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National Security Letters: access to customer records

A report from the Department of Justice Inspector General found that the FBI has been using its ability to issue National Security Letters, administrative subpoenas that do not require the FBI to go to court or grand jury, to obtain customer records from ISPs. Michael Vatis, a partner with Steptoe & Johnson LLP, explains that a Congressional inquiry and lawsuits could follow the DoJ's investigation, and assesses the possibility that the FBI's NSL powers could be reduced on privacy grounds.

Last month, the Department of Justice (DoJ) Inspector General (IG) released a report¹ finding significant problems with the Federal Bureau of Investigation's (FBI) use of 'National Security Letters' (NSLs). NSLs are essentially administrative subpoenas that the FBI can use, without having to go to a court or a grand jury, to obtain a wide variety of customer records from telecommunications companies, internet access providers, financial institutions and credit agencies. The IG found no evidence of deliberate violations of the law, but the report paints a picture of bureaucratic bungling, shoddy recordkeeping, confusion about the law and lack of adequate internal oversight. Still, not all blame resides with the FBI. The problems found by the IG in some ways were inevitable after Congress dramatically lowered, in the USA PATRIOT Act², the threshold for obtaining an NSL. After all, when the FBI need only certify that records are 'relevant' to an investigation in order to obtain them, and there is no meaningful judicial or congressional oversight of this sweeping power, misuse can fairly be expected. And given how little opposition there was in

Congress to the PATRIOT Act in general, or to the expansion of NSL authority in 2001 (the vote in the Senate was 98-1), the sudden uproar in Congress seems a bit belated, if not disingenuous. Still, with Congress and the media suddenly interested in this once-obscure investigative tool, there are two key issues for affected companies. First, will companies' cooperation with the FBI be the subject of congressional inquiry and perhaps lawsuits? Probably so. Second, will the congressional uproar lead to a significant cutback in substantive NSL authority, or will it cause only procedural changes to ensure more meaningful oversight by DoJ and Congress? Probably the latter.

The PATRIOT Act greatly expanded the FBI's authority to issue NSLs for toll-billing records, subscriber information, electronic communications transactional records, and financial and credit records. First, the Act significantly lowered the legal threshold for NSLs. Previously, the FBI had to certify that the subject of the NSL was himself an 'agent of a foreign power' - that is, a foreign government or an international terrorist group - or, in the case of subscriber records, that he communicated with such a person about terrorism. With the passage of the PATRIOT Act, however, the FBI need only certify that the requested information is 'relevant to an authorized investigation' into international terrorism or clandestine intelligence activities. In addition, the Act expanded the number of FBI officials who can issue an NSL, allowing the head of each FBI Field Office to issue them rather than only a small group of officials at FBI Headquarters.

The result of these changes has been a dramatic expansion in the number and scope of NSLs. Thus, the IG's report states that from

2003 through 2005, the FBI issued a total of 143,074 NSLs, most for toll billing records, subscriber information, and electronic communication transactional records. The numbers are far greater than what has previously been reported. For example, the IG reports that the FBI issued 47,221 in 2005 alone, while the DoJ last year reported that it had issued 9,254 in 2005. (The DoJ's earlier number did not include NSLs relating to non-U.S. persons or those issued under the Electronic Communications Privacy Act³ (ECPA) for subscriber records.) Moreover, since each NSL contains, on average, roughly three separate requests for information, the number of separate requests for information comes close to half a million. Given these numbers, the problems identified in the report are a bit more understandable.

The IG examined the processing of NSLs by FBI Headquarters and four field offices, reviewing a sample of 77 investigative files and 293 NSLs out of the hundreds of thousands issued. Importantly, while the IG found that the FBI had repeatedly violated the law, Attorney General Guidelines and internal FBI procedures, he also found no evidence that the violations were deliberate. Rather, the problems appeared to stem mostly from shoddy recordkeeping, careless handling of paperwork and misunderstanding or disregard of the applicable law and regulations. Still, some of the violations were significant. For instance, the Bureau sometimes obtained more information than it was legally entitled to, including the contents of electronic communications (emails and images) rather than just transactional records and sometimes got information without ever actually issuing an NSL at all. It also issued NSLs even

in situations where no underlying investigation had been approved, and significantly underreported to Congress the number of NSLs and the number of individual requests for information.

One of the more significant violations included the FBI's obtaining, on over 700 occasions, toll-billing or subscriber records for over 3,000 phone numbers from three telecommunications companies without even issuing an NSL. Essentially, FBI personnel at headquarters, who were not authorized to issue an NSL, would sign a so-called 'exigent circumstances letter' indicating that the information was needed immediately because of exigent circumstances and that subpoenas had been requested from the U.S. Attorney's Office and would be processed expeditiously. In fact, however, such letters were used even when there was no underlying emergency, even when no subpoena had been requested, and even when there was no documentation even tying the request to a specific investigation. This arrangement apparently grew out of close cooperation between the FBI and the three telecommunications companies immediately following 9/11, and was later embodied in contracts with the three companies. The contracts were apparently written to allow for 'near real-time servicing' of legal process because of the Bureau's concern that the processing of NSLs took too long.

Finally, some of the problems were not directly the fault of the FBI, but appeared to be caused by the recipient companies' mistakes. For example, in some instances, the company provided communications content even when not requested, or provided toll-billing records for the wrong phone numbers, or provided toll-billing or transactional

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information beyond the period requested.

Given that recipients of NSLs were responsible for some of the problems, it seems likely that some of those companies will be dragged into the legal fray. The secrecy around NSLs may prevent Congress from calling company executives to testify in open hearings, but it seems inevitable that the names of the three telecommunications companies, at least, will eventually leak out, and that could change the political calculus on Capitol Hill. It also seems likely that someone will sue the companies for alleged violation of ECPA, much as plaintiffs have sued telecommunications companies for their alleged participation in the National Security Agency's program of warrantless domestic surveillance. Such a suit would put to the test the immunity provisions in ECPA (18 U.S.C. sections 2703(e)⁴ and 2707(e)⁵) for companies that rely in 'good faith' on certain demands for information from law enforcement.

As to any legislative changes, it is unlikely that the IG report alone will cause Congress to narrow the NSL authority considerably, such as by reverting to the pre-Patriot Act standard, since the IG appeared to agree with the FBI's view that NSLs are an 'indispensable' investigative tool in national security cases. More likely, Congress will enact procedural requirements for greater internal oversight of NSLs by FBI headquarters and the DoJ, and more detailed reporting requirements to Congress. If that prediction is correct, it means telecommunications companies, internet access providers and financial institutions will continue to receive sweeping demands for information from the FBI. Given the FBI's record on this issue and

the new scrutiny given to NSLs by Congress and the media, companies should review NSLs with great care before complying, and should insist on receiving an NSL (or a grand jury subpoena or court order) before turning over customer records.

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1. <http://www.usdoj.gov/oig/special/s0703b/final.pdf>
2. <http://www.step toe.com/assets/attachments/1223.pdf>
3. http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_000_02510----000-.html
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