

August 11, 2008

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Director Mueller:

We were disappointed to learn that, in 2004, the Federal Bureau of Investigation (FBI) misused so-called “exigent letters” to obtain the telephone records of reporters working in the Jakarta, Indonesia, bureaus of *The Washington Post* and *The New York Times*. While we commend you for personally apologizing to the newspapers on behalf of the FBI, and for personally bringing this matter to the Committee’s attention, we expect to receive a more complete accounting of this violation of the Justice Department’s guidelines intended to protect privacy and journalists’ First Amendment rights.

The FBI’s misuse of “exigent letters” first came to light in March 2007, as part of a congressionally-mandated Inspector General (IG) audit of National Security Letters (NSLs). In addition to uncovering problems with NSLs, the IG found that the FBI had misused “exigent letters” to obtain records from telephone companies. The letters claimed that the records were being requested due to “exigent circumstances” and that subpoenas or NSLs would follow. According to the IG, however, “the FBI used the exigent letters in non-emergency circumstances, failed to ensure that there were duly authorized investigations to which the requests could be tied, and failed to ensure that NSLs were issued promptly after the fact.”

We recognize that, after the March 2007 report, you ended the FBI’s practice of using “exigent letters.” We also appreciate that, according to an IG audit earlier this year, the “FBI and the Department have made

significant progress” in implementing corrective actions. Nevertheless, the new revelations about the improper collection of reporters’ phone records -- combined with the general reports on the misuse of NSLs and exigent letters -- create a troubling impression of deliberate wrongdoing or serious negligence at the FBI. Together, these revelations underscore the importance of vigorous congressional oversight and suggest that additional legislation may be needed.

If nothing else, these new findings suggest a pressing need for the legislation we have cosponsored with a bipartisan group of Senators to create a qualified privilege for reporters, the “*Free Flow of Information Act of 2008*.” Our bill includes a provision designed to limit the government’s ability to collect the telephone records of reporters. In most cases, this provision would require a court to balance the government’s need for the information against the public’s interest in newsgathering and the free flow of information. Moreover, with rare exceptions, a federal court may compel the disclosure of such records from a phone company only after the reporter is given notice and an opportunity to be heard. This judicial review requirement would preclude a unilateral determination of exigent circumstances or investigative need by the FBI or any executive branch agency.

In future congressional hearings, we plan to ask you about the misuse of exigent letters and the possible need for additional legislation. We also look forward to the IG’s follow-up report on this topic. Before then, however, we request that the FBI fully brief Committee staff on the incidents involving reporters for *The New York Times* and *The Washington Post*, so that we can have a more substantive and constructive discussion of the matter in the very near future.

Sincerely,

PATRICK LEAHY
SPECTER
Chairman
August 11, 2008

ARLEN

Ranking Member

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Director
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