

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE



(U) Assessment of Oversight & Compliance with Targeting Procedures

LEADING INTELLIGENCE INTEGRATION

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(U) INTRODUCTION

(U) Section 702 of the Foreign Intelligence Surveillance Act (FISA), as amended by the FISA Amendments Act of 2008, provides a legal regime to target specific non-U.S. persons reasonably believed to be located outside the U.S. in order to acquire foreign intelligence information. Unless reauthorized by Congress, Section 702 will sunset in December 2017.

(U) In a letter dated October 27, 2015, the U.S. House of Representatives Permanent Select Committee on Intelligence requested that the Office of the Director of National Intelligence (ODNI) prepare, in coordination with the relevant Intelligence Community (IC) elements, a report evaluating the process by which IC elements task foreign intelligence targets under Section 702. Although the Committee's request noted that "Congress, the executive branch, and the courts all currently oversee Section 702 collection to ensure it complies with the Constitution and all applicable law," the Committee asked ODNI's report to focus on the oversight and compliance measures that apply to the tasking of foreign intelligence targets under Section 702 and to consider whether additional oversight and compliance measures are feasible or advisable. The Committee also asked that ODNI's report describe how, if at all, Presidential Policy Directive 28 (PPD-28), "Signals Intelligence Activities," has affected activities authorized under Section 702. Specifically, the letter asked, "Did PPD-28 cause the IC to modify or discontinue any of these activities" and "[A]re there any current or future foreign intelligence targets the IC would collect on if not for the restrictions of PPD-28?"

(U) As noted in previous and the current Joint Semiannual Assessments, ODNI and the Department of Justice (DOJ) assess overall that the agencies continue to implement their applicable targeting and minimization procedures in a focused and concerted manner to comply with the requirements of Section 702. Personnel involved in implementing the authorities are appropriately focused on directing their efforts at non-U.S. persons reasonably believed to be located outside the U.S. for the purpose of acquiring foreign intelligence information. Processes are in place to implement these authorities and impose internal controls for compliance and verification purposes. The compliance incidents that occur continue to represent a very small percentage (less than 1%) of the overall collection activity.

(U) ODNI worked with the relevant IC elements and DOJ to prepare this report in response to the Committee's request.

(U) BACKGROUND

(U) As noted by the Supreme Court, Section 702 “supplements pre-existing FISA authority by creating a new framework” to target non-U.S. persons located outside the U.S. but “[s]urveillance under [Section 702] is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment.” See Clapper v. Amnesty International, 568 U.S. ____ (2013). Specific statutory limitations on the use of Section 702 include the following:

- 1) Section 702 may not be used to intentionally target any person known at the time of acquisition to be located inside the U.S.;
- 2) Section 702 operations may not intentionally target a person reasonably believed to be located outside the U.S. if the purpose of such acquisition is to target a particular, known person reasonably believed to be located inside the U.S. (i.e., “reverse targeting” is prohibited);
- 3) Section 702 operations may not intentionally target a U.S. person reasonably believed to be located outside the U.S.;
- 4) Section 702 operations may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located inside the U.S.; and
- 5) All acquisitions of foreign intelligence information pursuant to Section 702 shall be conducted in a manner consistent with the fourth amendment to the Constitution of the U.S..

(U) Despite these safeguards, since its enactment in 2008 the IC’s implementation of Section 702 has been the topic of continuing public debate, Congressional hearings, civil litigation, and media coverage. On July 2, 2014, the President’s Privacy and Civil Liberties Oversight Board (PCLOB) released an exhaustive study of Section 702 titled, “*Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*” (hereinafter “PCLOB 702 Report”). The Board “found that the information the [Section 702] program collects has been valuable and effective in protecting the nation’s security and producing useful foreign intelligence.” Further, the PCLOB recognized, “the considerable value that the Section 702 program provides in the government’s efforts to combat terrorism and gather foreign intelligence,” and found that, “at its core, the program is sound.” The Board concluded its report by offering “policy recommendations” intended to provide additional privacy safeguards and the Government has responded to each of the Board’s recommendations. This report naturally draws on the results of the earlier PCLOB 702 Report as well as the results of other reviews of the activities the IC conducts pursuant to Section 702.

(U) TASKING PROCESS IN COMPLIANCE WITH TARGETING AND MINIMIZATION PROCEDURES

(U) Foreign intelligence activities conducted under Section 702 must comply with specific targeting and minimization procedures that have been adopted by the Attorney General and approved by the Foreign Intelligence Surveillance Court (FISC). As authorized by the Attorney General and Director of National Intelligence, all Section 702 targeting is initiated pursuant to the National Security Agency's (NSA) court-approved targeting procedures. Additionally, the Federal Bureau of Investigation (FBI) acquires data pursuant to its own Section 702 targeting procedures. The statute assigns ODNI and DOJ specific oversight responsibilities. All administrative requirements used to task a 702 target's communications facilities or "selectors" (e.g., a telephone number or email address) must satisfy the standards contained in the court-approved targeting procedures.

(U) Additionally, subsection (l) of Section 702 requires the Attorney General and DNI to conduct semiannual assessments of IC elements' compliance with the targeting and minimization procedures. Each of these assessments must be provided to Congress and the FISC. The statute also requires additional assessments and reviews to be conducted by the relevant agency heads and the Inspectors General of DOJ and each IC element authorized to acquire foreign intelligence pursuant to Section 702. All instances of potential non-compliance with court-approved targeting and minimization procedures are further required to be immediately reported to the FISC under Rule 13 of the Court's publicly available Rules of Procedure. To assist DOJ and ODNI in exercising their oversight and compliance responsibilities under the statute, DOJ and ODNI are provided copies of every Section 702 tasking record.

(U) Administrative requirements for an IC analyst to task a target's communications

(U) As also described in the PCLOB 702 Report, pages 41-48, IC analysts must comply with certain documentation and other administrative requirements prior to *tasking a selector* for acquisition pursuant to Section 702 – as a technical matter there is no such thing as tasking a "target's communications." Under NSA's court-approved targeting procedures, NSA will target a non-U.S. person reasonably believed to be located outside the U.S. by tasking one or more specific communications identifiers (also known as a "selector" - for example, an email address) to acquire foreign intelligence information that is to, from, or, in some cases, about a target. NSA may identify a foreign target of interest from a number of sources, including but not limited to already acquired collection or open source information. NSA then applies its targeting procedures before tasking the selector in order to acquire foreign intelligence information from or with the assistance of an electronic communication service provider. Tasked selectors are sent to electronic communication service providers who have been served with the required directives under the Section 702 certifications. The statute provides electronic communication service providers with a mechanism to seek judicial review of 702 directives.

(U) NSA's procedures require analysts to create a record documenting the tasking of each selector. Each tasking record includes a citation to the information leading the analyst to reasonably believe that the selector to be tasked is used by a non-U.S. person located outside the U.S.. The citation includes the source of the information, enabling oversight personnel to locate and review the information that led the analyst to his/her reasonable belief. Analysts must also identify the foreign power or foreign territory about which they expect the proposed targeting will obtain foreign intelligence information. Specifically, NSA analysts must include the following information, in relevant part, on the tasking sheet: (1) the specific selector being tasked; (2) citations to the specific documents or communications that led the agency to determine that the user of that facility is reasonably assessed to be located outside the U.S.; (3) a description of such cited documents or communications; (4) a statement regarding the assessed non-U.S. person status of the user; and (5) a statement identifying the foreign power or foreign territory about which NSA expects to acquire foreign intelligence information.

(U) NSA also includes a targeting rationale (TAR) in the tasking record, which ODNI and DOJ assess has improved their oversight team's ability to understand NSA's foreign intelligence purpose in tasking facilities. The TAR requires the targeting analyst to describe why tasking of a particular facility was requested. The intent of the TAR is to memorialize the linkage between the user of the facility and the foreign intelligence purpose covered by the certification under which it is being tasked, to include documentation of the analyst's assessment, based on their specialized training and experience, that tasking of the particular selector is expected to return foreign intelligence information relevant to the certification. Thus, NSA analysts must provide a written explanation of the basis for their assessment that the target possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning the foreign power or foreign territory identified in the tasking request for every section 702 targeting decision. *In other words, all of NSA's tasking under Section 702 is directed against specific, individual targets. No "bulk" or "mass" surveillance occurs under the statute.*

~~(S//NF)~~ The FBI's targeting procedures govern [REDACTED]. Specifically, [REDACTED] conducted by the FBI under Section 702 require that NSA first apply its own targeting procedures to determine that the user of a selector to be targeted (i.e. designated account) is a person reasonably believed to be outside the U.S. and is not a U.S. person. NSA is also responsible for determining that a significant purpose of the acquisition it requests is to obtain foreign intelligence information. After NSA designates accounts as being appropriate for acquisition, FBI must then apply its own, additional procedures, which require FBI to review NSA's conclusion of foreignness. If FBI's internal review of the information available to it *comports* with NSA's conclusion of foreignness, then FBI approves the tasking. If FBI's internal review *contradicts* NSA's conclusion of foreignness, then FBI does not approve the tasking at that time. However, if subsequent information is found to later support NSA's conclusion of foreignness, then FBI would approve the tasking.

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~~(S//NF)~~ More specifically, [REDACTED] the FBI applies its targeting procedures [REDACTED]. FBI targeting procedures are intended to ensure that no contradictory information is present [REDACTED] that may indicate that the target is located inside the U.S. or holds U.S. person status. FBI personnel who process tasking requests receive training in both the FBI targeting procedures and a detailed set of standard operating procedures, which describe the steps that the FBI takes to ensure that they have conducted due diligence in looking for information that may alter or affect NSA's foreignness assessment. To that end, the FBI uses a multipage checklist to record the results of its targeting process, culminating in approval or disapproval of the tasking.

~~(S//NF)~~ Although CIA does not directly engage in targeting or acquisition, it does nominate potential Section 702 selectors for tasking by NSA. [REDACTED]

[REDACTED] As with FBI nominated selectors, NSA will apply its targeting procedures, and, only if deemed appropriate, task the nominated selector.

(U) Based on its oversight of Section 702 and the low overall compliance incident rate, ODNI and DOJ assess that NSA's and FBI's administrative requirements for their analysts to task a target's communications, as well as CIA's nomination process, comply with their respective targeting procedures and the procedural requirements of Section 702. While tasking errors have occurred, those remain significantly under 1%. As reported in the Joint Assessments, NSA's tasking errors cover a variety of incidents, ranging from the tasking of an account that the Government should have known was used by a U.S. person or an individual located in the U.S. to typographical errors in the initial tasking of the account that affect no U.S. persons or persons located in the U.S.. But, as noted in the most recent Joint Assessment, the percentage of compliance incidents involving NSA's tasking incidents has remained consistently low, specifically 0.13% for the reporting period June 1, 2014 – November 30, 2014. The percentage of incidents of non-compliance with the FBI targeting procedures has remained consistently low as well, specifically 0.03% for the reporting period June 1, 2014 – November 30, 2014. And, even in those instances in which the targeting was not appropriate, none of those instances have been found to concern willful violations of the procedures.

(U) In addition to the robust administrative requirements and process contributing to the low compliance incident rate overall and pertaining to targeting incidents specifically, ODNI and DOJ assess that other factors such as training and better communication – both intra- and inter-agency communication – contribute to compliance with the targeting procedures and Section 702 requirements.

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(U//~~FOUO~~) The possibility of including additional [REDACTED] mechanisms for analyzing the foreignness of a target both pre- and post-targeting.”

~~(S//NF)~~ When NSA proposes to direct surveillance at a non-U.S. person target under Section 702, it does so because NSA already has learned something about the target or the facility or facilities the target uses to communicate. In addition to analysts conducting pre- and post-targeting reviews of NSA information to affirm the target is reasonably believed to be located outside the U.S., NSA has developed tools and capabilities that are used by analysts to help them assess the foreign location of a target both pre- and post-targeting. These include [REDACTED]

~~(S//NF)~~ NSA is also continuing to develop new tools and capabilities to assist analysts in bringing together multiple different data points that may be useful in reaching pre- and post-tasking foreignness determinations. For example, NSA is currently testing with analysts a tool [REDACTED]

NSA is also exploring additional improvements that would speed the process by which analysts are notified of a potential change in the foreignness status of a target, thereby allowing analysts to more quickly identify a potential change in a target's status and take appropriate action. These efforts are expected to continue to improve and build upon NSA's approach for ensuring compliance with its Section 702 court-approved procedures, which as noted in prior reviews has yielded an incident rate substantially below one percent since the Section 702 program was initiated. See, e.g. page 77-78 PCLOB 702 Report.

(U) The feasibility of creating standard criteria for determining the expected foreign intelligence value of a target.

(U) As noted above, NSA's targeting procedures require that NSA analysts provide a written explanation of the basis for their assessment that the target possesses, is expected to receive, or is likely to communicate foreign intelligence information. As described above in paragraph, this is known as the TAR. NSA has developed internal guidance for its analysts to assist them in documenting their assessment of the expected foreign intelligence information to be gained. This guidance includes exemplars and the supporting rationale for an improved description of the foreign intelligence that the analyst expects to receive by the tasking.¹ NSA has shared its internal guidance with the FBI and CIA to ensure that they provide NSA with the required documentation in support of their targeting nominations. DOJ and ODNI review the TARs as part of their regular oversight.

~~(S//NF)~~ [REDACTED]

(U) Potential new methods for training analysts to meet compliance requirements.

(U) Currently, NSA, CIA, and FBI require all personnel to complete agency-specific training pertaining to the handling of Section 702 information before they are provided access to unevaluated, unminimized Section 702 acquisitions. For example, for NSA personnel to access such data, they must annually complete an NSA Office of General Counsel (OGC) and Signals Intelligence Directorate (SID) Oversight and Compliance training program; review the targeting and minimization procedures as well as other documents filed with the certifications; and pass a competency test pertaining to Section 702 statutory and procedural requirements. Additionally, CIA continues to provide regular FISA training at least twice a year to all of the attorneys it embeds with CIA operational personnel. Furthermore, DOJ and FBI conduct in-person training at FBI field offices. As was reported in the September 2015 Joint Assessment, DOJ and ODNI assess that training is a key factor in the consistently low compliance incident rate. The fact that such incidents are not overly concentrated in any particular area generally reflects the strength of the agencies' training programs.

(U) In addition to its annual training described above, NSA offers internal training programs and continually looks for ways to improve its training. For example, NSA conducts surveys of its workforce to determine what improvements could be made in its Section 702 training, and based on the survey results, NSA formulated and provided its analysts with additional educational opportunities, such as training videos and informative work aides (e.g. topical flow charts explaining certain concepts). NSA is also using reminder-type training tools. For example, NSA began designing training reminders in November 2015 on an internal agency website where personnel could obtain information about specific types of Section 702-related issues and compliance matters. NSA is also considering, in part based on its workforce survey results, revising and updating its current Section 702 analytic training courses.

(U) More recently, CIA began a training program that provides hands-on experience with handling and minimizing Section 702-acquired data. Additionally, from December 2014 – May 2015, CIA centralized its FISA training to provide greater consistency and added a program that provides greater depth on the Section 702 nomination process.

(U) PROPOSED CHANGES TO NSA'S TASKING AND QUERYING TOOLS

(U) The Committee's letter requested an update on the status of proposed changes DOJ and ODNI suggested in the Joint Semiannual Assessment that NSA make to its tools related to tasking and querying under Section 702.

(U) Proposed Changes to NSA's tasking tool

~~(S//NF)~~ As it pertains to proposed changes to NSA's tasking tool, the September 2015 Joint Semiannual Assessment stated that ODNI and DOJ believe that:

NSA should strongly consider two changes to its tasking tool [. . .] First, NSA's tasking tool is currently configured in such a manner that [REDACTED] can result in the unintentional retasking of a facility without the application of the NSA targeting procedures. [Second], in processing [REDACTED] requests from CIA and FBI, detasked facilities are erroneously retasked without application of the NSA targeting procedures unless NSA personnel verify that the facility [REDACTED] is currently subject to Section 702 acquisition.

~~(S//NF)~~ However, the September 2015 Joint Semiannual Assessment also noted that the actual compliance benefit of taking actions to address these compliance risks would be, relatively speaking, quite modest. At most, the changes would eliminate 5% of the tasking errors that occurred in that reporting period, meaning 5% of the less than 1% overall error rate. Nonetheless, NSA is currently reviewing this recommendation and plans to engage in further discussions with DOJ and ODNI.

(U) Proposed Changes to NSA's querying tool

(U) As it pertains to proposed changes to NSA's tool for querying USP-associated selectors, the September 2015 Joint Semiannual Assessment stated:

Additionally, but separately, the joint oversight team believes NSA should assess modifications to systems used to query raw Section 702-acquired data to require analysts to identify when they believe they are using a U.S. person identifier as a query term. Such an improvement, even if it cannot be adopted universally in all NSA systems, could help prevent compliance instances with respect to the use of U.S. person query terms.

See page 41.

(U) NSA plans to test and implement this recommendation during calendar year 2016. The new internal compliance control mechanism being developed for NSA data repositories containing unevaluated and unminimized Section 702 information will require analysts to

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document whether the query being executed against the database includes a known US person identifier. Once the query is executed, the details concerning the query will be passed to NSA's auditing system of record for post-query review and potential metrics compilation. As part of the testing, NSA will evaluate the accuracy of reporting this number in future Joint Assessments.

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(U) PPD-28's EFFECT ON SECTION 702 ACTIVITIES

~~(S//NF)~~ After the publication of PPD-28 on January 17, 2014, NSA, FBI, and CIA each developed PPD-28 implementation guidance that includes activities that the agencies conduct pursuant to Section 702. *See, e.g.*, Section 4.2 of "USSID SP0018 Supplemental Procedures for the Collection, Processing, Retention, and Dissemination of Signals Intelligence Information and Data Containing Personal Information of Non-U.S. persons," published by NSA on January 12, 2015. The primary effect on Section 702 activities stems from Section 3 of PPD-28, which supplemented the existing policy process for reviewing sensitive signals intelligence collection activities. [REDACTED]

[REDACTED] ODNI has reported to the Congress by separate, classified correspondence, more specific information about the results of the PPD-28 sensitive targeting reviews.

(U) Section 4 of PPD-28 obligates IC elements to include appropriate safeguards for the personal information of all individuals, regardless of nationality, that is acquired during signals intelligence activities. Therefore, the agencies' PPD-28 procedures provide comparable protection to the retention and dissemination of the personal information of non-U.S. persons acquired during Section 702 operations that the agencies apply to the personal information of incidentally acquired U.S. person information. In addition, PPD-28 requires IC elements to notify the DNI of any significant compliance issue involving signals intelligence collection of personal information of any person, regardless of nationality. To date, there have been no compliance issues reported to DNI concerning Section 702 activities involving the handling of personal information of non-U.S. persons.