



PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

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***Recommendations Assessment Report***

**JANUARY 29, 2015**

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**Privacy and Civil Liberties Oversight Board**

**David Medine, Chairman**

**Rachel Brand**

**Elisebeth Collins Cook**

**James Dempsey**

**Patricia Wald**

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#### INTRODUCTION

One year after issuing its report on the government’s Section 215 surveillance program, and six months after issuing its report on the government’s Section 702 surveillance program,<sup>1</sup> the Privacy and Civil Liberties Oversight Board (“PCLOB”) is issuing this assessment of the degree to which the President, Congress, and the Foreign Intelligence Surveillance Court have implemented the recommendations made by the Board in those reports.

The PCLOB is an independent, bipartisan agency within the executive branch, charged with ensuring that the federal government’s efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties. The Board’s analyses of the Section 215 and 702 programs from a legal and policy perspective informed the Board’s recommendations. While most recommendations are directed at the executive branch, and in particular elements of the Intelligence Community, some recommendations are directed at Congress or the Foreign Intelligence Surveillance Court (“FISC” or “FISA court”). For each of the Board’s twenty-two recommendations, this document explains the recommendation, describes the steps taken to implement it to date, and offers the Board’s assessment of how fully it has been adopted.

Overall, the Board has found that the Administration and the Intelligence Community have been responsive to its recommendations. The Administration has accepted virtually all of the recommendations in the Board’s Section 702 report and has begun implementing many of them. It also has accepted many of the recommendations in the Board’s Section 215

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<sup>1</sup> See Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Jan. 23, 2014), available at [http://www.pclob.gov/library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](http://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf); Privacy and Civil Liberties Oversight Board, *Report on the Surveillance program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), available at <http://www.pclob.gov/library/702-Report-2.pdf>.

report and has supported legislation that would satisfy several more, including the most far-reaching of the Board's proposals.

However, many of the recommendations directed at the Administration have yet to be fully satisfied, with the Administration having taken only partial steps, at most, toward implementing them.

We have used five labels to characterize our assessments of the status of each recommendation made to the President and Congress:

- *Not implemented*: The recommendation has not been adopted.
- *Not implemented (implementing legislation proposed)*: Legislation introduced in Congress and supported by the Administration would substantially satisfy the recommendation.
- *Accepted, but awaiting implementation*: The Administration has accepted the recommendation but has not yet taken significant steps toward implementing it.
- *Being implemented*: The Administration has accepted the recommendation and has made substantial progress toward implementing it.
- *Implemented in part*: The Administration has adopted part of the recommendation, but has given no indication whether it intends to implement the remainder.

As seen below, most recommendations directed at the Administration are still in the process of being implemented or have only been accepted in principle, without substantial progress yet made toward their implementation. Congress has not yet passed legislation to reform the operations of the FISC, as recommended by the Board, or to end the bulk collection of domestic telephone records by the National Security Administration. Despite this inaction, the Administration has not followed the Board's recommendation by unilaterally ending the telephone records program, which it could do at any time. The Board reiterates its belief in the importance of ending the telephone records program and reforming the FISC, and it urges the prompt implementation of these recommendations.

With respect to other recommendations made by the Board, particularly those made only six months ago in our Section 702 report, we recognize that many entail significant logistical or technical undertakings, or require substantial changes to the way the Intelligence Community traditionally has done business. Some delay in the full implementation of these recommendations is understandable, therefore, and the Board looks forward to continued consultation with the Administration and the Intelligence Community regarding their efforts.

## **SECTION 215 REPORT RECOMMENDATIONS**

### **Recommendation 1: End the NSA's Bulk Telephone Records Program**

#### **Status:**

Not implemented (implementing legislation proposed)

#### **Text of the Board's Recommendation:**

The government should end its Section 215 bulk telephone records program.<sup>2</sup>

#### **Explanation for the Recommendation:**

The Board concluded that the Section 215 bulk telephone records program lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. As a result, the Board recommended that the government end the program. Without the current Section 215 program, the government would still be able to seek telephone calling records directly from communications providers through other existing legal authorities.

#### **Discussion of Status:**

The Administration accepted our recommendation in principle. However, it has not ended the bulk telephone records program on its own, opting instead to seek legislation to create an alternative to the existing program. During the year since the Board's recommendation was made, the Administration has obtained four extensions of the program from the FISC. The Administration has, however, made some modifications to the program as discussed under Recommendation 2 below.

Last year the Administration indicated its support for the USA FREEDOM Act introduced in the Senate.<sup>3</sup> If enacted, this bill would end the telephone records program, along the lines of the Board's recommendation. The bill would establish a new system under Section 215 for government access to telephone calling records in terrorism investigations. To obtain calling records, the government would need to identify a specific telephone number or similar selection term that is reasonably suspected of being associated with terrorism, and it could obtain only records of calls up to two "hops" from that number, with FISC approval. In November 2014, the USA FREEDOM Act failed to advance to a vote in the Senate. The Administration has informed us that it intends to continue supporting passage of the USA FREEDOM Act in the present congressional session, during which the bill is expected to be reintroduced.

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<sup>2</sup> Board Members Rachel Brand and Elisebeth Collins Cook did not join this recommendation.

<sup>3</sup> See S. 2685, 113th Cong. (2014).

The Board acknowledged in January 2014 that “immediate shutdown of the 215 program could be disruptive, and the government may need a short period of time to explore and institutionalize alternative approaches,” concluding that “it would be appropriate for the government to wind down the 215 program over a short interim period.” The Board did not recommend that ending the program be contingent on the passage of legislation that would replicate the program’s capabilities.

It should be noted that the Administration can end the bulk telephone records program at any time, without congressional involvement. While legislation like the USA FREEDOM Act would be needed to retain the unique capabilities of the program without collecting telephone records in bulk, the Board examined those capabilities and concluded that they have provided only “limited value” in combatting terrorism. After scrutinizing classified materials regarding cases in which the program was used, and questioning the Intelligence Community about those cases, the Board explained that “we have not identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation.”

## **Recommendation 2: Immediately Add Additional Privacy Safeguards to the Bulk Telephone Records Program**

### **Status:**

Implemented in part

### **Text of the Board’s Recommendation:**

The government should immediately implement additional privacy safeguards in operating the Section 215 bulk collection program.

### **Explanation for the Recommendation:**

The Board recommended that the government immediately implement several additional privacy safeguards to mitigate the privacy impact of the present Section 215 program. The Board noted that the recommended changes can be implemented without any need for congressional or FISC authorization.

### **Discussion of Status:**

The Board proposed that four new safeguards be implemented if the bulk telephone records program were to continue for any period of time. The status of each is described below.

*(a) Reduce the retention period for the bulk telephone records program from five years to three years.*

The Administration has not made this change.

*(b) Reduce the number of “hops” used in contact chaining from three to two.*

The Administration made this change in February 2014. Pursuant to the Administration’s request, the FISC orders authorizing the program now impose a “two-hop” restriction.

*(c) Submit the NSA’s “reasonable articulable suspicion” determinations to the FISC for review after they have been approved by NSA and used to query the database.*

The Administration made a similar, broader, change in February 2014. Pursuant to the Administration’s request, the FISC orders authorizing the program now require that the NSA’s “reasonable articulable suspicion” determinations be approved by the FISC *before* they are used to query the database.

*(d) Require a “reasonable articulable suspicion” determination before analysts may submit queries to, or otherwise analyze, the “corporate store,” which contains the results of contact chaining queries to the full “collection store.”*

The Board considers this recommendation to be moot, because the NSA’s automated query process has not been implemented. As explained in the Board’s report, the “corporate store” is related to “a new and automated method of performing queries” that the FISC first approved in 2012. “The ultimate result of the automated query process is a repository, the corporate store, containing the records of all telephone calls that are within three ‘hops’ of every currently approved selection term.” The Board estimated that this repository could contain calling records involving over 120 million telephone numbers.

Recent FISC orders renewing the telephone records program do not allow automated queries without prior authorization. Whereas earlier orders state that queries of the NSA’s Section 215 database “may occur either by manual analyst query or through the automated query process described below,” and then proceed to discuss the corporate store, recent orders state that such queries “may occur by manual analyst query only.”<sup>4</sup>

### **Recommendation 3: Enable the FISC to Hear Independent Views on Novel and Significant Matters**

#### **Status:**

Not implemented (implementing legislation proposed)

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<sup>4</sup> Compare Primary Order at 11, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (FISA Ct. Jan. 3, 2014), available at [http://www.dni.gov/files/documents/BR%2014-01%20Redacted%20Primary%20Order%20\(Final\).pdf](http://www.dni.gov/files/documents/BR%2014-01%20Redacted%20Primary%20Order%20(Final).pdf), with Primary Order at 11, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-166 (FISA Ct. Dec. 4, 2014), available at <http://www.dni.gov/files/documents/0112/BR%2014-166%20Primary%20Order%20FINAL.pdf>.

**Text of the Board's Recommendation:**

Congress should enact legislation enabling the FISC to hear independent views, in addition to the government's views, on novel and significant applications and in other matters in which a FISC judge determines that consideration of the issues would merit such additional views.

**Explanation for the Recommendation:**

Although the FISC continues to review applications for individualized FISA warrants, in the past decade it has also been called upon to evaluate requests for broader collection programs, such as the Section 215 telephone records program, and to review extensive compliance reports regarding the implementation of the surveillance authorized under Section 702. This expansion of the FISC's jurisdiction has presented it with complex and novel issues of law and technology. Currently, these issues are adjudicated by the court based only on filings by the government, supplemented by the research and analysis of the judges and their experienced legal staff.

The Board believes that, when FISC judges are considering requests for programmatic surveillance affecting numerous individuals or applications presenting novel issues, they should have the opportunity to call for third-party briefing on the legal issues involved. In addition to assisting the court, a mechanism allowing FISC judges to call upon independent expert advocates for a broader range of legal views could bolster the public's trust in its operations and in the integrity of the FISA system overall.

**Discussion of Status:**

Section 401 of the USA FREEDOM Act, if enacted, would establish a process for hearing independent views that is largely consistent with the Board's recommendation. This provision closely mirrors the Board's proposal regarding "the establishment of a panel of outside lawyers to serve as Special Advocates before the FISC in appropriate cases." The Administration accepted our proposal and has supported this provision of the USA FREEDOM Act to implement the recommendation.

Like the Board's proposal, the USA FREEDOM Act would authorize the presiding judge of the FISC to appoint a panel of at least five private sector attorneys, eligible for security clearances and with relevant professional experience, to participate in matters that a FISC judge determines involve a novel or significant interpretation of the law, including the application of law to new technologies. (Alternatively, a FISC judge may issue a written finding that such appointment is not appropriate in a given case.) As in the Board's proposal, the Special Advocate would be tasked with making arguments addressing privacy and civil liberties, and would have access to relevant materials, including government applications, petitions, and motions. Unlike the Board's proposal, the bill does not mandate that the Special Advocate be "permitted to participate in *all* proceedings related to that

application or matter” or “have access to *all* government filings” (emphasis added). Our report notes, however, that the FISC has the power to establish specific rules regarding the Special Advocate’s participation through its internal Rules of Procedure.

As noted above, while the USA FREEDOM Act failed to advance to a vote in the Senate during the last congressional session, it is expected to be reintroduced during the current session.

## **Recommendation 4: Expand Opportunities for Appellate Review of FISC Decisions**

### **Status:**

Not implemented (implementing legislation proposed)

### **Text of the Board’s Recommendation:**

Congress should enact legislation to expand the opportunities for appellate review of FISC decisions by the FISC and for review of FISC decisions by the Supreme Court of the United States.

### **Explanation for the Recommendation:**

Over the past decade, the FISC has generated a significant body of law interpreting FISA authorities and other potentially applicable statutes, and analyzing related constitutional questions. However, FISC opinions have been much less likely to be subject to appellate review than the opinions of ordinary federal courts; to date, only two cases have been decided by the Foreign Intelligence Surveillance Court of Review (“FISCR”). There should be a greater opportunity for appellate review of FISC decisions by the FISCR and for review of the FISCR’s decisions by the Supreme Court of the United States. Providing for greater appellate review of FISC and FISCR rulings will strengthen the integrity of judicial review under FISA. Providing a role for the Special Advocate in seeking that appellate review will further increase public confidence in the integrity of the process.

### **Discussion of Status:**

Section 401 of the USA FREEDOM Act, if enacted, would partly satisfy the Board’s recommendation.

Like the Board’s proposal, the USA FREEDOM Act would authorize the FISC, after issuing an order, to certify a question of law to be reviewed by the FISCR. Similarly, the bill would authorize the FISCR, after rendering a decision that partially or entirely grants a government application, to certify a question of law to be reviewed by the U.S. Supreme Court. In each circumstance, the higher court would decide whether to review the question certified by the lower court.

The USA FREEDOM Act provides fewer guarantees than the Board’s proposal that a Special Advocate will be allowed to participate in the appellate review process — both in the decision about whether to certify a question of law for review, and in the proceedings that take place once a question has been certified. Unlike the Board’s proposal, the bill provides no mechanism for a Special Advocate to request certification of a FISC or FISCER decision, and it provides no mechanism by which a Special Advocate can challenge the FISC’s decision not to certify a legal question for appellate review. The Board notes that FISC and FISCER rules of procedure could be revised to provide such mechanisms. In addition, under the Board’s proposal, when a legal question is accepted for review by the FISCER, the Special Advocate would be permitted to participate in the matter, just as in the FISC. By contrast, under the USA FREEDOM Act, such participation is permitted only when the FISCER also determines that the matter presents a novel or significant interpretation of the law.

As noted above, while the USA FREEDOM Act failed to advance to a vote in the Senate during the last congressional session, it is expected to be reintroduced during the current session.

## **Recommendation 5: Take Full Advantage of Existing Opportunities for Outside Legal and Technical Input in FISC Matters**

### **Status:**

The FISC has taken actions consistent with this recommendation.

### **Text of the Board’s Recommendation:**

The FISC should take full advantage of existing authorities to obtain technical assistance and expand opportunities for legal input from outside parties.

### **Explanation for the Recommendation:**

FISC judges should take advantage of their ability to appoint Special Masters or other technical experts to assist them in reviewing voluminous or technical materials, either in connection with initial applications or in compliance reviews. In addition, the FISC and the FISCER should develop procedures to facilitate amicus participation by third parties in cases involving questions that are of broad public interest, where it is feasible to do so consistent with national security.

### **Discussion of Status:**

As noted in the Board’s report, prior to the issuance of the Board’s recommendation the FISC had on one occasion accepted an amicus brief from an outside party (relating to the legality of a publicly known FISA surveillance program), and the PCLOB is aware of specific

instances in classified matters in which the FISC has since taken action consistent with this recommendation.

## **Recommendation 6: Publicly Release New FISC and FISCR Decisions that Involve Novel Legal, Technical, or Compliance Questions**

### **Status:**

Being implemented

### **Text of the Board's Recommendation:**

To the maximum extent consistent with national security, the government should create and release with minimal redactions declassified versions of new decisions, orders and opinions by the FISC and FISCR in cases involving novel interpretations of FISA or other significant questions of law, technology or compliance.

### **Explanation for the Recommendation:**

FISC judges should continue their recent practice of drafting opinions in cases involving novel issues and other significant decisions in the expectation that declassified versions will be released to the public. This practice has facilitated declassification review. The government should promptly create and release declassified versions of these FISC opinions.

### **Discussion of Status:**

Since the release of the Board's report, the government has declassified and released nearly a dozen orders and opinions issued by the FISC in 2014 regarding the bulk telephone records program, along with motions, briefing materials, and orders related to the efforts of advocacy organizations and private companies to seek public release of FISC materials and FISA-related information. The government has not publicly released any newly issued FISC decisions, orders, or opinions relating to surveillance matters beyond the telephone records program.

Intelligence Community representatives have stated to us that they intend to implement this recommendation, but their efforts to comply are constrained by the limited time and resources available to carry out declassification reviews, particularly because of the need to respond to litigation deadlines that often dictate the prioritization of documents to review and redact for public release.

## **Recommendation 7: Publicly Release Past FISC and FISCR Decisions that Involve Novel Legal, Technical, or Compliance Questions**

### **Status:**

Being implemented

### **Text of the Board's Recommendation:**

Regarding previously written opinions, the government should perform a declassification review of decisions, orders and opinions by the FISC and FISCR that have not yet been released to the public and that involve novel interpretations of FISA or other significant questions of law, technology or compliance.

### **Explanation for the Recommendation:**

The government should create and release declassified versions of older opinions in novel or significant cases to the greatest extent possible consistent with protection of national security. This should cover programs that have been discontinued, where the legal interpretations justifying such programs have ongoing relevance.

Although it may be more difficult to declassify older FISC opinions drafted without expectation of public release, the release of such older opinions is still important to facilitate public understanding of the development of the law under FISA. The Board acknowledges the cumulative burden of these transparency recommendations, especially as the burden of review for declassification may fall on the same individuals who are responsible for preparing new FISA applications, overseeing compliance with existing orders, and carrying out other duties. The Board urges the government to develop and announce some prioritization plan or approach. We recommend beginning with opinions describing the legal theories relied upon for widespread collection of metadata from Americans not suspected of terrorist affiliations, to be followed by opinions involving serious compliance issues.

### **Discussion of Status:**

The Intelligence Community has declassified and released many previously issued FISC decisions and related materials over the past year. Certain significant decisions that have been the topic of recent public debate remain to be released, however. For instance, the government has not released the first opinion issued by the FISC that approved a certification under Section 702 of FISA, in which the FISC was first required to evaluate whether the Section 702 surveillance program complies with the statute and the Fourth Amendment.

As with the previous recommendation, Intelligence Community representatives have stated to us that they intend to implement this recommendation, but their efforts to comply are

constrained by the limited time and resources available to carry out declassification reviews.

## **Recommendation 8: Publicly Report on the Operation of the FISC Special Advocate Program**

### **Status:**

Not implemented (implementing legislation proposed)

### **Text of the Board's Recommendation:**

The Attorney General should regularly and publicly report information regarding the operation of the Special Advocate program recommended by the Board. This should include statistics on the frequency and nature of Special Advocate participation in FISC and FISCR proceedings.

### **Explanation for the Recommendation:**

Should the government adopt our recommendation for a Special Advocate in the FISC, the nature of that advocate's role must be transparent to be effective. The FISC should publicly disclose any rules the court adopts governing the advocate's participation in proceedings. In addition, the Attorney General should regularly and publicly report statistics on the frequency of Special Advocate participation, including the number of times Special Advocates have sought review of FISC decisions in the FISCR and the U.S. Supreme Court.

### **Discussion of Status:**

As discussed above, legislation enabling the establishment of a FISC Special Advocate panel has not been enacted; thus, there is nothing yet to report.

The USA FREEDOM Act, which would establish a Special Advocate program, would require the Attorney General and Director of National Intelligence annually to report publicly on the number of times that a FISC Special Advocate is appointed, the identity of the appointee, the number of times that a FISC judge determines that participation of a Special Advocate is not appropriate, and the text of the written findings supporting such determinations.

As noted above, while the USA FREEDOM Act failed to advance to a vote in the Senate during the last congressional session, it is expected to be reintroduced during the current session.

## **Recommendation 9: Permit Companies to Disclose Information about Their Receipt of FISA Production Orders, and Disclose More Detailed Statistics on Surveillance**

### **Status:**

Being implemented

### **Text of the Board's Recommendation:**

The government should work with Internet service providers and other companies that regularly receive FISA production orders to develop rules permitting the companies to voluntarily disclose certain statistical information. In addition, the government should publicly disclose more detailed statistics to provide a more complete picture of government surveillance operations.

### **Explanation for the Recommendation:**

One important way to understand and assess any government program is numerically — to categorize its critical elements and count them. Periodic public reporting on surveillance programs is a valuable tool promoting accountability and public understanding. We believe that publication of additional numerical information on the frequency with which various surveillance authorities are being used would be possible without allowing terrorists to improve their tradecraft.

In recent years, U.S. companies have begun publishing reports showing, country by country, how many government demands they receive for disclosure of user data. Because we believe this kind of reporting can be useful in building and maintaining public trust, we recommended that the government work with companies to permit disclosure of more detailed information.

In addition, the Board recommended that the government report more detailed information. To ensure that government reports are meaningful, the government would have to distinguish between particularized programs and those involving bulk collection. In the case of targeted programs, the government should disclose how many orders have been issued and how many individuals have been targeted.

### **Discussion of Status:**

The government has taken steps toward implementing both parts of this recommendation. Early last year the government reached an agreement with five companies that had filed suit for permission to publish more information about the data requests they receive from the government in national security matters. The agreement enables providers that receive requests for customer data — in the form of FISA orders, national security letters, or

criminal process — to disclose more statistical information about those requests than previously. Many providers have issued reports with this information.

In June 2014, the Intelligence Community issued its first Transparency Report, which provides statistical information regarding the use of various national security authorities during the previous year.<sup>5</sup> Depending on the authority involved, the report provides the annual number of government applications, number of orders or requests for information issued, estimated number of targets affected, and number of database queries targeting particular persons or selectors. The government has committed to releasing these reports on an annual basis.

## **Recommendation 10: Inform the PCLOB of FISA Activities and Provide Relevant Congressional Reports and FISC Decisions**

### **Status:**

Accepted, but awaiting implementation

### **Text of the Board’s Recommendation:**

The Attorney General should fully inform the PCLOB of the government’s activities under FISA and provide the PCLOB with copies of the detailed reports submitted under FISA to the specified committees of Congress. This should include providing the PCLOB with copies of the FISC decisions required to be produced under Section 601(a)(5) [of FISA].

### **Explanation for the Recommendation:**

Beyond public reporting, FISA requires the Attorney General to “fully inform” the Senate and House intelligence and judiciary committees regarding the government’s activities under certain sections of FISA, including Section 215. FISA also requires the government to provide the congressional committees with copies of “all decisions, orders, or opinions” of the FISC or FISCER that include “significant construction or interpretation” of the provisions of FISA. These two reporting requirements facilitate congressional oversight. The Board urges the government to extend this complete reporting to the PCLOB as well, to facilitate the Board’s oversight role.

### **Discussion of Status:**

To date, neither the Intelligence Community nor the Attorney General has regularly and routinely provided the PCLOB with the congressional reports or FISC decisions described above, nor have proactive measures been taken to fully inform the PCLOB of the government’s activities under FISA.

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<sup>5</sup> See [http://icontherecord.tumblr.com/transparency/odni\\_transparencyreport\\_cy2013](http://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2013).

The Intelligence Community has, however, provided all specific documents that the PCLOB has requested, and on occasion also has provided the PCLOB with significant documents in the absence of a request. In addition, very recently, the Intelligence Community and Department of Justice have engaged in discussions with the PCLOB about implementing this recommendation, which they advise they are committed to satisfying.

## **Recommendation 11: Begin to Develop Principles for Transparency**

### **Status:**

Being implemented

### **Text of the Board's Recommendation:**

The Board urges the government to begin developing principles and criteria for transparency.

### **Explanation for the Recommendation:**

Transparency is one of the foundations of democratic governance. Our constitutional system of government relies upon the participation of an informed electorate. This in turn requires public access to information about the activities of the government. Transparency supports accountability. It is especially important with regard to activities of the government that affect the rights of individuals. In addition to the specific transparency measures outlined in Recommendations 6 through 10, the Board urges the Administration to commence the process of articulating principles and criteria for deciding what must be kept secret and what can be released as to existing and future programs that affect the American public.

### **Discussion of Status:**

The government has developed and shared with the Board a document outlining broad principles for transparency for the Intelligence Community. Our understanding is that this document will soon be transmitted to the Intelligence Community workforce and released publicly, followed by the development of more specific guidance on implementing the principles outlined in the document.

## **Recommendation 12: Disclose the Scope of Surveillance Authorities Affecting Americans**

### **Status:**

Implemented in part

**Text of the Board's Recommendation:**

The scope of surveillance authorities affecting Americans should be public.<sup>6</sup>

**Explanation for the Recommendation:**

The Administration should develop principles and criteria for the public articulation of the legal authorities under which it conducts surveillance affecting Americans. If the text of the statute itself is not sufficient to inform the public of the scope of asserted government authority, then the key elements of the legal opinion or other document describing the government's legal analysis should be made public so there can be a free and open debate regarding the law's scope. This includes both original enactments such as Section 215's revisions and subsequent reauthorizations. The Board's recommendation distinguishes between "the purposes and framework" of surveillance authorities and factual information specific to individual persons or operations. While sensitive operational details regarding the conduct of government surveillance programs should remain classified, and while legal interpretations of the application of a statute in a particular case may also be secret so long as the use of that technique in a particular case is secret, the government's interpretations of statutes that provide the basis for ongoing surveillance programs affecting Americans can and should be made public. This includes intended uses of broadly worded authorities at the time of enactment as well as post-enactment novel interpretations of laws already on the books.

**Discussion of Status:**

Intelligence Community representatives have advised us that they are committed to implementing this recommendation, as reflected in the transparency principles described above that they will soon be releasing. Further, in connection with the Board's July 2014 report on the Section 702 surveillance program, the Intelligence Community worked closely with the Board to declassify a great deal of information about the scope and nature of that surveillance program. The Intelligence Community advises us that it is continuing to evaluate ways in which to provide additional public transparency regarding surveillance authorities.

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<sup>6</sup> Board Members Rachel Brand and Elisebeth Collins Cook did not join this recommendation.

## **SECTION 702 REPORT RECOMMENDATIONS**

### **Recommendation 1: Revise NSA Procedures to Better Document the Foreign Intelligence Reason for Targeting Decisions**

#### **Status:**

Accepted, but awaiting implementation

#### **Text of the Board's Recommendation:**

The NSA's targeting procedures should be revised to (a) specify criteria for determining the expected foreign intelligence value of a particular target, and (b) require a written explanation of the basis for that determination sufficient to demonstrate that the targeting of each selector is likely to return foreign intelligence information relevant to the subject of one of the certifications approved by the FISA court. The NSA should implement these revised targeting procedures through revised guidance and training for analysts, specifying the criteria for the foreign intelligence determination and the kind of written explanation needed to support it. We expect that the FISA court's review of these targeting procedures in the course of the court's periodic review of Section 702 certifications will include an assessment of whether the revised procedures provide adequate guidance to ensure that targeting decisions are reasonably designed to acquire foreign intelligence information relevant to the subject of one of the certifications approved by the FISA court. Upon revision of the NSA's targeting procedures, internal agency reviews, as well as compliance audits performed by the ODNI and DOJ, should include an assessment of compliance with the foreign intelligence purpose requirement comparable to the review currently conducted of compliance with the requirement that targets are reasonably believed to be non-U.S. persons located outside the United States.

#### **Explanation for the Recommendation:**

This recommendation is designed to ensure that when the NSA selects a target for surveillance under Section 702, a valid foreign intelligence purpose supports the targeting decision.

The Board's review of the Section 702 program showed that the procedures for documenting targeting decisions within the NSA, and the procedures for reviewing those decisions within the executive branch, focus primarily on establishing that a potential target is a non-U.S. person reasonably believed to be located abroad. The process for documenting and reviewing the foreign intelligence purpose of a targeting decision is not as rigorous, and typically agency personnel indicate what category of foreign intelligence information they expect to obtain from targeting a particular person in a single brief sentence that contains only minimal information about why the analyst believes that

targeting this person will yield foreign intelligence information. However, the “foreign intelligence purpose” determination is a critical part of the statutory framework under Section 702. Changes to the targeting procedures that provide more guidance to analysts and require more explanation regarding the foreign intelligence purpose of a targeting will help analysts better articulate this element of their targeting decisions. When analysts articulate at greater length the bases for their targeting decisions, the executive branch oversight team that later reviews those decisions will be better equipped to meaningfully review them.

**Discussion of Status:**

The Administration has agreed to implement this recommendation.

The Intelligence Community, working with the Department of Justice, plans to modify the NSA’s targeting procedures in accordance with the Board’s recommendation. The revised targeting procedures will be submitted to the FISC for approval when the government next seeks to renew its Section 702 certifications, which are valid for up to one year.

As part of this process, the Intelligence Community has agreed to share the revised language of the targeting procedures with the Board before submitting it for FISC approval, in order to ensure that the revised language is consistent with the Board’s recommendation.

The NSA also has committed to revising its internal guidance and training for analysts as recommended by the Board, and it has informed the Board of the proposed schedule on which it intends to implement these changes.

Once the NSA’s targeting procedures have been modified and the NSA has made the corresponding changes to its internal guidance and training, the compliance audits that are performed regularly by the NSA and by a separate DOJ/ODNI oversight team will, as recommended by the Board, include more meaningful assessments of whether the individual targeting decisions made by NSA analysts under Section 702 were justified by a foreign intelligence purpose.

**Recommendation 2: Update the FBI’s Minimization Procedures to Accurately Reflect the Bureau’s Querying of Section 702 Data for Non-Foreign Intelligence Matters, and Place Additional Limits on the FBI’s Use of Section 702 Data in Such Matters**

**Status:**

Being implemented

**Text of the Board's Recommendation:**

The FBI's minimization procedures should be updated to more clearly reflect the actual practice for conducting U.S. person queries, including the frequency with which Section 702 data may be searched when making routine queries as part of FBI assessments and investigations. Further, some additional limits should be placed on the FBI's use and dissemination of Section 702 data in connection with non-foreign intelligence criminal matters.<sup>7</sup>

**Explanation for the Recommendation:**

Even though FBI analysts and agents who solely work on non-foreign intelligence crimes are not *required* to conduct queries of databases containing Section 702 data, they are *permitted* to conduct such queries and many do conduct such queries. This is not clearly expressed in the FBI's minimization procedures, and the minimization procedures should be modified to better reflect this actual practice. The Board believes that it is important for accountability and transparency that the minimization procedures provide a clear representation of operational practices.

In addition, in light of the privacy and civil liberties implications of using Section 702 information, collected under lower thresholds and for a foreign intelligence purpose, in the FBI's pursuit of non-foreign intelligence crimes, the Board believes it is appropriate to place some additional limits on what can be done with Section 702 information.

**Discussion of Status:**

The Administration has committed to implementing both parts of this recommendation.

With respect to the first part of the recommendation, the Intelligence Community is revising the FBI's minimization procedures to make clear the manner in which the FBI is permitted to query Section 702 data with U.S. person identifiers in non-foreign intelligence criminal assessments and investigations. The revised minimization procedures will be submitted to the FISC for approval when the government next seeks to renew its Section 702 certifications, which are valid for up to one year. The Intelligence Community has agreed to share the revised language of the minimization procedures with the Board before submitting it for FISC approval, in order to ensure that the revised language is consistent with the Board's recommendation.

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<sup>7</sup> Board Chairman David Medine and Board Member Patricia Wald joined this recommendation but in a separate statement recommended requiring judicial approval for the FBI's use of Section 702 data in non-foreign intelligence matters. Board Members Rachel Brand and Elisebeth Collins Cook would require an analyst who has not had FISA training to seek supervisory approval before *viewing* responsive 702 information and would require higher-level Justice Department approval before Section 702 information could be used in the investigation or prosecution of a non-foreign intelligence crime.

The Administration has informed us that it also plans to implement the second part of the recommendation, and has developed a proposal that will limit the circumstances in which Section 702 data may be used in connection with non-national security related criminal matters.

### **Recommendation 3: Require NSA and CIA Personnel to Provide a Statement of Facts Explaining their Foreign Intelligence Purpose Before Querying Section 702 Data Using U.S. Person Identifiers, and Develop Written Guidance on Applying this Standard**

#### **Status:**

Accepted, but awaiting implementation

#### **Text of the Board's Recommendation:**

The NSA and CIA minimization procedures should permit the agencies to query collected Section 702 data for foreign intelligence purposes using U.S. person identifiers only if the query is based upon a statement of facts showing that it is reasonably likely to return foreign intelligence information as defined in FISA. The NSA and CIA should develop written guidance for agents and analysts as to what information and documentation is needed to meet this standard, including specific examples.<sup>8</sup>

#### **Explanation for the Recommendation:**

Under the NSA and CIA minimization procedures for the Section 702 program, analysts are permitted to perform queries of databases that hold communications acquired under Section 702 using query terms that involve U.S. person identifiers. Such queries are designed to identify communications in the database that involve or contain information relating to a U.S. person. Although the Board recognizes that NSA and CIA queries are subject to rigorous oversight by the DOJ's National Security Division and the ODNI (with the exception of metadata queries at the CIA, which are not reviewed by the oversight team), we believe that NSA and CIA analysts, before conducting a query involving a U.S. person identifier, should provide a statement of facts illustrating why they believe the query is reasonably likely to return foreign intelligence information.<sup>9</sup> Implementing these measures will help to ensure that analysts at the NSA and CIA do not access or view communications acquired under Section 702 that involve or concern U.S. persons when there is no valid foreign intelligence reason to do so.

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<sup>8</sup> Board Chairman David Medine and Board Member Patricia Wald joined this recommendation but in a separate statement recommended requiring judicial approval for the use of U.S. person queries of Section 702 data for foreign intelligence purposes.

<sup>9</sup> Board Member Elisebeth Collins Cook would not extend a new requirement to CIA metadata queries.

**Discussion of Status:**

The Administration has committed to implementing both parts of this recommendation, and has developed a proposal to do so.

With respect to the NSA, the agency's internal guidance for analysts already includes the requirements recommended here.

With respect to the CIA's metadata queries using U.S. person identifiers, the CIA accepted and plans to implement this recommendation as it refines internal processes for data management.

**Recommendation 4: Provide the FISC with Documentation of Section 702 Targeting Decisions and U.S. Person Queries****Status:**

Being implemented

**Text of the Board's Recommendation:**

To assist in the FISA court's consideration of the government's periodic Section 702 certification applications, the government should submit with those applications a random sample of tasking sheets and a random sample of the NSA's and CIA's U.S. person query terms, with supporting documentation. The sample size and methodology should be approved by the FISA court.

**Explanation for the Recommendation:**

Providing a random sample of targeting decisions would allow the FISC to take a retrospective look at the targets selected over the course of a recent period of time. The data could help inform the FISA court's review process by providing some insight into whether the government is, in fact, satisfying the "foreignness" and "foreign intelligence purpose" requirements, and it could signal to the court that changes to the targeting procedures may be needed, or prompt inquiry into that question. The data could provide verification that the government's representations during the previous certification approval were accurate, and it could supply the FISC with more information to use in determining whether the government's acquisitions comply with the statute and the Fourth Amendment.

Similarly, a retrospective sample of U.S. person query terms and supporting documentation will allow the FISC to conduct a fuller review of the government's minimization procedures. Such a sample could allow greater insight into the methods by which information gathered under Section 702 is being utilized, and whether those methods are consistent with the minimization procedures. While U.S. person queries by the NSA and CIA are already subject

to rigorous executive branch oversight (with the exception of metadata queries at the CIA), supplying this additional information to the FISC could help guide the court by highlighting whether the minimization procedures are being followed and whether changes to those procedures are needed.

**Discussion of Status:**

The Administration has agreed to supply such information to the FISC as recommended by the Board, and is working with the FISC to establish the manner for doing so.

**Recommendation 5: Create and Submit to the FISC a Single Consolidated Document Describing All Significant Rules Governing Operation of the Section 702 Program**

**Status:**

Being implemented

**Text of the Board's Recommendation:**

As part of the periodic certification process, the government should incorporate into its submission to the FISA court the rules for operation of the Section 702 program that have not already been included in certification orders by the FISA court, and that at present are contained in separate orders and opinions, affidavits, compliance and other letters, hearing transcripts, and mandatory reports filed by the government. To the extent that the FISA court agrees that these rules govern the operation of the Section 702 program, the FISA court should expressly incorporate them into its order approving Section 702 certifications.

**Explanation for the Recommendation:**

The government's operation of the Section 702 program must adhere to the targeting and minimization procedures that are approved by the FISA court, as well as to the pertinent Attorney General guidelines and the statute itself. The government also makes additional representations to the FISA court through compliance notices and other filings, as well as during hearings, that together create a series of more rigorous precedents and a common understanding between the government and the court regarding the operation of the program. Such rules have precedential value and create real consequences, as the government considers itself bound to abide by the representations it makes to the FISA court. To the extent that the rules which have emerged from these representations and this interactive process govern the operation of the Section 702 program, they should be memorialized in a single place and incorporated into the FISC's certification review. This consolidation of rules will also facilitate congressional oversight of the Section 702

program, and the Board views this recommendation as a measure to promote good government.

**Discussion of Status:**

The Administration has begun creating the consolidated document recommended by the Board, and it has advised the FISC of its intent to submit this document to the court when the government next seeks to renew its Section 702 certifications.

**Recommendation 6: Periodically Assess Upstream Collection Technology to Ensure that Only Authorized Communications Are Acquired**

**Status:**

Accepted, but awaiting implementation

**Text of the Board's Recommendation:**

To build on current efforts to filter upstream communications to avoid collection of purely domestic communications, the NSA and DOJ, in consultation with affected telecommunications service providers, and as appropriate, with independent experts, should periodically assess whether filtering techniques applied in upstream collection utilize the best technology consistent with program needs to ensure government acquisition of only communications that are authorized for collection and prevent the inadvertent collection of domestic communications.

**Explanation for the Recommendation:**

Upstream collection involves a greater risk that the government will acquire wholly domestic communications, which it is not authorized to intentionally collect under Section 702. Ensuring that the upstream collection process comports with statutory limits and with agency targeting procedures involves an important technical process of filtering out wholly domestic communications. The government acknowledges, however, that the technical methods used to prevent the acquisition of domestic communications do not completely prevent them from being acquired. Even if domestic communications were to constitute a very small percentage of upstream collection, this could still result in a large overall number of purely domestic communications being collected. Mindful of these considerations, the Board believes that there should be an ongoing dialogue, both within the government and in cooperation with telecommunications providers or independent experts, to ensure that the means being used to filter for domestic communications use the best technology. We also believe that the determination about whether this is the case should be continually revisited.

**Discussion of Status:**

The NSA has begun assessing how it will implement this recommendation. Staff from the NSA and the PCLOB have made arrangements to discuss the ongoing progress of these efforts and ensure that the ultimate result is consistent with the Board's recommendation.

**Recommendation 7: Examine the Technical Feasibility of Limiting Particular Types of "About" Collection****Status:**

Accepted, but awaiting implementation

**Text of the Board's Recommendation:**

The NSA periodically should review the types of communications acquired through "about" collection under Section 702, and study the extent to which it would be technically feasible to limit, as appropriate, the types of "about" collection.

**Explanation for the Recommendation:**

In the upstream collection process, the NSA acquires not only Internet communications sent to and from the selector, such as an email address, used by a targeted person, but also communications that simply contain reference to the selector, sometimes in the body of the communication. These are termed "about" communications, because they are not to or from, but rather "about" the communication selectors of targeted persons. In addition, for technical reasons, "about" collection is needed even to acquire some communications that actually are to or from a target. Other types of "about" collection can result in the acquisition of communications between two non-targets, thereby implicating greater privacy concerns. Moreover, the permissible scope of targeting in the Section 702 program is broad enough that targets need not themselves be suspected terrorists or other bad actors. Thus, if the email address of a target appears in the body of a communication between two non-targets, it does not necessarily mean that either of the communicants is in touch with a suspected terrorist.

While "about" collection is valued by the government for its unique intelligence benefits, it is, to a large degree, an inevitable byproduct of the way the NSA conducts much of its upstream collection. At least some forms of "about" collection present novel and difficult issues regarding the balance between privacy and national security. But current technological limits make any debate about the proper balance somewhat academic, because it is largely unfeasible to limit "about" collection without also eliminating a substantial portion of upstream's "to/from" collection, which would more drastically hinder the government's counterterrorism efforts. We therefore recommend that the NSA work to develop technology that would enable it to identify and distinguish among the

types of “about” collection at the acquisition stage, and then selectively limit or modify its “about” collection, as may later be deemed appropriate.

**Discussion of Status:**

As with the previous recommendation, the NSA has begun assessing how it will implement this recommendation. Staff from the NSA and the PCLOB have made arrangements to discuss the ongoing progress of these efforts and ensure that the ultimate result is consistent with the Board’s recommendation.

**Recommendation 8: Publicly Release the Current Minimization Procedures for the CIA, FBI, and NSA**

**Status:**

Being implemented

**Text of the Board’s Recommendation:**

To the maximum extent consistent with national security, the government should create and release, with minimal redactions, declassified versions of the FBI’s and CIA’s Section 702 minimization procedures, as well as the NSA’s current minimization procedures.

**Explanation for the Recommendation:**

The Board believes that the public would benefit from understanding the procedures that govern the acquisition, use, retention, and dissemination of information collected under Section 702. The Board respects the government’s need to protect its operational methodologies and practices, but it also recognizes that transparency enables accountability to the public that the government serves. Therefore, the Board urges the government to engage in a declassification review and, to the greatest extent possible without jeopardizing national security, release unredacted versions of the FBI, CIA, and NSA minimization procedures.

**Discussion of Status:**

The Intelligence Community has been working to declassify and release all three agencies’ current minimization procedures. The Board has been informed that public release is imminent.

## **Recommendation 9: Adopt Measures to Document and Publicly Release Information Showing How Frequently the NSA Acquires and Uses Communications of U.S. Persons and People Located in the United States**

### **Status:**

Accepted, but awaiting implementation

### **Text of the Board's Recommendation:**

The government should implement five measures to provide insight about the extent to which the NSA acquires and utilizes the communications involving U.S. persons and people located in the United States under the Section 702 program. Specifically, the NSA should implement processes to annually count the following: (1) the number of telephone communications acquired in which one caller is located in the United States; (2) the number of Internet communications acquired through upstream collection that originate or terminate in the United States; (3) the number of communications of or concerning U.S. persons that the NSA positively identifies as such in the routine course of its work; (4) the number of queries performed that employ U.S. person identifiers, specifically distinguishing the number of such queries that include names, titles, or other identifiers potentially associated with individuals; and (5) the number of instances in which the NSA disseminates non-public information about U.S. persons, specifically distinguishing disseminations that includes names, titles, or other identifiers potentially associated with individuals. These figures should be reported to Congress in the NSA Director's annual report and should be released publicly to the extent consistent with national security.

### **Explanation for the Recommendation:**

Since the enactment of the FISA Amendments Act in 2008, the extent to which the government incidentally acquires the communications of U.S. persons under Section 702 has been one of the biggest open questions about the program, and a continuing source of public concern. The executive branch has maintained that it cannot provide such a number — because it is often difficult to determine from a communication the nationality of its participants, and because the large volume of collection under Section 702 would make it impossible to conduct such determinations for every communication that is acquired. The executive branch also has pointed out that any attempt to document the nationality of participants to communications acquired under Section 702 would actually be invasive of privacy, because it would require government personnel to spend time scrutinizing the contents of private messages that they otherwise might never access or closely review.

As a result of this impasse, lawmakers and the public do not have even a rough estimate of how many communications of U.S. persons are acquired under Section 702. Based on information provided by the NSA, the Board believes that certain measures can be adopted that could provide insight into these questions without unduly burdening the NSA or

disrupting the work of its analysts, and without requiring the agency to further scrutinize the contents of U.S. persons' communications. We believe that the NSA could implement five measures, listed above, that collectively would shed some light on the extent to which communications involving U.S. persons or people located in the United States are being acquired and utilized under Section 702.

**Discussion of Status:**

The NSA has begun assessing how it will implement this recommendation.

Subparts (1) and (2) of the recommendation involve counting how many telephone calls and upstream Internet communications the NSA acquires in which one participant is located in the United States. As noted in the Board's report, questions remain about whether such figures can accurately be recorded. The NSA has committed to studying this question, and staff from the NSA and the PCLOB have made arrangements to discuss the ongoing progress of its efforts.

**Recommendation 10: Develop a Methodology to Assess the Value of Counterterrorism Programs**

**Status:**

Not implemented

**Text of the Board's Recommendation:**

The government should develop a comprehensive methodology for assessing the efficacy and relative value of counterterrorism programs.

**Explanation for the Recommendation:**

Determining the efficacy and value of particular counterterrorism programs is critical. Without such determinations, policymakers and courts cannot effectively weigh the interests of the government in conducting a program against the intrusions on privacy and civil liberties that it may cause. Accordingly, the Board believes that the government should develop a methodology to gauge and assign value to its counterterrorism programs, and use that methodology to determine if particular programs are meeting their stated goals. The Board is aware that the ODNI conducts studies to measure the relative efficacy of different types of intelligence activities to assist in budgetary decisions. The Board believes that this important work should be continued, as well as expanded so as to differentiate more precisely among individual programs, in order to assist policymakers in making informed, data-driven decisions about governmental activities that have the potential to invade the privacy and civil liberties of the public.

**Discussion of Status:**

The Intelligence Community has not yet undertaken an effort, as the Board recommended, to develop and utilize a methodology for gauging the efficacy of its counterterrorism activities. PCLOB staff have been in discussions with the Intelligence Community about the implementation of this recommendation. We note that the Intelligence Community has been fully cooperative with the Board's own ongoing effort to research ways that intelligence components measure the usefulness of their programs. This has included providing information about ODNI's efforts to annually assess the cost and relative value (as measured by quantitative metrics and qualitative customer views) of Intelligence Community programs, including counterterrorism.