with persons suspected of leaking classified information to the reporters.

The exigent letter did not specify the 7-month interval noted in the case agent's November 5 e-mail, or contain any date restrictions. The exigent letter also stated that the request was made "due to exigent circumstances" and that "subpoenas requesting this information have been submitted to the U.S. Attorney's office who will process and serve them formally on [Company A] as expeditiously as possible." However, this statement was not accurate. A subpoena request had not been sent to the U.S. Attorney's Office at the time the exigent letter was served, or at any time thereafter.

The CAU SSA told us he could not recall why he sent this exigent letter and acknowledged that the case agent had not asked him to do so. He also acknowledged that he knew at the time he signed the letter, based on information previously given to him, that the request included reporters' numbers. He stated that he "had never even read the content of these [exigent] letters," but was "just using the standard forms . . . ." The CAU SSA told us that he used exigent letters based on the guidance he had received from a Company A analyst who told him "explicitly that this was the approved process between the attorneys for [Company A], as well as, you know, . . . the attorneys for the Bureau." He said that when he was assigned to the CAU, his prior experience had been working on Columbian drug trafficking and money laundering and Asian organized crime under the FBI's criminal programs, and he was not aware of any special policies or approval levels needed to obtain reporters' toll billing records.

The CAU SSA also said he did not recall the case agent making any representations about exigent circumstances underlying his inquiry about the availability of the toll billing records. The CAU SSA told us that he could imagine circumstances in which the leak of classified information could present exigent circumstances.[116] He also told us that the case agent's squad supervisor, who was on the initiating e-mail to the CAU for this request, would have known from CAU briefings she attended at the [redacted] Field Office that the CAU would be obtaining telephone records before legal process in a request of this type. However, the case agent told us that he did not tell the CAU SSA who signed the exigent letter that there were any exigent circumstances associated with his inquiry. Similarly, the squad supervisor told us that no one had told her of any exigent circumstances being presented to the CAU SSA in connection with this request.

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[116] The SSA stated that he considered the leak of "national defense information" to be the type of circumstance for which an exigent letter would be appropriate.

The CAU Intelligence Analyst who had sent the case agent a sample NSL for toll billing records said he did not recall any conversations with the CAU SSA about the exigent letter, but he speculated that he probably discussed it with the CAU SSA. The Intelligence Analyst also told us that he was not aware in December [redacted] about any special approval requirements for obtaining reporters' toll billing records and that the case agent's e-mail reference to obtaining DOJ approval "went over my head." The Intelligence Analyst said that, in hindsight, he thought he and others in the CAU would have proceeded differently had they noticed the case agent's reference to getting DOJ approval. He said he did not recall any discussions at the time about special requirements for obtaining DOJ approval, although he said that he understood that the case agent was working with the AUSA and a subpoena was "in the works."

On December 20, [redacted], the case agent, not aware that an exigent letter had been issued by the CAU SSA and following up on his earlier question whether Company A had the capacity to retrieve the records, sent an e-mail to the CAU Intelligence Analyst asking if there was "any word on whether calling activity for the below listed numbers is retrievable? I will advise you as soon as I get the GJ subpoena from the AUSA on the case." The "below-listed numbers" was a reference to the 12 numbers contained in the agent's November 5, [redacted], e-mail request to the analyst, which was included in the December 20 e-mail chain.

b. FBI Obtains Reporters' Toll Billing Records

On approximately December 22, [redacted], the on-site Company A analyst provided to the CAU the toll billing records requested in the December 17 exigent letter. The analyst provided records for seven of the eight telephone numbers associated with reporters or their news organizations' bureaus in [redacted][117]

We determined that the Company A analyst gave the FBI 22 months of records for Washington Post reporter [redacted] telephone number, of which only 38 days fell within the 7-month period of interest initially identified by the case agent as relevant to the leak investigation. In addition, 22 months of records were provided to the FBI for the telephone number assigned to the Washington Post's [redacted] bureau, of which only 20 days fell within the

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[117] The Company A analyst advised the CAU that Company A had no toll billing records for the eighth of the reporters' telephone numbers identified in the e-mail, which the FBI believed to be used by [redacted] Company A also produced records for two other telephone numbers specified in the e-mail that were not associated with reporters.

7-month period of interest. For the remaining five numbers, none of the retrieved records provided to the FBI fell within the 7-month period of interest.

In total, Company A provided the FBI with toll billing records for 1,627 telephone calls. Of this total, only three calls (.2 percent) fell within the 7-month period of interest identified by the case agent as relevant to the investigation (two calls in [redacted] records and one call in records of the Washington Post's bureau in [redacted]

We determined that CAU personnel uploaded all of the reporters' and news organizations' records for the 1,627 telephone calls provided by Company A into a [redacted] database on December 22, [redacted], where they were available for searching by authorized FBI and other [redacted] personnel.[118]

We also determined that on January 5, [redacted], the CAU Intelligence Analyst replied to the case agent's December 20, [redacted], e-mail asking whether the toll billing records of interest were retrievable. In his January 5 response, the Intelligence Analyst forwarded to the case agent two CAU "trace reports for the calling activities associated with your [redacted] target numbers."[119] One of the files attached to the e-mail was titled, "CAU3983FBItollsonly.xls." The analyst also stated in the e-mail, "We didn't have any [Company A] data" for three of the target numbers. The January 5 e-mail also stated that the analyst would send the "raw data" to the agent when he received the grand jury subpoena.

We found that both trace reports attached to the CAU analyst's January 5 e-mail contained all of the telephone data acquired by Company A concerning seven telephone numbers the case agent had identified as belonging to reporters or media organizations in his original e-mail request of November 5,

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[118] Our investigation found that prior to June 2008 the only FBI personnel who queried these records in the [redacted] database were the CAU Intelligence Analyst and two FBI employees who were assigned to the FBI OGC's review team that in 2007 was charged, in response to the OIG's first NSL report, with analyzing the FBI's basis for acquiring records through exigent letters and blanket NSLs. As discussed below, the prosecutor, CTD management, and the FBI OGC were not aware that the FBI had acquired reporters' records until the OIG informed the FBI General Counsel in June 2008. The administrator of the [redacted] database also told us that there is no evidence that non-FBI personnel who have access to the [redacted] database queried these records.

[119] "Trace reports" contain the results of CAU Intelligence Analysts' research on telephone data.

[redacted], and three other numbers.[120] The second trace report contained all of the telephone data acquired on the 10 telephone numbers, as well as available information in the [redacted] database related to 11 of the 12 telephone numbers listed in the case agent's November 5, [redacted], e-mail.

We also found that no grand jury subpoena was issued for these reporters' records, either before or after the records were produced. In addition, no Department personnel sought Attorney General approval for subpoenaing these reporters' records, as required by federal regulations and Department policy.

c. AUSA and FBI Field Division Personnel Knowledge that Reporters' Records Were Obtained

When we interviewed the case agent, his squad supervisor, and the [redacted] Field Office Assistant Special Agent in Charge who supervised the squad conducting the leak investigation, they told us that they were unaware that CAU personnel had asked Company A to provide the reporters' and news bureaus' telephone records or that anyone had sent an exigent letter to Company A for these records.

We asked the case agent about the January 5 e-mail from the CAU Intelligence Analyst to him forwarding the toll billing records from Company A and the trace reports on the records. He said that he had not opened the attachments to this e-mail and had not recognized from the e-mail that the attachments might have included toll billing records.[121] He told us that he "did not know exactly what trace reports meant," and that he interpreted another portion of the e-mail as meaning that the analyst had run the numbers against previously established databases.

The case agent also told us that he did not open the attachments, because he "just wanted to make sure that we did not proceed until we had sent the subpoena," adding, "there is no exigency so I was just content to wait and see what my deliberations with [the AUSA] would yield." The agent said that if he had "perceived it at the time as violating DOJ regulations or the law, [he] would have notified appropriate parties."

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[120] Nine of these 10 numbers also appeared on the December 17, [redacted], exigent letter to Company A.

[121] The Intelligence Analyst said that the only difference between what he sent with his January 5 e-mail and the raw data he received from Company A was the formatting of the data.

The case agent also told us that he never told the CAU SSA or anyone in his management chain that exigent circumstances existed regarding the need to obtain the telephone records listed in his November 5 e-mail. He also said that he had no idea where the CAU SSA obtained the language in the exigent letter stating that requests for subpoenas had already been submitted to the U.S. Attorney's Office. He further stated that the only representations he made to the CAU regarding a subpoena were contained in his e-mails, which stated that a subpoena was contemplated and would be provided in the future.

The AUSA who directed the leak investigation told us that he did not know anything about the FBI having obtained any reporters' records in the investigation until the OIG identified this issue and interviewed him in 2008. The AUSA also said he did not recall if the case agent had ever sent the reporters' telephone numbers to the CAU to determine if their records were available. The AUSA said he did not know that the CAU SSA had sent an exigent letter to Company A seeking the reporters' and news organizations' toll billing records, that Company A had provided responsive records, that a CAU Intelligence Analyst had sent the records and his analysis to the case agent in an e-mail, or that the reporters' records had been uploaded into a [redacted] database.

The final e-mail we found relating to the reporters' telephone records was sent by the case agent to the CAU Intelligence Analyst on March 24, [redacted]. The subject line of the e-mail stated, "Important question." The e-mail referenced the CAU Intelligence Analyst's January 5, [redacted], e-mail and stated:

> I am working closely with the United States Attorney's Office . . . and we are contemplating getting a grand jury subpoena for certain telephone toll records ([redacted] telephone numbers) that will require special approval from the Department of Justice before issuance. Before we undertake getting the approval for the subpoena, **the AUSA wants to know with certainty whether telephone toll records for [redacted] telephone calls can be obtained.** [redacted]
> This is a key question for us going forward. [Emphasis in original.]

The Intelligence Analyst replied by e-mail on the same day, stating, "Back in January I sent you two products which reflected [Company A] toll records on

several of the [redacted] numbers you had targeted, so we can get the data if the calls were carried on [Company A] lines." The e-mail also stated that one of the two reports "was only the [Company A] tolls."[122] The Intelligence Analyst added, "So, basically, you already have the records that we have."

When we asked the case agent about this e-mail, he told us he did not recall what his reaction to the e-mail was at the time. When we asked him at the time of his OIG interview whether, looking at the e-mail, he understood that the e-mail stated that the analyst had previously sent the agent two products that reflected Company A toll records, as distinguished from value-added analysis of existing databases, the agent acknowledged, "that is what this e-mail says, yeah."

d. FBI Conducts [redacted]

In [redacted] after the CAU Intelligence Analyst had provided the reporters' telephone records and accompanying trace reports to the case agent – the FBI sent the case agent [redacted] The FBI squad supervisor who supervised the leak investigation told us that the agents [redacted] – the leak investigation [redacted]

The squad supervisor told us that she instructed the case agent to [redacted] information that would assist

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[122] The e-mail stated that "one of the reports was only [Company A] tolls, which you could use in court, and the other one was an intelligence product with [sic] encompassed everything in [an [redacted] database].

the FBI in identifying the leaker or leakers and [redacted]

The squad supervisor told us that the plan for conducting [redacted] was discussed with her Division's chain of command and probably with a Unit Chief in the FBI's Counterintelligence Division at FBI Headquarters. An e-mail from the Unit Chief to the case agent and the squad supervisor on [redacted], noted that the [redacted]

We determined that on [redacted] the case agent and [redacted] According to the [redacted] Field Office squad supervisor and documentation of [redacted] article was a classified U.S. government intelligence document [redacted]

On [redacted] the case agent and [redacted]

The case agent's e-mail summarizing "key points" of [redacted] stated that he believed the [redacted] was successful, noting that the [redacted] The e-mail also stated that the [redacted] article was U.S. government classified information.

The squad supervisor told us that even though [redacted] classified U.S. government information.

[redacted], this media leak case was transferred from the original case agent to another FBI Special Agent in the [redacted] Field Office.[123] According to the U.S. Attorney's Office in [redacted], the leak investigation is still open.

3. FBI Notifies the Reporters That Their Records Were Obtained

In April 2008, during our investigation of the use of exigent letters, we discovered the e-mail exchanges described above concerning the reporters' toll billing records. The following month we determined that the FBI had acquired the reporters' and news bureaus' toll billing records without any legal process or Attorney General approval.

In June 2008, the OIG informed the FBI General Counsel and the Acting Assistant Attorney General in charge of the Department's National Security Division (NSD) that we had determined that the FBI had requested and obtained the toll billing records of members of the news media in this leak investigation without legal process or the required Attorney General approval. As discussed above, federal regulations also require that the FBI notify reporters if their toll billing records are subpoenaed without providing required advance notice.[124]

In response to our notifications of these violations, on August 8, 2008, FBI General Counsel Valerie Caproni wrote letters to the editors of the Washington Post and The New York Times, and to the reporters whose records were acquired, stating that the FBI, as part of an authorized FBI investigation, had obtained the telephone records of reporters and of their bureaus in [redacted].[125] The letters stated that the OIG had informed the FBI in the course of its investigation that the FBI had acquired the telephone records in response to an exigent letter. Additionally, the letter stated that, based on currently available information, the FBI had made no investigative use of the reporters' telephone records. The letter noted that while the exigent letter stated that

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[123] The case agent was later assigned to a second leak investigation described below.

[124] See 28 C.F.R. § 50.10(g)(3).

[125] See Valerie Caproni, General Counsel, Federal Bureau of Investigation, letters to [redacted] Leonard Downie, Executive Editor, Washington Post, and [redacted] Bill Keller, Executive Editor, The New York Times, August 8, 2008.

Because our investigation of this issue was on-going, the OIG asked the FBI to briefly defer notification to the reporters and news organizations, from June until August 2008, until all significant OIG interviews related to this matter had been completed.

subpoenas had been requested for the records and would be forthcoming, no subpoena was ever issued for the reporters' telephone toll billing records. The letters also stated (and the FBI confirmed to us) that the FBI has purged these records from FBI databases.[126]

However, the FBI did not disclose to the reporters or their editors that [redacted]

4. OIG Analysis

As discussed above, federal regulation and Department policy requires a balancing of First Amendment interests and the interests of law enforcement before issuance of subpoenas for the production of reporters' telephone toll billing records. The regulation also requires the Department to take reasonable alternative steps to obtain the records, and if those efforts fail, to request Attorney General approval before issuing any such subpoena.[127]

We determined that the FBI did not comply with these legal requirements. As detailed above, without any request from the FBI case agent or anyone in his chain of command and without the knowledge of any prosecutor, a CAU SSA issued an exigent letter to an on-site Company A analyst for the telephone toll billing records of Washington Post and New York Times reporters and their bureaus in [redacted] Company A provided the records to the FBI, and the FBI uploaded the records into a [redacted] database without complying with these requirements. The records remained in that database for over 3 years, unbeknownst to the prosecutor, CTD management, and FBI OGC attorneys, until OIG investigators determined that the records had been acquired and notified the FBI General Counsel. The FBI subsequently purged the records from the [redacted] databases and notified the reporters and their news organizations that their records had been acquired without following required procedures.

We believe that the actions of the FBI personnel involved in this matter were negligent in various respects. Moreover, the manner in which the

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[126] In addition to the letter, Director Mueller called the editors of the two newspapers to express regret that the FBI agents had not followed proper procedures when they sought the reporters' telephone records. [redacted]

[127] See 28 C.F.R. § 50.10 (2004).

reporters' telephone toll records were acquired by the FBI illustrated the absence of internal controls in the CAU for requesting records from the on-site communications service providers, the lack of training and guidelines at the CAU as to what constituted an emergency request, and the use of exigent letters that contained inaccurate statements.

First, we found that for the purpose of obtaining reporters records, the CAU SSA issued a factually inaccurate exigent letter without the knowledge or approval of the case agent or the AUSA. This was a complete breakdown in the required Department procedures for approving the issuance of grand jury subpoenas for reporters' toll billing records. Apparently on his own initiative, the CAU SSA requested these records even though he was not asked to obtain them – he was only asked to find out if [redacted] calls [redacted] were captured by the on-site communications providers' systems.

Second, we were troubled by the two inaccurate statements in the exigent letter, which stated that there were exigent circumstances and that a request for a grand jury subpoena had been submitted to the U.S. Attorney's Office. Notwithstanding these assertions of fact, the CAU SSA told us he did not recall the case agent making any representations about any exigent circumstances underlying his inquiry about the availability of records, and the case agent said he made no such representations. The CAU SSA speculated that he could imagine circumstances in which the leak of classified information could present exigent circumstances. Such speculation cannot justify requesting telephone records protected by the ECPA without the required Attorney General approval and compliance with federal regulation.

Third, we concluded that the case agent should have exercised greater attention to detail when he received the e-mail from the CAU Intelligence Analyst that included the toll records of the reporters and U.S. media organizations. The January 5, [redacted] e-mail sent by the CAU Intelligence Analyst to the case agent referred to "two trace reports for the calling activities associated with your [redacted] target numbers." These were references to the [redacted] telephone numbers the case agent had inquired about in his November 5, [redacted] e-mail. The attachments to the e-mail contained all of the telephone data acquired by Company A concerning several of the telephone numbers the case agent had identified as belonging to reporters or media organizations in his original e-mail request of November 5, [redacted]

The case agent told us that he did not open the attachments to the January 5 e-mail or realize then that they contained reporters' toll billing records. He also stated that he interpreted the e-mail as meaning that the analyst had run the numbers against pre-existing databases. However, the CAU Intelligence Analyst sent another e-mail to the case agent on March 24, [redacted] stating that the January 5 e-mail contained "two products which reflected [Company A] toll records on several of the [redacted] numbers that

you have targeted." The agent acknowledged to us that this e-mail stated that the analyst had sent him toll records, as opposed to a value-added analysis, but he said he did not realize that at the time. We believe that had the agent exercised more care at the time he received the March 24 e-mail, he would have realized then that the analyst had sent him reporters' toll records without a subpoena and without obtaining the required Attorney General approval.

Fourth, in addition to the individual FBI agents' failings in this case, we believe that this matter demonstrated how the CAU's lax and sloppy practices led to serious abuse of the FBI's authority to obtain information from the on-site communications service providers. For example, the exigent letter issued by the CAU SSA failed to specify any time period for the records requested. As a result, although the case agent had identified a 7-month period as being relevant to the investigation, Company A provided the FBI 22 months of records for a Washington Post reporter, only 38 days of which fell within the 7-month period. Similarly, Company A provided the FBI 22 months of records for the Washington Post's bureau in [redacted], only 20 days of which fell within the 7-month period. For the remaining five telephone numbers, *none* of the records given to the FBI included calls made during the 7-month period. Yet, neither the CAU Intelligence Analyst who received the records from Company A, the case agent who received the records by e-mail, nor anyone else in the FBI recognized that the FBI had acquired and uploaded records far outside the time period considered to be relevant to the investigation.

Furthermore, both the CAU Intelligence Analyst who received the records and the CAU SSA who signed the exigent letter told us they did not know about the federal regulation and special approval requirements for obtaining reporters' toll billing records. This suggests a lack of training and oversight of the operational support personnel responsible for interacting directly with the on-site communications service providers.[128]

C. Second Matter

1. Background

In connection with another media leak investigation a U.S. Attorney's Office issued grand jury subpoenas to one of the on-site providers for telephone

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[128] We discuss these training and oversight failures further in Chapter Five of this report.

toll billing records. The subpoena listed various target telephone numbers. As we describe below, attachments to the subpoenas contained [redacted] language [redacted] that would have resulted in the production of reporters' toll billing records in violation of federal regulation and Department policy. However, after service of the subpoenas, and before looking at the records, the prosecutors realized the error and impounded the records. Our investigation revealed that reporters' records were not included in the records that were produced in response to the subpoenas.

The following sections describe the circumstances surrounding the request for a [redacted] and the actions taken by the Department after it realized that this request may have resulted in the receipt of telephone records of reporters.

2. The Leak Investigation

Believing that someone may have illegally disclosed information to reporters, the Department opened a media leak investigation into the matter. It assigned two federal prosecutors (who we refer to as Prosecutor 1 and Prosecutor 2) to lead the investigation. These attorneys were assisted by an AUSA (who we refer to as the local AUSA) from the judicial district where a grand jury was convened to pursue the investigation, and FBI agents and Intelligence Analysts.[129]

After the leak investigation was opened, the investigative team sought to obtain records related to various telephone numbers. The FBI case agent assigned to the investigation told us that he spoke with a CAU SSA about the investigative team's interest in obtaining "to-and-from [redacted] calls [redacted]" for particular telephone numbers. The case agent told us that the CAU SSA had advised him to contact the on-site employees of Company A and Company B to obtain the language for the subpoenas necessary to obtain those calls.

The case agent went to the CAU and met one of the on-site Company A analysts. The case agent told us that he explained to the Company A analyst that "we were focused on to-and-from [redacted] calls [redacted] for a single target." The case agent said he believed that they "also

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[129] Pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, we have excluded grand jury information, including any identifying details about the leak under investigation, from this summary of the matter.

discussed the fact that there is a media leak case and that . . . we are not getting at reporters' numbers. . . ."

Following the meeting, the case agent sent an e-mail to the Company A analyst seeking "boiler plate" language he could use in forthcoming subpoenas related to the leak investigation. Specifically, the case agent's e-mail asked for "language you like to see in the subpoena to insure that it is as encompassing as possible."

The case agent told us, and e-mail records confirm, that he received suggested text for the subpoenas from an on-site Company A analyst. The suggested text requested, among other things, a [redacted] The case agent told us that he recalled "maybe a quick perusal" of Company A's suggested language, but he said that there was "nothing about the specific language that I would have remembered reading."[130]

The case agent told us that he merely forwarded the suggested text to Prosecutor 1 for his consideration and was not "prescribing that that text be used." However, Prosecutor 1 told us he used that text in typing attachments to subpoenas to Company A seeking the target telephone numbers' records. The facsimile cover sheet the case agent used to transmit the suggested language to Prosecutor 1 stated, "more boiler plate language per discussion Friday."

Our investigation determined that the case agent, his supervisor, and Prosecutor 1 knew at the time the subpoenas were issued that the target numbers had been in telephonic contact during the period specified in the subpoenas with a reporter who had obtained the leaked information.

Moreover, [redacted] the language [redacted] would cover [redacted]

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[130] The case agent stressed that Prosecutors 1 and 2 made it clear to the investigative team that they were the legal advisors on the investigative team. Therefore, he said, "we never reviewed draft subpoenas" and "we were not asked to review any language for sufficiency or adequacy from a legal or investigative perspective. We were merely advised when the subpoena was ready to be served."

[redacted] the records of reporters who may have contacted the target numbers.[131]

Shortly after receiving the facsimile from the case agent with Company A's suggested language, Prosecutor 1 drafted grand jury subpoena attachments. Each subpoena attachment requested [redacted]

[redacted]

The subpoenas themselves were initialed by the local AUSA.[132] The subpoenas both stated, "please see attachment," and Prosecutor 1 had notified the local AUSA by e-mail that Prosecutor 1 would draft the "riders" and add them after the subpoenas were drafted.[133] The local AUSA stated that these were the first subpoenas he had signed in the investigation. He said at the time, he did "not know anything" about the reasons for the subpoenas. He told us that he did not draft the attachments to the subpoenas and that the attachments were added without his knowledge (after he had initialed the subpoenas). Prosecutor 1, who drafted the attachments, confirmed that he did not think the local AUSA would have seen the attachments.

The case agent served the subpoenas, with the attachments, on the on-site Company A analyst. The case agent told us that he had no discussion with the on-site Company A analyst about the meaning of Company A's suggested language [redacted] before the subpoenas were served.

We received conflicting information about whether the case agent and Prosecutor 1 discussed the meaning of the [redacted]

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131 [redacted]

132 During this leak investigation, the local AUSA was not involved in the day-to-day work of the investigative team other than being asked to initial grand jury subpoenas.

133 We reviewed two e-mails that the local AUSA received from Prosecutor 1 concerning procedures to be followed for grand jury subpoenas issued by the media leak investigative team. Both e-mails stated that Prosecutor 1 would draft and add "riders" or attachments to the subpoenas after the subpoenas were drafted.

[redacted] language used in the attachment before the subpoenas were issued.

When we first interviewed Prosecutor 1, he told us that his only conversation with the case agent about the language in the subpoena attachment was when he received from the case agent a "muddled" explanation of what the language meant. Prosecutor 1 told us that the case agent's explanation was unclear and that, as a result of this confusing explanation, he only later realized that he did not accurately understand what a [redacted] meant.[134]

In our second interview of Prosecutor 1, he told us that after he had been interviewed by the OIG and reviewed relevant handwritten notes, he recalled more details of his conversation with the case agent, and that this conversation occurred before the subpoenas were issued. He said he recalled the case agent informing him that use of the suggested language would obtain the "incoming and outgoing calls to and from the target number." Prosecutor 1 said he specifically asked the case agent

> whether [Company A's suggested language] would get [redacted] phone records and I recall him specifically assuring me that he had spoken to people about this language [redacted] and that it was the language . . . that was just necessary to get local incoming and outgoing calls between the target number and anyone that they called . . .

During this second interview, Prosecutor 1 also produced an undated document, which Prosecutor 1 said was the subpoena attachment he had typed based on the facsimile he had received from the case agent with the suggested language from the on-site Company A analyst.[135] The document contained handwritten notes of Prosecutor 1 stating, "[Case agent] says – it wouldn't include [redacted] phone record." Prosecutor 1 said he made these notes shortly after a conversation with the case agent before the subpoenas were issued and that these notes refreshed his recollection of the conversation with the case agent.

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[134] The first interview of Prosecutor 1 was not recorded.

[135] Prosecutor 1 was only told in general terms the nature of the first interview and was not asked to bring relevant documents to the interview. Prosecutor 1 volunteered the document at the second interview, which was recorded.

Prosecutor 1's notes seem to corroborate his assertion that the case agent had told him, erroneously, that the language in the subpoena referring to a [redacted] would not generate [redacted] records, which would have included the records of reporters.

The case agent told us that he did not recall any discussion with Prosecutor 1 or Prosecutor 2 before the subpoenas were issued about the meaning of the text suggested by the on-site analyst. He said that he never told any of the prosecutors assigned to this case that the language in the subpoenas or the attachments would not request telephone records of reporters.[136] The case agent also said he did not recall ever telling the prosecutors that Company A told him it was necessary to add the suggested language to ensure that the FBI obtained the local and long distance calling activity. He stated that he had forwarded the language provided by an on-site Company A analyst to Prosecutor 1 "merely for [the attorneys'] consideration" and was "not prescribing that the text be used."

Prosecutor 1 said that, after the subpoenas had been served on Company A, he had a conversation with an FBI Special Agent assigned to another counterintelligence squad in the division who explained the resources available from the CAU to support the servicing of subpoenas for telephone records. Prosecutor 1 said that it was only during this conversation (not in the earlier conversation with the case agent) that he realized that if Company A produced all records [redacted] as had been requested in the subpoena, Company A could have produced the toll billing records of reporters [redacted] Prosecutor 1 said that the Special Agent told him that by requesting [redacted] Company A could provide the [redacted] Prosecutor 1 said that as a result of this conversation, "I now knew that [the case agent's] explanation [that the subpoena needed to request [redacted] in order to get the [redacted]

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[136] The case agent told us that he was unaware of any other member of the leak team telling the prosecutors that the language in the subpoenas and accompanying attachments would not request reporters' records. He also said that he thought it was "very unlikely" that such a conversation occurred.

was incorrect."[137] The Special Agent also told us that she recalled describing [redacted] to Prosecutor 1 at about this same time.[138]

Prosecutor 1 told us that subsequent to this conversation with the Special Agent, he met with several DOJ attorneys and supervisors in the Criminal Division to discuss what steps should be taken to address his concern that reporters' records may have been obtained by the subpoenas. Prosecutor 1 said that all participants agreed that any records obtained in response to the grand jury subpoenas should be sealed and that the Criminal Division's Office of Enforcement Operations (OEO) should be consulted on the matter.

Prosecutor 1 and another federal prosecutor spoke to the Criminal Division's OEO Director about the circumstances surrounding issuance of the subpoenas. Prosecutor 1 said that the OEO Director concurred that they should take certain actions (described below) to address the records obtained in response to the subpoenas.

Prosecutor 1 told us that he went to the case agent and directed the agent to copy from his computer the telephone records obtained from the subpoenas and save them to CDs, then delete from his computer's in-box the e-mail from the on-site Company A analyst to which the records were attached. The case agent and Prosecutor 1 told us that the case agent deleted the records from his computer in the presence of Prosecutor 1 and also deleted the items from his "deleted items" folder. Prosecutor 1 placed the CDs in an envelope and sealed it. Prosecutor 1 and the case agent each signed and dated the envelope, and Prosecutor 1 then placed the envelope in a safe at the Criminal Division. The case agent told us that he did not recall reviewing the records before they were deleted from his computer. Prosecutor 1 said that the case agent had assured him that no one had looked at the records.

However, the case agent told us that neither he nor anyone else had asked the Company A analyst who had sent the records to the case agent to delete his "sent" e-mail (attaching the records), and they did not know what CAU personnel had done with the records. They also said they did not inquire whether the responsive records had been uploaded by CAU personnel into any FBI or other databases to which FBI personnel had access, as typically occurs when such records are received by the CAU.

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[137] After the meeting, the Special Agent sent Prosecutor 1 by facsimile the [redacted] language they had discussed at the meeting.

[138] The Special Agent told us that she had learned about Company A's special resources from an employee of another member of the [redacted]

Based on advice from the OEO Director, the Criminal Division did not notify the reporters about the subpoenas. According to Prosecutor 1, the OEO Director told Prosecutor 1 and other Criminal Division attorneys that the regulation requiring notification to the reporter was not triggered because any possible collection of the reporters' records was inadvertent and the records received from Company A were sealed and not reviewed. The OEO Director also opined that the Attorney General did not have to be notified about the matter since the records had been impounded and would not be used unless Attorney General approval was sought.

Prosecutor 1 briefed members of the investigative team that [redacted] were prohibited from being used in connection with the leak investigation. The Assistant Special Agent in Charge of the Division's counterintelligence squads also sent an e-mail to all FBI personnel assigned to the investigation directing that the language suggested by the on-site Company A analyst referring to [redacted] not be used in the leak investigation because it could capture records of reporters.[139]

3. OIG Investigation

During our investigation of exigent letters, the OIG interviewed Prosecutor 1 about another media leak investigation that we describe in the next section, and we learned about the [redacted] grand subpoenas issued to Company A in this case.

We then informed Criminal Division officials that we believed that it should be determined whether the records Company A had provided to the FBI actually included any reporters' records. However, Criminal Division officials did not believe that any of the responsive records they had sequestered should be unsealed or reviewed.

We therefore suggested that, without examining the electronic or hard copy records that the Criminal Division had sequestered, the OIG and the Criminal Division should jointly determine whether Company A had provided any [redacted] records in response to the subpoenas because if all the [redacted] records were provided, they would contain the records of reporters.

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[139] Prosecutor 1 told us that he and others also reviewed all grand jury subpoenas issued by the investigative team and determined that they had issued no other subpoenas requesting [redacted]

We then determined that Company A gave CAU personnel responsive records within approximately 1 week of service of the subpoenas and that an on-site Company A analyst e-mailed the records to the case agent. We asked the administrator of the [redacted] database to identify any records uploaded in response to the subpoenas. With the database administrator's assistance, we determined that toll billing records on the target numbers listed in the subpoenas were uploaded into the database. However, we found no evidence that the FBI received or uploaded any [redacted] telephone records [redacted] We also found no evidence that reporters' records were ever provided to the FBI in response to the [redacted] subpoenas.[140]

Because of the [redacted] during the time period specified in the subpoenas and the fact that the Department had issued subpoenas for [redacted] records for this time period that would have included reporters' records, the OIG also raised with the Criminal Division and other Department officials the question whether notification of the reporters was required under 28 C.F.R. § 50.10(g)(3). As described above, that regulation requires that if telephone toll billing records of reporters are subpoenaed without the required advance notice, the affected reporter must be notified "as soon thereafter as it is determined that such notification will no longer pose a . . . substantial threat to the integrity of the investigation" and, in any event, within 45 days of any return in response to the subpoena.[141]

The Criminal Division and the OIG asked the Department's Office of Legal Counsel (OLC) to opine on the question when the notification provision in the regulation would be triggered. OLC concluded in an informal written opinion dated January 15, 2009, that the notification requirement would be triggered if, using an "objective" standard and

> based on the totality of the circumstances, a reasonable Department of Justice official responsible for reviewing and approving such subpoenas would understand the language of the subpoenas to call for the production of the reporters' telephone toll

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140 [redacted]

141 28 C.F.R. § 50.10(g)(3).

numbers, the subpoenas would be subject to the notification requirement of subsection (g)(3), regardless of the subjective intent of the individuals who prepared them.

The OLC opinion also concluded that the notification requirement would be triggered even if reporters' toll billing records were not in fact collected in response to such a subpoena.

Based on the OLC opinion, the Criminal Division concluded that it was not required to notify the reporters because it believed that neither Prosecutor 1 nor the case agent understood at the time the subpoenas were issued that the subpoenas called for reporters' records.

4. OIG Analysis

If Company A had in fact produced the [redacted] records as requested in the grand jury subpoenas, responsive records would have included reporters' toll billing records. Because Company A did not produce all records requested by the subpoenas, the reporters' records were not provided. However, we believe that the way in which the Department drafted and issued the subpoenas was deficient and troubling for several reasons.

First, the FBI agent provided, and Prosecutor 1 drafted and approved, language in the subpoena attachments that neither the FBI agent nor Prosecutor 1 correctly understood. Prosecutor 1 said he relied on the case agent's explanation of the phrase [redacted] The case agent told us he did not recall having a conversation with any prosecutor about what the language meant, and that he did not tell any of the prosecutors that the language would not request reporters' telephone records. The case agent also said that he expected Prosecutor 1 to perform any legal analysis of the language.

In addition, the local AUSA initialed the grand jury subpoenas without reviewing the attachments, which were prepared by Prosecutor 1 and attached after the local AUSA initialed the subpoenas. We believe the Department should ensure that the reviews by prosecutors who are asked to approve grand jury subpoenas are meaningful and complete. That did not happen with respect to these grand jury subpoenas and their attachments.

Second, our investigation found that but for the conversation about Company A's capabilities between a field division Special Agent assigned to a counterintelligence squad and an [redacted] employee, FBI and Criminal Division attorneys would likely not have learned about the problems with the language in the grand jury subpoenas. Once the Special Agent explained to Prosecutor 1 what [redacted] meant, Prosecutor 1 took several appropriate steps in alerting Criminal Division supervisors to the

potential problem with the subpoenas. We believe that the actions subsequently taken by the Criminal Division in consulting with the OEO Director and sequestering the responsive records were reasonable corrective measures.

However, the Criminal Division did not evaluate what steps should be taken to address the e-mail sent by the on-site Company A analyst to the Intelligence Analyst or others, attaching the records. We believe that in addition to the steps described above, the Criminal Division should have ensured that all copies of the records were permanently deleted from FBI e-mails, share drives, servers, or other electronic records.

Our investigation did not find that FBI personnel or Department attorneys intended to obtain reporters' records. Nonetheless, had Company A's analyst provided all the records requested in the subpoenas, the records would have included reporters' toll billing records since there was telephonic contact between the target telephone numbers and reporters during the period specified in the subpoenas.

Applying the standard articulated by the OLC for when reporters must be notified that their records were subpoenaed, we concluded that the Criminal Division's decision not to notify the reporters was reasonable. Given the technical terms used in the subpoenas, we did not find that a reasonable Department of Justice official would understand the language of the subpoenas to call for the production of reporters' toll billing records. We therefore agree, based on the objective standard articulated by the OLC, that the Department was not required to notify the reporters pursuant to 28 C.F.R. § 50.10(g)(3) that they were not afforded advance notice of the subpoenas. We also note that the Criminal Division informed the Court that had empanelled the grand jury of the subpoenas and the corrective actions it had taken, which we believe was an appropriate step to take.

As discussed further in Chapter Six of this report, we recommend that the FBI provide periodic guidance to FBI personnel on the special regulations and policies governing subpoenas for reporter's toll billing records.

D. Third Matter

1. Background

In an investigation of a third media leak matter, a U.S. Attorney's Office issued a grand jury subpoena to Company A for telephone records. In addition to providing records in response to the subpoena, an on-site Company A analyst, without any request from the FBI (or any legal process), [redacted] for records of telephone calls of a cellular phone used by a reporter, and provided information about his [redacted] of the reporter's records to the FBI in the absence of legal authority to do so. Also, at the request of a CAU supervisor but

without legal process, Company B and Company C employees [redacted] their databases for the telephone records of the reporter's cellular phone calling activity.[142]

2. The Leak Investigation (U)

An FBI Special Agent participated in an interview of a witness relating to the potential leak of information to a reporter. Based on information that was provided by the witness, the Special Agent sought additional information from the on-site analyst from Company A.

a. The Subpoena for [redacted]

The Special Agent served a grand jury subpoena on an on-site Company A analyst for the toll billing records of [redacted] To generate the subpoena, the Special Agent had faxed a subpoena request form to an administrative support employee in a U.S. Attorney's Office who was responsible for preparing subpoenas for a related investigation.[143] The Special Agent's subpoena request stated that a prosecutor assigned to the investigation would draft the attachment to the subpoena. The Special Agent noted on the facsimile cover sheet accompanying the subpoena request form, "We need Company A [redacted]

As a result of the request, the subpoena, on its face, requested [redacted] The subpoena contained no limiting date range.

The Special Agent served the subpoena by facsimile on an on-site Company A analyst. A cover letter addressed to Company A that accompanied the subpoena was signed by a prosecutor in the U.S. Attorney's Office, but the subpoena itself did not bear his signature or initials.

The Special Agent told us that he was "probably directed" to request the subpoena by his supervisor or one of the prosecutors associated with the related investigation. However, the prosecutors and the Special Agent's supervisor told us they did not recall approving the subpoena or discussing it with the Special Agent. The prosecutors said they did not know how the subpoena came to be issued.

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[142] As with the second matter, pursuant to Rule 6(e) we have excluded grand jury information, including any identifying details about the leak under investigation, from this summary.

[143] The Special Agent who made the subpoena request was not assigned to the related investigation.

The copy of the subpoena and related documents provided to us by Company A contained an attachment requesting, among other information, a [redacted] This request, if filled, would result in the [redacted] and provision to the FBI of the telephone records of [redacted] However, we do not believe the attachment to the subpoena was included in the material faxed to the Company A employee. We noted that the subpoena, the cover letter, and the return of service all included header information listing the date, time, and telephone number from which they were faxed. The attachment did not include any corresponding information indicating that it had been faxed. In addition, the subpoena itself did not indicate it contained an attachment.[144] Further, copies of the subpoena maintained in the files of the prosecutors and the U.S. Attorney's Office did not contain this attachment.

When we showed the prosecutors the attachment that was in the on-site provider's files, they said they did not recall ever seeing this type of attachment in their grand jury investigation or any other investigations. Moreover, the Special Agent told us that he would not have prepared the attachment and that he did not recall previously seeing the attachment. We believe that the Company A employee may have obtained the attachment from CAU personnel or from the CAU share drive. The CAU share drive, which was accessible by all CAU personnel and the on-site providers, included a boilerplate attachment that was nearly identical to the one Company A provided to us with the subpoena. The attachment on the share drive had been approved by the FBI OGC National Security Law Branch and included with numerous NSLs and grand jury subpoenas.

b. Company A [redacted] Cellular Phone Calling Activity

After the subpoena was served, the Special Agent sent an e-mail to the on-site Company A analyst that included the name and cellular phone number of a reporter, facts explaining the relevance of calling activity by the reporter to the investigation, and information indicating that the cellular phone number of the reporter was in contact [redacted] of the subpoena during a particular period.

The Special Agent told us that he provided the cellular phone number of the reporter to the Company A analyst because the analyst "asked for" it and

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[144] The subpoena did not state "see attachment" and the box on the face of the subpoena for "additional information" was not checked.

"just to make the [redacted] easier [redacted][145] The Special Agent also told us that he believed that because he was "only looking for the [redacted] DOJ approval was not required.[146]

The Company A analyst reviewed the [redacted] records and concluded that they did not include calling activity between the [redacted] and the reporter's cellular phone number. Before informing the Special Agent of that conclusion, the Company A analyst asked the Special Agent to provide the specific date that the Special Agent believed the reporter had called [redacted] The Special Agent responded with a date range.

Then, without any request from the FBI (or any legal process), the Company A analyst [redacted] Company A's database and downloaded records for the reporter's cellular phone number and informed the Special Agent by e-mail that there was no calling activity between the [redacted] telephone numbers during the specified date range. The Company A analyst told us that he did not print out the downloaded records since he did not find the suspected calling activity between the reporter [redacted] We found no evidence that the analyst informed the Special Agent or others in the FBI that he had [redacted] the Company A database for calling activity of the reporter.

The Special Agent told us that he had not asked the Company A analyst to [redacted] records of the reporter's calling activity and was not told of the [redacted] He also said he understood that absent a grand jury subpoena, reporter's telephone records could not be [redacted] and that "we were not asking for [a reporter's] records here." The Special Agent said that if the Company A analyst had found records of calls between the reporter [redacted] he would have told the analyst, "[w]e have got to stop at that. [redacted]

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145 [redacted]

146 [redacted]

The Company A analyst who [redacted] the [redacted] told us that it was helpful to have the reporter's telephone number prior to [redacted] the records [redacted] listed in the subpoena so that he could "give [the case agent] an answer really quickly as to whether we had the data or not." The analyst also told us that after he [redacted] the [redacted] records and did not discover telephone contact between the [redacted] and the reporter, he was concerned that he had missed the telephone call. He said that he therefore [redacted] the provider's database for calling activity by the reporter to determine whether there was any activity between the reporter [redacted][147] The analyst told us, "The only way to make sure that I did not mess up was to take a look at the records for [the reporter's] number . . . ."

The Company A analyst told us that if the Special Agent had not given him the reporter's telephone number, he would not have [redacted] those records. However, he also said he had no reason to believe that the Special Agent knew he had [redacted] the reporter's telephone number.

The Company A analyst e-mailed a [redacted] chart with the analyst's calling circle [redacted] to the Special Agent. This chart was attached to an e-mail that included multiple e-mails between the Company A analyst and the Special Agent in which the Special Agent had provided facts about suspected contact between the reporter [redacted] the reporter's cellular phone number, the time frame of the suspected contact, and the Company A analyst's notification to the Special Agent that records were not located during the specified period. The CAU Primary Relief Supervisor was copied on this e-mail.

The Special Agent's supervisor said he did not know the Special Agent had provided the reporter's cellular phone number to the Company A analyst. The supervisor also said he did not recall learning from the Special Agent or anyone else that the analyst had [redacted] the records of the reporter's cellular phone number.

The CAU Primary Relief Supervisor said he did not know that the Company A analyst had [redacted] for telephone calls made by the reporter. Yet, the CAU Primary Relief Supervisor had received the e-mail with the [redacted] chart described above that provided all these facts. The CAU Primary Relief

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[147] The Company A analyst explained why reviewing [redacted] calling activity records using the [redacted] might not disclose calling activity between the reporter [redacted] However, by reviewing calling activity records of the reporter's telephone number, the Company A analyst said, he could be certain to capture telephonic contact between the [redacted] numbers.

Supervisor also said he was not sure if a grand jury subpoena could be used for such records and did not know what the process was to get a grand jury subpoena for such records in conjunction with the U.S. Attorney's Office.

c. Company B and Company C Also [redacted] the Reporter's Cellular Phone Calling Activity

We determined that the Company A analyst who had [redacted] for telephone calls made by a reporter sent an e-mail to the CAU Primary Relief Supervisor with the subject line, "Requested Information." The e-mail listed [redacted] the reporter's cellular phone number, and a 3-day date range.

Company B records show that 2 minutes after this e-mail was sent, the on-site Company B employee [redacted] Company B's records for calling activity by the reporter's cellular phone number for a date range 1 day before and 1 day after the 3-day period identified in the Company A analyst's e-mail. Two minutes after that [redacted] the Company B employee [redacted] Company B's records for calling activity by [redacted] for the same period. Based on these e-mail records and other documents we reviewed, we believe that the Primary Relief Supervisor asked Company B to [redacted] its records for this purpose.

A Company B attorney told us that the Company B [redacted] of the reporter's calling activity found responsive records although the on-site Company B employee did not recall whether he provided any information about the records to the FBI. However, in response to our request to determine whether records from Company B responsive to this [redacted] were uploaded into FBI databases, the FBI database administrator told us that he did not find any evidence of such records.

According to an entry in the Company C employee's log, 2 days later the CAU Primary Relief Supervisor asked the on-site Company C employee to [redacted] for records of calls by both the reporter's cellular phone number [redacted] for the same 3-day period previously identified to the on-site Company A analyst. The Company C employee's log indicates that the CAU Primary Relief Supervisor told him the telephone numbers pertained to a leak case. The Company C employee [redacted] Company C's database for calling activity [redacted] and the reporter's cellular phone number, but did not identify any responsive records.

The CAU Primary Relief Supervisor told us he did not recall interacting with the Company C employee on this investigation, but that it was "possible" he conveyed a request to the Company C employee to [redacted] the records shown in the log. He added that he could not recall "when or why" he would have

made the request but he did not think the Company C employee would write his name in the Company C log "without having some justification."

The Special Agent told us that he did not ask the CAU Primary Relief Supervisor or the on-site Company B or Company C employees to [redacted] for the reporter's calling activity in their databases, and we found no evidence that employees of Company B or Company C, or anyone in the CAU, informed the Special Agent that they had done so.

3. OIG Analysis

We determined that the Department issued a grand jury subpoena to Company A seeking [redacted] that a reporter was believed to have called. The subpoena in Company A's file had an attachment that requested a [redacted] If Company A had had records of calls [redacted] Company A would likely have produced calling activity information of the reporter in response to the subpoena. This subpoena was issued without the required Attorney General approval or compliance with Department regulations governing the acquisition of reporters' toll billing records.

We also determined that the grand jury subpoena to Company A was issued without substantive review by a prosecutor. The subpoena cover letter was signed by an Assistant United States Attorney (AUSA), but the subpoena itself was not initialed by that AUSA (or any prosecutor), and the AUSA said he did not recall focusing on [redacted] Further, although the subpoena request form that the Special Agent faxed to the U.S. Attorney's Office stated that a prosecutor assigned to the investigation would draft the attachment, we do not believe any of the prosecutors drafted, reviewed, or approved the attachment.[148]

In addition, we found that the on-site employee of Company A [redacted] Company A's database for records of cellular phone calling activity by the

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[148] As noted above, while the copy of the subpoena maintained in the prosecutors' files had no attachment, the subpoena that was found in Company A's files had an attachment that requested a [redacted] However, the attachment in Company A's files did not bear a facsimile header indicating that it was faxed to the provider along with the subpoena. Further, the subpoena itself did not include the words "see attachment," or otherwise indicate that there was an attachment. No one from the FBI or the Department could explain to us when or how the attachment was appended to the subpoena.

reporter. The evidence indicates that the Company A analyst [redacted] the database on his own initiative after the FBI Special Agent provided detailed information to him about the investigation and the dates of possible contacts between the reporter [redacted] listed in the grand jury subpoena. The Company A analyst then provided information about the [redacted] to the FBI in the absence of legal authority to do so.

We determined that Company B and Company C also [redacted] their respective databases for records of cellular phone calling activity by the reporter's cellular phone number. They did so after the Company A analyst gave the CAU Primary Relief Supervisor the reporter's cellular phone number, [redacted] and dates of suspected calling activity between the [redacted] numbers. However, we did not find evidence to conclude that the Special Agent or any of the prosecutors assigned to the related investigation asked the on-site communications services providers to do [redacted] or that they knew that any of the providers' employees had done so. Rather, according to the Company C employee's log, he [redacted] the Company C databases for records related to the reporter's cellular phone number at the direction of the CAU Primary Relief Supervisor.

We concluded that the CAU Primary Relief Supervisor either directly asked or prompted the on-site employees of both Company B and Company C to [redacted] the calling activity of the reporter without legal process. The CAU Primary Relief Supervisor told us he was not sure if a grand jury subpoena could be used to obtain such records and did not know what the process was for getting such a grand jury subpoena. As noted above in our analysis of the first leak investigation, we found that the FBI failed to properly train and provide guidance to CAU personnel about the lawful means to acquire toll billing records, reporters' toll billing records, and other information from the on-site employees of Company A, Company B, and Company C.

In sum, we believe that the [redacted] of the reporter's cellular phone calling activity at the prompting or direction of a CAU Supervisor in this case were a clear abuse of authority, in violation of the ECPA, federal regulation, and Department policy. We believe the FBI's actions demonstrated inadequate training for CAU employees, inadequate controls over the issuance of subpoenas, and inadequate supervision of CAU personnel by the CAU and CTD management. As discussed further in Chapter Six of this report, we recommend that the FBI periodically train FBI personnel and issue periodic guidance on the special approval requirements for subpoenaing the telephone toll billing records of news reporters.

We also recommend that the Department determine if, in addition to the grand jury subpoenas identified in this review, the Department has issued other grand jury subpoenas in media leak investigations that included a request for [redacted] community of interest or calling circle [redacted].

If so, the Department should determine whether at the time the subpoenas were issued responsible Department personnel were aware of or suspected contacts between the target numbers in the subpoenas and reporters and whether the Department obtained the toll billing records of reporters in compliance with Departmental regulations, including the notification requirements.

III. Inaccurate Statements to the Foreign Intelligence Surveillance Court

As noted in our first NSL report, one of the uses of NSLs is to obtain evidence to support DOJ applications to the Foreign Intelligence Surveillance Court (FISA Court) for electronic surveillance, physical searches, or pen register/trap and trace orders.[149] For example, information obtained in response to NSLs seeking subscriber information under the ECPA is routinely used to help establish the required elements for Foreign Intelligence Surveillance Act (FISA) applications seeking electronic surveillance or pen register/trap and trace orders on a telephone number.

Based on our concern that the FBI may have used records obtained from exigent letters and other informal requests to seek such FISA Court orders, we asked the Department's National Security Division (NSD) to help us determine whether the Department had sought orders from the FISA Court based on any information obtained in response to exigent letters or other requests as described in Chapter Two of this report.

The NSD and the OIG determined that four FISA applications contained a total of five inaccurate statements. As discussed below, in the small sample of FISA applications that we reviewed, we found that FBI personnel filed inaccurate sworn declarations with the FISA Court to the effect that subscriber or calling activity information was obtained in response to NSLs or a grand jury subpoena, when in fact the information was obtained by other means, such as exigent letters.

In our review, we identified a sample of 37 applications to the FISA Court, which sought FISA electronic surveillance or pen register/trap and trace orders for 35 unique telephone numbers which were examined by the NSD and the FBI.[150] Our review attempted to determine on what basis the FBI had

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[149] See OIG, NSL I, 48.

[150] These 37 applications were selected for review because they referred to telephone numbers that either were listed in the 11 blanket NSLs that are described in Chapter Four or were referred to in CAU e-mails as record requests associated with FISA applications.

stated it had acquired information pertaining to the subscribers or other calling activity information for these telephone numbers.

Specifically, the NSD and the OIG examined the sample of applications to determine whether they inaccurately stated that NSLs were the source of the subscriber or calling activity information presented to the FISA Court.[151] In these 37 applications, the NSD and the OIG identified 4 FBI declarations that together contained 5 inaccurate statements as to the source of the subscriber or calling activity information relied upon to support the declarations. The four declarations containing these inaccurate statements were signed by four different FBI SSAs.[152]

These four declarations stated that NSLs were the source of the subscriber or calling activity information, when, in fact, NSLs were not the source for the information contained in the FISA application. Rather, for two of these inaccurate statements, exigent letters not NSLs were used to obtain records that were the sources of the information in the FISA applications. In another inaccurate statement, the records cited in an application to the FISA Court were obtained in response to a letter referring to the FBI's emergency voluntary disclosure authority, not in response to an NSL as the application stated. In another inaccurate statement, the FBI obtained the information informally by a verbal request, not in response to an NSL as the application stated. In another application, the NSD determined that a "trash cover" was the source of the FBI's information about the subscriber information, not an NSL as the application stated.[153]

We discuss these four declarations below, describing in more detail the five inaccurate statements we identified.

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[151] Applications to the FISA Court for pen register/trap and trace or electronic surveillance orders typically include declarations signed by FBI personnel stating the basis for asserting that the telephone number referenced in the application belongs to a particular subscriber. These declarations are signed under oath.

[152] The NSD identified 4 other misstatements in the previously mentioned 37 FISA declarations. These declarations all misstated either the dates of the NSLs seeking subscriber information or the dates when the FBI obtained responsive records from the providers. However, in contrast to the five misstatements described in this section, in these four other instances the statements that the subscriber information had been obtained through NSLs were accurate. The NSD notified the FISA Court of these inaccuracies in August 2008, calling the inaccurate dates "non-material" under Rule 10(b) of the FISA Court's Rules of Procedure.

[153] A trash cover is the search by law enforcement personnel of trash outside the land or yard adjoining a house left to be picked up by garbage collectors.

A. FISA Case No. 1

In this case, the Department applied to the FISA Court for a pen register/trap and trace order in connection with an FBI counterterrorism investigation. The declaration, signed by an Acting FBI SSA, stated that the FBI had obtained the subscriber information contained in the application in response to an NSL served on the carrier. On [redacted] the FISA Court approved the application and issued the order for a pen register/trap and trace device on the subscriber's telephone number.

However, working with the NSD and the FBI, we determined that the only NSL served on the carrier seeking subscriber information for this telephone number was dated [redacted] – 6 weeks after the FISA Court order was issued. Rather, we determined that the subscriber information on which the Department's FISA request relied was obtained in response to an exigent letter dated [redacted]

In August 2008, as a result of our review, the NSD notified the FISA Court of the inaccurate statement in the declaration, stating that the NSD considered the statement to be "non-material" for purposes of Rule 10(b) of the FISA Court Rules of Procedure.[154]

B. FISA Case No. 2

In this case, the Department filed with the FISA Court an emergency application for an electronic surveillance order on [redacted] in connection with a national security investigation.

The supporting declaration by an FBI SSA stated that the FBI had verified the subscriber information through information obtained on [redacted] in response to an NSL served that day on a carrier. The FISA Court's order was entered on [redacted].[155]

However, working with the NSD and the FBI, we determined that the only NSL to the carrier seeking records for this telephone number was dated [redacted] – 2 months after the FISA Court order was issued. We found

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[154] Rule 10(b) of the FISA Court requires the government to report misstatements or omissions of "material" facts. Neither the FISA Court rules nor the FISA defines what constitutes a "material" fact.

[155] On [redacted] a CAU SSA sent to all three on-site providers an e-mail with this telephone number and asked them to [redacted] for records. The telephone number was subsequently included in the Operation Y blanket NSLs, which we describe in Chapter Four of this report.