

Privacy and Civil Liberties Oversight Board



Semi-Annual Report

October 2015-March 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.

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Semi-Annual Report
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Report Distribution

In accordance with Section 801 of the Implementing Recommendations of the 9/11 Commission Act, 42 U.S.C. § 2000ee, the Semi-Annual Report of the Privacy and Civil Liberties Oversight Board (“Board”) covers the period of October 1, 2015 to March 31, 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 Barbara A. Mikulski,
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The Honorable Ron Johnson, Chairman
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and Governmental Affairs

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The Honorable Adam Schiff, Ranking Member
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The Honorable Robert Goodlatte, Chairman
U.S. House of Representatives
Committee on the Judiciary

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

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Introduction

The Privacy and Civil Liberties Oversight Board is an independent agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007 (“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 on 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, when appropriate, to make recommendations to P/CL officers regarding their activities and to coordinate those activities on relevant interagency matters.⁸

This Semi-Annual Report summarizes the work of the Board during the reporting period of October 1, 2015 through March 31, 2016.

Board Authorities

Congress established the Board to serve two main purposes:

- 1) 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
- 2) 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

Under the heading of *advice and counsel*, Congress charged the Board with reviewing proposed legislation, regulations, and policies related to efforts to protect the nation from terrorism, and advising the President and the departments, agencies, and elements of the executive branch to ensure that privacy and civil liberties are considered in the development and implementation of such legislation, regulations, policies, and guidelines.¹⁰ Congress, under the heading of *oversight*, also charged the Board 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.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.

Highlights of Board Activities

The Board is continuing its examination of certain counterterrorism-related activities conducted by the Intelligence Community ("IC") under Executive Order 12333 ("E.O. 12333").¹²

Thus far, 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

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)(1).

¹¹ *Id.* § 2000ee(d)(2).

¹² E.O. 12333, United States Intelligence Activities (Dec. 4, 1981), as amended.

(“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).

The Board anticipates that the E.O. 12333 reports covering these three “deep dives” will be largely or entirely classified. The Board also plans to issue a public report that explains E.O. 12333 at a high level. That report is expected to be completed this year.

During the period covered in this Semi-Annual Report, the Board released a report that provided an update on the progress the government has made toward implementing Board recommendations. These recommendations were made as part of the agency’s previous Reports on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court and its Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act. The *Recommendations Assessment Report* outlined the status of twenty-two Board recommendations made as part of these reports. In its review, the Board determined that all twenty-two of the Board’s recommendations have been implemented in full or in part, or that the relevant government agency had taken significant steps toward adoption and implementation.

In addition, the Board published its Advice Policy, which aims to ensure that the Board can more effectively provide vital, early input to federal agencies. The policy document, *Advisory Function Policy and Procedure*, specifies procedures under which the Board fulfills its advice function, placing the Board’s advice activities within the context of the executive branch’s deliberative process, and thereby provides a clear process for federal agencies and components to engage with the Board in early stages of the development of a new agency policy, rule, or regulation.

During the reporting period, Chairman David Medine appointed the agency’s first technology scholar, Steven Bellovin, a professor of computer science at Columbia University in New York, to help further expand Board’s expertise in technology and network security.

Finally, on March 29, 2016, Chairman Medine notified the White House of his intent to resign from the Board, which became effective July 1, 2016.

Work of the Board during the Reporting Period

E.O. 12333

The Board continued its in-depth review of counterterrorism activities conducted by the IC under E.O. 12333, building upon the significant work that was reported during the last period.

The Board and its staff had extensive interaction with the NSA and the CIA with briefings and document requests, both with respect to E.O. 12333 in general and to gather information in support of its examination of three specific counterterrorism activities under the order. Board staff also gathered information from other IC components regarding their E.O. 12333 procedures and their counterterrorism activities under the order. In addition to working

with the IC, the Board has also continued to receive information from representatives of NGOs and other stakeholders with regard to E.O. 12333.

During the reporting period, the Board's staff briefed the House and Senate Committees on the Judiciary, as well as the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, on the progress of the E.O. 12333 project and will continue to do so.

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, the Board participated in its third annual consultation with DHS and other agencies reporting under the order regarding privacy and civil liberties policies and practices in the area of critical infrastructure cybersecurity.

Signals Intelligence Activities: PPD-28

Section 5(b) of PPD-28 states: "The Privacy and Civil Liberties Oversight Board is encouraged to provide [the President] with a report that assesses the implementation of any matters contained within this directive that fall within its mandate."¹³ The Board previously engaged with IC elements as they drafted their initial procedures to implement the directive.

During the reporting period, the Board commenced its oversight project, which will ultimately result in a report to the President that assesses the implementation of PPD-28 as it relates to counterterrorism efforts and the protection of privacy and civil liberties. The Board is well into its initial fact-finding and, by the month after the close of the reporting period, had conferred with representatives from all elements of the IC.

Section 803 Reports

The Board continues to work with P/CL officers to identify practical changes to their reporting under Section 803 of the 9/11 Commission Act aimed to ensure that those reports are more informative and accessible. Eight federal departments and agencies are required to submit to Congress and the Board on a semi-annual basis Section 803 Reports covering the activities of privacy and civil liberties officers.

During the reporting period, the Board's staff briefed the staff of the House Committee on Oversight and Government Reform on the Board's work with regard to Section 803 as well as other activities. After the reporting period, the Board released recommendations to relevant agencies as they relate to reporting requirements under Section 803.

Assessing the Government's Implementation of the Board's Recommendations

¹³ PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

On February 5, 2016, the Board released a report that provided an update on the progress the government has made toward implementing the Board's recommendations. The *Recommendations Assessment Report* outlined the status of the twenty-two recommendations the Board made in its Report on the Section 215 telephone records program and its Report on the Section 702 surveillance program. Since the Board issued its recommendations, important measures have been taken to enhance the protection of Americans' privacy and civil liberties and to strengthen the transparency of the government's surveillance efforts without jeopardizing our counterterrorism efforts.

The Board's *Recommendations Assessment Report* is available at:

<https://www.pclob.gov/newsroom/20160205.html>.

Advice Policy

During the reporting period, the Board adopted and released a new policy, titled *Advisory Function Policy and Procedure*, which describes how the Board exercises its statutory advice function under which executive branch departments, agencies, or elements may engage with the Board in developing a new agency policy, rule, or regulation. One purpose of the Board's policy is to encourage 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 measure.

The Board's policy and a fact sheet are available on the Board's website:

https://www.pclob.gov/library/Policy-Advisory_Function_Policy_Procedure.pdf; and

https://www.pclob.gov/library/Policy-Advisory_Function_Policy_Fact_Sheet.pdf.

Since issuing this policy, the Board has engaged with agencies to provide advice on three matters during this reporting period, and received an additional agency request after the close of this reporting period.

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.

Workforce

The Board has sought to retain a workforce equipped with the skills required to achieve its mission. During the 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. The Board has been working to fill these positions through reimbursable details from other federal agencies and through direct hires. 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.

The Board has hired Attorney Advisors, Program Analysts, a Human Resources Officer, an Internal Controls Officer, and a Senior Acquisitions Specialist, as well as a new Chief Management Officer and a new Chief Information Security Officer. A full-time, contract Relocation Project Manager has also joined the staff to assist with the Board's upcoming 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. Shortly after the close of the reporting period, and prior to Chairman Medine's departure, the Board hired candidates to fill the positions listed above. The Board will work to continue processing and onboarding these new staff members during the coming months.

Board Nominations

On January 29, 2016, Board Member James X. Dempsey's term expired. On March 17, 2016,¹⁵ the White House announced that President Obama had nominated Mr. Dempsey to serve another term on the Board. The Senate Committee on the Judiciary had not yet considered Mr. Dempsey's nomination as of the publication of this report. Mr. Dempsey has continued to serve as a Board Member pursuant to subsection (h)(4) of the Board's enabling statute.¹⁶

Records Management

During the reporting period, on December 17, 2015, the Archivist of the United States approved the Board's comprehensive agency records schedule.

The Board manages its records in accordance with the requirements of the Federal Records Act.¹⁷ In addition, the Board is required to complete the Records Management Self-Assessment and Senior Agency Official Annual Report, as required by the National Archives and Records Administration ("NARA"). The Board has a Senior Records Official and an Agency Records Officer who, among other responsibilities, implement records policy, conduct employee debriefings to ensure proper records transfer and disposition, organize and digitize agency records, and provide records training. The records management team works closely with the General Counsel and the Chief Information Officer and consults with NARA as needed.

The Board's records schedule is available at:

http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0595/daa-0595-2015-0001_sf115.pdf

¹⁴ 42 U.S.C. § 2000ee(j)(1).

¹⁵ The White House announcement can be found at: <https://www.whitehouse.gov/the-press-office/2016/03/17/president-obama-announces-more-key-administration-posts>.

¹⁶ Under the Board's enabling statute, provided that a new nomination is made within sixty days after the expiration of a Board Member's term, the Board Member may continue to serve in the position until the adjournment sine die of the session of the Senate in which such nomination is submitted.

¹⁷ 44 U.S.C. §§ 3101, 3102.

Relocation of the Board's Offices

During the reporting period, efforts to plan, coordinate, and execute the Board's physical office relocation have continued.

The Board is required to conduct its work within a sensitive compartmented information facility ("SCIF"). After the Board's inception in 2012, it moved into government-rented space at 2100 K Street, NW, Washington, DC, which was already built to the necessary SCIF standards. In 2013, the Board was notified that the building would be torn down in late 2016. Since then, the Board has been working with the General Services Administration ("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 Act¹⁸ included a one-time appropriation of \$11.2 million to fund the agency's required move. In March 2016, the agency hired a full-time, contract Relocation Project Manager to assist with this effort.

Following an extensive search by the Board, GSA, and the IC, the Board concluded that there was no pre-existing SCIF space in the Washington, DC area suitable for the Board; therefore, a space would have to be retrofitted to SCIF standards for the Board.

Upon the advice of GSA, in October 2015, the agency identified 1120 Vermont Avenue, NW, 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."

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.

After the reporting period ended, 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. The Board expressed these concerns in a letter to GSA Administrator Denise Turner Roth as well as other relevant GSA officials.

At the time of publication of this report, the Board is working with GSA on a new lease procurement that would enable the Board to relocate to permanent office space to fulfill its mission in the most cost efficient manner possible.

Since new office space will not be available in time for the Board's required move from its current offices, the Board worked with the IC to identify interim SCIF office space located in College Park, Maryland. This space is available to the Board on a temporary basis. At present, it

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

is estimated that the Board will be located in this temporary space for up to a year, beginning in September 2016. The Board will not begin paying rent at a new permanent location until it assumes occupation of the space. 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.

IT Systems

During the reporting period, the Board’s Office of the Chief Information Officer (“OCIO”) focused on ensuring that the planning, budgeting, procurement, and management of the agency’s IT resources will support the agency’s needs. The OCIO upgraded and redesigned the agency’s IT architecture and transitioned to a “green” IT network, which reduced the overall number of IT servers and devices required to host the agency’s network, thereby saving energy.

As part of the architecture redesign, the OCIO designed and engineered a Virtual Desktop Infrastructure (“VDI”) solution for unclassified systems that provides continuity of operations, a secure platform for remote users, and reduced overhead costs and management for remote users. The Board plans to implement the VDI in the next few months.

Additionally, the OCIO concentrated on bringing the Board into full compliance with the Cybersecurity Cross-Agency Priority Goals outlined in the 2015 budget, which included (1) Information Security Continuous Monitoring (“ISCM”); (2) Identity, Credential, and Access Management (“ICAM”); and (3) anti-phishing and malware defenses. During the reporting period, the Board also implemented an IT asset management solution and subscribed to DHS’s EINSTEIN E3A service as part of the Continuous Diagnostics and Monitoring Program. As part of the ICAM goals, the Board has fully implemented Personal Identification Verification (“PIV”) cards for network access. The Board has also upgraded the PCLOB LAN (“PLAN”) Intrusion Detection System.

In the coming months, the Board will continue to focus efforts on the Cybersecurity Cross-Agency Priorities and implementation of the upgraded IT security architectures in support of the Board’s forthcoming office relocation.

Budget and Funding Highlights

The Board’s budget request, as reflected in the FY 2017 Congressional Budget Justification Book (“CJB”) ¹⁹ is for \$10,081,000 and no additional positions or resources over the FY 2016 request. The FY 2016 enacted budget included a one-time appropriation of an additional \$11,216,000 beyond the base budget to cover the costs of the Board’s mandatory move.

Public, Congressional, and Federal Agency Outreach

¹⁹ The Board’s FY 2017 CJB is available on its website: <https://www.pclob.gov/library/CJB17.pdf>.

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. The Board fulfills its statutory mandate through outreach and Board meetings, hearings, and, when practicable, events that are open 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.

Conclusion

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. The Board will continue to strengthen these relationships and keep Congress apprised of its efforts to ensure that the need for actions taken to protect the nation from terrorism is balanced with the need to protect privacy and civil liberties.