

## National Security Letters

### **BACKGROUND**

A National Security Letter (NSL) is a form letter signed by an FBI agent that can direct third parties to provide customer account information and transactional communication records. Information from NSLs may be used in criminal proceedings. Four federal statutes contain five specific provisions authorizing the Federal Bureau of Investigation to issue NSLs to obtain information from third parties.<sup>1</sup> The PATRIOT Act provided the government with a significant expansion of preexisting authority to obtain information through NSLs.<sup>2</sup> Pre-PATRIOT Act law required the government to demonstrate that the person whose records were sought was a “foreign power” or “agent of a foreign power” in order to issue a lawful NSL. Now the information sought must only be relevant to protecting against international terrorism or clandestine intelligence activities, provided that the investigation is not conducted solely on the basis of activities protected by the first amendment.<sup>3</sup> Therefore, NSLs may request information about persons other than the subjects of FBI national security investigation, as long as it is in the interest of protecting against terrorism.

The PATRIOT Act also expanded approval authority of NSLs by permitting Special Agents in Charge of the FBI’s field offices to authorize NSLs, which is an expansion beyond the pre-PATRIOT law requiring approval from one of a group of senior FBI Headquarters officials to issue a NSL.

In addition to the PATRIOT Act’s expansion of the use of NSLs, the Intelligence Authorization Act for FY 2004 expanded the definition of which “financial institutions” may be compelled through NSLs to provide to the FBI customer account information, and also expanded the definition of “financial records” to encompass more personal data.<sup>4</sup> The definition of “financial institutions” has been expanded to encompass travel agencies, real estate agents, the Postal Service, insurance companies, casinos and car dealers. The definition of “financial records” now includes information that does not

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<sup>1</sup> 18 U.S.C. § 2709(a), access to certain communication service provider records including telephone calls and emails; 12 U.S.C. § 3414(a)(5)(A), access to financial institution customer records including open and closed checking and savings accounts and safe deposit box records from banks, credit unions, as well as issuers of travelers checks, operators of credit card systems, pawnbrokers, loan or finance companies, travel agencies, real estate companies, casinos, etc.; 50 U.S.C. § 436, access to financial information, records and consumer reports; 15 U.S.C. § 1681u, access to certain financial information and consumer reports for counterintelligence purposes; and 15 U.S.C. § 1681v, access to credit agency consumer records for counterterrorism investigations.

<sup>2</sup> United and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>3</sup> *Id at* subsec. (b)(1)

<sup>4</sup> Intelligence Authorization Act of FY 2004, Pub. L. No. 109-77 (March 9, 2006).

even relate to financial matters, as long as it is held by a financial institution and pertains to that customer's relationship with the financial institution. Record holders who do not comply with a NSL could be compelled to turn over records under court order and charged of a crime, punishable by up to five years in prison.

### *Use of NSLs in the Library Setting*

A National Security Letter was used in at least one instance to request library records in 2005 when the FBI demanded the [Library Connection](#) consortium in Connecticut to turn over records of patrons' computer use.<sup>5</sup> The incident led to a court challenge by the American Civil Liberties Union on the [gag order](#) specified in the NSL. The FBI abandoned its request for the records one year later. In July 2007, AALL sent letters of support and thanks to three Connecticut librarians—[George Christian](#), [Barbara Bailey](#) and [Peter Chase](#)—for defending the privacy rights of library patrons. AALL hosted George Christian at our 100<sup>th</sup> Annual Meeting in New Orleans, LA, where he participated in a program titled “They Rose to the Challenge: Public Librarians Take on the USA PATRIOT Act Through *Doe v. Gonzales*.” (Sunday, July 15, 3:00 p.m., Program B-1)

The PATRIOT Act reauthorization law created slightly more stringent standards under which the FBI can obtain library records in the course of an investigation.<sup>6</sup> Under the new legislation, the FBI can obtain library records of anyone when they present facts showing “reasonable grounds” to believe that the records are “relevant” to an “authorized investigation.” The law requires the Director of FBI, or (if delegated) the Deputy Director of the FBI or the FBI Executive Assistant Director for National Security, to personally approve any request for library records. The reauthorization act clarified that libraries are not subject to NSLs except to the extent that they provide email access.<sup>7</sup> Furthermore, those issued a NSL may consult with an attorney.

### *Recent Reports of NSLs Being Misused by the FBI*

A March 2007 [review](#) of the FBI's use of NSLs conducted by the Department of Justice revealed that NSLs were being issued contrary to the Attorney General's and internal FBI policy. On over 700 occasions, the FBI obtained telephone toll billing records or subscriber information from three telephone companies without first issuing NSLs or grand jury subpoenas. Instead, information was sought under an “exigent circumstances” request letters, signed by unauthorized subordinate FBI agents. In many instances after receiving these records, the FBI issued after-the-fact NSLs; at the same time, the FBI did

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<sup>5</sup> *Doe v. Gonzales*, 449 F.3d 415 (2<sup>nd</sup> Cir.2006).

<sup>6</sup> Pub. L. 109-177 (March 9, 2006).

<sup>7</sup> *Id. at* Section 505. Libraries are subject if the library “is providing the services defined under” Section 2510(15) of title 18, which says ““electronic communication service” means any service which provides to users thereof the ability to send or receive wire or electronic communications.” A colloquy conducted by Senators Sununu and Durbin on February 16<sup>th</sup>, 2006 clarified the legislative history and intent of the provision: “a library that has Internet access, where a person can find an Internet e-mail service, is not a communications service provider; therefore, it would not fall under the purview of the NSL provision in 18 U.S.C. 2709.”

not maintain a log as to whether information received came in under a NSL or an exigent letter. In addition, the Department of Justice found instances where NSLs were issued not in relation to any specific pending FBI investigation. There is not a policy in place regarding what happens to information obtained in response to a NSL; therefore, it is indefinitely retained and retrievable by those who have access to the various FBI databases.

The report goes on to propose the following possible reforms:

- Destroy information obtained through NSLs that is no longer needed.
- Require those authorized personnel who issue NSLs to create a control file and suitable database for the tracking requests for information.
- Provide additional guidance to FBI field offices to eliminate unauthorized information in response to NSLs.
- Take steps to ensure that the FBI does not improperly issue exigent letters<sup>8</sup>

In January 2010, the FBI Office of the Inspector General (OIG) released another troubling [report](#) in which the OIG found widespread abuse of exigent letters to obtain telephone records.<sup>9</sup> The OIG recommended that the FBI take additional action to stop the use of these informal requests and take corrective action to ensure that similar abuses do not occur in the future.

### **CURRENT STATUS IN THE 111<sup>th</sup> CONGRESS (AS OF FEBRUARY 2010)**

Although the NSL provision is not one of the three provisions of the PATRIOT Act due to sunset, there have been several pieces of legislation recently introduced to amend the law governing NSLs.

- On September 17, Sen. Russ Feingold (D-WI) and Sen. Richard Durbin (D-IL) introduced the *Judicious Use of Surveillance Tools In Counterterrorism Efforts (JUSTICE) Act of 2009* ([S.1686](#)). The bill would add safeguards to the FBI's powers to issue NSLs. AALL signed on to a letter to the co-sponsors in support of the bill.
- On October 8, the Senate Judiciary Committee met to consider the *USA PATRIOT Act Sunset Extension Act of 2009* ([S. 1692](#)), a more narrowly tailored reauthorization bill introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-VT), Sen. Benjamin Cardin (D-MD) and Sen. Ted Kaufman (D-DE). The original version of the bill would have strengthened judicial review and audits of NSLs. At the mark-up, the committee adopted an amendment that weakened those requirements. The resulting bill makes only slight improvements

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<sup>8</sup> Department of Justice, Office of the Inspector General, *Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>

<sup>9</sup> Department of Justice, Office of the Inspector General, : A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records (January 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>

to the current law, including a requirement that the government provide a written statement showing that the information sought using an NSL is relevant to an investigation.

- On October 20, House Judiciary Committee Chairman John Conyers, Jr. (D-MI-14), Rep. Jerrold Nadler (D-NY-8) and Rep. Bobby Scott (D-VA-3) introduced the *USA Patriot Amendments Act of 2009* (H.R. 3845) which would restore the pre-PATRIOT Act standard for NSLs to ensure that the government obtains financial, communication and credit records only of people believed to be terrorists or spies. H.R. 3845 incorporated many of the provisions of a bill Rep. Nadler introduced in March which AALL supports, the *National Security Letters Reform Act of 2009* ([H.R. 1800](#)).
- On November 4 and 5, the committee held a mark-up of [H.R. 3845](#). During the mark-up, the committee adopted several amendments, including Chairman Conyers' [manager's amendment](#) that would tighten the standards for issuing NSLs and adopt important new reporting, audit and oversight provisions.
- At the end of the 2009, Congress adopted a 60-day extension of the expiring provisions. Speaker of the House Nancy Pelosi (D-CA-8) rejected a request from Sen. Patrick Leahy (D-VT), Chair of the Judiciary Committee, and Sen. Dianne Feinstein (D-CA), Chair of the Intelligence Committee, to include their bill, the *USA PATRIOT Act Sunset Extension Act of 2009* (S. 1692), in the defense spending authorization bill.
- On February 24 and 25, the Senate and House voted for an additional one-year extension of the three expiring provisions.

The Center for Democracy and Technology compiled a [side-by-side comparison](#) of current law, the *PATRIOT Act Sunset Extension Act* ([S. 1692](#)) and H.R. 3845 as reported, to illustrate the differences among the bills. For more in-depth analysis of the legislation that would impact the law governing NSLs, please see the Congressional Research Service's new report, "[National Security Letters: Proposed Amendments in the 111th Congress](#)."

AALL will continue to monitor this important issue, particularly its impact on our Nation's libraries.

[Link to Chart Summarizing Access to Library Records by NSLs Before and After the USA PATRIOT Act](#)