

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD (independent bipartisan agency within the executive branch).

Report on the Telephone Records Program
Conducted under Section 215
of the USA PATRIOT Act and on the
Operations of the Foreign Intelligence Surveillance Court

JANUARY 23, 2014
US PCLOB Inquiry Report 23.1.14 p.10 et seq.

B. Legal Analysis: Statutory and Constitutional Issues

Section 215 is designed to enable the FBI to acquire records that a business has in its possession, as part of an FBI investigation, when those records are relevant to the investigation. Yet the operation of the NSA's bulk telephone records program bears almost no resemblance to that description. While the Board believes that this program has been conducted in good faith to vigorously pursue the government's counterterrorism mission and appreciates the government's efforts to bring the program under the oversight of the FISA court, the Board concludes that Section 215 does not provide an adequate legal basis to support the program.

There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk — potentially encompassing all telephone calling records across the nation — they cannot be regarded as “relevant” to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of turning over records already in their possession) — an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.

In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders.

Finally, we do not agree that the program can be considered statutorily authorized because Congress twice delayed the expiration of Section 215 during the operation of the program without amending the statute. The “reenactment doctrine,” under which Congress is presumed to have adopted settled administrative or judicial interpretations of a statute, does not trump the plain meaning of a law, and cannot save an administrative or judicial interpretation that contradicts the statute itself. Moreover, the circumstances presented here differ in pivotal ways from any in which the reenactment doctrine has ever been applied, and applying the doctrine would undermine the public's ability to know what the law is and hold their elected representatives accountable for their legislative choices.

The NSA's telephone records program also raises concerns under both the First and Fourth Amendments to the United States Constitution. We explore these concerns and explain that while government officials are entitled to rely on existing Supreme Court doctrine in formulating policy, the existing doctrine does not fully answer whether the Section 215 telephone records program is constitutionally sound. In particular, the scope and duration of the program are beyond anything ever before confronted by the courts, and as a result of technological developments, the government possesses capabilities to collect, store, and analyze data not available when existing Supreme Court doctrine was developed. Without seeking to predict the direction of changes in Supreme Court doctrine, the Board urges as a policy matter that the government consider how to preserve underlying constitutional guarantees in the face of modern communications technology and surveillance capabilities.

Link to whole report

<http://www.theguardian.com/world/interactive/2014/jan/23/privacy-civil-liberties-board-nsa-report-text>