

Exhibit 1

Electronic Frontier Foundation v. Department of Justice, C.A. No. 07-656 (JDB)

Supplemental Memorandum to Plaintiff's Proposal
for a Freedom of Information Act Production Schedule

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FBI Finds It Frequently Overstepped in Collecting Data

By John Solomon
Washington Post Staff Writer
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An internal [FBI](#) audit has found that the bureau potentially violated the law or agency rules more than 1,000 times while collecting data about domestic phone calls, e-mails and financial transactions in recent years, far more than was documented in a [Justice Department](#) report in March that ignited bipartisan congressional criticism.

The new audit covers just 10 percent of the bureau's national security investigations since 2002, and so the mistakes in the FBI's domestic surveillance efforts probably number several thousand, bureau officials said in interviews. The earlier report found 22 violations in a much smaller sampling.

The vast majority of the new violations were instances in which telephone companies and Internet providers gave agents phone and e-mail records the agents did not request and were not authorized to collect. The agents retained the information anyway in their files, which mostly concerned suspected terrorist or espionage activities.

But two dozen of the newly-discovered violations involved agents' requests for information that U.S. law did not allow them to have, according to the audit results provided to [The Washington Post](#). Only two such examples were identified earlier in the smaller sample.

FBI officials said the results confirmed what agency supervisors and outside critics feared, namely that many agents did not understand or follow the required legal procedures and paperwork requirements when collecting personal information with one of the most sensitive and powerful intelligence-gathering tools of the post-Sept. 11 era -- the National Security Letter, or NSL.

Such letters are uniformly secret and amount to nonnegotiable demands for personal information -- demands that are not reviewed in advance by a judge. After the 2001 terrorist attacks, Congress substantially eased the rules for issuing NSLs, requiring only that the bureau certify that the records are "sought for" or "relevant to" an investigation "to protect against international terrorism or clandestine intelligence activities."

The change -- combined with national anxiety about another domestic terrorist event -- led to an explosive growth in the use of the letters. More than 19,000 such letters were issued in 2005 seeking 47,000 pieces of information, mostly from telecommunications companies. But with this growth came abuse of the newly relaxed rules, a circumstance first revealed in the Justice Department's March report by [Inspector General Glenn A. Fine](#).

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"The FBI's comprehensive audit of National Security Letter use across all field offices has confirmed the inspector general's findings that we had inadequate internal controls for use of an invaluable investigative tool," FBI General Counsel Valerie E. Caproni said. "Our internal audit examined a much larger sample than the inspector general's report last March, but we found similar percentages of NSLs that had errors."

"Since March," Caproni added, "remedies addressing every aspect of the problem have been implemented or are well on the way."

Of the more than 1,000 violations uncovered by the new audit, about 700 involved telephone companies and other communications firms providing information that exceeded what the FBI's national security letters had sought. But rather than destroying the unsolicited data, agents in some instances issued new National Security Letters to ensure that they could keep the mistakenly provided information. Officials cited as an example the retention of an extra month's phone records, beyond the period specified by the agents.

Case agents are now told that they must identify mistakenly produced information and isolate it from investigative files. "Human errors will inevitably occur with third parties, but we now have a clear plan with clear lines of responsibility to ensure errant information that is mistakenly produced will be caught as it is produced and before it is added to any FBI database," Caproni said.

The FBI also found that in 14 investigations, counterintelligence agents using NSLs improperly gathered full credit reports from financial institutions, exercising authority provided by the [USA](#) Patriot Act but meant to be applied only in counterterrorism cases. In response, the bureau has distributed explicit instructions that "you can't gather full credit reports in counterintelligence cases," a senior FBI official said.

In 10 additional investigations, FBI agents used NSLs to request other information that the relevant laws did not allow them to obtain. Officials said that, for example, agents might have requested header information from e-mails -- such as the subject lines -- even though NSLs are supposed to be used to gather information only about the e-mails' senders and the recipients, not about their content.

The FBI audit also identified three dozen violations of rules requiring that NSLs be approved by senior officials and used only in authorized cases. In 10 instances, agents issued National Security Letters to collect personal data without tying the requests to specific, active investigations -- as the law requires -- either because, in each case, an investigative file had not been opened yet or the authorization for an investigation had expired without being renewed.

FBI officials said the audit found no evidence to date that any agent knowingly or willingly violated the laws or that supervisors encouraged such violations. The Justice Department's report estimated that agents made errors about 4 percent of the time and that third parties made mistakes about 3 percent of the time, they said. The FBI's audit, they noted, found a slightly higher error rate for agents -- about 5 percent -- and a substantially higher rate of third-party errors -- about 10 percent.

The officials said they are making widespread changes to ensure that the problems do not recur. Those changes include implementing a corporate-style, continuous, internal compliance program to review the bureau's policies, procedures and training, to provide regular monitoring of employees' work by supervisors in each office, and to conduct frequent audits to track compliance across the bureau.

The bureau is also trying to establish for NSLs clear lines of responsibility, which were lacking in the past, officials said. Agents who open counterterrorism and counterintelligence investigations have been told that

they are solely responsible for ensuring that they do not receive data they are not entitled to have.

The FBI audit did not turn up new instances in which another surveillance tool known as an Exigent Circumstance Letter had been abused, officials said. In a finding that prompted particularly strong concerns on [Capitol Hill](#), the Justice Department had said such letters -- which are similar to NSLs but are meant to be used only in security emergencies -- had been invoked hundreds of times in "non-emergency circumstances" to obtain detailed phone records, mostly without the required links to active investigations.

Many of those letters were improperly dispatched by the bureau's Communications Analysis Unit, a central clearinghouse for the analysis of telephone records such as those gathered with the help of "exigent" letters and National Security Letters. Justice Department and FBI investigators are trying to determine if any FBI headquarters officials should be held accountable or punished for those abuses, and have begun advising agents of their due process rights during interviews.



The FBI audit will be completed in the coming weeks, and Congress will be briefed on the results, officials said. FBI officials said each potential violation will then be extensively reviewed by lawyers to determine if it must be reported to the Intelligence Oversight Board, a presidential panel of senior intelligence officials created to safeguard civil liberties.

The officials said the final tally of violations that are serious enough to be reported to the panel might be much less than the number turned up by the audit, noting that only five of the 22 potential violations identified by the Justice Department's inspector general this spring were ultimately deemed to be reportable.

"We expect that percentage will hold or be similar when we get through the hundreds of potential violations identified here," said a senior FBI official, who spoke on the condition of anonymity because the bureau's findings have not yet been made public.

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