

July 27, 2007

Senator Patrick Leahy, Chairman  
Committee of the Judiciary  
United States Senate  
433 Russell Senate Office Bldg.  
Washington, D.C. 20510

Senator Arlen Specter  
Committee of the Judiciary  
711 Hart Building  
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

The Electronic Privacy Information Center (EPIC) is writing regarding the recent changes to the Federal Bureau of Investigation's (FBI) internal guidelines on the use and reporting of National Security Letters (NSL). We believe that the FBI's revised internal guidelines do not adequately address the concerns previously raised, and that in light of recent developments, section 505 of the Patriot Act, which established the enhanced the NSL authority, should be repealed.

### **The Patriot Act Significantly Expanded the NSL Power**

NSLs are an extraordinary search procedure by which the FBI can compel disclosure of certain customer and consumer data from telephone companies, financial institutions, Internet service providers and consumer credit agencies without judicial approval. Originally, NSLs were an exception to the Right to Financial Privacy Act (RFPA), which permitted – but did not compel – financial institutions to answer FBI requests.<sup>1</sup> The FBI received authority to issue National Security Letters through an amendment to the RFPA<sup>2</sup> and the Electronic Communications Privacy Act (ECPA).<sup>3</sup> In 1994, two more NSL provisions were incorporated in the National Security Act<sup>4</sup> and the Fair Credit Reporting Act (FCRA).<sup>5</sup>

The Patriot Act<sup>6</sup> amended the ECPA<sup>7</sup>, the RFPA<sup>8</sup>, and the FCRA.<sup>9</sup> It added a provision in the FCRA creating a fifth NSL section, allowing any government agency investigating or analyzing international terrorism to issue NSLs for certain consumer reports.<sup>10</sup> The Patriot Act

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<sup>1</sup> P.L. 95-630, § 1114, 92 Stat. 3706 (1978).

<sup>2</sup> P.L. 99-569, F 404, 100 Stat. 3197 (1986).

<sup>3</sup> P.L. 99-508, § 201, 100 Stat. 1867-68 (1986).

<sup>4</sup> The Nat'l Sec. Act (50 U.S.C. 401 *et seq.*(2006)).

<sup>5</sup> 15 U.S.C. § 1681u.

<sup>6</sup> P.L. 107-56, § 505, 115 Stat. 365-66 (2001).

<sup>7</sup> The Elec. Comm'n Privacy Act (18 U.S.C. §2709 (1988)).

<sup>8</sup> The Right to Fin. Privacy Act (12 U.S.C. §§3401-3422 (2000)).

<sup>9</sup> The Fair Credit Reporting Act (15 U.S.C. §1681 *et seq.* (2000 & Supp. IV 2005)).

<sup>10</sup> P.L. 107-56, § 358(g); *see also* Charles Doyle, *National Security Letter in Foreign Intelligence Investigations: A Glimpse of the Legal Background and Recent Amendments*, CRS Report for Congress, RS22406, at 3 (March 21, 2006).

also expanded the number of people who could issue NSLs – from only FBI headquarters officials to include heads of FBI field offices as well as to any government agency investigating or analyzing international terrorism. It loosened the pre-Patriot Act requirement that the FBI had “specific and articulable facts giving reason to believe that the customer of entity whose records are sought is a foreign power or an agent of a foreign power” as defined in the Foreign Intelligence Surveillance Act of 1978<sup>11</sup> to the post-Patriot Act requirement that the information “be relevant to an investigation to protect against international terrorism or foreign spying” provided that the investigation of a United States person is not conducted “solely on the basis of activities protected by the first amendment of the Constitution of the United States.”<sup>12</sup> These changes led to a dramatic increase in NSL use – 8,500 were issued in 2000, 39,346 in 2003, 56,507 in 2004, and 47,000 NSLs were issued in 2005.<sup>13</sup>

The Patriot Act Improvement and Reauthorization Act (“Patriot Act IRA”) made further changes to the NSL powers, such as providing for judicial enforcement of NSLs and establishing penalties for failure to comply or failure to obey the non-disclosure requirement.<sup>14</sup> It also required the Attorney General to “fully inform” Congress concerning all NSL requests.<sup>15</sup>

### **EPIC Has Previously Shown Troubling Signs of Abuses of Patriot Act Powers**

In October 2005, EPIC first brought to the Committee’s attention documents that we obtained under the Freedom of Information Act regarding the abuse of Patriot Act powers. EPIC received documents that revealed at least 13 instances in which the FBI’s Office of General Counsel investigated alleged FBI misconduct during intelligence activities and found these matters serious enough to report them to the Intelligence Oversight Board (IOB). As we explained, under Executive Order § 12863, inspectors general and general counsel throughout the intelligence community must report to the IOB “intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential Directive.” The IOB, in turn, reports such activities to the President and Attorney General.

In a November 2005 letter to the Washington Post, EPIC again raised the issue that the administration has not been forthcoming about the extent of problems with the Patriot Act. We called on the FBI to enact better methods of oversight and reporting.

In 2006, EPIC updated the Committee regarding documents released to EPIC under the FOIA<sup>16,17</sup>. We became aware of 42 cases reported to the IOB between 2000 and 2005. This was an increase from the 13 cases EPIC described in a previous letter to the Committee.<sup>18</sup>

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<sup>11</sup> See e.g. 18 U.S.C. § 2709 (2000); 50 U.S.C. §§ 1801-1811 (2000).

<sup>12</sup> P.L. No 107-56 115 Stat. 272 (2001).

<sup>13</sup> Andrew Zajac, *Report blasts FBI*, The Chi. Trib., (Mar. 10, 2007) available at <http://www.chicagotribune.com/news/nationworld/chi-0703100217mar10,1,1003672.story?coll=chi-newsnationworld-hed> (last visited June 26, 2007).

<sup>14</sup> USA Patriot Improvement and Reauthorization Act, H.R. 3199 and S. 1389 109<sup>th</sup> Cong. (2006).

<sup>15</sup> *Id.* at § 118.

<sup>16</sup> Patriot Act FOIA, (2006) <http://www.epic.org/privacy/terrorism/usapatriot/foia>.

<sup>17</sup> Letter from EPIC to the U.S. Sen. Comm. on the Judiciary (June 16, 2006) available at [http://www.epic.org/privacy/surveillance/sen\\_iob\\_letter.pdf](http://www.epic.org/privacy/surveillance/sen_iob_letter.pdf).

This year, we wrote again following the issuance of the report from the Inspector General which made clear that the FBI exceeded its authority to issue NSLs and has not been forthcoming with information on the use of these powers.<sup>19</sup> The OIG report also highlighted instances of NSLs issuing outside of statutory authority. In light of these recent revelations, we requested that section 505 of the Patriot Act be repealed.

### **The Attorney General and FBI Are Not Properly Reporting or Responding to Abuses**

On June 13, 2007, the FBI released its updated guidelines for field agents in the use of NSLs.<sup>20</sup> These policy changes do not adequately address improprieties in the use of NSLs and do not meet the OIG's suggestion to "balance operational needs, information sharing, and privacy concerns."<sup>21</sup>

Under the revised guidelines, NSLs can still issue under the lowered standard of "relevance to" or "sought for" an investigation to protect against international terrorism or espionage as permitted by the Patriot Act.<sup>22</sup> The guidelines continue the practice of allowing field offices to issue NSLs instead of the pre-Patriot Act system requiring headquarters to issue NSLs. There was no meaningful change in the FBI's guidelines to correct the abuses of overproduction by third parties; instead, it cements the FBI's previous decision to simply issue another NSL to address the overproduction. Information obtained through an NSL does not have to be labeled as such before being uploaded into the FBI's database providing no way to track what, or how much, NSL information is being used in criminal proceedings, or for whom NSLs are issued. There is no provision for independent oversight, such as a review by a Foreign Intelligence Surveillance Court (FISC) judge, to reasonably guarantee compliance with all laws, policies and Attorney General guidelines before NSLs are issued. In addition, there is no guidance on when other less intrusive means of obtaining the same information are feasible as required by Executive Order 12333 § 2.4.

A June 14, 2007 Washington Post story described the results of an internal FBI audit. The audit found that FBI agents abused their NSL powers more than 1,000 times, "far more than was documented in a Justice Department report in March [the OIG report]."<sup>23</sup> The audit covered 10%

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<sup>18</sup> Letter from EPIC to the U.S. Sen. Comm. on the Judiciary (Oct. 24, 2005) *available at* [http://www.epic.org/privacy/terrorism/usapatriot/judiciary\\_102405.pdf](http://www.epic.org/privacy/terrorism/usapatriot/judiciary_102405.pdf).

<sup>19</sup> Letter from EPIC to the U.S. Sen. Comm. on the Judiciary (March 21, 2007) *available at* [http://www.epic.org/privacy/pdf/nsl\\_letter.pdf](http://www.epic.org/privacy/pdf/nsl_letter.pdf).

<sup>20</sup> Gen. Counsel, Nat'l Sec. Law Policy and Training Unit, FBI, *Comprehensive Guidance on National Security Letters* (June 1, 2007), *available at* [http://www.epic.org/privacy/nsl/New\\_NSL\\_Guidelines.pdf](http://www.epic.org/privacy/nsl/New_NSL_Guidelines.pdf). [Hereinafter *NSL Guidance*].

<sup>21</sup> Press Release, FBI, *Response to DOJ Inspector General's Report on FBI's Use of National Security Letters*, (Mar. 9, 2007) *available at* <http://www.fbi.gov/pressrel/pressrel07/nsl030907.htm> (last visited June 18, 2007).

<sup>22</sup> P.L. 107-56, §505, 115 Stat. 365-66 (2001).

<sup>23</sup> John Solomon, *FBI Find It Frequently Overstepped in Collecting Data*, *The Wash. Post*, June 14, 2007, at A1, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2007/06/13/AR2007061302453.html?nav=rss\\_politics](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/13/AR2007061302453.html?nav=rss_politics). (The FBI internal audit of the NSLs has not yet been released to the public and EPIC's Freedom of Information Act request has not yet been answered, thus The Washington Post article is the most authoritative source available at this time.)

of the FBI's investigations, so the mistakes in the FBI's domestic surveillance efforts "probably number several thousand."<sup>24</sup>

A July 10, 2007, Washington Post story reported that Attorney General Alberto Gonzales had received reports of improper uses of NSL powers during the period when the Patriot Act reauthorization was pending in Congress.<sup>25</sup> This is a troubling development because the Attorney General had previously told Congress he was "not aware of any documented case of abuse."<sup>26</sup> Congress relied on these assurances by the Attorney General when it reauthorized the Patriot Act.

### **Patriot Act Reform, Judicial and Congressional Oversight Are Needed to Protect Civil Liberties**

The lack of substantive changes by the FBI's revised guidelines on the use and reporting of NSLs, combined with documents EPIC obtained under the Freedom of Information Act regarding abuses reported to the Intelligence Oversight Board and the OIG report show that the FBI exceeded its authority to issue NSLs and has not been forthcoming with information on the use of these powers. EPIC urges the Committee to require the Attorney General to issue a full audit and unclassified report of the use of NSLs.

We also urge the Committee to require the Attorney General to release the FBI's internal audit. EPIC reiterates our request to repeal section 505 of the Patriot Act. To prevent further abuses, EPIC requests independent judicial approval before issuance of NSLs, and reenactment of the pre-Patriot Act standard that the FBI have "specific and articulable facts giving reason to believe that the customer of entity whose records are sought is a foreign power or an agent of a foreign power."

Sincerely,

Marc Rotenberg  
EPIC Executive Director

Guilherme Roschke  
EPIC Staff Counsel

Tanith L. Balaban  
EPIC IPOP Clerk

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<sup>24</sup> *Id.*

<sup>25</sup> John Solomon, *Gonzales Was Told of FBI Violations*, The Wash. Post, July 10, 2007, at A1, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902065\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/07/09/AR2007070902065_pf.html).

<sup>26</sup> *Oversight of the USA Patriot Act: Hearings Before the Committee on the Judiciary United States Senate, 109th Cong. 17 (2005)*, available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/24293.pdf> (Statement of Attorney General Gonzales).