

Privacy and Civil Liberties Oversight Board



Semi-Annual Report

April-September 2016

Working to ensure that efforts by the executive branch to protect the nation from terrorism are balanced with the need to protect privacy and civil liberties.

Privacy and Civil Liberties Oversight Board
www.PCLOB.gov
Email: info@pclub.gov

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Report Distribution

In accordance with Section 801 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Commission Act”), 42 U.S.C. § 2000ee, the Semi-Annual Report of the Privacy and Civil Liberties Oversight Board (“Board” or “PCLOB”) covers the period of April 1, 2016 through September 30, 2016 and is being provided to the President and the following Members of Congress:

The Honorable Thad Cochran, Chairman
U.S. Senate Committee on Appropriations

The Honorable Patrick Leahy,
Ranking Member
U.S. Senate Committee on Appropriations

The Honorable Ron Johnson, Chairman
U.S. Senate Committee on Homeland Security and
Governmental Affairs

The Honorable Claire McCaskill,
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The Honorable Devin Nunes, Chairman
U.S. House of Representatives Permanent Select
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The Honorable Adam Schiff
Ranking Member
U.S. House of Representatives Permanent Select
Committee on Intelligence

The Honorable John Conyers, Jr.,
Ranking Member
U.S. House of Representatives
Committee on the Judiciary

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Introduction

The Board is an independent agency within the executive branch established by the 9/11 Commission Act. The bipartisan, five-member Board is appointed by the President and confirmed by the Senate. The Board's mission is to ensure that the executive branch's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties.

The Board's enabling statute, 42 U.S.C. § 2000ee, vests the agency with two fundamental purposes: To review and analyze actions the executive branch takes to protect the nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and to ensure that liberty concerns are considered in the development and implementation of laws, regulations, and policies related to efforts to protect the nation from terrorism.

In addition, the Board also has designated roles under the following authorities:

- **Executive Order 13636 (“E.O. 13636”)**,¹ Improving Critical Infrastructure Cybersecurity, issued in February 2013, calls upon multiple agencies to develop and implement a Cybersecurity Framework to minimize the risk of a cyberattack on critical infrastructure. Section 5 of the Executive Order requires the Department of Homeland Security (“DHS”) to prepare a report, in consultation with the Board, recommending ways to mitigate the privacy and civil liberties risks created by cybersecurity measures adopted under the order. The report must be reviewed on an annual basis and revised as necessary.
- **Presidential Policy Directive 28 (“PPD-28”)**² articulates principles to guide why, whether, when, and how the United States conducts signals intelligence activities for authorized foreign intelligence and counterintelligence purposes. In the directive, the President encourages the Board to provide him with an assessment of the implementation of any matters contained in the directive that fall within the Board's mandate.
- **Section 803 of the 9/11 Commission Act (“Section 803”)**³ requires certain executive branch departments, agencies, and elements to designate at least one senior official as a privacy and civil liberties officer (“P/CL officer”).⁴ Each agency's P/CL officer must issue Semi-Annual Reports on the discharge of each of his or her functions under the statute.⁵ These Section 803 Reports are to be submitted to the head of the P/CL officer's agency, designated congressional committees, and the Board.⁶ To the greatest extent possible, the reports must be in unclassified form and made available to the public.⁷

¹ E.O. 13636, Improving Critical Infrastructure Cybersecurity (Feb. 12, 2013).

² PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

³ Pub. L. No. 110-53 § 803 (2007).

⁴ 42 U.S.C. § 2000ee-1(a). The entities covered are the Office of the Director of National Intelligence, the Central Intelligence Agency, and the Departments of Defense, Health and Human Services, Homeland Security, Justice, and Treasury.

⁵ *Id.* § 2000ee-1(f). Before its amendment in 2014, the statute required quarterly reports.

⁶ *Id.* § 2000ee-1(f)(1)(A).

⁷ *Id.* § 2000ee-1(f)(1)(B), (g)(1).

In addition to receiving and reviewing the P/CL officers' Semi-Annual Reports, the Board is directed by statute to make recommendations, when appropriate, to P/CL officers regarding their activities and to coordinate those activities on relevant interagency matters.⁸

Board Authorities

Congress established the Board to serve two main purposes: To analyze and review actions the executive branch takes to protect the nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and to ensure that liberty concerns are considered in the development and implementation of laws, regulations, and policies related to efforts to protect the nation against terrorism.⁹

The Board's responsibilities are comprised of two primary functions: oversight and advice.

- 1) In its oversight role, the Board is charged with continually reviewing the regulations, policies, and procedures of the executive branch, as well as its other actions to protect the nation from terrorism, to ensure that such actions (i) protect privacy and civil liberties; and (ii) are consistent with governing laws, regulations, and policies regarding privacy and civil liberties.¹⁰
- 2) Second, under its advice function, the Board encourages executive branch agencies to consult with the Board at an early stage in the development of a new policy, rule, or regulation, which helps to ensure that privacy and civil liberties protections are part of the initial design of the proposal.¹¹

Under its enabling statute, the Board must periodically submit, not less than semiannually, a report describing its work pursuant to its advice and oversight functions during the preceding period. It is a priority of the Board to keep Congress updated on Board activities and to work with Congress on issues within the Board's jurisdiction.

This Semi-Annual Report summarizes the work of the Board during the reporting period of April 1, 2016 through September 30, 2016.

Highlights of Board Activities

The Board has continued its examination of certain counterterrorism-related activities conducted by the Intelligence Community ("IC") under Executive Order 12333 ("E.O. 12333").

In addition, at the request of the President, the Board worked to complete its oversight project on the implementation of PPD-28 as it relates to counterterrorism efforts and the protection of privacy and civil liberties.

⁸ *Id.* § 2000ee(d)(3). In addition, the Board may designate new departments, agencies, or elements of the executive branch for coverage by the requirements of Section 803. *See id.* § 2000ee-1(a).

⁹ *Id.* § 2000ee(c).

¹⁰ *Id.* § 2000ee(d)(2).

¹¹ *Id.* § 2000ee(d)(1).

The Board's work on these oversight projects is further detailed in this report.

During the reporting period, PCLOB completed three projects pursuant to its advice function, and it completed an additional three advice projects shortly after the reporting period ended.

Additionally, the Board continued to work with the General Services Administration ("GSA") and the IC to identify and secure a permanent location for the agency that meets the agency's requirements, including security requirements. In September, 2016, the PCLOB was forced to move out of its previous building, located at 2100 K Street NW, Washington, DC because the building had been sold and is slated for demolition. The agency has temporarily relocated to a facility in College Park, Maryland. This location is only temporarily available to the PCLOB and the Board expects that a permanent location will be identified during the subsequent reporting period.

Work of the Board during the Reporting Period

Signals Intelligence Activities: PPD-28

In PPD-28, the President "encouraged [The Board] to provide [the President] with a report that assesses the implementation of any matters contained within this directive that fall within its mandate."¹²

This oversight report to the President assesses the implementation of PPD-28 as it relates to counterterrorism efforts and the protection of privacy and civil liberties. The Board completed its fact-finding after conferring with representatives from all elements of the IC. In December 2016, the subsequent reporting period, the Board completed this classified report and submitted it to the National Security Council ("NSC").

E.O. 12333

The Board has continued its examination of certain counterterrorism-related activities conducted by the IC under E.O. 12333, building upon the significant work that has been done to date.¹³

This review has included extensive meetings and briefings with various elements of the IC, a thorough examination of relevant procedures and policies, and input from the public, including academic experts, former government officials, and non-governmental organizations ("NGOs"). The Board and its staff have worked with the National Security Agency ("NSA") and the Central Intelligence Agency ("CIA") to gather information and documents in support of in-depth examinations of three specific counterterrorism activities under E.O. 12333 (one at the NSA and two at the CIA).

¹² PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

¹³ E.O. 12333, United States Intelligence Activities (Dec. 4, 1981), as amended.

During the reporting period, which ended on September 30, 2016, the Board prioritized its work on these three in-depth examinations, or “deep dives,” while it continued to work on a public report that explains E.O. 12333 at a high level. The Board anticipates that these deep dives will be largely or entirely classified.

Cybersecurity: E.O. 13636

E.O. 13636 requires DHS to consult with the Board in producing a public report, required by Section 5(c) of the order, that assesses the privacy and civil liberties risks of the functions and programs undertaken pursuant to the order.

During the reporting period, DHS issued its 2016 E.O. 13636 Privacy and Civil Liberties Assessment Report. Prior to DHS’s completion of that report, the Board’s staff had provided informal feedback to the contributing agencies.

In addition, the Board commenced its participation in its fourth annual consultation with DHS and the other agencies reporting under the Order.

Section 803 Report Recommendations

Section 803 requires agencies’ P/CL officers to issue Semi-Annual Reports about their activities to their respective agency heads, Congress, and the PCLOB. Eight federal departments and agencies are required to submit these reports. This legislation instructs the PCLOB to advise these agencies on their efforts to protect privacy and civil liberties.

During the reporting period, the PCLOB released a set of recommendations, which were approved unanimously by the Board, to provide guidance to help federal agencies improve the reports they file under Section 803. These recommendations are aimed at promoting transparency and are intended to make Section 803 reports more informative and accessible.

The Board’s Section 803 Recommendations can be found on the PCLOB’s website:

<https://www.pclob.gov/library/Section%20803%20Recommendations%20June%202016.pdf>

Organizational Activities of the Board

The Board continued to undertake the multiple functions necessary to operate as an independent agency, including recruiting and hiring staff, securing suitable office space, and developing policies to govern the Board’s Information Technology (“IT”) systems and other internal operations.

As reported in the Semi-Annual Report for the period covering October, 2015 through March, 2016, on July 1, 2016, David Medine stepped down from his position as Board Chairman.

Workforce

The Board has continued to pursue a workforce equipped with the skills required to achieve its mission. During the last reporting period, Congress appropriated funds for the Board's Fiscal Year ("FY") 2016 budget, thereby enabling the Board to expand its staff by twelve additional positions. To date, the Board has filled most of these positions, though some positions remain unfilled while security clearances are processed. The Board also seeks to ensure that staff composition encompasses a broad range of professional backgrounds, including experience in intelligence, counterterrorism, oversight and investigations, and privacy and civil liberties.

During this reporting period, the Board has hired Attorney Advisors, a Program Analyst, an Executive Assistant/Human Resources Officer, an Internal Controls Officer, and a Senior Acquisitions Officer, as well as a new Chief Management Officer and a new Chief Information Security Officer. A short-term Relocation Project Manager assists with the Board's relocation of its physical office spaces.

Under the Board's enabling statute,¹⁴ only the Chairman has the authority to appoint and fix the compensation of the Board's staff. In the absence of a Chairman, the Board may not hire additional staff, but positions can be filled through details that are reimbursable or non-reimbursable to that individual's employing agency.

Relocation of the Board's Offices

During the reporting period, the Board's physical office relocated to its interim space in College Park, Maryland, and the Board is in the final stages of locating a permanent facility. It continues to be a priority of the Board to minimize the agency's time in the interim location and to ensure that the move to its permanent location is done in the most cost-efficient manner possible.

By way of background, the Board is required to conduct its work within a Sensitive Compartmented Information Facility ("SCIF"). After its inception in 2012, the Board moved into government-rented space at 2100 K Street, NW, Washington, DC, which was already built to the necessary SCIF standards. The Board was subsequently notified that the building would be torn down in late 2016. Since then, the Board has been working with GSA and the IC to relocate at the lowest cost to the government and with the least disruptions to the Board's operations. The Board does not have independent leasing authority and therefore GSA is the lead agency with regard to the Board's move.

The FY 2016 Consolidated Appropriations Act¹⁵ included a one-time appropriation of \$11.2 million to fund the agency's mandatory move. In March 2016, the agency hired a short-term Relocation Project Manager to assist with this effort.

Upon the advice of GSA, in October 2015, the agency identified a property at 1120 Vermont Ave Washington, DC as a suitable and cost-effective location for its new, permanent offices. This location was included in GSA's inventory as "back fill space."

¹⁴ 42 U.S.C. § 2000ee(j)(1).

¹⁵ Pub. L. No. 114-113 (Dec. 18, 2015).

In addition, GSA recommended to the Board that the leasing strategy should include negotiating a ten-year lease on the property concurrent with proceeding with construction plans. At GSA's advice, the Board agreed to this strategy and received several assurances from GSA that the associated risks could be managed. This strategy was formalized in a February 8, 2016 Occupancy Agreement between GSA and the Board.

During this reporting period however, the Board received notice that GSA had decided to take a different course of action and instead would pursue a one-year lease with no assurances that a longer-term lease could be negotiated simultaneously. The Board viewed this as an untenable development that put taxpayer dollars at risk. On July 1st, the Board expressed these concerns in a letter to GSA Administrator Denise Turner Roth as well as other relevant GSA officials.

The Board is continuing to work with GSA to enter into a lease that would enable the Board to relocate to permanent office space to fulfill its mission in the most cost efficient manner possible. Therefore, the projected cost of relocating twice—to interim and then to permanent space—remains minimal, and limited to the cost of physically moving computers and other equipment.

The Board will continue to keep Congress fully informed about developments related to the Board's mandatory move.

Presidential Transition

The Board has designed the Deputy General Counsel to serve as the PCLOB's primary contact for matters related to the Presidential transition. While the PCLOB is a small, independent agency with limited matters related to a change in the Administration, this designee will provide the Presidential Transition Team with any information and assistance it requests.

IT Systems

During the reporting period, the Board's Office of the Chief Information Officer ("OCIO") focused on transitioning the PCLOB IT infrastructure from offices in Washington, DC to interim office space in College Park, Maryland. The agency implemented a Virtual Desktop Infrastructure ("VDI") solution for unclassified systems to support the agency during the relocation, and to provide a more secure platform for remote user access.

The Board has hired a new Chief Information Security Officer whose primary focus is to ensure that the PCLOB is in full compliance with the Cybersecurity Cross-Agency Priority Goals. These goals include: Information Security Continuous Monitoring ("ISCM"), and anti-phishing and malware defenses. Additionally, the OCIO remains diligent in completing Authorization of the PCLOB LAN ("PLAN") with the addition of the VDI system.

In the coming months, the Board will continue to focus efforts on the Cybersecurity Cross-Agency Priorities and implementation, upgrade of the PCLOB website to enhance content delivery, upgrade the PCLOB intranet to support information sharing, and provide assistance with IT controls in support of the PCLOB's financial and privacy internal controls.

Public, Congressional, and Federal Agency Outreach

Pursuant to direction in the Board's enabling statute, it is a Board priority to ensure, to the extent possible consistent with the protection of classified information, that the Board's work and reports are available to the public. To foster a better understanding of its mission and work, Board Members and staff frequently speak at events hosted by other government agencies, as well as by a variety of groups and organizations, including bar associations, business organizations, educational institutions, and non-governmental organizations.

It is also a priority for Board Members and staff to meet periodically with Members of Congress and congressional staff to update them on the Board's work.

In addition, on May 10, 2016, Board Member Rachel Brand and former Chairman David Medine testified before the Senate Judiciary Committee during a hearing to examine Section 702 of the Foreign Intelligence Surveillance Act. The Board Members' testimony is available on the PCLOB website:

<https://www.pclob.gov/library/20160510-R%20Brand%20testimony%20SJC.pdf>

<https://www.pclob.gov/library/20160510-SJC%20Medine%20Testimony.pdf>

Conclusion

During the reporting period, the Board continued its oversight work related to its examination of certain counterterrorism-related activities conducted by the IC under E.O. 12333 and was working to complete its report to the President on the implementation of PPD-28.

During the reporting period, the PCLOB completed three projects pursuant to its advice function, and it completed an additional three advice projects shortly after the reporting period ended.

The Board appreciates the continued collaborative efforts of Congress, the executive branch, advocacy groups, industry representatives, and members of the public who have engaged with the Board in support of its mission.