



PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

(U) RECOMMENDATIONS ASSESSMENT REPORT

August 31, 2022¹

(U) INTRODUCTION

(U) The Privacy and Civil Liberties Oversight Board (“PCLOB” or “Board”), in its reports concerning various counterterrorism programs, has made recommendations to ensure that these programs appropriately balance national security with privacy and civil liberties. Specifically, the PCLOB has made recommendations in its reports on the government’s USA PATRIOT Act Section 215 and Foreign Intelligence Surveillance Act (“FISA”) Section 702 surveillance programs (“Section 215 Report” and “Section 702 Report,” respectively), the implementation of Presidential Policy Directive – 28, Signals Intelligence Activities (“PPD-28 Report”), Central Intelligence Agency (“CIA”) financial data activities in support of ISIL-related counterterrorism efforts pursuant to Executive Order 12333 (“CIA Deep Dive 1”), and, most recently, the use of XKEYSCORE by the National Security Agency (“NSA”) as an analytic tool for counterterrorism purposes (“NSA Deep Dive Report”).²

(U) The PCLOB previously released assessments of the status of the Section 215 Report and Section 702 Report recommendations in 2015 and 2016 (“2015 Recommendations Assessment Report” and “2016 Recommendations Assessment Report,” respectively). The

¹ (U) This report reflects the status of implementation of PCLOB recommendations as of August 31, 2022. Any delay from that date to the date of publication is due to completion of accuracy and classification review.

² (U) CIA Deep Dive 1 and NSA Deep Dive reports recommendations assessments remain classified and are thus excluded from this report. The PCLOB will soon provide a classified annex to congress on these two reports and will subsequently work with the IC on what can be released in a public report.

PCLOB issues this report from PCLOB staff (“Staff”) to provide an update on the status of those recommendations and to assess, for the first time, the status of the recommendations contained within the PPD-28 Report.³

(U) This report describes the status of each prior Board-level recommendation using terms first defined in the 2015 Recommendations Assessment Report:⁴

- **Implemented:** The Administration has accepted and incorporated the recommendation into relevant activities.
- **Not implemented:** The recommendation has not been adopted.
- **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.⁵

(U) As set forth in greater detail below, at present, Congress and the Intelligence Community (“IC”) have implemented ten of the Board’s Section 215 Report

³ (U) This report was prepared in large part prior to the appointments of Board Chair Sharon Bradford Franklin and Board Members Beth A. Williams and Richard E. DiZinno. As a result, those Members were not involved with the production or approval of this document, including while it underwent accuracy and classification review. None of its assessments and conclusions should be attributed to them. PCLOB staff worked with Board Members Ed Felten and Travis LeBlanc in preparing this report.

⁴ (U) For that reason, this Recommendations Assessment Report does not address staff-level recommendations regarding the Department of Treasury’s Terrorist Finance Tracking Program and staff-level report and recommendations regarding a CIA counterterrorism activity conducted pursuant to Executive Order 12333 (“CIA Deep Dive 2”). However, PCLOB staff continues to engage with Treasury and the CIA to assess implementation of those staff-level recommendations. The staff-level recommendations to CIA Deep Dive 2 were declassified and released on February 10, 2022, <https://documents.pclob.gov/prod/Documents/OversightReport/e4876b33-fbde-45fd-9aed-6469f37c0b3a/PCLOB%20Staff%20Recommendations%20Regarding%20CIA%20Activity.pdf>.

⁵ (U) The 2015 Recommendations Assessment Report also used the categories “Not implemented (implementing legislation proposed)” and “Accepted, but awaiting implementation,” but those do not apply to any of the recommendations assessed in this report.

recommendations. Of the remaining two recommendations, the IC has implemented one in part and is implementing the other. The IC has implemented six of the Board's Section 702 Report recommendations, has implemented three recommendations in part, and is implementing the one other recommendation. The IC has implemented two of the Board's PPD-28 Report recommendations, implemented one in part, and is implementing the fourth. Annex I sets forth these assessments in a chart.

(U) Recommendations implemented or overtaken by changes in law or policy—and described as such in a previous PCLOB Recommendations Assessment Report (“Resolved Recommendations”)—are not separately assessed here. Annex II sets forth a list of the Resolved Recommendations. If the status of a Resolved Recommendation changes, the PCLOB may revisit that recommendation in a future Recommendations Assessment Report.

(U) SECTION 215 REPORT RECOMMENDATIONS

(U) In January 2014, the PCLOB issued its *Report on the Telephone Call Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*. The report presented the PCLOB's analysis of the program the government operated at that time under Section 215 and the role and operation of the Foreign Intelligence Surveillance Court ("FISC" or "FISA Court") and Foreign Intelligence Surveillance Court of Review ("FISCR").

(U) The Board made twelve recommendations that accompanied its analysis of the program. Recommendations 7, 10, and 12 are assessed below; Recommendations 1 through 6, 9, and 11 are resolved and therefore noted in Annex II.

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

(U) Implemented in part.

(U) Text of the Board's Recommendation:

(U) 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.⁶

⁶ (U) PCLOB, 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 203 (2014) [hereinafter Section 215 Report], https://documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf.

(U) Explanation for the Recommendation:

(U) 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.

(U) 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.⁷

(U) Discussion of Status:

(U) In the 2016 Recommendations Assessment Report, the Board assessed that this recommendation was being implemented. Since then, the IC declassified and released 80 FISC opinions and orders issued prior to the enactment of the USA FREEDOM Act (“UFA”). Specifically, in connection with a Freedom of Information Act (“FOIA”) request from the Electronic Frontier Foundation (“EFF”), the IC conducted a comprehensive survey of FISC decisions rendered between July 10, 2003⁸ and the enactment of UFA. (The IC's survey

⁷ (U) PCLOB, RECOMMENDATIONS ASSESSMENT REPORT 10 (2015) [hereinafter 2015 Recommendations Assessment Report], https://documents.pcllob.gov/prod/Documents/OversightReport/8c09c647-c5dc-4ecb-b1d7-43e4dca27fb9/Recommendations_Assessment-Report_2015.pdf.

⁸ (U) The IC defined this date to correspond to the date for which the Attorney General is required by statute to submit to Congress FISC decisions, orders, opinions, and other documents that contain a significant construction or interpretation of law. 50 U.S.C. § 1871(a)(5); 50 U.S.C. § 1871(c)(2).

excludes FISC opinions from the time period beginning with the creation of the FISC in 1978 and ending on July 10, 2003, and so it only partially addresses the Board’s recommendation.) The IC identified 79 opinions and orders that presented a significant construction or interpretation of law and released redacted versions of 73 of those decisions.⁹ In August 2022, ODNI released unclassified, redacted versions of six opinions and orders, as well as one additional opinion that had been previously overlooked.

(U) ODNI’s release of FISC documents from July 10, 2003, and onwards does not include FISC opinions from the time period beginning with the creation of the FISC in 1978 until July 9, 2003, and so it only partially addresses the Board’s recommendation. While recognizing the difficulty of searching non-digital archives, the Staff continue to urge ODNI to review for declassification all decisions, orders, and opinions from 1978 until July 9, 2003. The Staff maintains that those documents by their very nature, are critical to determining whether any case within that group and any cases that come after them are “novel or significant cases,” the public release of which, would “facilitate public understanding of the development of the law under FISA.”¹⁰

(U) Recommendation 10: Inform the PCLOB of FISA Activities and Provide Relevant Congressional Reports and FISC Decisions

(U) Status:

(U) Implemented.

⁹ (U) Pursuant to EFF’s FOIA request, the government identified 79 FISC opinions that it deemed to “include a significant construction or interpretation of any law, including a significant construction of a ‘specific selection term’ under the USA FREEDOM Act.” Order Granting Def.’s Mot. Partial S.J., *EFF v. Department of Justice*, 376 F. Supp. 3d 1023 (N.D. 2019). ODNI published redacted, unclassified copies of 73 of these decisions on the IC’s website, IC on the Record; the government did not publish the other six opinions, either in declassified or redacted form, citing FOIA’s first and third exemptions (protection of classified information and protection of information protected by statute). EFF brought suit to compel release of the remaining six opinions, and the court granted summary judgment in favor of the government.

¹⁰ (U) 2015 Recommendations Assessment Report at 10.

(U) Text of the Board's Recommendation:

(U) 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].¹¹

(U) Explanation for the Recommendation:

(U) 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 FISCR 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.¹²

(U) Discussion of Status:

(U) The Board noted in the 2016 Recommendations Assessment Report that the PCLOB had made standing requests for certain types of documents, and the IC was then implementing a process to provide those documents to the PCLOB on a routine basis. That process is now operational. In addition to these documents, IC components provide other information about governmental activities under FISA. Considering IC efforts to provide the PCLOB with applicable congressional notifications, FISC and FISCR decisions, and other FISA-related information, the Staff concludes that this recommendation has been implemented. The Staff looks forward to the IC continuing to report to the PCLOB in a meaningful and timely fashion. Contemporaneous reporting is imperative to the Board's oversight role.

¹¹ (U) Section 215 Report at 205.

¹² (U) 2015 Recommendations Assessment Report at 13.

(U) Recommendation 12: Disclose the Scope of Surveillance Authorities Affecting Americans

(U) Status:

(U) Implemented.

(U) Text of the Board's Recommendation:

(U) The scope of surveillance authorities affecting Americans should be public.¹³

(U) Explanation for the Recommendation:

(U) 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.¹⁴

¹³ (U) Section 215 Report at 206.

¹⁴ (U) 2015 Recommendations Assessment Report at 15.

(U) Discussion of Status:

(U) The IC has taken steps since the 2016 Recommendations Assessment Report to provide more information to the public about the activities the IC conducts pursuant to its surveillance authorities. Additionally, the IC has provided information about certain activities in which it does *not* engage. NSA’s public announcements that it discontinued “about” collection under FISA Section 702¹⁵ and suspended the collection and use of call detail records pursuant to Section 215 of the USA PATRIOT Act, as amended by the USA FREEDOM Act,¹⁶ are two prominent examples. The IC’s Annual Statistical Transparency Reports have provided additional information and explanatory context. The amount of information about surveillance activities provided in these Transparency Reports has increased in recent years, in part due to PCLOB recommendations, requirements in the FISA Amendments Reauthorization Act of 2017, and commitments made by the IC in the *Principles of Intelligence Transparency for the Intelligence Community* (hereafter the “*IC’s Principles of Transparency*”).

(U) The Staff commends the IC for its ongoing transparency efforts. We note that in addition to transparency efforts related to Section 215 and 702 authorities, the IC has also implemented transparency efforts around its E.O. 12333 authorities. For example, the IC has publicly released IC elements’ Attorney-General Approved Procedures governing the protection of U.S. person information, as well as explanatory documents.¹⁷ As the IC works

¹⁵ (U) In April 2017, NSA disclosed that it had terminated “about” collection pursuant to FISA Section 702. Press Release, NSA, *NSA Stops Certain Section 702 “Upstream” Activities* (Apr. 28, 2017), <https://www.nsa.gov/Press-Room/Press-Releases-Statements/Press-Release-View/Article/1618699/nsa-stops-certain-section-702-upstream-activities/>. “About” collection is the capture of communications that reference a selector (for example, an email address), but are not to or from a selector.

¹⁶ (U) In August 2019, NSA announced that it had ceased collection and use of these call detail records in early 2019 and subsequently dismantled the technical architecture of the program. *See* PCLOB, *REPORT ON THE GOVERNMENT’S USE OF THE CALL DETAIL RECORDS PROGRAM UNDER THE USA FREEDOM ACT 24* (2020), [https://documents.pclob.gov/prod/Documents/OversightReport/87c7e900-6162-4274-8f3a-d15e3ab9c2e4/PCLOB%20USA%20Freedom%20Act%20Report%20\(Unclassified\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/87c7e900-6162-4274-8f3a-d15e3ab9c2e4/PCLOB%20USA%20Freedom%20Act%20Report%20(Unclassified).pdf).

¹⁷ (U) *See, e.g.*, IC ON THE RECORD GUIDE TO POSTED DOCUMENTS – EXECUTIVE ORDER 12333, <https://www.intel.gov/ic-on-the-record/guide-to-posted-documents#EO12333>; NSA CIVIL LIBERTIES AND PRIVACY OFFICE, *NSA’S CIVIL LIBERTIES AND PRIVACY PROTECTIONS FOR TARGETED SIGINT ACTIVITIES UNDER EXECUTIVE ORDER 12333* (2014),

to expand and implement its transparency initiatives, the Staff encourages the IC to continue its efforts to bring further transparency to the use and interpretation of all IC authorities.

https://media.defense.gov/2021/Aug/18/2002833871/-1/-1/0/NSA_CLPO_REPORT_TARGETED_EO12333.PDF; THE CIA'S UPDATED EXECUTIVE ORDER 12333 ATTORNEY GENERAL GUIDELINES, <https://www.cia.gov/static/100ea2cab2f739cab617eb40f98fac85/Detailed-Overview-CIA-AG-Guidelines.pdf>. The IC has also released information about the IC elements' policies implementing PPD-28. *See, e.g.*, https://www.dni.gov/files/CLPT/documents/Chart-of-PPD-28-Procedures_May-2017.pdf.

(U) SECTION 702 REPORT RECOMMENDATIONS

(U) In July 2014, the PCLOB issued its *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*. The report presented the PCLOB's analysis of the program the government operates under Section 702.

(U) The Board made ten recommendations that accompanied its analysis of the program. Recommendations 1, 3 through 5, 9 and 10 are assessed below; the other recommendations are resolved and therefore noted in Annex II.

(U) Recommendation 1: Revise NSA Procedures to Better Document the Foreign Intelligence Reason for Targeting Decisions**(U) Status:**

(U) Implemented in part.

(U) Text of the Board's Recommendation:

(U) 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 [Office of the Director of National Intelligence ("ODNI")] and [Department of Justice ("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.¹⁸

(U) Explanation for the Recommendation:

(U) 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.

(U) 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.¹⁹

¹⁸ (U) PCLOB, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 134-35 (2014) [hereinafter Section 702 Report], <https://documents.pcllob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf>.

¹⁹ (U) 2015 Recommendations Assessment Report at 16-17.

(U) Discussion of Status:

(U) In the 2016 Recommendations Assessment Report, the Board explained that NSA implemented subpart (b) of this recommendation through revisions to its targeting procedures and partially implemented subpart (a). Specifically, NSA’s revised targeting procedures specified the procedure in more detail, but NSA did not add or clarify written substantive criteria for determining the expected foreign intelligence value of a particular target. Staff are concerned by the partial implementation of this recommendation. Staff continues to recommend that NSA fully implement this recommendation. The 23rd Semiannual Joint Assessment reported that of the NSA’s compliance incidents during the reporting period, 21.9% (up from 14.5%) were Tasking Incidents,²⁰ and that 11% (down from 23% in the previous reporting period) of those tasking errors “were the result of NSA not having a sufficient foreign intelligence purpose for the tasking.”²¹

(U) The status of this recommendation has not changed since the Board’s 2016 analysis.

(U) 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

²⁰ (U) *Compare* SEMIANNUAL ASSESSMENT OF COMPLIANCE WITH PROCEDURES AND GUIDELINES ISSUED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, SUBMITTED BY THE ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE, Reporting Period: June 1, 2019 – November 30, 2019, 37 (2021, redacted version published July 18, 2022) [hereinafter 23d Semiannual Report], https://www.intel.gov/assets/documents/702%20Documents/declassified/23rd_Joint_Assessment_of_FISA_for_Public_Release.pdf, with SEMIANNUAL ASSESSMENT OF COMPLIANCE WITH PROCEDURES AND GUIDELINES ISSUED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, SUBMITTED BY THE ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE, Reporting Period: December 1, 2018 – May 31, 2019, 37 (2021, redacted version published March 14, 2022), https://www.intel.gov/assets/documents/702%20Documents/declassified/22nd_Joint_Assessment_of_FISA_702_Compliance_CLEARED_REDACTED_FOR_PUBLIC_RELEASE.pdf.

²¹ (U) 23d Semiannual Report at 50.

(U) Status:

(U) Implemented.

(U) Text of the Board's Recommendation:

(U) 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.²²

(U) Explanation for the Recommendation:

(U) 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. 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.²³

²² (U) Section 702 Report at 139.

²³ (U) 2015 Recommendations Assessment Report at 19.

(U) Discussion of Status:

(U) As of the 2016 Recommendations Assessment Report's publication, the government had implemented this recommendation through revisions to NSA's and CIA's minimization procedures, except as to CIA metadata queries. In 2016, CIA advised the Board that CIA was in the process of implementing that part of the recommendation.

(U) CIA's querying procedures now address the Board's recommendation regarding metadata. Each use of a U.S. person term to query a CIA system containing unminimized content or non-content (*e.g.*, metadata) information acquired pursuant to FISA Section 702 "must be accompanied by a statement of facts showing that the use of that query term is reasonably likely to retrieve foreign intelligence information, as defined by FISA."²⁴ CIA's minimization procedures incorporate its querying procedures by reference.²⁵

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

(U) Implemented in part.

(U) Text of the Board's Recommendation:

(U) 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.²⁶

²⁴ (U) CIA 2020 Querying Procedures, paragraph IV.B.2, https://www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_Cert_CIA%20Querying%20Procedures_10.19.2020.pdf.

²⁵ (U) CIA 2020 Minimization Procedures, paragraph 4, https://www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_Cert_CIA%20Minimization%20Procedures_10.19.2020.pdf.

²⁶ (U) Section 702 Report at 141.

(U) Explanation for the Recommendation:

(U) 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 FISC'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.

(U) 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.²⁷

(U) Discussion of Status:

(U) The Board previously determined that the government substantially implemented this recommendation in 2015 by briefing the FISC and providing written summaries of Section 702 oversight practices. The government has informed the PCLOB that since 2015, the government has periodically offered to provide the FISC with tasking sheets and query documentation as part of the certification review process. Thus far, the FISC has not requested to receive tasking sheets and query documentation. The government has also stated that it provides briefings and other information to the FISC during the FISC's review of Section 702 certification applications and compliance matters. PCLOB Staff also followed up with FISC staff regarding whether and how the FISC has implemented this recommendation. However,

²⁷ (U) 2015 Recommendations Assessment Report at 20-21.

it is the FISC staff's view that such an inquiry relates to the substance of the Court's adjudication of Section 702 renewal submissions, the status of which is inappropriate to share with a non-party and calls into question the independence of the judiciary.²⁸

(U) While PCLOB Staff appreciates the government's continued offers to supply tasking sheets and query documentation to the FISC, an offer to provide that information is not the same as submitting that information to the FISC for the judge's review. Staff encourages the government to include a sampling of tasking sheets and query documentation as part of its Section 702 certification applications. Staff also continues to encourage the FISC to engage with this additional information as part of its review process for the reasons the Board articulated above. Consequently, Staff finds this recommendation to be implemented in part.

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

(U) Status:

(U) Implemented.

(U) Text of the Board's Recommendation:

(U) 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.²⁹

²⁸ (U) Discussion by Mason Clutter, PCLOB Acting Executive Director, with Foreign Intelligence Surveillance Court Staff, on or about May 18, 2022. *See also* E-mail from PCLOB Staff Member to Board Members (May 19, 2022, 11:57AM).

²⁹ (U) Section 702 Report at 142.

(U) Explanation for the Recommendation:

(U) The government's operation of the Section 702 program must adhere to the targeting and minimization procedures that are approved by the FISC, as well as to the pertinent Attorney General guidelines and the statute itself. The government also makes additional representations to the FISC 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 FISC. 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.³⁰

(U) Discussion of Status:

(U) The government implemented this recommendation by submitting a summary of Section 702 requirements to the FISC as part of the 2015 Section 702 certification application. The FISC did not incorporate this submission into its order approving the certification. ODNI and DOJ have committed to providing an updated written summary to the FISC that reflects intervening changes in law and policy.

(U) 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

(U) Status:

(U) Implemented in part; not implemented in part.

³⁰ (U) 2015 Recommendations Assessment Report at 21-22.

(U) Text of the Board's Recommendation:

(U) 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 include 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.³¹

(U) Explanation for the Recommendation:

(U) 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.

³¹ (U) Section 702 Report at 146.

(U) 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 702.³²

(U) Discussion of Status:

(U) NSA has implemented subparts 9(4) and 9(5) of the Board's recommendation in the IC's Annual Statistical Transparency Reports.

(U) Specifically, for subpart 9(4), the Board recommended that NSA report "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." NSA previously informed the Board that the IC would report U.S. person identifier query statistics publicly as part of the IC's USA FREEDOM Act reporting, although the IC would not separately break out the number of such queries that include names, titles, or other identifiers potentially associated with individuals as described in subpart (4) of the Board's recommendation. As NSA indicated, subsequent Annual Statistical Transparency Reports include the total number of U.S. person query terms used to query Section 702 content, and the number of U.S. person queries of noncontacts obtained under Section 702, per calendar year.

(U) For subpart 9(5), the Board recommended that NSA report "the number of instances in which the NSA disseminates non-public information about U.S. persons, specifically distinguishing disseminations that include names, titles, or other identifiers potentially associated with individuals." NSA previously advised the Board that the IC planned to declassify and publicly report statistics on disseminations of U.S. person information, although as with the recommendation in subpart 9(4), the IC would not separately break out the number of such queries that include names, titles, or other identifiers potentially associated with

³² (U) 2015 Recommendations Assessment Report at 25-26.

individuals as described in subpart (5) of the Board's recommendation. As NSA indicated, subsequent Annual Statistical Transparency Reports include the total number of Section 702 reports containing U.S. person information (distinguishing between reports where such information is masked and where it is unmasked), and the number of previously masked U.S. person identities unmasked by NSA pursuant to an authorized request by another agency, per calendar year.

(U) For each of subparts 9(4) and 9(5), NSA's implementation diverged from the Board's recommendation because NSA does not separately break out statistics of instances involving names, titles, or other identifiers, as distinguished from other types of U.S. person information. The PCLOB has discussed with NSA its process for calculating statistics to publish related to subparts 9(4) and 9(5).

(U) In 2014, the Board had recommended in subparts (1), (2), and (3) that NSA report "(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." In 2016, NSA informed the Board that NSA considered various approaches to address these subparts of the Board's recommendation and confronted a variety of challenges. However, NSA advised that it remained committed to developing and implementing measures that would, in the language of the Board's recommendation, "provide insight about the extent to which the NSA acquires and utilizes" communications involving U.S. persons and people located in the United States under the Section 702 program. NSA sought to work with PCLOB staff to develop such measures, either through further refinement of the measures described in the Board's recommendation or through development of alternative approaches.

(U) In June 2017, then-Director of National Intelligence ("DNI") Daniel Coats testified in an open hearing before the Senate Select Committee on Intelligence regarding FISA legislation. Specifically, regarding the counting of incidentally collected U.S. person communications, the then-DNI stated that "it remains infeasible to generate an exact, accurate, meaningful, and responsive methodology that can count how often a U.S. person's communications may be incidentally collected under 702." The then-DNI cited privacy and civil liberties implications "of intense identity verification research on potential U.S. persons who are not targets of an investigation" and "a diversion of critical resources and the mass of critical resources that [NSA] would need to try to attempt to reach [a number]" as the primary reasons why a number cannot be reached. Further, the then-DNI stated that "even if we

decided the privacy intrusions were justified, and if I had unlimited staff to tackle this problem, we still do not believe it is possible to come up with an accurate, measurable result.”³³

(U) The Board has continued oversight on subparts 1, 2, and 3 of this recommendation. In 2016, the NSA advised the PCLOB that it “remained committed to developing and implementing measures” that would, in the language of the Board’s original recommendation, “provide insight about the extent to which the NSA acquires and utilizes” communications involving U.S. persons and people located in the United States under the Section 702 program.³⁴ In June 2017, however, the DNI testified to Congress that it remains “‘infeasible’ to generate an exact, accurate, [and] meaningful” measurement.³⁵ ODNI and NSA have informed the Staff that the IC maintains that position as of June 2022.

(U) The Staff nonetheless urges NSA to continue its commitment, as reflected in the PCLOB’s 2016 Recommendations Assessment Report, to develop alternate metrics instead of subparts 1, 2 and 3, such as an appropriately designed statistical measurement or an estimate based on secure multiparty computation. For example, academic researchers have recently proposed a novel methodology relying on secure multiparty computation that, if successful, would represent a significant advancement in the ability to measure incidental collection under Section 702.³⁶ Those researchers have consulted with both the PCLOB and the IC. As that proposal continues to develop, the Staff encourages the IC to continue its engagement and consideration of this potential measurement methodology in addition to continuing to seek others. Only with continued engagement will the IC be able to develop metrics that, even if they do not provide exact measurements, may provide meaningful estimates of significant value to Congress and the public without creating undue privacy risks.³⁷

³³ (U) *Open Hearing on FISA Legislation Before the Select Committee on Intelligence of the United States Senate*, 115th Cong. 9 (2017) (Testimony of Daniel R. Coats, Director of National Intelligence) [hereinafter DNI Coats Testimony], <https://www.congress.gov/115/chrq/CHRG-115shrg25889/CHRG-115shrg25889.pdf>.

³⁴ (U) Section 702 Report at 146.

³⁵ (U) DNI Coats Testimony at 9.

³⁶ (U) Anunay Kulshrestha & Jonathan Mayer, *Estimating Incidental Collection in Foreign Intelligence Surveillance: Large-Scale Multiparty Private Set Intersection with Union and Sum* (2022), <https://www.usenix.org/system/files/sec22-kulshrestha.pdf>.

³⁷ (U) *See* Separate Statement of PCLOB Board Member Ed Felten.

(U) Recommendation 10: Develop a Methodology to Assess the Value of Counterterrorism Programs

(U) Status:

(U) Being implemented.

(U) Text of the Board's Recommendation:

(U) The government should develop a comprehensive methodology for assessing the efficacy and relative value of counterterrorism programs.³⁸

(U) Explanation for the Recommendation:

(U) 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.³⁹

(U) Discussion of Status:

(U) ODNI's report dated February 8, 2016, *Processes for Assessing the Efficacy and Value of Intelligence Programs* ("ODNI Efficacy Report"), sets forth a methodology for assessing the efficacy of intelligence programs. The IC has informed the Staff that this methodology remains

³⁸ (U) Section 702 Report at 148.

³⁹ (U) 2015 Recommendations Assessment Report at 26.

operative, and that policymakers and leadership continue to review intelligence activity assessments conducted pursuant to this methodology.

(U) Moving forward, the Staff encourages ODNI to publish more details about how it implements this methodology. The Staff also encourages ODNI to continue to apply its efficacy methodology to every IC program—even those where the nature of the program makes quantitative assessment difficult. Finally, the Staff understands that the IC has implemented modifications to the intelligence assessment methodology that are not reflected in the ODNI Efficacy Report. The Staff encourages the IC to update and make public the ODNI Efficacy Report to reflect all current modifications to the methodology for value assessments, and to continue to modify and refine the methodology in the future.

(U) PPD-28 REPORT RECOMMENDATIONS

(U) In December 2016, the PCLOB issued its *Report to the President on the Implementation of Presidential Policy Directive 28: Signals Intelligence Activities*. Section 5 of PPD-28 “encouraged [the PCLOB] to provide [the President] with a report that assesses the implementation of any matters contained within this directive that fall within its mandate.”

(U) The PCLOB’s report, publicly released in October 2018, analyzed how the implementation of PPD-28 as applied to counterterrorism programs could better protect privacy and civil liberties and made four accompanying recommendations. Each of those recommendations is assessed below.

(U) Recommendation 1: Publish Criteria for Which Activities or Types of Data Are Subject to PPD-28**(U) Status:**

(U) Implemented in part.

(U) Text of the Board’s Recommendation:

(U) The Board recommends that the National Security Council (“NSC”) and ODNI issue criteria for determining which activities or types of data will be subject to PPD-28’s requirements. The ODNI could establish these criteria by issuing a list of PPD-28 activities or by promulgating guidelines for applying PPD-28. This guidance may be classified, in whole or in part, in order to provide the appropriate level of detail. Whatever the format, the ODNI guidance should be in writing and applied uniformly throughout the IC.⁴⁰

⁴⁰ (U) PCLOB, REPORT TO THE PRESIDENT ON THE IMPLEMENTATION OF PRESIDENTIAL POLICY DIRECTIVE 28: SIGNALS INTELLIGENCE ACTIVITIES 13-14 (2018) [hereinafter PPD-28 Report], [https://documents.pclob.gov/prod/Documents/OversightReport/16f31ea4-3536-43d6-ba51-b19f99c86589/PPD-28%20Report%20\(for%20FOIA%20Release\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/16f31ea4-3536-43d6-ba51-b19f99c86589/PPD-28%20Report%20(for%20FOIA%20Release).pdf).

(U) Explanation for the Recommendation:

(U) The President issued PPD-28 to establish special requirements and procedures for the conduct of signals intelligence activities. PPD-28 does not define “signals intelligence activities.” Nor did the ODNI. It was left to each IC element to determine how to apply PPD-28 to its respective activities. As a result, the application varies across the IC.

(U) It is not unusual for individual IC elements to apply different procedures to similar types of data. This is often a function of the authorities and missions unique to each IC element. However, the lack of a common understanding as to the activities to which PPD-28 applies has led to inconsistent interpretation and could lead to compliance traps, especially as IC elements engage in information sharing.⁴¹

(U) Discussion of Status:

(U) The government has determined that PPD-28 applies to information acquired pursuant to FISA Section 702. ODNI’s General Counsel described this determination in a letter dated February 22, 2016, which the United States and the European Union publicly included in the 2016 EU-US Privacy Shield Framework.⁴²

(U) While the Staff commends the IC’s public release of this information, the government has, in effect, published one example. This example clarifies the status of information collected under one IC authority, albeit a prominent authority. A single, authority-specific example does not amount to promulgation and uniform application of criteria to guide determinations about the scope of PPD-28’s application. Accordingly, this recommendation is partially

⁴¹ (U) PPD-28 Report at 12-13.

⁴² (U) Letter from Robert S. Litt, General Counsel, Office of the Director of National Intelligence, to Justin S. Antonipillai, Counselor, U.S. Department of Commerce, and Ted Dean, Deputy Assistant Secretary, International Trade Administration (Feb. 22, 2016), <https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004q1F>. The Privacy Shield was invalidated by the Court of Justice of the European Union on July 16, 2020. A new EU-U.S. Data Privacy Framework was announced on October 7, 2022. *See White House, Fact Sheet: President Biden Signs Executive Order to Implement the EU-U.S. Data Privacy Framework* (Oct. 7, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/>.

implemented, and the Staff encourages ODNI to work with the NSC and the IC to develop a complete set of criteria.

(U) Recommendation 2: Consider Mission and Privacy Implications of Applying PPD-28 to Multi-Sourced Systems

(U) Status:

(U) Implemented.

(U) Text of the Board's Recommendation:

(U) IC elements should consider both the mission and privacy implications of applying PPD-28 to multi-sourced systems.⁴³

(U) Explanation for the Recommendation:

(U) In order to ensure that all information subject to PPD-28 receives PPD-28 protections, the CIA has, at times, opted to apply PPD-28 protections to all information within multi-sourced systems even if the CIA assesses that PPD-28 does not apply to all data within the systems.

(U) The Board appreciates CIA's efforts to comply with the directive and recognizes that it may be both more protective of civil liberties and more economical from a technical, training and resource perspective to be over-inclusive in applying PPD-28 provisions.⁴⁴

⁴³ (U) PPD-28 Report at 16. The PPD-28 Report used the phrase "multi-sourced systems" to describe systems that "contain information collected through more than one intelligence discipline." PPD-28 Report at 15.

⁴⁴ (U) PPD-28 Report at 16.

(U) Discussion of Status:

(U) As recommended by the Board, CIA has continued to assess the application of PPD-28 to its multi-sourced systems. Its review has focused on how to apply PPD-28 protections while accounting for differing sources of information. CIA's assessments have, among other things, resulted in CIA embedding data management officers within its entities that use multi-sourced systems. These officers work with operations staff to determine the applicable retention periods and other requirements for particular data sets.

(U) Recommendation 3: Update PPD-28 Procedures for IC Elements Accessing Unevaluated SIGINT for the First Time**(U) Status:**

(U) Being implemented.

(U) Text of the Board's Recommendation:

(U) The Board recommends that the NSC and ODNI ensure that any IC elements obtaining first-time access to unevaluated signals intelligence update their PPD-28 use, retention and dissemination practices, procedures, and trainings before receiving any unevaluated data.⁴⁵

(U) Explanation for the Recommendation:

(U) IC elements' authorities and access to information may change over time. When such changes occur, the IC will need to ensure that it remains in compliance with PPD-28.

(U) IC elements obtaining first-time access to unevaluated signals intelligence pursuant to 2.3 procedures should consider how PPD-28 impacts their retention, use, and dissemination practices. IC elements receiving formally disseminated signals intelligence may rely on the disseminating IC element's determination that the personal

⁴⁵ (U) PPD-28 Report at 18.

information is foreign intelligence and that it is relevant to the authorized purpose of the dissemination. IC elements gaining access to unevaluated signals intelligence should assume the responsibility of determining whether personal information meets the PPD-28 use, retention, and dissemination rules.⁴⁶

(U) Discussion of Status:

(U) In an October 2018 response to the Board's PPD-28 Report, ODNI stated that it will exercise its review and approval authorities to ensure that an IC element seeking approval to obtain access to unevaluated signals intelligence will review and update its PPD-28 implementing policies, as appropriate.⁴⁷ In March 2022, ODNI and NSA reported that the first Executive Order 12333 Sec. 2.3 Raw SIGINT sharing program, with the National Geospatial-Intelligence Agency (NGA), was approved. In August 2022, NGA notified the Board that the program had gone operational. In that notification, NGA reported that it established an oversight and compliance program, which was reviewed and approved by ODNI, in consultation with NSA, to ensure that personnel associated with the program properly handle unevaluated SIGINT. The implementation of this recommendation remains ongoing.

(U) Recommendation 4: Update PPD-28 Procedures as Other Practices and Policies Change

(U) Status:

(U) Implemented.

(U) Text of the Board's Recommendation:

(U) The Board recommends that to the extent consistent with the protection of classified information, IC elements promptly update their public PPD-28 procedures

⁴⁶ (U) PPD-28 Report at 16-18.

⁴⁷ (U) ODNI, *Status of Implementation of PPD-28: Response to the PCLOB's Report 6* (Oct. 2018) [hereinafter ODNI Response to PPD-28 Report], https://www.dni.gov/files/icotr/Status_of_PPD_28_Implementation_Response_to_PCLOB_Report_10_16_18.pdf.

to reflect any pertinent future changes in practices and policy, including those changes due to issuance of new procedures of Section 2.3 of E.O. 12333.⁴⁸

(U) Explanation for the Recommendation:

(U) Since IC element authorities, as well as access to information, may change over time, it is important that each IC element (1) periodically review its PPD-28 procedures to ensure that the procedures continue to reflect current practices, (2) periodically review its PPD-28 practices to ensure that they remain consistent with the directive and ODNI guidance, and (3) update its publicly available procedures, consistent with classification requirements, to reflect changes in practice.⁴⁹

(U) Discussion of Status:

(U) In the ODNI PPD-28 Response, ODNI stated that it will ensure that IC elements promptly update their public PPD-28 procedures to reflect any pertinent changes in practices and policies.⁵⁰ ODNI explained that IC elements review their PPD-28 procedures when potentially relevant changes occur. For example, CIA and the Department of Defense reviewed their public PPD-28 procedures after updating their respective Attorney General guidelines. So far, no IC element has determined that an update to its PPD-28 procedures is required. ODNI has confirmed that it will continue to monitor IC elements' internal review.

⁴⁸ (U) PPD-28 Report at 18.

⁴⁹ (U) PPD-28 Report at 18.

⁵⁰ (U) ODNI Response to PPD-28 Report at 7-8.

(U) Annex I: Recommendations Discussed in This Report(U) Section 215 Report

Recommendation	Status
7: Publicly Release Past FISC and FISCR Decisions that Involve Novel Legal, Technical, or Compliance Questions	Implemented in part
10: Inform the PCLOB of FISA Activities and Provide Relevant Congressional Reports and FISC Decisions	Implemented
12: Disclose the Scope of Surveillance Authorities Affecting Americans	Implemented

(U) Section 702 Report

Recommendation	Status
1: Revise NSA Procedures to Better Document the Foreign Intelligence Reason for Targeting Decisions	Implemented in part
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	Implemented
4: Provide the FISC with Documentation of Section 702 Targeting Decisions and U.S. Person Queries	Implemented in part
5: Create and Submit to the FISC a Single Consolidated Document Describing All Significant Rules Governing Operation of the Section 702 Program	Implemented
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	Implemented in part; not implemented in part
10: Develop a Methodology to Assess the Value of Counterterrorism Programs	Being implemented

(U) PPD-28 Report

Recommendation	Status
1: Publish Criteria for Which Activities or Types of Data Are Subject to PPD-28	Implemented in part
2: Consider Mission and Privacy Implications of Applying PPD-28 to Multi-Sourced Systems	Implemented
3: Update PPD-28 Procedures for IC Elements Accessing Unevaluated SIGINT for the First Time	Being implemented
4: Update PPD-28 Procedures as Other Practices and Policies Change	Implemented

(U) Annex II: Resolved Recommendations

(U) The following PCLOB recommendations were addressed as resolved in a prior Recommendations Assessment Report and are not separately discussed in this Report:

(U) Section 215 Report

Recommendation	Status ⁵¹
1: End the NSA's Bulk Telephone Records Program	Implemented (USA FREEDOM Act)
2: Immediately Add Additional Privacy Safeguards to the Bulk Telephone Records Program	Implemented in part; Superseded by USA FREEDOM Act
3: Enable the FISC to Hear Independent Views on Novel and Significant Matters	Implemented (USA FREEDOM Act)
4: Expand Opportunities for Appellate Review of FISC Decisions	Implemented (USA FREEDOM Act)
5: Take Full Advantage of Existing Opportunities for Outside Legal and Technical Input in FISC Matters	Implemented
6: Publicly Release New FISC and FISCR Decisions that Involve Novel Legal, Technical, or Compliance Questions	Implemented
8: Publicly Report on the Operation of the FISC Special Advocate Program	Implemented (USA FREEDOM Act)
9: Permit Companies to Disclose Information about Their Receipt of FISA Production Orders, and Disclose More Detailed Statistics on Surveillance	Implemented (USA FREEDOM Act)
11: Begin to Develop Principles for Transparency	Implemented

⁵¹ (U) Each status is as set forth in the PCLOB's Recommendations Assessment Report dated February 5, 2016.

(U) Section 702 Report

Recommendation	Status
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	Implemented
6: Periodically Assess Upstream Collection Technology to Ensure that Only Authorized Communications Are Acquired	Implemented
7: Examine the Technical Feasibility of Limiting Particular Types of "About" Collection	Implemented
8: Publicly Release the Current Minimization Procedures for the CIA, FBI, and NSA	Implemented

Annex III: Separate Statement on the 2022 Recommendations Assessment Report by Board Member Ed Felten, October 4, 2022

Introduction

I support the contents of this report and thank the PCLOB staff for their excellent work in preparing it.

I write to expand on the status of Recommendation 9 of PCLOB's July 2014 report on FISA Section 702, which the present report assesses as "implemented in part; not implemented in part." A portion of this PCLOB recommendation was that NSA estimate the number of records NSA collected under the Section 702 program that incidentally contain U.S. Person Information (USPI).¹ As the report notes, NSA has not provided such an estimate. NSA says that doing so would be infeasible and would unnecessarily put USPI at risk. This is the first time I recall that an agency has simply declined to implement fully a recommendation from a PCLOB oversight project.

I believe that NSA can and should do more to provide such an estimate, to inform Congress and the public. To explain why, I will need to draw on my training and experience in computer science and mathematics, and go into a bit of technical detail. I emphasize that any numbers in this statement are entirely hypothetical, chosen only for illustrative purposes, and should not be taken as conveying anything about the prevalence of USPI in Section 702 program data, which I do not know.

NSA's Statements on Barriers to Accurate Estimation

NSA cites two primary reasons for not attempting to provide the recommended estimate: that an accurate estimate would require NSA to examine too many records to be practical; and that the estimation process itself could degrade the privacy of US Persons because of USPI access during the estimation.

¹ Specifically, PCLOB recommended that NSA report (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, and (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.

I find both arguments unconvincing, for reasons I will explain below. In short, NSA could work around both issues by careful design of the estimation method and by aiming to provide useful information rather than an overly precise estimation.

Usefully Estimating USPI Prevalence at Reasonable Cost

USPI prevalence would be estimated by randomly sampling a selection of the relevant records, examining each record in the sample for the presence of USPI, and then using standard statistical methods to derive an estimate of overall USPI prevalence along with a margin of error.

This estimation procedure would necessarily involve the inspection of a small amount of USPI. However, it would also significantly further the goal of reconciling national security with privacy, by informing Congress and the public about the privacy implications of current practices. If conducted thoughtfully, this process would be a net gain for privacy protection.

A crucial question is how many records to sample. Sampling more records would reduce the margin of error but would also increase the resources required, such as the time of NSA analysts who would otherwise be pursuing the agency's foreign intelligence mission.

NSA argues, essentially, that any sample size large enough to enable an accurate estimate would have prohibitive cost. I disagree. I believe there is a "sweet spot" in the middle where the sample is accurate enough to be useful but the cost is feasible.

Suppose, hypothetically, that NSA examined a random sample of 600 records² and found that none of them contained USPI. Using standard statistical methods, one would conclude that the prevalence of USPI in the full data set is less than 0.5%, with 95% statistical confidence.³

Or suppose, again hypothetically, that NSA examined a random sample of 600 records and found that 60 of them contained USPI. Standard statistical methods would then imply that

² Technical note: This hypothetical, and all of the others in this statement, are independent of the total number of records in NSA's data set.

³ In general, for any $N > 30$, if N samples are examined and no USPI found, the prevalence of USPI in the full sample is less than $3/N$, with 95% statistical confidence. See Hanley, James A., and Abby Lippman-Hand. "If nothing goes wrong, is everything all right?: interpreting zero numerators." *JAMA* 249, no. 13 (1983): 1743-1745.

the prevalence of USPI in the full data set is between 7.8% and 12.7%, with 95% statistical confidence.

Neither outcome is entirely precise. More precision is available at more cost; and insisting on much higher precision would impose much higher cost. But precision for precision's sake is not the goal of the exercise. Either of these outcomes—putting the USPI prevalence between 0% and 0.5%, or between 7.8% and 12.7%—would be informative to Congress and the public.

To be clear, I am not arguing for a procedure that is sloppy or less than rigorous. NSA would be correct in insisting on a statistically valid methodology, and we should expect nothing less from such an expert agency. My point is simply that the result of a rigorous study can be useful even if it produces a confidence interval of moderate size.

If NSA Were Unable to Distinguish USPI Records from Non-USPI

Another possibility is that in analyzing the sample, NSA analysts with reasonable effort would be unable to categorize some communication subjects as a U.S. Person or non-U.S. Person. If this were the case, it would not invalidate the analysis. It would simply suggest an analysis that puts the subjects into three categories (USP, non-USP, and cannot tell) rather than two. Such an analysis could still provide for each category a valid estimate of the prevalence of that category, with statistical margin of error.

If it turned out that NSA analysts, with reasonable effort, could not determine whether a substantial proportion of records were U.S. Person data or not, this too would be informative to Congress and the public. For example, such a finding would suggest that excluding U.S. Person information from Section 702 collection was more difficult than previously believed.

Limiting the Impact on USPI

NSA's second argument is that a sampling-based analysis of USPI prevalence would itself require access to USPI, perhaps in significant quantities, which creates privacy risk for U.S. Persons, contrary to the privacy-protective rationale for the analysis. This argument I also find unconvincing.

It is true that if NSA examined a record as part of the sample, and that record contained USPI, this would be an access to USPI by NSA personnel that would not have happened if

not for the sampling study. However, the amount of USPI accessed in this way will be small, if indeed the prevalence of USPI in the collected data is low. If, on the other hand, the sample turns out to contain a lot of USPI, then USPI records must be common in the full data set—a finding that would be valuable for Congress and the public.

The risk of significant USPI access could be mitigated by a simple change to the sampling procedure. For example, NSA could sample and analyze records until either 600 records had been sampled or 20 records had been found with USPI, whichever came first.

To see the effect of this change, consider two scenarios. If 600 records are examined and no USPI found, then the USPI prevalence in the full sample is less than 0.5% with 95% confidence, as noted above, and no USPI has been accessed in the study. Alternatively, if sampling is stopped after finding 20 records with USPI out of 200 examined, then the USPI prevalence in the full sample is between 5.5% and 15%, with 95% statistical confidence. This is a wider confidence interval than if 600 records had been examined, but it would still usefully inform the debate.

Summary

To be clear, I am not arguing that 600 and 20 are the best numbers to use, nor that the general procedure I sketched here is the best one. Better procedures probably exist. But these examples do illustrate how NSA can derive an estimate of USPI prevalence that serves the purpose of usefully informing the debate, while limiting the resources required and the USPI impact of the estimation process.

To comply fully with PCLOB's recommendation, NSA could start by engaging with Congress and public experts to devise an estimation method that best balances informing the debate, stewarding NSA's valuable analyst time, and protecting USPI. NSA can also discuss with PCLOB its plan for implementing the recommendation, including at the classified level if appropriate.

Annex IV: Separate Statement on the 2022 Recommendations Assessment Report by Board Member Travis LeBlanc, August 31, 2022¹

Introduction

Today, the Privacy and Civil Liberties Oversight Board (“PCLOB” or “Board”) releases its third Recommendations Assessment Report (“RAR”).² The RAR provides the public with important updates on the progress the Executive Branch has made toward implementing the Board’s prior recommendations. In 2015, we published the Board’s first RAR summarizing the implementation (or, in some instances, the lack of full implementation) of Board recommendations that the Board had issued in our two seminal 2014 oversight reports on Section 215 of the USA Patriot Act and Section 702 of the Foreign Intelligence Surveillance Act (“FISA”).³ Today’s RAR updates our 2016 RAR and incorporates our progress assessments for the recommendations from three additional oversight projects conducted by the Board.⁴ The current report assesses the Executive Branch’s implementation of 13 recommendations.

¹ As with the Recommendations Assessment Report, this separate statement reflects the status of implementation of PCLOB recommendations as of August 31, 2022. Any delay from that date to the date of publication is due to completion of accuracy and classification review. See PCLOB, RECOMMENDATIONS ASSESSMENT REPORT 1 (2022) [hereinafter 2022 Recommendations Assessment Report].

² 2022 Recommendations Assessment Report. The first report was released on Jan. 29, 2015 and the second on Feb. 5, 2016. See PCLOB, RECOMMENDATIONS ASSESSMENT REPORT (2015) [hereinafter 2015 Recommendations Assessment Report]; PCLOB, RECOMMENDATIONS ASSESSMENT REPORT (2016) [hereinafter 2016 Recommendations Assessment Report].

³ See 2015 Recommendations Assessment Report. The first oversight report addressed the NSA’s bulk collection of telephone calling records under Section 215 of the USA PATRIOT Act, as well as the operations of the Foreign Intelligence Surveillance Court and transparency regarding surveillance. PCLOB, REPORT ON THE GOVERNMENT’S USE OF THE CALL DETAIL RECORDS PROGRAM UNDER THE USA FREEDOM ACT 2020 (2014) [hereinafter Section 215 Report]. The second report addressed surveillance under Section 702 of the Foreign Intelligence Surveillance Act by the NSA, CIA, and FBI. PCLOB, REPORT ON THE GOVERNMENT SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) [hereinafter Section 702 Report].

⁴ See 2016 Recommendations Assessment Report. The reports include the implementation of Presidential Policy Directive 28: Signals Intelligence Activities; a Central Intelligence Agency (“CIA”) counterterrorism activity conducted under Executive Order 12333 (“CIA Deep Dive I”); and, most recently, the use of XKEYSCORE by the National Security Agency (“NSA”) as an analytic tool for counterterrorism purposes. PCLOB, REPORT TO THE PRESIDENT ON THE IMPLEMENTATION OF PRESIDENTIAL POLICY DIRECTIVE 28: SIGNALS INTELLIGENCE ACTIVITIES (2018); PCLOB, CIA DEEP DIVE REPORT I (2017); PCLOB, CIA DEEP DIVE REPORT II (2017);

Although I fully join in Board Member Ed Felten’s individual statement to this RAR,⁵ I write separately to highlight several consistent themes that the Board has observed across the dozens of recommendations that we have made over the last nine years. Typically, our oversight reports are conducted on specific programs, the ensuing recommendations are accordingly tailored to the program under investigation, and our reports are typically transmitted to the affected agencies as well as the Office of the President, Office of the Director of National Intelligence (“ODNI”), and Congress. To the greatest extent possible and consistent with the Director of National Intelligence’s assessment of what may be declassified in the public interest, we aim to publish our reports, including recommendations, to the public as well.

The unclassified, public recommendations that the Board has issued demonstrate that the Executive Branch generally heeds the guidance the Board has offered to improve transparency, compliance, oversight, accountability, and the overall protection of privacy and civil liberties in the conduct of signals intelligence activities. However, upon reviewing the Executive Branch’s progress on our outstanding recommendations, we do see some of the same concerns repeatedly expressed by several iterations of the Board across our reviews of different programs. In this statement, I will highlight several of these thematic concerns. My hope in writing this statement is that it encourages the Intelligence Community in the future to proactively consider the recommendations in all our reports as an opportunity to reassess the extent to which any other surveillance program could be improved in a manner that is consistent with the recommendations (even if that program is not the one that is the specific subject of the report) or limited to only the programs that are the subject of the report. In other words, our recommendations should not be viewed as guidance to only the agency or agencies that are the subject of our oversight report. While I do not intend to suggest that the PCLOB’s recommendations have the weight of common law, our recommendations are advisory in nature and one would hope that the Intelligence Community would consider our guidance across any signals intelligence programs where similar privacy and civil liberties concerns are present.

First, the Executive Branch should be able to articulate the value and efficacy of broad “critical” surveillance programs. In the ideal world, as an aspect of internally assessing the continuing need for a signals intelligence program, the Intelligence Community would regularly require the directors of those programs to set forth the value and efficacy of the

PCLOB, REPORT ON XKEYSCORE (2021) [hereinafter XKEYSCORE Report or NSA Deep Dive].

⁵ Ed Felten, *Separate Statement to the 2022 Recommendations Assessment Report*, Oct. 4, 2022.

program to Executive Branch leadership. In our investigations, we repeatedly hear from the Intelligence Community that a program is “very valuable,” “critical,” and “highly effective,” but the Intelligence Community is then unable to articulate that value in any methodological assessment, even in a classified environment. Even where we do see efforts at articulations of value, it’s often anecdotal, sometimes hypothetical, and routinely lacking in a consistent methodology that is used to assess the particular signals intelligence program or across programs. Our oversight investigations could be completed more expeditiously and they could better balance privacy and civil liberties concerns with national security if agencies had this information readily available as we do routinely request it during our investigations. Congress in its oversight capacity would also benefit from ready access to this information.⁶ Of course, an additional benefit of requiring regular assessments of value and efficacy is that programs, such as the now-defunct Call Detail Records Program under Section 215 of the USA Patriot Act, hopefully would have been recognized as ineffective much sooner.

To offer one illustrative example, the Board’s Section 702 Report recommended that ODNI research and publish a methodology to determine the efficacy and value of particular counterterrorism programs.⁷ In response, the ODNI released a report setting forth a methodology for assessing the efficacy of intelligence programs.⁸ In its release, the ODNI stated “this methodology remains operative, and that policymakers and leadership continue to review intelligence activity assessments conducted pursuant to this methodology.”⁹ It is not clear, however, the extent to which this methodology has been implemented consistently and across the Intelligence Community. For example, upon our review of the National Security Agency’s XKEYSCORE program, and upon diving into questions concerning, methodology, efficacy, and cost-benefit analyses, the Board was unable to elicit answers to critical questions like how much the program costs financially to operate, how many U.S. persons have been impacted by XKEYSCORE, how much data the program collects and analyzes, how widely

⁶ See Sens. Ron Wyden and Mark Udall, *Wyden, Udall Issue Statement on Effectiveness of Declassified NSA Programs*, Jun. 19, 2013, at <https://www.wyden.senate.gov/news/press-releases/wyden-udall-issue-statement-on-effectiveness-of-declassified-nsa-programs>.

⁷ Section 702 Report at 148.

⁸ Office of the Dir. of Nat’l Intelligence, *Processes for Assessing the Efficacy and Value of Intelligence Programs*, Feb. 8, 2016.

⁹ Section 702 Report at 148; 2022 Recommendations Assessment Report at 23-24; Office of the Director of Nat’l Intelligence, *ODNI Releases Paper on Processes IC Uses for Assessing Efficacy, Value of intelligence* (2016), <https://www.intelligence.gov/ic-on-the-record-database/results/8-odni-releases-paper-on-processes-ic-uses-for-assessing-efficacy-value-of-intelligence-programs>. See also Office of the Director of Nat’l Intelligence, *Processes for Assessing the Efficacy and Value of Intelligence Programs* (2016), https://www.dni.gov/files/documents/Processes_for_Assessing_the_Efficacy_and_Value_of_Intelligence_Programs.pdf.

information analyzed through XKEYSCORE is shared, the number of lives saved, or the number of terrorist events averted as a result of XKEYSCORE. As a result, our 2020 report (which will hopefully be approved for public release at some point in 2023) included just two counterterrorism examples of the "Operational Value" of the program.¹⁰ It is disappointing that this was best evidence of value that the Intelligence Community could provide to us and it does not appear to be consistent with ODNI's 2016 guidance.

Second, there should be regular program-specific training, including coverage of the privacy and civil liberties concerns and protections, for analysts or agents who have access to such programs. It is a basic principle of compliance frameworks to ensure clear guidance and training for analysts.¹¹ This is important to minimize compliance incidents associated with inadequate training. For example, in the Board's Section 702 Report, the Board recommended the National Security Agency ("NSA") revise its targeting procedures, including revised guidance and training for analysts by, among other things, specifying the criteria for the foreign intelligence determination and the kind of written explanation needed to support it.¹² NSA did not fully implement the recommendation and it therefore comes as no surprise that the NSA continues to suffer from compliance incidents on these issues.¹³ In the 2021 *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* ("Joint Assessment"),¹⁴ 15% of tasking errors were due to invalid foreign intelligence information determinations and another 15% of tasking errors were because NSA didn't review conflicting information that indicated the target was not outside the United States.¹⁵ The problems are not only in the Section 702 context: As reported in my *Additional Unclassified Separate Statement of March 2021* to the Board's still-classified XKEYSCORE Report, I am equally concerned about serious compliance incidents in the context of XKEYSCORE, including concerns around program-specific training.¹⁶

¹⁰ See NSA Deep Dive.

¹¹ NSA, *Essential Elements of a Compliance Program* (2016), <https://www.nsa.gov/portals/75/documents/about/civil-liberties/resources/essential-elements-of-a-compliance-program.pdf>.

¹² 2022 Recommendations Assessment Report at 11-13.

¹³ Office of the Dir. of Nat'l Intelligence, SEMIANNUAL ASSESSMENT OF COMPLIANCE WITH PROCEDURES AND GUIDELINES ISSUED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, SUBMITTED BY THE ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE 48-55 (2021) [hereinafter 2021 Joint Assessment]. See also 2022 Recommendations Assessment Report at 12-13.

¹⁴ *Id.*

¹⁵ 2021 Joint Assessment at 51-2.

¹⁶ See Travis LeBlanc, *Additional Unclassified Statement by Board Member Travis LeBlanc*, March 12, 2021, Mar. 12, 2021.

Third, we have repeatedly reaffirmed the public’s need for transparency and accountability by recommending that the Intelligence Community develop and, to the extent possible, publicly articulate the legal authorities supporting signals intelligence activities, including releasing all Foreign Intelligence Surveillance Court (“FISC”) and Foreign Intelligence Surveillance Court of Review (“FISCR”) opinions, orders, and memos containing novel or significant interpretations of law.¹⁷ For example, in the Board’s Section 215 Report, the Board recommended developing principles and criteria for the public articulation of the legal authorities under which the Executive Branch conducts surveillance affecting Americans.¹⁸

Additionally, the Board in its Section 215 report previously recommended the Executive Branch review all FISC and FISCR decisions to release those that involve novel interpretations of FISA or other significant questions of law, technology, or compliance.¹⁹ Congress subsequently in the USA Freedom Act also mandated the release of all FISC and FISCR decisions that “include[] a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term ‘specific selection term.’”²⁰ After more than five years, the Executive Branch has still not reviewed all FISC or FISCR documents in order to determine which may have novel interpretations of FISA or other significant questions of law, technology, or compliance.²¹

The FISA Court was originally created in 1978 to “hear applications for and grant orders approving electronic surveillance.”²² Today, the court does much more than approve electronic surveillance orders: it vets three different types of procedures, attempts to review the compliance of its orders, and, in at least one instance, ordered an audit of the actual signals intelligence collection conducted by the NSA.²³ As the foreign intelligence surveillance courts’ programmatic approvals have increased, so too has the importance of their legal opinions, orders, and memoranda. While some limitations on publication are necessary to protect national security, novel and significant judicial rulings and opinions interpreting the Constitution, our laws, and Intelligence Community surveillance are fundamental to building trust in an informed democratic republic. The Executive Branch should promptly conduct a search and release all remaining novel and significant FISC and FISCR opinions.

¹⁷ 2022 Recommendations Assessment Report at 4-6.

¹⁸ *Id.*

¹⁹ Section 215 Report at 206. *See also* 2015 Recommendations Assessment Report at 15.

²⁰ 50 U.S.C. § 1872.

²¹ 2022 Recommendations Assessment Report at 4.

²² 50 U.S.C. § 1803.

²³ 50 U.S.C. § 1804; 50 U.S.C. § 1881; Memorandum Opinion at 3, [Caption Redacted], [Docket No. Redacted], 2011 WL 10945618, at *8 (FISA Ct. Oct. 3, 2011); William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633 (2009-2010).

Fourth, we have repeatedly requested that the Intelligence Community estimate or calculate the number of U.S. persons whose communications are swept into large surveillance programs. Most recently, Board Member Ed Felten and I recommended tagging communications that an analyst reasonably believes includes U.S. person communications.²⁴ While this would not provide an estimate for incidental collection, it would at least allow the calculation of year-over-year records that analysts identify as reasonably containing communications of U.S. persons, which could also be used to notify others downstream who also review the same U.S. person records.²⁵

Additionally, we have repeatedly asked the Intelligence Community to estimate or calculate the number of U.S. persons who are “incidentally” swept into the government’s signals intelligence collections.²⁶ For example, to date, the Intelligence Community has refused to fully implement the Board’s recommendation to measure how many Americans’ communications are collected under Section 702.²⁷ The recommendation, which was catalyzed by a 2011 letter from Senators Ron Wyden and Mark Udall, specifically recommended the Executive Branch obtain:

(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.²⁸

The NSA investigated various approaches to obtaining these numbers until 2017, when then-DNI Daniel Coats testified that the Intelligence Community would not perform such an analysis and that it would stop researching solutions.²⁹ Despite this position, the academic

²⁴ Board Member Travis LeBlanc, *Additional Unclassified Statement by Board Member Travis LeBlanc*, March 12, 2021, Pg. 8-9, Mar. 12, 2021.

²⁵ *See id.*

²⁶ Section 702 Report at 146; 2015 Recommendations Assessment Report at 25-6; 2022 Recommendations Assessment Report at 19.

²⁷ 2022 Recommendations Assessment Report at 19.

²⁸ Letter from Senators Ron Wyden and Mark Udall to the Honorable I. Charles McCullough, III Inspector General of the Intelligence Community, Office of the Director of National Intelligence, May 4, 2011.

²⁹ Hearing on FISA legislation, Hearing Before the Senate Select Committee on Intelligence (2017) (Testimony of Director of National Intelligence Daniel R. Coats), *available at* <https://www.intelligence.senate.gov/hearings/open-hearing-fisa-legislation-0#>. The current ODNI

community has continued to research solutions to estimate or calculate “incidental” collection in signals intelligence programs. Princeton University Professor Jonathan Mayer and Anunay Kulshrestha recently published a paper suggesting methods to estimate “incidental” collection using secure multiparty computation (“MPC”).³⁰ Their work indicates that it is potentially feasible to fulfill the Board’s recommendation by combining certain data sets with MPC and “generate an automated aggregate estimate of incidental collection that maintains confidentiality for intercepted communications and user locations.”³¹ I would strongly encourage the Intelligence Community to revisit opportunities to estimate or calculate “incidental” collection, including reviewing the feasibility of the MPC methodology.

Conclusion

While the Board may only be a watchdog, it is a watchdog that can identify, oversee, advise, report, and recommend. Being a watchdog does not mean releasing reports only to have them collect dust on a shelf. Our RAR is an important tool for ensuring accountability by advising the Executive Branch, Congress and the public on gaps between the implementation of our recommendations and the current practices, policies, and procedures of the Intelligence Community. The concerns expressed in my separate statement and our larger RAR are not disparate issues disconnected from each other. Several of the issues concern broad themes that represent consistent deficiencies in the Intelligence Community’s efforts to safeguard privacy and civil liberties. I encourage the broader Intelligence Community to review all our reports and recommendations and to proactively consider how the guidance in those reports may be applicable to any other signals intelligence activities or programs.

Before concluding, I do want to recognize that the Intelligence Community, especially the civil liberties and privacy professionals embedded across the Intelligence Community, have made commendable strides in addressing the Board’s recommendations since 2016. Recognizing that there is still significant work left to be completed to come into full alignment with the Board’s recommendations, I am hopeful that the Intelligence Community will be able to complete full implementation of all our recommendations prior to the issuance of the Board’s next RAR.

office has confirmed that its position remains the same. See E-mail from ODNI Staff to PCLOB Staff, on or about Nov 1, 2021.

³⁰ Anunay Kulshrestha & Jonathan Mayer, *Estimating Incidental Collection in Foreign Intelligence Surveillance: Large-Scale Multiparty Private Set Intersection with Union and Sum*, 22 (2022).

³¹ *Id.* at 1.

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Lastly, I would like to express appreciation to our Board's staff for their steadfast dedication to completing this RAR as well as my counselor, Mark M. Jaycox, for his continued advice and support.