

Communications Daily

PCLOB Declines to Release Report on Surveillance-Related Order

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At the direction of intelligence officials, the Privacy and Civil Liberties Oversight Board refused to release its deep dive report on a key intelligence-related executive order, according to a Freedom of Information Act response. The Cato Institute filed the FOIA request seeking PCLOB reports on executive order No. 12333 to determine if agencies are abusing their authority. Senate Intelligence Committee Chairman Richard Burr, R-N.C., said earlier this month the president can use 12333 to exercise surveillance authorities without congressional approval, including controversial authority central to the USA Freedom Act debate (see [2003180042](#)).

PCLOB consulted an unidentified intelligence agency and determined PCLOB's "deep dive report" under EO 12333 is "neither segregable nor releasable." The agency cited FOIA exemptions.

The board shouldn't allow the entity it's auditing to dictate what information PCLOB distributes, said Cato Research Fellow Patrick Eddington: PCLOB is allowing the entity to withhold a work product, which "vitiates the entire notion of why we have a PCLOB" tasked with overseeing intelligence activity. He noted PCLOB recently released reports on USA Freedom Act Section 215 (see [2002260061](#)) and Section 702.

The oversight panel has "derivative classifying authority," meaning the intelligence community deems "what information is classified and at what level," a spokesperson emailed. "The Board reviews and oversees information that belongs to the intelligence community." The deep dive "is and will very likely remain classified," the spokesperson said, citing the nature of the topic: "Neither the previous Board nor the current Board had any expectation that it would be unclassified."

The House left town last week without addressing the Senate's recent USA Freedom Act extension, so related surveillance authorities will lapse until the House passes the Senate version. The real-world and national security impact, however, is limited, if not inconsequential, experts told us. Intelligence agencies can continue using these authorities for investigations based on facts that occurred before March 15.

The debate about surveillance authorities could extend for a long time, said Berkeley Center for Law & Technology Executive Director Jim Dempsey, given lack of a significant impact on

national security and arguably no impact for ongoing investigations. He noted there have been other short-term lapses in surveillance authority since 2001.

The broader question is how Congress addresses FISA warrant revisions involving the partisan fight over Carter Page (see [2002120064](#)), Dempsey said. The probe of Page, an adviser to President Donald Trump's 2016 campaign, exposed "disturbing flaws," Dempsey said. DOJ's inspector general is expected to determine in the next six months or so whether the Page case was an anomaly, Dempsey said.

There's also debate about whether Congress should extend four Section 215 authorities: the roving wiretap, business records, lone wolf and call detail records (CDR) program provisions. Consensus is stronger for letting the CDR program sunset, given its cost and lack of intelligence value. The House-passed reauthorization would end the CDR program, but the Senate passed its extension without addressing that aspect.

Burr's comments suggest the debate over Section 215 authorities is irrelevant, Dempsey said. It just shows "what a game it is, what a sham it is," he said. Anyone who thinks the government can't get a wiretap on somebody without these authorities isn't paying attention to existing law, he said.

The president's Article II authority allows him to direct the collection of intelligence, a Burr aide said, noting it's usually done through executive order: "FISA provides guardrails around how that surveillance may be used – which is exactly why it is necessary."

The Open Technology Institute disagrees with Burr's interpretation, said Senior Policy Counsel Lauren Sarkesian. Regarding PCLOB's refusal to publish the EO report, she said USA Freedom reauthorization can be used to deal with transparency issues for agencies. It's worth monitoring to see if the House can pass the Senate extension through unanimous consent while in pro forma session, she said. That would end the lapse of the authorities, which she agreed doesn't have a significant real-world impact on investigations in the short term.