NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

10 March 2014

Mr. James R. Silkenat
President, American Bar Association
321 North Clark Street
Chicago, IL 60654-7598

Dear Mr. Silkenat:

Thank you very much for your letter of February 20, 2014, regarding the importance of preserving and respecting the attorney-client privilege. We greatly appreciate the work of the American Bar Association (ABA) and the organization's mission of "defending liberty and delivering justice." At a time when certain aspects of the reporting and commentary about the National Security Agency (NSA) shed more heat than light on important matters of security, liberty, and privacy worthy of meaningful public discussion, we also appreciate the thoughtful and constructive approach of your inquiry.

NSA is firmly committed to the rule of law and the bedrock legal principle of attorney-client privilege, which as you noted, is one of the oldest recognized privileges for confidential communications. We absolutely agree that the attorney-client privilege deserves the strong protections afforded by our legal system, and that it is vital that proper policies and practices are in place to prevent its erosion. Although it is not possible to address press reports about any specific alleged intelligence activities—and thus to point out the absence of critical factual information in any such reports—we appreciate the opportunity to clarify our current policies and practices and to work with the ABA to ensure that the public has confidence that our intelligence institutions respect the role of privileged communications.

Let me be absolutely clear: NSA has afforded, and will continue to afford, appropriate protection to privileged attorney-client communications acquired during its lawful foreign intelligence mission in accordance with privacy procedures required by Congress, approved by the Attorney General, and, as appropriate, reviewed by the Foreign Intelligence Surveillance Court. Moreover, NSA cannot and does not ask its foreign partners to conduct any intelligence activity that it would be prohibited from conducting itself in accordance with U.S. law. This broad principle applies to all of our signals intelligence activities, including any activities that could implicate potentially privileged communications.

NSA conducts signals intelligence activities in accordance with Executive Order (EO) 12333 and the Foreign Intelligence Surveillance Act (FISA), as appropriate. As you are aware, under FISA the Agency may not target any unconsenting U.S. person anywhere in the world under circumstances in which the U.S. person would enjoy a reasonable expectation of privacy without an individualized determination of probable cause by a federal judge (absent certain limited exceptions, such as an emergency) that the target is a foreign power or an agent of a foreign power. The term "U.S. person" could include an individual, company, or other organization such as a U.S. law firm. Moreover, FISA states that "[n]o otherwise privileged

communication obtained in accordance with, or in violation of, the provisions of this Act shall lose its privileged character." 50 U.S.C. §1806(a). Finally, FISA also provides that "[n]o information acquired from electronic surveillance pursuant to this title may be used or disclosed by Federal officers or employees except for lawful purposes." *Id.*

We appreciate that "[t]he ABA understands the critical role that NSA plays in gathering intelligence information and protecting our national security." As the ABA acknowledges, "during the course of these activities, it is inevitable that certain communications between U.S. law firms and their clients may be collected or otherwise obtained by the agency." Given the inevitability of incidental collection of U.S. person information during the course of NSA's lawful foreign intelligence mission—to include potentially privileged information—the issue is how to provide appropriate protections for any such information when it may be acquired. Accordingly, EO 12333 and FISA require compliance with procedures designed to protect the privacy of U.S. persons, which would include U.S. law firms. These privacy procedures must be approved by the Attorney General and, when appropriate, by the Foreign Intelligence Surveillance Court.

These procedures, many of which have been recently declassified and are available at icontherecord.tumblr.com, are designed to minimize the acquisition, retention, and dissemination of information to, from, or about U.S. persons, including any potentially privileged information, consistent with NSA's foreign intelligence mission. For example, these procedures require NSA personnel to destroy any non-pertinent information of or concerning any U.S. person that NSA may incidentally acquire during signals intelligence operations.[1] This destruction requirement applies to privileged as well as non-privileged communications. Moreover, as a general matter, these procedures provide that the dissemination of information about U.S. persons—privileged or not—is expressly prohibited unless it is necessary to understand foreign intelligence or assess its importance; is evidence of a crime; or indicates a threat of death or serious bodily harm.[2]

Recognizing that special considerations apply to potentially privileged communications, NSA's approved procedures also contain provisions that expressly address privileged material and require consultation with the Office of General Counsel when such situations arise. For example, NSA's procedures state:

> All proposed disseminations of information constituting U.S. person privileged communications (e.g. attorney/client, doctor/patient) and all information concerning criminal activities or criminal or judicial proceedings in the United States must be reviewed by the Office of General Counsel prior to dissemination.

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[1] See generally, U.S. Signals Intelligence Directive No. 18 (USSID SP00018) dated January 25, 2011 (implementing the procedures approved by the Attorney General contained in Department of Defense Regulation 5240.1-R and its classified annex). See also Section 3(b)(1) of *Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978,* as amended, dated October 3, 2011 (hereinafter NSA's Section 702 Minimization Procedures).

[2] 50 U.S.C. § 1801(h)(2) & (h)(3); see also USSID SP00018, Section 7.2; NSA's Section 702 Minimization Procedures, Section 6(b).

USSID SP00018, Section 7.4.[3]

The purpose of this requirement is to ensure that, in the event NSA personnel discover a potentially privileged communication during their review of signals intelligence information, the Office of General Counsel must be consulted on a case-by-case basis to determine whether the information is in fact privileged and, if so, the appropriate steps to be taken.

Although it is not possible to discuss the specific advice provided with respect to any particular classified intelligence operation, NSA's Office of General Counsel has, in the past, provided clear guidance on the appropriate steps to protect privileged information. Such steps could include—among other advice tailored to the particular facts and circumstances under which sensitive intelligence activities have been or are to be undertaken—requesting that certain collection or reporting be limited; that intelligence reports be written so as to prevent or limit the inclusion of privileged material and to exclude U.S. identities; and that dissemination of such reports be limited and subject to appropriate warnings or restrictions on use.

Finally, it is important to note that NSA's approved procedures expressly recognize that the acquisition of privileged communications raises particularly sensitive concerns in the context of criminal proceedings. For example, NSA's procedures for certain FISA information state:

> As soon as it becomes apparent that a communication is between a person who is known to be under a criminal indictment in the United States and an attorney who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring of that communication will cease and the communication will be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the communication containing that conversation will be segregated and the National Security Division of the Department of Justice will be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence information contained therein.

Section 4 of NSA's Section 702 Minimization Procedures.

In sum, NSA recognizes the importance of attorney-client privileged communications consistent with our legal traditions and the provisions of the Foreign Intelligence Surveillance Act; has privacy procedures approved by the Attorney General and the Foreign Intelligence Surveillance Court to address any incidentally acquired U.S. person information and issues of attorney-client privilege when they arise; has taken a variety of appropriate steps to protect potentially privileged information in any circumstance in which it may be encountered; and works closely with the Department of Justice to ensure that privileged communications are handled properly in the context of criminal proceedings.

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[3] See also, Section 4 of NSA's Section 702 Minimization Procedures.

If you have additional questions or concerns, I would encourage continued dialogue with our General Counsel, Raj De, at 301-688-6705.

KEITH B. ALEXANDER
General, U.S. Army
Director, NSA