



December 8th, 2010

# The FBI Arbitrarily Covers Up Evidence of Misconduct: Is This the Transparency Obama Promised?

Commentary by Jennifer Lynch

EFF recently received documents in response to one of our Freedom of Information Act (FOIA) requests that demonstrate a disturbing trend: the FBI's arbitrary application of FOIA exemptions to hide, or in some instances, reveal, its unlawful activities.

Through a careful comparison of thousands of pages of documents we received from this FOIA request with the same documents we received from an earlier FOIA request, we found that redactions in many of these duplicated documents were strikingly different. In several cases, the FBI redacted *more* information in *later*-produced documents than it did in earlier-produced documents. In other cases, the FBI redacted differing amounts of information when it produced two copies of the same report in response to the same FOIA request. Sometimes the agency blocked out whole paragraphs, while at other times it blocked out only the key words that explain the details of its acts. What is interesting is that the FBI claimed the same FOIA exemptions in each version; it just applied them differently.

The documents at issue are reports submitted by the FBI to the Intelligence Oversight Board (IOB), a body that is charged with overseeing the intelligence community's compliance with the Constitution and intelligence laws. In all, the documents total almost 2500 pages, and we'll discuss the troubling picture they paint of an agency engaged in excessive illegal intelligence gathering in a later post. But first, below, are side-by-side comparisons of four reports and an overview of the information they reveal (move the slider to see the differences). Following that is our analysis of what this means for the public's access to information about our government.

## The Documents

### 1. FBI IOB Report 2001-69 - NSL for Financial Records

Version 1—Received in 2010

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[redacted] DIVISION  
IOB MATTER 2001-69 (U)

b2  
b7E

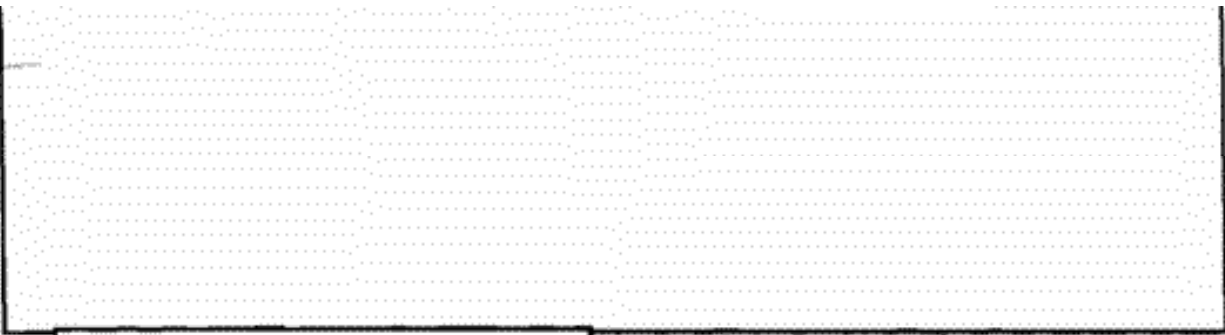
The Federal Bureau of Investigation (FBI) has determined the [redacted] Division [redacted]

(S)

(S)

b1

(S)



b1  
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b6  
b7C  
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b7E

[redacted] as the legal authority to request the information. The letters were signed by the Acting Special Agent in Charge who, at that time, did not have legal authority to issue National Security Letters. This matter has been reported to the FBI's Office of Professional Responsibility for action deemed appropriate. ~~X~~

**Version 2—Also Received in 2010**

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[redacted] DIVISION  
IOB MATTER 2001-69 (U)

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The Federal Bureau of Investigation (FBI) has determined the [redacted] Division obtained financial records pertaining to a suspected terrorist without proper authority. In this regard, in [redacted] in conjunction with an on-going international terrorism investigation of [redacted] [redacted] Division personnel prepared and issued requests for hotel records pertaining to the subject and his companion, [redacted] and financial records pertaining to the subject. The latter request was sent by facsimile within hours of the attacks on the World Trade Center and the Pentagon to [redacted] [redacted] requesting bank and credit card records. Although the letters prepared by [redacted] only "requested" information from the record-holders, those responsible for preparing the correspondence incorrectly styled them as National Security Letters (see 50 U.S.C. § 1851 and 12 U.S.C. § 3414) and recited the certification language [redacted] [redacted] as the legal authority to request the information. The letters were signed by the Acting Special Agent in Charge who, at that time, did not have legal authority to issue National Security Letters. This matter has been reported to the FBI's Office of Professional Responsibility for action deemed appropriate. ~~X~~

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We received two copies of the same report in response to our more recent FOIA request to the FBI. The same exemptions were claimed in both copies of the report but Version 1 is much more heavily redacted than Version 2.

The report discusses the FBI's improper collection of bank and credit card records. In Version 1, all important information about the violation (including that it relates to financial records) was withheld. Version 2 reveals most of the details and shows the extent of the FBI's violation. In this matter, the FBI, as part of an ongoing investigation into international

terrorism, sought hotel and financial records on a subject. Although the agent responsible had no legal authority to obtain the financial records, he or she purposefully styled a request to a financial institution as a National Security Letter (NSL) to hide this fact, essentially lying to obtain the bank and credit card information. There is likely no way the financial institution receiving the NSL would have been able to tell the letter was illegal and thus no one would have been able to challenge this violation of the law. And even if the bank found out the NSL was illegal, the "gag order" accompanying all NSLs at the time would have prevented the bank from talking about it publicly.

## 2. FBI IOB Report 2003-115 — Illegal Use of FISA-Authorized Pen Register

Version 1—Received in 2007/2008

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[REDACTED] DIVISION  
IOB MATTER 2003-115 (U)

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(U)

~~(S)~~ Inquiry has determined that on 07/09/03, a federal grand jury subpoena was issued in connection with a [REDACTED] criminal investigation based upon a telephone number obtained pursuant to a Pen Register and Trap and Trace device authorized by the Foreign Intelligence Surveillance Court (FISC). The federal grand jury subpoena was obtained requesting [REDACTED]

b3 FGJ

[REDACTED] The Foreign Intelligence Surveillance Act of 1978 (FISA) requires that the Attorney General approve any use of FISA-derived information in a criminal proceeding.<sup>1</sup> The Office of Intelligence Policy and Review (OIPR) of the Department of Justice (DOJ) considers the issuing of a federal grand jury subpoena based upon FISA-derived information to be the use of such information in a criminal proceeding. Since [REDACTED] actions constituted a violation of the FISA statute, this report is being made to the Intelligence Oversight Board. ~~(S)~~-(U)

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b7E

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[REDACTED] DIVISION  
IOB MATTER 2003-115 (U)

b2  
b7E

(U) ~~(S)~~ Inquiry has determined that on [REDACTED] a federal

[REDACTED]  
[REDACTED] Pen Register and Trap and Trace device  
[REDACTED]

b2  
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is being made to the Intelligence Oversight Board. ~~(S)~~

We received Version 1 of the report above in response to our FOIA request from 2007. This version details the FBI's use of a telephone number collected under a FISA-authorized pen register/trap and trace surveillance to support a federal grand jury subpoena in a criminal investigation. This is problematic because the law clearly precludes the FBI from using a FISA-derived telephone number in a criminal case without the Attorney General's prior approval. And, it appears from the report that the Bureau did not have the AG's approval before proceeding with the grand jury subpoena.

The FBI sent us Version 2 of the report this fall in response to our 2008 FOIA. In Version 2, the Bureau has blocked out all important identifying details.

### 3. FBI IOB Report 2006-305 — NSL for "All Images Uploaded"

Version 1—Received in 2007/2008

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[redacted] FIELD OFFICE b2  
IOB MATTER 2006-305 (U) b7E

(U) ~~(S)~~ By **electronic communication** dated April 18, 2006, the Federal Bureau of Investigation (FBI) [redacted] Field Office reported that on three separate occasions, during the time period of [redacted] to [redacted] the [redacted] Field Office inappropriately utilized a National Security Letter (NSL). The [redacted] Field Office drafted an NSL **requesting transactional records and all images uploaded.** [redacted]

b2  
b7E

[redacted] However, because the information that is allowed to be obtained pursuant to an NSL is very specific, and **"all images uploaded" is not specifically allowed** pursuant to an NSL, the [redacted] Field Office erroneously utilized the NSL. The information that was obtained beyond the scope of the NSL shall be sequestered. The inappropriate utilization of the NSL was in violation of **V.12.** of The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection.<sup>1</sup> Thus, the matter is being reported to the IOB.

Version 2—Received in 2010

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
[redacted] FIELD OFFICE  
IOB MATTER 2006-305 (U)

b2  
b7E

(S) By [redacted] dated April 18, 2006, the Federal Bureau of Investigation (FBI) [redacted] Field Office reported that on three separate occasions, during the time period of [redacted] the [redacted] Field Office inappropriately utilized a National Security Letter (NSL). The [redacted] Field Office drafted an NSL [redacted]

[redacted] The [redacted] However, because the information that is allowed to be obtained pursuant to an NSL is very specific, and [redacted] pursuant to an NSL, the [redacted] Field Office erroneously utilized the NSL. The information that was obtained beyond the scope of the NSL shall be sequestered. The inappropriate utilization of the NSL was in violation of [redacted] of The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection.<sup>1</sup> Thus, the matter is being reported to the IOB.

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We received Version 1 of the report above in response to our FOIA request from 2007. The FBI sent us Version 2 this fall.

On first glance, the amount of information withheld in Version 2 of this report does not appear as extensive as in the two reports above. Upon closer inspection, however, the FBI has blocked out all details of its illegal activity in Version 2. This IOB report describes the agency's attempts to use an NSL to obtain not only transactional information (a legal use of an NSL) but also all the images a subject uploaded to his ISP. As the IOB report notes, the FBI is not allowed to use an NSL to get this type of content information. (The three types of information available under an NSL are "Subscriber and Toll Billing Records," "Financial Records," and "Consumer Credit Records.") The other piece of information withheld in Version 2 of this report is the specific section of the Attorney General's Guidelines on foreign intelligence collection that was violated. It's unclear why the agency would have felt it necessary to block out this information, as this section of the Guidelines merely describes what information is available pursuant to an NSL (a redacted version of the Guidelines is available here).

#### 4. FBI IOB Report 2007-717 — NSL for Educational Records

##### Version 1—Received in 2007/2008

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER

CHARLOTTE DIVISION

IOB MATTER 2007-717 (U)

(S)

~~(S)~~ The Charlotte Division ("Charlotte") of the Federal Bureau of Investigation ("FBI") reported via electronic communication dated February 21, 2007, that a National Security Letter was served requesting records that were beyond the permissible scope of a National Security Letter. Specifically, the FBI sought to obtain [redacted] from a state university for an individual with ties to the July 2005 London bombings. [redacted] are outside the scope of records that may be obtained with a National Security Letter. The state university recognized this error and refused to produce any records in response to the National Security Letter. Accordingly, no records were obtained as a result of the service of this National Security Letter. The FBI rescinded the National Security Letter, and instead served a Federal Grand Jury subpoena for [redacted]. The state university complied with the Federal Grand Jury subpoena and produced [redacted].

FGJ

(U) ~~(S)~~ The FBI's service of a National Security Letter requesting educational records was in violation of The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, even though no records were obtained in response to the National Security Letter. Thus, the matter is being reported to the IOB.

(U)

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER  
 [REDACTED] DIVISION  
 IOB MATTER 2007-717 (U)

~~(S)~~ The [REDACTED] Division [REDACTED] of the Federal Bureau of Investigation ("FBI") reported via electronic communication dated February 21, 2007, that a National Security Letter was served requesting records that were beyond the permissible scope of a National Security Letter. Specifically, the FBI sought to obtain [REDACTED]

[REDACTED] [REDACTED] are outside the scope of records that may be obtained with a National Security Letter. The [REDACTED] [REDACTED] recognized this error and refused to produce any records in response to the National Security Letter. Accordingly, no records were obtained as a result of the service of this National Security Letter. The FBI rescinded the National Security Letter, and instead served a Federal Grand Jury subpoena for [REDACTED]. The [REDACTED] complied with the Federal Grand Jury subpoena and produced [REDACTED].

~~(S)~~ The FBI's service of a National Security Letter requesting [REDACTED] was in violation of The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, even though no records were obtained in response to the National Security Letter. Thus, the matter is being reported to the IOB.

We received Version 1 of the report above in response to our FOIA request from 2007. This document (which, in its less redacted version, was the subject of an earlier EFF report) details how the FBI tried to use a National Security Letter to obtain educational records on a student at a state university in North Carolina. As we noted in our earlier report, educational records are very clearly not one of the three classes of information available under an NSL. Luckily, the university's legal counsel recognized this and refused to comply with the NSL.

The FBI sent us Version 2 of the report this fall. Like the third report discussed above, the redactions in this version don't appear, at first glance, to be extensive. However, when compared with Version 1, it's clear the FBI has withheld the entire meat of the story.

## Analysis

The Freedom of Information Act requires the government to disclose details of its activities to the public. Although certain exemptions within the Act allow agencies to withhold some information (for example where national security or personal privacy is at issue), the presumption is in favor of disclosure. President Obama reiterated this on his first full day of office by directing:

*The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be*

*embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.*

Many applauded the President at the time for ushering in a new era of transparency in government. However, our review of these documents finds that not only has the FBI failed to comply with this “presumption of openness,” but in fact in some cases, the amount and type of information withheld under the Obama administration is far greater than the amount of information withheld under the supposedly more “closed” Bush administration.

This certainly isn't the first time we've seen evidence that an arm of the Justice Department has withheld more than it is entitled to under FOIA. We found this in the FBI's response of one of our earlier FOIA requests and reported on it [here](#). More recently, the New York Times [reported](#) on the Justice Department's attempts to keep from the public eye evidence of its embarrassing role in the US government's “collaboration with [Nazi] persecutors.”

This trend is problematic because it puts Americans at a distinct disadvantage in obtaining information necessary to be informed about how our government operates. In each of these cases, if we or the Times had not obtained a second version of the document, we likely would not have been able to discover the agency's cover up. The FOIA exemptions claimed by the agency are difficult to challenge in court, and the agency, by virtue of the fact that it has access to all the text, clearly has the upper hand.

In the recent controversy over the latest WikiLeaks release, [many have argued](#) that WikiLeaks' release of unredacted and in some cases classified documents has put the United States at risk. However, the documents WikiLeaks has released have also informed Americans about the actions of our government, both the good and in many cases the bad. These documents tell us what the government is up to, and also fuel an educated public debate about government activities. These are the goals of FOIA, and when the FOIA process works properly (i.e., when agencies do not withhold more information than they are entitled to under the Act and do not drag their feet on releasing records until someone challenges them either through a request or litigation), all Americans benefit. However, when federal agencies arbitrarily withhold information and don't play by the rules, it makes it more likely that entities like WikiLeaks will feel the need to work around a broken system that seems to encourage unnecessary secrecy.

Federal agencies should not be able to hide their missteps behind white blocks. We plan to bring this to the court's attention in our lawsuit challenging the FBI and other agencies' improper withholding of reports submitted to the Intelligence Oversight Board.

Related Issues: [FOIA Litigation for Accountable Government](#), [National Security Letters](#), [Transparency](#)

Related Cases: [FOIA: Intelligence Agencies' Misconduct Reports](#), [FOIA: National Security Letters \(NSLs\)](#)

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<http://www.eff.orghttp://www.eff.org/deeplinks/2010/12/fbi-arbitrarily-covers-evidence-misconduct>]



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