

Enclosure 2

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Office of the Inspector General of the Intelligence Community



**Unclassified Summary of Assessment of Intelligence Community
Foreign Intelligence Surveillance Act Title V Information (INS-2016-003)**

November 28, 2016

Important Notice

This is an unclassified summary of a classified assessment that was issued on November 28, 2016 by the Inspector General of the Intelligence Community.

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Introduction

In accordance with Section 108 of the USA FREEDOM Act of 2015, the Office of the Inspector General of the Intelligence Community (IC IG) completed an assessment of information acquired under Title V of the Foreign Intelligence Surveillance Act (FISA) (50 U.S.C. § 1861 et seq.) during calendar years 2012 through 2014.¹ Accordingly, the IC IG assessed:

- the importance of information acquired under Title V of FISA to the activities of the IC;
- the manner in which business record information was collected, retained, analyzed, and disseminated by the IC under Title V;
- minimization procedures used by IC elements under Title V, and whether the minimization procedures adequately protect the constitutional rights of United States persons;² and
- minimization procedures proposed by an IC element under Title V that were modified or denied by the Foreign Intelligence Surveillance Court (FISC).

Methodology

To conduct this assessment, inspectors from the IC IG interviewed officials and examined related reports including those issued by the Department of Justice (DOJ) and National Security Agency (NSA) Offices of Inspectors General (OIGs), the Privacy and Civil Liberties Oversight Board (PCLOB), and the ODNI. This assessment was based significantly on program stakeholder interviews, reviews of FISC applications and orders issued from 2012 through 2014, and reviews of reports issued by the NSA and DOJ OIGs. We relied heavily on the findings in these reports to assess the importance of Section 215 information and adequacy of minimization procedures to protect the constitutional rights of United States persons; we did not independently validate the findings in those reports.³

¹ Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015. P.L. 114-23, 2 June 2015, 129 Stat. 268.

² “United States person” is defined as a citizen, legal permanent resident, an unincorporated association in which a “substantial number” of members are citizens or legal permanent residents, or corporations incorporated in the United States as long as such associations or corporations are not themselves “foreign powers.” 50 U.S.C. § 1801(i).

³ Section 215 of the USA PATRIOT Act allows the FBI Director or his designee to seek orders from the FISC for “any tangible things,” including books, records, and other items from any business organization, or entity provided the item or items are relevant to an authorized investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

The IC IG reviewed business records applications submitted to and orders approved by the FISC from 2012 through 2014 as well as notices filed with the FISC and the Intelligence Oversight Board regarding non-compliance with minimization procedures or FISC Orders and actions taken to mitigate recurrence. The IC IG also reviewed and analyzed FBI Interim and Final Minimization Procedures and minimization procedures contained in business records applications and orders. In addition, we reviewed and discussed FISC Rules of Procedure and the process for modifying applications with the DOJ's National Security Division (NSD), which represents the IC before the FISC on business record applications and conducts oversight of the IC's implementation of FISC authorizations.

The IC IG incorporated technical comments received from various stakeholders including the DOJ OIG, DOJ NSD, FBI, and NSA on a draft of this report. A draft of this report was also provided to the Attorney General and the Director of National Intelligence. This review was conducted in accordance with Council of Inspectors General on Integrity and Efficiency 2012 Quality Standards for Inspections and Evaluations.

Findings

From 2012 through 2014, the IC did not have a formal process to assess the importance of information obtained using Section 215 authority.

The IC had no formal process from 2012 through 2014 to assess the importance of information obtained using Section 215 authority, although IC officials asserted that such information was vital to IC missions. According to IC officials, use of Section 215 authority was not intended to produce intelligence that would provide a single source of information to stop terrorist attacks, but instead could be used to complement programs that worked in tandem with other intelligence sources to provide a comprehensive picture of potential national security threats.

From 2012 through 2014, the IC made several attempts to develop formally a range of quantitative and qualitative processes to evaluate the importance of Section 215 information. Obtaining input from intelligence professionals and consumers was the primary method used to determine whether information collected using Section 215 authority was responsive to intelligence needs or advanced FBI investigations. The ODNI also published annual statistics regarding use of Title V of FISA. However, attempts by the IC to qualitatively assess the importance of specific information obtained using Section 215 authority were ineffective due to challenges identifying appropriate consumers of the information or obtaining necessary feedback from customers.

Observation

On 28 November 2015, the bulk collection of business records authorized under Section 215 ended when the final FISC order authorizing collection expired. The USA FREEDOM Act, among other things, provides a new mechanism through which the NSA may use FISC-approved selectors to obtain call detail records from telecommunications service providers.⁴ The Act neither required the NSA to establish specific measures to assess the importance of the information obtained nor to assess whether the information provided to NSA under the new program continues to meet the IC's needs. While challenging, the IC should look for opportunities to establish metrics to assess the importance of information obtained. Going forward, identifying and tracking measures of effectiveness to assess the importance of information collected could help determine whether the goals are achieved and resources are effectively and efficiently used as required by federal internal control standards.

The IC implemented and generally complied with applicable minimization procedures to collect, retain, analyze, and disseminate information obtained using Section 215 authority.

The IC implemented and generally complied with the minimization procedures that were applicable to its use of Section 215 authority. Although DOJ's Final Procedures were limited to the retention and dissemination of non-publicly available U.S. person information, minimization procedures for the NSA had a broader scope, and imposed limits on the type of information collected and the manner in which it was collected, retained, analyzed, and disseminated. Minimization procedures also contained extensive oversight requirements to verify compliance and required corrective actions for non-compliance.

Minimization procedures included provisions to safeguard U.S. person information and constitutional rights.

According to the ODNI Office of General Counsel, Section 215 contains a range of safeguards that protect civil liberties. For example, Section 215 can only be used to obtain foreign intelligence information for an investigation not concerning a U.S. person, or, if concerning a U.S. person, to protect against international

⁴ USA FREEDOM Act of 2015 § 109. The USA FREEDOM Act requires the DNI to report information concerning U.S. person search terms and queries of certain unminimized, FISA-acquired information, as well as information concerning unique identifiers used to communicate information collected pursuant to certain FISA orders.

terrorism or clandestine intelligence activities.⁵ Moreover, the government must submit an application to the FISC for approval to obtain business records pursuant to Section 215.⁶ In addition, the FISC reviewed notices of incidents of non-compliance submitted by DOJ on behalf of the NSA; DOJ NSD also submitted compliance notices to the FISC for FBI non-bulk business records. If the FISC finds that incidents of non-compliance resulted from processes inconsistent with minimization procedures, the court can require changes to internal systems or procedures and reporting on progress made to achieve compliance. In 2016, the DOJ OIG concluded that the process used to obtain non-bulk business records orders from 2012 through 2014 contained safeguards that protected U.S. persons from the unauthorized collection, retention, and dissemination of nonpublic information about them.

FISC did not deny business record applications, but the extent of modifications by the FISC was not always apparent.

While the FISC did not deny business record applications, the extent to which the FISC required DOJ to revise proposed business records applications, and the minimization procedures, was not always apparent. DOJ's National Security Division considers modifications to be limited to any changes by the FISC *after* DOJ filed the final application and order. NSD does not consider revisions to applications and orders made at the request of the FISC after it reviewed "read copies" to constitute modifications.⁷ According to annual statistics provided to Congress by the Attorney General pursuant to 50 U.S.C. §§ 1807 and 1862(b) DOJ, the FISC made modifications to 135 proposed orders in applications for access to business records from 2012 through 2014.⁸

FISC Rules of Procedure required DOJ to provide the FISC with proposed applications for business records prior to formal submission. According to the FISC, as part of the process through which the court interacts with the government in reviewing proposed applications, the FISC's legal staff frequently examined the legal sufficiency of applications before they were presented in final

⁵ Office of the Director of National Intelligence, IC on the Record, *Privacy, Technology & National Security. An Overview of Intelligence Collection*—Hon. Robert S. Litt, ODNI General Counsel. 18 July 2013. Remarks as prepared for delivery to the Brookings Institute, Washington, D.C.

⁶ The USA FREEDOM Act permits the Attorney General to authorize the emergency production of business records. In such cases, the government must still submit an application to the FISC within 7 days of that authorization.

⁷ "Read copy" is a term used to refer to an advance copy of an application provided to the FISC.

⁸ The statistics reflect only the number of final applications submitted to and acted on by the FISC. The statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely.

form to a judge. These interactions consisted of telephone conversations in which legal staff asked the government questions about the legal and factual elements of applications and submissions; meetings to obtain additional information; or hearings in cases in which a judge assessed the need for additional information to rule on a matter. According to the FISC, in 2013 it began tracking the frequency with which modifications and denials occurred. However, statistics provided to Congress by the Attorney General reflected only the number of business records applications submitted to the FISC that were denied or withdrawn, not those filed as advance copies and subsequently withdrawn.⁹

Conclusion

Information acquired under Section 215 authority supported activities of the IC in various ways, but without specific measures, the importance of the information cannot be fully assessed. Requirements placed on bulk collection through FISC-approved minimization procedures set limits on the manner in which information was collected, retained, analyzed, and disseminated. Minimization procedures for non-bulk collection governed the retention and dissemination of non-publicly available U.S. person information. However, the extent to which the FISC required DOJ to revise proposed business records applications, and the minimization procedures, was not always apparent.

⁹ United States Foreign Intelligence Court letter from the Presiding Honorable Reggie B. Walton, Presiding Judge, to the Committee on the Judiciary, United States Senate. 29 July 2013.