



November 29, 2007

David M. Hardy, Chief  
 Record/Information Dissemination Section  
 Records Management Division  
 Federal Bureau of Investigation  
 Department of Justice  
 935 Pennsylvania Avenue, N.W.  
 Washington, DC 20535-0001

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT /  
 Expedited Processing Requested**

To Whom It May Concern:

This letter constitutes a request ("Request") by the American Civil Liberties Union and the American Civil Liberties Foundation (collectively "ACLU") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Federal Bureau of Investigation's ("FBI") implementing regulations, 28 C.F.R. § 16.1 *et seq.*

Media reports and documents released by the Department of Defense ("DoD") pursuant to a FOIA request by the ACLU recently revealed that the FBI may be issuing National Security Letters ("NSLs") at the behest of the DoD. *See, e.g.,* Mark Mazzetti and Eric Lichtblau, *Pentagon Review Faults Bank Record Demands*, N.Y. Times, Oct. 14, 2007; Karen Mathews, *Pentagon Faulted for 'Security Letters,'* Associated Press, Oct. 14, 2007. This Request seeks records concerning the FBI's use and practice of issuing NSLs in non-FBI investigations, whether at the request of the DoD or other agencies. This Request also seeks records concerning the FBI's implementation of its power to impose non-disclosure obligations on NSL recipients since the NSL law was amended in 2006.

### **Requester**

The ACLU is a national organization that works to protect civil rights and civil liberties. As the leading defender of freedom, equality, privacy, and due process rights in the United States, the ACLU has sought information and educated the public about various government surveillance methods utilized and expanded since the 9/11 terrorist attacks, including the government's use of NSLs. The ACLU has filed multiple

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FOIA requests pertaining to the FBI's use of NSLs. The ACLU has also challenged the legality of the NSL power in multiple lawsuits. More generally, the ACLU has drawn attention to, as well as challenged, the government's broad targeting and surveillance of innocent people as part of the war on terrorism, the government's crackdown on criticism and dissent, secret and unchecked surveillance powers of the USA PATRIOT Act, and the National Security Agency's warrantless surveillance of telephone calls and emails.

### Requested Records

The ACLU seeks disclosure of any and all record(s)<sup>1</sup> created after September 11, 2001, concerning:

1. The FBI's use or issuance of NSLs<sup>2</sup> at the request of the DoD for use in DoD investigations, including but not limited to: copies of NSLs; records containing statistical data; records discussing legal authority; records discussing policy; records indicating the kinds of information sought or obtained through NSLs; correspondence; records containing complaints about the use or potential use of NSLs; records relating to investigations of the use or potential use of NSLs; and records relating to disciplinary actions.

2. The FBI's use or issuance of NSLs for use in joint FBI/DoD investigations, including but not limited to: copies of NSLs; records containing statistical data; records discussing legal authority; records discussing policy; records indicating the kinds of information sought or obtained through NSLs; correspondence; records containing complaints about the use or potential use of NSLs; records relating to

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<sup>1</sup> The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

<sup>2</sup> For the purpose of this Request, the term "NSL" encompasses any written demand or request for information issued pursuant to 18 U.S.C. § 2709, 12 U.S.C. § 3414, 15 U.S.C. § 1681u, 15 U.S.C. § 1681v, or 50 U.S.C. § 436, or issued for the purpose of obtaining the types of information encompassed by those statutes, even if not labeled or called an "NSL."

investigations of the use or potential use of NSLs; and records relating to disciplinary actions.

3. The FBI's use or issuance of NSLs in non-FBI investigations, including but not limited to: copies of NSLs; records containing statistical data; records discussing legal authority; records discussing policy; records indicating the kinds of information sought or obtained through NSLs; correspondence; records containing complaints about the use or potential use of NSLs; records relating to investigations of the use or potential use of NSLs; and records relating to disciplinary actions.

4. The FBI's use, implementation, and interpretation of its authority to impose non-disclosure obligations on NSL recipients since the NSL non-disclosure provisions were amended in March 2006 by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 195 (2006), and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006).

#### **Application for Expedited Processing**

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and corresponding regulations because the records at issue are urgently needed by an organization "primarily engaged in disseminating information" in order to "inform the public concerning actual or alleged Federal Government activity," 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii). The records sought also relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

The ACLU is "primarily engaged in disseminating information" to the public within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v); 28 C.F.R. § 16.5 (d)(1)(ii). Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information"). Specifically, the ACLU publishes

newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee through the ACLU's public education department. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); [www.aclu.org/patriot\\_foia/index.html](http://www.aclu.org/patriot_foia/index.html); [www.aclu.org/exclusion](http://www.aclu.org/exclusion); <http://www.aclu.org/safefree/nationalsecurityletters/32088res20071014.html>. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU produces an in-depth television series on civil liberties.<sup>3</sup> Depending on the results of this Request, the ACLU will likewise disseminate the information obtained about government surveillance and the FBI's power to impose non-disclosure obligations on NSL recipients to the public through these kinds of publications in these kinds of channels.

Furthermore, the records sought concern actual or alleged federal government activity – specifically (i) the FBI's use (and potential abuse) of its NSL authority to demand information for non-FBI investigations, thereby enabling other agencies like the DoD to access information to which they are not otherwise entitled, and (ii) the FBI's implementation of its power to gag NSL recipients. 28 C.F.R. § 16.5(d)(1)(ii). Additionally, the records sought pertain to a matter of widespread media interest in which there exist possible questions about the government's integrity which affect public confidence -- namely, the FBI's use and abuse of NSLs, generally, and the FBI's use and abuse of its power to gag NSL recipients. 28 C.F.R. § 16.5(d)(1)(iv).

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<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. The ACLU also makes archived material available at the American Civil Liberties Union Archives at Princeton University Library. Additionally, ACLU publications are often disseminated to relevant groups across the country, which then further distribute them to their members or to other parties.

Recent revelations by the Department of Justice Inspector General concerning extensive and serious government abuses of the NSL authority<sup>4</sup> have generated significant media interest in how the government (and particularly the FBI) is actually using NSLs to gather information about people in the United States. *See, e.g., Bush Addresses Misuse of FBI Subpoenas*, N.Y. Times, Mar. 11, 2007; Lara Jakes Jordan, *Gonzales, Mueller Admit FBI Broke Law*, Wash. Post, Mar. 10, 2007; Richard Schmitt, *FBI Abuses May Lead to Patriot Act Limits*, L.A. Times, Mar. 10, 2007; Jerome Sherman, *Specter Calls for Patriot Act Review*, Pittsburgh Post-Gazette, Mar. 10, 2007; R. Jeffrey Smith, *Report Details Missteps in Data Collection*, Wash. Post, Mar. 10, 2007; David Stout, *FBI Head Admits Mistakes in Use of Security Act*, N.Y. Times, Mar. 10, 2007; Dan Eggen and John Solomon, *FBI Audit Prompts Calls for Reform*, Wash. Post, Mar. 10, 2007; Michael Abramovitz and Paul Kane, *Gonzales Tries to Mollify GOP Critics on Firings, Missteps*, Wash. Post, Mar. 10, 2007; Kelli Arena and Elaine Quijano, *Audit: FBI's Patriot Act Snooping Broke Rules*, CNN.com, Mar. 9, 2007; Barton Gellman and John Solomon, *Frequent Errors in FBI's Secret Records Requests*, Wash. Post, Mar. 9, 2007; Glenn Greenwald, Editorial, *The FBI's Lawbreaking is Tied Directly to President Bush*, Salon.com, Mar. 9, 2007; Tim Grieve, *Inspector General: FBI is Misusing "National Security Letters,"* Salon.com, Mar. 9, 2007.

After release of the Inspector General's report, major editorial pages called on both Congress and the FBI to put an end to abusive NSL practices and to evaluate whether the existing NSL statutes should be amended to prevent further abuse. *See, e.g.,* Editorial, *Abuse of Authority*, Wash. Post, Mar. 11, 2007; Editorial, *The Failed Attorney General*, N.Y. Times, Mar. 11, 2007, § 4; *see also*, John Doe, Op-Ed., *My National Security Letter Gag Order*, Wash. Post, Mar. 23, 2007. Members of Congress held numerous press conferences about NSL abuses. *See, e.g.,* Senators Richard Durbin and John Sununu, *Press Conference on the Department of Justice Inspector General's Report on National Security Letters and Patriot Act Powers*, Federal News Service, Mar. 9, 2007, www.fnsg.com; Senators Patrick Leahy and Arlen Specter, *Press Conference on the Department of Justice Inspector General's Report on National Security Letters and Patriot Act Powers*, Federal News Service, Mar. 9, 2007, www.fnsg.com. Senior officials have been forced to comment on the NSL abuses. *See, e.g., Bush Addresses Misuse of FBI*

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<sup>4</sup> Dep't of Justice, Office of Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (2007).

*Subpoenas*, N.Y. Times, Mar. 11, 2007; David Stout, *FBI Head Admits Mistakes in Use of Security Act*, N.Y. Times, Mar. 10, 2007; Lara Jakes Jordan, *Gonzales, Mueller Admit FBI Broke Law*, Wash. Post, Mar. 10, 2007; Michael Abramovitz and Paul Kane, *Gonzales Tries to Mollify GOP Critics on Firings, Missteps*, Wash. Post, Mar. 10, 2007; Federal Bureau of Investigation Director Robert Mueller, *Press Conference on the Department of Justice Inspector General's Report on National Security Letters and Patriot Act Powers*, Federal News Service, Mar. 9, 2007, [www.fnsg.com](http://www.fnsg.com).

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The public's concern about the government's use of NSLs is not limited to the FBI. Indeed, revelations this year that the DoD and CIA may also be abusing NSL authority – or issuing NSLs without any legal authority whatsoever – is also a matter of grave public concern that has generated significant media interest in its own right. *See, e.g.*, Editorial, *Not Above the Law*, Columbus Dispatch, Jan. 23, 2007; Robyn Blumner, Editorial, *In Cheney's World, We All Report to the Military*, St. Petersburg Times, Jan. 21, 2007; Editorial, *Our View on Security and Civil Liberties: No Court Order Needed*, USA Today, Jan. 18, 2007; *Talk of the Nation: Is the Government Examining Your Bank Account?* (NPR radio broadcast Jan. 17, 2007); Editorial, *Congress Must Step in to Stop Government Snooping*, Kansas City Star, Jan. 16, 2007; *Cheney Defends Taking of Americans' Bank Records*, Detroit Free Press, Jan. 15, 2007; Nitya Venkataraman, *What Uncle Sam Knows About You*, ABCNews.com, Jan. 15, 2007; David Savage, *Cheney Defends Pentagon*, L.A. Times, Jan. 15, 2007; Mark Mazzetti, *Cheney Defends Efforts to Obtain Records*, N.Y. Times, Jan. 15, 2007; Mark Follman, *Banking on Increased Spying at Home*, Salon.com, Jan. 15, 2007; Interview with Vice President Dick Cheney, Fox News Sunday, Jan. 14, 2007; *Cheney Defends Pentagon Financial Records Searches*, Associated Press, Jan. 14, 2007; Karen DeYoung, *Officials: Pentagon Probed Finances*, Wash. Post, Jan. 14, 2007; Julian E. Barnes and Greg Miller, *Pentagon Conducting Probes in U.S.*, L.A. Times, Jan. 14, 2007; Lolita Baldor, *Pentagon Viewing Americans' Bank Records*, Associated Press, Jan. 14, 2007; *Pentagon, CIA Expand U.S. Intel Gathering*, United Press International, Jan. 14, 2007; Eric Lichtblau and Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. Times, Jan. 13, 2007.

The question of government abuses of the NSL authority remains an urgent matter very much in the public eye. Significant media interest in the FBI's use of NSLs was piqued once again in September 2007, when a federal district court judge found the NSL statute's non-disclosure

provisions to be unconstitutional, and struck down the entire NSL statute. *See, e.g.,* Adam Liptak, *Judge Voids F.B.I. Tool Granted by Patriot Act*, N.Y. Times, Sep. 7, 2007; Dan Eggen, *Judge Invalidates Patriot Act Provisions*, Wash. Post, Sep. 7, 2007; Kevin Bohn, *Court Rules Part of Patriot Act Unconstitutional*, CNN, Sep. 7, 2007; Larry Neumeister, *Federal Judge Strikes Down Part of Patriot Act, Blasts Congress*, Associated Press, Sep. 7, 2007; Charlie Savage, *Judge Rules Against FBI Data-Gathering Tool*, Boston Globe, Sep. 7, 2007; Richard B. Schmitt, *Judge Strikes Down Part of Patriot Act*, L.A. Times, Sep. 7, 2007; John Nichols, *The Patriot Act -- and the Senate's -- Constitution Problem*, The Nation, Sep. 6, 2007; Ryan Singel, *Court Strikes Down Key Patriot Act Power Again*, Wired, Sep. 6, 2007; *Judge Throws Out Part of USA Patriot Act*, United Press International, Sep. 6, 2007; Andrew Cohen, *The Patriot Act Ruling in Context*, Wash. Post, Sep. 6, 2007; Greg Gordon, *Federal Judge Strikes Down Key Patriot Act Provision*, McClatchy Newspapers, Sep. 6, 2007; Edith Honan, *Judge Strikes Down Part of Patriot Act*, Reuters, Sep. 6, 2007.

That ruling prompted major editorial pages to call, once again, on both Congress and the FBI to end abusive NSL practices, particularly abuse of the non-disclosure power. *See, e.g.,* Editorial, *Talking About Secrecy*, L.A. Times, Sep. 10, 2007; Editorial, *A Brake on the Patriot Act*, San Francisco Chronicle, Sep. 10, 2007; Editorial, *Patriot Act: Heartening News*, Seattle Post-Intelligencer Editorial Board, Sep. 7, 2007; *see also* Jerrold Nadler, Letter to the Editor, *National Security Letters*, N.Y. Times, Sep. 20, 2007. The government's appeal of the NSL ruling also garnered significant press attention. *See, e.g.,* Genaro C. Armas, *FBI Chief: Patriot Act Ruling Misguided*, Associated Press, Nov. 6, 2007; Andrea L. Foster, *Justice Department Fights to Use National-Security Letters*, Chron. Higher Educ., Nov. 6, 2007; Larry Neumeister, *Feds Fight Ruling on Security Letters*, Associated Press, Nov. 5, 2007.

Most recently, documents released to the ACLU by the DoD as the result of a separate FOIA request revealed that the FBI may also be abusing its NSL authority by issuing NSLs in non-FBI investigations, particularly at the behest of the DoD. These revelations also generated widespread and exceptional media interest. *See, e.g.,* Editorial, *National Security: Going Wrong Way*, Seattle Post-Intelligencer, Oct. 17, 2007; Dahlia Lithwick, *The Dog Ate My Evidence: What Happens When the Government Can't Re-create the Case against You?*, Slate.com, Oct. 16, 2007; *Pentagon, FBI Misusing Secret Info Requests: ACLU*, Agence France Presse, Oct. 15, 2007; *New Docs Reveal DoD's Secret Domestic*

*Surveillance*, The North County Gazette, Oct. 15, 2007; *Morning Edition: Pentagon Accused of Domestic Spying*, (NPR radio broadcast Oct. 15, 2007); Karen Mathews, *Pentagon Faulted for 'Security Letters'*, Associated Press, Oct. 14, 2007; *All Things Considered: National Security Letters Sought for Defense Department Workers*, (NPR radio broadcast Oct. 14, 2007); Editorial, *Spies, Lies and FISA*, N.Y. Times, Oct. 14, 2007; Mark Mazzetti and Eric Lichtblau, *Pentagon Review Faults Bank Record Demands*, N.Y. Times, Oct. 13, 2007.

Disclosure of records pertaining to the FBI's practice of issuing NSLs for non-FBI investigations, thereby enabling agencies like the DoD to circumvent the limits on their own authority to issue NSLs, is vital to the public's understanding of the way in which the government as a whole is using NSLs to gather personal data about people in the United States. It will also shed light on whether the DoD is using the FBI to expand its own role in domestic surveillance. Moreover, disclosure of records pertaining to how the FBI has interpreted and implemented its power to gag NSL recipients since the NSL law was amended in 2006 is key to the public's understanding of the FBI's practice of imposing onerous secrecy obligations on NSL recipients, and will help the public to evaluate whether that power is being abused.

Thus, records concerning the FBI's use of NSLs at the behest of other agencies, as well as records concerning the FBI's implementation of its gag power, are urgently needed to inform the public concerning and "actual or alleged federal government activity." 28 C.F.R. § 16.5(d)(1)(ii). The records plainly also relate to a matter of widespread media interest regarding "questions about government integrity, which affects public confidence". 28 C.F.R. § 16.5(d)(1)(iv). The records sought are crucial to providing the public with a full picture of the government's use of NSLs. The records requested are not sought for commercial use and the ACLU plans to disseminate the information disclosed as a result of this FOIA request to the public at no cost. Accordingly, expedited processing is appropriate in this case.

#### **Application for Waiver or Limitation of Fees**

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is "likely to contribute significantly to the public understanding of the activities or operations of the government and



is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.1(k)(1).

Numerous news accounts reflect the considerable public interest in the records we seek. *See* cited articles, *supra*. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of and between the FBI and other government agencies. *See* 28 C.F.R. § 16.11(k)(1)(i). In addition, disclosure is not in the ACLU’s commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA request will be available to the public at no cost. *See* 28 C.F.R. § 16.11(k)(1)(ii). Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”) (citation omitted).

We also request a waiver of document search and duplication fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 28 C.F.R. § 16.11(c)(1)-(2); 28 C.F.R. § 16.11(d)(1). The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *Nat’l Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Electronic Privacy Information Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA).<sup>5</sup>

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<sup>5</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with respect to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of

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Pursuant to applicable regulations and statute, we expect the determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).


If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

L. Danielle Tully  
American Civil Liberties Union  
125 Broad Street, 19th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,



E. Danielle Tully  
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Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, three separate agencies – the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice – did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.