent letters were issued – that section authorized a provider to voluntarily release toll records information to a governmental entity if the provider "reasonably

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[271] The ECPA NSL statute authorizes only the FBI Director or his designees in positions not lower than Deputy Assistant Director (DAD) or field division-based Special Agents in Charge (SAC) to sign NSLs compelling communications service providers to produce subscriber and toll billing records information in investigations of international terrorism or espionage. See 18 U.S.C. § 2709. As Diagram 2.2 in Chapter Two illustrates, by issuing exigent letters the FBI substituted a 1-step process in which CAU personnel signed requests for telephone records without supervisory review by those officials authorized by the ECPA to approve and certify the FBI's basis for requesting these types of records, and without the documentation of the predication for the requests that FBI policy required.

believe[d] that an emergency involving immediate danger of death or serious physical injury justifie[d] disclosure of the information."[272]

We recognize that some – but not all – of the FBI's requests may have been made in circumstances that qualified as emergencies under the applicable emergency voluntary disclosure provision. For example, as we described earlier, exigent letters and other informal requests were used to obtain records in connection with Operation Y (an investigation of a terrorist plot in [redacted] to detonate explosives [redacted] At least one provider's employee told us that he was informed of the nature of the threat in that matter.[273]

However, other exigent letters and informal requests were used in circumstances that do not appear to qualify as emergencies under Section 2702. For example, as described in Chapter Four, although CAU personnel used exigent letters and other informal requests to obtain records from all 3 providers relating to over 400 telephone numbers in connection with "Operation Z," the Unit Chief and an SSA of the operational unit responsible for that high-profile counterterrorism operation told us that they did not believe the CAU requests were made in exigent circumstances.[274] In

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[272] 18 U.S.C. § 2702(c)(4) (Supp. 2002). In March 2006, the provision was amended to allow voluntary disclosure "if the provider, in good faith, believes that an emergency involving "danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." *USA PATRIOT Improvement and Reauthorization Act of 2005*, Pub. L. No. 109-177, § 107(b)(1)(B), 120 Stat. 192 (2006). The legislative history of a similar amendment to Section 2702(b)'s emergency voluntary disclosure provision for content information suggests that the belief standard was relaxed because communications service providers "expressed concern to the Committee that the [reasonably believes] standard was too difficult for them to meet and that, as a result, providers may not disclose information relating to emergencies." *Cyber Security Enhancement Act of 2002*, H.R. Rep. No. 107-497, at 12-13 (2002). The Committee report that accompanied the amendments to Section 2702(b) also stated that the Section was "aimed at protecting providers who in good faith attempt to assist law enforcement with an emergency situation." Id. at 14. However, it also stated that the amendment "does not change the standard or lower the standard for law enforcement behavior." Id.

[273] Company B's representative said he was told by CAU personnel that "it could be the next 9/11." However, Company B provided the fewest records to the FBI in connection with this operation. In contrast, one of Company A's employees told us he received no briefing from the CAU regarding this operation, and the other employee stated that he worked on the matter for several weeks before becoming aware that the records he was providing were associated with Operation Y.

[274] After reviewing a draft of this report, the FBI provided the OIG with several contemporaneous e-mails beginning on June 12, 2006, which it asserted would demonstrate the emergency nature of Operations Z. However, we concluded that those e-
(Cont'd.)

addition, an FBI e-mail shows that the Unit Chief refused to state in the EC that was belatedly drafted to document the predication for the CAU's Operation Z requests that the requests were made in circumstances "judged to be exigent."[275]

Several factors make it difficult to determine whether and when the FBI's other uses of exigent letters and informal requests satisfied Section 2702's emergency disclosure exception. First, given the FBI's lack of internal controls over the process of requesting records by exigent letters and other informal requests, it is difficult for the OIG or the FBI to determine with certainty today how many of the requests were made in circumstances satisfying Section 2702(c)(4). Indeed, the FBI has conceded that the lack of documentation for the requests and their connection to particular investigations has impeded its efforts to demonstrate which requests clearly were made in Section 2702 circumstances.

Second, the FBI officials who were most familiar with the exigent letter practice at the time the letters were in use – including Glenn Rogers, Bassem Youssef, and the NSLB Assistant General Counsel – unequivocally stated to us that they did not consider the letters at the time they were made to be requests for voluntary production pursuant to Section 2702.

In addition, as described in Chapter Two, the evidence shows that CAU personnel who made the requests did not understand "exigent circumstances" to be synonymous with the definition of qualifying emergencies under 2702. Although some agents and analysts said an "exigent" matter included a life-threatening matter, others described it as an important, pressing, fast-moving, or high-priority matter, and others said it was a matter in which a high-level FBI official demanded the information.

Finally, even assuming that some of the investigations associated with the exigent letter requests were qualifying emergencies under the statute, the evidence is insufficient to determine whether the providers had the statutorily required belief that such emergencies justified voluntary disclosure. Relevant factors to this issue include that the exigent letters did

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mails reflected the importance of the investigation, but did not convey that emergency circumstances existed and required disclosure without waiting for legal process. Indeed, with regard to the earliest request for records reflected in these e-mails, we found that the operational unit issued an NSL for the records.

[275] We found other examples of use in non-emergency circumstances, such as the exigent letters used to obtain reporters' records and records relating to a fugitive investigation described in Chapter Three.

not request voluntary disclosure, but instead stated that compulsory legal process (generally grand jury subpoenas) had already been requested and would be served "as expeditiously as possible." In addition, employees of the on-site providers told us they usually were given no information about the circumstances underlying the exigent letters or other informal requests for records, and that they "assumed" the circumstances were exigent. Further, at least one of the provider's employees told us he had doubts about whether the requests were truly exigent.[276] Under these circumstances, it is difficult to determine whether and when the providers' employees had the statutorily required "reasonable" or "good faith" belief that the requisite emergency circumstances existed.[277]

After reviewing a draft of this report, the FBI also asserted for the first time that as a matter of law the FBI is not required to serve NSLs to obtain "records associated [redacted]" in national security investigations. According to the FBI, the majority of exigent letter and other informal requests discussed in this report were for telephone records [redacted] the FBI could have obtained these records without any legal process or qualifying emergency through voluntary production by the communications service providers.[278]

[redacted]

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[276] This provider ultimately required FBI requesters to endorse a stamped certification that tracked the statutory language in Section 2702 before the provider would provide records in response to exigent letters.

[277] After reviewing a draft of this report, the FBI asserted that the legal standard of Section 2702 could be met when an FBI employee requested telephone records in a qualifying emergency, regardless of whether the FBI employee was aware of the statute. The FBI also asserted that the providers could form a "reasonable" or "good faith" belief that an emergency existed without necessarily knowing the facts surrounding the emergency. As described above, however, with some exceptions the providers frequently received no information about the investigation for which records were requested, or even a generalized representation that an emergency situation existed.

[278] We disagree with the FBI's statement that the majority of exigent letter and other informal requests discussed in this report were for telephone records [redacted] In fact, we determined, based on the FBI's records, that the majority of its exigent letter requests were for toll billing records associated [redacted] We were unable to reach a conclusion concerning the percentage [redacted] requested through informal means other than exigent letters, because the records for these requests (some of which were oral or written on post-it notes) are incomplete and therefore unreliable.

[redacted]

The FBI did not rely on this section when it requested and obtained the records discussed in this report. However, after reviewing a draft of the OIG report the FBI asked the Office of Legal Counsel (OLC) for a legal opinion on this issue.[280] When making the request for an OLC opinion, the FBI stated that [redacted]

On January 8, 2010, the OLC issued its opinion, concluding that the ECPA "would not forbid electronic communications service providers [redacted][281] In short, the OLC agreed with the FBI that under certain circumstances [redacted] allows the FBI to ask for and obtain these records on a

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[279] The *Stored Communications Act*, codified in Chapter 121 of Title 18 at 18 U.S.C. §§ 2701-2712, was enacted in 1986 as part of the ECPA. The *Stored Communications Act* contains the relevant NSL and other FBI access to toll billing records provisions at issue in this report.

[280] The FBI presented the issue to the OLC as follows: "Whether Chapter 121 of Title 18 of the United States Code applies to call detail records associated [redacted]

[281] [redacted]

voluntary basis from the providers, without legal process or a qualifying emergency.

It is important to note that the FBI acknowledged in its July 2009 comments to a draft of this report that it had never considered or relied upon [redacted] when it obtained any of the telephone records at issue in this report. Moreover, it cannot be known at this point whether any provider would have divulged such records based on [redacted] alone, and without the FBI's representation to the provider that an NSL or other compulsory legal process would be served.

For the reasons discussed below, we believe the FBI's potential use of [redacted] to obtain records has significant policy implications that need to be considered by the FBI, the Department, and the Congress.

[redacted][282]

[redacted][283]

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[282] [redacted]

[283] The FBI has stated that it does not intend to rely on [redacted] However, that could change, and we believe that appropriate controls on such authority should be considered now, in light of the FBI's past practices and the OLC opinion.

[redacted]285

[redacted]287

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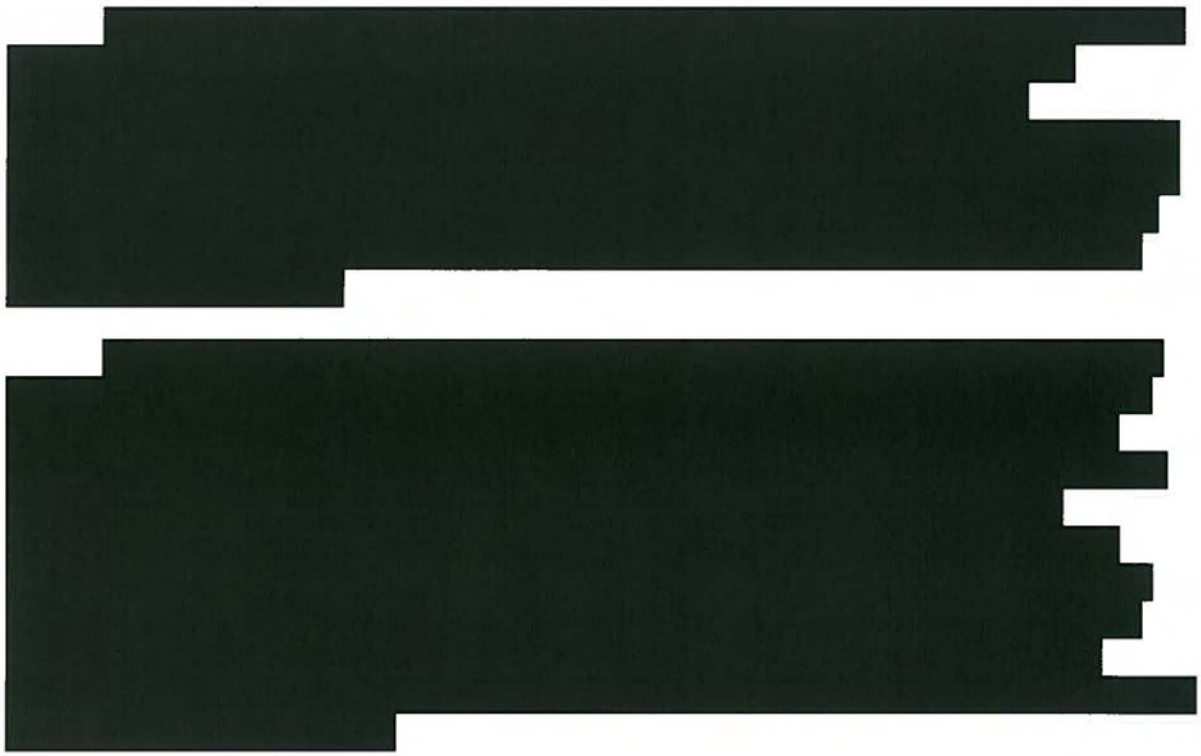
284 Under 18 U.S.C. § 2709(b) the FBI may only issue NSLs to obtain such records upon the certification that the records sought are relevant to an authorized counterterrorism or counterintelligence investigation. In the voluntary context, the FBI may request and obtain such records under 18 U.S.C. § 2702(c)(4) only if "the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency."

285 For example, requests for voluntary disclosure under the emergency circumstances provisions of the ECPA NSL statute must be approved at a level not lower than an Assistant Special Agent in Charge in a field office and a Section Chief at Headquarters. See FBI OGC Electronic Communication (EC) to all Divisions (March 1, 2007), at 4. The EC also advises that approval of such requests must be in writing, even if the initial approval was oral. The rank of the approving official for NSLs is set by statute at Special Agent in Charge in field offices and Deputy Assistant Director at Headquarters. See 18 U.S.C. § 2709(b).

286 Under the ECPA NSL statute, the FBI is required to report to certain congressional committees, on a semiannual basis, concerning all NSL requests made under Section 2709(b). See 18 U.S.C. § 2709(e).

287 Moreover, other collections of similar types of records for intelligence activities contain statutorily mandated approval, minimization, and reporting requirements. For example, the FISA business records provisions provide useful comparisons as to how such intelligence activities are regulated, [redacted] Under these provisions, the FBI may apply to the FISA Court for an order requiring the production (Cont'd.)



of business records and other tangible things "to obtain foreign intelligence information not concerning a United States person." See 50 U.S.C. § 1861. By statute, use of this authority is subject to extensive Attorney General-approved minimization procedures governing how information acquired concerning U.S. persons must be retained and disseminated. Id. at § 1861(g). The FBI is also subject to comprehensive congressional reporting requirements as to all orders it obtains, [redacted] Id. at § 1862.

[288] As discussed in this report, under the ECPA NSL statute, the FBI may only seek toll billing records when relevant to an authorized counterterrorism or counterintelligence investigation, provided that the investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution. See 18 U.S.C. § 2709(b). Provisions in the FISA statute similarly protect U.S. persons with respect to FBI applications to the FISA Court seeking orders to produce business records (50 U.S.C. § 1861(a)(2)(B)) and to conduct electronic surveillance (50 U.S.C. § 1805(a)).

[289] We recognize that the FBI's Domestic Investigations and Operations Guide (DIOG) and Executive Order 12,333, as amended, contain restrictions on how the FBI can collect, use, and disseminate intelligence, particularly with respect to the privacy and civil liberties interests of U.S. persons. However, these constraints are not statutory.

[290] [redacted]

In sum, the potential use of [redacted] by the FBI has important policy implications for [redacted] We believe that [redacted] creates a significant gap in FBI accountability and oversight that should be examined closely by the FBI, the Department, and Congress.

It is also important to recognize that the FBI advanced the [redacted] only after the OIG found repeated misuses of its statutory authority to obtain telephone records through NSLs or the ECPA's emergency voluntary disclosure provisions. We believe that, given the abuses described in this report, it is critical for the Department and Congress to consider appropriate controls on any use by the FBI of its authority to obtain records voluntarily [redacted]

The OIG therefore recommends that the FBI and the Department consider how the FBI may use [redacted] when seeking telephone billing records, particularly with respect to [redacted] We also recommend that the Department notify Congress of this issue and of the OLC opinion interpreting the scope of the FBI's authority under it, so that Congress can consider [redacted] and the implications of its potential use.

B. Other Informal Requests for Telephone Records

We found that without any documentation for the requests except possibly e-mail messages, CAU personnel routinely asked the on-site providers' employees to provide calling activity information in response to what were referred to as "sneak peeks." Using sneak peeks, the FBI requested the providers' employees [redacted] their databases and tell the FBI whether they had any records on specified telephone numbers. At the FBI's request, the providers would conduct sneak peeks and sometimes give the FBI additional information about the telephone records, such as whether there was calling activity between specified numbers or calls to or from certain [redacted] These sneak peeks were conducted without any legal process whatsoever.

We also concluded that many of these sneak peeks violated the ECPA, which prohibits communications service providers from knowingly divulging "a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity" except pursuant to legal process or in certain limited circumstances set forth in the statute. 18 U.S.C. § 2702(a)(3). The relevant exceptions require providers to disclose such records or information in response to compulsory process, such as

NSLs, and also permit voluntary disclosure based on the providers' good faith-belief of a qualifying emergency.[291] We concluded that the FBI did not serve legal process under the ECPA for the information it received pursuant to sneak peeks.

In addition, we do not believe that the sneak peek practice complied with the ECPA's emergency voluntary disclosure provision for several reasons. First, the practice was described to us as a routine occurrence in the CAU and not limited to "exigent" or emergency circumstances. Second, some of the specific instances where the sneak peek practice was used included media leak and fugitive investigations which did not meet the emergency voluntary disclosure provision. Third, the FBI's lack of internal controls over the sneak peek practice has made it impossible to reliably determine how many or in what circumstances sneak peek requests were made, and what the providers were told or believed about the reasons for these requests.

Our review also found that the FBI improperly asked Company A's on-site employees to conduct "community of interest" [redacted] In response to a community of interest [redacted] request, Company A would retrieve [redacted] records [redacted] Although we could not determine due to the FBI's lack of documentation how often the FBI requested these community of interest [redacted] or how often Company A provided such records to the FBI, we found at least 52 exigent letters, 250 NSLs, and 350 grand jury subpoenas served on the on-site providers that included such requests.

The FBI's community of interest [redacted] requests were often included in the boilerplate attachments to NSLs. We found that FBI officials who signed NSLs that contained community of interest requests often were not aware they were making such requests. In such instances, the FBI issued NSLs with community of interest [redacted] requests without first conducting, or documenting in the NSL approval memoranda (approval ECs), any assessment of the possible relevance of [redacted] telephone numbers to the underlying investigation. Absent such an assessment, we believe the FBI did not satisfy the ECPA requirement to issue NSLs in national security investigations only upon certification by those authorized

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[291] As described previously, prior to March 2006, this exception required the provider to have a "reasonable belief" that a qualifying emergency existed.

to sign NSLs that the records sought are relevant to authorized national security investigations.[292]

We also found that the FBI's community of interest [redacted] practices likely resulted in the FBI obtaining and uploading into a [redacted] database thousands of telephone records for [redacted] telephone numbers without the advance determination by an SES-level official that the records were relevant to an authorized international terrorism investigation. In addition, the FBI is unable with certainty to identify today which records in the database are associated with [redacted] numbers and whether those numbers were relevant to the underlying investigations for which they were requested. We also concluded that the FBI did not recognize the implications of Company A's community of interest [redacted] capability when Company A first posted its analysts on-site at the CAU; did not issue written guidance in coordination with the FBI OGC about the circumstances in which such requests were appropriate under the ECPA; did not establish an approval process for such requests or ensure that the predication for these requests was properly documented in approval ECs; and did not ensure that records sought in community of interest [redacted] requests were included in required reports to Congress on NSL usage.

Our review also uncovered other irregularities in the manner in which the FBI obtained toll billing records and other information from the on-site providers. From 2004 through 2006 Company A and Company C [redacted] calling activity by certain "hot numbers" identified to them by CAU personnel. Without serving legal process or even exigent letters, CAU personnel requested that the companies [redacted] the calling activity information for a total of at least 152 of these hot telephone numbers. The on-site Company A analyst thereafter provided the FBI (either verbally or by e-mail) calling activity information for at least 42 hot numbers during the period covered by our review.

Based on the Office of Legal Counsel's legal analysis of the ECPA in its November 5, 2008, opinion, we concluded that the calling activity information provided to the FBI on the "hot numbers" constituted "a record or other information pertaining to a subscriber or a customer," under the ECPA.[293] Therefore, we concluded that absent valid legal process or a qualifying emergency, the FBI was not authorized to obtain this information.

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[292] See 18 U.S.C. § 2709(b).

[293] 18 U.S.C. § 2702(a)(3).

We found that the FBI did not serve legal process on the providers in advance of receiving information about hot numbers. Moreover, we found no evidence that the FBI requested, or the providers gave the FBI, this information pursuant to the emergency voluntary disclosure provision of the ECPA. Instead, it appears that the information was disclosed as part of the contractual arrangement between two of the providers and the FBI, and was often used in connection with fugitive matters that did not qualify as emergency situations under Section 2702.

Therefore, we concluded that the FBI's practice of requesting and obtaining calling activity information about hot numbers without service of legal process violated the ECPA.

We also examined whether information obtained in response to exigent letters or other informal requests were used in applications for electronic surveillance or pen register/trap and trace orders filed with the Foreign Intelligence Surveillance Court (FISA Court). The Department's National Security Division (NSD) and the FBI reviewed 37 FISA applications, which together referenced a total of 35 unique telephone numbers, to determine whether FBI declarations filed in support of the applications accurately stated the basis for verifying subscriber or calling activity information. We found five misstatements in four declarations, which were filed under oath by FBI personnel. The declarations inaccurately stated that the FBI had acquired subscriber or calling activity information from NSLs when in fact the information was acquired through other means, such as exigent letters, an emergency disclosure letter, and a verbal request to the communications service providers. Moreover, several of the NSLs referred to in the four applications were served at least 2 months after the FISA Court issued the requested orders.

As a result of this review, the NSD notified the FISA Court of the inaccurate statements. The NSD concluded that, under the ECPA, the inaccurate statements made in the FBI declarations were non-material. Yet, even though the inaccurate statements may have been non-material to the FISA application, we believe that any inaccurate statements to the FISA Court are serious and 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 improper means. Based on our results in these cases, we believe there are likely 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 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.

Our investigation also uncovered FBI misuse of administrative subpoenas to obtain telephone records. 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. In some cases, the providers even gave the FBI records or other calling activity information prior to the service of administrative subpoenas.

We concluded that the ECPA was violated when the FBI obtained ECPA-protected telephone records 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 . . . ."[294] However, the ECPA does not authorize the FBI to obtain ECPA-protected records or information 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.[295]

We also found that from 2003 to 2006 the FBI served at least 54 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 of these subpoenas were issued when the FBI's [redacted] Field Division had no active narcotics investigation to which the requested records were relevant. Therefore, this was an improper use of Title 21 administrative subpoenas. Further, the CAU SSA who signed seven of the subpoenas was not among those officials delegated authority under the statute to sign administrative subpoenas.

C. FBI Attempts at Corrective Actions

As discussed in Chapter Four of this report, from late 2003 through March 2007 when the OIG issued its first NSL report the FBI made various

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[294] 18 U.S.C. § 2703(c)(2).

[295] We found no evidence that these were emergency voluntary disclosures pursuant to Section 2702.

attempts to address issues arising from the CAU's use of exigent letters and other informal means to obtain telephone records. However, during this time period the FBI's actions were seriously deficient and ill-conceived, and the FBI repeatedly failed to ensure that it complied with the law and FBI policy when obtaining telephone records from the on-site communications service providers. For example, during this period the FBI regularly issued after-the-fact NSLs, which were an inappropriate tool for remedying the FBI's improper exigent letter practices. Additionally, the FBI issued 11 improper blanket NSLs to try to "cover" or validate the improperly obtained records. These attempts were inconsistent with the ECPA NSL statute, the Attorney General's NSI Guidelines, and FBI policy.

By contrast, after the OIG issued its first NSL report in March 2007, the FBI took several appropriate actions to address the problems created by exigent letters. The FBI ended the use of exigent letters; issued clear guidance on the proper use of NSLs and the ECPA emergency voluntary disclosure statute; and conducted an audit of NSLs issued by field and Headquarters divisions from 2003 through 2006, the results of which were summarized in the OIG's second NSL report released in March 2008. The FBI also directed that its personnel be trained on NSL authorities; agreed to the move of the communications service providers' employees off FBI premises; and expended significant efforts to determine whether improperly obtained records should be retained or purged from FBI databases.

1. The FBI's Initial Attempts at Corrective Action

As detailed in Chapter Four of this report, in late-December 2004 the CAU asked NSLB attorneys to issue an after-the-fact NSL to cover records that had previously been provided to the CAU. By late 2004, FBI National Security Law Branch attorneys, including Deputy General Counsel Julie Thomas, learned about the CAU's use of exigent letters, but the NSLB failed to examine the practice adequately to ensure that it comported with the law, the Attorney General's NSI Guidelines, and FBI policy. Instead, the NSLB sought to devise a process to expedite issuing after-the-fact NSLs for records that the CAU had requested in emergency circumstances pursuant to exigent letters.

Yet, these after-the-fact NSLs were legally flawed. Although the NSLB accepted the CAU's use of exigent letters with the promise of future legal process, the ECPA authorizes the FBI to compel the production of records or other covered information only upon certification in writing by specified senior officials that the records sought "are relevant to an authorized

investigation to protect against international terrorism or clandestine intelligence activities" and that any investigation of a U.S. person "is not conducted solely on the basis of activities protected by the first amendment."[296] After-the-fact legal process, no matter how soon after the fact, is not authorized either by the ECPA NSL statute, the Attorney General's NSI Guidelines, or FBI policy. Additionally, none of the after-the-fact NSLs cited the ECPA emergency voluntary disclosure statute as authority for the previous [redacted]

Although the CAU began to obtain after-the-fact legal process more quickly, the backlog of records requests persisted. The backlog began during Glenn Rogers's tenure as CAU Unit Chief and continued after Bassem Youssef became the CAU Unit Chief in November 2004. While some after-the-fact NSLs were issued by FBI field and Headquarters divisions and the NSLB to address the backlog, we found that neither Rogers nor Youssef took appropriate steps to ensure that the CAU tracked or adequately addressed the backlog. Neither supervisor ensured that FBI personnel who had asked the CAU for records issued the appropriate NSLs or, if these efforts were unsuccessful, alerted senior CTD managers to the problem. As a result, by mid-2006 the FBI had a backlog of record requests for more than 900 telephone numbers. In addition, neither Youssef nor any other CAU personnel sufficiently informed NSLB attorneys of the full scope of the problems the CAU was facing regarding the backlogged record requests.

The FBI attempted to address the backlog by issuing 11 blanket NSLs that were designed to "cover" or validate telephone records that had been provided to the FBI pursuant to exigent letters or other informal requests. The FBI attached to the blanket NSLs signed by senior CTD officials lists that included telephone numbers that had been [redacted] by the on-site providers as long as 3 years earlier.

However, these blanket NSLs were improper and flawed, and they did not comply with the ECPA NSL statute, Attorney General's NSI Guidelines, and FBI policy. As noted above, the ECPA does not authorize the FBI to cover the prior production of telephone records or ECPA-protected calling activity information by issuing after-the-fact NSLs. In addition, the blanket NSLs included telephone numbers relevant to criminal or domestic terrorism investigations for which NSLs were not an authorized technique under the ECPA NSL statute, the Attorney General's NSI Guidelines, or FBI policy. Additionally, the blanket NSLs were not accompanied by required approval ECs, and most of them did not contain the required certifications

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[296] See 18 U.S.C. § 2709(b).

for NSLs imposing non-disclosure and confidentiality obligations on the recipients. Finally, the after-the-fact blanket NSLs did not retroactively cure any violations of the ECPA that occurred when the FBI requested and received records without legal process and in the absence of a qualifying emergency.

2. Corrective Actions after the OIG's First NSL Report

By contrast, after the FBI received the OIG's first NSL report it began to take appropriate steps to address the improper use of exigent letters and other informal requests for telephone records. In March 2007, the FBI OGC issued guidance directing that FBI personnel no longer use exigent letters. The guidance explained the distinctions between the FBI's authority to compel the production of ECPA-protected records or to request emergency voluntary disclosures. The guidance made clear the legal avenues that were available to FBI investigators who seek to obtain telephone records, including a description of the legal basis for emergency voluntary disclosure requests. In June 2007, the FBI issued comprehensive guidance to all FBI personnel regarding the FBI's NSL authorities.

In 2007 and 2008, the FBI conducted three audits to assess the extent of its errors in NSL usage. The FBI reviews generally confirmed the OIG's findings in its first NSL report as to the types of errors made by FBI agents in their use of NSL authorities as well as the unauthorized collections caused by third parties who provided the FBI with information that was not requested.

In December 2007 and January 2008, the employees of the three on-site providers moved out of the FBI. These moves were also accompanied by changes in the FBI's protocols for obtaining telephone records from the three providers.

Additionally, the FBI developed a process to determine whether to retain or purge telephone records obtained through exigent letters and those listed in blanket NSLs. As part of this process, the FBI reviewed records for the 4,379 unique telephone numbers listed in exigent letters and the 11 blanket NSLs to determine whether there was a basis to justify retention of the records. In deciding whether to retain records based on the results of that research, the FBI developed a 5-step "decision tree" based upon the two ECPA authorities for obtaining telephone records. Since the ECPA does not authorize the FBI to compel the production of ECPA-protected records with a promise of future legal process, the FBI's decision tree was used by the FBI not as a basis for the original record requests, but as a basis upon which to analyze whether the FBI would retain the records.

In a complex and time-consuming review, the FBI determined that it would retain most of the records but purge others. In essence, the process attempted to determine if the FBI could find legal process issued in connection with the [redacted] request, if the FBI would issue new legal process modeled on the ECPA standard for issuing legal process, or if neither of those options was available, if the FBI could justify retention under an after-the-fact application of the ECPA emergency voluntary disclosure statute.

Under the FBI's analysis, the FBI will retain records for 3,352 telephone numbers because it found either that (1) appropriate legal process associated with the request was previously issued or could be issued for these records; or (2) because the circumstances at the time of the requests satisfied the statutory standard for emergency voluntary disclosures.

The FBI also concluded that it would purge records for 739 telephone numbers because the circumstances under which the records were requested did not meet any of the criteria for retention available in the FBI's decision tree. In addition, the FBI concluded that it must purge a portion of the records for 302 of these telephone numbers because the records obtained were outside the time period specified in the legal process identified by the FBI.

The FBI faced a difficult challenge in reviewing the records improperly acquired from exigent letters or listed in the 11 blanket NSLs. However, under the circumstances it created, we believe the FBI's approach to determine which records to retain and which to purge was reasonable.

In sum, we concluded that the FBI initial attempts to cover the improperly obtained records were deficient, ill-conceived, and poorly executed. However, we believe its review process and other corrective measures since issuance of our first NSL report in March 2007 have been reasonable, given the difficult and inexcusable circumstances that its deficient exigent letter practices created.

D. Improper Requests for Reporters' Telephone Records or Other Calling Activity in Three Media Leak Investigations

We also found that in three media leak investigations the FBI requested, and in two of these instances obtained from on-site communications service providers, telephone records or other calling activity information for telephone numbers assigned to reporters. However, the FBI did not comply with federal regulation and Department policy that requires Attorney General approval before requesting such records and that also requires a balancing of First Amendment interests and the interests of

law enforcement before issuing subpoenas for the production of reporters' telephone toll billing records.[297]

The first leak investigation involved the disclosure of classified information in articles published by the Washington Post and The New York Times in [redacted] about the [redacted] Without a request from FBI investigators, and without the knowledge of any prosecutor, a CAU SSA issued an exigent letter to an on-site Company A analyst for the telephone records of the Post and Times reporters who wrote the articles and their bureaus in [redacted] Company A provided the records to the FBI, and the FBI uploaded the records into a [redacted] database.

The records remained in that database for over 3 years, unbeknownst to the prosecutor, CTD management, and FBI OGC attorneys until 2008 when OIG investigators determined that the records had been improperly acquired and notified the FBI General Counsel. We concluded that the FBI's acquisition of these records constituted a complete breakdown in the required Department procedures for approving the issuance of grand jury subpoenas to obtain reporters' toll billing records.

In the same investigation, we also found that the FBI sent the counterintelligence squad case agent [redacted] to [redacted] This case agent was accompanied [redacted] The agents in the [redacted] – the leak investigation [redacted] Pursuant to instructions from his supervisor, the FBI case agent [redacted]

In August 2008, following the OIG's notification to the FBI that it had improperly acquired the reporters' records, the FBI informed the newspapers and the reporters that their telephone records had been obtained, as required by federal regulation. However, the FBI's notification did not disclose that [redacted]

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[297] See 28 C.F.R. § 50.10.

[redacted]

In the second media leak investigation an Assistant United States Attorney (local AUSA) and a federal prosecutor approved grand jury subpoenas that directed a communications service provider to deliver [redacted] This language meant that the subpoenas sought not [redacted] but also the toll billing records for [redacted] reporters.

After the subpoenas were served and records were sent to the FBI case agent as e-mail attachments, the prosecutor realized by virtue of a fortuitous conversation with an FBI Special Agent that the provider could have given the FBI reporters' records [redacted] requested. The prosecutor took steps to sequester the telephone records and notified the Department's Criminal Division of the issue. In our review, we found no evidence [redacted] or that reporters' toll billing records were provided to the FBI in response to the subpoenas.

Following consultations with the Office of Legal Counsel, the Criminal Division concluded that it was not required to notify the reporters of the subpoenas, even though the subpoenas, if fulfilled, would have resulted in acquisition of reporters' records.

We concluded that the way in which the Department drafted and issued the two subpoenas in this leak investigation was deficient. The prosecutor drafted and approved language in the subpoena attachments that neither the FBI agent nor the prosecutor correctly understood; the local AUSA assigned to assist the investigation in the jurisdiction where the grand jury was empanelled initialed the grand jury subpoenas without reviewing the attachments, which were prepared by the prosecutor and attached after the local AUSA initialed the subpoenas; and but for a fortuitous conversation between a Special Agent not involved in the investigation and the prosecutor, FBI and Criminal Division attorneys would likely not have learned about the problems with the language in the subpoenas.

In the third media leak investigation the Department served on an on-site Company A analyst a grand jury subpoena requesting a [redacted] for records of a [redacted] the FBI believed was in telephonic contact with a reporter. [redacted]

[redacted]

In addition, based on information provided to the Company A analyst by an FBI Special Agent, the Company A analyst [redacted] Company A's database and downloaded records for the reporter's cellular phone calling activity. After the [redacted] which was [redacted] without any legal process, the Company A analyst informed the FBI Special Agent that there were no records of calling activity between the reporter's and the [redacted] numbers during the specified date range. The Company A analyst [redacted] this [redacted] without the knowledge of the Special Agent.

Also, at the request of the CAU's Primary Relief Supervisor, without any legal process, the on-site Company B and Company C employees [redacted] their databases for calling activity by the reporter's cellular phone number. The Company B employee found responsive records, although Company B reported to us that the employee did not recall whether he had provided responsive information to the FBI. We found no evidence that these records were uploaded into FBI databases. The on-site Company C employee determined that Company C had no responsive records.

In sum, we concluded that serious lapses in training, supervision, and oversight led to the abuses involving the FBI's improper requests for reporters' records in these three leak investigations. CAU personnel told us they did not know about the special approval requirements for subpoenaing reporters' toll billing records. The federal prosecutors involved with these matters, said they did not know the subpoenas sought reporters' records either because they did not see or examine the attachments or because they did not correctly understand that the terminology used in the subpoenas or attachments could result in the acquisition of reporters' records. The failures in training, the diffusion of prosecutorial responsibility for the grand jury subpoenas, and the absence of oversight within the CAU or from the CTD or the FBI OGC resulted in the Department not following legal requirements and its own policies for issuing subpoenas to obtain reporters' toll billing records.

E. OIG Findings on Management Failures and Individual Accountability for Exigent Letters and other Improper Requests for Telephone Records

In Chapter Five of this report, we assessed the accountability of FBI employees, their supervisors, and the FBI's senior leadership for the use of exigent letters and other improper practices we described in this report.

We concluded that numerous, repeated, and significant management failures led to the FBI's use of exigent letters and other improper requests

for telephone transactional records over an extended period of time. These failures began shortly after the CAU was established within the Counterterrorism Division (CTD) in 2002, and they continued until March 2007 when the OIG issued its first NSL report describing the improper use of exigent letters. We believe that every level of the FBI – from the most senior FBI officials, to the FBI's Office of the General Counsel (FBI OGC), to managers in the CTD, to supervisors in the CAU, to the CAU agents and analysts who repeatedly signed the letters were responsible in some part for these failures.

FBI Director Mueller, Deputy Director Pistole, and FBI General Counsel Caproni said they were unaware until late 2006 that the CAU was obtaining telephone records without appropriate legal process. In addition, all but one of the CTD supervisors we interviewed said they did not know prior to the OIG's first NSL investigation that the CAU was using exigent letters to obtain telephone records from the on-site providers.

We found that beginning in 2003, shortly after the CAU was established and the FBI contracted to have Company A's employees work on-site, FBI officials failed to recognize and address clear risks for potential misuse of the FBI's NSL and other authorities to obtain telephone records. These risks arose from the combination of several factors, including the FBI's expanded authority to obtain records protected by the ECPA, the close proximity of the on-site providers' employees to FBI personnel in a common FBI work area, and the assignment of SSAs and Intelligence Analysts to the CAU who had no background or training in national security investigations or in using NSLs.

At the same time, FBI officials at all levels failed to develop a plan and implement procedures to ensure that telephone records were properly obtained from the on-site communications service providers. The FBI compounded its planning failures when it did not ensure that all CAU personnel were trained on the legal requirements for obtaining ECPA-protected records. In particular, FBI managers – from CAU Unit Chiefs, to the FBI OGC, to the senior leaders of the FBI – failed to ensure that CAU personnel were properly trained to request telephone subscriber and toll billing records information from the on-site communications service providers in national security investigations only in response to legal process or under limited emergency situations defined in 18 U.S.C § 2702(c)(4). They also failed to ensure that CAU personnel were trained to comply with the Attorney General's NSI Guidelines and internal FBI policies governing the acquisition of these records. They also failed to recognize the need for, and assure adequate oversight of, the practices employed by the CAU to obtain subscriber information, toll billing records, and other calling activity information from the on-site providers.

In reviewing the FBI's responsibility for exigent letters and other improper requests for telephone records and the performance of FBI personnel involved in the practices covered in this review, we recognize that the FBI was confronting major organizational and operational challenges during the period covered by our review. As we noted in our first NSL report, following the September 11 attacks the FBI overhauled its counterterrorism operations, expanded its intelligence capabilities, and began to upgrade its information technology systems. Throughout the 4-year period covered by this review, the CTD also was responsible for resolving hundreds of threats each year, some of which, such as bomb threats or threats to significant national events, needed to be evaluated quickly. Many of these threats, whether linked to domestic or international terrorism, resulted in a large number of high-priority requests to the CAU for analysis of telephone communications associated with the threats, which was the CAU's core mission.

Members of the FBI's senior leadership told us that they placed great demands on the CAU and other Headquarters' units. The FBI Director stated that he placed "tremendous pressure" on CTD personnel to respond to terrorism threats. Other senior FBI officials stated that there were countless "hair on fire" days when Headquarters personnel worked through nights and on weekends to determine whether information the FBI received from various sources presented threats to the United States. Indeed, some of the exigent letters and other improper practices we describe in this report were used to obtain telephone records that the FBI used to evaluate some of the most serious terrorist threats posed to the United States in the last few years. In our view, these circumstances do not excuse the management and performance failures we describe in this report, but they provide important context to the events that led to the serious abuses we found in this review.

We also believe the management failures we described do not explain all the deficiencies we found in this review. In this review, we concluded that FBI supervisors and attorneys did not take sufficient action to prevent or promptly correct the improper use of exigent letters and other informal requests for telephone records. We also concluded that the performance of some FBI employees who signed letters that were inaccurate on their face was not in accord with the high standards expected of FBI and other law enforcement personnel.

First, we found that Glenn Rogers, the CAU's first Unit Chief, authorized the CAU's use of exigent letters without proper legal review by the NSLB, and failed to ensure that the personnel assigned to the CAU received proper guidance on national security investigations and using NSLs. Rogers also personally signed 12 exigent letters without making an effort to confirm that exigent letters were appropriate for use by the CAU in

national security investigations. Moreover, he signed and allowed his subordinates to sign letters that inaccurately stated that subpoenas requesting the telephone records had been submitted to the U.S. Attorney's Office and would be served expeditiously. He also instructed subordinates who questioned him about using such inaccurate letters to continue to use them. In addition, Rogers failed to implement a system for tracking the use of exigent letters, which resulted in a growing backlog of [redacted] of records for which the providers were promised follow-up legal process. These failures led to the routine use of exigent letters and after-the-fact NSLs, as well as the use of sneak peeks and other improper practices detailed in this report. Finally, Rogers failed to ensure that Bassem Youssef, his successor as CAU Unit Chief, was adequately briefed on the unit's methods and procedures, including the specific methods the CAU used for obtaining records from the providers.

Second, we found that Bassem Youssef inherited the improper practices that were in place during Rogers's tenure but that he, too, did not do all he could have, and should have, to address the improper use of exigent letters and other informal requests for telephone records. Youssef failed to understand or adequately assess, in coordination with CTD management and the NSLB, the various methods by which CAU personnel were obtaining records from the on-site providers. Youssef told us that he was unaware of the details of the CAU's requests for community of interest [redacted] sneak peek requests, hot number [redacted] and the unauthorized use of administrative subpoenas. In addition, Youssef personally signed 1 exigent letter, although he did not review or read the exigent letter for more than 5 months after he signed the letter and 18 months after he became the CAU Unit Chief.

Third, we believe Julie Thomas did not properly perform her duties as the NSLB Deputy General Counsel with respect to the CAU's use of exigent letters. Many of the improper practices described in this report pre-dated Thomas's tenure in the NSLB. However, after she became the NSLB Deputy General Counsel and became aware of exigent letters, she did not adequately review and assess the legality of their use in a timely fashion, halt their use, ensure in coordination with CTD officials that CAU personnel understood the lawful methods for obtaining records from the on-site communications service providers, or ensure that the NSLs that she personally signed complied with the ECPA NSL statute.

We found that the Assistant General Counsel, an FBI senior line attorney who was the NSLB point-of-contact for NSL-related policies and issues, did not recognize that exigent letters promising future legal process were an improper tool for obtaining ECPA-protected records and that after-the-fact NSLs also were unauthorized. The Assistant General Counsel also provided inaccurate guidance on the use of exigent letters, and she did

not review a copy of any exigent letter until May 2006, more than 18 months after first learning of their use in the CAU. After reviewing an exigent letter, she merely revised the letter to substitute the term "NSL" for the inaccurate reference to after-the-fact issuance of grand jury subpoenas, and she advised the CAU that it could continue to use the revised exigent letter. The Assistant General Counsel also did not recognize that many of the exigent requests that came to the CAU qualified for emergency voluntary disclosure requests under the ECPA. By these actions and inaction, the Assistant General Counsel allowed the FBI's improper use of exigent letters and after-the-fact NSLs to continue. Although the Assistant General Counsel kept her supervisors informed of the advice she was giving and the actions she was taking, we believe based on her experience in national security investigations and the senior policy position she held in the NSLB that she should have directly confronted the legal deficiencies in the use of exigent letters and, through her supervisors in the NSLB and in conjunction with CTD managers, ensured that the use of exigent letters ended.

As described in Chapter Four of this report, we found that 4 senior CTD officials – Joseph Billy, Jr., Arthur Cummings III, Michael Heimbach, and Jennifer Smith Love – signed a total of 11 improper blanket NSLs in 2006. Each of these NSLs had multiple deficiencies. None of them was accompanied by required approval Electronic Communications (EC) documenting the predication for the requests, and some were issued without the required ECPA certifications. While we recognize that each of these four officials had other significant responsibilities in the FBI and that they each worked in a high-pressure environment in furtherance of the FBI's counterterrorism mission, we believe they should have taken more care to ensure that the NSLs they signed complied with the ECPA, the Attorney General's NSI Guidelines, and FBI policy. In signing these improper NSLs, we believe that these CTD senior officials contributed to misuses of NSL authorities.

As described in Chapter Two of this report, we determined that many CAU employees signed the inaccurate and improper exigent letters issued by the CAU. In evaluating the accountability of the CAU employees who signed these exigent letters, we asked them whether they knew when they signed the letters that the factual statements they contained were inaccurate. We specifically asked whether they knew that exigent circumstances existed at the time they signed the letters and whether they knew that requests for grand jury subpoenas had been submitted to the U.S. Attorney's Office, as specifically stated in the letters.

With few exceptions the CAU employees who signed the letters said they believed exigent circumstances were present. However, most of the CAU SSAs we interviewed told us they did not know whether grand jury subpoenas had been requested at the time they signed the exigent letters,

although some said they recognized that the letters inaccurately described the process for obtaining grand jury subpoenas. Some CAU employees explained their signing the letters by stating they "thought it was all part of the program coming from the phone companies themselves," and they assumed the letters were approved by the FBI or communications service providers' attorneys. Another CAU employee said that he knew that subpoenas had not been issued but signed the exigent letters anyway because he saw the letter used by other CAU personnel as a standard practice and he received assurances from CAU Unit Chief Rogers that the exigent letter was okay to use. Other CAU employees said they said that they did not pay much attention to and were not concerned about the reference to a grand jury subpoena. Still others told us that when they signed the letters they did not know for sure what type of after-the-fact legal process would be used by the field division or Hedquarters unit that initiated the request. Others said that they considered the reference to grand jury subpoenas to broadly include all categories of legal process, such as NSLs. And others told us that they never read the exigent letters closely enough to notice any of the statements they contained.

It is important to recognize several mitigating factors regarding these CAU signers of exigent letters. For example, CAU Unit Chief Rogers and the NSLB approved the use of exigent letters, the FBI failed to train CAU personnel on the authorized means of requesting records from the on-site providers, and the communications service providers readily accepted the exigent letters.

However, we believe that none of these factors excuses FBI employees who signed an exigent letter from not making the effort to confirm the factual accuracy of the letter or, knowing the letter was inaccurate, not raising concerns about the letter's accuracy to FBI supervisors. Simply put, we do not believe employees of the FBI should sign their names to letters making a statement that is not true, even if the letters are approved by management, sanctioned by FBI attorneys, part of an established practice, or accepted by the recipients.

We also recognize that a few SSAs raised concerns about the exigent letters to their supervisor, CAU Unit Chief Rogers, and that he instructed them to continue using the letters without changing the wording. Even in this circumstance, we believe that FBI employees confronted with this problem had options other than to simply sign the letters. They could have sought further guidance from more senior managers in the FBI, either directly or anonymously. They could have complained to a senior CTD official or the FBI Inspection Division. They could have contacted the OIG. None of them took any of these steps. Instead, they continued to sign inaccurate exigent letters.

Finally, as discussed above, FBI personnel were involved with requests to [redacted] reporters' toll billing records in three different media leak investigations, without first complying with Departmental regulation or obtaining the required Attorney General approvals. We believe that these matters involved some of the most serious abuses of the FBI's authority to obtain telephone records. As described in Chapter Five of this report, we recommend that the FBI consider appropriate action for the FBI employees who sought to obtain these records without first obtaining the required Attorney General approval.

II. Recommendations

As discussed above, after we issued our first NSL report in March 2007 the FBI ended the use of exigent letters and took other corrective actions to address the improper use of exigent letters. However, as a result of further deficiencies we uncovered in this review, we believe the FBI and the Department need to take additional action to ensure that FBI personnel comply with the statutes, guidelines, regulations, and policies governing the FBI's authority to request and obtain telephone records. We therefore provide the following recommendations to the FBI and the Department:

1. The FBI should assess this report and the information we developed in this review to determine whether administrative or other personnel action is appropriate for the individuals involved in the use of exigent letters and other improper requests for telephone records.

2. The FBI should issue periodic guidance and conduct periodic training of FBI Headquarters and field personnel engaged in national security investigations regarding the authorities available to the FBI under the *Electronic Communications Privacy Act* (ECPA) and other federal statutes to obtain telephone subscriber and toll billing records information and other information protected by the ECPA. Such training should cover not only the provisions of the ECPA, but also other federal statutes and regulations governing the FBI's authority to obtain to such records, including the Pen Register Act, the federal regulation governing subpoenas for toll billing records of reporters, and the FBI's administrative subpoena authorities.

3. The FBI should periodically review its existing guidance and directives to determine if clarifications or updates are needed to describe the authority of FBI personnel serving in "acting" positions (whether appointed or on temporary duty assignments) to sign documents or approve activities for which signature or approval authority is delegated by the FBI Director. As described in Chapter Four of this report, CTD officials signed improper blanket NSLs while serving as Acting Deputy Assistant Directors. At the time these NSLs were signed, the FBI had not issued guidance on whether

FBI personnel serving in acting positions were authorized to sign NSLs. To ensure that all FBI personnel serving in acting positions understand what they are authorized or not authorized to approve or sign under various federal statutes, Attorney General Guidelines, and FBI policies, we believe the FBI should clarify the authorities of FBI personnel serving in various acting positions.

4. The FBI OGC should review existing contracts between the FBI and private entities or individuals that provide for the FBI's acquisition of telephone records, e-mail records, financial records, or consumer credit records to ensure that the methods and procedures used by the FBI for requesting, obtaining, storing, and retaining these records are in conformity with the NSL statutes and other applicable federal statutes, regulations, Executive Orders, Attorney General Guidelines, and FBI policy.

5. The FBI should issue a directive requiring that FBI personnel, including FBI OGC attorneys with expertise pertinent to the subject matter of the contract, review contract proposals, responses to requests for contract proposals, and proposed contracts or arrangements with wire or electronic communications service providers. The objective of the review should be to ensure that any records requested, obtained, stored, or retained pursuant to any such contracts are done so in conformity with applicable federal statutes, regulations, Executive Orders, Attorney General Guidelines, and FBI policy.

As described in Chapter Two of this report, NSLB attorneys did not review the contracts with the three on-site providers until after reviewing a draft of the OIG's first NSL report. Although the FBI has stated that these contracts did not require FBI OGC review, the FBI OGC informed the House Judiciary Committee that procurement attorneys reviewed certain portions of the contract documents relating to the justification and approval of the contacts.[298] The FBI also informed the Judiciary Committee that FBI OGC attorneys will be more involved in the contract review process in the future. To ensure that FBI personnel who are familiar with the laws and policies affected by such contracts review analyze these important contract proposals and contracts before they are finalized, the FBI should require that FBI personnel with relevant expertise – not just procurement attorneys

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[298] Letter to The Honorable John Conyers, Jr., Responses of the Federal Bureau of Investigation Based Upon the March 20, 2007 Hearing Before the House Judiciary Committee Regarding The FBI's Use of National Security Letters Requested by April 19, 2007 Letter (January 13, 2009), at 6-7.

– review contract proposals and approve the final wording of such contracts.

6. If the FBI places employees of communications service providers in the same work space as FBI employees, the FBI should establish appropriate written guidance, supervisory and oversight procedures, and appropriate training to ensure that the methods and procedures used to obtain records from the providers conform to the ECPA and other applicable federal statutes, regulations, Executive Orders, Attorney General Guidelines, and FBI policy.

7. The FBI should issue guidance specifically directing FBI personnel that they may not use the practices known as hot number [redacted] to obtain calling activity information from electronic communications service providers.

8. The FBI should issue guidance regarding when FBI personnel may issue [redacted] community of interest [redacted] requests. As described in Chapter Two, in November 2007 the FBI Counterterrorism Division prepared draft guidance that would require advance determinations of the relevance of [redacted] telephone numbers included in the community of interest [redacted] requests. The draft guidance also would require that senior FBI officials and a Department attorney approve such requests and that telephone numbers [redacted] pursuant to these requests be documented for purposes of congressional reporting on NSL usage. We recommend that the FBI finalize and issue this guidance to FBI personnel.

9. The FBI should carefully review the circumstances in which FBI personnel asked the on-site communications service providers [redacted] on specified "hot numbers" to enable the Department to determine if the FBI obtained calling activity information under circumstances that trigger discovery or other obligations in any criminal investigations or prosecutions.

10. The Department should determine if, in addition to the grand jury subpoenas identified in this review, the Department has issued other grand jury subpoenas in media leak investigations that included a request for [redacted] community of interest or calling circle [redacted] If so, the Department should determine whether at the time the subpoenas were issued responsible Department personnel were aware of or suspected contacts between the target numbers in the subpoenas and members of the news media and whether the Department obtained the toll billing records of news reporters in compliance with Departmental regulations, including the notification requirements.

11. The FBI, in conjunction with the National Security Division (NSD) and other relevant Department components, should review current policies and procedures governing [redacted] reporters by Department personnel. We recommend that after conducting this review, the FBI and the NSD consider under what circumstances FBI personnel may [redacted] reporters, and specifically whether approval by senior FBI officials at the level of an Assistant Director or higher should be required for [redacted]

12. 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.

13. The FBI and the Department should consider how the FBI may use [redacted] when seeking telephone billing records, particularly with respect to [redacted] We also recommend that the Department notify Congress of this issue and of the OLC opinion interpreting the scope of the FBI's authority under it, so that Congress can consider the [redacted] and the implications of its potential use.

III. OIG Conclusion on Exigent Letters and Other Improper Requests for Telephone Records

In sum, in this review we found widespread use by the FBI of exigent letters and other informal requests for telephone records. These other requests were made by e-mail, face-to-face, on post-it notes, and by telephone, without first providing legal process or even exigent letters. The FBI also obtained telephone records through improper "sneak peeks," community of interest [redacted], and hot-number [redacted] Many of these practices violated FBI guidelines, Department policy, and the ECPA statute. In addition, we found that the FBI also made inaccurate statements to the FISA Court related to its use of exigent letters. Some of the most troubling improper requests for telephone records occurred in media leak cases, where the FBI sought and acquired reporters' telephone toll billing records

and calling activity information without following federal regulation or obtaining the required Attorney General approval.

Our review also found that the FBI's initial attempts at corrective action were seriously deficient, ill-conceived, and poorly executed. However, after our first NSL report was issued in March 2007, the FBI took appropriate action to stop the use of exigent letters and to address the problems created by their use. Yet, we believe the FBI should take additional action regarding the use of other improper requests for telephone records. We therefore believe the FBI should implement the recommendations in this report and ensure that similar abuses of exigent letters or other improper requests for telephone records do not occur in the future.

APPENDIX

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to File No.

FBIHQ
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Washington, DC 20535
Room [redacted]
May 27, 2003

[redacted]

Telephone: [redacted]
Facsimile: [redacted]
Attn: [redacted]

RE: Special Project / [redacted]

Dear Mr. [redacted]

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 [redacted] as expeditiously as possible.

Sincerely,

Glenn Rogers
Unit Chief
Communications Analysis Group

[redacted]

By: [redacted]
Supervisory Special Agent

3020 X
NSL
[redacted]000021

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

August 4, 2006

[redacted]

Attention: [redacted]

Re: Special Project / SSA [redacted]

Dear Mr. [redacted]

Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided. National Security Letters directing you to provide this information will be processed and served upon [redacted] as expeditiously as possible.

For the following U.S. numbers:

[redacted]

Sincerely,

Bassem Youssef
Unit Chief
Communications Analysis Unit

By: [redacted]
Supervisory Special Agent