

Questions for the Record

Senate Committee on the Judiciary Hearing on Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties

June 27, 2017

QUESTIONS FOR THE RECORD - Chairman Grassley

Elisabeth Collins, Privacy and Civil Liberties Oversight Board Member

1. During the hearing, you indicated that more must be done to provide an accurate and meaningful statistic representing the number of Americans whose communications are incidentally collected through the Section 702 program, in keeping with Recommendation 9 made by the Board in its July 2014 report on Section 702. In February 2016, the Board released a Recommendations Assessment Report in which it evaluated Recommendation 9 as having been “implemented” by the USA Freedom Act with regard to disclosure of “more detailed statistics on surveillance.”
 - a. To that effect, please describe the evaluation the Privacy and Civil Liberties Oversight Board undertook to determine the feasibility of the intelligence community being able to calculate accurately the statistic concerning incidental collection of Americans.

In Recommendation 9 of the Privacy and Civil Liberties Oversight Board's (PCLOB) Section 702 report, the Board proposed five measures that would “provide insight about the extent to which the NSA acquires and utilizes the communications involving U.S. persons and people located in the United States under the Section 702 program.”

Specifically, the Board recommended that the NSA annually count: (1) the number of telephone communications acquired in which one caller is located inside the United States; (2) the number of Internet communications acquired through upstream collection that originate or terminate inside the United States; (3) the number of communications that the NSA positively identifies as such in the routine course of its work; (4) the number of queries performed that employ U.S. person identifiers, specifically distinguishing the number of such queries that include names, titles, or other identifiers potentially associated with individuals; and (5) the number of instances in which the NSA disseminates non-public information about U.S. persons, specifically distinguishing disseminations that include names, titles, or other identifiers potentially associated with individuals. We made these recommendations after close analysis of the privacy implications, operational impact, and likely credibility of other methodologies. We considered the feasibility of a range of alternatives and declined to recommend other metrics.

The Board acknowledged that these metrics would provide an imperfect snapshot of the scope of incidental collection, but noted that when taken collectively they would provide Congress and the public with useful information about the scope of incidental collection. Pages 146-147 of the

PCLOB's report provide a fuller description of the Board's reasoning for this recommendation. In our February 2016 Recommendations Assessment report, we characterized the status of Recommendation 9 as "being implemented." At the time of the report's issuance, the NSA had advised the Board that, pursuant to its USA FREEDOM Act reporting obligations, the NSA intended to publish statistics substantially similar to those proposed by the Board in 9(4) and 9(5). The NSA was still assessing its ability to implement the measures proposed in 9(1), 9(2), and 9(3).

- b. Please describe what additional steps, if any, the Privacy and Civil Liberties Oversight Board concluded the intelligence community should take to calculate accurately the statistic concerning incidental collection of Americans.

The PCLOB recommended implementation of five measures to provide insight about the extent to which the NSA acquires and utilizes the communications involving U.S. persons and people in the United States under Section 702. The Board reported that the NSA accepted the recommendations in our 2015 Recommendations Assessment Report. As referenced in the agency's 2016 Recommendations Assessment Report, the NSA has publicly released statistics for Recommendations 9(4) and 9(5), which quantify the number of U.S. person queries and the number of U.S. person identities disseminated in intelligence reporting, respectively. In my individual capacity as a Board Member, I continue to encourage the NSA to develop reliable measures responsive to Recommendations 9(1), 9(2), and 9(3).

Senator Mazie K. Hirono

Questions for the Record following hearing on June 27, 2017 entitled:
“The FISA Amendments Act: Reauthorizing America’s Vital National Security Authority and
Protecting Privacy and Civil Liberties”

Hon. Elisebeth B. Collins, Board Member, Privacy and Civil Liberties Oversight Board:

- 1) You are currently the only board member of the PCLOB, and have been for four months. It is my understanding that without a quorum, you are unable to order new investigations, though you may conduct investigations that were ordered when you did have a quorum.
 - a. Does your inability to order new investigations reduce your ability to fulfill your statutory mandate of protecting the privacy and civil liberties of the American people? If not, will there be a point at which this ability is reduced, and when would that point be?

The Privacy and Civil Liberties Oversight Board (PCLOB) is comprised of one full-time chairman and four part-time Board Members – each with staggered terms. Per our statute, a quorum consists of three or more Members.

In June 2016, the PCLOB’s Chairman resigned. In December 2016, one Board Member’s term expired. Then, in January 2017, the agency lost its quorum after another Board Member resigned. In February 2017, PCLOB lost its fourth Board Member after another term expired. The PCLOB is now more limited in its authorities but has continued to operate as an independent, executive branch agency.

During a sub-quorum period, PCLOB may not initiate new advice or oversight projects. However, the remaining Board Members and staff can continue to work on projects that were approved by the Board before it lost its quorum. Board Members can continue agency related work in their own individual capacities, and agencies can seek advice from Board Members in their individual capacities. Additionally, the agency may not hire staff in the absence of a Chairman who has sole hiring authority.

The PCLOB and its staff are actively engaged on several mission-related projects initiated before the Board lost its quorum, in addition to the projects that had already been undertaken. As the remaining Board Member, I am authorized and continue to perform duties that I could before the Board lost a quorum, such as testify before Congress, continue oversight of the intelligence community, interface with domestic and international partners, and guide staff on projects. Also, if asked, I may also provide advice to agencies in my individual official capacity with the full resources of the Board.

PCLOB is actively committed to fulfilling its statutory mandate of protecting the privacy and civil liberties of the American people. The dedication of the professional staff is proof of this with the daily work being done on oversight projects that will bring greater transparency into certain counterterrorism activities of the executive branch.

- b. Have you received any indication from the White House about when additional board members will be nominated?

I welcome any board members the White House nominates, but I am unaware of a specific timeframe when board members will be nominated.

- c. Has the PCLOB released a semi-annual report since August 2016? Have materials that would go in the report if the board had a quorum been prepared? If so, have those materials been made public?

On January 6, 2017, the PCLOB issued a Semi-Annual Report that covered the work of the Board for the period of April through September 2016. This report also included updates on the Board's work that followed the end of the reporting period through the time the report was released. This Semi-Annual report is available on the PCLOB's website:

<https://www.pclob.gov/library/Semi-Annual-Report-Apr-Sept2016.pdf>

Under its enabling statute, the PCLOB cannot issue Semi-Annual Reports while in the absence of a quorum because these reports require Board approval. The Board lost its quorum on January 7, 2017. In lieu of a Semi-Annual report for the most recent reporting period, however, on June 20, 2017, I submitted a letter to the respective Chair and Ranking Members of PCLOB's oversight committees to explain the limitations that prevent PCLOB from issuing a Semi-Annual Report. I reiterated that PCLOB's staff remain available to brief or update Members of Congress and their staff on the agency's mission projects or other agency activities.

Even in sub-quorum status, however, PCLOB remains committed to keeping the Members of Congress fully informed about the agency's activities. In the past several months, I have met and spoken with Members of Congress, testified before a Congressional panel, and participated in a classified briefing. Additionally, PCLOB staff have also briefed Congressional staff on our activities.