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05/29/2003

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To: Adrien Silas, DOJ/OLA

From: [redacted] FBI/OCA
(202) 324[redacted]

Adrien:

The Investigative Law Unit (ILU) of the FBI's Office of General Counsel provided the following comments re the Intelligence Authorization Act of 2004

Subject: Intelligence Authorization Act of 2004

This responds to the request for review of the Intelligence Authorization Act of 2004. Specifically noted for ILU review were two sections: Section 321, which serves to return (on December 31, 2005) the statutory provisions amended by the USA PATRIOT Act and described in the PATRIOT Act's section 224(a) as sunset provisions to the same versions in effect the day prior to enactment of the PATRIOT Act; and Section 354, which amends the definition of "financial institution" in the Right to Financial Privacy Act (12 U.S.C. 3401(1)), but only for the purposes of section 3414 of that Act. The amendment would broaden the definition to include the same financial entities listed in 31 U.S.C. 5312(a)(2), and include any of those named institutions that have a part located in the United States or its territories, the District of Columbia, Puerto Rico, Guam, American Somoa, or the U.S. Virgin Islands. This amendment, in effect, greatly increases the types of financial entities where a national security letter can be used to obtain financial information. Since Section 3414, itself, exempts government authorities from compliance with most of the onerous RFPA provisions, the definitional change will provide another useful tool for intelligence/counterintelligence and terrorism/counterterrorism investigations and analyses.

ILU has no objections to the content of the two amendments.

E-mailed to Silas 5/29

The "Wall", the USA PATRIOT Act and the Evolution of FBI International Terrorism Investigations Since 9/11

(U) A major benefit of the USA PATRIOT Act ("the Act"), as it pertains to the so-called "Wall" that existed prior to 9/11 between the law enforcement and intelligence communities, has to do with speed and efficiency. There are specific provisions in the Act that authorized the sharing of intelligence information gathered via criminal investigative techniques with the intelligence community. These include Section 203, which, for example, allowed federal grand jury and wiretap information to be shared with the intelligence community. The sections of the Act having to do with the activities of the intelligence community were geared towards harmonizing the law to fit contemporary technological realities. They were also meant to ease somewhat the thresholds required to obtain certain types of information in intelligence investigations. The broad effect of the Act was thus to foster an environment in which information could flow between the two communities robustly and sensibly. Law enforcement and intelligence personnel are now able to work together at the earliest possible stages in order to combat international terrorism. Nothing can replace the raw investigative effort exerted by criminal and intelligence investigators. But the PATRIOT Act has enabled these investigators to do their jobs more quickly, with fewer barriers and with more ability to integrate information.

(U) (S) Once the PATRIOT Act had been passed in October 2001, information began to flow more readily between law enforcement and the intelligence community. One of the more crucial examples of this movement was the sharing of information between the national security side of the FBI and the DOJ Criminal Divisions and U.S. Attorneys. In March 2002, the Attorney General issued intelligence sharing procedures mandating that FBI counterterrorism officials would be required to provide international terrorism case file information with criminal prosecutors. This sharing initially began as a review of files and later evolved into a close working relationship between the FBI Counterterrorism Division (CTD) and the DOJ Criminal Division's Counterterrorism Section (CTS). CTS, moreover, helps to act as a bridge between the FBI and the United States Attorneys throughout the country.

(U) (S) Later, in July 2002, the Foreign Intelligence Surveillance Court (FISC) added a new component to the spectrum of intelligence sharing. Up to that time, the minimization procedures adopted pursuant to the Foreign Intelligence Surveillance Act (FISA) did not allow for the dissemination – from FBI to CIA or NSA -- of international terrorism foreign intelligence data that had been collected under FISA authority to be shared in its so-called "raw" form. In other words, the FBI would have to have first minimized the data before sharing it with the CIA or the NSA. The FISC changed this by allowing NSA and CIA to have access to the data. Those agencies thus could greatly speed up the process of bringing their resources to bear in working on the common transnational terrorism threats we now face. Moreover, because the PATRIOT Act had brought the criminal investigators closer to the intelligence community through the FBI, by mid-2002 there began to emerge true integration among several of the agencies engaged in this effort.

(U) (S) In August 2002, the Attorney General enhanced intelligence sharing with international partners. The AG issued procedures allowing the CIA and NSA to disseminate FISA-derived foreign intelligence relating to United States Persons (USPERs) to foreign governments without having to return to the AG for authorization in each discrete instance. The Attorney General instead required that, while the CIA and NSA could disseminate the information on an ongoing basis, they had to report the disseminations to him in a report on at least an annual basis. Thus, the same protections could be kept while ensuring that vital information moved to our international partners quickly.

(U) In September 2002, the Attorney General issued guidelines regarding the movement of intelligence information from criminal investigations and proceedings into the intelligence community. These guidelines focused on Sections 203 and 905 of the PATRIOT Act. Intelligence acquired during the course of criminal investigations is mandated by Section 905 to be disclosed to the Director of Central Intelligence and Homeland Security officials. Section 203 more specifically authorizes grand jury, electronic, wire and oral interception information to be shared with the intelligence community.

(U) Overall, the PATRIOT Act made a number of specific changes that directly benefited the FBI in its investigations. Section 505 allowed National Security Letters (NSLs) to be issued under a relevance standard. This requires the FBI to demonstrate that the request is relevant to on ongoing national security investigation. Section 206 gave the FBI roving wiretap authority under FISA. The roving provision operates like roving authority under criminal law statutes. Section 207 increased the duration of FISA coverage to permit FBI field offices to monitor FISAs for longer periods. All agents of a foreign power searches increased from 45 to 90 days and for Non-U.S. Person officers or employees of foreign powers the initial FISA period of coverage increased to 120 days. Renewals on such applications were extended to one year of coverage. Section 203 (mentioned above) has allowed intelligence gathered through certain criminal process to be shared with the intelligence community. Section 214 changed the FISA Pen Register/Trap and Trace standard to relevance. This has allowed for robust use of the Pen Register/Trap and Traces in the initial stages of national security investigations and has helped the FBI to build a better picture of connections among suspected international terrorist subjects. Finally, Section 208 modified the FISA statute by increasing the number of judges on the court. This has eased the burden on all involved in the FISA process. Moreover, three FISA judges are now located within fifty miles of Washington, DC. All of the above tools have greatly enabled the FBI to ensure that the law enforcement and intelligence communities have the ability to share information in the effort to confront international terrorism.

(U) In November 2002, the last vestiges of the "Wall" disintegrated when the Foreign Intelligence Surveillance Court of Review issued its very first opinion. In that opinion, the court affirmed the March 2002 Attorney General intelligence information sharing procedures (the FISC had limited them somewhat in May 2002). Further, the Foreign Intelligence Surveillance Court of Review opinion had the effect of declaring the

"Wall" to have been a misinterpretation of the FISA statute and other guidance. The court stated that under the FISA statute as originally written, the government needed to show that only "a purpose" for the collection or search was to gather foreign intelligence rather than the "sole purpose." The court noted that the PATRIOT Act modified the standard to a "significant purpose." The overall effect of the opinion was to bolster the push behind the PATRIOT Act to integrate law enforcement and intelligence efforts, within clear guidance, and to banish misperceptions about the "Wall."

(U) In January 2003, the President announced the creation of the Terrorist Threat Integration Center (TTIC) in his State of the Union Address. TTIC and its successor, the National Counterterrorism Center (NCTC)(created by executive order in August 2004 and affirmed by statute in December 2004), have been responsible for integrating all terrorism analytical threat reporting in a single entity. All intelligence community databases are accessible at NCTC. Intelligence information gleaned from criminal proceedings, such as federal grand juries, is disseminated to NCTC and is integrated into national intelligence reporting. Section 203 of the PATRIOT Act has allowed this to happen.

(U) (S) In October 2003, the Attorney General issued revised Guidelines for National Security Investigations and Foreign Intelligence Collection (NSIG). These guidelines reflect the evolution of changes in national security law, intelligence collection and international terrorism investigations that occurred over the preceding two years. The NSIG reflect the integrated nature of national security investigations and recognize the need to use all available investigative tools, both criminal and intelligence, to combat current transnational threats. The NSIG themselves are a powerful statement on new realities, ones that reflect the need for information integration between criminal investigations and intelligence investigations.

(U) In the year and a half since the creation of the NSIG, the 9/11 Commission has issued its reports and recommendations, and the President signed intelligence reform legislation. The FBI continues to evolve, working towards building a strong Directorate of Intelligence while continuing its law enforcement mission. As the integrated approach to battling International Terrorism evolves, the FBI continues to rely on the provisions of the PATRIOT Act. The Act has enabled the FBI to obtain important information more efficiently than before, allowing its investigators to focus more effectively on their cases. The Act is one of the underpinnings of bringing law enforcement and intelligence services together. If the Congress were to allow the Sunset provisions to lapse, it would be depriving the intelligence and law enforcement communities of valuable and necessary tools. It also would send a signal at odds with the evolution in national security investigations over the last three and half years. The intelligence community has been told repeatedly to "connect the dots" since 9/11. With the help of the law enforcement community, it has made progress. The 9/11 Commission has embraced the value of the PATRIOT Act. The FBI asks that Congress reinforce these views.

"This FISA technique allows the FBI to obtain the same type of information that criminal PR/TT's under "Section 2703 (d)" can obtain. Specific CTD advantages are:

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FEDERAL BUREAU OF INVESTIGATION
Letterhead

[Drafting] Field Division
[Street Address]
[City, State, Zip]

[Month Date, Year]

[Mr./Mrs.] [COMPANY POINT OF CONTACT]
[TITLE]
[COMPANY]
[STREET ADDRESS]
[CITY, STATE **No Zip Code**]

Dear [Mr./Mrs.] [LAST NAME]:

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 12, United States Code (U.S.C.), Section 3414(a)(5), (as amended, October 26, 2001), you are hereby directed to produce to the Federal Bureau of Investigation (FBI) all financial records pertaining to the customer and/or accounts listed below:

Name: [if available]
Account Number(s): [if available]
Social Security Number: [if available]
Date of Birth: [if available]

For period from inception of account(s) to present. [OR SPECIFIC DATE RANGE] Please see the attachment following this request for the types of information that your financial institution might consider to be a financial record.

In accordance with Title 12, U.S.C. Section 3414(a)(5)(A), I certify that the requested records are sought for foreign counterintelligence investigation purposes to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

In accordance with Title 12, U.S.C., Section 3403(b), I certify that the FBI has complied with all applicable provisions of the Right to Financial Privacy Act.

Please be advised that Title 12, U.S.C., Section 3414(a)(5)(D), prohibits any financial institution, or officer, employee or agent of such institution, from disclosing to any person that the FBI has sought or obtained access to a customer's or entity's financial records under this statute.

You are requested to provide records responsive to this request personally to a representative of the [DELIVERING DIVISION] field office of the FBI. Any questions you have regarding this request should be

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directed only to the [DELIVERING DIVISION] field office. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation.

Your cooperation in this matter is greatly appreciated.

Sincerely,

[ADIC/SAC Name]
Assistant Director/Special Agent in Charge

ATTACHMENT

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Last Updated: Wednesday, June 30, 2004

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Change in Scope of National Security Letters under the Right to Financial Privacy Act

1. On 13 December, 2003, the President signed the Intelligence Authorization Act for Fiscal Year 2004 (Public Law 108-177). Section 374 of that Act significantly expanded the definition of "financial institution" for National Security Letters (NSLs) (12 U.S.C. 3414(a)(5)) obtained under the Right to Financial Privacy Act of 1978.

2. Previously, the definition of "financial institution" to which these NSLs applied was restricted to "a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution" located in the U.S., its territories, and possessions. See 12 U.S.C. 3401(1).

3. Under this expanded definition (see paragraph 4 below), the FBI can now use 12 U.S.C. 3414 NSLs to request financial records from a wide variety of additional entities including pawnbrokers, travel agencies, telegraph companies, security dealers and brokers, and commodity futures transactions.

4. Section 374 of Public Law 108-177 amended 12 U.S.C. 3414 to state that the applicable definition of "financial institution" for NSLs obtained under 12 U.S.C. 3414 is now the definition located at 31 U.S.C. 5312(a)(2) and (c)(1) which read:

31 U.S.C. 5312(a)(2) "financial institution" means--

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) any credit union;

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;

(S) a telegraph company;

(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;

(U) persons involved in real estate closings and settlements;

(V) the United States Postal Service;

(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;

(X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which--

(i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or

(ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act);

(Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or

(Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

31 U.S.C. 5312(c)(1) -
(c) Additional definitions.--For purposes of this subchapter, the following definitions shall apply:

(1) Certain institutions included in definition. --The term "financial institution" (as defined in subsection (a)) includes the following:

(A) Any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.].