



September 22, 2008

The Honorable Glenn A. Fine
Inspector General
Office of the Inspector General
U.S. Department of Justice
Room 4322
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Washington, DC 20530

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Dear Inspector General Fine:

Attorney General Michael Mukasey recently announced he was developing new Attorney General Guidelines governing the Federal Bureau of Investigation's investigative authorities. Arguing in support of the new guidelines, the Attorney General and officials from the Federal Bureau of Investigation have repeatedly claimed that the authorities granted in the new guidelines simply clarify and consolidate existing guidelines, implying that they interpret their authorities under previous guidelines to authorize the use of intrusive investigative techniques of unlimited duration in criminal investigations even without any factual "predication." The American Civil Liberties Union is concerned that the Department of Justice and the FBI have been interpreting their authority under the current guidelines to allow such intrusive techniques, as the plain language in the text of these documents belies such a reading. We request that you initiate an investigation to determine if the FBI is violating the current guidelines before the new guidelines are allowed to take effect.

Attorney General Mukasey's claimed purpose for revising the guidelines is to consolidate and "harmonize" the standards currently regulated under separate Attorney General Guidelines for General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, and Attorney General Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. Subsequent comments by FBI officials indicate the new guidelines will also supersede supplemental guidelines for foreign intelligence collection issued in 2006, which are currently classified, as well as 1988 guidelines regarding FBI involvement in "otherwise illegal activity" and 1976 guidelines (the Levi Guidelines) on FBI investigations regarding civil disorders and demonstrations.

The new guidelines, which have been reviewed by the American Civil Liberties Union, authorize the FBI to engage in a wide range of intrusive investigative activities without a factual predicate whenever the

FBI determines it has an “authorized purpose.” The new guidelines define the authorized purposes for such an “assessment” in extraordinarily broad terms: to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence. The investigative techniques authorized for use during an “assessment” period – which unlike preliminary inquiries has no time limit – could include unlimited physical surveillance, searches of commercial databases, the recruiting and tasking of informants, and even “pretext” – that is undercover – interviews by FBI agents. Indeed, the new guidelines authorize the FBI to investigate people under this grant of authority simply to determine if they would make effective FBI informants. So if the FBI determines it is acting to prevent crime or protect national security it can investigate people it has no factual basis for suspecting of involvement in any improper or illegal activity. This claim conflicts with Americans’ constitutional rights and with any common sense interpretation of the government’s authority to violate the privacy of innocent Americans.

Our greater concern, however, is that the FBI may already be engaged in the activities described above, in violation of the plain language contained in the current guidelines. In testimony before the U.S. House of Representatives on September 16, 2008, FBI Director Robert Mueller said,

Up to now, special agents have depended on several sets of guidelines to guide their investigations. Each set was tailored to a particular program area and, therefore, different rules governed different types of investigations. These differences were especially pronounced for national security investigations versus criminal investigations. To give you a few examples, in the guidelines governing national security investigations prohibited recruiting or tasking sources unless the FBI had at least a preliminary investigation open. They also prohibited physical surveillance other than casual observation, while the general crimes guidelines, which governed other criminal investigations, did not contain these limitations. So, ironically, in my cases an agent could readily use physical surveillance to watch a suspected smuggling route for drugs or counterfeit blue jeans but not for a terrorist bomb... Different rules should not apply depending on how the agent decides to describe what he or she is investigating. I must emphasize that the new guidelines are not designed to give the FBI any broad new authorities.

Under guidelines currently in place regarding the FBI’s criminal investigative authorities, the 2002 Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (the Ashcroft guidelines) and the 1976 Levi guidelines regarding civil disturbances and demonstrations, it is difficult to see where Director Mueller finds such authority to initiate criminal investigations without a factual predicate that would support opening a preliminary inquiry. The only criminal investigative authority given to the FBI under the Ashcroft guidelines short of a preliminary inquiry is the “prompt and extremely limited checking out of initial leads.” The Ashcroft guidelines make clear that this “limited activity should be conducted with an eye toward promptly determining whether further investigation (either a preliminary inquiry or a full investigation) should be conducted.”

The idea that the FBI would interpret this clearly limited authorization to allow the use of such intrusive techniques as 24-7 physical surveillance and tasking informants and undercover agents for an unlimited duration is simply astonishing. And while the Ashcroft guidelines do not explicitly prohibit specific techniques during the “checking leads” phase of an investigation, the plain language of the text is significantly more restrictive than that which will be authorized under the new guidelines. Indeed, the 2005 Office of Inspector General audit of the FBI’s compliance with the Attorney General’s Investigative Guidelines did not even probe the FBI’s activities under the “checking leads” authority, so it is clear you did not see this as broad grant of authority to conduct extended investigations. It is important to note that your audit found the FBI failed to comply with requirements under the guidelines in over half of the preliminary inquiries that were extended beyond the initial 180-day authorization, and in 77% of the preliminary investigations that were extended past the first extension period. This record raises our concern that if the FBI has been interpreting its authority to engage in the intrusive techniques described above conducted under an even less regulated “checking leads” authority, there is likely to be even greater abuse.

The Levi guidelines regarding FBI investigative authorities during civil disturbances and demonstrations, which are still in effect, are even more restrictive, requiring a request from “the AG or his designee” before any activity can begin. The type of information the FBI may collect during such an investigation is limited to:

- 1). Date, time, place and type of activity;
- 2). Number of persons expected;
- 3). Intended mode of transportation and routes;
- 4). Date of arrival in vicinity and housing plans, if pertinent; and
- 5). Similar information necessary to provide adequate federal response to ensure public health and safety

Moreover, the techniques for collecting this information are limited to inquiries of:

- 1). FBI files and indices;
- 2). Public records and other public sources of information;
- 3). Federal, state and local records and officials; and
- 4). Interviews with persons involved in the planning of the demonstration, "provided that in conducting interviews with such persons the FBI shall initially advise them specifically of the authority to make the inquiry and the limited purpose for which it is made."

Again, it is difficult to understand how the FBI could see an authority in these guidelines that is anything similar to the broad powers conferred in the new guidelines. Either Director Mueller was less than candid when he testified these are not new authorities, or the FBI has interpreted its authority to conduct criminal investigations absent a factual predicate in a manner that violates the plain language of existing guidelines.

The ACLU formally requests you undertake an investigation regarding whether the FBI has engaged in criminal investigative activities beyond the scope of Attorney General Guidelines currently in effect. The investigation should examine whether the FBI has used prohibited investigative techniques to infiltrate groups engaged in non-violent protest activities or political demonstrations without a factual predicate indicating a possible violation of federal law. The investigation should particularly examine the manner in which the FBI uses race, religion, national origin, or First Amendment protected activities in determining whether to initiate, expand, or continue an investigation.

There is no point to publishing guidelines regarding the FBI's investigative authorities if the FBI chooses not to follow those guidelines, or interprets the terms in a manner contrary to their commonly understood definitions. The FBI has far too much power, and far too grave a history of abusing that power, for legal limits on its investigative authorities to be established by anything but clear, bright, and easily understood boundaries. We look forward to the results of your investigation.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Caroline Fredrickson'.

Caroline Fredrickson