

Amid Concerns, FBI Lapses Went On

Records Collection Brought Internal Questions But Little Scrutiny

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Sunday, March 18, 2007; A01

FBI counterterrorism officials continued to use flawed procedures to obtain thousands of U.S. telephone records during a two-year period when bureau lawyers and managers were expressing escalating concerns about the practice, according to senior FBI and Justice Department officials and documents.

FBI lawyers raised the concerns beginning in late October 2004 but did not closely scrutinize the practice until last year, FBI officials acknowledged. They also did not understand the scope of the problem until the Justice Department launched an investigation, FBI officials said.

Under pressure to provide a stronger legal footing, counterterrorism agents last year wrote new letters to phone companies demanding the information the bureau already possessed. At least one senior FBI headquarters official -- whom the bureau declined to name -- signed these "national security letters" without including the required proof that the letters were linked to FBI counterterrorism or espionage investigations, an FBI official said.

The flawed procedures involved the use of emergency demands for records, called "exigent circumstance" letters, which contained false or undocumented claims. They also included national security letters that were issued without FBI rules being followed. Both types of request were served on three phone companies.

Referring to the exigent circumstance letters, [Sen. Charles E. Grassley](#) (R-Iowa) wrote in a letter Friday to Justice Department Inspector General Glenn A. Fine: "It is . . . difficult to imagine why there should not have been swift and severe consequences for anyone who knowingly signed . . . a letter containing false statements. Anyone at the FBI who knew about that kind of wrongdoing had an obligation to put a stop to it and report it immediately."

A March 9 report by Fine bluntly stated that the FBI's use of the exigency letters "circumvented" the law that governs the FBI's access to personal information about U.S. residents.

The exigency letters, created by the FBI's New York office after the Sept. 11, 2001, attacks, told telephone providers that the FBI needed information immediately and would follow up with subpoenas later. There is no basis in the law to compel phone companies to turn over information using such letters, Fine found, and in many cases, agents never followed up with the promised subpoenas, he said.

But Fine's report made no mention of the FBI's subsequent efforts to legitimize those actions with improperly prepared national security letters last year.

Fine's report brought a deluge of criticism on the FBI, prompting a news conference at which Director Robert S. Mueller III took responsibility for the lapses. Some lawmakers immediately proposed curtailing the government's expansive anti-terrorism powers under the USA Patriot Act.

In a letter to Fine that was released along with the March 9 report, Mueller acknowledged that the bureau's agents had used unacceptable shortcuts, violated internal policies and made mistakes in their use of exigent circumstance letters.

Mueller also said he had banned the future use of such letters this month, although he defended their value and denied that the agency had intentionally violated the law.

Other FBI officials acknowledged widespread problems but said they involved procedural and documentation failures, not intentional misgathering of Americans' phone records. Mueller ordered a nationwide audit, which began Friday, to determine if the inappropriate use of exigency letters went beyond one headquarters unit.

"We wish, in retrospect, that we had learned about this sooner, corrections had been made and the process was more transparent," FBI Assistant Director John Miller said yesterday.

Fine's report said the bureau's counterterrorism office used the exigency letters at least 739 times between 2003 and 2005 to obtain records related to 3,000 separate phone numbers. FBI officials acknowledged that the process was so flawed that they may have to destroy some phone records to keep them from being used in the future, if the bureau does not find proof they were gathered in connection with an authorized investigation.

Disciplinary action may be taken when the bureau completes an internal audit, a senior FBI official said in an interview at headquarters Friday.

Ann Beeson, an attorney for the ACLU who has sued the FBI in an effort to block some of its data requests, said that if the bureau cannot prove a link between the letters and an ongoing investigation, its requests were "a total fishing expedition."

The FBI agreed that one senior official, who spoke on the condition of anonymity because of forthcoming House and Senate hearings on the matter, would speak for the agency.

Lawmakers have begun to probe who knew about the use of the letters and why the department did not act more swiftly to halt the practice. Grassley asked that Fine turn over to the Senate Judiciary Committee copies of all FBI e-mails related to the letters of demand, as well as transcripts of the interviews Fine conducted on the issue.

The committee has scheduled a hearing for Wednesday, with Mueller as the chief witness. On Tuesday, the House Judiciary Committee intends to question Fine and FBI general counsel Valerie Caproni.

FBI and Justice Department officials said most of the letters at issue were drafted by the Communications Analysis Unit (CAU), which comprises about a dozen people assigned to analyze telephone records and other communications for counterterrorism investigators. They sent the secret requests to three companies -- AT&T, Verizon and a third firm whose identity could not be learned. Since the 2001 terrorist attacks, the FBI has been paying the companies' cost of supplying such records almost instantaneously in a form that its agents can readily examine, according to the report and the senior FBI official.

In each letter, the FBI asserted that "due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided." The bureau promised in most of the letters that subpoenas for the same information "have been submitted to the U.S. Attorney's office who will process and serve them formally."

But the inspector general's probe concluded that many of the letters were "not sent in exigent circumstances" and that "there sometimes were no open or pending national security investigations tied to the request," contrary to what U.S. law requires. No subpoenas had actually been requested before the letters were sent. The phone companies nonetheless promptly turned over the information, in anticipation of getting a more legally viable document later, FBI officials said.

The use of such letters was virtually "uncontrolled," said an FBI official who was briefed on the issue in early 2005. By that fall, CAU agents had begun creating spreadsheets to track phone records they had collected for a year or more that were not covered by the appropriate documents, according to FBI e-mails and interviews with officials.

A spokesman for AT&T declined to discuss the topic, referring questions to the FBI. Verizon spokesman Peter Thonis, who would not confirm nor deny the existence of an FBI contract with his firm, said that "every day Verizon subpoena units respond to emergency requests from federal, state and local law enforcement for particular calling records. After 9/11, of course, Verizon responded to FBI emergency requests in terrorist matters, and we had every reason to believe they were legitimate emergency situations."

The inspector general's report said that the wording of the exigency letters was copied from a standard letter that the FBI's New York office used to obtain urgently needed records after the 2001 terrorist bombings. When officials from that office were later reassigned to create the CAU in Washington, the senior FBI official said, "they brought their business practices with them" and continued to use the same letter "for reasons that I cannot explain."

But the unit was not authorized under FBI rules to make such requests, and from the outset in 2003 it asked FBI field offices to submit the promised legal follow-up documents. The offices rarely did so speedily, and in many cases ignored the request altogether.

"In practice, if you have already got the records, the incentive to do the paperwork is reduced," the senior FBI official said.

When a lawyer in the FBI's national security law branch, Patrice Kopistansky, noted in late 2004 that the proper legal justifications were frequently missing or extremely late, she did not advise agents to "change their process," the senior official said. "Our advice was instead to . . . use these letters only in true emergencies" and institute "covering practices."

These included ensuring that the bureau's agents had opened a related investigation and promptly sent a formal national security letter to provide legal backing for the demand.

Bassem Youssef, who currently heads the CAU, raised concerns about the tardy legal justifications shortly after he was assigned to the job in early 2005, according to his lawyer, Steve Kohn.

"He discovered they were not in compliance, and then he reported that to his chain of command. They defended the procedures and took no action," Kohn said, adding that "their initial response was to deny the scope of the problem."

Youssef has battled the FBI in court over whether he was denied a promotion because of discrimination based on his ethnicity.

Eventually, the general counsel's office organized a meeting at headquarters on Sept. 26, 2005, where the bureau considered a work-around: Its lawyers proposed creating special, catch-all investigative files that could be used to authorize quick phone-records seizures that did not involve open field investigations.

But one official at the meeting, Youssef, argued that genuine emergency requests for the records "were few and far between," according to an e-mail summarizing the meeting that was reviewed by The Washington Post, and the idea was never implemented. The account referred to efforts by one of the bureau's top lawyers to brief "higher ups" in the agency about the problem.

"At some point, they told us there were not that many such letters" still in use, the senior official said. "We believed the problem had resolved itself . . . in retrospect, it never got resolved."

One reason that FBI officials did not act more quickly is that Kopistansky and others in the general counsel's office did not review until May 2006 copies of any of the exigent circumstances letters sent to the phone companies from 2003 to 2005. As a result, they were unaware that some of the letters contained false statements about forthcoming subpoenas and urgent deadlines, the senior official said.

Bureau officials ultimately decided to "clean up" the problem by writing seven national security letters designed to provide legal backing for all the telephone records requests that still needed it, the senior FBI official said. In every case, these requests in 2006 covered records already in the FBI's possession and lacked the required cover memos spelling out the investigative requirements for the requests.

At no time did senior FBI officials outside the communications unit attempt to tally how often the exigent circumstances letters had been used, with the result that Mueller and others in senior management did not learn about the scope of the problem until two months ago, when Fine informed them, the senior official said.