U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 14, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on December 6, 2006. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." We hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

IMPACT OF CHANGES IN SUPPLEMENTAL PATRIOT BILL

4. During the debate over reauthorization of the PATRIOT Act, I introduced a bill (S.2369) along with Senator Leahy to correct some of the provisions contained in the conference report negotiated with the House of Representatives. One provision of concern was the provision governing challenges to the so-called "gag" or non-disclosure requirement that accompanies National Security Letters and orders issued pursuant to Section 215 of the Patriot Act. Under the conference report, the recipient of an NSL or a Section 215 order can challenge the "gag," but there is a conclusive presumption requiring courts to uphold the "gag" if the government makes a good-faith certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations. Our bill eliminates this "conclusive presumption" to give courts more discretion in reviewing the "gag" requirement.

a. Why shouldn't we trust Article III judges to make sound decisions about disclosure or nondisclosure?

These responses are current as of 2/8/07

Response:

The provisions adopted in the USA Patriot Act Improvement and Reauthorization Act of 2005 (the Act) to modify the so-called "gag" provisions of the National Security Letter (NSL) statutes and Section 215 of the PATRIOT Act were not the result of any distrust of Article III judges. To the contrary, they are carefully crafted provisions that conform to constitutional allocations of power. When the Executive Branch certifies that there should be non-disclosure of an NSL or a 215 order because disclosure would interfere with a criminal, counterterrorism, or counterintelligence investigation or endanger the life or physical safety of any person, that certification is fully reviewable by an Article III judge because the judiciary is fully competent to evaluate those possible harms. On the other hand, when the Executive Branch certifies (via a high level executive official) that disclosure of an NSL or 215 order might endanger national security or interfere with diplomatic relations, the Executive is making an assessment in an area that is at the core of the Executive Branch's Constitutional authority. In those instances (i.e., national security and foreign relations), the Executive Branch is better able to assess the risk caused by disclosure.

b. Would this change negatively impact the FBI's use of NSLs or Section 215 orders?

Response:

As indicated above, we believe the Executive Branch is best able to assess the harm to national security or to diplomatic relations that could be caused by disclosing the existence of an NSL or a 215 order, and that the statute should not be further amended.

Outside the Scope

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These responses are current as of 2/8/07

the violation, a report may be issued to the appropriate entity within DOJ or to the FBI's OPR, resulting in formal review and potential disciplinary action.

96. In light of the FBI's failure to comply with the existing Guidelines and the ineffectual sanctions to deter violations of the Guidelines, please state the FBI's position on H.R. 4132, the Law Enforcement Cooperation Bill introduced by Congressmen Lundgren and Delahunt. The bill would require mandatory prompt Notification to federal, state and local prosecutors having jurisdiction, whenever the FBI obtains knowledge a confidential informant or any other individual has committed a violent crime. If the FBI has concerns about this proposed legislation, please provide the Committee with a detailed explanation of those concerns.

Response:

The FBI's concerns regarding H.R. 4132 are articulated in the 8/25/06 letter provided as Enclosure D.

III. NEW REPORTING REQUIREMENTS UNDER THE REAUTHORIZATION OF THE PATRIOT ACT

The USA Patriot Improvement and Reauthorization Act enacted last March contains new reporting requirements relating to National Security Letters as well as an audit of the use of these letters.

97. Under the Act, a report on the number of National Security Letters is due to the Senate Judiciary Committee by April 2007. Please provide the Committee with an update and detailed information on the FBI's progress to comply with implementation of these new reporting requirements.

Response:

Pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, the AG submitted the first annual report on 4/28/06. The FBI is currently compiling the information required for the calendar year 2006 report. We expect that report to include a caveat regarding the reported number of different U.S. persons on whom we have collected data through NSLs because, toward the end of the year, we discovered that we had not adequately explained the change in the reporting requirement to our field personnel. That lack of clarity, together with the fact that the U.S. person status of the subject of an NSL (as opposed to the

U.S. person status of the target of the investigation) is not always clear, leads us to believe that the statistics we have this year on the number of different U.S. persons whose data is gathered through NSLs will not be as precise as we would like. Further, we have learned from the review conducted by the DOJ OIG that there are other errors in our compilation of these numbers. We continue to work to ensure the accuracy and reliability of these statistics.

98. Please provide the Committee with information relating to any changes in FBI policy or procedures following the enactment of the USA Patriot Improvement And Reauthorization Act last March.

Response:

The USA Patriot Improvement and Reauthorization Act ("Patriot IRA") amended several statues that are regularly used by the FBI in the conduct of its national security investigations. In limited respects, some of these statutory changes required changes to FBI processes; other notable changes largely codified procedures the FBI already followed.

NSLs. The Patriot IRA modified the various authorities pursuant to which the FBI issues NSLs in several respects, it increased the number of committees to which certain semi-annual reports are made, and it altered the content slightly of those reports.

Those changes required three changes to FBI process and procedure. First, the FBI is now required to report the number of different persons (including status as a U.S. Person or Non-U.S. Person) about whom information is sought. As discussed further above, before enactment of the Patriot IRA the FBI reported only the U.S. Person status and the number of different targets about whom information was gathered. This change in external reporting has required changes in internal reporting. Agents are now required to include with every request for an NSL the U.S. Person status of the person to whom the requested NSL relates.

The second change to FBI process and procedure required by the Patriot IRA relates to the internal evaluation that must accompany every request for an NSL. Prior law automatically imposed an obligation of confidentiality on the recipient of an NSL. The Patriot IRA requires a case-by-case evaluation of the need *vel non* for the recipient to be obligated not to disclose the existence of the NSL. In response, FBI process now requires its employee initiating the NSL request to

explain in the request whether, and if so why, the recipient should be obligated not to disclose the NSL. That justification is reviewed along with the request for the NSL and must be approved by the official who executes the NSL.

Finally, the Patriot IRA mandated that the recipient of an NSL be affirmatively notified of: the process by which he or she can challenge the NSL or the nondisclosure provision and his or her right to disclose the NSL to persons necessary to comply with the NSL request, including an attorney to obtain legal advice or legal assistance regarding the NSL. The FBI made conforming changes to the standard forms of all NSLs.

Roving Foreign Intelligence Surveillance Act (FISA) Surveillance. The Patriot IRA modified FISA regarding the amount of detail the FBI must provide in connection with a FISA roving surveillance order. The application must now include a description of the "specific" target when the target is identified by description rather than by name. The Court, in turn, must find the possibility of the target thwarting surveillance based upon specific facts. The FBI has always provided a description of the target of surveillance, to the extent known. (The FBI's describing the target with as much specificity as possible has always been necessary to accomplish collection on the correct person or persons authorized by the Court.) Thus, this change, in effect, codified existing practice and did not require changes to FBI procedures.

The Patriot IRA also added a statutory return requirement, pursuant to which the FBI is generally required to notify the Court within ten days of instituting surveillance of a new facility under the roving authority. In the notice, the FBI must inform the Court of the nature and location of the new facility, the facts and circumstances upon which the applicant relies, any new minimization procedures, and the total number of electronic surveillances that have been or are being conducted under the roving authority. As a practical matter, that change simply codified the practice that was generally followed with roving surveillance. Even before the Patriot IRA, the FISA Court typically mandated notice to the Court when the surveilled facility changed. The new statute has imposed some more reporting requirements, and FBI has adjusted its process to generate the required information in a timely fashion.

Business Records under FISA. The Patriot IRA made significant changes to Section 215 of the Patriot Act (FISA Business Records Order). Among other things, the law now requires that a FISA Business Records Order describe the tangible things that must be produced with sufficient particularity to permit them

to be fairly identified. The Order must also contain a date on which the tangible things must be provided, and that date must afford the recipient a reasonable period of time in which to produce them. The Patriot IRA also imposes high-level supervisory approval of FISA Business Records Orders when they are seeking certain special categories of things such as library circulation records, library patron lists, book sales records, book customer lists, firearm sales records, tax return records, educational records, and medical records containing information that would identify a person.

The new statutory obligation to specifically describe the documents sought and to provide a date on which they must be produced did not required changes to FBI policy and procedures. Rather, it simply codified existing policy and procedure.

The obligation to obtain high-level supervisory approval for sensitive FISA Business Records Requests has resulted in an alteration in practice. Previously, virtually all FISA Business Records Requests were signed by either the FBI General Counsel or the FBI Deputy General Counsel for the National Security Law Branch. As a result of the Patriot IRA, that process has been altered to the limited extent that, in those very limited situations in which sensitive records are sought, the General Counsel obtains the signature of either the FBI Director or Deputy Director.

FISA Duration Changes. The Patriot IRA extended the duration of initiations and renewals of electronic surveillance, physical searches, and pen register/trap-and-trace surveillance for agents of foreign powers who are not U.S. persons. Initiations and renewals for U.S. persons remained the same.

The duration of FISA surveillance and physical search for non-U.S. persons was increased from the standard of 90-day initiations and 90-day renewals. Electronic surveillance and physical search coverage increased to a 120-day initiation and one-year renewal, and the pen register/trap-and-trace increased to a one-year initiation.

While there was little, if any, effect on FBI policies or procedures, both DOJ and the FBI have benefitted from the substantial savings in resources that resulted from the new durations.

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Outside the Scope

140. In April 2005, a Department of Justice Inspector General review of eight FBI field offices, conducted over three days, found that three of these offices failed to review their high-priority FISA interceptions within 24 hours.

a. Please state the FBI's current rule regarding how quickly FISA interceptions must be reviewed.

Response:

FBI policy is that FISA intercepts in the highest priority counterterrorism and counterintelligence cases (those in which the subject potentially presents a direct threat of violent terrorist activity) will be reviewed within 24 hours. Additional information in response to this inquiry is classified and is, therefore, provided separately.

b. Please describe what is entailed by such a review.

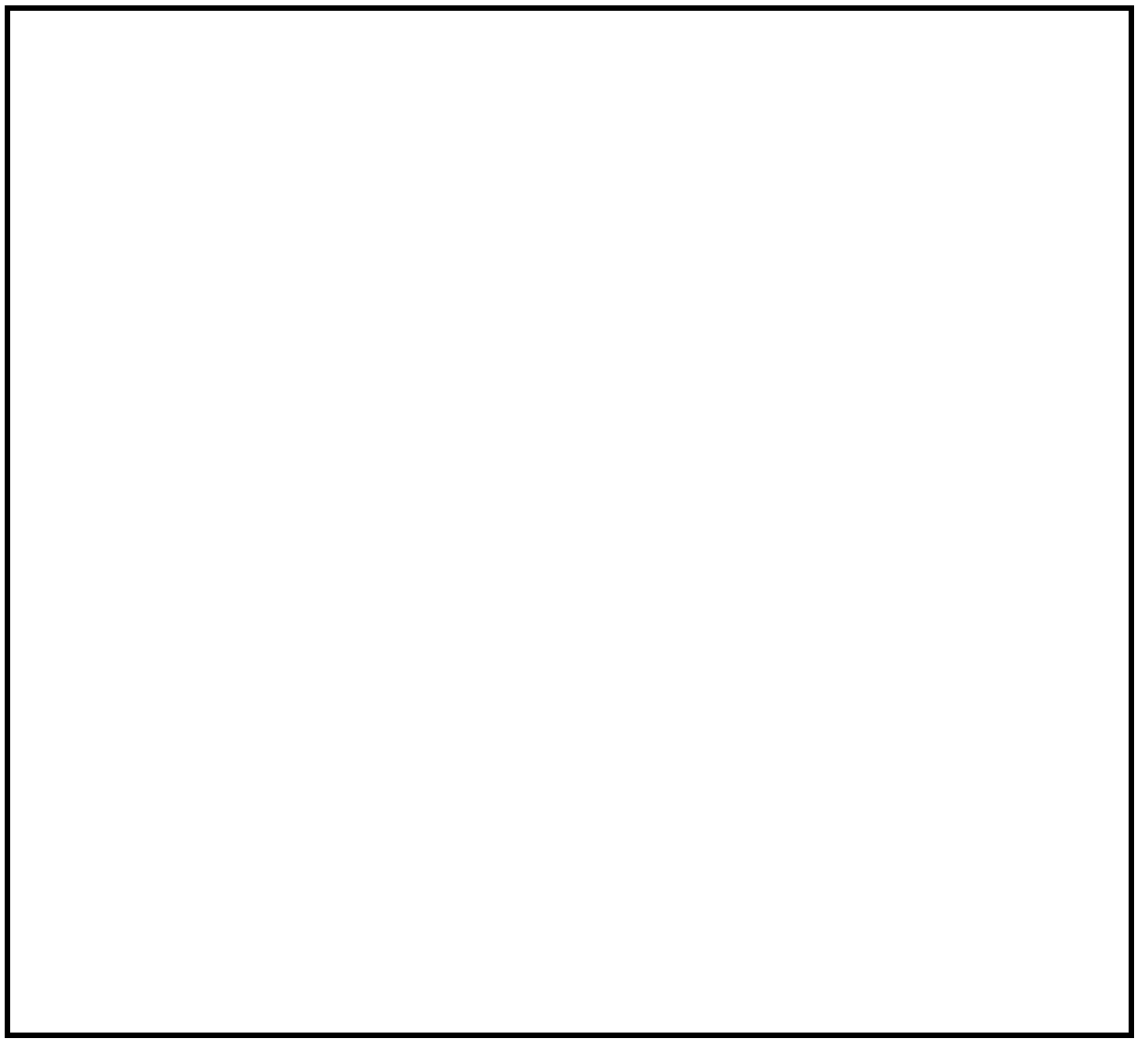
Response:

A review is completed when the linguist or analyst determines whether a session contains a threat to safety and/or security or contains actionable intelligence. If the reviewer determines there is a threat or actionable intelligence contained in the session, this information is immediately reported to parties that can act on the information.

c. Please explain what specific steps, if any, you are taking to clarify the rule on reviewing FISA interceptions and to ensure that field offices are abiding by this rule.

Response:

The FBI disseminated policy in 2004 and in 2006 reiterating the rule that a session is not considered reviewed until the threat information/actionable intelligence or lack thereof has been determined. This policy is reinforced through repeated FISA training. Outside the Scope



These responses are current as of 2/8/07

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