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Privacy and Civil Liberties Oversight Board  
General Services Administration  
Regulatory Secretariat Division (MVCB)  
ATTN: Ms. Hada Flowers  
1800 F Street N.W., 2<sup>nd</sup> floor  
Washington, DC 20405

**Re: Notice PCLOB-2015-01, Comments on the Board's Plan for Examination of EO 12333 Activities**

To the members of the Privacy and Civil Liberties Oversight Board:

Thank you for the opportunity to submit comments on the Board's plans to examine various counterterrorism-related activities conducted under Executive Order ("EO") 12333.

While declassified documents show that a large proportion of electronic surveillance activities are conducted under EO 12333, little information about these activities is publicly available.<sup>1</sup> Our comments contain a list of questions and issues that we urge you to address during your examination of EO 12333 activities. Answers to these questions will provide the public with a much-needed understanding of how the government interprets and exercises its powers to conduct electronic surveillance and other intelligence gathering activities under the Order.

Please note that when our comments mention the terms "acquire" and "collect," these are not used interchangeably. The U.S. persons' procedures under EO 12333 have distinguished between the acquisition or gathering of information on one hand, and "collection" on the other. For example, the Department of Defense considers that "collection" occurs only when information

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<sup>1</sup> NATIONAL SECURITY AGENCY, LEGAL FACT SHEET: EXECUTIVE ORDER 12333 (2013), *available at* <https://www.aclu.org/files/assets/eo12333/NSA/Legal%20Fact%20Sheet%20Executive%20Order%2012333.pdf>

has been “processed into intelligible form.”<sup>2</sup> Accordingly, when we use the term “collect” or “collection” below, we are referring to the government’s definition of “collection.” When we use “acquire” or “acquisition”, we are referring to the ordinary process of gathering or obtaining a particular communication or piece of information.

Finally, while we understand that the Board intends to make public its overview of the legal framework established by EO 12333, we urge the Board also to seek declassification of its studies of two counterterrorism-related activities governed by EO 12333, with only those redactions that are truly necessary. In particular, the Board should do everything in its power to ensure that any analysis of applicable laws and statutes are made public.

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<sup>2</sup> DEPARTMENT OF DEFENSE, ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS, § C.2.2.1., DOD 5240.1-R (1982), available at <http://dtic.mil/whs/directives/corres/pdf/524001r.pdf>.

**List of Issues and Questions Concerning EO 12333 Activities**

ISSUE	QUESTIONS FOR OVERVIEW REPORT	QUESTIONS FOR IN-DEPTH REPORTS
<p><b>1. General Legal Questions</b></p>	<p>Has the NSA, CIA, ODNI, DOJ, White House Counsel, National Security Council or any other federal agency or department created any opinion, memorandum or document analyzing: (1) Whether and how EO 12333 or activities conducted under it are consistent with the relevant provisions of the Constitution and/or statutory law; and (2) whether and how EO 12333 or activities conducted under it are consistent with the U.S.’s obligations under international law, including the ICCPR? Please seek declassification of all such documents, or at least the public release of a summary of the legal analysis contained in these documents.</p>	<p>Has the NSA, CIA, ODNI, DOJ, White House Counsel, National Security Council or any other federal agency or department created any opinion, memorandum or document analyzing whether and how the program under review is consistent with: (1) the relevant provisions of the Constitution and/or statutory law, and (2) international law? Please seek declassification of all such documents, or at least the public release of a summary of the legal analysis contained in these documents.</p>
<p><b>2. EO 12333 vs. domestic statutory authorities</b></p>	<p>Under what circumstances, if any, are communications and other data acquired inside the U.S. under EO 12333? If intelligence activities are carried out inside the U.S. under the Order, what are the rules governing such activities?</p>	<p>Does any part of the program under review acquire communications and other data within the U.S.? If so, what is the legal basis for such activity and what are the rules governing such activity?</p>
<p><b>3. Congressional Oversight</b></p>	<p>What does the congressional oversight regime for EO 12333 look like? For instance, how frequently are (a) the House Permanent Select Committee on Intelligence (“HPSCI”) and the Senate Select Committee on Intelligence (“SSCI”), (b) subsets of those committees, or any other committees or groupings of Congress (e.g., “Gang of Four” or “Gang of Eight”); and (c) Congress as a whole, briefed on surveillance activities conducted under EO 12333? What kinds of information about EO 12333 surveillance are shared only with HPSCI, SSCI or smaller groups of members? In cases where only</p>	<p>How has congressional oversight of the program under review functioned? In particular, how frequently are the members or relevant committees of Congress briefed on the program under review, and which members or committees are briefed? Is knowledge about the program under review restricted to HPSCI, SSCI or smaller groups of members? What are the kinds of reviews, assessments or investigations that HPSCI and SSCI have conducted, if any, to ensure that the program under review complies with the Constitution and any domestic or international</p>

	HPSCI, SSCI or smaller groups have been briefed, how often have these committees or groups shared information with other members, and how have they done so? Has any committee, subset or grouping of Congress conducted any review, assessment or investigation of the constitutionality and/or legality of EO 12333 surveillance activities? What were their findings and conclusions?	legal obligations? What action have HPSCI and SSCI taken, if any, to remedy or deter any privacy or legal violations arising from the program under review?
<b>4. Funding</b>	How does Congress allocate funds for intelligence activities conducted under EO 12333? Have these programs been audited, and what were the results?	How much funding is allocated to the program under review? Has the program been audited, and what were the results?
<b>5. Intelligence Outsourcing</b>	What kinds of intelligence activities conducted under EO 12333 are outsourced to private contractors? What rules and regulations are in place to ensure that these contractors respect privacy, civil liberties, and relevant U.S. and international laws when they conduct such activities? How is oversight of these contractors conducted? Have there been any instances of fraud, waste or abuse involving contractors that conduct such activities?	What role(s), if any, do private contractors have in conducting the program under review? What rules and regulations are in place to ensure that these contractors respect privacy, civil liberties, and relevant U.S. and international laws when they conduct activities under the program? How is oversight of these contractors conducted? Have there been any instances of fraud, waste or abuse involving contractors that conduct activities under the program?
<b>6. Internal Oversight</b>	How frequently is compliance with EO 12333 and relevant privacy procedures and policies reviewed internally (i.e., within the executive branch), and which entities perform such reviews? What is the nature and frequency of incidents of non-compliance, and what recommendations have the relevant oversight bodies made to prevent future incidents and to otherwise ensure respect for privacy and civil liberties? Have these recommendations been implemented, and if so, has their effectiveness been measured or studied? How do the President's Intelligence Advisory Board ("PIAB") and its	How frequently is the program's compliance with EO 12333 and relevant privacy procedures or policies reviewed internally (i.e., within the executive branch), and which entities perform such reviews? What is the nature and frequency of incidents of non-compliance, and what recommendations have the relevant oversight bodies made to prevent future incidents and to otherwise ensure that the program respects privacy and civil liberties? Have these recommendations been implemented, and if so, has their effectiveness been measured or studied? How do

	component Intelligence Oversight Board (“IOB”) conduct oversight of intelligence activities under EO 12333?	the PIAB and the IOB oversee the program under review?
<b>7. Effectiveness</b>	How is the effectiveness of intelligence activities conducted under EO 12333 assessed, which government entities conduct these assessments, and how frequently do such assessments occur? What metrics are used to measure effectiveness? Has any surveillance operation, program or activity under EO 12333 been terminated because it was deemed ineffective? Has there been any surveillance operation, program or activity that has yielded intelligence or information that could have been obtained using more targeted or privacy-protective methods?	How is the effectiveness of the program under review assessed, which government entities conduct these assessments, how frequently do such assessments occur, and what metrics are used? Could the intelligence or information obtained from the program under review have been obtained using more targeted or privacy-protective methods?
<b>8. Acquisition vs. Collection</b>	DoD 5240.1-R, the DoD’s U.S. persons’ procedures under EO 12333, considers data acquired by electronic means to be “collected” only when “it has been processed into intelligible form.” <sup>3</sup> On the other hand, USSID 18, the NSA’s signals intelligence directive, states that “collection” is the “intentional tasking or selection of identified nonpublic communications for subsequent processing aimed at reporting or retention as a file record.” <sup>4</sup> Are these definitions intended to have the same meaning? What does “intelligible form” mean? Can the Board provide examples of when “collection” takes place under these definitions?	-
<b>9. PPD-28 and Information</b>	How has the establishment of PPD-28 and the agencies’ supplemental procedures affected how	How has the establishment of PPD-28 and the agencies’ supplemental procedures affected how

<sup>3</sup> *Id.*

<sup>4</sup> UNITED STATES SIGNALS INTELLIGENCE DIRECTIVE, USSID SP0018 (U)LEGAL COMPLIANCE AND U.S. PERSONS MINIMIZATION PROCEDURES, § 9.2., (NATIONAL SECURITY AGENCY, 2011), available at <http://s3.documentcloud.org/documents/836235/ussid-sp0018.pdf>.

<p><b>Acquisition and Collection</b></p>	<p>information is (a) acquired, and (b) collected under EO 12333? Although the ODNI has pledged that the Intelligence Community will no longer retain or disseminate information solely because of a person’s foreign status,<sup>5</sup> there appears to be no similar limitation with respect to acquisition or collection. Are any agencies acquiring and/or collecting data under EO 12333 solely based on the foreign status of those targeted or affected?</p>	<p>information is (a) acquired, and (b) collected under the program under review? Does the program under review acquire and/or collect data under EO 12333 based solely on the foreign status of those targeted or affected?</p>
<p><b>10. “Bulk” collection vs. “targeted” collection</b></p>	<p>What percentage or proportion of EO 12333 surveillance operations or programs involve “bulk” (versus “targeted”) collection as defined under Footnote 5 of PPD-28?<sup>6</sup></p>	<p>Is the program under review a “bulk” or “targeted” collection program?</p>
<p><b>11. Joint information acquisition / collection efforts with foreign governments</b></p>	<p>What rules and regulations apply to intelligence gathering activities that are conducted jointly with foreign governments? A senior intelligence official has stated that the Intelligence Community cannot ask its foreign partners to spy on targets or communications it is legally prohibited to spy on, but acknowledged that it can accept information from other governments it cannot legally acquire or collect.<sup>7</sup> If this is an accurate description, how does this principle work in practice?</p>	<p>What role, if any, do foreign intelligence agencies and other relevant foreign government entities have in acquiring, collecting, or processing information under the program under review? What rules and regulations are in place to ensure that the foreign entity respects privacy, civil liberties, and relevant U.S. and international laws when it conducts such activities under the program?</p>

<sup>5</sup> INTERIM PROGRESS REPORT ON IMPLEMENTING PPD-28 (OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, OCT 2011), *available at* <http://www.dni.gov/index.php/newsroom/reports-and-publications/204-reports-publications-2014/1126-interim-progress-report-on-implementing-ppd-28?tmpl=component&format=pdf>.

<sup>6</sup> Press Release, The White House, Office of the Press Sec’y, Presidential Policy Directive (PPD)- 28, § 5 (Jan. 17, 2014) [hereinafter PPD-28], *available at* <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signalsintelligence-activities>.

<sup>7</sup> G. ALEX SINHA, WITH LIBERTY TO MONITOR ALL, 68-69 (HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, 2014), *available at* [http://www.hrw.org/sites/default/files/reports/usnsa0714\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf).

<b>12. Search terms</b>	What types of search terms are used to acquire and/or collect information under EO 12333 (e.g. specific, known personal identifiers, names of organizations, geographical regions, general topics, terms that target communications because of their encrypted nature, etc.)? Which types of search terms are most commonly used, and how much information does each type of search term acquire and/or collect?	What types of search terms does the program under review use to acquire and/or collect information? Which types of search terms are most commonly used, and how much information does each type of search term acquire and/or collect?
<b>13. Impact on U.S. persons' communications</b>	To what extent do intelligence activities conducted under EO 12333 acquire and/or collect: (1) communications between U.S. persons and non-U.S. persons; and (2) wholly domestic communications between U.S. persons? Please request that the relevant agencies provide estimates, based on sampling if necessary.	To what extent does the program under review acquire and/or collect: (1) communications between U.S. persons and non-U.S. persons; and (2) wholly domestic communications between U.S. persons? Please request that the relevant agencies provide estimates, based on sampling if necessary.
<b>14. Religious profiling</b>	Under what circumstances are an individual or organization's racial, religious, or ethnic affiliation a relevant characteristic that may be taken into account in conducting intelligence collection under EO 12333? Has information collected under EO 12333 been used to map the demographics, travel, associations, and financial activities of Muslim, South Asian and Arab communities in the U.S.? What type of training do analysts and other personnel who conduct EO 12333 surveillance receive on these matters?	Have there been any incidents where the program under review was used to target individuals or organizations on the basis of their racial, religious or ethnic affiliation? What measures were taken, if any, to address the privacy and civil liberties violations arising from such incidents?
<b>15. Minimization</b>	What are the relevant minimization rules and how are they implemented in practice, and how have the rules and/or practice changed since the establishment of PPD-28? In particular, please address the following questions: <ul style="list-style-type: none"> <li>• The ODNI has pledged that the Intelligence</li> </ul>	What are the rules for disseminating and retaining data acquired and/or collected under the program under review, and how are these rules implemented in practice? How much of the information collected under the program under review is deemed exempt from the default 5-year retention limit? How often has the relevant agency

	<p>Community will no longer retain or disseminate information solely because of a person’s foreign status.<sup>8</sup> The NSA’s PPD-28 Procedures expressly incorporate this limitation with respect to dissemination, but not retention.<sup>9</sup> (In contrast, the CIA’s PPD-28 Procedures apply this limitation to both activities.)<sup>10</sup> Could the Board clarify whether the NSA still asserts the authority to retain information solely because of a person’s foreign status?</p> <ul style="list-style-type: none"> <li>• How has the principle that information will no longer be retained or disseminated based solely on a person’s foreign status been implemented? What additional criteria are used in deciding whether to retain or disseminate data?</li> <li>• Does the executive branch adhere to the default 5-year retention limit established by Congress,<sup>11</sup> and if so, how much of the information collected is deemed exempt from that default?</li> <li>• How often do agencies mask or delete data before the 5-year retention limit is reached, and is this done before or after dissemination?</li> <li>• Has non-U.S. persons’ data collected under</li> </ul>	<p>masked or deleted data before the 5-year retention limit is reached? Has non-U.S. persons’ data collected under the program under review ever been minimized?</p>
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<sup>8</sup> *Supra*, n. 5.

<sup>9</sup> PPD-28 SECTION 4 PROCEDURES, §§ 6.1, 7.2 (NATIONAL SECURITY AGENCY, 2015), available at [https://www.nsa.gov/public\\_info/files/nsacss\\_policies/PPD-28.pdf](https://www.nsa.gov/public_info/files/nsacss_policies/PPD-28.pdf).

<sup>10</sup> SIGNALS INTELLIGENCE ACTIVITIES, 4, 5 (CENTRAL INTELLIGENCE AGENCY, 2015), available at <https://www.cia.gov/library/reports/Policy-and-Procedures-for-CIA-Signals-Intelligence-Activities.pdf>.

<sup>11</sup> Intelligence Authorization Act for Fiscal Year 2015, § 309 available at <https://www.congress.gov/bill/113th-congress/house-bill/4681/text#toc-H24A00B60DB134DD19E2349A918676294>.



	<p>EO 12333 ever been minimized?</p> <ul style="list-style-type: none"> <li>• What is the process by which minimization decisions are made?</li> </ul>	
<b>16. Use of EO 12333-collected information during criminal proceedings</b>	<p>Are there any criminal cases where prosecutors have relied on evidence (a) directly obtained or (b) derived from EO 12333 surveillance? How many of these cases exist, and how many or what proportion of them resulted in conviction? Can the Board make public statistics on how many of these cases concerned crimes other than those that are “likely to affect national security, defense or foreign relations of the United States” as defined in Section VII(A)(2) of the MOU on the Reporting of Information Concerning Federal Crimes?<sup>12</sup> Are defendants notified when information obtained or derived through EO 12333 activities is used against them?</p>	<p>Are there any criminal cases where prosecutors have relied on evidence (a) directly obtained or (b) derived from the program under review? How many of these cases exist, how many or what proportion of them resulted in conviction, and how many of these cases concerned crimes other than those that likely to affect U.S. national security, defense or foreign relations?</p>
<b>17. Use of EO 12333-collected information during immigration and other proceedings</b>	<p>Are there any deportation or exclusion proceedings where the government has relied on evidence (a) directly obtained, or (b) derived from EO 12333 surveillance? How many of these cases exist, and how many or what proportion of them have led to deportation or exclusion? Are there any other kinds of legal or administrative proceedings where the government has relied on evidence directly obtained or derived from EO 12333 surveillance? Are parties to these proceedings notified when information obtained or derived through EO 12333 activities is used against them?</p>	<p>Are there any deportation or exclusion proceedings where the government has relied on evidence (a) directly obtained, or (b) derived from the program under review? How many of these cases exist, and how many or what proportion of them have led to deportation or exclusion?</p>
<b>18. Use of EO 12333-collected information during</b>	<p>Has information obtained or derived from EO 12333 surveillance been used to support a targeted killing operation? How many or what proportion of targeted</p>	<p>Has information obtained or derived from the program under review been used to support a targeted killing operation?</p>

<sup>12</sup> DEPARTMENT OF JUSTICE, MEMORANDUM OF UNDERSTANDING: REPORTING OF INFORMATION CONCERNING FEDERAL CRIMES (1995), *available at* <http://fas.org/irp/agency/doj/mou-crimes.pdf> .

<b>targeted killing operations</b>	killing operations conducted by the U.S. have relied on information obtained or derived from EO 12333 surveillance?	
<b>19. Information sharing with other agencies</b>	Do any agencies other than the collecting agency (e.g., the FBI or the DEA) have access to “raw,” unminimized EO 12333 data? If so, which agencies and under what circumstances? If not, when and how is processed information shared with other agencies?	Do any other agencies have access to “raw,” unminimized data collected under the program under review? If so, which agencies and under what circumstances? If not, when and how is processed information shared with other agencies?
<b>20. Information sharing with foreign governments</b>	What internal requirements exist for determining with whom data is shared, including how equities are weighed when sharing intelligence with governments that have a history of committing human rights abuses? What safeguards are included in information sharing agreements with foreign governments to ensure that the privacy of both U.S. persons and non-U.S. persons is adequately protected? Is the NSA, CIA, or any other element of the IC or USG aware of any human rights violations that were committed using information that was shared with the foreign government? Has information acquired/collected by U.S. intelligence been used in foreign prosecutions of U.S. persons?	-