

## **KEY FINDINGS IN THE OIG REPORT**

The following findings by the OIG are fully supported by the evidence and demonstrate a systemic review of management practices within the FBI's Counterterrorism Division:

- “We found that numerous, repeated, and significant management failures led to the FBI’s use of exigent letters and other improper requests for telephone transactional records over an extended period of time.” page 213, lines 12-14
- “[T]he FBI failed to provide adequate training, guidance, and oversight to ensure that FBI personnel used this resource in accordance with applicable statutes, guidelines, regulations, and FBI policies.” page 213, lines 21 -24
- “The first CAU Unit Chief, Glenn Rogers, and most SSAs initially assigned to the CAU had no prior experience in national security investigations. The FBI’s failure to provide adequate guidance on the proper way to obtain telephone records had serious consequences.” page 215-16
- “The FBI compounded its planning failures when it did not ensure that all CAU personnel were trained on the legal requirements for obtaining ECPA-protected records.” page 216, lines 19-21
- “At the most basic level, the FBI failed to instruct CAU personnel that FBI requesters must provide NSLs or other legal process before CAU personnel requested records from the on-site providers relevant to FBI investigations, except in certain specified emergency situations.” page 216, lines 33-36
- “Additionally, the FBI failed to train field and Headquarters requesters on when and how true emergency requests should be handled. The FBI also failed to advise CAU personnel of the statutes or regulations . . .” page 216, lines 37-39
- “The FBI’s failures also involved senior attorneys in FBI OGC. NSLB attorneys failed to recognize the seriousness of the information they learned in late 2004 and early 2005 about the “form letter” – an exigent letter – that was being used in the CAU to obtain records from the on-site providers that was followed by after-the-fact NSLs. From then until March 2007, when the OIG’s first NSL report was issued, FBI OGC failed to take sufficient action to address the FBI’s improper use of these exigent letters and after-the-fact legal process.” page 217, lines 12-19.
- For example, in April 2005 the Assistant General Counsel who was the NSLB point of contact for NSL-related policies and issues,

wrote that exigent letters could be used in emergencies ‘only if it is clear to you that the requestor [sic] cannot await an NSL.’ This guidance did not accurately state the requirements of either the ECPA NSL statute (18 U.S.C. § 2709), or the emergency voluntary disclosure statute (18 U.S.C. § 2702(c) (4).” page 217, lines 22-27

- “A second instance of a flawed legal response occurred in May 2006 when the NSLB again perpetuated the use of exigent letters promising future legal process.” Page 218, lines 1-3
- “We believe that each of these CTD officials [i.e. John Pistole and Willie Hulon, the Executive Assistant Directors of the FBI National Security Branch; CTD Assistant Director Joseph Bily, Jr.; and CTD Deputy Assistant Director John Lewis] was responsible for knowing what their subordinates were doing, ensuring that agents and others under their command complied with applicable law and FBI policy governing the acquisition of telephone transactional records, and ensuring that FBI attorneys had sufficient information about CAU’s practices to provide appropriate legal guidance and advice concerning what the CAU was doing and planning to do.” Page 219-220
- “The failure of FBI officials to understand the practices employed within the CAU to obtain records from the on-site providers extended not only to exigent letters, but also to other improper methods described in Chapter Three of this report.” Page 220, lines 4-7
- “As a result of these actions, the FBI violated the statutory and Attorney General Guidelines’ requirements for senior-level approval of requests for telephone subscriber and toll billing records information and other ECPA-protected information and the 4-step NSL approval process established by the FBI’s own policy to ensure these requests were based on appropriate predication.” Page 220, lines 19-24
- “In sum, we believe that FBI senior leadership, senior attorneys, and CTD supervisors failed to take adequate measures to ensure that the FBI was obtaining telephone records from the on-site communications providers properly, that sufficient training was provided to the FBI employees who obtained these records, that the new NSL powers granted to the FBI in the Patriot Act were sufficiently monitored, and that the FBI provided sufficient oversight on these new and intrusive authorities. The need for these actions should have been particularly clear when FBI attorneys learned in late 2004 and early 2005 that the FBI was acquiring telephone records without legal process.” Page 220, lines 29-38
- “While Rogers served as the CAU’s first Unit Chief and later as CXS Assistant Section Chief, he made several decisions that resulted in

widespread use of exigent letters without adequate legal review by the NSLB, and also without an adequate system to track their use or document the many less formal requests for telephone records from the on-site providers.” Page 221, lines 14-18

- “Second, we found that Rogers failed to properly discharge his duties as CAU Unit Chief and CXS Assistant Section Chief when he signed, and permitted his subordinates to sign, exigent letters that inaccurately stated that subpoenas requesting the telephone records listed in the letters had ‘been submitted to the U.S. Attorney’s Office who will process and serve them formally . . . as expeditiously as possible.” Page 221, lines 32-37
- “Third, Rogers failed to ensure that the personnel assigned to his unit – many of whom had no prior experience in the FBI’s national security programs – received training on the authorized methods to request and obtain telephone subscriber and toll billing records information in national security investigations. None of the CAU SSAs we interviewed who signed exigent letters said that had received training on the FBI’s authorities under ECPA to obtain records pursuant to NSLs or the emergency voluntary disclosure statute.” Page 222, lines 26-33
- “Fourth, Rogers did not ensure that guidance was issued which, at a minimum, described in what situations exigent letters could be used. As a result, we found that CAU personnel used exigent letters and then provided after-the-fact legal process in a wide variety of inappropriate circumstances.” Page 222, lines 34-37
- “Fifth, Rogers failed to ensure that Bassem Youssef, his successor as CAU Unit Chief, was briefed on the unit’s methods and procedures, including the specific methods the CAU used for obtaining records from the on-site providers.” Page 223, lines 5-8
- “In addition, we found that Rogers’s failure to clearly explain to CAU personnel what was appropriate under the law and FBI policy led to other lax and sloppy practices in the CAU . . .” Page 223, lines 24-28
- “Sixth, when Rogers was the CAU Unit Chief and also when he was the CXS Assistant Section Chief, the CAU did not implement any system for tracking requests to the on-site providers, or keeping copies of the exigent letters, or ensuring that legal process was issued promptly after the records were provided to the FBI.” Page 223, lines 31-35
- “However, we found that after Thomas became the NSLB Deputy General Counsel and became aware of the exigent letters, she did not adequately review and assess the legality of their use in a timely fashion, halt their use, ensure in coordination with CTD officials that CAU personnel understood the lawful methods for

obtaining records from the on-site communication service providers, or ensure that the NSLs that she personally signed complied with the ECPA NSL statute.” Page 231, lines 1-7

- “... Thomas failed to directly address the fact that these letters violated the ECPA.” Page 231, lines 22-23
- “... Thomas did not take prompt, decisive action in December 2004 when she learned that (1) the CAU was regularly obtaining records from the on-site providers by using a form letter that promised future legal process, and (2) the CAU was having difficulty obtaining after-the-fact legal process from Headquarters’ operating units and FBI field divisions regarding the records it already had received from the on-site providers.” Page 231, lines 25-31
- “In particular, Thomas did not ask to review the exigent letter; did not direct the Assistant General Counsel or anyone else to review the exigent letter; did not ensure that CAU personnel were trained on the lawful methods for obtaining telephone records; did not review the FBI’s contracts with the three on-site communications service providers (or the underlying contract proposals and other documents) until after the FBI received a draft of the OIG’s first NSL report; and did not determine if the CAU had issued any guidance to its employees about the appropriate and legal way for FBI personnel to request records from the on-site providers.” Page 231, lines 32-40
- “At critical junctures throughout 2005 and 2006, when Thomas learned more about the CAU’s various practices for obtaining records from the on-site providers, she did not take timely, decisive, and effective actions to ensure that the CAU obtained records from the on-site [233] providers only in accordance with the ECPA and ensure that the use of exigent letters and after-the-fact NSLs was halted.” Page 232 (line 38) to 233 (line 2).
- “... Thomas did not correct inaccurate guidance that the Assistant General Counsel had given to the CAU: that they could continue to use exigent letters ‘only if it is clear to you that the requestor [sic] cannot await an NSL.’ As described in Chapters Four and Six of this report, this advice was inaccurate because even if the exigent letter was construed as seeking voluntary production pursuant to Section 2702, the advice would allow use of the letter in circumstances that did not meet Section 2702’s definition of emergency circumstances.” Page 233, lines 6-13
- “In June 2006, when Thomas received an e-mail informing her that the Assistant General Counsel had sent a new version of a model exigent letter to the CAU in May 2006, Thomas again allowed the practice of using exigent letters to continue. The new version of the exigent letter promised that NSLs (rather than grand jury subpoenas) would be issued in the future. While the revised model

exigent letter corrected an inaccurate statement in the exigent letter about grand jury subpoenas, the revised letter still did not ensure compliance with the ECPA's requirements that either (1) the FBI issue legal process in advance of obtaining records; or (2) the provider produce records voluntarily in circumstances satisfying Section 2702's emergency voluntary disclosure provision. Consequently, the revised exigent letter did not resolve the fundamental legal problem with the letters under the ECPA.” Page 234, lines 5-17

- “In addition, we found that Thomas herself signed seven after-the-fact NSLs in 2005. The ECPA does not authorize the issuance of retroactive legal process, and such process would not validate an improper disclosure of records under the ECPA.” Page 234, lines 18 – 21
- “... we believe Thomas inappropriately approved the use of the exigent letters practice and after-the-fact NSLs, did not promptly review an exigent letter or direct another attorney to review one, did not review the providers' contracts and 234 associated documents, repeatedly missed opportunities to halt the use of exigent letters, did not work with CTD managers to ensure CAU personnel were properly instructed on the FBI's authorities to obtain telephone records from the on-site providers, and signed improper after-the-fact NSLs.” Page 234 (line 35) - 235 (line 4)
- “... the Assistant General Counsel . . . provided inaccurate guidance to Youssef that 'we are willing to allow these requests when there really are exigent circumstances . . . only if it is clear . . . that the requestor cannot await an NSL.’” Page 235, lines 32-36
- “Even after reviewing an exigent letter, she did not recognize that the CAU was obtaining records in violation of the ECPA. Instead of recommending that their use be halted, in May 2006 she merely revised the exigent letter to substitute the term "NSL" for the inaccurate reference to after-the-fact issuance of grand jury subpoenas, and she advised the CAU that it could continue to use the revised exigent letter. By these actions, she allowed the FBI's improper use of exigent letters and after-the-fact NSLs to continue.” Page 236, lines 15-22
- “In sum, we concluded that based on the Assistant General Counsel's experience in national security investigations and the position she held in the NSLB, she should have directly confronted the legal deficiencies in use of exigent letters and, through her supervisors in the NSLB and in conjunction with CTD managers, ensured that the use of exigent letters ended, which she did not do.” Page 236, lines 33-38

- “[I]n signing these four NSLs, Billy failed to take appropriate steps to ensure that NSLs he signed complied with the ECPA, the Attorney General's NSI Guidelines, and FBI policy. When Billy signed these NSLs he had nearly 20 years of experience with FBI national security investigations, and he knew the legal and policy requirements for using this intelligence tool. Yet, he signed these NSLs either without the required certifications or without ensuring that the requests were adequately predicated under the ECPA by examining the approval ECs. Page 240, lines 9-16
- “[B]y signing these NSLs Cummings failed to take appropriate steps to ensure that the NSLs complied with the ECPA, the Attorney General's NSI Guidelines, and FBI policy. When Cummings signed these NSLs, he had about 14 years experience in conducting FBI national security investigations, yet he failed to ensure that the requests were adequately predicated under the ECPA by examining the approval ECs.” Page 241, lines 16-21
- “[B]y signing this NSL Heimbach failed to take appropriate steps to ensure that he complied with the ECPA, the Attorney General's NSI Guidelines, and FBI policy. When Heimbach signed this NSL, he had over 3 years experience in conducting FBI national security investigations, yet he failed to ensure that the requests were adequately predicated under the ECPA by examining the approval EC. Page 242, lines 16-21
- “[W]e believe serious, repeated management failures by the FBI's senior leadership, the CTD, and the FBI OGC caused the breakdown in responsibility and accountability for exigent letters, other improper requests, and the attempts at corrective action—such as blanket NSLs.
- However, we also believe that the CTD senior 243 individuals who signed these blanket NSLs contributed to misuses of these authorities.” Page 243-44
- “As described in Chapter Three of this report, FBI personnel were involved with requests to \_\_\_ reporters' toll billing records in three different media leak investigations without first obtaining the required Attorney General approval. We believe that these matters involved some of the most serious abuses of the FBI's authority to obtain telephone records.” Page 249, lines 9-14
- “As described in Chapter Five of this report, we recommend that the FBI consider appropriate action for the FBI employees who sought to obtain these records without first obtaining the required Attorney General approval.” Page 285, lines 6-9