



April 7, 2008

Mr. Glenn A. Fine
Inspector General
United States Department of Justice
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Washington, DC 20530

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RICHARD ZACKS
TREASURER

Dear Mr. Fine:

We are writing to request that your office conduct an investigation into reports that the Federal Bureau of Investigation (FBI) violated the law by obtaining and sharing personal consumer information with the Department of Defense (DOD). Through the ACLU's recent Freedom of Information Act (FOIA) request, we have received documents indicating that the FBI may have issued national security letters (NSLs) on behalf of DOD and turned over information resulting from those letters to DOD without having a legal basis for doing so.¹ A full investigation by your office is necessary so that the American public will have confidence in the facts disclosed, and, if necessary, so that the inappropriate intermingling of U. S. military and civilian authorities can be stopped.

Congress gave DOD a narrow NSL authority – strictly limited to issuance of non-compulsory requests for information regarding DOD employees in counter-intelligence and counter-terrorism investigations,² and to obtaining financial records³ or consumer reports⁴ when “such information is necessary for the agency’s conduct or such investigation, activity or analysis.” The DOD does not, however, have the authority to issue the other two forms of NSLs that permit access to communications records,⁵ or consumer information identifying financial institutions and individuals.⁶ Those authorities may only be used by the FBI and in relation to an authorized investigation.

The documents obtained by ACLU litigators suggest that DOD may have asked the FBI to issue NSLs compelling the production of information

¹ See Newly Unredacted Documents Confirm Lack of Oversight of Military’s Domestic Surveillance Powers, ACLU press release (April 1, 2008), at: <http://www.aclu.org/safefree/nationalsecurityletters/34724prs20080401.html>.

² National Security Act, 50 U.S.C. § 436.

³ Right to Financial Privacy Act, 12 U.S.C. § 3414.

⁴ Fair Credit Reporting Act, 15 U.S.C. § 1681v.

⁵ Electronic Communications Privacy Act, 18 U.S.C. § 2709.

⁶ Fair Credit Reporting Act, 15 U.S.C. § 1681u.

DOD wanted, but was not authorized to obtain. Furthermore, the documents suggest that the FBI appears to have complied with these requests even when it was not conducting its own authorized investigation. For the FBI to assist DOD in obtaining records DOD is not legally authorized to obtain is problematic in and of itself. For the FBI to issue NSLs without its own “authorized investigation,” however, would appear to violate the FBI’s statutory authority.

In particular, we are concerned about an internal document we received entitled “Department of Defense National Security Letter Program Review,” which is apparently an audit conducted in 2006 and 2007 at the request of the Undersecretary of Defense for Counterintelligence and Security.⁷ That review examines NSL authorities and procedures, including the procedures allowing DOD to issue three types of financial NSLs directly. However, that audit goes on to explain:

In most cases, when the FBI issues an NSL at the behest of a DOD component, the request is part of a joint FBI/DOD investigation. **However, a DOD component can submit a Request for Assistance (RFA) where the FBI issues an NSL on a DOD investigation (not joint with the FBI).**⁸

In addition, our FOIA uncovered an excerpt from the Air Force Office of Special Investigations Manual, which states that “NSLs issued pursuant to the Electronic Communications Privacy Act and the Fair Credit Reporting Act must be issued through the FBI.”⁹ These are precisely the statutes that the DOD does not have the authority to invoke, and the manual suggests that the DOD can simply ask the FBI to issue the NSL in its stead. This is the only statement on communications records in this manual excerpt, thereby raising the implication that this is a common practice. Similarly, the actual conclusions and recommendations section of the audit suggests keeping records on “[t]he number of NSLs issued by the FBI at the request of a DOD component or as a part of a joint DOJ/DOD investigation.”¹⁰ Such a statement implies that the FBI is issuing NSLs in the absence of true cooperative and authorized investigations.

We respectfully ask that your office immediately undertake an investigation into the practices suggested by these FOIA releases. Your office has already documented severe problems in way the FBI issues and

⁷ Department of Defense National Security Letter Program Review, *available at* <http://www.aclu.org/safefree/nationalsecurityletters/34724prs20080401.html>, 54-70. [hereinafter Program Review]


⁸ *Id.* at 60.

⁹ AFOSI Manual 71-119 (Approved draft, dtd 11 Feb 02), National Security Letter Excerpt, §3.4.2.1, *available at* <http://www.aclu.org/safefree/nationalsecurityletters/34724prs20080401.html>, 112.

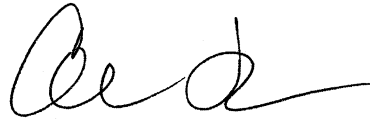
¹⁰ Program Review, *supra* at 72,

maintains NSLs that are otherwise compliant with the authorizing statutes. However, if the FBI is acquiring private information to which it is not entitled, or if it is sharing that information with DOD without proper authority, the problems with NSLs may run even deeper than suggested in your reports from this year and last.

Sincerely,

Handwritten signature of Anthony D. Romero in black ink.

Anthony D. Romero
Executive Director

Handwritten signature of Caroline Fredrickson in black ink.

Caroline Fredrickson
Director,
Washington Legislative Office