

VIA E-MAIL

Jun. 13, 2017

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Dear Mrs. Dupree

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Privacy and Civil Liberties Oversight Board (“PCLOB”).

EPIC seeks the PCLOB’s report on Executive order 12333. The PCLOB previously outlined the need for Intelligence Community agencies to update their E.O. 12333 guidelines.<sup>1</sup> The PCLOB subsequently announced that it would issue a public report examining surveillance conducted under EO 12333 and the implications for privacy and civil liberties.<sup>2</sup> More recently, the board announced an anticipated publication date of the report scheduled for the end of 2016.<sup>3</sup> It has been reported that a final draft of the report is now complete, though the agency has not released that report to the public.<sup>4</sup>

The public has a right to review the PCLOB’s detailed analysis of the use of EO 12333 surveillance authorities by the U.S. Intelligence Community.

### Documents Requested

- (1) The complete report on Executive Order 12333; and
- (2) Any correspondence related to the publication of the report.

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<sup>1</sup> Letter from David Medine, Chairman, PCLOB, to Hon. Attorney Gen. Eric H. Holder, Jr., U.S. Dep’t of Justice, and Hon. Dir. James R. Clapper, Office of the Dir. of Nat’l Intelligence (Aug. 22, 2013), [https://www.pclub.gov/library/Letter-DNI\\_AG\\_12333\\_Guidelines.pdf](https://www.pclub.gov/library/Letter-DNI_AG_12333_Guidelines.pdf).

<sup>2</sup> Privacy and Civil Liberties Oversight Bd., *PCLOB Announces Its Short Term Agenda* (July 23, 2014), <https://www.pclub.gov/newsroom/20140807.html>.

<sup>3</sup> Privacy and Civil Liberties Oversight Bd., *Semi-Annual Report: October 2015-March 2016* (2016), [https://www.pclub.gov/library/Semi\\_Annual\\_Report\\_August\\_2016.pdf](https://www.pclub.gov/library/Semi_Annual_Report_August_2016.pdf).

<sup>4</sup> Jenna McLaughlin, *The U.S. Government’s Privacy Watchdog Is Basically Dead, Emails Reveal*, *The Intercept*, (Mar. 3 2017), <https://theintercept.com/2017/03/03/the-governments-privacy-watchdog-is-basically-dead-emails-reveal/>.

## Background

Executive Order 12333 (EO 12333) sets out the President's rules and orders governing activities of the U.S. Intelligence Community.<sup>5</sup> The Order outlines the roles of the different departments and agencies (Part 1), regulates their conduct (Part 2), and outlines oversight, procedures, and definitions (Part 3). In general terms, the Order is the authority under which the National Security Agency (NSA) collects foreign intelligence. The Director of the NSA is authorized under the Order to:

collect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions.<sup>6</sup>

EO 12333 establishes broad surveillance authorities for the intelligence community outside the scope of public law. The NSA conducts broad and unwarranted surveillance of U.S. and foreign citizens under the Order. EO 12333 often serves an alternate basis of authority for surveillance activities, above and beyond Section 215 and 702 of FISA.<sup>7</sup> The Order provides a blanket authority for surveillance programs that are not otherwise prohibited under federal law. Surveillance experts are accordingly wary of any statement “from the intelligence community [that] uses the caveat ‘not under this program,’ or ‘not under this authority’” because “almost certainly it means that whatever it is they’re denying is done under some other program or authority,” most likely under EO 12333.<sup>8</sup>

The Privacy and Civil Liberties Oversight Board (“PCLOB”) is an independent, five-member agency within the executive branch charged with conducting oversight of actions taken by the executive branch in counterterrorism operations. PCLOB’s mission is to ensure that such actions are conducted consistent with the need to protect privacy and civil liberties.<sup>9</sup>

On November 2013 the PCLOB launched a broad examination of the intelligence activities conducted under EO 12333 and their implications for privacy and civil liberties. The Board received briefings on EO 12333 activities from each agency within the Intelligence Community.<sup>10</sup> The PCLOB also convened several meetings to discuss the

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<sup>5</sup> Exec. Order No. 12,333, 3 C.F.R. 200 (1982), as amended by Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003), Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008), reprinted as amended in 50 U.S.C. § 401 (2011) [hereinafter EO 12333].

<sup>6</sup> *Id.* § 1.7(c)(1).

<sup>7</sup> EPIC, *Executive Order 12333*, <https://epic.org/privacy/surveillance/12333/>.

<sup>8</sup> Bruce Schneier, *Don't Listen to Google and Facebook: The Public-Private Surveillance Partnership Is Still Going Strong*, *The Atlantic* (Mar. 25, 2014), <https://www.theatlantic.com/technology/archive/2014/03/don-t-listen-to-google-and-facebook-the-public-private-surveillance-partnership-is-still-going-strong/284612/>.

<sup>9</sup> Privacy and Civil Liberties Oversight Bd., *About Us*, <https://www.pclob.gov/about-us.html>.

<sup>10</sup> Letter from David Medine, Chairman, PCLOB, to Hon. Dir. James R. Clapper, Office of the Dir. of Nat'l Intelligence (Oct. 2, 2013), [https://www.pclob.gov/library/Letter-DNI\\_AG\\_12333\\_Guidelines-Response\\_From\\_Chairman.pdf](https://www.pclob.gov/library/Letter-DNI_AG_12333_Guidelines-Response_From_Chairman.pdf).

review of EO 12333. The PCLOB held a meeting with representatives of NGOs on December 17, 2014, followed by a public meeting to “discuss and vote on a work plan” for the EO 12333 review on April 8, 2015, followed by another public event at the National Constitution Center on May 13, 2015, followed by two closed meetings in July and November 2015 where the board “voted to select certain counterterrorism-related activities governed by Executive Order 12333” as the subject of the examinations.<sup>11</sup> The first meeting with NGOs outlined important questions that the PCLOB should address, including “the scope of activities conducted under the auspices of E.O. 12333, including domestic activities; how information is being used; separation of powers issues; what falls outside FISA? What falls inside 12333? What kind of stored versus in-transit information is collected?”<sup>12</sup>

### Current Status of the EO 12333 Report

According to the PCLOB’s initial work plan, submitted in April 2015, the Board planned to “concentrate on activities of the CIA and NSA” as well “issue a public report that explains E.O. 12333 at a high level, focusing on how the legal framework established by the executive order and its implementing procedures governs the collection, use, retention, and dissemination of information concerning U.S. persons. The Board’s goal is to complete both reports by the end of 2015.”<sup>13</sup>

The PCLOB announced in the summer of 2016 that the deadline for the public report would be pushed back to the end of 2016.<sup>14</sup> However, the last semi-annual report published by the board in January 2017 did not mention the public report.<sup>15</sup> To date the report has not been released to the public. Documents released by the PCLOB in December of 2016 revealed that the complete report is now in the possession of the agency. For example, according to emails sent from the board to congressional staff, the board intended to publish a report by the end of 2016.<sup>16</sup> A spokeswoman for PCLOB confirmed that the agency still plans to release its analysis, despite the stepping down of chairman Medine, but to date the agency has not released the report.<sup>17</sup>

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<sup>11</sup> Privacy and Civil Liberties Oversight Bd., *Meetings and Events*, <https://www.pclob.gov/events.html>.

<sup>12</sup> See Meeting Summary, Privacy & Civil Liberties Oversight Board, *Board Meeting with NGOs on E.O. 12333* (Dec. 17, 2014), <https://www.pclob.gov/library/20141217-EO12333-NGOMeeting.pdf>.

<sup>13</sup> Privacy and Civil Liberties Oversight Bd., *PCLOB Examination of E.O. 12333*, (Apr. 8, 2015) [https://pclob.gov/library/20150408-EO12333\\_project\\_description.pdf](https://pclob.gov/library/20150408-EO12333_project_description.pdf).

<sup>14</sup> Privacy and Civil Liberties Oversight Bd., *Semi-Annual Report: October 2015-March 2016* (2016), [https://www.pclob.gov/library/Semi\\_Annual\\_Report\\_August\\_2016.pdf](https://www.pclob.gov/library/Semi_Annual_Report_August_2016.pdf).

<sup>15</sup> Privacy and Civil Liberties Oversight Bd., *Semi-Annual Report: April-September 2016*, (2017) <https://www.pclob.gov/library/Semi-Annual-Report-Apr-Sept2016.pdf>

<sup>16</sup> Jenna McLaughlin, *The U.S. Government’s Privacy Watchdog Is Basically Dead, Emails Reveal*, The Intercept, (Mar. 3 2017), <https://theintercept.com/2017/03/03/the-governments-privacy-watchdog-is-basically-dead-emails-reveal/>.

<sup>17</sup> Julian Hattem, *Surprise Resignation Threatens to Hobble Privacy Watchdog*, TheHill (Apr. 8, 2016), <http://thehill.com/policy/national-security/275545-surprise-vacancy-threatens-privacy-watchdog>.

## Request for Expedited Processing

EPIC's FOIA request should be granted expedited processing. A FOIA request warrants expedited processing where it is (1) made by a person primarily engaged in disseminating information" (2) "with a time urgency to inform the public of actual or alleged federal government activity." 6 C.F.R. § 1001.8(h)(1)(ii); 5 U.S.C. § 552(a)(6)(E)(v)(II).

EPIC is an organization "primarily engaged in disseminating information." 6 C.F.R. § 1001.8(h)(1)(ii). "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

There is an "urgency to inform the public" about the surveillance programs described in the EO 12333 Report. As the PCLOB itself has acknowledged, many agencies' E.O. 12333 guidelines are out of date, in some cases in almost three decades, despite dramatic changes in technology and information use. The current scope of these surveillance activities is a matter of ongoing public concern, and the PCLOB has invested significant resources in investigating and evaluating the current agency practices.

In early 2017, the PCLOB lost its statutory quorum of three members, and without the quorum the PCLOB "may not initiate new advice or oversight projects" or offer advice to the intelligence community.<sup>18</sup> Since the report is in a final stages, and it is not clear if and when new board members will be appointed, the circumstances justify releasing the report to the public now.

Release of the report is also urgent because of the upcoming EU-US Privacy Shield Annual Review, which will take place in September. As EU justice commissioner Věra Jourová recently explained "[The review] will be an important milestone where we need to check that everything is in place and working well. If we want to further consolidate this new transatlantic bridge, we need the active engagement and contribution of all interested parties to the review."<sup>19</sup> Public release of the report would shed light on the scope of surveillance and current privacy and civil liberties protections in the U.S. Without the report, the public will not be able to advocate for specific reforms related to the programs reviewed by the PCLOB.

There is also an urgent need for the report to be released to the public because Section 702 of the FISA Amendments Act is set to expire at the end of 2017 and Congress is currently in the process of reviewing the surveillance authority. Reauthorization of this surveillance authority has already been discussed in hearings of

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<sup>18</sup> See Jenna McLaughlin, *The U.S. Government's Privacy Watchdog Is Basically Dead, Emails Reveal*, The Intercept, (Mar. 3 2017), <https://theintercept.com/2017/03/03/the-governments-privacy-watchdog-is-basically-dead-emails-reveal/>.

<sup>19</sup> *First EU-US Privacy Shield Annual Review to Take Place in September*, The Register (Apr. 4, 2017), [https://www.theregister.co.uk/2017/04/04/first\\_eu\\_us\\_privacy\\_shield\\_annual\\_review\\_to\\_take\\_place\\_in\\_september\\_2017/](https://www.theregister.co.uk/2017/04/04/first_eu_us_privacy_shield_annual_review_to_take_place_in_september_2017/)

the House and Senate Judiciary and Intelligence Committees.<sup>20</sup> Public interest in the scope and use of surveillance authorities has also continued to grow as the investigations into the Russian interference with the 2016 Presidential Election have developed.<sup>21</sup>

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 16.5(e)(3); § 552(a)(6)(E)(vi).

### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Any duplication fees should also be waived because disclosure of the requested information “is in the public interest because (1) “disclosure of the requested records is likely to contribute significantly to the public understanding,” (2) of a matter involving “the operations or activities of the government,” and (3) must not be “primarily in [the requester’s] commercial interest.” 6 C.F.R. § 1001.10(l); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies the three considerations for the PCLOB to grant a fee waiver. § 16.10(k)(2).

First, “disclosure of the requested records is likely to contribute significantly to the public understanding,” because as described above, government surveillance is a very sensitive issue that touches upon privacy of all Americans. Too little is known about surveillance activities conducted under EO 12333 and releasing the report is necessary and will contribute significantly to the public understanding of the matter.

Second, the disclosure involves “the operations or activities of the government,” as described above, the purpose of the requested report is to shed light on government surveillance that is done by the NSA, CIA and other governmental agencies.

Third, disclosure is not “primarily in the commercial interest” of EPIC, the requester. .” 6 C.F.R. § 1001.10(l). EPIC is a registered non-profit organization

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<sup>20</sup> Section 702 of The Foreign Intelligence Act: Hearing before the Judiciary Committee, 115-2 Cong. (2017); FISA Legislation, Senate Select Committee on Intelligence 115 Cong. (2017).

<sup>21</sup> April Doss & Susan Hennessey, *What Intelligence Officials Really Mean When They Talk About ‘Unmasking’*, Wash. Post (Apr. 7, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/04/07/what-intelligence-officials-really-mean-when-they-talk-about-unmasking/?utm\\_term=.db6f17b774bc](https://www.washingtonpost.com/posteverything/wp/2017/04/07/what-intelligence-officials-really-mean-when-they-talk-about-unmasking/?utm_term=.db6f17b774bc); Arthur Rizer & Daniel Semelsberger, *Is Reform on The Horizon for Section 702 Surveillance?*, The Hill (Apr. 12, 2017), <http://thehill.com/blogs/pundits-blog/technology/328351-is-reform-on-the-horizon-for-section-702-surveillance>; Holly Yan, *What Is The FISA Court, And Why Is It So Secretive?*, CNN (Apr. 12, 2017), <http://www.cnn.com/2017/04/12/politics/fisa-court-explainer-trnd/>.

committed to privacy, open government and civil liberties, and has no commercial interest in the request.<sup>22</sup>

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

Doaa Abu-Elyounes  
Doaa Abu-Elyounes  
EPIC IPIOP law clerk

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<sup>22</sup> EPIC, *About EPIC*, <http://epic.org/epic/about.html>.