



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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*86 Chambers Street  
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December 23, 2014

**BY E-MAIL**

David McCraw  
Jeremy Kutner  
Legal Department  
The New York Times Company  
620 8<sup>th</sup> Avenue, 18<sup>th</sup> Floor  
New York, NY 10018

Re: *New York Times Company v. U.S. Department of Justice*,  
14 Civ. 3776 (AT)

Dear Mr. McCraw and Mr. Kutner:

On behalf of the United States Department of Justice (the “Government”), we enclose two documents pursuant to the schedule so-ordered by the Court on August 28, 2014, in the above-referenced FOIA case. Please find attached documents Bates-labeled DOJ-OIG-00714 to DOJ-OIG-00930. Information in these documents has been redacted pursuant to certain FOIA exemptions, including 5 U.S.C. §§ 552(b)(1), (b)(3), and (b)(7)(E). Where redactions have been made, the applicable exemption is marked on each document. In addition, as noted on the information sheet labeled DOJ-OIG-00930, 16 pages have been withheld in full pursuant to 5 U.S.C. §§ 552(b)(1) and (b)(3).

The Government reserves its right to modify or supplement the exemptions listed for information that has been redacted from these documents. If you have any questions, please let us know.

Sincerely,

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*Encls.*

~~SECRET~~ (U)

# A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records (U)

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## EXECUTIVE SUMMARY (U)

In the USA PATRIOT Improvement and Reauthorization Act of 2005 (the Reauthorization Act), Congress directed the Office of the Inspector General (OIG) to conduct "a comprehensive audit of the effectiveness and use, including improper or illegal use" of the Federal Bureau of Investigation's (FBI) use of Section 215 of the Patriot Act.<sup>1</sup> See Pub. L. No. 109-177, §106A. Section 215 of the Patriot Act allows the FBI to seek orders from the Foreign Intelligence Surveillance Court for "any tangible things," including books, records, and other items from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities.<sup>2</sup> Congress directed the OIG to review the use of Section 215 for two time periods – calendar years (CY) 2002 through 2004 and CY 2005 through 2006. The first report is due to Congress on March 9, 2007; the second is due on December 31, 2007.<sup>3</sup> (U)

In our first report, we describe the results of the first OIG review of the use of Section 215. Although we were only required to review calendar years 2002 through 2004 in this first review, we elected to include data from calendar year 2005. (U)

This Executive Summary summarizes the report, including its main findings. (U)

### I. Methodology of the OIG Review (U)

In this review, the OIG conducted over 90 interviews of FBI and Department of Justice officials. During the field work phase of the review, OIG teams traveled to FBI field offices in New York, Chicago, Philadelphia, and San Francisco, where we interviewed over 50 FBI employees. We also

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<sup>1</sup> The term "USA PATRIOT Act" is an acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). It is commonly referred to as "the Patriot Act." (U)

<sup>2</sup> Section 215 was originally scheduled to sunset on December 31, 2005. The Reauthorization Act extended Section 215 until December 31, 2009. (U)

<sup>3</sup> The Reauthorization Act also directed the OIG to conduct reviews for the same two time periods on the use and effectiveness of the FBI's use of national security letters (NSL), another investigative authority that was expanded by the Patriot Act. The OIG's first report on the use and effectiveness of national security letter authority is contained in a separate report. (U)

conducted telephone interviews of 25 FBI agents in other field offices. In Washington, D.C., the OIG interviewed senior FBI and Department of Justice officials who participated in implementing procedures and processing requests for Section 215 orders. (U)

The OIG also examined documents obtained from the Department's Office of Intelligence Policy and Review (OIPR) and the FBI relating to each instance of the FBI's use or attempted use of Section 215 authority during calendar years 2002 through 2005.<sup>4</sup> (U)

## II. Background on Section 215 (U)

### A. Legal Background (U)

Pursuant to Section 215 of the Patriot Act, the FBI may obtain "any tangible things," including books, records, and other items, from any business, organization, or entity, provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Section 215 did not create any new investigative authority but instead expanded existing authority found in the Foreign Intelligence Surveillance Act (FISA) of 1978. 50 U.S.C. § 1801 et seq. (U)

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court) in order to conduct electronic surveillance to collect foreign intelligence information.<sup>5</sup> In 1998, Congress amended FISA to authorize the FBI to apply to the FISA Court for orders compelling four kinds of businesses to "release records in its possession" to the FBI: common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities. The amendment did not further define "records." This provision, which was codified at 50 U.S.C. § 1862, became known as the "business records" provision and was the provision expanded by Section 215 of the Patriot Act.<sup>6</sup> (U)

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<sup>4</sup> Until the fall 2006, the Office of Intelligence Policy and Review was a separate component of the Department. In March 2006, the Reauthorization Act authorized the creation of a National Security Division (NSD) within the Department. In September 2006, Kenneth L. Wainstein was confirmed as the first Assistant Attorney General for the NSD. Shortly after that, OIPR's functions were moved to the NSD. (U)

<sup>5</sup> Applications for FISA orders are prepared and presented to the FISA Court by OIPR. (U)

<sup>6</sup> 50 U.S.C. § 1862(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001). (U)

The 1998 business records amendment required the FISA application to specify that the records were sought for an investigation to gather foreign intelligence information or an investigation concerning international terrorism, and that there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." 50 U.S.C. § 1862 (2000 ed.) This language meant that the FBI was limited to obtaining information regarding a specific person or entity the FBI was investigating and about whom the FBI had individualized suspicion. In addition, the amendment prohibited the entity complying with the order from disclosing either the existence of the order or any information produced in response to the order. (U)

Subsequent to the 1998 FISA amendment creating this investigative authority and prior to the passage of the Patriot Act in October 2001, the FBI obtained only one FISA order for business records. This order was obtained in 2000. (U)

Section 215 of the Patriot Act significantly expanded the scope of the FBI's investigative authority pursuant to the business records provision of FISA and lowered the standard of proof required to obtain this type of business record. The pertinent part of Section 215 provides: (U)

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. 50 U.S.C. § 1861(a)(1). (U)

While the 1998 language limited the reach of this type of investigative authority to four types of entities, the new language does not explicitly limit the type of entity or business that can be compelled by an order. Section 215 of the Patriot Act also expanded the categories of documents that the FBI can obtain under the business records provision of FISA, because it is not limited to "records" and provides that the FBI may obtain an order for "the production of any tangible things (including books, records, papers, documents, and other items)." (U)

Section 215 also lowered the evidentiary threshold to obtain such an order. As a result, the number of people whose information could be obtained was expanded because the FBI is no longer required to show that the items being sought pertain to a person whom the FBI is investigating. Instead, the items sought need only be requested "for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). This standard, referred to as the relevance standard, permits the FBI to seek information concerning persons not necessarily under investigation but who are connected in some way to a person or entity under investigation.<sup>7</sup> (U)

## **B. Public Concerns about Section 215 (U)**

After enactment of the Patriot Act, controversy focused on the scope of Section 215. Public concerns about the scope of the new Section 215 authority centered on the ability of the FBI to obtain library records, including books loaned to library patrons. Many public commentators began to refer to Section 215 as the "library provision." Librarians, their professional associations, and others voiced concerns about the potential First and Fourth Amendment implications of compelled production of library records.<sup>8</sup> These concerns related to the broad reach of Section 215 and also to the so-called "gag provision," which existed under the previous version of FISA and which forbids recipients of Section 215 orders from disclosing the existence of the order or any information obtained pursuant to an order. (U)

## **C. The Process for Seeking Section 215 Orders (U)**

We determined that prior to passage of the Patriot Act in late 2001, no written policies, procedures, or templates for requests or applications for business records existed in the FBI or OIPR. After passage of the Patriot

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<sup>7</sup> The Reauthorization Act revised the language of Section 1861(b)(2) by providing that tangible things are presumptively relevant when they pertain to entities or individuals that are foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, or individuals known to associate with subjects of such investigations. (U)

<sup>8</sup> For example, the American Library Association (ALA) adopted a resolution declaring that the ALA "considers sections of the USA PATRIOT Act . . . a present danger to the constitutional rights and privacy rights of library users" and urged the Congress to provide additional oversight and amend or change portions of the Act." Resolution on the USA PATRIOT Act and Related Measures That Infringe on the Rights of Library Users (Jan. 29, 2003). (U)



Act, between 2002 and 2005 a general process for requesting Section 215 orders was developed and refined, as were templates for the field offices' requests for Section 215 orders and for applications to the FISA Court. The process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, the FISA Court review, and FBI service of the order. (U)

The process begins when an FBI case agent in a field office prepares a business records request form, which must be approved by the squad's Supervisory Special Agent and other managers in the FBI field office. The request is sent to FBI Headquarters, including the Office of General Counsel's National Security Law Branch (NSLB), for further review and approval. If the request is approved, an NSLB attorney drafts the application package, forwards the draft application package to OIPR, and the request is assigned to an OIPR attorney. The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to finalize the draft application package. The draft application package is then reviewed by an OIPR supervisor. The final application package is returned to the FBI for an accuracy review and any additional edits are made based on the FBI's review of the final package. Upon completion of the final version, signatures of designated senior FBI personnel are obtained and the package is prepared for presentation to the FISA Court by an OIPR attorney. (U)

OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with a copy of the application and order in advance. The application package is then formally presented to the FISA Court for its review and approval at the scheduled hearing. If the FISA Court judge approves the application, the judge signs the order approving the application. At the hearing, the judge may make handwritten changes to the order, such as the length of time for the recipient to produce the items, and, if so, will sign the order with the handwritten modifications. The order is returned to the requesting FBI field office for service on the entity in possession of the items. The order sets forth the time period allowed for producing the items. (U)

#### **D. Different Types of Section 215 Requests (U)**

During the period covered by our review, calendar years 2002 through 2005, the FBI and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: "pure" Section 215 applications and combination or "combo" Section 215 applications. (U)

A "pure" Section 215 application is a term used by OIPR to refer to a Section 215 application for any tangible item that is not associated with



applications for any other FISA authority. For example, a Section 215 request for driver license records from state departments of motor vehicles would constitute a pure Section 215 request. (U)

A "combo" application is a term used by OIPR to refer to a Section 215 request that was added to or combined with a FISA application for pen register/trap and trace orders. Pen register and trap and trace devices identify incoming and outgoing telephone numbers on a particular telephone line but do not allow the FBI to listen to the content of the telephone call. The use of the combination request evolved from OIPR's determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through the orders. Unlike criminal investigation pen register/trap and trace orders, which routinely included a clause requiring the provision of subscriber information, FISA pen register/trap and trace orders did not contain such provisions. FBI agents had to employ other investigative tools, such as national security letters, to obtain the subscriber information. In order to streamline the process for obtaining subscriber information, beginning in early 2005 OIPR began to append a request for Section 215 orders to applications for FISA pen register/trap and trace authority.<sup>9</sup> (U)

#### **E. Other Investigative Authority Available to the FBI for Third Party Information (U)**

In addition to Section 215 orders, the FBI has several other investigative tools that allow it to obtain information from third parties in national security investigations.<sup>10</sup> For example, as noted above, FISA pen register/trap and trace orders permit the FBI to identify incoming and outgoing telephone numbers on a particular telephone line. (U)

Some investigative authority rests directly with the field offices and does not require FBI Headquarters or FISA Court approval. For example, national security letters (NSL) are written commands from the FBI to communications providers, such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer

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<sup>9</sup> As of March 2006, Section 215 combination requests were no longer necessary because the Reauthorization Act authorized the disclosure of subscriber information in connection with FISA pen register/trap and trace orders. (U)

<sup>10</sup> For this report, national security investigations refer to investigations involving counterterrorism or counterintelligence components. (U)

and consumer transaction information. In the field, the FBI Special Agents in Charge are authorized to approve NSLs. (U)

In national security investigations with a criminal nexus, the FBI can also ask the United States Attorney's Office to obtain grand jury subpoenas for third party information. A grand jury subpoena is the criminal investigative tool that mostly closely resembles a Section 215 order. Generally speaking, a grand jury may obtain non-privileged evidence, including any records and tangible items, relevant to the grand jury's investigation. FBI agents conducting a national security investigation with a criminal nexus do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena. Grand jury subpoenas are issued under the signature of the prosecutor supervising the grand jury investigation. (U)

### **III. Examination of Section 215 Orders Sought and Obtained in Calendar Years 2002 through 2005 (U)**

As part of the OIG's review of the use and effectiveness of Section 215 authority, Congress directed the OIG to examine: (U)

- Every business record application submitted to the FISA Court including whether: (a) the FBI requested that the Department of Justice submit a business record application to the FISA Court and the application was not submitted, and (b) whether the FISA Court granted, modified, or denied any business record application; (U)
- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)
- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions; (U)
- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority; and, (U)
- The effectiveness of the business record requests as an "investigative tool," including: (a) what types of records are obtained and the importance of those records in the intelligence

activities of the FBI and the DOJ; (b) the manner in which the information obtained through business record requests is collected, retained, analyzed, and disseminated by the FBI; (c) whether and how often the FBI used information obtained from business record requests to produce an "analytical intelligence product" for distribution to, among others, the intelligence community or federal, state, and local governments; and (d) whether and how often the FBI provided information obtained from business record requests to law enforcement authorities for use in criminal proceedings. (U)

**A. Pure Section 215 Requests and Orders for Calendar Years 2002 through 2005 (U)**

Our review examined all Section 215 applications and orders. We found that in calendar years 2002 through 2005, OIPR submitted a total of 21 pure Section 215 applications for FISA Court approval. All of these applications were approved by the FISA Court. (U)

The first pure Section 215 order was approved by the FISA Court in May 2004, more than two years after the Patriot Act was passed. The FISA Court approved six more Section 215 applications in CY 2004, for a total of seven. The FISA Court approved 14 Section 215 applications in CY 2005. Although a total of 21 Section 215 orders were approved, they contained only 18 unique requests.<sup>11</sup> (U)

Examples of the types of business records that were obtained through these Section 215 orders include driver's license records, public accommodations records, apartment records, credit card records, and telecommunications subscriber information for telephone numbers. We also looked at the types of investigations from which the 18 pure approved

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<sup>11</sup> Two requests approved during the period of our review were for the same provider and the targets - Targets A and B - were connected in the same investigation. After the applications were approved by the FISA Court and before the orders were served, the FBI learned that there was a mistake in the application concerning Target A that needed to be corrected in a new application. The FBI decided to wait to serve the order for Target B when the new order for Target A was obtained. In early 2005, the FBI obtained a new order for Target A. Before the orders could be served, the FBI learned that a subcontractor of the provider was in possession of the records for both targets. The FBI then submitted new applications for the same records for both targets. Thus the FBI submitted two corrected applications for Target A and one for Target B, and we do not consider these corrected applications as unique. (U)

applications were submitted: 9 were from counterintelligence (CI) cases, 8 were from counterterrorism (CT) cases, and 1 was from a cyber case. (U)

In reviewing OIPR and FBI documents, we determined that there were 31 instances in which FBI agents sought Section 215 orders during this timeframe but did not obtain them. These requests were prepared by the FBI but were never finalized, either by the FBI's NSLB for submission to OIPR or by OIPR for presentation to the FISA Court.<sup>12</sup> (U)

We reviewed the documents concerning the 31 withdrawn requests and applications and interviewed FBI, NSLB, and OIPR personnel to determine why these Section 215 requests were not submitted to OIPR or to the FISA Court. We identified five categories of reasons that apply to the majority of the withdrawn requests and applications: (1) the investigation was closed or changed course; (2) an alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

We identified several requests or applications that were withdrawn because the field office closed the investigation or the investigation changed course and the information was no longer needed. We determined that most of these requests had been pending for several months, and in one case over a year, at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. In one case, at the time of the withdrawal an FBI Headquarters supervisor notified NSLB that the FBI was going to interview the target and wrote in an e-mail, "An interview is forthcoming and the records, although material six months ago, are moot at this point." (U)

We also identified several cases in which the FBI obtained the items sought in the Section 215 request through other investigative means. One of these requests was for information from a library. We found that an NSLB supervisor would not permit the request to go forward because of the controversy surrounding Section 215 requests for information from libraries. Once the field office was advised that NSLB would not send the application to OIPR, the field office obtained the information through other investigative means. (U)

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<sup>12</sup> For ease of reference, we describe all of these instances as "withdrawn" requests or applications, although in several cases we were unable to determine the reason the request or application did not make it to the next level and there did not appear to be an affirmative decision by anyone within the FBI not to proceed for a substantive reason. (U)

We determined that several of the FBI's Section 215 requests that were later withdrawn, including the first request submitted in April 2002, were affected by OIPR's interpretation of the Family Education Rights and Privacy Act of 1974 (FERPA), commonly referred to as "the Buckley Amendment." The Buckley Amendment applies to all educational agencies and institutions and governs the rights and privacy of students and parents in relation to access to and release of educational records.<sup>13</sup> See 20 U.S.C. § 1232g. (U)

OIPR was concerned that the Buckley Amendment might limit the reach of Section 215 with respect to educational records because Section 215 did not contain the proviso found in other parts of FISA stating that "notwithstanding any other provision of law," the government may obtain certain types of information. According to OIPR officials, because Section 215 did not contain this language, it could be construed to be superseded by the Buckley Amendment and disclosure of the records request to the student and parents would be required. OIPR officials told the OIG that other statutes that also state or imply that they provide the exclusive means of obtaining certain types of records, such as tax or medical records, could be similarly construed. Although some NSLB attorneys disagreed with OIPR's interpretation of the law, NSLB did not ask OIPR to finalize any of the applications concerning educational records. (U)

We also identified some cases in which a determination was made that a Section 215 request lacked sufficient or adequate information to go forward. Finally, we identified several instances in which we were unable to determine – from documents or interviews with NSLB or OIPR personnel – the reason that the request or application did not proceed to the next level or when the requests were withdrawn.<sup>14</sup> (U)

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<sup>13</sup> FERPA is called "the Buckley Amendment" after its principal sponsor, Senator James Buckley of New York. With respect to release of educational records, the Buckley Amendment provides that educational entities will not receive federal funds if they release educational records to third parties without written consent from the student's parents except in limited circumstances, such as in connection with a student's application for financial aid. 20 U.S.C. § 1232g (a)(1). The Buckley Amendment also provides that an educational entity does not have to obtain written consent to release educational records "in compliance with judicial order, or pursuant to any lawfully issued subpoena"; however, the entity must notify the student and parents of the order or subpoena in advance of complying with it unless the court orders the institution not to disclose the existence or content of the subpoena or the institution's response. 20 U.S.C. § 1232g (b)(1)(J)(i) and (ii) and (b)(2)(B); 20 U.S.C. § 1232g (a)(2). (U)

<sup>14</sup> We discuss the lengthy delays in processing Section 215 requests in Chapter Four of the report. (U)



We found that the FBI has not obtained a FISA Court order for the production of library records. However, FBI field offices submitted requests to FBI Headquarters to seek to obtain information from a library on a few occasions, one of which we discussed above. These requests were later withdrawn before any application was filed with the FISA Court. (U)

**B. Combination Section 215 Applications and Orders for Calendar Years 2002 through 2005 (U)**

In addition to the pure Section 215 requests, we found that a total of 141 combination business record applications were submitted and approved by the FISA Court in calendar year 2005. The first combination order was issued by the FISA Court in February 2005. However, with the enactment of Section 128 of the Reauthorization Act, which provides that FISA pen register orders now include the subscriber information, the number of combination applications should significantly decrease in CY 2006. (U)

**C. Modified Section 215 Orders (U)**

We also reviewed, as required by the congressional directive, how many times the FISA Court modified any Section 215 order. We found that two Section 215 orders were modified in 2004 and two were modified in 2005, for a total of four Section 215 orders modified by the FISA Court. The orders modified in 2004 were pure Section 215 orders, and the orders modified in 2005 were combination 215 orders. According to OIPR, modifications generally consist of handwritten changes to orders that are made by FISA Court judges at the hearing in which the order is signed. However, OIPR officials stated that OIPR does not usually consider revisions to applications and orders that OIPR makes based on feedback from the FISA Court's review of advance copies of FISA applications to be modifications. (U)

With respect to the orders modified in 2004, the first modified Section 215 order related to the time frame to produce the requested records to the FBI. The FISA Court modified the order by extending the time frame from 10 days to 60 days.<sup>15</sup> With respect to the other pure Section 215 modified order, the modification related to the records being requested. The FISA Court clarified the records to be produced by describing the records more precisely than the language in the order as presented to the Court. (U)

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<sup>15</sup> The timeframe that recipients of Section 215 orders are given to produce the items is not determined by statute or regulation. Instead the FBI determines the number of days it believes is reasonable based on the type and volume of information that must be produced. (U)



With respect to the orders modified in 2005, both modified combination orders contained the same modification. In these applications, OIPR sought orders for a specialized type of telephone information. OIPR notified the FISA Court that federal judges in criminal cases had denied requests for this kind of information in certain instances. Although the FISA Court agreed to approve the applications, the Court directed the government to file a supplemental brief on this issue. Prior to the hearing on the applications, OIPR revised the applications and included a footnote setting forth a summary of the criminal case law with respect to this kind of information and revised the order to include a direction for the government to provide the FISA Court with a supplemental briefing on this subject. (U)

#### **D. Improper Use of Section 215 Authority (U)**

As part of this review, Congress directed the OIG to identify "any noteworthy facts or circumstances concerning the business records requests, including any illegal or improper use of the authority." Our review noted two instances of improper use of Section 215 authority, both of which involved the pen register/trap and trace portion of combination Section 215 orders. We did not identify any instances involving improper or illegal use in connection with pure Section 215 orders or authority. (U)

In the first instance of improper use, the field office had obtained an order for a pen register/trap and trace device on a telephone that was no longer used by the subject. This resulted in the FBI receiving unauthorized information, which is called "over collection," between March 2005 and October 2005. According to the FBI, the case agent for this investigation inadvertently overlooked documents in the file indicating that the telephone number no longer belonged to the target of the investigation. A new case agent discovered the problem, reported the over collection, and sequestered and destroyed the improperly collected data. (U)

In the second instance of improper use, the FBI inadvertently collected certain telephone numbers pursuant to a pen register/trap and trace order because the telephone company did not advise the FBI that the target had discontinued using the telephone line until several weeks after the fact. For a short period of time, the telephone number had been issued to someone else. The FBI identified the improperly collected information, removed it from its databases, and provided it to OIPR. (U)

We determined that the FBI had discovered both incidents and reported them, as required, to the Intelligence Oversight Board or IOB.<sup>16</sup> In addition, both incidents were reported to the FISA Court by OIPR.<sup>17</sup> (U)

We also identified a situation that we believe constitutes a "noteworthy fact" concerning a Section 215 combination order and several interrelated FISA electronic surveillance orders. In January 2006, OIPR filed a notice to the FISA Court stating that in connection with several cases, OIPR had learned in December 2005, that a source who had previously provided significant information about the targets reported that he did not believe that one of the targets, who was associated with all of the other targets, was a supporter of a particular terrorist organization.<sup>18</sup> (U)

OIPR reported to the FISA Court that the FBI had learned of this information in April 2005 from another intelligence agency but had "inadvertently failed to provide it at the time they received it." The FISA Court issued an order directing the government to explain the delay in reporting this information to the Court. In March 2006, OIPR filed an explanation stating that the case agents who were responsible for verifying the accuracy of the FISA renewal application submitted in April 2005 mistakenly believed that the problematic source information had already been provided to OIPR. Although the case agents had provided OIPR with several intelligence reports about the same source, these intelligence reports did not include the intelligence report containing the problematic information. According to the court filing, the FBI did not believe the omission was intentional because all other information obtained from the source, some of which was not favorable to the FBI's investigation, had been reported to OIPR. (U)

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<sup>16</sup> The Intelligence Oversight Board, created by Executive Order in 1976, is charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863. The Executive Order also requires the general counsels of the intelligence community, including the FBI's General Counsel, to report to the IOB on at least a quarterly basis intelligence activities they "have reason to believe may be unlawful or contrary to Executive order or Presidential directive," which are referred to as "IOB violations." (U)

<sup>17</sup> OIPR is required to report FISA compliance incidents to the FISA Court pursuant to Rule 10(c) of the FISA Court's Rules of Procedures that became effective February 17, 2006. (U)

<sup>18</sup> The OIPR notice also stated the reasons the government continued to believe that there was sufficient information to support FISA applications for all of the targets despite this source's information. (U)

#### **IV. Delays in Implementing Section 215 Authority and Other Impediments to Use (U)**

##### **A. Delay in Implementing Procedures and Policies (U)**

The Reauthorization Act directed us to examine “the justification for the failure of the Attorney General to issue implementing procedures governing requests for the production of tangible things . . . in a timely fashion, including whether such delay harmed national security.” To respond to this directive, we first attempted to determine whether the Attorney General was required by statute, regulation or other directive to issue implementing procedures. In our review of documents and interviews with witnesses, we found no such requirement. However, we also found no evidence that the Attorney General or any Department official directed OIPR or the FBI to implement Section 215 procedures. (U)

Our review determined that after passage of the Patriot Act in 2001, neither the Department nor the FBI issued implementing procedures or guidance with respect to Section 215 authority. OIPR and the FBI eventually developed standard forms and applications for obtaining Section 215 orders. NSLB distributed a standard request form to field offices in October 2003, and NSLB and OIPR completed a standard application and order in the spring 2004. We determined that the delay occurred because the Department, including OIPR and the FBI, were focused on processing full content FISA requests, training, and hiring personnel to address the increased FISA workload and did not focus on the need for templates and procedures for Section 215 orders. (U)

##### **B. Section 215 Processing Delays (U)**

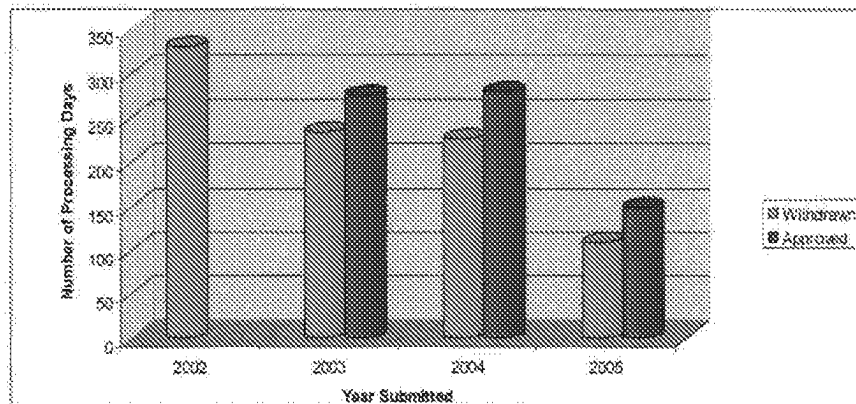
When FBI field offices began requesting Section 215 orders in April 2002, they encountered processing problems. For example, in many instances no one from NSLB responded to Section 215 requests for several months, if at all. In addition, in some cases NSLB sent draft applications to OIPR, but the applications were not finalized by OIPR for several months. In other cases in which a draft application was prepared, the field office did not receive any response from NSLB or OIPR. As a result of these delays, in some cases the information was no longer needed by the time the field office received a response from NSLB or OIPR, and the request was withdrawn. (U)

We sought to calculate how long requests remained pending in NSLB and in OIPR. However, the FBI's and OIPR's recordkeeping systems in place at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. Therefore, we have

incomplete information with respect to many of the requests. From the available data, we determined that the average processing time for approved requests was 275 days in 2003, 279 days in 2004, and 149 days in 2005.<sup>19</sup> For 2004 and 2005 we were able to calculate the average processing time for approved requests in both NSLB and OIPR. In 2004, the requests were pending in NSLB for 162 days and in OIPR for 180 days. In 2005, the average processing time at NSLB was 60 days and 88 days at OIPR. We determined that the average processing time for withdrawn requests was 330 days in 2002, 234 days in 2003, 226 days in 2004, and 109 days in 2005. (U)

The chart below reflects the average processing time of withdrawn requests and approved requests.<sup>20</sup> (U)

**Average Processing Time (U)**



Source: OIPR and FBI (U)

**C. Impediments to Processing Section 215 Requests (U)**

We found several impediments that hindered the FBI's ability to obtain Section 215 orders. Section 215 requests were delayed because NSLB and OIPR disagreed over interpretations of the law, and NSLB and OIPR lacked sufficient resources for handling Section 215 requests. The

<sup>19</sup> All of the requests submitted in 2002 were withdrawn. (U)

<sup>20</sup> For each year listed on the chart, we calculated processing times based on how long it took to process the requests submitted in that year, whether they were approved in that same calendar year or were eventually approved in the next calendar year. For the requests submitted in 2002, we were only able to calculate processing time at OIPR and not also at the FBI, so this number reflects only OIPR processing times. Similarly, in 2003 for approved requests, we had data only for OIPR processing times. (U)



multi-layered process for obtaining Section 215 orders also contributed to the processing delays. In addition, we found a lack of knowledge in the field about Section 215 authority. (U)

### **1. Statutory Interpretation (U)**

We found that the processing of Section 215 requests was slowed by the uncertainty in interpreting the Patriot Act. One of the legal issues that affected several of the first requests generated in 2002 and 2003 was the intersection of Section 215 with another statute that provides for the production of educational records. OIPR's interpretation of the statute was that Section 215 did not trump existing laws because, unlike other provisions of FISA, Section 215 did not include in the business records provision the phrase "notwithstanding any other provision of law." As discussed above, while some NSLB attorneys disagreed with this interpretation, NSLB was not willing to push the issue with the FISA Court, and as a result no request for educational records was presented to the FISA Court between calendar years 2002 and 2005. (U)

According to NSLB and OIPR attorneys, this impediment to obtaining educational records has since been addressed. The Reauthorization Act amended FISA by adding 50 U.S.C. § 1861(a)(3), which specifically addresses educational and other sensitive categories of business records. According to several NSLB and OIPR attorneys we interviewed, because this provision clarifies that educational records are obtainable through the use of a Section 215 order, the non-disclosure provisions of Section 215 apply rather than the notification provisions of the Buckley Amendment. (U)

Another cause for the delay in processing Section 215 requests was that NSLB and OIPR attorneys disagreed over the interpretation of the relevance standard and how much information had to be included in Section 215 applications about the items requested and their connection to the FBI's investigation. NSLB attorneys believed that the level of detail required by OIPR about the investigations in the applications was far beyond that needed to satisfy the relevance threshold. OIPR attorneys believed the information was necessary to persuade the FISA Court to approve the applications. NSLB and OIPR eventually agreed upon the content and form of a standard application after several months of back and forth about the issue. However, even after a standard application form was agreed upon, NSLB attorneys continued to have disagreements with OIPR attorneys in individual cases about the level of detail required. (U)

## **2. Insufficient Resources (U)**

Another impediment to obtaining Section 215 was the insufficient resources devoted to this process. Neither NSLB nor OIPR had adequate resources to dedicate to the implementation of Section 215 requests after passage of the Patriot Act. The workload of both entities increased dramatically after the September 11 terrorist attacks and passage of the Patriot Act, and substantial resources were needed to process full content FISA applications. Both entities were authorized to hire large numbers of employees, and by 2004 both NSLB and OIPR grew substantially. However, by spring 2004 a significant backlog of full content FISA applications had developed, and the Attorney General directed OIPR and NSLB to create a task force to address the FISA backlog. NSLB was required to detail approximately 10 attorneys to OIPR to work on the backlogged full content FISA applications. (U)

As a result, NSLB did not focus on Section 215 requests or make obtaining a Section 215 order a priority until late 2003, when NSLB submitted four Section 215 applications to OIPR. In addition, around this same time an NSLB attorney was designated the point of contact within NSLB for Section 215 requests. (U)

Also in July 2004 OIPR attempted to address NSLB concerns about the processing of Section 215 requests by assigning a detailed NSLB attorney to handle Section 215 requests. This detailed attorney, however, was also assigned to handle full content FISA applications. In early 2005, two OIPR attorneys were assigned to handle Section 215 requests – a line attorney and a supervisor. According to OIPR and NSLB attorneys, the assignment of these two attorneys to Section 215 requests improved the process significantly. (U)

## **3. Multi-Layered Review Process (U)**

The multiple layers of review for Section 215 applications also delayed their issuance. The process for obtaining a Section 215 order involves review in the FBI field office, in FBI Headquarters and NSLB, and in OIPR. To obtain a 215 order, a field agent must first obtain his supervisor's approval, then the field office's Special Agent in Charge and the Chief Division Counsel approval, before the request is forwarded to FBI Headquarters and NSLB. In NSLB, a line attorney drafts the application package, which is then reviewed by a supervisor before it is provided to OIPR. In OIPR, a line attorney prepares the package, and the work is reviewed by a supervisor before it is ready to be finalized for signature. After OIPR returns the "final" version to NSLB for signature, the application and



order are reviewed by NSLB personnel and changes may be requested as a result of this review. (U)

This review process can be lengthy. Without close management, an application can be delayed for weeks or months at any stage. Even with close management of the process, the process from beginning to end would likely take several weeks with respect to a simple or problem-free Section 215 request. (U)

#### **4. Lack of Knowledge about Section 215 Authority (U)**

Based upon our interviews in the field, we also determined that FBI field offices still do not fully understand Section 215 orders. Several agents told the OIG that they were only vaguely aware of Section 215 authority, and many agents stated that they did not know what the process was for obtaining a Section 215 order. (U)

#### **D. Effect of Impediments (U)**

The impediments discussed above contributed to the FBI not obtaining its first Section 215 order until spring 2004. Another effect of the impediments was that, in some instances, field offices were not contacted about Section 215 requests until several months after the requests had been submitted to NSLB. In various cases, once the agents were contacted the information was no longer needed because of developments in the case. In several instances agents were aware that NSLB had received their requests, but their requests remained pending for months due to disagreements between NSLB and OIPR about whether a particular request should go forward. In other instances, the requesting agents told the OIG that they never received a response back from NSLB or OIPR. (U)

We found that the processing delays and the lack of response to field office applications contributed to a perception among FBI field agents that the process was too slow and not worth the effort. We interviewed several agents who had never sought to obtain a Section 215 order, but they reported to the OIG that they had "heard" about the process taking far too long. Several agents also told us that if they could obtain the Section 215 order in a shorter time, they would be more encouraged to use Section 215 requests. Agents stated that if they were to identify an item that they needed quickly, they would seek to determine whether the item could be obtained through a national security letter, a grand jury subpoena, or other process that is faster than the Section 215 process. (U)

We asked FBI and OIPR employees whether they believed the problems in implementing Section 215 and the delays in obtaining Section

215 orders harmed their cases or national security. None of the FBI and OIPR officials we interviewed said that they were aware of any harm to national security caused by the delay in obtaining Section 215 orders. None of the agents who initiated the requests for Section 215 orders told the OIG that their cases were negatively affected by the inability to obtain the information sooner. The FBI's Deputy General Counsel of NSLB told us that the failure to obtain a business record order or to obtain it expeditiously may have negatively impacted the pace of national security investigations, but that she did not believe that this meant that there was harm to national security. (U)

We were provided no evidence of harm to national security in a specific case that was caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in a Section 215 request. However, we were concerned by the number of instances where the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay in obtaining an order. (U)

#### **V. Use and Effectiveness of Information Obtained from Section 215 Orders (U)**

Congress also directed the OIG to include in its review an examination of the types of records obtained by Section 215 orders and the importance of those records; the manner in which the information is collected, retained, analyzed, and disseminated by the FBI; whether and how often the FBI used information obtained from Section 215 orders to produce an "analytical intelligence product" for distribution to, among others, the intelligence community; and whether and how often the FBI provided information obtained from Section 215 orders to law enforcement authorities for use in criminal proceedings. (U)

##### **A. Collection, Analysis, and Retention (U)**

Before items subject to a Section 215 order can be obtained, the order must be served upon the entity that has custody of the records. Personal delivery or service of the order is typically accomplished by the requesting or "originating" FBI field office, unless the recipient of the order is outside the district. In that instance, the FBI field office where the recipient is located is asked by the originating field office to serve the order. (U)

The manner in which information from Section 215 orders is collected depends on the category of information sought. For pure Section 215 orders, the recipient produces the documents in hard copy or electronic

format. If after reviewing the information the case agent determines no further investigation is warranted, the agent stores the information with the rest of the investigative case file. The agent may prepare a document summarizing the information obtained for purposes of documenting the existence of the records. If the information warrants dissemination within the FBI, the agent prepares a written communication to the relevant field office or offices. If the information warrants dissemination outside of the FBI, such as to an intelligence agency, the agent prepares the appropriate form of communication. (U)

For "combination" orders, FBI personnel told us that if the recipient and the FBI have technological compatibility, the recipient will transfer the requested subscriber information electronically directly into the FBI computer system called "Telephone Applications."<sup>21</sup> If the FBI and recipient systems are not compatible, the information is provided to the FBI in another format, such as a computer diskette or hard copy. This information is then electronically uploaded or manually inputted into Telephone Applications and then searched by the case agent. (U)

Information stored in Telephone Applications and other FBI databases may be accessible by personnel from other law enforcement or intelligence agencies who are assigned on detail to the FBI in some capacity, such as a task force addressing terrorism matters. Access depends on the clearance level of the non-FBI personnel and whether the information is "restricted" in the computer systems. (U)

**B. How the Information Obtained Has Been Used in Investigations (U)**

We found that pure Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information useful to the development of the case. We found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in three instances. However, the FBI did not create any analytical intelligence products based on the information obtained in response to Section 215 orders. We also obtained limited information about the dissemination of information produced in response to combination Section 215 orders. Because there were 141 combination orders, we were unable to interview all of the case agents associated with these orders. However, in our field office visits, we interviewed four agents who had

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<sup>21</sup> Telephone Applications is an investigative tool that also serves as the central repository for all telephone data collected during the course of FBI investigations. (U)

obtained combination orders. None of these agents reported disseminating information obtained in response to the combination orders. (U)

We also sought to determine whether any of the information obtained from any Section 215 order was used in any criminal proceeding. We did not identify any instance in which information obtained from a pure Section 215 order was used in a criminal proceeding. We identified only one instance in which use authority approval was sought for information from a combination Section 215 order. The field office sought and obtained Attorney General approval to use the FISA electronic surveillance and combination order information in a grand jury investigation and in grand jury subpoenas for one case. The FBI case agents told the OIG that although use authority was obtained for the FISA-derived information, no grand jury subpoenas were ever issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. (U)

We also interviewed the agents who obtained records from the Section 215 orders. The agents suggested that the records obtained were important and useful in two ways: (1) the records provided substantive information that was relevant to the investigation and either confirmed prior investigative leads or contributed to the development of additional investigative information; or (2) even if the records did not contribute to the development of additional investigative information, they were still valuable as "necessary steps to cover a lead." Most of the agents we interviewed said the records obtained under Section 215 orders fell in the second category because the records typically did not provide additional investigative information, although they helped the agents exhaust every lead. They also stated that the importance of the information is sometimes not known until much later in an investigation when the information is linked to some other piece of intelligence that is obtained. (U)

## **VI. OIG Conclusions (U)**

In evaluating the effectiveness of Section 215 authority, we first considered the number of pure Section 215 orders obtained during CY 2002 through CY 2005. The FBI obtained only 18 unique Section 215 orders in the 3 calendar years following passage of the Patriot Act. (U)

However, we found that a significant number of Section 215 orders were not sought or obtained because of legal, bureaucratic or other impediments. The question concerning the applicability of the Buckley Amendment to Section 215 requests for educational records played a role in the FBI not obtaining Section 215 orders in several instances. Other



impediments, such as the disagreements between NSLB and OIPR about the amount of information sufficient to satisfy the relevance standard, insufficient resources to process Section 215 requests, and the multi-layered review process, resulted in many Section 215 requests not being processed for lengthy periods of time. We determined that with respect to several Section 215 requests that were withdrawn, the requests had been pending with NSLB or OIPR for several months, and in one instance over a year, at the time the field office notified NSLB that it was withdrawing the request because the investigation had changed course or was being closed. In addition, we identified several requests for Section 215 orders that were never responded to by NSLB or OIPR, and neither NSLB nor OIPR employees were able to explain what happened to those requests. (U)

These processing problems not only resulted in far fewer Section 215 orders being obtained than were requested, but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile in the investigation. Agents told the OIG that the length of the process to obtain a Section 215 order is a significant impediment to its use and that agents will typically attempt all other investigative tools before resorting to a Section 215 request. This negative perception about the Section 215 process may also have affected the number of Section 215 orders sought by the field offices. (U)

We examined the type of information that has been obtained through the use of pure Section 215 orders and how that information has been used and disseminated in national security investigations. We found no instance where the information obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to other intelligence agencies. However, we found that Section 215 orders have been used to obtain useful investigative information. (U)

Agents told us they believe that the kind of intelligence gathering from Section 215 orders was essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation, when the information is linked to some other piece of intelligence that is obtained. (U)

The field agents we interviewed described Section 215 authority as a "tool of last resort" that may be "critical" when other investigative authority or investigative methods do not permit the FBI to obtain the information. In many national security investigations, there is no criminal investigation and therefore the FBI is unable to seek grand jury subpoenas. In addition, national security letters are limited in scope and do not cover large

categories of third party information. Agents also told us that, in some instances, they had in fact used other investigative techniques, but these efforts were unsuccessful. (U)

We also interviewed other FBI officials and attorneys at the FBI and OIPR concerning the effectiveness of Section 215 orders. They stated that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means, such as grand jury subpoenas or national security letters. The head of OIPR described Section 215 authority as a "specialized tool that has its purpose." (U)

At the same time, however, the evidence showed that the FBI has not used this specialized tool as effectively as it could have because of the impediments to its use that we described above. Some of these impediments have since been addressed. For example, NSLB and OIPR cited the Reauthorization Act provision specifically allowing the FBI to obtain educational and other sensitive records through Section 215 orders. The FBI has also distributed a Section 215 request form to all field offices; and NSLB and OIPR have developed a template application form that is used in all Section 215 applications. (U)

We also evaluated the use of Section 215 authority to obtain subscriber information for telephone numbers that were the subject of pen register/trap and trace orders. OIPR obtained the first "combination" order in February 2005. A total of 141 combination applications were submitted and approved by the FISA Court in calendar year 2005. Several FBI and OIPR attorneys we interviewed, including OIPR Counsel, told us that this information was very important in FBI investigations. The Deputy General Counsel of NSLB agreed, stating that the addition of Section 215s to FISA pen register/trap and trace applications was a "huge boon because without the 215s, the FBI would have had to issue numerous [national security letters] to get the subscriber information."<sup>22</sup> (U)

We conducted this review mindful of the controversy concerning the possible chilling effect on the exercise of First Amendment rights posed by the FBI's ability to use Section 215 authorities, particularly the potential use of Section 215 orders to obtain records held by libraries. Our review found that the FBI did not obtain Section 215 orders for any library records

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<sup>22</sup> Congress has also recognized the importance of subscriber information in FISA pen registers. As part of the Reauthorization Act, Congress amended the FISA pen register provision to include subscriber information. (U)



from 2002 through 2005, in part because the few applications for such orders were withdrawn while undergoing the review process within NSLB and OIPR. (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. As directed by the Reauthorization Act, the OIG will continue to assess the FBI's use and effectiveness of Section 215 authority. (U)

## CHAPTER ONE INTRODUCTION (U)

In the USA PATRIOT Improvement and Reauthorization Act of 2005 (Reauthorization Act), Congress directed the Office of the Inspector General (OIG) to conduct "a comprehensive audit of the effectiveness and use, including improper or illegal use" of the Federal Bureau of Investigation's (FBI) investigative authority that was expanded by Section 215 of the Patriot Act.<sup>1</sup> See Pub. L. No. 109-177, §106A. Section 215 of the Patriot Act allows the FBI to seek orders from the Foreign Intelligence Surveillance Court for "any tangible things," including books, records, and other items from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Congress directed the OIG to review the use of Section 215 for two time periods – calendar years (CY) 2002 through 2004 and CY 2005 through 2006. The first report is due to Congress on March 9, 2007, the second is due on December 31, 2007.<sup>2</sup> (U)

This report describes the results of the first OIG review of the use of Section 215. Although we were only required to review calendar years 2002 through 2004 in this first review, we elected to include data from calendar year 2005. (U)

### I. **The USA PATRIOT Improvement and Reauthorization Act of 2005** (U)

Enacted in the wake of the September 11, 2001, terrorist attacks, the Patriot Act states that it seeks to provide federal authorities "with the appropriate tools required to intercept and obstruct terrorism." Several

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<sup>1</sup> The term "USA PATRIOT Act" is an acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). It is commonly referred to as "the Patriot Act." (U)

<sup>2</sup> The Reauthorization Act also directed the OIG to conduct reviews for the same two time periods on the use and effectiveness of the FBI's use of national security letters, another investigative authority that was expanded by the Patriot Act. The OIG's first report on the use and effectiveness of national security letter authority is contained in a separate report. (U)

Patriot Act provisions, including Section 215, were originally scheduled to sunset on December 31, 2005. (U)

On March 9, 2006, the President signed into law the USA PATRIOT Improvement and Reauthorization Act of 2005, which, among other things, made permanent or extended several Patriot Act provisions.<sup>3</sup> Section 215 was not made permanent but was extended for another four years, until December 31, 2009. The Reauthorization Act also resulted in some substantive changes to Section 215, which we discuss in Chapter Two. (U)

## II. Methodology of the OIG Review (U)

In this review, the OIG examined documents obtained from the Department of Justice's (Department or DOJ) Office of Intelligence Policy and Review (OIPR) and the FBI relating to each instance of the FBI's use or attempted use of Section 215 authority during calendar years 2002 - 2005.<sup>4</sup> In addition, we reviewed Department reports concerning the FBI's use of Section 215 authorities. We also reviewed a classified report prepared by the staff of the Senate Select Committee on Intelligence (SSCI) in 2005 on the electronic surveillance process in counterterrorism and counterintelligence cases that included a discussion of the FBI's use of Section 215.<sup>5</sup> We also examined FBI, OIPR, and other DOJ documents regarding the implementation of procedures for obtaining Section 215 orders, including documents reflecting the obstacles encountered by FBI and OIPR personnel during the implementation process, improvements made to the process, and other issues. (U)

The OIG conducted approximately 91 interviews of FBI and Department officials as part of the review. During the field work phase of the review, OIG teams traveled to FBI field offices in New York, Chicago, Philadelphia, and San Francisco to review investigative case files from which

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<sup>3</sup> The provisions that had been scheduled to expire on December 31, 2005, were temporarily extended while Congress was attempting to finalize the reauthorization bill. (U)

<sup>4</sup> Until the fall 2006, the Office of Intelligence Policy and Review was a separate component of the Department. In March 2006, the Reauthorization Act authorized the creation of a National Security Division (NSD) within the Department. In September 2006, Kenneth L. Wainstein was confirmed as the first Assistant Attorney General for the NSD. Shortly after that, OIPR's functions were moved to the NSD. (U)

<sup>5</sup> Senate Select Committee on Intelligence, Committee Staff Audit and Evaluation of the Foreign Intelligence Surveillance Act Process (*SSCI Staff Audit*), SSCI report number 2005-4702, July 22, 2005. (U)

requests for Section 215 orders were initiated. While visiting these field offices, OIG personnel interviewed approximately 52 FBI employees, including FBI Assistant Directors in Charge, Special Agents in Charge, Assistant Special Agents in Charge, Chief Division Counsel, Supervisory Special Agents, case agents, intelligence analysts, and support personnel.<sup>6</sup> We also conducted telephone interviews of 25 FBI agents in other field offices who were responsible for seeking Section 215 orders. (U)

In Washington, D.C., OIG personnel interviewed 14 senior FBI and OIPR officials who participated in implementing procedures and processing requests for Section 215 orders, including the Counsel to OIPR, a former and the current Deputy General Counsel of the FBI Office of General Counsel's National Security Law Branch (NSLB), and other attorneys and personnel from NSLB and OIPR. (U)

### **III. Organization of the Report (U)**

This report is divided into six chapters. Following this Introduction, we describe in Chapter Two the legal background related to Section 215 authority, the internal process in the FBI and in the Department for seeking Section 215 orders, and a comparison of Section 215 orders to other investigative tools, including criminal tools, which the FBI uses in counterterrorism and counterintelligence investigations. (U)

In Chapter Three, we provide a detailed examination of the instances in which the FBI obtained Section 215 orders from 2002 through 2005, including the number of orders obtained, the types of information obtained pursuant to the orders, and the number of applications submitted but for which orders were not obtained. At the end of Chapter Three, we discuss whether we identified any improper use of Section 215 authority. (U)

In Chapter Four, we describe our analysis of the implementation of procedures for obtaining Section 215 orders, the delays in processing Section 215 requests, and other problems that affected the FBI's ability to obtain Section 215 orders. (U)

In Chapter Five, we present our findings on the use and effectiveness of Section 215 orders, including our evaluation of methods and processes used to collect, retain, analyze, and disseminate information derived from

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<sup>6</sup> FBI field offices are also referred to as "divisions." The Chief Division Counsel or CDC is the legal officer for the field office. (U)

these orders, and how the orders were used in counterterrorism and counterintelligence cases. Chapter Six contains our conclusions. (U)

The Appendix contains the comments of the Attorney General and the Director of National Intelligence in response to the report. (U)



## CHAPTER TWO BACKGROUND (U)

### I. Introduction (U)

This chapter provides a description of the legal background related to Section 215 authority, the internal process in the FBI and in the Department for obtaining Section 215 orders, and a description of and comparison to other investigative tools, including criminal tools, available to the FBI at certain stages of its counterterrorism and counterintelligence investigations. (U)

### II. Legal Background (U)

Pursuant to Section 215 of the Patriot Act, the FBI may obtain "any tangible things," including books, records, and other items, from any business, organization, or entity, provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Section 215 did not create any new investigative authority but instead expanded existing authority found in the Foreign Intelligence Surveillance Act (FISA) of 1978. 50 U.S.C. § 1801 et seq. First we describe the authority as it existed in FISA prior to the Patriot Act. Next we describe the changes to the authority brought about by Section 215. Thereafter we briefly describe the controversy concerning Section 215 that arose after passage of the Patriot Act. (U)

#### A. Foreign Intelligence Surveillance Act of 1978 and the Business Records Provision (U)

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court) to conduct electronic surveillance to collect foreign intelligence information.<sup>7</sup> Generally, to obtain a FISA order, the FBI must show that there is probable cause to believe that the target of the

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<sup>7</sup> FISA applications and orders are classified, and intelligence developed under FISA is also classified, generally at the Secret level. Foreign intelligence is defined as information that relates to the ability of the United States to protect against: (1) actual or potential attacks of a foreign power or an agent of a foreign power; (2) sabotage or international terrorism; or (3) clandestine intelligence activities; or information that relates to the national defense, security or conduct of the foreign affairs of the United States. 50 U.S.C. § 1801(e). (U)

surveillance is a foreign power or an agent of a foreign power, a term defined by FISA that includes terrorist organizations.<sup>8</sup> Applications for FISA orders are prepared and presented to the FISA Court by the Department's Office of Intelligence Policy and Review (OIPR).<sup>9</sup> (U)

Congress provided the FBI with additional investigative authorities pursuant to FISA in the mid-1990s. In 1994, FISA was amended to permit the FISA Court to approve applications for warrantless physical searches. 50 U.S.C. § 1822 et seq. In 1998, Congress amended FISA again to authorize the FBI to apply to the FISA Court for orders compelling certain kinds of businesses to "release records in its possession" to the FBI.<sup>10</sup> However, this amendment limited the scope of the authority to obtain business records from four types of entities – common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities. The amendment did not further define "records." This provision, which was originally codified at 50 U.S.C. § 1862, became known as the "business records" provision and was the provision expanded by Section 215 of the Patriot Act. 50 U.S.C. § 1862(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001). (U)

The 1998 business records amendment also required the FISA application to specify that the records were sought for an investigation to gather foreign intelligence information or an investigation concerning international terrorism and that there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." 50 U.S.C. § 1862 (2000 ed.) This language meant that the FBI was limited to obtaining information regarding a specific person or entity the FBI was investigating about whom the FBI had individualized suspicion. In addition, the amendment prohibited the entity complying with the order from disclosing either the

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<sup>8</sup> For a description of the requirements of FISA and how they were interpreted by the Department and the courts prior to the Patriot Act, see the OIG's report, "Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks", pages 44-53 (June 2006 – unredacted and unclassified version). For a description of how the Patriot Act expanded certain authorities under FISA, see the OIG's report titled "A Review of the FBI's Handling of the Brandon Mayfield Case", pages 221-224 (March 2006). (U)

<sup>9</sup> We discuss the process for obtaining a FISA order and OIPR's role in the process in more detail in Section III C below. (U)

<sup>10</sup> The 1998 amendment also allowed the FBI to obtain FISA orders to use pen register or trap and trace devices, which allow the FBI to obtain the telephone numbers dialed to and from a particular telephone number. 50 U.S.C. § 1842 et seq. We discuss pen register and trap and trace devices in Section IV below and in Chapter Three. (U)

existence of the order or any information produced in response to the order.  
(U)

Subsequent to the 1998 FISA amendment creating this investigative authority and prior to the passage of the Patriot Act on October 26, 2001, the FBI obtained only one FISA order for business records. This order was obtained in 2000 and related to the production of business records from an

[redacted] ~~(S)~~ (U)

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**B. Expansion of Business Records Authority by Section 215**  
(U)

Section 215 of the Patriot Act significantly expanded the scope of the FBI's investigative authority pursuant to the business records provision of FISA and lowered the standard of proof required. The pertinent part of Section 215 provides: (U)

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. 50 U.S.C. § 1861(a)(1).<sup>11</sup>  
(U)

While the old language limited the reach of this type of investigative authority to common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities, the new language does not explicitly limit the type of entity or business that can be compelled by a Section 215 order. So, for example, [redacted]

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[redacted] could be compelled to produce information under Section 215. ~~(S)~~ (U)

<sup>11</sup> "United States person" is defined as a citizen, legal permanent resident, or unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, and corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(i) (2005). (U)

Second, Section 215 of the Patriot Act expanded the categories of documents that the FBI can obtain under the business records provision of FISA. The FISA business records provision was limited to "records," while Section 215 provides that the FBI may obtain an order for "the production of any tangible things (including books, records, papers, documents, and other items)." This means the FBI may obtain pursuant to Section 215, for example, [REDACTED] ~~(S)~~ (U)

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Section 215 also lowered the evidentiary threshold to obtain an order and expanded the number of people whose information could be obtained through such an order. The pre-Patriot Act language required that the records sought pertain to a person about whom the FBI could show "specific and articulable facts" demonstrating that the person was a foreign power or an agent of a foreign power and that the information was for an investigation to gather foreign intelligence information or an investigation concerning international terrorism. Section 215 no longer requires that the items being sought pertain to a person whom the FBI is investigating. Instead, the items sought need only be requested "for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. §1861(b)(2). This standard, referred to as a relevance standard, permits the FBI to seek information concerning persons not necessarily under investigation but who are connected in some way to a person or entity under investigation.<sup>12</sup> (U)

### C. Public Concerns about Section 215 (U)

Almost immediately after the Patriot Act was enacted, public controversy focused on the scope of Section 215. We briefly describe this controversy in order to provide context for the FBI's and OIPR's actions with respect to Section 215 authority between 2002 and 2005, which we describe in detail in Chapter Three. (U)

Public concerns about the scope of Section 215 authority quickly centered on the ability of the FBI to obtain library records, including books read by or loaned to library patrons. Many public commentators began to

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<sup>12</sup> The Reauthorization Act revised the language of Section 1862(b)(2) further by providing that tangible things are presumptively relevant when they pertain to entities or individuals that are foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, or individuals known to associate with subjects of such investigations. We discuss additional changes to Section 215 by the Reauthorization Act in Section II D. (U)

refer to Section 215 as the "library provision." Librarians, their professional associations, and others voiced concerns about the potential First and Fourth Amendment implications of compelled production of library records.<sup>13</sup> The First Amendment concerns related to the broad reach of Section 215 and also to the so-called "gag provision," which existed under the previous version of FISA and which forbids recipients of Section 215 orders from disclosing the existence of the order or any information obtained pursuant to an order, thus prohibiting recipients from challenging the order. (U)

According to Department officials and our examination of all 215 applications submitted to the Department through 2005, the FBI has never obtained a FISA Court order for the production of library records. However, we discuss in Chapter Three  requests from FBI field offices asking FBI Headquarters to seek to obtain information from a library. One of the requests was forwarded to OIPR, but this request was never presented to the FISA Court. Another request was not presented to OIPR after review by FBI attorneys. ~~(S)~~ (U)

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**D. Reauthorization Legislation Results in Additional Changes to Section 215 (U)**

The Reauthorization Act included some substantive amendments to Section 215 in addition to extending it for four years until December 31, 2009. For example, the Reauthorization Act provided that Section 215 orders must, among other things, contain a particularized description of the items sought and provide for a reasonable time to assemble them. In addition, the Act established a detailed judicial review process for recipients of Section 215 orders to challenge their legality before a FISA Court judge. (U)

Additional changes to Section 215 were adopted with the passage of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.<sup>14</sup>

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<sup>13</sup> For example, the American Library Association (ALA) adopted a resolution declaring that the ALA "considers sections of the USA PATRIOT Act . . . a present danger to the constitutional rights and privacy rights of library users" and urged the Congress to provide additional oversight and amend or change portions of the Act." Resolution on the USA PATRIOT Act and Related Measures That Infringe on the Rights of Library Users (Jan. 29, 2003). (U)

<sup>14</sup> Both the 2005 Reauthorization Act and the 2006 Reauthorizing Amendments Act were signed into law on March 9, 2006. Although the conference committee had approved the 2005 Reauthorization Act on December 15, 2005, the full Congress was unable to vote on the bill because of an 11-week filibuster in the Senate. During this 11-week period, (cont'd)



For example, the 2006 amendments provided that a recipient of a Section 215 order may petition the FISA Court to modify or set aside the nondisclosure requirement after one year from the issuance of the order if certain findings are made.<sup>15</sup> (U)

### III. The Process for Seeking Section 215 Orders (U)

The FBI had obtained only one FISA order for business records prior to passage of the Patriot Act in late 2001, and no written policies, procedures, or templates for requests or applications for Section 215 orders existed in the FBI or OIPR. The general process described below was developed and refined between 2002 and 2005, as were templates for the field offices' requests for Section 215 authority and for applications to the FISA Court for Section 215 orders.<sup>16</sup> (U)

As described below, the process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, the FISA Court review, and FBI service of the order. Each phase is discussed in the following sections. (U)

#### A. FBI Field Office Initiation and Review (U)

The process begins when an FBI case agent in a field office determines that in a counterterrorism or counterintelligence investigation there is a need for business records or other items for which the appropriate investigative authority is Section 215.<sup>17</sup> For example,

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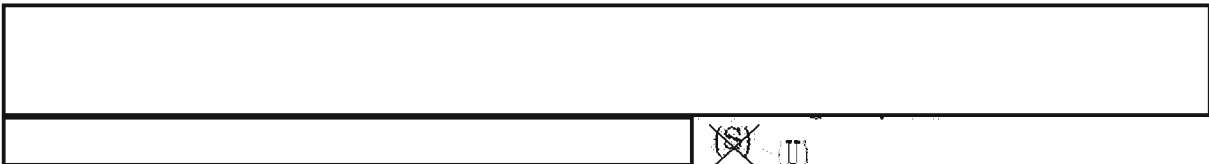
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Congress twice temporarily extended the provisions of the Patriot Act that were scheduled to expire on December 31, 2005 – the first time until February 3, 2006, and the second time until March 10, 2006. Congress reached a compromise in early March 2006. As part of the compromise, Congress agreed to make some substantive changes to Section 215 that were included in a separate bill – the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. (U)

<sup>15</sup> USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178. Because these amendments were not in effect until 2006, we will discuss them in greater detail in our report concerning Section 215 orders obtained by the FBI in CY 2006, which is due to Congress by December 31, 2007. (U)

<sup>16</sup> We describe in detail in Chapter Four the facts concerning the development of this process and the FBI and OIPR templates. (U)

<sup>17</sup> The FBI and OIPR still refer to requests for investigative authority pursuant to Section 215 as “business records requests” or “business records applications.” We primarily use the terms “Section 215 authority” or “Section 215 orders,” but we may use the term “business records” interchangeably in this report. (U)



~~(S)~~ (U)

First, the agent must prepare a business records request form that requires the agent to provide, among other things, the following information: a brief summary of the investigation, a specific description of the items requested, an explanation of the manner in which the requested items are expected to provide foreign intelligence information, and the identity of the custodian or owner of the requested items. The request is reviewed and approved by the squad's Supervisory Special Agent, the Chief Division Counsel, and the Special Agent in Charge at the FBI field office. The request is then sent to FBI Headquarters for further review and processing.<sup>19</sup> (U)

**B. FBI Headquarters Review (U)**

The field office request is forwarded to FBI Headquarters to both the "substantive desk" (in the Counterterrorism Division or Counterintelligence Division) and the Office of General Counsel's National Security Law Branch (NSLB). Both review the request and determine whether it merits further processing. The field case agent may be contacted for additional information or clarification. If a request is rejected, no additional work is done by the substantive desk or NSLB. (U)

If the request is approved, an NSLB attorney drafts the application package that will be forwarded to OIPR. The application includes a specific description of the items requested, a description of the underlying investigation, a description of how the FBI expects the requested items to further the investigation, and the custodian of records. The NSLB attorney also drafts the order for the FISA Court judge's signature, which specifies the items to be produced and the time period within which the items must

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<sup>18</sup> The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection prescribe the investigative techniques available at each stage of an investigation. (U)

<sup>19</sup> The business records request form was not finalized and distributed with guidance to the field by the FBI's Office of General Counsel until October 29, 2003. Prior to that time, FBI field offices submitted an Electronic Communication or EC, the standard form of communication within the FBI, to FBI Headquarters setting forth the field office's request for Section 215 authority. ECs are "uploaded" into a computer system called Automated Case Support or ACS, which has been the FBI's centralized case management system since 1995. (U)

be produced. The NSLB attorney works with the case agent and other FBI personnel to obtain the information the NSLB attorney believes is necessary to include in the application. The draft application package is reviewed by NSLB supervisors and forwarded to OIPR after any additional revisions are made as a result of the NSLB supervisors' review. (U)

### **C. OIPR Review (U)**

The NSLB attorney forwards the draft application package to OIPR, and the request is assigned to an OIPR attorney.<sup>20</sup> The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to finalize the draft application package. The OIPR attorney may ask for additional information about the items requested or about the underlying investigation and may include additional information in the application. The draft application package is then reviewed by an OIPR supervisor, called an Associate Counsel, who may also have concerns or questions that must be resolved.<sup>21</sup> Upon completion of the final version, the signatures of designated senior FBI personnel are obtained and the package is prepared for presentation to the FISA Court by an OIPR attorney. (U)

### **D. FISA Court Review (U)**

OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with a copy of the application and order, which is called a "read" copy. The FISA Court, through a FISA Court legal advisor, may contact OIPR prior to the hearing with additional questions or for clarification after reviewing the read copy of the application and order. OIPR and the FBI then address any of the Court's questions or concerns and make any necessary revisions to the application or order prior to the hearing. The application package is then formally presented to the FISA Court for its review and approval at the scheduled hearing. If the FISA Court judge approves the application, the judge signs the order approving the application. At the hearing, the judge may request additional information from the government. In addition, the judge may make handwritten changes to the order, such as the length of time for the recipient to produce the items, and, if so, will sign the order with the handwritten modifications.<sup>22</sup> (U)

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<sup>20</sup> NSLB and OIPR did not agree on a form or template Section 215 application until mid- to late-2004. (U)

<sup>21</sup> At the time of our review, in addition to Associate Counsels, OIPR also had three Deputy Counsels and was headed by the Counsel for Intelligence Policy. (U)

<sup>22</sup> We discuss modification of FISA orders in more detail in Chapter Three. (U)

#### **E. FBI Field Office Service of the Order (U)**

The order is returned to the requesting FBI field office or the field office closest to the recipient of the order for service on the recipient. A copy of the order is also maintained at OIPR for its records. The order is served on the provider designated in the order. The order sets forth the time period for producing the items. The provider must produce the items requested in the order to the FBI field office which served the order. (U)

#### **IV. Other Investigative Authority Available to the FBI for Third-Party Information (U)**

In addition to Section 215 orders, the FBI has several other investigative tools that allow it to obtain information from third parties in national security investigations.<sup>23</sup> For example, FISA permits the FBI to use pen register and trap and trace devices to identify incoming and outgoing telephone numbers on a particular telephone line. Pen register and trap and trace devices do not allow the FBI to listen to the content of the telephone call.<sup>24</sup> (U)

Some investigative authority rests directly with the field offices and does not require FBI Headquarters or FISA Court approval. For example, national security letters (NSL) are written commands from the FBI to entities such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer and consumer transaction information. In the field, SACs are authorized to approve NSLs. Field offices may also send voluntary letters asking a third party to provide information that falls outside the scope of the NSL statutes. These letters are typically signed by the field office SAC. (U)

In national security investigations with a criminal nexus, the FBI can ask the United States Attorney's Office to obtain grand jury subpoenas for third-party information. The grand jury subpoena is the criminal investigative tool that mostly closely resembles a Section 215 order. Generally speaking, the law permits grand jurors to obtain non-privileged

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<sup>23</sup> For this report, national security investigations refer to investigations involving counterterrorism or counterintelligence components. (U)

<sup>24</sup> FISA permits the FISA Court to authorize collection of this information for up to one year in cases of non-U.S. persons and 90 days in cases of U.S. persons. Orders for non-U.S. persons may be renewed for one year, and orders for U.S. persons may be renewed for an additional 90 days. 50 U.S.C. § 1842(e). (U)

evidence, including any records and tangible items, relevant to the grand jury's investigation. Agents conducting a national security investigation with a criminal nexus, however, do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena. Grand jury subpoenas are issued under the signature of the prosecutor supervising the grand jury investigation. (U)



## CHAPTER THREE

### EXAMINATION OF SECTION 215 ORDERS OBTAINED IN CALENDAR YEARS 2002 THROUGH 2005 (U)

#### I. Introduction (U)

As part of the OIG's review of the use and effectiveness of Section 215 authority, Congress directed the OIG to include an examination of the following: (U)

- Every business record application submitted to the FISA Court including whether: (a) the FBI requested that the Department of Justice submit a business record application to the FISA Court and the application was not submitted, and (b) whether the FISA Court granted, modified, or denied any business record application; (U)
- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)
- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions; (U)
- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority; and, (U)
- The effectiveness of the business record requests as an "investigative tool," including: (a) what types of records are obtained and the importance of those records in the intelligence activities of the FBI and the DOJ; (b) the manner in which the information obtained through business record requests is collected, retained, analyzed, and disseminated by the FBI; (c) whether and how often the FBI used information obtained from business record requests to produce an "analytical intelligence product" for distribution to, among others, the intelligence community or federal, state, and local governments; and (d) whether and how often the FBI provided information obtained from business record requests to law enforcement authorities for use in criminal proceedings. (U)

In the next three chapters – Chapters Three, Four, and Five – we set forth the information we obtained in connection with these directives, and our analysis of this information. We begin in Chapter Three with a detailed examination of the Section 215 orders obtained in CY 2002 through CY 2005. We discuss the number of orders obtained, the types of information obtained pursuant to the orders, the number of applications submitted to FBI Headquarters or to OIPR that were later withdrawn, and the number of Section 215 orders that were modified. At the end of the chapter, we discuss whether we identified any improper use of Section 215 orders. (U)

## **II. Two Uses of Section 215 Authority Between CY 2002 and CY 2005 (U)**

During the period covered by our review, CY 2002 through CY 2005, the FBI and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: “pure” Section 215 applications and combination or “combo” Section 215 applications. (U)

A “pure” Section 215 application is a term used by OIPR to refer to a Section 215 application for any tangible item that is not associated with applications for any other FISA authority. For example, a Section 215 request for driver’s license records from state departments of motor vehicles would constitute a pure Section 215 request. (U)

A “combo” application is a term used by OIPR to refer to a Section 215 request that was added to or combined with a FISA application for pen register/trap and trace orders. The use of the combination request evolved from OIPR’s determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through the orders.<sup>25</sup> Unlike criminal investigation pen register/trap and trace orders, which routinely included a clause requiring the provision of subscriber information, FISA pen register/trap and trace orders did not contain such provisions. Thus, while the FBI could obtain the numbers dialed to and from the target number through FISA orders, FBI agents had to employ other investigative tools, such as national security letters, to obtain the subscriber information. In order to streamline the process for obtaining subscriber information, beginning in early 2005 OIPR began to append a request for Section 215

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<sup>25</sup> As discussed above, the FBI did not obtain authority to use pen register and trap and trace devices in national security investigations until FISA was amended in 1998. (U)

orders to applications for FISA pen register/trap and trace authority. The result was that information obtained in a FISA pen register/trap and trace order was equivalent to the information obtained in a criminal pen register/trap and trace order.<sup>26</sup> As of March 2006, Section 215 combination requests were no longer necessary because the Reauthorization Act authorized the disclosure of subscriber information in connection with FISA pen register/trap and trace orders. (U)

### **III. Pure Section 215 Applications and Orders for Calendar Years 2002 Through 2005 (U)**

We describe in this section the number of pure Section 215 applications submitted to the FISA Court during calendar years 2002 through 2005; how many of these applications were approved; the number of U.S. persons and non-U.S. persons referenced in these applications; the types of records obtained; and the FBI field offices that obtained Section 215 orders from the FISA Court. We then report the Section 215 requests for which orders were not obtained, which we call "withdrawn" applications, and the reasons for the withdrawal of the applications.<sup>27</sup> (U)

#### **A. Number of Pure Section 215 Orders (U)**

For calendar years 2002 through 2005, OIPR submitted a total of 21 pure Section 215 applications for FISA Court approval. All of these applications were approved. The first pure Section 215 order was approved by the FISA Court on May 21, 2004, more than two years after the Patriot Act was enacted.<sup>28</sup> The FISA Court approved six more Section 215 applications in CY 2004, for a total of seven. The FISA Court approved 14 Section 215 applications in CY 2005. ~~(S)~~ (U)

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<sup>26</sup> We interviewed several FBI agents who told us they were not aware of the addition of the Section 215 requests to pen register/trap and trace requests. Some agents we interviewed were not aware that the pen register orders had been modified to include subscriber information, and the agents told the OIG they were still using national security letters to obtain the subscriber information. (U)

<sup>27</sup> In Section V, we discuss the issue of modified orders in detail, after we examine the pure and combination orders, because both pure and combination orders were modified. (U)

<sup>28</sup> The FBI began submitting Section 215 requests to OIPR in spring 2002, but none of the requests initiated in CY 2002 were presented to the FISA Court. The first request for which a Section 215 order was obtained was submitted by the FBI to OIPR in October 2003. We discuss the delays in obtaining Section 215 orders in Chapter Four. (U)

Although a total of 21 Section 215 orders were approved, they concerned only 18 unique requests. Two of the requests were for the same provider, and the targets – Target A and Target B – were connected in the same investigation. After the applications were approved by the FISA Court and before the orders were served, NSLB learned that there was a mistake in the application concerning Target A that needed to be corrected.<sup>29</sup> In early 2005, OIPR submitted a corrected application and obtained an order in the spring 2005 for the same records for Target A. Before the orders were served, the FBI learned that a subcontractor, and not the provider listed in the orders, was in possession of the records for both Target A and Target B. The FBI then submitted new applications for both Target A and Target B for the same records but a different provider, and these applications were approved in summer 2005. Thus, the FBI submitted two corrected applications for Target A and one corrected application for Target B, and we do not consider these corrected applications as unique. (U)

One of the 18 unique requests was for telephone subscriber information. With respect to this request, the field office had prepared an application for a FISA pen register/trap and trace order and wanted to obtain the subscriber information without using national security letters. The field office supervisor dealt directly with OIPR's Counsel for Intelligence Policy, and they discussed the case with a FISA Court judge in person. As a result of these discussions, OIPR submitted an application for a Section 215 order for the subscriber information. The FISA Court approved two orders – one for the pen register and trap and trace devices and a Section 215 order for the related subscriber information. This order was signed on October 27, 2004. Thereafter OIPR began appending requests for Section 215 orders for subscriber information to FISA pen register/trap and trace applications.

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<sup>29</sup> The FBI decided to wait to serve the order for Target B until the new order for Target A had been obtained. (U)

**TABLE 3.1 (U)**  
**Pure Section 215 Orders Issued by the**  
**Foreign Intelligence Surveillance Court (U)**

	CY 2002(U)	CY 2003(U)	CY 2004(U)	CY 2005(U)	Total(U)
Total number of applications submitted to the FISA Court (U)	0 (U)	0 (U)	7 (U)	14 (U)	21 (U)
Unique number of applications submitted to the FISA Court (U)	0 (U)	0 (U)	7 (U)	11 (U)	18 (U)

Source: Office of Intelligence Policy and Review (U)

We also identified the number of U.S. persons and non-U.S. persons referenced in the pure Section 215 applications that were submitted and approved by the FISA Court.<sup>30</sup> The following table shows the results for calendar years 2002 through 2005. (U)

**TABLE 3.2 (U)**  
**Number of U.S. Persons and Non-U.S. Persons Referenced In**  
**Section 215 Orders (U)**

	CY 2002(U)	CY 2003(U)	CY 2004(U)	CY 2005(U)	Total(U)
U.S. Person (U)	0 (U)	0 (U)			
Non-U.S. Person (U)	0 (U)	0 (U)			
Total (U)	0 (U)	0 (U)			

Source: OIPR (U)

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b1  
b3  
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(S) As the above table shows, in the first calendar year in which pure applications were submitted [redacted] non-U.S. persons were the subject of the applications. In the second year, applications presented to the FISA Court reflected [redacted] of U.S. persons and non-U.S. persons.<sup>31</sup> (U) (S)

<sup>30</sup> The OIG used the information that appeared in the Section 215 applications to determine if the subject was a U.S. person or non-U.S. person. As previously noted, for purposes of this report a U.S. person is defined as a U.S. citizen or lawful permanent resident. (U)



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b3  
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**B. Types of Records Requested in Section 215 Applications Presented to the FISA Court (U)**

We also identified the type of business records that were sought in the Section 215 applications submitted to the FISA Court during our review period.<sup>32</sup> Table 3.3 shows the nine types of records that were requested and the number of times those types of records were sought during calendar years 2002-2005.<sup>33</sup> Examples of the types of records obtained include driver's license records, public accommodations, apartment records, credit card records, and telecommunications subscriber information for telephone numbers. (U)

3 [Redacted] (S)

[Redacted] In the first case, the FBI planned to submit a FISA pen register/trap and trace request but for investigative reasons did not want to use an NSL for the subscriber information. The Counsel for Intelligence Policy suggested that the FBI append a Section 215 request to the pen register/trap and trace application. The FISA Court approved the applications in two separate orders. Thereafter, OIPR began to regularly append Section 215 applications to FISA pen register/trap and trace applications. [Redacted]

[Redacted] (S)

<sup>33</sup> The totals in Table 3.3 match the number of unique applications approved by the FISA Court, not the total number of orders approved. (U)

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**TABLE 3.3 (U)**  
**Types of Records Requested in Pure Section 215 Orders (U)**

Type of Record Requested (U)	Number (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
[Redacted] (U)	[Redacted] (U)
<b>Total</b>	18 (U)

Source: OIPR (U)

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**C. FBI Field Offices That Submitted Section 215 Requests Approved by the FISA Court (U)**

The OIG also analyzed how many FBI field offices submitted pure applications for Section 215 orders that were presented to and approved by the FISA Court. A total of [Redacted] of the FBI's 56 field offices ([Redacted] percent) applied for the 18 unique pure Section 215 orders approved in calendar years 2004 and 2005. Table 3.4 illustrates the number of orders associated with each field office over the two calendar years in which pure applications were approved. (X) (U)

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**TABLE 3.4 (U)**  
**FBI Field Offices That Submitted Pure Section 215 Requests**  
**Approved by the FISA Court (U)**

FBI Field Office (U)	CY 2004 (U)	CY 2005 (U)	Number of Approved Pure Orders (U)
<b>Totals (U)</b>	<b>7 (U)</b>	<b>11 (U)</b>	<b>18 (U)</b>

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Source: OIPR and the FBI. (U)

We also looked at the types of investigations from which pure applications were submitted and orders were issued. The 18 unique pure applications were grouped into three categories: counterintelligence (CI), counterterrorism (CT), and cyber investigations.<sup>34</sup> The following table shows the types of investigations that used pure Section 215 orders. (U)

**TABLE 3.5 (U)**  
**Types of Investigations that Generated Pure Section 215**  
**Requests Approved by the FISA Court (U)**

Case Type (U)	CY 2002 (U)	CY 2003 (U)	CY 2004 (U)	CY 2005 (U)	Totals (U)
CI (U)	0 (U)	0 (U)	3 (U)	6 (U)	9 (U)
CT (U)	0 (U)	0 (U)	4 (U)	4 (U)	8 (U)
Cyber (U)	0 (U)	0 (U)	0 (U)	1 (U)	1 (U)
<b>Total (U)</b>	<b>0 (U)</b>	<b>0 (U)</b>	<b>7 (U)</b>	<b>11 (U)</b>	<b>18 (U)</b>

Source: OIPR and the FBI. (U)

<sup>34</sup> The FBI's Cyber Division is responsible for overseeing traditional criminal investigations involving use of computers or the Internet, such as sexual predators who use the Internet to exploit children. The Cyber Division is also responsible for coordinating and supervising investigations of intrusions into government computer systems or networks that may be sponsored by foreign governments. Section 215 authority is not available in cyber criminal investigations but can be used in national security cyber investigations. (U)

**D. Withdrawn Section 215 Applications (U)**

In reviewing OIPR and FBI documents for calendar years 2002 through 2005, we also determined that there were 31 instances in which the FBI sought Section 215 orders but did not obtain them. These requests were prepared by the FBI but were never finalized either by NSLB for submission to OIPR or by OIPR for presentation to the FISA Court. For ease of reference, we describe all of these instances as "withdrawn" requests or applications, although in six cases we were unable to determine the reason the request or application did not make it to the next level and there did not appear to be an affirmative decision by anyone within the FBI not to proceed for a substantive reason.<sup>35</sup> We describe this category of withdrawn cases in more detail below in Section D 2 e. ~~(S)~~ (U)

First, we provide descriptive information about the withdrawn requests and applications, such as the types of records or other items sought in these withdrawn requests and applications and the field offices that sought these Section 215 orders.<sup>36</sup> We then describe in detail the reasons that Section 215 orders were not obtained for these requests and applications. (U)

**1. Descriptive Data Concerning Withdrawn Section 215 Requests and Applications (U)**

According to OIPR and FBI records, 13 FBI applications for Section 215 orders were submitted to OIPR but were never submitted to the FISA Court. Fifteen Section 215 requests from FBI field offices were submitted to FBI Headquarters but were never presented to OIPR for further processing. For three requests, we lacked sufficient information to determine whether the request was withdrawn while the request was pending at NSLB or whether the request was submitted to OIPR and was withdrawn while the request was pending at OIPR. Therefore, a total of 31 requests and applications were submitted during calendar years 2002 through 2005 for which no Section 215 order was obtained. ~~(S)~~ (U)

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<sup>35</sup> The FBI's and OIPR's recordkeeping systems at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. We determined the number of requests and how they were processed based on documents and interviews. (U)

<sup>36</sup> Section 215 requests that were submitted to NSLB but were never presented to OIPR are referred to as "withdrawn requests." Section 215 requests that were presented to OIPR as draft applications but that were never presented to the FISA Court are referred to as "withdrawn applications." (U)

a. **Types of Items Sought (U)**

We also examined the types of "tangible things" that were sought in the withdrawn requests and applications. The OIG identified 13 categories of items requested in these requests and applications, which included:

library, educational [redacted] (S)

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[redacted] Table 3.6 shows how often each type of record was requested in the withdrawn applications. (S) (U)

**TABLE 3.6 (U)**  
**Types of Records Requested in Withdrawn Applications for Pure Section 215 Orders (U)**

Type of Record Requested (U)	Number of Requests (U)
[redacted]	8 (S)
[redacted]	4 (S)
[redacted]	3 (S)
[redacted]	2 (S)
[redacted]	2 (S)
[redacted]	2 (S)
[redacted]	2 (S)
[redacted]	2 (S)
[redacted]	2 (S)
[redacted]	1 (S)
[redacted]	1 (S)
[redacted]	1 (S)
[redacted]	1 (S)
<b>Total (U)</b>	<b>31 (U)</b>

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Source: OIPR and the FBI (U)

FBI field offices sought but did not obtain Section 215 orders for library records on two occasions. In one of those instances, an FBI field

<sup>37</sup> The FBI could not produce documentation on one of the withdrawn applications. (U)

[redacted] (S)

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office sought a library's [redacted] (S)  
[redacted] We  
discuss those requests in detail in Section 2 below. (S) (U)

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**b. Field Offices Originating the Withdrawn Requests and Applications (U)**

We identified the FBI field offices that initially submitted the withdrawn Section 215 requests. Table 3.7 lists the field offices that submitted these requests. (U)

**TABLE 3.7 (U)**  
**Breakdown by FBI Field Office of Withdrawn Pure Section 215 Requests and Applications (U)**

Originating FBI Field Office (U)	Withdrawn at FBI (U)	Withdrawn at OIPR (U)	Unknown (U)	Total (U)
[redacted]	4 (S)	0 (S)	0 (S)	4 (S)
[redacted]	1 (S) (U)	2 (S) (U)	0 (S) (U)	3 (S) (U)
[redacted]	1 (S)	1 (S)	0 (S)	2 (S)
[redacted]	2 (S)	1 (S)	0 (S)	3 (S)
[redacted]	1 (S)	1 (S)	0 (S)	2 (S)
[redacted]	0 (S)	2 (S)	0 (S)	2 (S)
[redacted]	1 (S)	1 (S)	0 (S)	2 (S)
[redacted]	0 (S)	1 (S)	1 (S)	2 (S)
[redacted]	0 (S)	1 (S)	0 (S)	1 (S)
[redacted]	0 (S)	0 (S)	1 (S)	1 (S)
[redacted]	1 (S)	0 (S)	0 (S)	1 (S)
[redacted]	0 (S)	1 (S)	0 (S)	1 (S)
[redacted]	1 (S)	0 (S)	0 (S)	1 (S)
[redacted]	1 (S)	0 (S)	0 (S)	1 (S)
[redacted]	0 (S)	1 (S)	0 (S)	1 (S)
[redacted]	1 (S)	0 (S)	0 (S)	1 (S)
[redacted]	0 (S)	0 (S)	1 (S)	1 (S)
[redacted]	1 (S)	0 (S)	0 (S)	1 (S)
[redacted]	0 (S)	1 (S)	0 (S)	1 (S)
<b>Totals (U)</b>	<b>15 (S)</b>	<b>13 (S)</b>	<b>3 (S)</b>	<b>31 (U)</b>

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Source: OIPR and the FBI (U)

(S) [redacted] of the FBI's 56 field offices (0 [redacted] percent) and [redacted] (S)  
(S) [redacted] originated the Section 215 requests and applications for which Section 215 orders were never obtained. (S) (U)

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**2. Reasons for Withdrawn Requests and Applications (U)**

We reviewed the documents concerning the 31 withdrawn requests and applications and interviewed FBI, NSLB, and OIPR personnel to determine why the Section 215 orders were withdrawn. Table 3.8 below shows the number of withdrawn applications associated with each reason. (U)

**TABLE 3.8 (U)**  
**Reasons for Withdrawn Applications**  
**for Pure Section 215 Orders (U)**

<b>Reason for the Withdrawal (U)</b>	<b>Number of Requests (U)</b>
Investigation was closed or changed course (U)	9 (S) (U)
Other investigative tool was used (U)	5 (S) (U)
Statutory interpretation (U)	4 (S) (U)
Insufficient information to support request (U)	2 (S) (U)
Request became a full FISA (U)	2 (S) (U)
Provider told FBI agent it did not have the record (U)	1 (S) (U)
FBI could not resolve OIPR's concern about appropriate storage of information (U)	1 (S) (U)
Objection by another agency (U)	1 (S) (U)
Unknown (U)	6 (S) (U)
<b>Total (U)</b>	<b>31 (U)</b>

Source: OIPR and the FBI (U)

We identified five categories of reasons that apply to the majority of the requests and applications: (1) investigation was closed or changed course; (2) alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. Below we discuss each of these categories and provide descriptive examples. (U)

**a. Closed case or investigation changed course (U)**

The first category were cases in which the request was withdrawn because the field office closed the investigation or the investigation changed course and the information was no longer needed. We identified nine requests or applications that were withdrawn for this reason. Based on the information we were provided, we determined that most of these requests had been pending for several months, and in one case over a year, at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. We discuss a few examples below. ~~(S)~~ (U)

(S) In one case the field office sent the Section 215 request to NSLB around July 2004 seeking [redacted] records from [redacted] and NSLB (S) provided a draft application to OIPR on August 4, 2004. In January 2005, an NSLB attorney sent an e-mail to OIPR asking that the request be given "some priority" because it had "been in the pipeline forever." The e-mail also refers to a disagreement between NSLB and OIPR about the level of detail about the investigation that OIPR had requested for the application. On March 3, 2005, the OIPR attorney sent an e-mail to an FBI Headquarters supervisor in which she informed him that she was meeting with one of her managers about the request the next day and in preparation for this meeting asked the FBI Headquarters supervisor about the status of the investigation. The next day the supervisor replied, "I believe I have vented to you enough about this process and what a 'hindrance' it has been to our investigative efforts. That being said, I request that we withdraw our req [sic] for business records as [the case is] to the point now where the records are moot." The NSLB attorney who was copied on this e-mail exchange forwarded it to the FBI Deputy General Counsel on May 26, 2005, and the Deputy General Counsel responded, "I can understand the frustration. I will let [OIPR Deputy Counsel] know [it is] withdrawn." (S)(U)

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(S) In another case, the field office sent the request to NSLB on July 14, 2004, and NSLB forwarded a draft application to OIPR on September 27, 2004. The request was for an order compelling [redacted] to produce [redacted] (S) [redacted] On January 12, 2005, an FBI Headquarters supervisor notified NSLB that the information was no longer needed because the FBI was going to interview the target. The supervisor wrote in an e-mail, "An interview is forthcoming and the records, although material six months ago, are moot at this point." (S)(U)

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(S) In another case, the field office submitted to NSLB around August 2004 its request for a [redacted] records concerning the [redacted] (S) [redacted] NSLB submitted a draft application to OIPR on September 27, 2004. Records show that an OIPR attorney had drafted an application and provided it to her management on November 5, 2004. In January and March 2005, e-mail traffic indicates that NSLB was addressing some issues in the application raised by OIPR. In June 2005, an NSLB attorney inquired about the status of the request with OIPR and was informed that a Deputy Counsel in OIPR was reviewing the draft application. In an e-mail dated October 31, 2005, the NSLB attorney notified the field agent that OIPR had asked for more information about the request and inquired whether the field office still needed the Section 215 order. On November 3, 2005, the field office responded that the Section 215 order should be withdrawn. In an EC explaining the status of the investigation, the field office reported that [redacted] (S)

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[Redacted]

(S)

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In a fourth case, the Section 215 request for [Redacted] records was sent to FBI Headquarters on June 6, 2005. NSLB did not receive the request until July 14, 2005. In August 2005, an NSLB attorney began requesting information from the case agent about the underlying case. The questions required the case agent to communicate with another intelligence agency, and the case agent experienced some delays in obtaining information from that agency. In late August, September, October, and November, the NSLB attorney sent e-mails to the case agent asking for a status on the requested information. On December 15, 2005, the field office notified NSLB that [Redacted] and the field office no longer considered [Redacted]. The field office asked to withdraw the Section 215 request. At the time of the withdrawal, NSLB had not yet forwarded a draft application to OIPR. (S) (U)

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**b. Use of alternative investigative tool (U)**

(S) We identify [Redacted] cases in which the FBI obtained the items sought in the Section 215 request through other investigative means. We describe some examples of those requests below. (S) (U)

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**(1) Library** [Redacted]

(S)

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On November 25, 2003, a field office submitted to NSLB a Section 215 request for [Redacted] library because the field office believed that [Redacted]. According to FBI employees in the field office, an NSLB supervisor would not permit the request to go forward because of the political controversy surrounding Section 215 requests for information from libraries. The NSLB attorney who reviewed the request told the OIG that she attempted to get approval for the request but that her supervisor denied it because it involved a library. The Deputy General Counsel for NSLB told the OIG that he believed OIPR and the Department would disapprove of the FBI seeking information from a library, especially since the FBI had not yet obtained its first Section 215 order. He said he inquired whether the field office could obtain the information through some other means. Once the field office was advised that NSLB would not send an application to OIPR, the field office sought [Redacted] and eventually obtained [Redacted]. (S)

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(2)

[redacted] (S)  
[redacted] records (S) (U)

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On December 18, 2003, a field office submitted a Section 215 request on a target business that we call Target E. Target E had hired a company we call Company X to provide [redacted] for Target E. The Section 215 request was for Company X to provide records concerning Target E's [redacted] provided to Target E. On February 5, 2004, NSLB advised the field office that because [redacted] the most appropriate tool for obtaining the records was a national security letter. The field office later issued an NSL for the information.<sup>39</sup> (S) (U)

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**c. OIPR's statutory interpretation (U)**

(S) We determined that [redacted] of the FBI's Section 215 requests that were later withdrawn, including the first request, were affected by OIPR's interpretation of the Family Education Rights and Privacy Act of 1974 (FERPA), commonly referred to as "the Buckley Amendment." The Buckley Amendment applies to all educational agencies and institutions, including colleges and universities, and governs the rights and privacy of students and parents in relation to access to and release of educational records.<sup>40</sup> 20 U.S.C. § 1232g. With respect to release of educational records, the Buckley Amendment provides that educational entities will not receive federal funds if they release educational records to third parties without written consent from the student's parents except in limited circumstances, such as in connection with a student's application for financial aid. 20 U.S.C. § 1232g (a)(1). The Buckley Amendment also provides that an educational entity does not have to obtain written consent to release educational records "in compliance with judicial order, or pursuant to any lawfully issued subpoena"; however, the entity must notify the student and parents of the order or subpoena in advance of complying with it unless the court orders the institution not to disclose the existence or content of the subpoena or the institution's response. 20 U.S.C. § 1232g (b)(1)(J)(i) and (ii) and (b)(2)(B). (S) (U)

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<sup>39</sup> The field office did not notify NSLB that it was withdrawing this request until July 1, 2004. (U)

<sup>40</sup> FERPA is called "the Buckley Amendment" after its principal sponsor, then Senator James Buckley of New York. (U)



The Buckley Amendment became an issue in the FBI's first Section 215 request. In a Letterhead Memorandum (LHM) dated April 23, 2002, to OIPR, the FBI's Assistant Director for Counterterrorism requested educational records, including [REDACTED] (S)

(S) [REDACTED] a university for Target D pursuant to Section 215. The OIPR attorney who handled this request told the OIG that she prepared a draft application and that it was approved by her supervisor in June 2002 and then provided to the Counsel for Intelligence Policy for his review. ~~(S)~~ (U)

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The Counsel for Intelligence Policy told the OIG that he was concerned that the Buckley Amendment might limit the reach of Section 215 with respect to educational records. He said that he was concerned because Section 215 did not contain the proviso contained in other parts of FISA stating that "notwithstanding any other provision of law," the government may obtain certain types of information. According to the Counsel for Intelligence Policy, because Section 215 did not contain this language, it could be superseded by the Buckley Amendment and disclosure of the records request to the student and parents would be required.<sup>41</sup> The Counsel for Intelligence Policy told the OIG that he believed that other statutes that also state or imply that they provide the exclusive means of obtaining certain types of records, such as tax or medical records, could be similarly construed. According to the staff audit report of FISA prepared by SSCI, this concern was shared by some of the lawyers at NSLB and elsewhere in the Department.<sup>42</sup> (U)

However, according to the Counsel for Intelligence Policy, OIPR did not refuse to seek Section 215 orders for educational records. He said that OIPR would have been willing to present an application to the FISA Court for educational records if the FBI considered the information important enough and wanted to press the issue with the FISA Court. (U)

According to OIPR records, the FBI's Section 215 request with respect to Target D was withdrawn on November 26, 2002. We were unable to

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<sup>41</sup> The Patriot Act added a new subsection to the Buckley Amendment. This subsection provides that the Attorney General may apply to a court of competent jurisdiction for an ex parte order requiring educational institutions to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism." 20 U.S.C. § 1232g(j). According to NSLB documents, OIPR took the position that this provision did not apply to FISA Court orders. The Counsel for Intelligence Policy told the OIG that, without the opportunity to review documents on this issue, he did not recall what, if any, position he took on this provision of the Patriot Act. (U)

<sup>42</sup> SSCI Staff Audit, supra note 4, at 140 n.86. (U)

determine who within the FBI made this decision. None of the NSLB attorneys we interviewed recalled this request or who handled it. The Counsel for Intelligence Policy told the OIG that the FBI may have decided not to pursue the Section 215 order because this request could be problematic with the FISA Court and because it was the FBI's first request for a Section 215 order.<sup>43</sup> (U)

OIPR's concerns about the Buckley Amendment affected [redacted] other [redacted] (S)  
Section 215 requests.<sup>44</sup> (S) (U)

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**(1) University library's records** (S) (U)

In February 2003 the FBI sent a Section 215 request to OIPR for a university library's records concerning [redacted] (S)

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[redacted] In an e-mail dated April 28, 2003, to the Counsel for Intelligence Policy and others, an OIPR attorney wrote that she had spoken to an FBI Headquarters supervisor about the request and advised him that she was concerned that "the request would not be allowed under the

<sup>43</sup> The OIPR attorney who worked on this case told the OIG that the Office of the Deputy Attorney General reviewed the application and determined that the application should not go forward and suggested that the Office of Legal Counsel (OLC) review the application. OIPR submitted the application to OLC with a request for an opinion in early July 2002. However, OLC never issued a written opinion in response to the request. The Counsel for Intelligence Policy told the OIG that he did not recall discussing this particular application with anyone from the Office of the Deputy Attorney General or whether anyone advised OIPR not to submit the application. In addition, he told the OIG that he did not recall submitting the application to OLC for review. (U)

(S) <sup>44</sup> In [redacted] the FBI requested educational records, but it was not directly affected by OIPR's interpretation of the Buckley Amendment. In this case, NSLB advised the field office that it lacked sufficient support for the request. We discuss this case in Section D 2 d below. [redacted] (S)

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<sup>45</sup> We counted this request as a request for library records rather than a request for educational records. The field office sent its request to FBI Headquarters in an EC dated February 11, 2003. We were unable to determine when this request was provided to OIPR. (U)

Buckley Amendment.” She wrote that she wanted to meet with the Counsel for Intelligence Policy to discuss the application. ~~(S)~~ (U)

Neither the Counsel for Intelligence Policy nor the OIPR attorney could recall what happened with the request and whether any additional information about the status of the request was communicated to the FBI. No one from NSLB we interviewed recalled this request. FBI documents show that [redacted] and OIPR ~~(S)~~ documents show that the Assistant Director for the FBI’s Counterintelligence Division sent a memorandum to OIPR dated November 14, 2003, rescinding its request for a Section 215 order. ~~(S)~~ (U)

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**(2) University [redacted] records** ~~(S)~~ (U) ~~(S)~~

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b3  
b7E

On April 22, 2003, a field office sent an EC to FBI Headquarters requesting a Section 215 order compelling a university to produce [redacted] ~~(S)~~

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[redacted] In an EC to FBI Headquarters dated January 16, 2004, the field office reported that there had been “months of discussion and debate” about the request between the field office, NSLB, and OIPR because of the Buckley Amendment. The NSLB attorney who was involved in this case told the OIG that in late 2003 and early 2004 the FBI had not yet obtained its first Section 215 order and did not want to use an educational records request as its test case because of the legal issues involved. Consequently, NSLB did not provide OIPR with an application for this request. ~~(S)~~ (U)

**(3) University [redacted] other educational records** ~~(S)~~ (U) ~~(S)~~

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b7E

In mid-2005, a field office submitted a request for educational records. OIPR records show that this request was received by OIPR on June 14, 2005.<sup>46</sup> FBI documents show that the field office and NSLB again discussed the issue of the Buckley Amendment and the problems the FBI might encounter with attempting to use Section 215 to obtain educational records. OIPR records show that the FBI withdrew the request on October 7, 2005. (U)

<sup>46</sup> It is possible that the field office submitted the request directly to OIPR and to NSLB at the same time. We were unable to determine from FBI records when the field office submitted the request. (U)

According to NSLB and OIPR attorneys, this statutory interpretation issue has been addressed by Section 106(a)(2) of the Reauthorization Act, which amended Section 215. Section 106(a)(2) provides that applications for production of educational, medical, tax, library, and other sensitive categories of records must be personally approved by the FBI Director, the Deputy Director, or the Executive Assistant Director for National Security. See 50 U.S.C. § 1861(a)(3). The Counsel for Intelligence Policy told the OIG he had proposed more explicit language to clarify that Section 215 trumped existing laws concerning the production of these sensitive categories of records, but the Department did not approve this language. According to the Counsel for Intelligence Policy, this provision has not yet been challenged. NSLB and OIPR attorneys told the OIG, however, that they believe Section 215 as amended controls the production of educational records and, therefore, the Section 215 non-disclosure provisions apply, not the Buckley Amendment notification provisions. (U)

**d. Insufficient information to support request (U)**

We identified two cases in which a determination was made that the request lacked sufficient or adequate information to go forward. We describe these cases below. ~~(S)~~ (U)

**(1) Educational records** [redacted] (S)  
[redacted] ~~(S)~~ (U)

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A field office sent a request to NSLB for educational records, including [redacted] (S)  
[redacted] <sup>47</sup> In its summary of the investigation, the field office wrote that [redacted] (S)  
[redacted] In addition, the document stated that the [redacted]  
[redacted] In its explanation of the reason for requesting the educational records, the field office wrote that it had reason to believe that [redacted] (S)  
[redacted] The request noted that due to the [redacted] (S)  
[redacted] The request did not further explain how the educational records would be used to further the investigation. [redacted] (S)  
~~(S)~~ (U)

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<sup>47</sup> We could not determine the date this request was submitted to NSLB. (U)

The NSLB attorney who handled this request told the OIG that she considered the request to be problematic because the field office was seeking educational records [redacted]

(S) [redacted] She stated that she recalled discussing the problems with this request with the field office. On April 13, 2005, the NSLB attorney sent an e-mail to several field office employees about the request and wrote, "Can I consider this request withdrawn, in light of the issues we've discussed?" The field office confirmed that it was withdrawing the request. ~~(S)~~ (U)

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(S) (2) [redacted] information ~~(S)~~ (U)

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In July 2004, a field office submitted a request to FBI Headquarters for a [redacted] records that would indicate [redacted] One of [redacted] the bases for the information supporting the investigation of the target was information obtained from a human source. In response to a request for information from the OIG, the field office reported that some time after the Section 215 request was submitted to FBI Headquarters, the field office determined that the source provided false information and was unreliable. The field office reported this development to FBI Headquarters and decided to withdraw the request for a Section 215 order. ~~(S)~~ (U)

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**e. Unknown (U)**

We identified six instances in which we were unable to determine -- from documents or interviews with NSLB or OIPR personnel -- the reason that the request or application did not proceed to the next level or when the requests were withdrawn. We were able to determine that five of those six requests were never sent to OIPR. ~~(S)~~ (U)

We sent requests for information to the field offices that had prepared these requests. In response, most of the field offices reported to the OIG that their requests were never responded to by NSLB, OIPR, or FBI Headquarters.<sup>49</sup> One of the case agents reported to the OIG that at some point after he submitted the request, he inquired about its status with the substantive desk at FBI Headquarters and was advised by a supervisor that

<sup>48</sup> This information is called [redacted] We discuss [redacted] further in Section V. ~~(S)~~ (U)

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<sup>49</sup> According to OIPR documents, one of the requests involved two FBI field offices. We contacted both field offices, and both reported that they did not have a record of having made a Section 215 request in connection with this target. (U)



because of a backlog concerning Section 215 requests, his request "would not likely see the light of day."<sup>50</sup> Another field office reported to the OIG that it was assumed by the field office that the request had "died on the vine."  
(U)

**IV. Combination Section 215 Applications and Orders for Calendar Years 2002 Through 2005 (U)**

In this section, we describe the number of applications for "combination" orders that were submitted to the FISA Court during calendar year 2005, the first year this type of application was processed; how many were approved; the number of U.S. persons and non-U.S. persons referenced in the applications; and the number and identity of FBI field offices that obtained the approved orders. (U)

**A. Number of Applications Submitted to the FISA Court for Combination Orders (U)**

A total of 141 combination business record applications were submitted and approved by the FISA Court in calendar year 2005. The first combination order was issued by the FISA Court on February 10, 2005. (S) (U)

With the enactment of Section 128 of the Reauthorization Act, which provides that FISA pen register orders now include the subscriber information, the number of combination applications should significantly decrease in CY 2006. (U)

**B. Number of U.S. Persons and Non-U.S. Persons Referenced in Combination Orders (U)**

We next identified the number of U.S. persons and non-U.S. persons referenced in the "combination" applications.<sup>5</sup>  (S)

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<sup>50</sup> We discuss the lengthy delays in processing Section 215 requests in Chapter Four.  
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(S) [redacted] 141 combination orders that were issued in 2005. For 2005, there were [redacted] "U.S. persons" and [redacted] "non-U.S. persons" for a total of [redacted] referenced in the 141 combination applications that were approved by the FISA Court. (S) (U)

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**C. Type of Records Requested in the Combination Orders (U)**

Our review of all the "combination" applications presented to the FISA Court in 2005 indicated that the business record portion of the application was routine and was used to obtain telecommunications subscriber information for the telephone numbers that were captured by the pen register/trap and trace order. (U)

FBI agents and the Counsel for Intelligence Policy told us that that the subscriber information is limited to customers of the communications provider that is the recipient of the order. For example, [redacted]

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[redacted]

**D. FBI Field Offices that Initiated Requests for Combination Orders (U)**

The OIG also determined how many FBI field offices were associated with the "combination" applications that were presented to and approved by the FISA Court in 2005. Table 3.9 illustrates the results. (U)

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**TABLE 3.9 (U)**  
**FBI Field Offices That Initiated Requests for**  
**Combination Section 215 Orders (U)**

Originating FBI Field Office (U)	Number of Combination ER/TT 215 Orders (U)
[Redacted Table Content]	

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Source: OIG and the FBI (U)

(S) [Redacted] of the 56 field offices ([Redacted] percent) and [Redacted] (S)  
 (S) [Redacted] "combination" orders in calendar year 2005. ~~(S)~~ (U)

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**V. Modified Section 215 Orders (U)**

We also reviewed, as required by the congressional directive, how many times the FISA Court modified any Section 215 order. We examined information about the number and types of modifications of both pure and combination Section 215 orders by the FISA Court. However, the Counsel for Intelligence Policy told the OIG that determining what is a "modification" is "more of an art than a science." He said that generally modifications are handwritten changes to orders that are made by FISA Court judges at the hearing in which the order is signed. OIPR witnesses stated that OIPR does not usually consider revisions to applications and orders based on feedback from the FISA Court's review of "read" or advance copies to be modifications. The Counsel for Intelligence Policy told the OIG that, for the most part, when OIPR makes changes to the applications in advance of the hearing, OIPR has agreed with the FISA Court's concern and the manner in which the Court suggests that the issue be addressed in the revision. The Counsel for Intelligence Policy stated that in these instances OIPR would not consider the revisions to be modifications. (U)

We attempted to identify the number of modifications by reviewing the Department's semi-annual reports to Congress in which the Department reports, among other things, the number of Section 215 orders obtained and any modifications to those orders. We also reviewed all of the Section 215 pure and combination orders for handwritten changes to the orders signed by the FISA Court judge, and we asked OIPR officials about the number of modified orders. We identified a total of four modified orders. Two pure Section 215 applications were modified by the Court, both in 2004. Two combination Section 215 applications were also modified, both in 2005. We first discuss the 2004 pure Section 215 orders that were modified and then the 2005 combination Section 215 orders that were modified. (U)

**A. 2004 Section 215 Modified Orders (U)**

(S) The first modification of a Section 215 order in 2004 related to the time frame to produce the requested records to the FBI. The FISA Court order [redacted] to produce four categories of items related to two different timeframes. The order submitted by OIPR to the FISA Court directed all 4 categories of items to be produced within 10 business days. The FISA Court modified the order by limiting the 10-day timeframe to the first 3 categories of items and extending the timeframe to 60 days for the fourth category of items. ~~(S)~~ (U)

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The timeframe that recipients of Section 215 orders are given to produce the items is not determined by statute or regulation. Instead, the FBI determines the number of days it believes is reasonable based on the

type and volume of information that must be produced. This timeframe is then specified in the order that is provided to the FISA Court with the application. FBI witnesses told the OIG that they received feedback from the FISA Court through OIPR about what the FISA Court believed reasonable timeframes were regarding compliance with Section 215 orders and that changes were made to orders in light of this feedback. (U)

With respect to the other pure Section 215 modified order, the modification related to the records being requested. The FISA Court clarified the records to be produced by describing the records more precisely than the language in the order as presented to the Court. This modification limited the scope of the records to [redacted] (S)

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**B. 2005 Section 215 Modified Orders (U)**

With respect to the modified combination orders in 2005, both orders contained the same modification. In these applications, OIPR sought orders directing [redacted] to produce [redacted] (S)

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[redacted] OIPR notified the FISA Court that federal judges in criminal cases had denied requests for [redacted] (S)

[redacted] Although the FISA Court agreed to approve the applications, the Court directed the government to file a supplemental brief on this issue. Prior to the hearing on the applications, OIPR revised the applications and included a footnote setting forth a summary of the relevant criminal case law regarding [redacted] (S)

(S) [redacted] and revised the order to include a direction for the government to provide the FISA Court with a supplemental briefing on this subject. (S) (U)

**VI. Improper or Illegal Use of Section 215 Authority (U)**

As part of this review, Congress also directed the OIG to identify "any noteworthy facts or circumstances concerning the business records requests, including any illegal or improper use of the authority." We found two instances of improper use of Section 215 authority, both of which involved combination Section 215 orders and arose out of the pen register/trap and trace authority contained in the orders. We did not identify any instances involving improper or illegal use in connection with pure Section 215 orders or authority. We also identified a situation that we



believe constitutes a "noteworthy fact" concerning a Section 215 combination order and several FISA electronic surveillance orders that were interrelated.<sup>52</sup> (U)

Because the FBI is required to report illegal or improper use of Section 215 authority to the Intelligence Oversight Board (IOB), we first briefly describe the IOB. Next, we describe in detail the two instances of improper use of Section 215 authority. Finally, we briefly discuss the noteworthy item we identified. (U)

#### **A. Intelligence Oversight Board (U)**

The Intelligence Oversight Board, created by Executive Order in 1976, is charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863.<sup>53</sup> The Executive Order also requires the general counsels of the intelligence community, including the FBI's General Counsel, to report to the IOB on at least a quarterly basis intelligence activities they "have reason to believe may be unlawful or contrary to Executive order or Presidential directive," which are referred to as "IOB violations." Examples of IOB violations include conducting electronic surveillance on telephones beyond the time period allowed by the FISA order. (U)

Internal FBI policies and procedures require FBI employees to report potential IOB violations within 14 days of discovery to both NSLB and the Internal Investigations Section of the FBI Inspection Division. In addition, each FBI field office and FBI Headquarters' division is required to submit quarterly reports to NSLB certifying that all employees were contacted concerning the requirements to report possible IOB matters. NSLB reviews

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<sup>52</sup> After reviewing the draft report, OIPR officials told the OIG that because the instances of improper use and the noteworthy item arose out of the pen register/trap and trace authority of combination orders, they believe the OIG should not include these instances in this report. While we understand this argument, we believe that these instances should be included in this report because Section 215 authority was implicated. For example, with respect to the two instances of improper use, we found that subscriber information associated with the improperly collected telephone numbers was obtained. The OIG therefore included these instances in the report, while making clear that we found no instances of intentional misconduct or improper use of a pure Section 215 order. (U)

<sup>53</sup> For more information about the IOB, see the OIG's report titled "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," pages 20-24 (March 2006). (U)

the incoming report describing the possible IOB violation and prepares a written opinion as to whether the matter should be reported to the IOB. If NSLB determines that the matter should be reported to the IOB, NSLB prepares correspondence to the IOB setting forth the basis for the notification. (U)

**B. Improper Use of Section 215 Orders (U)**

Through our review of FBI and OIPR documents, we identified two instances of improper use of Section 215 authority. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. To examine this issue, we obtained documents about these Section 215 orders as well as documents about reporting of IOB violations related to them. (U)

Based on our review of the Section 215 documents and our review of documents in four field offices, we found no other examples of improper use of Section 215 orders. In addition, we asked OIPR and FBI personnel if they were aware of any improper use of business record requests or orders. The Counsel for Intelligence Policy was the only FBI or OIPR employee we interviewed who told the OIG he recalled any IOB violation with respect to Section 215 orders. He recalled the IOB violation we describe in Section B 2 below. (U)

We determined that the FBI had discovered both incidents and reported them to the IOB. In addition, both incidents were reported to the FISA Court by OIPR.<sup>54</sup> (U)

**1. First instance of improper use (U)**

The OIG became aware of the first instance of improper use during our review of FBI case files at one of the field offices we visited. We learned that the field office had obtained an order for a pen register and trap and trace device on a telephone that was no longer used by the subject. This resulted in the FBI receiving unauthorized information, which is called "over collection," between March 2005 and October 2005. (U)

According to FBI documents, in January 2005 the case agent obtained the subscriber information for the telephone number in question

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<sup>54</sup> OIPR is required to report FISA compliance incidents to the FISA Court pursuant to Rule 10(c) of the FISA Court's Rules of Procedures that became effective February 17, 2006. (U)

through a national security letter. The response to the national security letter stated that while the telephone number had previously belonged to the target, it no longer did as of [redacted] 2004. Despite this reporting, on February [redacted] 2005, an application for a FISA pen register/trap and trace order for this telephone number that no longer belonged to the target was submitted to OIPR. Subsequent to filing the application, in an EC from another field office dated February [redacted] 2005, the case agent was again notified that the telephone number did not belong to the target. However, the agent did not withdraw the request, and on [redacted] 2005, the order was approved. (~~S~~)(U)

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The order was scheduled to expire in spring 2005, and before it expired the FBI obtained a full-content FISA order for the same telephone number and two others. In September 2005, the case agent transferred to another squad and a new case agent was assigned to the case. In early October 2005, the new case agent was advised by a translator, who had been assigned to the case for only two days, that the language being spoken on the telephone calls was not the language the FBI believed it to be. The new case agent became concerned and requested that the FISA coverage be terminated immediately. In addition, on that same day, he notified his squad supervisor and an attorney from OIPR about the possible over collection of information. (U)

Upon further investigation, including a review of the response to the NSL about the subscriber information, the new case agent learned on October 11, 2005, that the telephone number did not belong to the target. The FBI field office notified the Counterterrorism Division at FBI Headquarters of the possible over collection of information in an EC dated November 29, 2005. While reviewing the case file for another reason in March 2006, the new case agent saw for the first time the EC from another field office dated February [redacted] 2005, stating that the telephone number no longer belonged to the target. The new case agent discussed the matter with his supervisors and prepared an EC to report a possible IOB violation. This EC was sent to FBI Headquarters on April 3, 2006.<sup>55</sup> (~~S~~)(U)

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On June 29, 2006, NSLB reported the matter to the IOB. In its explanation to the IOB about the incident, the FBI reported, "It appears that [the case agent] overlooked the text in the NSL and EC." No other

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<sup>55</sup> At the time of the OIG's visit to the field office (June 2006), FBI personnel were in the process of gathering the data obtained from the unauthorized over collection for sequestration with the FISA Court and were awaiting further instruction on how to process this matter. As of January 2007, the data had been purged and destroyed. (U)

information about the reason for the violation was reported. On July 7, 2006, the FBI informed OIPR of the IOB matter. On July 23, 2006, OIPR reported the matter to the FISA Court. (U)

**2. Second instance of improper use (U)**

The OIG became aware of the second instance of improper use during our review of the Section 215 combination applications that were provided to the OIG by OIPR. We learned that the FBI inadvertently collected certain telephone numbers pursuant to a pen register/trap and trace order because the telephone company did not advise the FBI that the target had discontinued using the telephone line until [redacted] weeks after the fact at which time the FBI discontinued collecting information. For [redacted] during this [redacted] period, the telephone number had been issued to someone else. (S) (U) b1 b3 b7E

The FBI obtained its first combination order for this telephone number on February [redacted] 2005, and it was renewed in June 2005 and again in September 2005. On November 30, 2005, the telephone company representative advised the FBI that the telephone number was disconnected on [redacted] 2005. The telephone company representative advised the FBI that the target had obtained a new telephone number on [redacted] 2005. The telephone company representative also advised the FBI that the old telephone number had not been reissued to anyone else. (S) (U) b7E

On December 1, 2005, [redacted] (S) b1 b3 b7E  
However, [redacted]  
[redacted]  
[redacted] As a result, during this [redacted] period the FBI inadvertently collected telephone numbers from calls to and from [redacted] which was not covered by a FISA order.<sup>56</sup> (S) (U)

On February [redacted] 2006, the FBI field office agent queried the FBI database that is the repository of telephone numbers obtained from pen register/trap and trace devices to determine what information the FBI had (U) b7E

<sup>56</sup> The FISA order for this old telephone number was set to expire on December 2, 2005. In the renewal application, the FISA Court was advised of the reason for the change in telephone numbers, that the FBI had inadvertently already collected data concerning this new telephone number, and the reason for this over collection. The FISA Court approved the renewal application for the new telephone number on December 2, 2005. (S) (U)

intercepted on the target between October [ ] 2005, and December [ ] 2005.<sup>57</sup> According to the database, the FBI had in fact intercepted telephone numbers on the target for [ ] between November [ ] 2005, and November [ ] 2005.<sup>58</sup> ~~(S)~~ (U)

On March 9, 2006, the field office reported to FBI Headquarters and NSLB that a possible IOB violation had occurred and around this time provided to OIPR a compact disc containing the over-collected data. On April 7, 2006, OIPR notified the FISA Court of the over collection and provided to the FISA Court the disk containing the data that had been deleted from FBI databases. On July 17, 2006, NSLB reported the violation to the IOB. (U)

**C. Noteworthy Item (U)**

We also identified an issue concerning the accuracy of information provided to the FISA Court regarding several electronic surveillance FISA orders and a combination order based in part on one source's information. (U)

On January 6, 2006, OIPR filed a notice to the FISA Court stating that in connection with several cases, OIPR had learned on December 22 and 23, 2005, that the source who had previously provided significant information about the targets reported that he did not believe that one of the targets, who was associated with all of the other targets, was a supporter of a particular terrorist organization. The OIPR notice also stated the reasons the government continued to believe that there was sufficient information to support FISA applications for all of the targets despite this source's information. ~~(S)~~ (U)

OIPR reported to the FISA Court that the FBI had learned of this information in April 2005 from another intelligence agency but had "inadvertently failed to provide it at the time they received it." On January [ ] 2006, the FISA Court issued an order directing [ ] ~~(S)~~

[ ] On March [ ] 2006, OIPR filed an

<sup>57</sup> According to another FBI document, this query of the database occurred on December [ ] 2005. ~~(S)~~ (U)

<sup>58</sup> According to the database, the data collected was on the old telephone number. According to FBI documents, this was a mistake in the database due to a glitch in the interception software and the data was in fact collected on the new telephone number the target began using on November [ ] 2005. ~~(S)~~ (U)



11-page declaration of a Deputy Assistant Director from the FBI's Counterterrorism Division providing an explanation from the case agents who were responsible for the FISA application on the primary target about which this source information was reported and case agents who were responsible for FISA applications that incorporated information from the primary target's FISA application. According to the declaration, the primary target case agents reviewed the April [ ] 2005, intelligence report containing the source information on April [ ] 2005. On April [ ] 2005, the case agents had finalized the FISA renewal application on the primary target. On April [ ] 2005, the case agents had provided OIPR with several intelligence reports about the same source. According to the declaration, when the case agents verified the accuracy of the renewal application on April [ ] they mistakenly believed that the problematic source information had already been reported to OIPR. The declaration also stated that the FBI believed that the omission was not intentional because all other information obtained from the source, some of which was not favorable to the FBI's investigation, had been reported to OIPR. According to the declaration, case agents responsible for FISA applications that were related to the primary target's FISA application incorporated information from the primary target's FISA application and did not verify independently that the April [ ] intelligence report had been reported to OIPR and incorporated into the FISA application. (~~S~~) (U)

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**VII. Summary (U)**

As discussed in this Chapter, from 2002 through 2005, OIPR submitted 21 pure Section 215 applications for FISA Court approval, all of which were approved. The first pure Section 215 order was approved by the FISA Court on May [ ] 2004. These 21 Section 215 orders concerned 18 unique requests. Seven unique orders were obtained in CY 2004 and 11 unique orders were obtained in CY 2005. (~~S~~) (U)

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We also identified 31 Section 215 requests that were withdrawn. We identified five categories of reasons for the withdrawn that applied to the majority of the requests and applications: (1) investigation was closed or changed course; (2) alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

(S) We identified [ ] requests or applications that were withdrawn because the investigation changed course or was closed. Most of these requests had been pending for several months at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. We identified [ ] cases in which the FBI obtained

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the items sought in the Section 215 request through some other investigative means, such as a voluntary disclosure letter or a national security letter. We also found that OIPR's interpretation of the Buckley Amendment was raised as a concern in connection with [redacted] withdrawn requests for educational records, although one of those requests was eventually withdrawn because [redacted]. We identified [redacted] cases in which a determination was made that the request lacked sufficient or adequate information to go forward. We identified [redacted] instances in which we were unable to determine – from documents or interviews with NSLB or OIPR personnel – the reason that the request or application did not proceed to the next level. (S) (U)

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We also identified the total number of combination Section 215 orders sought and obtained. The FBI did not begin obtaining combination orders until February 10, 2005. Throughout the remainder of CY 2005, the FBI obtained a total of 141 combination orders. (S) (U)

We found that four Section 215 orders – two pure orders in 2004 and two combination orders in 2005 – were modified by the FISA Court. We determined that in addition to these reported instances of modifications, OIPR sometimes makes changes to applications or orders based on conversations with FISA Court judges and/or FISA Court legal advisors before the final application is filed with the FISA Court, and these changes are not generally considered to be modifications. (U)

Finally, we identified two instances of improper use of Section 215 orders. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. We did not find any instance of improper use of pure Section 215 authority. In both instances the FBI identified the improper use and reported it to the IOB. (U)

## CHAPTER FOUR

### DELAYS IN IMPLEMENTING SECTION 215 AUTHORITY AND OTHER IMPEDIMENTS TO USE (U)

#### I. Introduction (U)

Before passage of the Patriot Act, the FBI had obtained only one FISA order for business records. FISA had been amended in 1998 to allow for such orders, but no written policies, procedures, or forms had been issued by the FBI or OIPR with respect to FISA business records applications. After passage of the Patriot Act in 2001, neither the Attorney General nor OIPR issued implementing procedures or guidance with respect to Section 215 authority. (U)

In the Patriot Act reauthorization legislation, Congress directed the OIG to include the following in its review: (U)

- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)
- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions. (U)

In this chapter, we first set forth the facts concerning the implementation of policies and procedures concerning Section 215 authority, the delays in processing Section 215 requests, and other problems that have affected the FBI field offices' ability to obtain Section 215 orders. We then analyze the reasons why the Department did not issue implementing procedures concerning Section 215 authority. We also set forth our analysis concerning the bureaucratic and other impediments that affected the FBI's ability to obtain Section 215 orders. At the end of the chapter, we discuss what effect the processing delays and other impediments have had on the FBI's ability to obtain Section 215 orders. (U)

## II. Factual Background (U)

### A. Attorney General's Implementation of Section 215 Procedures (U)

On October 26, 2001, the same day the President signed the Patriot Act, the Department issued detailed guidance describing the changes brought about by the Patriot Act. At that time, the Department did not implement procedures for obtaining Section 215 orders. (U)

In October 2003, the FBI disseminated an internal standard request form for field offices to request Section 215 orders, along with guidance about how to use the form. In the spring of 2004, OIPR and the FBI issued a template for Section 215 applications and orders. (U)

### B. Section 215 Processing Delays (U)

As noted above, the first Section 215 order was obtained in spring 2004. We found that when FBI field offices began requesting Section 215 orders, they encountered processing problems. For example, as described in Chapter Three, in several instances no one from NSLB responded to Section 215 requests for several months or did not respond at all. In addition, in some cases NSLB sent draft applications to OIPR, but the applications were not finalized for several months. In some cases, FBI Headquarters sent Section 215 requests directly to OIPR without notifying NSLB and never received a response from OIPR. In other cases in which a draft application was prepared, the field office did not receive any response from NSLB or OIPR. As a result of these delays, in some cases the information was no longer needed by the time the field office received a response from NSLB or OIPR, and the request was subsequently withdrawn. (U)

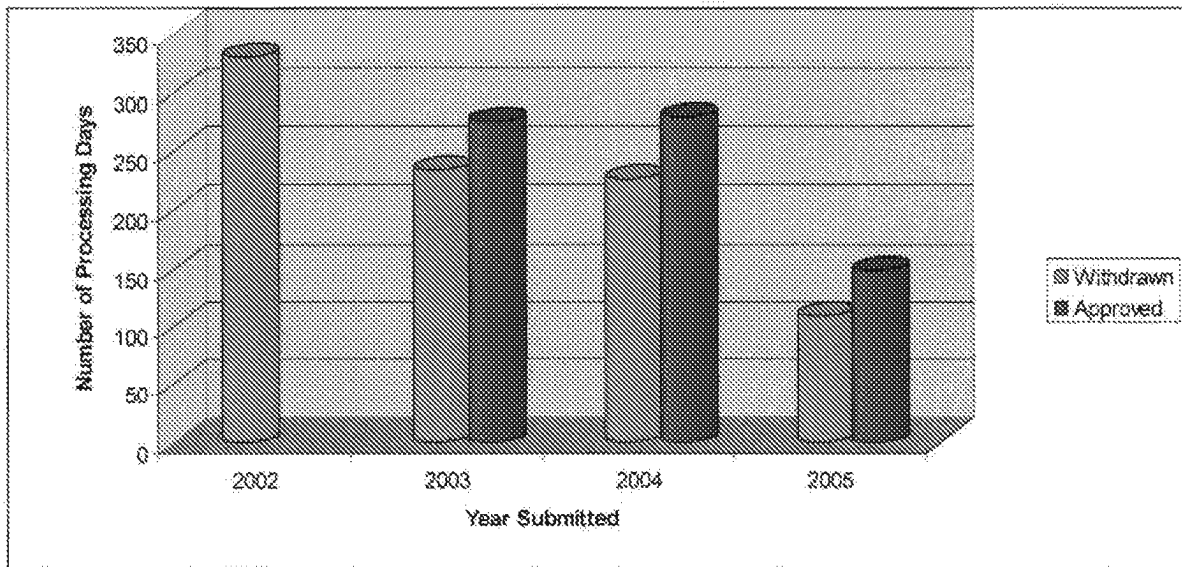
We sought to determine how long requests were pending in NSLB and in OIPR in order to calculate average processing times for requests for which orders were obtained and for withdrawn requests for Section 215 orders. However, the FBI's and OIPR's recordkeeping systems in place at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. Therefore, the information we provide below contains incomplete information with respect to many of the requests. The data below provides the average processing times we were able to calculate, with certain qualifications about the data. Thereafter, we describe in detail the difficulties the FBI and OIPR encountered in processing the first Section 215 requests submitted in 2002, NSLB's efforts to push for its first Section 215 order in 2003, the disagreements that arose between NSLB and OIPR about what was required in the template for

Section 215 applications, and other problems that affected the Section 215 process. (U)

The chart below reflects the average processing time of withdrawn requests and approved requests.<sup>59</sup> (U)

1. Average processing times (U)

DIAGRAM 4.1 (U)  
Average Processing Time (U)



Source: OIPR and FBI (U)

• CY 2002 (U)

From documents obtained from OIPR and the FBI, we were able to determine that the FBI generated five Section 215 requests in CY 2002. No Section 215 orders were obtained for these requests because all five requests were subsequently withdrawn. As a result, we cannot calculate an average processing time for approved requests submitted in 2002. ~~(S)~~ (U)

<sup>59</sup> For each year listed on the chart, we calculated processing times for requests submitted in that year, whether they were approved or withdrawn in that same calendar year or in the next calendar year. For the requests submitted in 2002, we were only able to calculate processing times at OIPR and not the total processing times. Similarly, in 2003 for approved requests, we had data only for OIPR processing times and not total processing times. (U)

Of the five withdrawn requests submitted in 2002, one of the requests was pending at NSLB when it was withdrawn, but we were unable to determine when it was withdrawn so we cannot calculate its processing time up to that point. The other four requests were pending at OIPR when they were withdrawn. We were able to determine for three of these four requests when they were submitted to OIPR and when the requests were withdrawn. Because we were unable to determine when these requests were submitted to NSLB, we cannot calculate the total processing time for these requests.<sup>60</sup> The average processing time in OIPR for these three requests was 330 days.<sup>61</sup> ~~(S)~~ (U)

• **CY 2003 (U)**

We were able to determine that the FBI generated four Section 215 requests in 2003 which were eventually approved in 2004. We were unable to determine when these requests were prepared by the field offices or submitted to NSLB; therefore we cannot calculate the total average processing time. However, we were able to determine when all four requests were submitted to OIPR and when Section 215 orders were obtained. Thus we are able to calculate only the OIPR processing time and not the total processing time. The average OIPR processing time for these four requests was 275 days. ~~(S)~~ (U)

The FBI generated ten Section 215 requests in CY 2003 that were later withdrawn. We have submission and withdrawal dates for only four of the ten requests. Of these four requests, three of the requests were submitted to NSLB and were withdrawn without any application being sent to OIPR and one was withdrawn after the request was submitted by the FBI field office directly to OIPR. The total average processing times for these four withdrawn requests was 234 days. ~~(S)~~ (U)

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<sup>60</sup> From the documents, it appears that these requests may have been submitted directly to OIPR and may not have been provided to NSLB. (U)

<sup>61</sup> With respect to one of these three requests, the FBI was unable to provide any information or documentation. OIPR records showed that the request was submitted on October 16, 2002, and was withdrawn on July 20, 2004, for a total of 643 days pending. A Deputy Counsel in OIPR told the OIG that the request was withdrawn because a full content FISA order was obtained; however, we do not have any information about when the full content FISA order was obtained. The full content FISA order could have been obtained several months before the request was actually withdrawn. The field office that handled the investigation of the target reported to the OIG that it never made a Section 215 request for this target. ~~(S)~~ (U)



• **CY 2004 (U)**

(S) The FBI generated at least [redacted] Section 215 requests in CY 2004 for (S) which orders were obtained.<sup>62</sup> We know when the field offices submitted the (S) requests to NSLB and when the orders were obtained for [redacted] (S) requests. Thus, we are able to calculate the average total processing time. (S) The average total processing time for these [redacted] requests was 279 days. For (S) [redacted] requests we were able to calculate how long the requests were pending in NSLB and in OIPR. The requests were pending in NSLB for 162 days and in OIPR for 180 days. ~~(S)~~ (U)

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(S) The FBI generated [redacted] Section 215 requests in CY 2004 that were (S) later withdrawn. We have submission and withdrawal dates for all [redacted] (S) requests. Of these [redacted] request [redacted] were submitted to NSLB and (S) withdrawn while the requests were still pending at NSLB [redacted] were pending (S) at OIPR when they were withdrawn. For one of these requests, we were (S) unable to determine whether it was pending at NSLB or OIPR when it was (S) withdrawn. The total average processing time for these [redacted] requests was (S) 226 days. Of the [redacted] requests that were pending at OIPR when they were (S) withdrawn, we had sufficient data for [redacted] of the requests to track how long (S) the requests were pending at NSLB and at OIPR. These [redacted] requests were (S) pending at NSLB for an average of 80 days before they were sent to OIPR. (S) They were pending at OIPR for an average of 141 days before they were (S) withdrawn. ~~(S)~~ (U)

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• **CY 2005 (U)**

(S) The FBI generated [redacted] Section 215 requests in CY 2005 that were (S) approved. We know when the field offices submitted the requests to NSLB (S) and when the orders were obtained for [redacted] of the requests. The average (S) total processing time for these [redacted] requests was 149 days. For these (S) [redacted] requests, we were also able to determine the average time the (S) requests were pending at NSLB and at OIPR. The average processing time (S) at NSLB was 60 days. The average processing time at OIPR was 88 days.<sup>63</sup> (S) ~~(S)~~ (U)

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(S) <sup>62</sup> A possible [redacted] request was generated in 2004 and submitted to OIPR on (S) January 4, 2005. We do not have any data on when the field office submitted the request (S) to NSLB. ~~(S)~~ (U)

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<sup>63</sup> For purposes of discussing processing times, we included all 21 Section 215 requests for which orders were obtained instead of only the 18 unique requests. (U)



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(S) The FBI generated [redacted] requests for Section 215 orders in 2005 that were later withdrawn. We have submission and withdrawal dates for [redacted] (S) requests. For [redacted] requests, however, we were unable to (S) determine whether they were withdrawn at NSLB or OIPR. Of the [redacted] (S) remaining requests, one was pending at NSLB when it was withdrawn and [redacted] (S) were pending at OIPR when they were withdrawn. The average (S) processing time for these [redacted] requests was 109 days.<sup>64</sup> For the [redacted] (S) requests that were pending at OIPR when they were withdrawn, we were unable to determine how long the requests were pending in NSLB compared to OIPR. (S) (U)

**2. Processing delays with initial Section 215 requests in 2002 and 2003 (U)**

We interviewed OIPR and FBI officials regarding the delay in obtaining Section 215 orders and the delay in developing guidance for obtaining Section 215 orders. The Counsel for Intelligence Policy told the OIG that after the September 11 attacks and passage of the Patriot Act, the number of requests for FISA electronic surveillance or "full content" FISA requests increased dramatically and that OIPR struggled to keep up with this demand. According to the Counsel for Intelligence Policy, OIPR responds to the priorities set by the Attorney General and by the Intelligence Community, including the FBI. He said that one of those priorities was the Attorney General's new procedures on intelligence information sharing, issued in March 2002, that resulted in significant changes in how intelligence information was handled. The Counsel for Intelligence Policy told the OIG that he discussed with the Office of the Deputy Attorney General the need for training on these new procedures, and that the Counsel for Intelligence Policy agreed to develop the training. In addition, in December 2002 the Deputy Attorney General issued a directive instructing OIPR, the FBI, and the DOJ Criminal Division, in consultation with the Intelligence Community, to implement a comprehensive training curriculum on the Patriot Act changes to the Foreign Intelligence Surveillance Act and related matters for all DOJ attorneys and FBI agents assigned to national security investigations.<sup>65</sup> OIPR developed a curriculum that addressed the

(S) <sup>64</sup> It is possible that a [redacted] request was generated in 2005. It was withdrawn in April 2005, but we were unable to determine when it was generated, and for this reason we did not include it in this section. With respect to [redacted] other withdrawn requests, we were unable to determine when they were submitted to NSLB or when they were withdrawn. We (S) also did not include these [redacted] requests in our calculations in this section. (S) (U)

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(S) <sup>65</sup> See Memorandum from the Deputy Attorney General, Training on FISA and Related Matters (December 24, 2002). (U)

FISA process and information sharing procedures. The Counsel for Intelligence Policy told the OIG that training was provided to approximately 4,000 agents and attorneys in May and June 2003. The OIPR attorney responsible for developing the training told us that the new Section 215 authority was a minor component of the training.<sup>66</sup> The Counsel for Intelligence Policy said that another priority OIPR was directed to focus on was a task force to address FISA applications related to the "ramp up" to the war in Iraq. (U)

With respect to the FBI's ability to obtain Section 215 orders, the Counsel for Intelligence Policy told the OIG that the FBI "know[s] how to get what [it] want[s]" and that he regularly receives telephone calls from FBI executives, including the Director, when a particular application or type of application is a priority. He said that during this time period the FBI "was not beating down [OIPR's] door" for Section 215 orders. NSLB attorneys told the OIG that during this time, NSLB attorneys discussed on numerous occasions with OIPR officials the FBI's displeasure with the pace of processing Section 215 requests by OIPR. (U)

FBI employees also told the OIG that Section 215 requests were not a priority initially because the number of requests for full content FISA orders increased significantly after September 11, 2001, and NSLB attorneys were focused on addressing these cases. In addition, in 2002 NSLB did not have an attorney designated as a point of contact for Section 215 requests. NSLB was attempting to hire more attorneys to handle the increased workload. A former supervisor of NSLB told the OIG that when he became the supervisor in April 2002, the unit had approximately 10 attorneys and when he left in September 2003, NSLB had grown to approximately 30 attorneys.<sup>67</sup> (U)

In early 2003, an NSLB attorney volunteered to work on Section 215 requests. She began developing a standard request form for the field offices to use for submitting Section 215 requests to NSLB. Around the same time, the Chief Division Counsel for a large field office drafted a standard request form for his field office to use to make Section 215 requests. The Chief Division Counsel communicated with the NSLB attorney about the form, and she provided recommendations and suggestions. In addition, in an e-mail dated April 24, 2003, she recommended that once he obtained approval from his management to use the request form, his field office

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<sup>66</sup> The OIPR attorney responsible for developing the training told us that it focused on obtaining "full content" FISA orders, which the attorney termed a "more aggressive technique" than Section 215 orders. (U)

<sup>67</sup> At the time, NSLB was called the National Security Law Unit. (U)

should use the form until the FBI-wide standard request form she had developed was approved at FBI Headquarters. (U)

(S)

In 2003, the FBI generated a total of [redacted] Section 215 requests that were withdrawn. Through August 2003 when NSLB began to focus on obtaining a Section 215 order, which we discuss below, the FBI generated [redacted] requests for Section 215 orders. One of the requests was sent from the Counterintelligence Division to OIPR in February 2003.<sup>68</sup> This was the request previously discussed for a university library's records concerning [redacted]

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This request was determined by OIPR to be problematic because of issues arising out of the Buckley Amendment, and was withdrawn.<sup>69</sup> (S) (U)

(S)

[redacted] requests were sent to NSLB but were never forwarded to OIPR. One of the requests was for a university's [redacted] records and was submitted in April 2003. As previously mentioned, the NSLB attorney who handled this request told the OIG that because of the issues with the Buckley Amendment, the FBI did not want to push this case forward as its Section 215 test case with the FISA Court. Another request was submitted to NSLB in March 2003, but was later withdrawn. We were unable to determine the reason this request was withdrawn. (S) (U)

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**3. NSLB's efforts in the summer 2003 to push for a Section 215 order (U)**

In the summer 2003, NSLB began to focus more resources on Section 215 requests. In May 2003, a new Deputy General Counsel for NSLB was appointed. He told the OIG that at the time he was aware that the FBI had attempted to obtain a small number of Section 215 orders but had been unsuccessful. He said there was a sense within NSLB that the FBI needed to "break through and get [a Section 215 order]." In addition, he said that there was a recognition that the FBI needed to begin obtaining Section 215 orders because Section 215 was one of the Patriot Act provisions that was scheduled to sunset at the end of 2005 and Congress would be scrutinizing

<sup>68</sup> Because there was no internal process in place directing field offices to submit Section 215 requests to NSLB in addition to the Counterterrorism Division or the Counterintelligence Division, field offices sometimes sent requests only to the FBI Headquarters operational divisions, and the FBI Headquarters operational division submitted the requests directly to OIPR. (U)

<sup>69</sup> OIPR documents show that this request was withdrawn by the FBI in November 2003 [redacted]

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the FBI's use of the authority in determining whether to renew the authority. (U)

In an effort to push the issue of obtaining a Section 215 order, in mid-October 2003 NSLB simultaneously submitted  Section 215 applications to OIPR. In addition, on October 29, 2003, NSLB distributed to all field offices the standard Section 215 request form that was developed by NSLB. Along with the standard request form, NSLB distributed detailed guidance concerning Section 215 requests that specified who within the FBI field office was required to approve the Section 215 request and directed the field offices to submit request forms to NSLB. ~~(S)~~ (U)

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#### 4. Processing delays continue in OIPR and NSLB (U)

According to NSLB and OIPR attorneys we interviewed, NSLB and OIPR had several disagreements about the content and form of the Section 215 applications NSLB submitted to OIPR in mid-October 2003. First, NSLB attorneys told us that they believed the Section 215 applications should be streamlined and similar to a grand jury subpoena. However, when discussion with OIPR personnel began on the development of a template, OIPR wanted the application to include more information than NSLB proposed.<sup>70</sup> Disagreement revolved around differing interpretations of the relevance standard and the level of detail necessary in the application package to meet that standard. OIPR personnel told us that they believed the applications needed more detail to satisfy the scrutiny of the FISA Court. (U)

NSLB and OIPR personnel worked for several months to develop a template for Section 215 applications submitted by NSLB to OIPR. Among other things, the application includes a specific description of the items requested, a description of the underlying investigation, and a description of how the FBI expects the requested items to further the investigation.<sup>71</sup> (U)

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<sup>70</sup> An OIPR attorney who was involved in these discussions about the Section 215 applications said that she had prepared a template application for Section 215 requests in 2002 that was reviewed by an NSLB attorney. However, this template application was not used by the NSLB attorneys who prepared the applications that were submitted to OIPR in late 2003. (U)

<sup>71</sup> In addition to addressing issues that arose out of statutory interpretation, NSLB attorneys were also discussing the practical issues associated with serving classified Section 215 orders on individuals who did not have security clearances and businesses that did not have approved storage containers. NSLB considered many options, such as determining on a case-by-case basis whether the information listed in a Section 215 order is classified. NSLB eventually determined that all Section 215 orders were to be treated as classified, although uncleared personnel could be shown the order for purposes of (cont'd)



NSLB attorneys told the OIG that even after a standard application form was agreed upon, they continued to believe that the amount of detail that OIPR required in the description of the investigation and the items requested in Section 215 applications was more than the law required to establish relevance. One NSLB attorney told the OIG that OIPR attorneys wanted "an inordinate amount of detail" in the applications. (U)

Another initial problem that arose with the applications submitted in mid-October 2003 concerned whether the FBI could present Section 215 requests to the FISA Court directly. NSLB attorneys had drafted the applications for the signature of the FBI's General Counsel and not an OIPR attorney. NSLB attorneys told us that they believed FBI attorneys could present the FBI's applications directly to the FISA Court without OIPR approval because Section 215 states that the FBI Director or his designee can make applications to the FISA Court for Section 215 orders.<sup>72</sup> See 50 U.S.C. § 1861. (U)

OIPR attorneys disagreed, stating that the FISA Court Rules of Procedures provide that the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys had not been authorized by the Attorney General to practice before the FISA Court. Eventually, NSLB agreed to draft applications for the signature of an OIPR attorney, and OIPR attorneys would present the applications to the FISA Court. (U)

(S) All [redacted] of the initial applications submitted by NSLB to OIPR in October 2003 were eventually presented to and approved by the FISA Court but not until much later in 2004. At some point after the applications were first submitted, NSLB decided to focus on the application it believed was narrow in scope and presented the fewest problems. This request was for a

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[redacted]

[redacted] This application was (S)

finalized by OIPR in spring 2004 and was approved by the FISA Court on

May [redacted] 2004. [redacted] (S)

[redacted] (X) (U)

collecting information in response to the order but could not maintain a copy of the order. In November 2004, NSLB revised the FBI's standard Section 215 request form and included authorization for service on persons without security clearances. (U)

<sup>72</sup> On October 10, 2003, the Director of the FBI designated the General Counsel of the FBI to make Section 215 applications to the FISA Court. Other officials who have been delegated this authority include the FBI's Deputy Director, the Executive Assistant Director for National Security, the Assistant Directors and Deputy Assistant Directors of the Counterterrorism, Counterintelligence, and Cyber Divisions, the Deputy General Counsel for National Security Affairs, and the Senior Counsel for National Security Affairs. (U)

Both OIPR and FBI personnel told the OIG that in addition to processing delays caused by disagreements concerning the content and form of the Section 215 applications, some delay occurred because the processing of business record requests was not a priority by either the FBI or OIPR at this time.<sup>73</sup> Instead, OIPR and the FBI were focusing on the "full content" FISA applications that had become backlogged.<sup>74</sup> Pursuant to an Attorney General directive issued in April 2004, OIPR was in the process of forming a FISA task force to address the backlog of full content FISA requests.<sup>75</sup> (U)

Section 215 requests continued to take several months to be processed in the remainder of 2004 and 2005. For example, [redacted] applications were submitted by NSLB to OIPR on August 4, 2004. On (S) September 23, 2004, and again on October 5, 2004, the NSLB attorney who handled Section 215 requests wrote an e-mail to her supervisors stating that NSLB had not heard anything about the applications from OIPR. Similarly, on November 9, 2004, the same NSLB attorney wrote an e-mail to (S) a CDC stating that [redacted] more applications had been submitted to OIPR in September but NSLB had not received any response from OIPR. NSLB attorneys were also frustrated by the edits recommended by OIPR attorneys and the amount of information and follow-up work that was being requested. (S) (U)

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In the fall of 2004, the new Deputy General Counsel of NSLB and OIPR Deputy Counsel for Operations met to discuss the problems with the processing of Section 215 requests. The NSLB Deputy General Counsel and the OIPR Deputy Counsel told us that they agreed to attempt to resolve their differences about the content of the FISA applications in order to address the backlog. OIPR and FBI management also implemented a "48-hour" rule, by which OIPR personnel were to contact FBI personnel within 48 hours of receipt of a business record application regarding any significant concerns

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<sup>73</sup> When we asked OIPR personnel about the delayed processing times, two attorneys told the OIG that a "moratorium" was placed in the spring of 2004 on the further processing of Section 215 applications and that the moratorium may have been connected to litigation. The Counsel for Intelligence Policy told the OIG he did not recall a moratorium on the processing of Section 215 applications from the FBI. (U)

<sup>74</sup> The Counsel for Intelligence Policy told the OIG that although OIPR was given authority to hire a significant number of employees, the majority of these employees did not begin working for OIPR until 2004. As a result, OIPR did not have sufficient personnel to handle the workload. (U)

<sup>75</sup> Memorandum from the Attorney General to the FBI Director and Counsel to the Office of Intelligence Policy and Review, Changes in Procedures for Implementing the Foreign Intelligence Surveillance Act (April 16, 2004). (U)



OIPR had with the request. However, NSLB personnel told us they did not observe any changes or improvements to the process as a result of the implementation of this rule. (U)

Processing delays were also experienced within NSLB, both with respect to requests for which orders were eventually obtained and with respect to requests that were withdrawn. For example, we found that with respect to a request that was submitted to NSLB by a field office on February 12, 2004, NSLB did not send an application to OIPR until January 14, 2005, almost a full year later.<sup>76</sup> (U)

**5. OIPR and NSLB take steps to improve Section 215 process (U)**

By early 2005, the Department faced the "sunset provision" of Section 215, pursuant to which the authority would lapse or "sunset" unless Congress affirmatively renewed the provision. In April 2005 FBI officials testified before Congress about the FBI's use of the authorities provided by the Patriot Act. This generated a renewed emphasis within the FBI's Office of General Counsel on the use of the Section 215 provision. Around this same time, the Deputy General Counsel for NSLB collected information on the status of the FBI's pending Section 215 requests and a summary of the history of the problems between NSLB and OIPR regarding Section 215 requests. (U)

Around this same time, the NSLB Deputy General Counsel met with a Deputy Counsel of OIPR and discussed the issue of the pending Section 215 requests. At this meeting, the OIPR Deputy Counsel informed the NSLB Deputy General Counsel that OIPR had recently assigned two experienced OIPR attorneys to address Section 215 requests. (U)

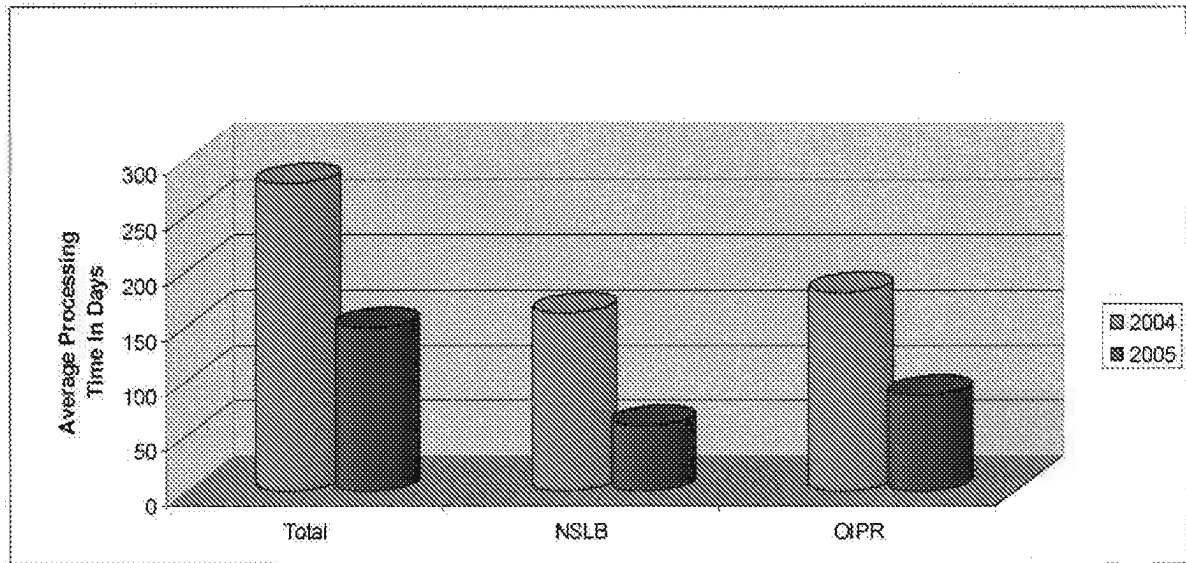
<sup>76</sup> In addition, after the first Section 215 order was obtained in spring 2004, the NSLB attorney who was handling Section 215 requests wrote an e-mail dated June 1, 2004, to [redacted] agents stating, "I have received from each of you a business record request at some point in the past - some of these requests are quite old. I need to know from each of you whether you still need the information that you sought in the request that you made. Also, feel free to send me additional requests now that we have the ball rolling." [redacted] requests had been submitted in 2003, one had been submitted in January 2004 and another in February 2004. [redacted] of the agents responded that the requests should be withdrawn for different reasons. For example, in one case the custodian of records had reported to the FBI that it did not have the information and in another case [redacted] [redacted] that would have been the recipient of the order refused to provide the records. Section 215 orders were eventually obtained for the other [redacted] requests. (S) (U)

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According to the OIPR Deputy Counsel for Operations, since these two OIPR attorneys have been assigned to handle Section 215 requests, she has received very few complaints about Section 215 requests. She said that ideally OIPR would like to process Section 215 requests in 60 days. NSLB attorneys also told the OIG that the process improved after the two new OIPR attorneys were assigned to handle Section 215 requests. ~~(S)~~ (U)

In fact, as the diagram below demonstrates, the time it took OIPR and NSLB to process withdrawn and approved Section 215 applications improved considerably comparing applications submitted in 2004 and applications submitted in 2005. (U)

**DIAGRAM 4.2 (U)**  
**Comparison of NSLB and OIPR Processing Time**  
**for Calendar Years 2004 and 2005 (U)**



Source: OIPR and FBI (U)

**III. OIG Analysis (U)**

Congress directed the OIG to examine "the justification for the failure of the Attorney General to issue implementing procedures governing requests for the production of tangible things . . . in a timely fashion, including whether such delay harmed national security." To respond to this directive, we first attempted to determine whether the Attorney General was required by statute, regulation or other directive to issue implementing procedures. In our review of documents and interviews with witnesses, we found no such requirement. However, we also found no evidence that the

Attorney General or any Department official directed OIPR or the FBI to implement Section 215 procedures. We found that OIPR and the FBI eventually developed standard forms and applications for obtaining Section 215 orders. NSLB distributed a standard request form to field offices in October 2003, and NSLB and OIPR completed a standard application and order in the spring 2004. As discussed above, we determined that the Department, including OIPR, and the FBI were focused on processing full content FISA requests, training, and hiring personnel to address the increased workload and did not focus on the need for templates and procedures for Section 215 orders. (U)

#### **A. Bureaucratic or Procedural Impediments (U)**

Congress also directed the OIG to identify bureaucratic or procedural impediments that negatively affected the FBI's ability to obtain Section 215 orders. We found several impediments that hindered the FBI's ability to obtain Section 215 orders. First, we discuss these impediments in detail, including the legal disagreement concerning statutory interpretation, the lack of resources, the multi-layered process for obtaining Section 215 orders, and the lack of knowledge in the field about Section 215 authority. Thereafter we discuss the effects of these impediments on the implementation and use of Section 215. (U)

##### **1. Statutory interpretation (U)**

The first impediment was the uncertainty in interpreting the law. One of the legal issues that affected several of the first requests generated in 2002 and 2003 was the intersection of Section 215 with the Buckley Amendment that provides for the production of educational records. OIPR's interpretation of the statute was that Section 215 did not trump existing laws because, unlike other provisions of FISA, Section 215 did not include in the business records provision the phrase "notwithstanding any other provision of law." As discussed above, while some NSLB attorneys disagreed with this interpretation, NSLB was not willing to push the issue with the FISA Court, and as a result no request for educational records was presented to the FISA Court between CY 2002 and 2005. (U)

According to NSLB and OIPR attorneys, this legal impediment to obtaining educational records has been addressed. Section 106(a)(2) of the Reauthorization Act amended FISA by adding 50 U.S.C. § 1861(a)(3), which specifically addresses educational, medical, tax, and other sensitive categories of business records. The amendment provided that when the FBI is requesting such items, the request must be personally approved by the FBI Director, the FBI Deputy Director, or the Executive Assistant Director for National Security. According to several NSLB and OIPR attorneys we

interviewed, because this provision clarifies that educational records are obtainable through the use of a Section 215 order, the non-disclosure provisions of Section 215 apply rather than the notification provisions of the Buckley Amendment. (U)

NSLB and OIPR attorneys also disagreed over the interpretation of the relevance standard and how much information had to be included in Section 215 applications about the items requested and their connection to an FBI investigation. NSLB attorneys believed that the level of detail required by OIPR about the investigations in the applications was far beyond that needed to satisfy the relevance threshold. On the other hand, OIPR attorneys believed the information was necessary in order to persuade the FISA Court to approve the applications. NSLB and OIPR eventually agreed upon the content and form of a standard application after several months of back and forth about the issue. Even once a standard application form was agreed upon, NSLB attorneys continued to have disagreements with OIPR attorneys in individual cases about the level of detail required. However, once the two OIPR attorneys who were assigned to Section 215 requests in early 2005 took over, according to NSLB and OIPR attorneys, the number of disagreements on this issue has decreased significantly and the parties are working well together. (U)

## **2. Insufficient resources (U)**

The second impediment to obtaining Section 215 was the lack of resources devoted to this process. Neither NSLB nor OIPR had adequate resources to dedicate to the implementation of Section 215 requests after passage of the Patriot Act. The workload of both entities increased dramatically after the September 11 attacks and passage of the Patriot Act, and substantial resources were needed to process full content FISA applications. Both entities were authorized to hire large numbers of employees, and by 2004 both NSLB and OIPR had grown substantially. However, by spring 2004 a significant backlog of full content FISA applications had developed, and the Attorney General ordered OIPR and NSLB to create a task force specifically to address the FISA backlog. NSLB was required to detail approximately 10 attorneys to OIPR to work on the backlogged full content FISA applications. (U)

As a result, NSLB did not focus on Section 215 requests or make obtaining a Section 215 order a priority until late 2003 when NSLB submitted a group of Section 215 applications to OIPR in October 2003. In addition, around this same time an NSLB attorney was finally designated as the point of contact within NSLB for Section 215 requests. (U)



In July 2004 OIPR attempted to address NSLB's concerns about the processing of Section 215 requests by assigning a detailed NSLB attorney to handle Section 215 requests. This detailed NSLB attorney, however, was also assigned to handle full content FISA applications, and NSLB attorneys told the OIG that this decision did not address the processing delays associated with Section 215 applications. In spring 2005, the Deputy Counsel for OIPR assigned two OIPR attorneys to handle Section 215 requests – a line attorney and a supervisor.<sup>77</sup> According to OIPR and NSLB attorneys, the dedication of these two attorneys to Section 215 requests has improved the process significantly. (U)

### **3. Multiple layers of review (U)**

The multiple layers of review for Section 215 applications also delayed their issuance. The process for obtaining a Section 215 order involves multiple layers of review in the FBI field office, in FBI Headquarters and NSLB, and in OIPR. An agent must obtain his supervisor's approval, then the SAC and the CDC approval, before the request is forwarded to FBI Headquarters and NSLB. In NSLB, a line attorney drafts the application package, which is then reviewed by a supervisor before it is provided to OIPR. In OIPR, a line attorney prepares the package, and the work is also reviewed by a supervisor before it is ready to be finalized for signature. After OIPR returns the "final" version to NSLB for signature, the application and order are reviewed by NSLB personnel and changes may be requested as a result of this review. (U)

At each step the reviewers at the FBI or OIPR often have questions, which may require additional information from the originating field agent. If an OIPR attorney has a question, he or she usually communicates with the NSLB attorney, who contacts the agent for the information and then communicates the response back to OIPR. Supervisors at FBI Headquarters or in the field or CDCs in the field offices may also be involved in these communications if there are disagreements about the adequacy of the information provided or questions about the basis of the FBI's assertions in its applications. (U)

Because of the number of levels of review and the multitude of entities involved in preparing a Section 215 application, the review process can be lengthy. In addition, without close management an application can be delayed for weeks or months at any stage. Even with close management of the process, the process from beginning to end would likely take several

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<sup>77</sup> Around this same time, the NSLB attorney detailed to OIPR returned to the FBI. (U)

weeks with respect to a simple or problem-free Section 215 request. An OIPR Deputy Counsel told the OIG that OIPR would like to complete its part of the process in 60 days. However, as detailed above, the OIPR process in 2005 for approved applications took much longer – on average 88 days. In addition, the Counsel for Intelligence Policy told us that for agents the process can seem unnecessarily complicated because the agents see “the layers of review [involved in obtaining a FISA business record order] as opposed to [the simpler process] to obtain a criminal grand jury subpoena.”<sup>78</sup> (S) (U)

#### 4. Field office knowledge about Section 215 orders (U)

Finally, based upon our interviews in the field, we also determined that FBI field offices still do not fully understand Section 215 orders. Several agents told the OIG that they were only vaguely aware of Section 215 authority, and many agents stated that they did not know what the process was for obtaining a Section 215 order. (U)

##### B. Effect of Impediments (U)

The bureaucratic, legal, and other impediments discussed above contributed to the FBI not obtaining its first Section 215 order until May 2004 despite the field generating its first request in April 2002. Another effect of the impediments was that in some instances field offices were not contacted about Section 215 requests until several months after the requests had been submitted to NSLB. In various cases, once the agents were contacted the information was no longer needed because of developments in the case, such as [redacted] In several instances agents were aware that NSLB received their requests, but their requests remained pending for months due to disagreements between NSLB and OIPR about whether a particular request should go forward. In other instances, the requesting agents told the OIG that they never received a response back from NSLB or OIPR. (S) (U)

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We found that the processing delays and the lack of response to field office applications contributed to a perception among FBI field agents that

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<sup>78</sup> The Reauthorization Act also requires that minimization requirements be developed for all documents obtained pursuant to a FISA business record order. The Counsel for Intelligence Policy predicted that agents will likely be more reluctant to use the FISA business records provision because of the additional level of complexity to the process involved in minimization in the use of FISA business records. We will assess the effect, if any, of minimization procedures on the use of Section 215 authority in our review of Section 215 orders in CY 2006. (U)



the process is too slow and not worth the effort. We interviewed several agents who had never sought a Section 215 order, but they reported to the OIG that they had "heard" about the process taking far too long. Several agents told us that if they could obtain the Section 215 order in a shorter time, such as 30 days or 60 days, they would be more encouraged to use Section 215 requests. Agents also stated that if they were to identify an item that they needed quickly, they would seek to determine whether the item could be obtained through a national security letter, a grand jury subpoena, or other process that is faster than the Section 215 process. ~~(S)~~ (U)

We also asked FBI and OIPR employees whether they believed the problems in implementing Section 215 and the delays in obtaining Section 215 orders harmed their cases or national security. None of the FBI and OIPR officials we interviewed said that they were aware of any harm to national security caused by the delay in obtaining Section 215 orders. None of the agents who initiated the requests for Section 215 orders told the OIG that their cases were negatively affected by the inability to obtain the information sooner. The FBI's Deputy General Counsel of NSLB told us that the failure to obtain a business record order or to obtain it expeditiously may have negatively impacted the pace of national security investigations, but that she did not believe that this meant that there was harm to national security. (U)

We were provided no evidence of harm to national security in any specific cases caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in a Section 215 request. However, we were concerned by the number of instances in CY 2002 through CY 2005 that the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay or other impediment to obtaining an order. (U)

**CHAPTER FIVE**  
**USE AND EFFECTIVENESS OF INFORMATION OBTAINED**  
**FROM SECTION 215 ORDERS (U)**

**I. Introduction (U)**

Congress also directed the OIG to include in its review an examination of the types of records obtained under Section 215 orders and the importance of those records; the manner in which the information is collected, retained, analyzed, and disseminated by the FBI; whether and how often the FBI used information obtained from Section 215 orders to produce an "analytical intelligence product" for distribution to, among others, the intelligence community; and whether and how often the FBI provided information obtained from Section 215 orders to law enforcement authorities for use in criminal proceedings. (U)

In this chapter, we first discuss the collection, analysis, and retention process with respect to Section 215 orders. Next, we describe in detail the types of information that have been obtained and how this information has been used in investigations, including whether any information has been disseminated to the intelligence community or used in any criminal proceeding. Finally, we evaluate the effectiveness of the FBI's use of Section 215 authority. (U)

**II. How Section 215 Information is Collected, Analyzed, Retained, and Disseminated (U)**

**A. Collection, Analysis, and Retention (U)**

Before items subject to a Section 215 order can be obtained, the order must be served upon the entity that has custody of the records. Personal delivery or service of the order is typically accomplished by the requesting or "originating" FBI field office, unless the recipient of the order is outside that district. In that instance, the FBI field office where the recipient is located is asked by the originating field office to serve the order. The manner in which information from Section 215 orders is collected depends on the category of information sought. (U)

For pure Section 215 orders, the records are typically obtained by the requesting FBI field office directly from the recipient, which either produces the documents in hard copy or electronic format.<sup>79</sup> The records obtained are reviewed and analyzed either by the initiating case agent or an FBI intelligence analyst. If after reviewing the information the case agent determines no further investigation is warranted, the agent stores the information with the rest of the investigative case file. The agent may write an Electronic Communication (EC) summarizing the information obtained for purposes of documenting the existence of the records electronically in ACS, the FBI's electronic case file system. If the information warrants dissemination within the FBI, the agent prepares an EC to the relevant field office or offices. If the information warrants dissemination outside of the FBI, such as to an intelligence agency, the agent prepares a Letterhead Memorandum or other appropriate form of communication. (U)

For "combination" Section 215 orders, FBI personnel told us that if the recipient and the FBI have technological compatibility, the recipient will transfer the requested subscriber information electronically directly into the FBI computer system called "Telephone Applications."<sup>80</sup> If the FBI and recipient's systems are not compatible, the information is provided to the FBI in another format, such as a computer diskette or hard copy. This information is then electronically uploaded or manually inputted into Telephone Applications. The information may also be included in an EC and uploaded into ACS if the agent determines it has some relevance or significance that should be documented in the case file. (U)

In some instances, subscriber information is not automatically provided with the telephone toll information. In these instances, the agents go back to the communication provider to request the additional information for specific telephone numbers that they obtained from the order and have identified to be of interest.<sup>81</sup> This information is then either electronically uploaded or manually entered into Telephone Applications. (U)

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<sup>79</sup> In those instances where the requesting FBI field office is located in a different district than the recipient of the order, the FBI field office which serves the order is asked to personally retrieve the requested records and forward them to the requesting office. (U)

<sup>80</sup> Telephone Applications is an investigative tool that also serves as the central repository for all telephone data collected during the course of FBI investigations. (U)

<sup>81</sup> The subscriber information obtained by a "combination" order is only for records that are maintained by the communication provider upon whom the order was served. If the phone number of interest belongs to another provider, other investigative tools such as national security letters are used to obtain the subscriber information related to that phone number. (U)

With respect to combination orders, the subscriber information is reviewed by the case agent by querying Telephone Applications and determining what links there are between the information obtained and existing names, telephone numbers, and other identifying information. An intelligence analyst may assist the case agent in reviewing the information obtained and performing additional analyses of the data. (U)

Information stored in ACS and Telephone Applications may be accessible by personnel from other law enforcement or intelligence agencies who are assigned to the FBI in some capacity, such as a task force addressing terrorism matters. Access depends on the clearance level of the non-FBI personnel and whether the information is "restricted" in the computer systems. (U)

**B. How the Information Obtained Has Been Used in Investigations (U)**

As described in Chapter Three, the types of records FBI agents obtained through pure Section 215 orders included driver's license records, public accommodations, apartment records, credit card records, and telecommunications subscriber information for telephone numbers records. (S) The FBI was able to obtain records in only [redacted] cases.<sup>82</sup> ~~(S)~~ (U)

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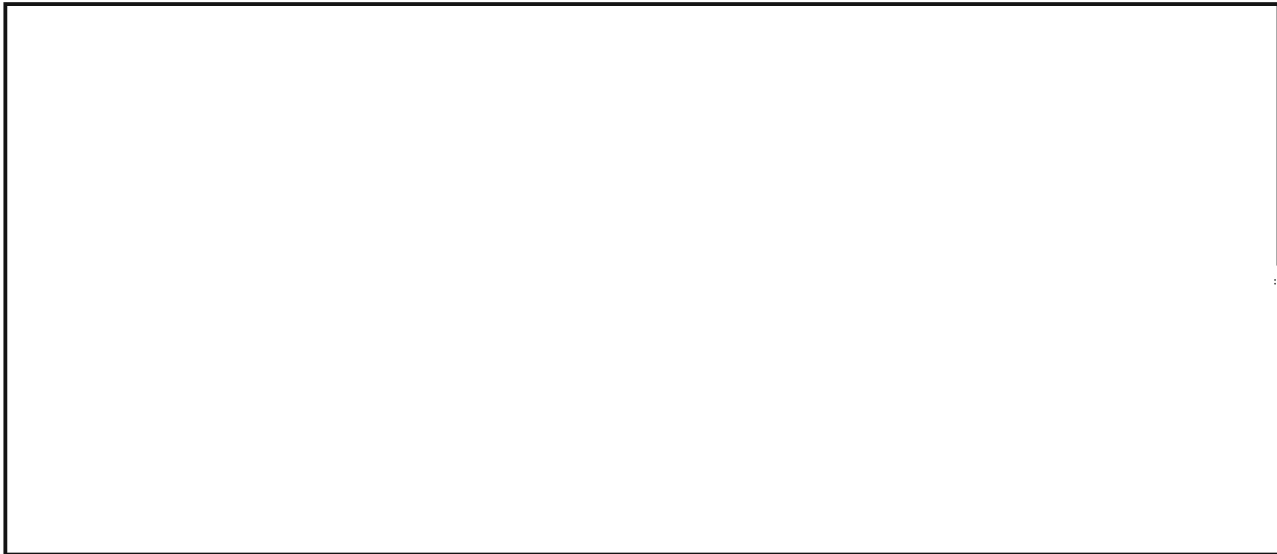
We interviewed the agents who obtained records that were the subject of Section 215 orders. The agents stated the records obtained were important and useful in two ways: (1) the records provided substantive information that was relevant to the investigation and either confirmed prior investigative leads or contributed to the development of additional investigative information; or (2) even if the records did not contribute to the development of additional investigative information, they were still valuable as "necessary steps to cover a lead." Most of the agents we interviewed said the records obtained fell in the second category, because the records typically did not provide additional investigative information, but they helped the agents exhaust every lead. They also stated that the importance of the information is sometimes not known until much later in an

<sup>82</sup> In one of the cases in which no records were obtained, the FBI field office had sought (S) [redacted] records. The FBI agent told the OIG that the [redacted] reported that it did not have the records that were the subject of the Section 215 order [redacted] the Section 215 order was not served. The FBI field office sought [redacted] and records related to [redacted] including [redacted] (S) (S) (S) (S) (S) The case agent told the OIG that service of the order was delayed because of legal issues raised by the [redacted]. He said he did not serve the order because he was able to obtain information through other means. ~~(S)~~ (U)

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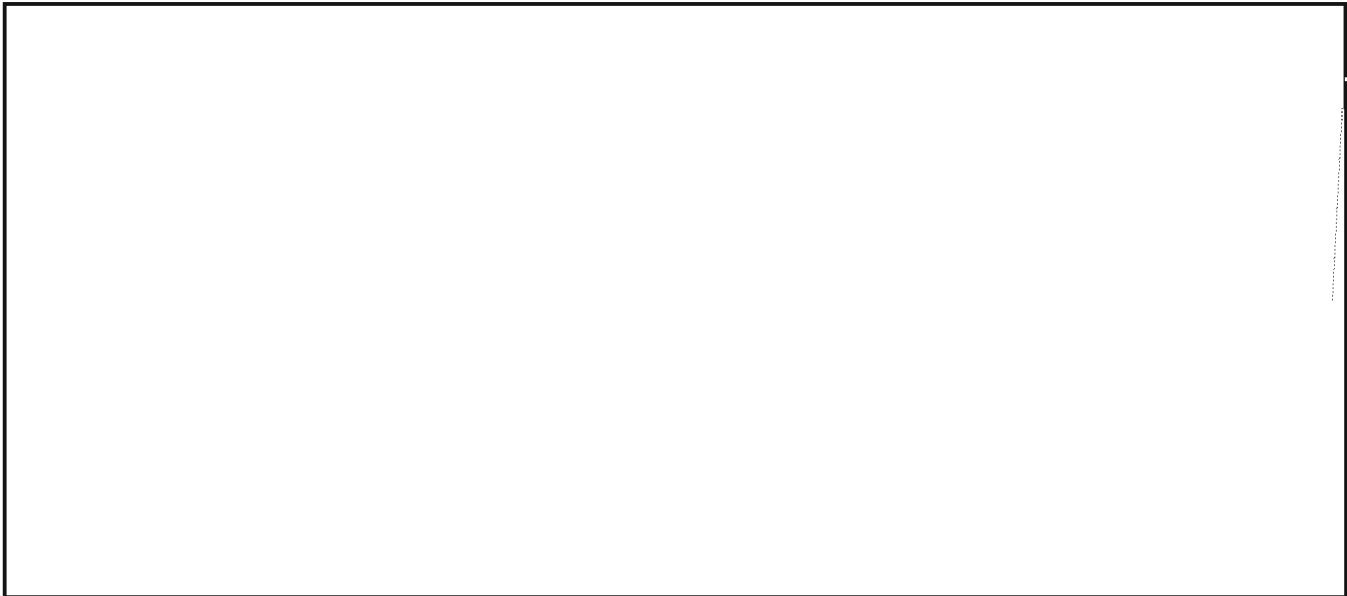
investigation when the information is linked to some other piece of intelligence that is obtained. We discuss four illustrative cases in detail below. (U)

**1. Case No. 1 (U)**



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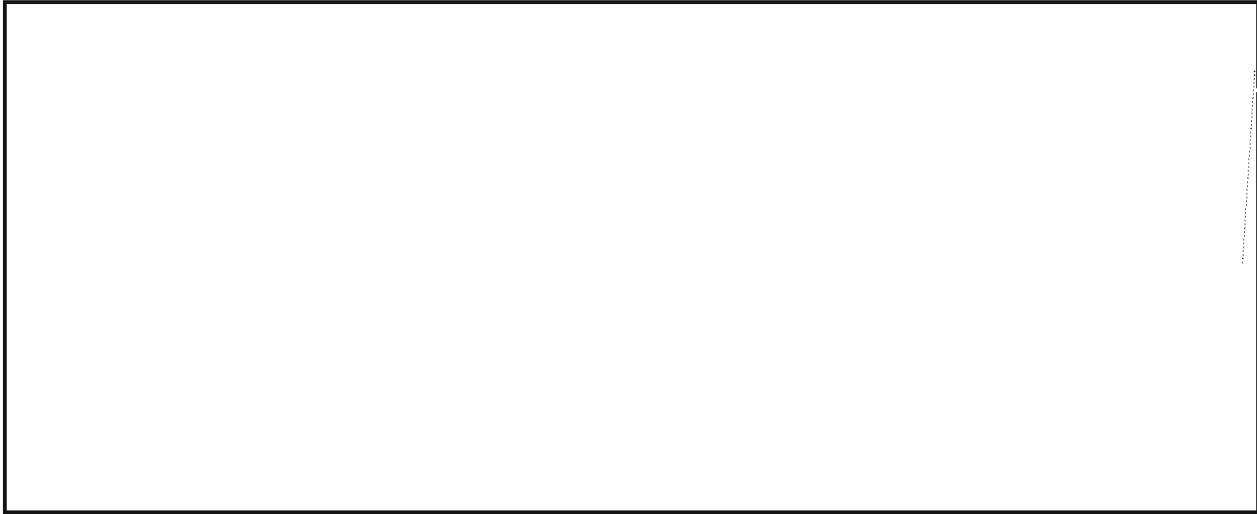
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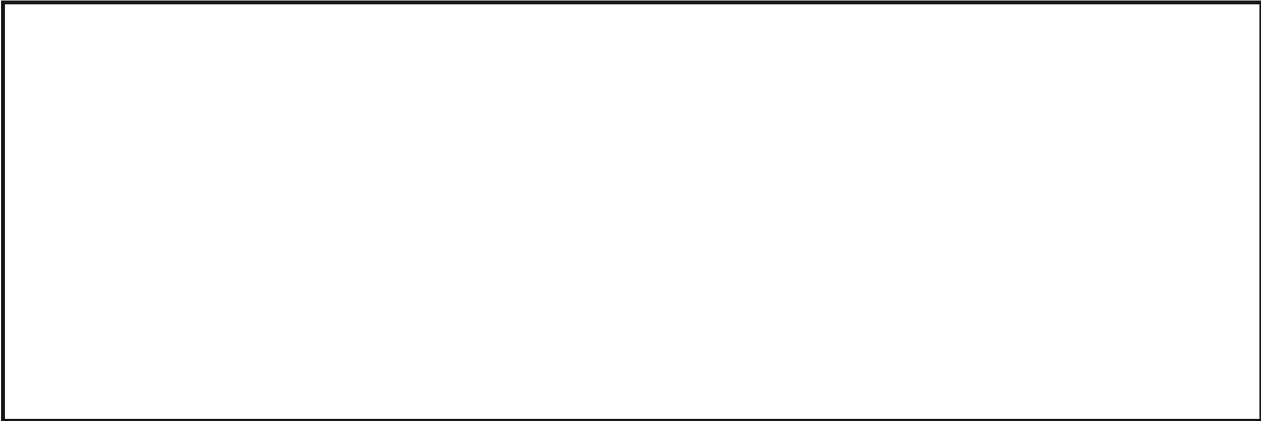


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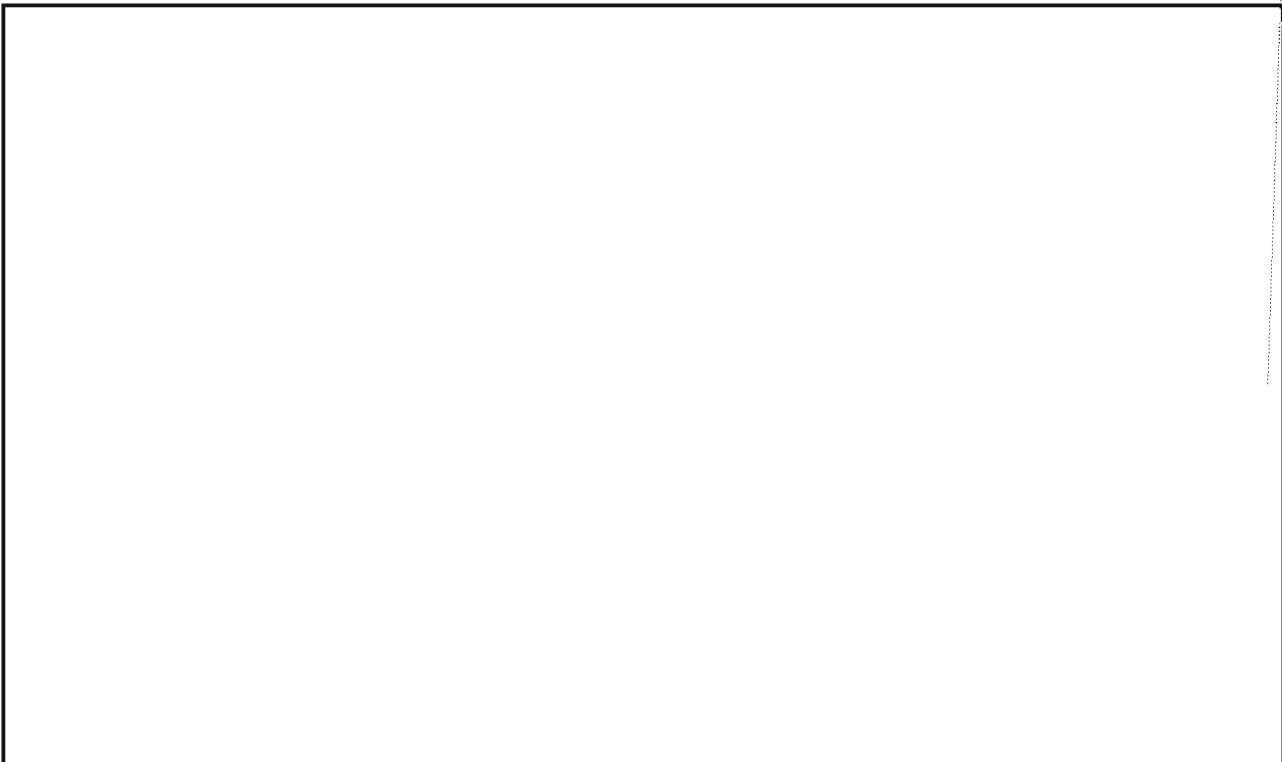


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3. Case No. 3 (U)



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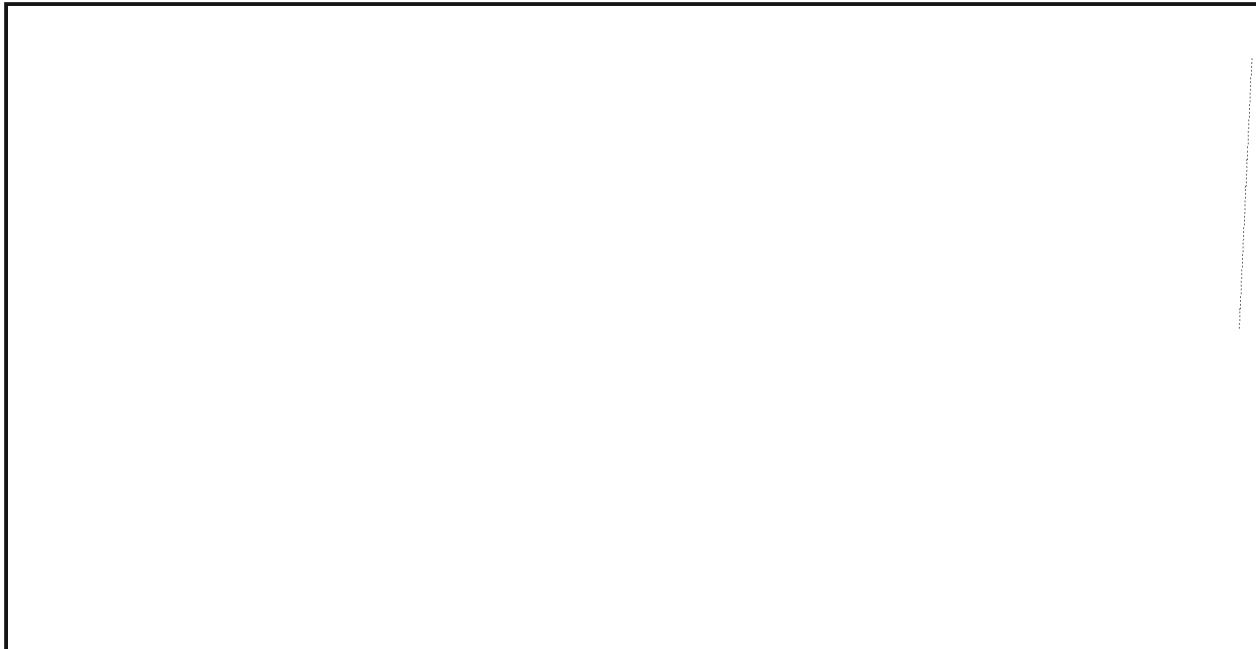


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4. Case No. 4 (U)

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C. Dissemination (U)

We found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in three instances. However, the FBI did not create any analytical intelligence products based on the information obtained in response to Section 215 orders. In one counterterrorism case, the FBI agent obtained [redacted]

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[redacted] (S)  
[redacted] The agent received the  
information from [redacted]

[redacted] The agent sent the information to an outside intelligence agency to determine whether the agency could provide more information about [redacted] in response to the Section 215 order. The agent told the OIG that he did not receive a response back from the agency to his request. For the other two instances, the orders were sought by the FBI on behalf of another agency. The requesting intelligence agency had determined that [redacted]

(S)

[redacted] In addition, the [redacted] (S)

requesting intelligence agency had determined that [REDACTED] (S)

[REDACTED] The two orders that were eventually served were obtained in July 2005. The FBI obtained the information from the custodian of the information in November 2005, and the information was provided to the intelligence agency that requested the orders.<sup>84</sup> ~~(S)~~ (U)

We also obtained limited information about the dissemination of information produced in response to combination Section 215 orders. Because there were 141 combination orders, we were unable to interview all of the case agents associated with these orders. However, in our field office visits we interviewed four agents who had obtained combination orders. None of these agents reported disseminating information obtained in response to the combination orders. However, as previously discussed, information obtained in response to combination orders is uploaded into Telephone Applications. We determined that personnel from other law enforcement and intelligence agencies who are assigned on detail to the FBI in some capacity, such as on a task force addressing terrorism matters, may have access to Telephone Applications. (U)

#### D. Use in Criminal Proceedings (U)

We also sought to determine whether any of the information obtained from any Section 215 order was used in any criminal proceeding. If a case agent wants Section 215 information to be used in a criminal proceeding, approval from the Attorney General must be obtained in certain instances. With respect to electronic surveillance, physical searches, and pen register/trap and trace devices, FISA provides that the Attorney General must approve use of the information in subsequent law enforcement proceedings. 50 U.S.C. §§ 1806 (b)(electronic surveillance), 1825(c)(physical searches), and 1845(b)(pen register/trap and trace devices).<sup>85</sup> However, FISA does not explicitly require Attorney General "use authority" for information obtained from Section 215 orders. With respect to use of information obtained from "combination" orders, "use authority" is required because these orders produce information derived from FISA pen

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<sup>84</sup> The recipient of the order had in its possession information for only one of the two targets of the orders – Target A. ~~(S)~~ (U)

<sup>85</sup> These sections of FISA provide that information acquired may not be disclosed for law enforcement purposes unless the disclosure "is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General." (U)

register/trap and trace devices which is subject to the "use authority" requirement. According to the Counsel for Intelligence Policy, whether the FBI would be required to obtain Attorney General approval to use information obtained from a pure Section 215 order is an open question because the FBI has not yet sought to use information from a pure Section 215 order in a criminal proceeding. According to NSLB attorneys, the FBI does not believe that the FBI is required to obtain Attorney General approval to use Section 215 information in a criminal proceeding because the statute does not contain any such requirement. (U)

With respect to use authority of other types of FISA-derived information, each request for use authority must be submitted to the Attorney General through OIPR. OIPR maintains a log book recording each request for use authority. ~~(S)~~ (U)

We did not identify any instance in which information obtained from a pure Section 215 order was used in a criminal proceeding. We identified only one instance in which use authority approval was sought for information from a combination Section 215 order. In this case, the field office had developed information of possible [redacted] (S)

[redacted]

The field office sought and obtained Attorney General approval to use the FISA electronic surveillance and combination order information in a grand jury investigation and in grand jury subpoenas. The target of the combination order was not among the targets of the criminal investigation. The FBI case agents told the OIG that although use authority was obtained for the FISA-derived information, no grand jury subpoenas were issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. ~~(S)~~ (U)

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### III. OIG Analysis (U)

In evaluating the effectiveness of Section 215 authority, we first considered the number of pure Section 215 orders obtained during CY 2002 through CY 2005.<sup>86</sup> The FBI obtained only 18 unique Section 215 orders in the 3 calendar years following passage of the Patriot Act.<sup>87</sup> (U)

<sup>86</sup> We evaluate the use of Section 215 authority with FISA pen register/trap and trace orders separately below. (U)

<sup>87</sup> Unlike FISA electronic surveillance authority, which had been used by the FBI since 1978, the business records authority was relatively new and had not been widely used even (cont'd)

We found that a significant number of Section 215 orders were not sought or obtained because of the legal and bureaucratic impediments discussed in Chapter Four. The question concerning the applicability of the Buckley Amendment to Section 215 requests for educational records played a role in the FBI not obtaining Section 215 orders in four instances. The other impediments we discussed, such as the disagreements between NSLB and OIPR about the amount of information sufficient to satisfy the relevance standard, insufficient resources, and the multi-layered review process, resulted in many Section 215 requests not being processed for many months. We were able to determine that with respect to seven Section 215 requests that were withdrawn, the requests had been pending with NSLB or OIPR for several months, and in one instance over a year, at the time the field office notified NSLB that it was withdrawing the request because the investigation had changed course or was being closed.<sup>88</sup> In addition, we identified five field office requests for Section 215 orders that were never responded to by NSLB or OIPR, and neither NSLB nor OIPR employees were able to explain what happened to those requests.<sup>89</sup> ~~(S)~~ (U)

These processing problems not only resulted in far fewer Section 215 orders being obtained than were requested but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile. Agents told the OIG that the length of the process to obtain a Section 215 order is a significant impediment to its use and that agents will typically attempt all other investigative tools before resorting to a Section 215 request. This negative perception about the Section 215 process may also have affected the number of Section 215 orders sought by the field offices. (U)

Next, we considered the type of information that has been obtained through the use of pure Section 215 orders and how that information has been used and disseminated in national security investigations. We found no instance where the information obtained from a Section 215 order resulted in a major case development such as the disruption of a terrorist

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before passage of the Patriot Act. The FBI did not obtain business records authority until 1998 and had used it only once before passage of the Patriot Act. (U)

<sup>88</sup> We identified a total of nine instances in which requests were withdrawn because the investigation changed course or was closed. However, in two of these cases we were unable to determine when the request was withdrawn. ~~(S)~~ (U)

<sup>89</sup> We identified a total of six requests for which we were unable to determine the reason the request was withdrawn. We do not have sufficient information with respect to two of the requests to determine whether the field office received a response from NSLB or OIPR about the request. ~~(S)~~ (U)

plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to other intelligence agencies. However, we found that Section 215 orders have been used to obtain information that allowed the FBI to ascertain [redacted] (S)

[redacted] and to obtain information about the [redacted] In addition, the FBI used information from a Section 215 order to try to identify [redacted] (S)  
[redacted]  
[redacted] (S) (U)

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FBI agents told us they believe that the kind of intelligence gathering from Section 215 orders was essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation when the information is linked to some other piece of intelligence that is obtained. (U)

The field agents we interviewed described Section 215 authority as a "tool of last resort" that may be "critical" when other investigative authority or investigative methods do not permit the FBI to obtain the information. In many national security investigations, there is no criminal investigation and therefore the FBI is unable to seek grand jury subpoenas. In addition, national security letters are limited in scope and do not cover large categories of third party information. Agents also told us that in some instances they had in fact used other investigative techniques, but these efforts were unsuccessful. (U)

We also interviewed other FBI officials and attorneys at the FBI and OIPR concerning the effectiveness of Section 215 orders. These witnesses, including the Deputy General Counsel of NSLB, the Counsel of OIPR, and the NSLB Assistant General Counsel who serves as the point of contact for all Section 215 requests, told the OIG that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means, such as grand jury subpoenas or national security letters.<sup>90</sup> The Counsel for Intelligence Policy also described Section 215 authority as a "specialized tool that has its purpose." (U)

<sup>90</sup> One OIPR attorney told us that the attorney believed "nothing would be lost" if the Section 215 provision was repealed. While agreeing that the use of the provision for the subscriber information was useful, the OIPR attorney stated that "only time will tell" if the "pure" requests will be useful. The OIPR attorney was of the opinion that with the passage of the Reauthorization Act allowing for challenges by recipients of the order, the FBI's use of Section 215 might decline. (U)



The evidence showed that Section 215 authorities provide a specialized tool to obtain information in national security investigations that cannot be obtained by other means. At the same time, however, the evidence showed that the FBI did not use this specialized tool effectively because of the impediments to its use that we described above. Some of these impediments have since been addressed. For example, NSLB and OIPR told the OIG that the Reauthorization Act provision specifically allowing the FBI to obtain educational and other sensitive records through Section 215 orders will allow the FBI to obtain these records; the FBI has a Section 215 request form that has been distributed to and is used by all field offices; and NSLB and OIPR have developed a template application form that is used in all Section 215 applications. In addition, NSLB and OIPR witnesses told the OIG that the attorneys assigned to Section 215 processing in both offices work well together. Because these impediments have been resolved, the FBI and OIPR should be able to process more Section 215 orders in the future. The most significant remaining impediment is the lengthy process for obtaining a Section 215 order. (U)

We recognize that the multiple layers of review to obtain Section 215 orders stems in part from the fact that business records in counterintelligence and counterterrorism cases can only be obtained through the FISA process. We also recognize that the multiple levels of review within the field office, NSLB and OIPR help to ensure that the field office is seeking to use Section 215 authority appropriately and that there is an adequate basis for the request. However, the multiple levels of review necessarily make the process slow and cumbersome. In order to ensure that extensive delays do not occur, the process must be closely managed from beginning to end. (U)

We also evaluated the use of Section 215 authority to obtain subscriber information for telephone numbers that were the subject of pen register/trap and trace orders. OIPR obtained the first "combination" Section 215 order on February  2005. A total of 141 combination applications were submitted and approved by the FISA Court in calendar year 2005. Several FBI and OIPR attorneys we interviewed, including the Counsel for Intelligence Policy, told us that this information was very important in FBI investigations. The Deputy General Counsel of NSLB agreed, stating that the addition of Section 215s to FISA pen register/trap and trace applications was a "huge boon because without the 215s, the FBI

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would have had to issue numerous [national security letters] to get the subscriber information."<sup>91</sup> ~~(S)~~ (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. (U)

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<sup>91</sup> As previously discussed, Congress has also recognized the importance of subscriber information in FISA pen registers. As part of the Reauthorization Act, Congress amended the FISA pen register provision to include subscriber information. (U)

## CHAPTER SIX CONCLUSIONS (U)

As required by the Patriot Act reauthorization legislation, the OIG conducted this review of the FBI's use of the authority to obtain business records as expanded by Section 215 of the Patriot Act. The Act required the OIG to examine how many requests were prepared by the FBI; how many applications were approved, denied, or modified by the FISA Court; any improper use of Section 215 authority; and any noteworthy facts or circumstances concerning Section 215 requests. Congress also directed the OIG to examine the Department's failure to issue implementing procedures governing Section 215 requests, whether this failure harmed national security, and whether bureaucratic or other impediments hindered the FBI's use of Section 215. Finally, Congress directed the OIG to review the effectiveness of the FBI's use of Section 215, including the types and importance of information obtained, whether information has been disseminated or used in analytical products, and whether the information has been used in any criminal proceedings. Our review covered calendar years 2002 through 2005. As required by the Reauthorization Act, we will report in late 2007 on the use of Section 215 in 2006. (U)

Our review found that the FBI did not obtain its first Section 215 order until May 2004. From then until the end of 2005, the period of our review, the FBI obtained a total of 21 pure Section 215 orders. However, in February 2005, the FBI also began attaching Section 215 requests to pen register/trap and trace applications to obtain subscriber information for the telephone numbers captured through the pen register and trap and trace devices. These Section 215 requests were called "combination" or "combo" requests. Throughout the remainder of 2005, the FBI obtained a total of 141 combination orders. We found that all 162 Section 215 applications (21 pure requests and 141 combination requests) submitted to the FISA Court were approved. (U)

We also identified 31 Section 215 requests that were withdrawn, either while they were pending approval at the FBI's National Security Law Branch or at OIPR. We identified five categories of reasons for the withdrawn requests: (1) the investigation was closed or changed course; (2) an alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

Only four Section 215 orders – two pure orders in 2004 and two combination orders in 2005 – were modified by the FISA Court, and we found the modifications were not significant. (U)

We identified two instances of improper use of Section 215 orders. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. We did not find any instance of improper use of pure Section 215 authority. In one instance, the case agent overlooked documents in the file indicating that the telephone number no longer was being used by the target of the investigation. This error was not noticed until several months later when a new case agent took over the investigation. In the second instance, the FBI collected data for several weeks on a telephone number that did not belong to the target because the telephone company belatedly notified the FBI that the target had stopped using the telephone number. In both instances, the FBI sequestered and destroyed the improperly collected data. The FBI also reported both instances of improper use to the President's Intelligence Oversight Board (IOB), as required. In addition, both incidents were reported to the FISA Court by OIPR. (U)

The Reauthorization Act also directed the OIG to examine the justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing Section 215 requests for business record applications and whether such delay harmed national security. We found that the Patriot Act did not specifically require implementing procedures, and no one in the Department directed OIPR or the FBI to develop such implementing procedures. However, our review determined that such guidance would have been useful. Eventually, OIPR and the FBI developed standard forms and applications for obtaining Section 215 orders. We found that the reason for this delay was that the Department, including OIPR and the FBI were focused on processing full content FISA requests, training, and hiring personnel to address the increased FISA workload and therefore did not focus on the need for templates and procedures for Section 215 orders. (U)

We also found that when FBI field offices began requesting Section 215 orders, they encountered processing problems and their ability to obtain Section 215 orders was affected by several impediments. These impediments included disagreements between the FBI and OIPR concerning statutory interpretation, insufficient resources to address Section 215 requests expeditiously, the multi-layered process for obtaining Section 215 orders, and the lack of knowledge throughout FBI field offices about Section 215 authority. These processing problems and impediments not only resulted in far fewer Section 215 orders being obtained than were requested, but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile. Some, but not all, of these impediments have since been resolved. (U)

We uncovered no evidence of harm to national security in any specific cases caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in Section 215 requests. However, we found that the multi-layered review process, combined with the other impediments described above, resulted in long delays in obtaining Section 215 orders. As a result, in many instances the FBI did not receive approval to obtain the Section 215 information until many months after the original request was made. (U)

We also noted the number of instances in which the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay or other impediment to obtaining a Section 215 order. (U)

With respect to the effectiveness of the FBI's use of Section 215 authority, the evidence showed that Section 215 authority provides the FBI with a specialized tool to obtain certain information in national security investigations that cannot be obtained by other means. We found that the FBI obtained a wide variety of records using Section 215 orders, such as driver's license records; apartment leasing records; credit card records;

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We examined how the FBI has used this information in national security investigations. We found that Section 215 orders have been used primarily to exhaust investigative leads, although in some instances the FBI obtained identifying information about suspected agents of a foreign power not previously known to the FBI. However, the evidence showed no instance where the information obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot. In addition, we found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in only three instances, and the FBI did not create any analytical intelligence products based on the information obtained in response to pure Section 215 orders. We identified only one instance in which the FBI sought to use information from a Section 215 order in a criminal proceeding. This information was derived from a combination Section 215 order. Although the FBI obtained Department approval to obtain grand jury subpoenas using this Section 215 information, no grand jury subpoenas were issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. (U)

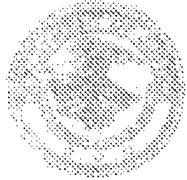
We conducted this review mindful of the controversy concerning the possible chilling effect on the exercise of First Amendment rights posed by the FBI's ability to use Section 215 authorities, particularly the potential use of Section 215 orders to obtain records held by libraries. Our review

found that the FBI did not in fact obtain Section 215 orders for any library records from 2003 through 2005, in part because the few applications for such orders did not survive the review process within NSLB and OIPR. (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. As directed by the Patriot Reauthorization Act, the OIG will continue to assess the FBI's use and effectiveness of Section 215 authority. (U)



# APPENDIX



# The Attorney General

Washington, D.C.

March 1, 2007

The Honorable Glenn A. Fine  
Inspector General  
Office of the Inspector General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Fine:

I welcome the opportunity to comment on your report entitled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records."

Your report demonstrates that the Department of Justice, including the FBI, has been responsible in using the authority granted by Congress to obtain business records under Section 215 of the USA PATRIOT Act. You offered no recommendations for improvements or other modifications to Department procedures and practices for the use of this authority.

Consistent with your findings, I believe that the initial delays in using this investigative tool, though unfortunate, have been largely if not entirely resolved and that no harm to national security resulted from those delays.

Your review found only two instances of "improper use" of the business records authority, and I respectfully submit that characterization is not apt. In both cases, errors which you describe as "inadvertent[]" (one by a case agent and the second by a third party) resulted in the FBI receiving information that was not authorized by the terms of the relevant order of the Foreign Intelligence Surveillance Court. You found that, in both cases, the FBI identified the mistakes, sequestered or destroyed the collected data, and reported the error to the Intelligence Oversight Board and to the Court. Therefore, these examples show that the oversight process is working as it should to identify and address inadvertent mistakes when they occur.

I appreciate the diligent effort by you and your staff to complete this report, and we look forward to working with you closely on the 2006 report. The Department must continually work to improve its use of these specialized investigative tools.

Sincerely,

A handwritten signature in black ink, appearing to read "A. R. Gonzales", written over a light blue horizontal line.

Alberto R. Gonzales

UNCLASSIFIED

DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC 20511

E/S 00153

MEMORANDUM FOR: Glenn A. Fine  
Inspector General, Department of Justice

SUBJECT: Review of the Department of Justice's Use of Section 215  
Authority

REFERENCE: DOJ OIG Memorandum, Review of the Department of Justice's  
Use of Section 215 Authority 8 February 2007.


The Office of the Director of National Intelligence (ODNI) has reviewed your draft report entitled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records."

As you noted in your report, Section 215 orders are a specialized tool the Federal Bureau of Investigation (FBI) can use to obtain certain information in national security investigations that cannot be obtained by any other means. I commend your efforts in performing a comprehensive review and analysis of this critical national security investigative tool.

Your review highlighted several concerns regarding the timeliness and processing of Section 215 orders, and I believe that not only the FBI and Department of Justice, but also the Intelligence Community as a whole, would benefit from receiving your recommendations for improvements in this regard. I understand that those recommendations may be provided in your second report on this matter and I look forward to receiving them.

If you have any questions or require further assistance my Inspector General Edward Maguire can be contacted at (703) 482-4955.

  
\_\_\_\_\_  
J. M. McConnell

  
\_\_\_\_\_  
Date

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# A Review of the FBI's Use of Section 215 Orders for Business Records in 2006 (U)

FBI INFO.  
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DECLASSIFY ON: 12-11-2039  
DATE: 12-11-2014



Office of the Inspector General  
March 2008

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## CHAPTER ONE INTRODUCTION (U)

The *USA PATRIOT Improvement and Reauthorization Act of 2005* (Reauthorization Act or the Act) directed the Department of Justice (Department or DOJ) Office of the Inspector General (OIG) to conduct "a comprehensive audit of the effectiveness and use, including improper or illegal use" of the Federal Bureau of Investigation's (FBI) investigative authority that was expanded by Section 215 of the Patriot Act.<sup>1</sup> See Pub. L. No. 109-177, § 106A. Section 215 of the Patriot Act allows the FBI to seek orders from the Foreign Intelligence Surveillance Court (FISA Court) for "any tangible things," including books, records, and other items from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. The Reauthorization Act also required the OIG to review the FBI's use of Section 215 for two time periods - calendar years 2002 through 2004 and 2005 through 2006.<sup>2</sup> (U)

On March 9, 2007, the OIG issued our first report, which reviewed the use of Section 215 in 2002 through 2005.<sup>3</sup> This is the OIG's second report required by the Reauthorization Act. This report examines the FBI's requests for Section 215 orders in 2006. In addition, as required by the Reauthorization Act, this report examines the minimization procedures for business records which the Reauthorization Act required the Attorney General to adopt in 2006. (U)

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\* This report includes information that the Department of Justice considered to be classified and therefore could not be publicly released. To create the public version of the report, the OIG redacted (deleted) the portions of the report that the Department considered to be classified, and we indicated where those redactions were made. In addition, the OIG has provided copies of the full classified report to the Department, the Director of National Intelligence, and Congress. (U)

<sup>1</sup> The term "USA PATRIOT Act" is an acronym for the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). It is commonly referred to as "the Patriot Act." (U)

<sup>2</sup> The *USA PATRIOT Improvement and Reauthorization Act of 2005* (Reauthorization Act or the Act) also directed the OIG to conduct reviews on the use and effectiveness of the FBI's use of national security letters (NSL), another investigative authority that was expanded by the Patriot Act. The OIG reviews of the FBI's use of NSL authority are contained in separate reports. The OIG's first report on NSLs, issued in March 2007, reviewed the FBI's use of NSLs in 2003 through 2005. The OIG is issuing a second report on NSLs that examines the FBI's and Department's corrective actions taken in response to our first NSL report and the FBI's use of NSLs in 2006. In addition, the OIG is completing a third report on the FBI's use of "exigent letters." (U)

<sup>3</sup> Although we were only required to review 2002 through 2004 in the first review, we elected to include data from 2005 in that report. (U)

## I. The Patriot Act and the Patriot Reauthorization Act of 2005 (U)

Enacted after the September 11, 2001, terrorist attacks, the Patriot Act states that it seeks to provide federal authorities "with the appropriate tools required to intercept and obstruct terrorism." Several Patriot Act provisions, including Section 215, were originally scheduled to sunset on December 31, 2005. On March 9, 2006, the President signed into law the Reauthorization Act, which, among other things, made permanent or extended several Patriot Act provisions. However, Section 215 was not made permanent but was extended for 4 years until December 31, 2009. The Reauthorization Act also resulted in several substantive changes to Section 215, which we discuss in Chapter Two of this report. (U)

## II. Methodology of the OIG Review (U)

In this review of the use of Section 215 orders, the OIG examined documents obtained from the FBI and the Department's Office of Intelligence Policy and Review (OIPR) relating to each instance of the FBI's use or attempted use of Section 215 authorities during 2006.<sup>4</sup> In addition, we reviewed Department reports concerning the FBI's use of Section 215 authorities. (U)

In this review, the OIG conducted over 60 interviews of FBI, Department, and other officials. The OIG also visited FBI field offices in New York City and suburban Maryland to review investigative case files from which requests for Section 215 applications originated and to interview FBI employees, including FBI Special Agents in Charge (SAC), Assistant Special Agents in Charge, Chief Division Counsels, Supervisory Special Agents, case agents, and intelligence analysts.<sup>5</sup> We also conducted telephone interviews of FBI employees in several other field offices who had initiated Section 215 requests. (U)

The OIG also interviewed senior FBI and OIPR officials who participated in implementing procedures and processing requests for Section 215 orders, including OIPR's former Acting Counsel and former Counsel for Intelligence Policy, the FBI General Counsel and the Deputy

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<sup>4</sup> Until fall 2006, the Office of Intelligence Policy Review (OIPR) was a separate component of the Department. In March 2006, the Reauthorization Act authorized the creation of a National Security Division (NSD) within the Department. In September 2006, Kenneth L. Wainstein was confirmed as the first Assistant Attorney General for the NSD, and shortly after that OIPR was moved to the NSD. OIPR's and NSD's intelligence functions will be reorganized within NSD's planned Office of Intelligence. Because the reorganization is not yet complete, we refer to OIPR in this report. (U)

<sup>5</sup> FBI field offices are also referred to as "divisions." The Chief Division Counsel is the chief legal officer for the field office. (U)



General Counsel of the FBI Office of General Counsel's National Security Law Branch (NSLB), other attorneys and personnel from NSLB and OIPR, and officials responsible for administering the FBI and OIPR Section 215 tracking systems. (U)

### III. Organization of the Report (U)

This report is divided into eight chapters followed by one unclassified appendix and two classified appendices. After this introduction, we describe in Chapter Two the legal background related to Section 215 authority and the processes for seeking Section 215 orders and for retaining and disseminating records received pursuant to those orders. (U)

In Chapter Three, we provide an overview of the instances in which the FBI sought to obtain Section 215 orders in 2006, including the number of FBI requests, the number of orders obtained, and the type of information requested. (U)

In Chapter Four, we provide a detailed description of the FBI's requests for Section 215 orders processed in 2006. We describe the records requested; the purpose of the requests; the processing time for the requests; whether the applications were granted, modified, or withdrawn; whether the records were produced; and if so, how they were used. (U)

In Chapter Five, we present our findings and analysis of the 2006 applications and orders, including their processing time, Foreign Intelligence Surveillance Court modifications, and their use and effectiveness. (U)

In Chapter Six, we identify any improper, illegal, or noteworthy use of Section 215, and in Chapter Seven we examine the minimization procedures adopted by the Attorney General in response to the Reauthorization Act. (U)

Chapter Eight contains our conclusions. (U)

The Unclassified Appendix to the report contains the comments on the report by the Director of National Intelligence, the Assistant Attorney General for the National Security Division, and the Director of the FBI. (U)

The two Classified Appendices describe other uses of Section 215 (S) orders to collect  (S)

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**IV. Summary of OIG Findings (U)**

Our review determined that, similar to the findings of our first report on Section 215 orders, the FBI and OIPR processed various FBI requests for the use of both "pure" and "combination" Section 215 orders in 2006.<sup>6</sup> In 2006, the FBI and OIPR processed 15 pure Section 215 applications and 32 combination applications which were formally submitted to the FISA Court. All 47 Section 215 applications submitted to the FISA Court were approved.<sup>7</sup> The Section 215 applications requested a variety of information, including credit card records, [redacted]

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[redacted] (S) (U)

(S) Unlike in previous years, [redacted] (S)

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We also determined that during the period covered by this report FBI agents encountered similar processing delays for Section 215 applications as those identified in our previous report. These delays were caused by unfamiliarity with the Section 215 process, too few resources to handle requests expeditiously, a multi-layered review process, and various substantive issues regarding whether certain applications met the statutory requirements. Overall, the average processing time for Section 215 orders in 2006 was 147 days, which was similar to the processing times for 2005. However, the FBI and OIPR were able to expedite certain Section 215 requests in 2006, and when the FBI identified two emergency requests the FBI and OIPR processed both Section 215 requests quickly. (U)

Similar to our previous report, we examined how the FBI has used information obtained from Section 215 orders in national security investigations. Aside from the [redacted] [redacted] we found that in 2006 Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information to support additional FBI investigative requests and to [redacted] (S)

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<sup>6</sup> Pure Section 215 requests are not associated with applications for the use of any other *Foreign Intelligence Surveillance Act* (FISA) authority. Combination Section 215 requests are business record requests added to or combined with a FISA application for pen register/trap and trace orders. (U)

<sup>7</sup> Four of the pure Section 215 applications processed in 2006 were signed by the FISA Court in 2007. (U)

We did not identify any illegal use of Section 215 authority. However, our review identified two instances in which the provider produced records that were in response to, but outside the scope of, Section 215 orders. In one of these two instances, the FBI quickly determined that it had inadvertently received information not authorized by the Section 215 orders and took appropriate steps to address the matter. In the other case, approximately 2 months passed before the FBI recognized and addressed the matter. As a result, we recommend that the FBI develop and implement procedures to ensure that FBI employees check that they are not receiving or using information that is not authorized by the Section 215 order. (U)

Our review also identified that the FBI reported only one of the two matters to the President's Intelligence Oversight Board (IOB).<sup>8</sup> The FBI determined that only one of the two instances involved statutorily protected material and that only the instance involving the statutorily protected material was reportable to the IOB. The FBI also determined that the non-statutorily protected material should be considered as voluntarily produced material even though the provider had refused to produce the material without a court order. (U)

As a result, we recommend that the FBI develop procedures for identifying and handling material that is produced in response to, but outside the scope of, Section 215 orders. The procedures should include the FBI's justification for handling any class of such material differently from other classes. We believe the FBI should not base the procedures for handling such material solely on whether the material is or is not statutorily protected. For example, the procedures should address additional factors such as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures. (U)

We also identified two other "noteworthy" issues. First, we found that the FBI had issued national security letters (NSL) for information about [redacted] (S) [redacted] after the FISA Court, citing First Amendment concerns, had twice declined to sign Section 215 orders in the same investigation. We questioned the appropriateness of the FBI's issuing these NSLs after the Court's decision because NSLs have the same First Amendment caveat as Section 215 requests and the FBI issued the NSLs based on the same factual predicate, without further reviewing the underlying investigation to ensure that it was not premised solely on protected First Amendment conduct. (S) (U)

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<sup>8</sup> In 1976 the Intelligence Oversight Board (IOB) was created by Executive Order and charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863. (U)

The second noteworthy issue

[Redacted]

[Redacted]

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Finally, as directed by the Reauthorization Act, we also examined whether the interim minimization procedures adopted by the Department for Section 215 orders protect the constitutional rights of U.S. persons. We concluded that the standard minimization procedures adopted in September 2006, which are interim procedures, do not adequately address the intent and minimization requirements of the Reauthorization Act, and we recommend that the Department develop specific standard minimization procedures relating to Section 215 orders. (U)

## CHAPTER TWO BACKGROUND (U)

### I. Introduction (U)

This chapter provides a brief description of the legal background related to Section 215 authority and the process for obtaining Section 215 orders. (U)

### II. Legal Background (U)

Pursuant to Section 215 of the Patriot Act, the FBI may obtain "any tangible things," including books, records, and other items from any business, organization, or entity provided that the item or items are for an authorized investigation. The tangible things are available "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." 50 U.S.C. § 1861. Section 215 did not create any new investigative authority but instead expanded existing authority found in the *Foreign Intelligence Surveillance Act of 1978* (FISA). 50 U.S.C. § 1801 et seq. (U)

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court) in order to conduct electronic surveillance to collect foreign intelligence information.<sup>9</sup> In 1998, Congress amended FISA to authorize the FBI to apply to the FISA Court for orders compelling four kinds of businesses to "release records in its possession" to the FBI: common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities. The amendment did not further define "records." This provision, which was codified at 50 U.S.C. § 1862, became known as the "business records" provision and was the provision expanded by Section 215 of the Patriot Act.<sup>10</sup> (U)

The 1998 business records amendment required a FISA application to specify that the records were sought for an investigation to gather foreign intelligence information or an investigation concerning international

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<sup>9</sup> OIPR prepares and presents applications for Section 215 orders to the FISA Court on behalf of the FBI. According to the FISA Court Rules of Procedures, the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys have not been authorized to appear before the Court for this purpose. (U)

<sup>10</sup> 50 U.S.C. § 1882(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001). (U)

terrorism, and that there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." 50 U.S.C. § 1862 (2000 ed.). This language meant that the FBI was limited to obtaining information regarding a specific person or entity the FBI was investigating and about whom the FBI had individualized suspicion. In addition, the amendment prohibited the entity complying with the order from disclosing either the existence of the order or any information produced in response to the order. (U)

Subsequent to the 1998 FISA amendment creating this investigative authority and prior to passage of the Patriot Act in October 2001, the FBI obtained only one FISA order for business records. This order was obtained in 2000. (U)

Section 215 of the Patriot Act significantly expanded the scope of the FBI's investigative authority pursuant to the business records provision of FISA and lowered the standard of proof required to obtain this type of business record. The pertinent part of Section 215 provides: (U)

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.<sup>11</sup> 50 U.S.C. § 1861(a)(1). (U)

While the 1998 language limited the reach of this type of investigative authority to four types of entities, the new language did not explicitly limit the type of entity or business that can be compelled by an order. Section 215 of the Patriot Act also expanded the categories of documents that the FBI can obtain under the business records provision of FISA, because it no longer was limited to "records" and provides that the FBI may obtain an order for "the production of any tangible things (including books, records, papers, documents, and other items)." *Id.* (U)

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<sup>11</sup> "United States person" is defined as a citizen, legal permanent resident, an unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, or corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(f). (U)



Section 215 also lowered the evidentiary threshold to obtain such an order. As a result, the number of people whose information could be obtained was expanded because the FBI is no longer required to show that the items being sought pertain to a person whom the FBI is investigating. Instead, the items sought need only be requested "for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). This standard, referred to as the relevance standard, permits the FBI to seek information concerning persons not necessarily under investigation but who are connected in some way to a person or entity under investigation. (U)

The Reauthorization Act further amended Section 215 by requiring that an application establish "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." *Id.* At the same time, the Reauthorization Act provided for a presumption of relevance for four specified entities or individuals: foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, and individuals known to associate with subjects of such investigations. *Id.* When an application involves one of the four entities or individuals referenced in the presumption, the applicant need not establish reasonable grounds to believe the requested items are relevant. (U)

The Reauthorization Act included other substantive amendments to Section 215. For example, the Act specifically authorized the collection of certain sensitive records, including library, medical, educational, and tax return records. The Act also required that an application for these sensitive records be approved by the FBI Director or a specified designee, and specific congressional reporting.<sup>12</sup> In addition, the Reauthorization Act specifically provided that Section 215 orders must, among other things, contain a particularized description of the items sought and provide for a reasonable time to assemble them. The Act also established a detailed judicial review process for recipients of Section 215 orders to challenge their legality before a FISA Court judge and extended Section 215 for 4 years until December 31, 2009. (U)

Additional changes to Section 215 were adopted with the enactment of the *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*. For example, the 2006 amendments provided that a recipient of a Section 215 order may petition the FISA Court to modify or set aside the nondisclosure

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<sup>12</sup> As permitted by the Reauthorization Act, the FBI Director delegated approval authority for these records to the Deputy Director and the Executive Assistant Director for the FBI's National Security Branch. (U)

requirement after 1 year from the issuance of the order if certain findings are made.<sup>13</sup> (U)

### III. The Process for Seeking Section 215 Orders (U)

As we described in our March 2007 report regarding the use of Section 215 orders from 2002 through 2005, the process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, FISA Court review, and FBI service of the order. (U)

The process to obtain a Section 215 order normally begins when an FBI case agent in a field office prepares a business records request form, which requires the agent to provide, among other things, the following information: a brief summary of the investigation, a specific description of the items requested, an explanation of the manner in which the requested items are expected to provide foreign intelligence information, and the identity of the custodian or owner of the requested items. The request form must be approved by the squad's Supervisory Special Agent, the Chief Division Counsel, and the SAC at the FBI field office. The approval process is automated through the FBI's FISA Management System (FISAMS), which sends electronic notifications to each individual responsible for taking the next action in order to process the business record in the field office. After the approvals are completed in the field office, the FISAMS notifies the "substantive desk" (in the Counterterrorism Division or Counterintelligence Division) at FBI Headquarters. (U)

At FBI Headquarters, the business records request form is reviewed and approved by both the substantive desk and the Office of General Counsel's NSLB. Once the FISAMS delivers the request to the substantive desk, it is assigned to an NSLB attorney who works with the case agent and other FBI personnel to obtain the information the NSLB attorney believes is necessary to include in the draft application and order. The draft application package is then reviewed by NSLB supervisors and forwarded to OIPR, where the request is assigned to an OIPR attorney. (U)

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<sup>13</sup> USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178. The Court may grant a petition to modify or set aside a petition if the Court finds there is no reason to believe that disclosure may endanger the national security, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety any person. However, if the Attorney General, Deputy Attorney General, or FBI Director certifies that the disclosure may endanger the national security or interfere with diplomatic relations, the certification will be treated as conclusive unless the Court finds that such a certification was made in bad faith. (U)

The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to obtain the information the OIPR attorney believes is necessary to include in the draft application and order. An OIPR supervisor then reviews the draft application package. The final application package is returned to the FBI for an accuracy review and additional edits may be made based on the FBI's review of the final package. Upon completion of the final version, signatures of designated senior FBI personnel are obtained and an OIPR attorney prepares the package for presentation to the FISA Court. (U)

While the final signatures are collected, OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with an advance copy of the application and order, which is called a "read" copy. The FISA Court, through a FISA Court legal advisor, may identify concerns and request changes to the documents after reviewing the "read" copy. OIPR and the FBI then address the Court's questions or concerns and make revisions to the application or order. If the FISA Court deems it necessary, OIPR then formally presents the application package to the FISA Court at the scheduled hearing.<sup>14</sup> If the FISA Court judge approves the application, the judge signs the order. At the hearing, the judge may make handwritten changes to the order and, if so, will sign the order with the handwritten modifications. (U)

The order is then entered into the FISAMS and served by the FBI field office nearest to the provider designated in the order. Among other things, the order sets forth the time period for producing the items. (U)

#### **IV. How Section 215 Information is Collected, Analyzed, Retained, and Disseminated (U)**

The FBI continues to collect, analyze, and retain Section 215 information as described in our previous report. In brief, a Section 215 order is served by the FBI office nearest the custodian of records named in the Court order. The records are either provided to the FBI in hard copy or in electronic format. Upon receipt, the records may be uploaded into the Automated Case Support (ACS) system, the FBI's electronic case file system, or reviewed and analyzed by the case agent or an FBI analyst. If the records are provided in electronic format, they may be uploaded into the ACS system by a technician prior to an agent's review. If the records are provided in paper format, the agent may review them and if the case agent determines no further investigation is warranted, the agent may store the information with the rest of the investigative case file. Whether provided in paper or electronic format, the case agent may write an Electronic

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<sup>14</sup> Some applications are signed by the FISA Court without requiring an OIPR attorney to appear at the scheduled hearing. ~~(S)~~ (U)

Communication (EC) summarizing the information obtained for purposes of documenting the existence of the records electronically in the ACS system.  
(U)

If the information warrants dissemination within the FBI, the agent prepares an EC to the relevant field office or offices. If the information warrants dissemination outside of the FBI, such as to an intelligence agency or foreign government, the agent provides the records to the appropriate FBI office for approval. Records provided to a foreign government for intelligence purposes are vetted through the Designated Intelligence Disclosure Official and records provided for use in a criminal proceeding are processed pursuant to the Mutual Legal Assistance Treaty. (~~S~~) (U)

### CHAPTER THREE OVERVIEW OF SECTION 215 REQUESTS PROCESSED IN 2006 (U)

#### I. Introduction (U)

As part of the OIG's review of the use and effectiveness of Section 215 authorities, the Reauthorization Act directed the OIG to examine the following: (U)

- Every business record application submitted to the FISA Court including whether: (a) the FBI requested that the Department of Justice submit a business record application to the FISA Court and the application was not submitted, and (b) whether the FISA Court granted, modified, or denied any business record application; (U)
- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions; (U)
- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority; (U)
- The effectiveness of the business record requests as an "investigative tool," including: (a) what types of records are obtained and the importance of those records in the intelligence activities of the FBI and the DOJ; (b) the manner in which the information obtained through business record requests is collected, retained, analyzed, and disseminated by the FBI; (c) whether and how often the FBI used information obtained from business record requests to produce an "analytical intelligence product" for distribution to, among others, the intelligence community or federal, state, and local governments; and (d) whether and how often the FBI provided information obtained from business record requests to law enforcement authorities for use in criminal proceedings; and (U)
- With respect to 2006, an examination of the minimization procedures adopted by the Attorney General pursuant to the Reauthorization Act and whether such minimization procedures protect the constitutional rights of United States persons.<sup>15</sup> (U)

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<sup>15</sup> The Reauthorization Act also directed that the OIG examine the justification for the failure of the Attorney General to issue implementing procedures governing requests for (Cont'd.)

In this chapter we provide an overview of FBI requests for Section 215 orders that were processed in 2006. We describe the number of requests submitted by FBI agents, the number of Section 215 orders obtained, the type of information requested, and the number of requests that were withdrawn. (U)

## II. Two Uses of Section 215 Authority (U)

In 2006, as in previous years, FBI Headquarters and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: "pure" and "combination" Section 215 applications. (U)

A "pure" Section 215 application is a term used by OIPR to refer to a Section 215 application for any tangible item that is not associated with applications for any other FISA authority. For example, a Section 215 request for driver's license records from state departments of motor vehicles would constitute a pure Section 215 request. (U)

A "combination" application is a term used by OIPR to refer to a Section 215 request that is added to or combined with a FISA application for pen register/trap and trace orders.<sup>16</sup> The use of the combination request evolved from OIPR's determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through the orders.<sup>17</sup> (U)

### A. Pure Section 215 Applications (U)

We reviewed all pure Section 215 applications that NSLB or OIPR processed in 2006 for submission to the FISA Court. In this section, we describe the number of pure Section 215 requests; the number of pure applications formally submitted to and approved by the FISA Court; the number of U.S. and non-U.S. persons that were the subjects of these applications; the types of records obtained; the FBI field offices that requested Section 215 applications; and the types of investigations that generated Section 215 requests. (U)

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business records applications and whether such delay harmed national security. We addressed this request in our March 2007 Section 215 report. (U)

<sup>16</sup> A pen register is a surveillance device that captures the phone numbers dialed on outgoing telephone calls; trap and trace devices capture the numbers identifying incoming calls. (U)

<sup>17</sup> We discuss the origin of combination requests in more detail in Chapter Three of our March 2007 report. (U)



**1. Number of Pure Section 215 Applications (U)**

In 2006, the FBI or OIPR processed 21 requests for pure Section 215 applications. Of these, 15 were formally submitted to the FISA Court for approval – 11 were submitted in 2006 and 4 were submitted in 2007.<sup>18</sup> The six additional requests were "withdrawn." Withdrawn applications are those which are either not presented or not formally presented to the FISA Court for approval.<sup>19</sup> (U)

Each of the 15 formal submissions processed in 2006 was approved by the FISA Court. Table 3.1 illustrates this information. (U)

b1  
b3  
b7E

**TABLE 3.1  
Pure Section 215 Applications  
Processed by NSLB or OIPR in 2006 (U)**

	2006 <sup>(U)</sup>
Number of applications processed during 2006 and formally submitted to the FISA Court (U)	15 (U)
Number of applications processed during 2006 and withdrawn (U)	6 (U)
<b>Total applications processed during 2006 (U)</b>	<b>21 (U)</b>

Source: OIPR and FBI (U)

\*Note: The 15 applications processed during 2006 include 4 that the FISA Court approved in 2007. The six withdrawn applications processed during 2006 include one that was withdrawn in 2007. (U)

In total, between 2002 and 2006, 36 Section 215 applications were processed and formally submitted to the FISA Court. Each of the 36 was approved, as indicated in Table 3.2. (U)

<sup>18</sup> OIPR formally submitted interim standard minimization procedures to the FISA Court in 2006. Although this submission was given a business record docket number, it was not a Section 215 application and therefore we do not count it as a business record application. We discuss the interim standard minimization procedures in Chapter Seven of this report. (U)

<sup>19</sup> One of the six withdrawn applications was presented to the FISA Court twice as a "read" copy before it was withdrawn. We discuss the reasons for the withdrawn applications in Chapter Four. (U)

**TABLE 3.2**  
**Pure Section 215 Orders Issued by the**  
**Foreign Intelligence Surveillance Court (U)**

	2002 (U)	2003 (U)	2004 (U)	2005 (U)	2006* (U)	Total (U)
Total number of applications submitted to and approved by the FISA Court (U)	0 (U)	0 (U)	7 (U)	14 (U)	15 (U)	36 (U)

Source: OIPR and FBI (U)

\*Note: The 15 applications processed during 2006 include 4 that the FISA Court approved in 2007. (U)

**2. Subjects of Pure Section 215 Applications (U)**

We compiled the number of U.S. and non-U.S. persons who were identified as the subject of the Section 215 request and the underlying FBI investigation. We relied on the information provided in the Section 215 applications for this information.<sup>20</sup> Table 3.3 shows the results for applications processed in 2006. (U)

**TABLE 3.3**  
**Number of U.S. Persons and Non-U.S. Persons Identified as Subjects**  
**in Section 215 Applications Processed in 2006\* (U)**

	Approved applications (U)	Withdrawn applications (U)	Total (U)
U.S. Person (U)	[REDACTED]		
Non-U.S. Person (U)			

Source: OIPR and FBI (U)

\*Note: Table 3.3 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [REDACTED] (S)

(S) [REDACTED] (U) [REDACTED] (S) [REDACTED] (S)

The number of persons referenced in Table 3.3 is greater than the number of applications approved by the FISA Court because Section 215 applications can name more than one subject, and we counted each subject separately [REDACTED] if the applications requested business records for more than one subject [REDACTED] applications requested business records for [REDACTED] different subjects. (S) (U)

Moreover, Table 3.3 does not present the full universe of U.S. persons and non-U.S. persons named as subjects or otherwise affected by Section

<sup>20</sup> As previously stated, the FISA statute defines a "United States person" as a citizen, legal permanent resident, unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, or corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(f). (U)

b1  
b3  
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b1  
b3  
b7E

215 applications processed in 2006 for two reasons. First, Table 3.3 does not include individuals who were the subject of a Section 215 application but not the subject of an FBI investigation (a "non-subject"). We did not include the number of non-subjects because [redacted] Section 215 applications requested records of non-subjects, but [redacted] identified whether the non-subjects were U.S. or non-U.S. persons.<sup>21</sup> (~~S~~) (U)

b7E

Second, Table 3.3 does not reflect the number of U.S. persons and non-U.S. persons about whom information was collected as a result of [redacted]

[redacted] (~~S~~) (U)

b1  
b3  
b7E

In our March 2007 report, we reported that in 2004 (the first calendar year in which pure applications were submitted to the FISA Court) [redacted]

b7E

[redacted]

[redacted] With these important caveats, Table 3.4 shows the number of subjects that were identified as U.S. and non-U.S. persons for 32 of the 36 Section 215 applications processed from 2002 through 2006 and approved by the FISA Court. (~~S~~) (U)

**TABLE 3.4**  
**Number of U.S. Persons and Non-U.S. Persons Identified as Subjects in Section 215 Orders Processed from 2002 through 2006 (U)**

	2002 (U)	2003 (U)	2004 (U)	2005 (U)	2006* (U)	Total (U)
U.S. Person (U)	0 (U)	0 (U)	[redacted]			
Non-U.S. Person (U)	0 (U)	0 (U)	[redacted]			
<b>Total</b>	<b>0 (U)</b>	<b>0 (U)</b>	[redacted]			

b1  
b3  
b7E

Source: OIPR and FBI (U)

\*Note: CY 2006 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes the [redacted]

[redacted] (~~S~~) (U)

b1  
b3  
b7E

<sup>21</sup> [redacted] Section 215 applications requested records for non-subjects. One

b7E

[redacted]

[redacted] (~~S~~) (U)

### 3. Types of Records Requested in Section 215 Applications (U)

We also identified the types of business records that were sought in Section 215 applications processed in 2006. Table 3.5 shows the types of records requested, as well as the number of requests for each type of record in Section 215 applications processed in 2006 and approved by the FISA Court, excluding [redacted] (S)

b1  
b3  
b7E

[redacted] Table 3.6 shows the same information for the withdrawn Section 215 applications processed in 2006. (S)

(S) (U)

**TABLE 3.5**  
**Types of Records Requested in Pure Section 215 Applications Processed in 2006 and Approved by the FISA Court\* (U)**

Type of Record Requested (U)	Approved Applications (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
<b>Total</b>	<b>11 (U)</b>

b7E

Source: OIPR and FBI (U)

\*Note: Table 3.5 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes the [redacted] (S)

[redacted] (S) (U)

b1  
b3  
b7E

**TABLE 3.6**  
**Types of Records Requested in Pure Section 215 Applications Processed in 2006 and Withdrawn\* (U)**

Type of Record Requested (U)	Withdrawn Applications (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
[redacted] (S) (U)	[redacted] (S) (U)
<b>Total</b>	<b>6 (U)</b>

b7E

Source: OIPR and FBI (U)

\*Note: Table 3.6 includes an application processed in 2006 but withdrawn in 2007. (U)



**5. Types of Investigations from which Section 215 Requests Originated (U)**

We also examined the types of investigations from which pure requests originated. The pure Section 215 applications originated from either counterintelligence (CI), counterterrorism (CT), or cyber investigations. Table 3.8 shows the types of investigations from which pure Section 215 applications processed in 2006 and approved by the FISA Court originated, excluding [redacted]

b1  
b3  
b7E

**TABLE 3.8**

**Types of Investigations that Generated Pure Section 215 Requests Processed in 2006 and Approved by the FISA Court (U)**

Case Type (U)	2002 (U)	2003 (U)	2004 (U)	2005 (U)	2006* (U)	Totals (U)
CI (U)	0 (U)	0 (U)	3 (U)	6 (U)	4 (U)	13 (U)
CT (U)	0 (U)	0 (U)	4 (U)	4 (U)	6 (U)	14 (U)
Cyber (U)	0 (U)	0 (U)	0 (U)	1 (U)	1 (U)	2 (U)

Source: OIPR and FBI (U)

\*Note: For 2006, Table 3.8 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted]

b1  
b3  
b7E

**B. Combination Section 215 Applications and Orders in 2006 (U)**

In this section, we describe the number and types of applications for combination orders that were submitted to the FISA Court in 2006. A combination application is a term used by OIPR to refer to a Section 215 request that was added to or combined with a FISA application for a pen register/trap and trace. The use of the combination request evolved from OIPR's determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through those orders. As a result, Section 215 requests were added to pen register/trap and trace orders to seek subscriber information. OIPR also used combination orders in 2005 and 2006 to obtain [redacted]

b7E

After passage of the Reauthorization Act on March 9, 2006, combination orders became unnecessary for subscriber information and OIPR temporarily ceased using combination orders [redacted]. Section 128 of the Reauthorization Act amended the FISA statute to [redacted]

b7E

b7E



authorize subscriber information to be provided in response to a pen register/trap and trace order. Therefore, combination orders for subscriber information were no longer necessary. In addition, OIPR determined that substantive amendments to the statute undermined the legal basis for which OIPR had received authorization [redacted] from the FISA Court. Therefore, OIPR decided not to request [redacted] pursuant to Section 215 until it re-briefed the issue for the FISA Court.<sup>24</sup> As a result, in 2006 combination orders were submitted to the FISA Court only from January 1, 2006, through March 8, 2006. (S) (U)

b7E

**1. Number of Combination Applications Submitted to and Approved by the FISA Court (U)**

From January 1, 2006, through March 8, 2006, the FISA Court approved 32 combination business record applications. Of the 32 combination applications, 7 were new requests for combination orders and 25 were requests to renew or extend previous orders. (U)

**2. Types of Records Requested in Combination Orders (U)**

We determined that each business record application attached to the pen register/trap and trace applications included a request for subscriber information for the telephone numbers captured in the pen register/trap and trace. Some of the business record requests also included requests [redacted]

(S) [redacted] The 32 combination applications requested subscriber information [redacted] of those phone numbers. (S) (U) (S)

b1  
b3  
b7E

**3. Number of U.S. Persons Identified as Subjects in Combination Orders (U)**

As with the pure Section 215 orders, we identified the number of U.S. and non-U.S. persons identified as "subjects" in combination orders. We found that [redacted] subjects were named in the 32 combination orders. Of the [redacted] subjects [redacted] were "U.S. persons" and [redacted] were "non-U.S. persons." (S) (U) (S)

(S) [redacted] (S) (S)

b1  
b3  
b7E

<sup>24</sup> OIPR first briefed the issue to the FISA Court in February 2006, prior to the Reauthorization Act. [redacted]

b7E

[redacted] (S) (U)

**4. FBI Field Offices that Initiated Requests for Combination Orders (U)**

(S) We determined that  FBI field offices submitted 32 combination applications approved by the FISA Court from January 1, 2006, through March 8, 2006. (S) (U)

b1  
b3  
b7E

**5. Types of Investigations from which Combination Orders Originate (U)**

Of the 32 combination orders we reviewed, 25 were issued in counterterrorism cases and 7 were issued in counterintelligence cases. (U)

## CHAPTER FOUR SECTION 215 REQUESTS PROCESSED IN 2006 (U)

In this chapter, we discuss the FBI's requests for Section 215 orders processed in 2006. We first describe pure section 215 requests and identify the types of records requested and any delays in the processing time.<sup>25</sup> If a Section 215 request was withdrawn, we identify the reasons for the withdrawal and at what stage it was withdrawn. If a Section 215 application and order was presented to the FISA Court, we identify whether the Court granted, modified or denied the request. If a Section 215 order was issued and records were received by the agent, we describe how the records were used. We then briefly discuss Section 215 combination orders. (U)

### I. Pure Section 215 Requests (U)

In this section we discuss 11 of the 15 pure Section 215 requests processed in 2006 for which Section 215 orders were obtained and the 6 requests that were withdrawn. We do not discuss [redacted] (S)

[redacted] (S)

b1  
b3  
b7E

#### A. Requests for which Section 215 Orders Were Obtained (U)

##### 1. Request for [redacted] (U)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request for [redacted] in a counterintelligence investigation. [redacted] (S)

[redacted] (S)

The Section 215 request was processed in 188 days. [redacted] (S)

b1  
b3  
b7E

<sup>25</sup> We do not discuss every delay in processing, only those which had a significant and identifiable effect on the overall processing time. (U)

[Redacted]

b1  
b3  
b7E

After reviewing the read application and order, the FISA Court requested that OIPR clarify the specialized minimization procedures and indicate that the specialized minimization procedures were in addition to the interim standard minimization procedures adopted by the Attorney General in September 2006. (U)

In response to the Section 215 order [Redacted]

(S) [Redacted] The agent told the OIG that [Redacted] through this Section 215 request he learned that [Redacted]

b1  
b3  
b7E

[Redacted]

**2. Request for** [Redacted]

An FBI agent submitted a Section 215 request for [Redacted]

[Redacted] in a counterintelligence investigation. [Redacted]

b1  
b3  
b7E

[Redacted]

b1  
b3  
b7E

[Redacted]

b1  
b3  
b7E

<sup>26</sup> Minimization procedures limit access, retention, and dissemination of business records. The Attorney General's interim standard minimization procedures applicable to all business records that were issued in September 2006 are discussed in Chapter Seven. (U)

This Section 215 request was processed in 175 days. The case was delayed initially for almost 2 months at the field office because the agent thought the request was pending at NSLB when it was actually awaiting approval by a field office supervisor. Once the request was drafted by NSLB and sent to OIPR, the two offices disagreed as to whether [redacted]

b1  
b3  
b7E

[redacted] (S) (S)

According to the agent, the information received pursuant to the Section 215 order did not further the counterintelligence investigation. (U)

**3. Request for [redacted]** (S) (U)

b7E

An FBI agent submitted a Section 215 request in a counterintelligence investigation [redacted]

b1  
b3  
b7E

[redacted] (S) (S)

This request was processed in 203 days [redacted]

b1  
b3  
b7E

[redacted] (S) (S)

(S) [redacted] Ultimately, the FBI did neither. According to the FBI General Counsel, additional minimization procedures were not necessary because of the limited manner in which the FBI intended to use the information from this Section 215 request. (S) (U)

<sup>27</sup> A full FISA is a request for authority to conduct electronic surveillance or physical searches and is more detailed than a Section 215 request because the application must establish probable cause to believe, among other things, that the target is a foreign power or an agent of a foreign power. (U)

After reviewing the read application and order, the FISA Court requested that OIPR explain the relevance of an aspect of the request. According to OIPR e-mails, the OIPR attorney had previously asked NSLE the same question and was able to explain the relevance to the FISA Court. The court granted the Section 215 request. According to the case agent, the (S) [redacted] produced an additional 2 months of records not authorized by the FISA Court order. ~~(S)~~ (U)

b1  
b3  
b7E

The agent told the OIG that he made a copy of the [redacted] records that did not include the two additional months of [redacted] produced to the FBI but not authorized by the FISA Court order. The agent then sealed the [redacted] records that he had originally received from the provider into an envelope. ~~(S)~~ (U)

b7E

The agent stated that he sent the redacted copy of the records to FBI [redacted]. The agent stated that the additional records and the size of the [redacted] had delayed his evaluation of the portion of records appropriately produced pursuant to the Court order; however, he stated that he expected that these records would be useful. ~~(S)~~ (U)

b7E

The FBI informed the OIG that it had determined that the receipt of additional records beyond the scope of the FISA Court order was not reportable to the Intelligence Oversight Review Board (IOB) and that the FBI would consider the additional material to be a voluntary production by the provider. OIPR had not yet decided whether the incident was reportable to the FISA Court.<sup>28</sup> (U)

4. Request for [redacted] (S) [redacted] (S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a counterintelligence investigation [redacted] (S)

[redacted] (S)

b1  
b3  
b7E

<sup>28</sup> We discuss this collection of additional records again in Chapter Six. (U)



b1  
b3  
b7E

[Redacted]

(S)

This Section 215 request was processed in 120 days. The request raised questions concerning the appropriate use of a Section 215 order [Redacted]

(S)

[Redacted]

(S)

b1  
b3  
b7E

(S)

Instead, the NSLB attorney decided to request the records through a Section 215 application. In addition, the NSLB attorney included in the application a request for [Redacted]

(S)

(S)

[Redacted]

As a result of the Section 215 order [Redacted]

(S)

b1  
b3  
b7E

[Redacted]

(S)

5. Request for [Redacted]

(S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a counterterrorism investigation [Redacted] who was a non-U.S. person. A [Redacted] was in possession of weapons, explosives, and false documents. According to the case agent, the FBI opened a terrorism investigation [Redacted]

(S)

[Redacted]

[Redacted] the United States intended to deport him. The police in the country to which he was going to be deported wanted to arrest the subject on forgery charges stemming from the use of a fraudulent identification (purportedly issued by the foreign government) found [Redacted]

(S)

b1  
b3  
b7E

According to an FBI analyst, pursuant to the Mutual Legal Assistance Treaty requirements, the FBI provided the foreign police with the fraudulent

identification and other evidence to be used in a potential criminal prosecution.

[REDACTED] (S)

b1  
b3  
b7E

the NSLB attorney decided to submit a Section 215 request.<sup>29</sup>

(S) (U)

This Section 215 request, processed in 125 days, raised 2 substantive issues. The first was a legal question as to whether [REDACTED] were business records within the meaning of Section 215.

(S)

b1  
b3  
b7E

[REDACTED] (S)  
[REDACTED] (S)  
According to e-mail communications we reviewed, the NSLB attorney assigned to this case stated that it was unnecessary to establish probable cause since the [REDACTED] (S)

[REDACTED] (S)  
The NSLB attorney noted that the [REDACTED] could accept an NSL for [REDACTED] but decided not to issue an NSL because of concerns that the [REDACTED] (S)

(S)

The second substantive issue was whether [REDACTED] was associated with a terrorist organization and therefore whether the records were relevant to a national security investigation.

(S)

b1  
b3  
b7E

[REDACTED] (S)

According to the FBI agent [REDACTED] (S)

[REDACTED] (S)

FBI determined were of potential intelligence or national security value.

[REDACTED] (S)  
the Designated Intelligence Disclosure Official at FBI Headquarters approved [REDACTED] to the foreign country for intelligence value only, and not for use in a criminal proceeding. [REDACTED] (S)

b1  
b3  
b7E

[REDACTED] were of no intelligence value to the United States. (S) (U)

<sup>29</sup> A Section 215 order may be issued for a tangible thing that is also obtainable pursuant to a grand jury subpoena or court order directing the production of records or tangible things. 50 U.S.C. § 1861 (c)(2)(D). (U)

[REDACTED] (S)

b1  
b3  
b7E

6. Request for [redacted] (S)

(S) An FBI agent submitted a Section 215 request for records related to [redacted] by several non-U.S. persons in a counterterrorism case. The Section 215 request was generated at FBI Headquarters at the request of a foreign government which intended to prosecute the subjects for terrorism [redacted] (S)

b1  
b3  
b7E

This request was processed in 72 days. After reviewing the read application and order, the FISA Court requested that OIPR revise the application and order to more precisely identify the records requested [redacted] (S)

b1  
b3  
b7E

Section 215 requires that orders describe the records requested with "sufficient particularity to permit them to be fairly identified." 50 U.S.C. § 1861(b)(2)(A). (S) (U)

The case agent told the OIG that he provided [redacted] with a summary of the records for lead purposes over 1 month before the defendants pled guilty and 4 months after the trial was originally scheduled to begin. According to the case agent, some of the delay in obtaining the business records occurred because the request [redacted] (S)

b1  
b3  
b7E

(U) Because a summary of the records was not provided until after the trial began and a month or two before the defendants pled guilty, the agent told us that he did not think the records were used at the trial. The agent also told the OIG that the investigator from the foreign government asked to meet with DOJ officials to discuss how the Mutual Legal Assistance Treaty process could work faster in the future. The agent told the OIG that the records produced in response to the Section 215 order were not relevant to any FBI investigations of U.S. persons. (S)

7. Request for [redacted] (S)

b1  
b3  
b7E

(S) An FBI agent submitted a Section 215 request in a counterterrorism investigation of a U.S. person [redacted] (S)

[redacted] named relatives were subjects of other FBI investigations. One of the subjects [redacted] was believed to be associated with a terrorist organization. [redacted] (S)

b1  
b3  
b7E

[redacted] (S)

b1  
b3  
b7E

[Redacted]

b1  
b3  
b7E

This Section 215 request was processed in 212 days. According to the NSLB attorney who handled the matter, the agent who submitted the request established the relevance of the [Redacted] for the U.S. subject and his relatives who were also subjects of other FBI investigations, but did not provide any information to establish the relevance of the records for [Redacted]

(S)

b1  
b3  
b7E

Although the agent eventually persuaded the NSLB attorney to include [Redacted] because the subject was in telephone contact with [Redacted] OIPR raised a concern [Redacted]

(S)

(S)

(S)

[Redacted] After discussions between the NSLB attorney and an OIPR supervisor, OIPR submitted to the FISA Court an application for the names and addresses associated with the three subjects of FBI investigations and omitt[Redacted] but included [Redacted]

(S)

[Redacted]

(S)

This request was further delayed when it was not properly entered into the FISAMS, OIPR added and then removed detailed facts from a related FISA application, the assigned OIPR attorney went on vacation, and OIPR modified the Section 215 template to conform to the requirements of the newly enacted Reauthorization Act. (U)

In response to this Section 215 order [Redacted]

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b3  
b7E

[Redacted]

(S)

(S)

(S)

The agent told the OIG that the information received from the Section 215 order did not show evidence of terrorist activities, but that obtaining the information helped close a lead.

~~(S)~~ (U)

**8. Request for** [Redacted]

(S) (U)

(S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a counterterrorism investigation of a U.S. person. The case agent was investigating a subject who conducted business with a company that was linked to a group

suspected of operating a hawala.<sup>32</sup> [redacted]

[redacted]

b1  
b3  
b7E

The Section 215 request was processed in 604 days. According to an NSLB attorney's e-mail, the draft application was sent to OIPR 1 year before the OIPR attorney began communicating with NSLB about the request. The former Acting Counsel for Intelligence Policy told the OIG that on several occasions during the first year the Section 215 application was pending at OIPR, she spoke to the FBI Deputy General Counsel regarding the status of the application. In an e-mail to NSLB from OIPR, the OIPR attorney expressed concerns that the application lacked a nexus to terrorism. OIPR requested additional information regarding the request, such as an [redacted]

b1  
b3  
b7E

[redacted]

In response to the Section 215 order, the agent received records [redacted]

[redacted] however, the agent did not receive information [redacted]

b1  
b3  
b7E

[redacted]

**9. and 10. Requests for [redacted]**

~~(S)~~ (U)

b1  
b3  
b7E

An FBI agent submitted [redacted] Section 215 requests for [redacted] [redacted] as part of a counterterrorism investigation. The requests were deemed urgent based on the serious and credible nature of the threat reported. Because of the threat, the FBI investigated individuals [redacted] [redacted] contact with known contacts of a terrorist organization. The subjects of the Section 215 requests were a U.S. person and a non-U.S.

<sup>32</sup> A hawala is a money transfer system in lieu of or parallel to traditional banks.

~~(S)~~ (U)

person. They were being investigated by the FBI because [redacted]

b1  
b3  
b7E

[redacted] As part of the investigation, the agent wanted to understand the relationship between the two subjects during a specific time period [redacted]

(S)  
(S)  
(S)  
(S)

The Section 215 request for [redacted] was processed in 10 days. The Section 215 request for [redacted] was processed in 17 days. [redacted]

(S)  
(S)  
(S)

b1  
b3  
b7E

[redacted] The FBI then requested full FISA orders for the information, but NSLB suggested seeking Section 215 orders instead. [redacted]

(S)

[redacted] modified those requests to conform to the business record application and submitted the Section 215 applications to NSLB. ~~(S)~~ (U)

The agent received no records in response to the Section 215 orders. According to the agent [redacted] and the agent had initiated his Section 215 request approximately 6 months after the time period he was investigating. ~~(S)~~ (U)

b1  
b3  
b7E

**11. Request for [redacted]** ~~(S)~~ (U)

An FBI agent submitted a Section 215 request for [redacted] intelligence investigations. [redacted]

b1  
b3  
b7E

<sup>33</sup> 18 U.S.C. § 2709 authorizes NSLs for subscriber information and toll billing records information, or electronic communication transactions records. (U)



This request was processed in 137 days. After reviewing the read application and order, the FISA Court requested that OIPR extend the time for the provider to produce the records from 20 to 30 days. (U)

According to the case agent, upon receipt of the record, [redacted] (S)

b1  
b3  
b7E

[redacted] (S)

[redacted] Nevertheless, the case agent stated that the information was useful because it closed the lead and corroborated other information. (U) (S)

**B. Section 215 Requests that were Withdrawn (U)**

In the following section, we describe the six withdrawn Section 215 requests. We discuss the type of records requested, the processing time, and the reason the request was withdrawn. Based on our interviews and document review, we identified two primary reasons for the withdrawal of FBI requests for Section 215 applications: the request lacked sufficient predicate or the provider did not maintain the records requested.<sup>34</sup> We also identify whether the request was withdrawn at NSLB or OIPR. (U)

**1. Request for [redacted] (S)**

b1  
b3  
b7E

An FBI agent submitted a Section 215 request for a ILS person's [redacted] in a counterterrorism case. [redacted] (S)

[redacted] (S)

This Section 215 request was withdrawn from OIPR by the FBI after 434 days [redacted] (S)

b1  
b3  
b7E

[redacted] (S) The Section 215 request was presented to the FISA Court as a read copy application on two [redacted] (S)

<sup>34</sup> We use the term "primary reason" because two investigations changed course while NSLB or OIPR attorneys were working with FBI agents to develop sufficient information to support the request. We consider the change of course to be a secondary reason because both cases changed course before the FBI case agents provided the information required by NSLB or OIPR to submit the Section 215 request to the FISA Court. (U)

occasions. On both occasions, the FISA Court indicated it would not sign the order because of First Amendment concerns. ~~(S)~~ (U)

[Redacted]

b1  
b3  
b7E

2. Request for [Redacted]

(S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a preliminary counterterrorism investigation of a non-U.S. person. [Redacted]

(S)

[Redacted]

(S)

This Section 215 request was withdrawn from NSLB by the FBI after 426 days. Prior to it being withdrawn, the NSLB attorney sent several e-mails to the agent requesting additional information to support the Section 215 request. In response, the agent indicated, among other things

[Redacted]

(S)

b1  
b3  
b7E

[Redacted] FBI e-mail indicates that the General

<sup>35</sup> We discuss this case in detail in Chapter Six at pages 65-74. (U)

Counsel and Deputy General Counsel for NSLB "legally killed" the Section 215 request.<sup>36</sup> (S)(U)

3. Request for [redacted] (S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a counterterrorism investigation of a U.S. person. [redacted] (S)

[redacted] (S)

[redacted] he FBI agent e-mailed FBI Headquarters and confirmed that he was pursuing the Section 215 business record request. (S)(U)

This Section 215 request was withdrawn from NSLB by the FBI after 608 days. The case agent told the OIG that FBI Headquarters informed him that the case would not be approved because the subject was a naturalized U.S. citizen and there was no connection to a foreign power. Although this request was initially provided to OIPR without prior approval by the NSLB attorney, it subsequently was re-routed to and later withdrawn at NSLB. (U)

4. Request for [redacted] (S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a counterterrorism investigation of a U.S. person. The subject was being investigated because of a business contact with an agent of a foreign power. [redacted] (S)

[redacted] (S)

[redacted] The FBI case agent told the OIG that he generally pursued financial information using NSLs, but decided to try the Section 215 request since he had not previously used this investigative tool. (S)(U)

This Section 215 request was withdrawn from NSLB by the FBI after 160 days. The request was withdrawn after several e-mails from the NSLB attorney to the case agents.<sup>37</sup> In the e-mails, the NSLB attorney identified several concerns regarding the request, including [redacted] (S)

b1  
b3  
b7E

[redacted] (S)

<sup>36</sup> In addition, an e-mail from the assigned NSLB attorney indicates that the FBI Deputy General Counsel questioned whether the investigation was properly opened. (U)

<sup>37</sup> NSLB was in contact with two case agents because the case was reassigned while the application was pending. (U)

[Redacted]

(S)

b1  
b3  
b7E

Eventually, the case agent to whom the investigation had been transferred asked to withdraw the request because he did not see the need for the records requested. ~~(S)~~ (U)

**5. Request for**

[Redacted]

(S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request in a cyber-terrorism investigation of a non-U.S. person [Redacted]

[Redacted]

(S)

(S)

This Section 215 request was withdrawn from NSLB by the FBI after 186 days when the agent learned that the provider did not maintain the records requested. (U)

**6. Request for**

[Redacted]

(S)

b1  
b3  
b7E

An FBI agent submitted a Section 215 request for [Redacted] as part of a counterintelligence investigation. [Redacted]

[Redacted]

(S)

(S)

This Section 215 request was withdrawn from OIPR by the FBI after 58 days when the agent learned that the provider did not maintain the records for the employees of the foreign parent company. ~~(S)~~ (U)

**II. Combination Section 215 Requests (U)**

As previously discussed, as a result of the March 2006 Reauthorization Act, combination orders for subscriber information became unnecessary and OIPR ceased preparing combination order [Redacted]

[Redacted] Therefore, in 2006 combination orders were submitted to the FISA Court only from January 1 through March 8, 2006. Below we present a brief overview of the use of combination orders. We also describe the modifications or handwritten notations by the FISA Court to those orders.

(S)

~~(S)~~ (U)

b1  
b3  
b7E

**A. Use of Combination Orders (U)**

[Redacted]

(S)

b1  
b3  
b7E

b7E

[Redacted]

~~(S)~~ (U)

Combination applications are drafted at OIPR and after they are signed by the FISA Court, the orders are sent to the field office nearest the custodian of records for service. The most common combination order is for subscriber information, which identifies the person whose phone was used to contact the subject of an investigation. The subscriber information is only for records that are maintained by the communication provider upon whom the order was served. If the phone number of interest belongs to another provider, other investigative tools such as NSLs can be used to obtain the subscriber information related to that phone number.

b7E

[Redacted]

[Redacted] ~~(S)~~ (U)

Combination orders are also used to obtain [Redacted]. Four agents told us that they received [Redacted] as directed by the FISA Court in 2006. Of the four agents who said they received [Redacted] [Redacted] only two told us that the information was helpful. One agent told us that the [Redacted]

b7E

[Redacted]

[Redacted] ~~(S)~~ (U)

Two agents told us the [Redacted] was not useful. [Redacted]

b7E

[Redacted]

The other agent said he never attempted to utilize the information because his subject moved out of the country. ~~(S)~~ (U)

As we noted in our March 2007 report, agents were not always aware when OIPR added a business record request to their pen register/trap and trace request. We spoke to agents who submitted both initial and renewal requests for pen register/trap and trace orders in 2006. Many agents who submitted initial requests could not tell us whether OIPR added a business record to their pen register/trap and trace requests or whether they received subscriber information pursuant to the order. Agents who submitted

<sup>36</sup> Telephone Applications is an investigative tool that also serves as the central repository for all telephone data collected during the course of FBI investigations. (U)

renewal applications were more likely to be aware of the addition of the business record. If an agent is not aware of the addition of the business record request and the provider does not produce the information required in the court order, then the agent does not know to enforce the Section 215 order. (U)

**B. Modifications and Notations to Combination Orders (U)**

The following section describes the number of Section 215 applications and orders modified by the FISA Court. We identified modifications or notations on four combination orders. (U)

The FISA Court handwrote modifications or notations on four combination applications and orders in 2006. With regard to one combination order, the FBI had informed the FISA Court that it received records in response to, but beyond the scope of, the FISA Court order but had not provided the additional material to OIPR when the FBI sought to renew the order. The FISA Court modified the order to require that the FBI provide the material to OIPR by a specific date. (U)

The second combination order contained a handwritten correction to the expiration date of the Court's order. Although the application correctly stated the order would expire in 90 days, the month of the expiration date in the order was incorrect and the FISA Court modified the order so that the month correctly reflected the 90-day duration of the order. (U)

The remaining two combination orders requested [redacted]

[redacted] The Court's handwritten notations on the two combination orders reference the Court's opinion. (S) (U)

b7E



## CHAPTER FIVE OIG ANALYSIS (U)

In this chapter, we provide our analysis of FBI requests for Section 215 orders processed in 2006. In addition, as required by the Reauthorization Act, we discuss bureaucratic and other impediments to obtaining a Section 215 order, FISA Court modifications to the applications and orders, and the use and effectiveness of the information received pursuant to the Section 215 orders. (U)

### I. Delays in Implementing Section 215 Authority and Other Impediments to Use (U)

The Reauthorization Act directed the OIG to identify bureaucratic or procedural impediments that negatively affected the FBI's ability to obtain Section 215 orders. In this section, we identify the processing time for Section 215 requests in 2006 and then compare our findings for 2006 to the findings in our previous report, which covered Section 215 requests from 2004 through 2005.<sup>39</sup> We then discuss the causes for the delays. (U)

#### A. Pure Section 215 Processing Times in 2006 (U)

In order to calculate the processing time for each Section 215 request in 2006, we sought to determine how long each request was pending at an FBI field office, FBI Headquarters, and OIPR. Initially, we expected to identify the relevant dates through the FBI's FISA Management System (FISAMS) and OIPR's OASIS case management database, the FISA tracking systems used by the FBI and OIPR. However, we learned that the dates recorded in the FBI and OIPR tracking systems were not always reliable. For example, Section 215 requests were not always entered into FISAMS when they were actually initiated in the FBI field office. Other requests were initiated at FBI Headquarters and entered into FISAMS at an arbitrary future date. When this occurred, FISAMS reflected the date the request was entered into the system as opposed to the actual initiation date. For example, FISAMS indicates that one particular Section 215 request was first initiated more than 2 weeks after the FISA Court signed the order. FISAMS also indicates that another Section 215 request was initiated after NSLB sent a completed draft application to OIPR. (U)

Similarly, OIPR's tracking system does not always contain accurate processing dates. For example, OASIS reflects the date on which OIPR first receives an application from FBI Headquarters. However, FBI Headquarters erroneously sent three requests to OIPR before the Section 215 applications

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<sup>39</sup> The first Section 215 request was approved in 2004. (U)

and orders were drafted and approved by NSLB. As a result, these three requests were returned to NSLB for drafting and approvals. OASIS shows the date that OIPR received the misdirected request and not the date it received and began reviewing the draft Section 215 application and order approved by NSLB.<sup>40</sup> (U)

Therefore, the dates we relied upon to identify the processing time for Section 215 applications in 2006 reflect information from our interviews of FBI and OIPR staff, contemporaneous e-mails, and the FBI and OIPR tracking systems. (U)

As used in this report, the "processing time" for a request includes the number of days that elapsed from the date the agent initiated the Section 215 business record request to the date the request was signed by the FISA Court or withdrawn. We did not include the time required to serve the order on the recipient in our processing time calculation because that information was not available for each request. (U)

Chart 5.1 illustrates the total processing time for the 11 of the 15 approved Section 215 orders processed in 2006. The chart provides the processing time for each entity involved in the process. The chart does not include [redacted]

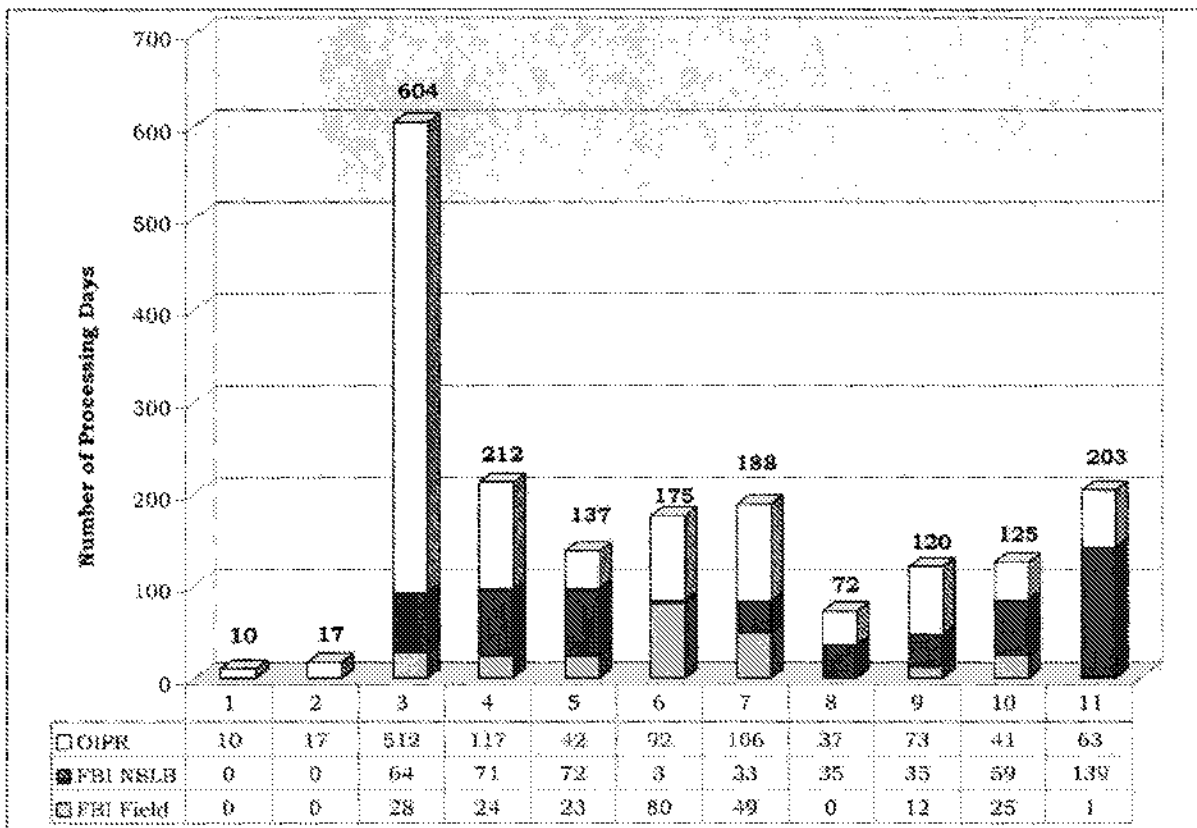
[redacted] (S)

b1  
b3  
b7E

<sup>40</sup> In addition, in 2006 neither the FBI's nor OIPR's tracking systems included information that tracks applications related to [redacted] OIPR began to include a reference to applications related to [redacted] in 2007 after the OIG questioned how OIPR could accurately track and report the total number of Section 215 applications in its semi-annual reports to Congress if the recordkeeping system did not include applications related to [redacted] (S)

b1  
b3  
b7E

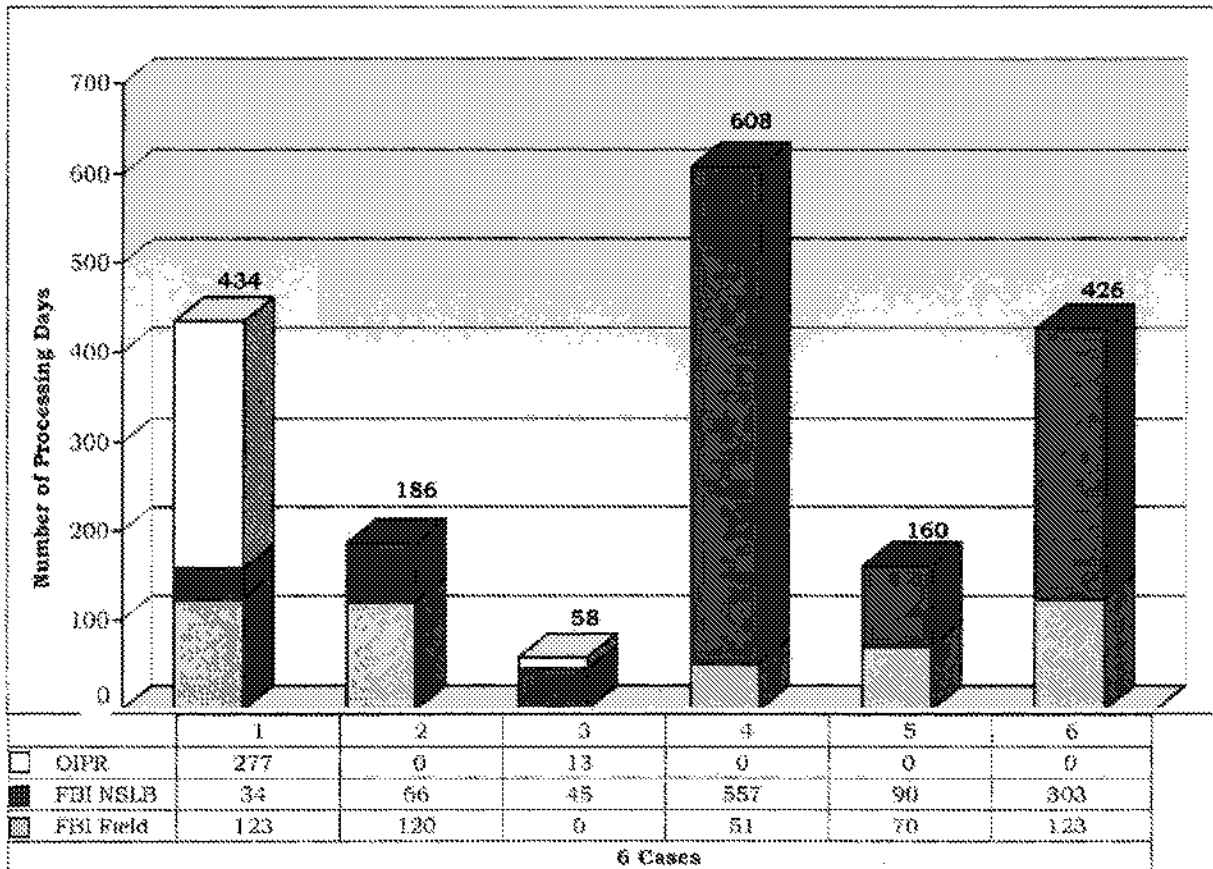
**CHART 5.1**  
**Processing Time for 11 "Pure"**  
**Section 215 Requests Processed in 2006 (U)**



Source: FBI and OIGR (U)

Chart 5.2 illustrates the total processing time for the six withdrawn requests processed in 2006. (U)

**CHART 5.2**  
**Processing Time for Six Withdrawn "Pure" Section 215 Requests Processed in 2006 (U)**



Source: FBI and OIPR (U)

NSLB and OIPR attorneys told us that the experience both agencies have gained in handling Section 215 requests resulted in efficiencies in the review and approval process. By 2005, NSLB and OIPR had assigned specific attorneys to process the business record applications in their respective offices. The dedicated FBI and OIPR attorneys developed a procedure and a working relationship that allowed them to process business record applications more efficiently.<sup>41</sup> (U)

<sup>41</sup> The process has since changed at both the FBI and OIPR. In early 2007, the FBI decided not to dedicate a specific attorney to Section 215 requests and now assigns routine requests to one of four designated attorneys who either provide a preliminary draft of the business record application to OIPR or assist a colleague in doing so. In addition, in October 2007 the OIPR attorney assigned to Section 215 requests left OIPR and OIPR assigned the Section 215 responsibilities to two other attorneys. (U)

However, we found that several requests were delayed at FBI Headquarters in 2006 because they were prematurely sent to OIPR, held up by the substantive unit at FBI Headquarters, or assigned to the wrong NSLB attorney. We also found some processing delays at OIPR as well. We discuss both types of processing delays in the following section. (U)

**B. Pure Section 215 Processing Times 2004-2006 (U)**

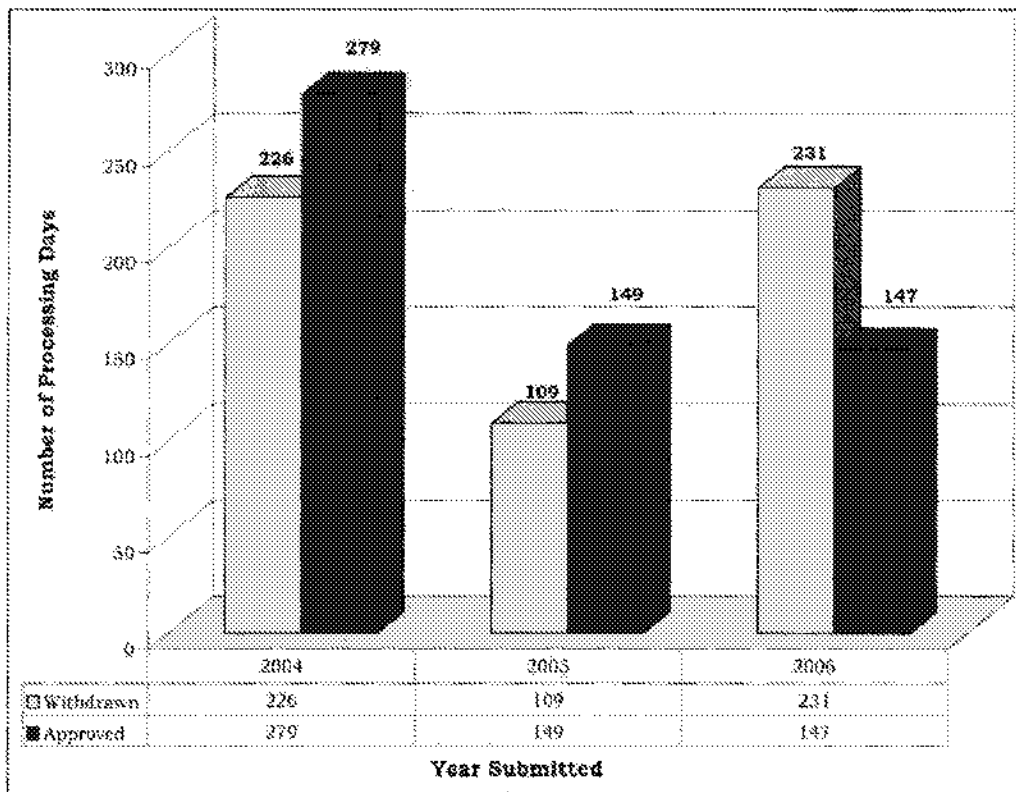
The FBI and OIPR processed 21 pure Section 215 requests in 2006. In this section, we discuss only 17 of the 21 applications. [redacted] (S)

(S) [redacted] The processing time for these requests ranged from 10 days to 608 days, with an average of 169 days for the approved orders and 312 days for the withdrawn requests. These statistics are not directly comparable to those in our previous report because we have included the time spent preparing the application in an FBI field office in our calculations for 2006. (S) (U)

However, if we exclude FBI field office time, the 2006 processing time average is 147 days for approved orders and 231 days for withdrawn requests. Chart 5.3 illustrates the combined FBI Headquarters and OIPR processing time for Section 215 requests from 2004 through 2006, excluding FBI field time. Chart 5.3 shows that the processing time for approved Section 215 requests has decreased each year since 2004, although the processing time for withdrawn requests rose in 2006. (U)

b1  
b3  
b7E

**CHART 5.3**  
**FBI Headquarters and OIPR Average Processing Time**  
**for Section 215 Requests from 2004 through 2006\* (U)**



Source: FBI and OIPR (U)

\*Note: Chart 5.3 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted]

[redacted] (S) (U)

(S)

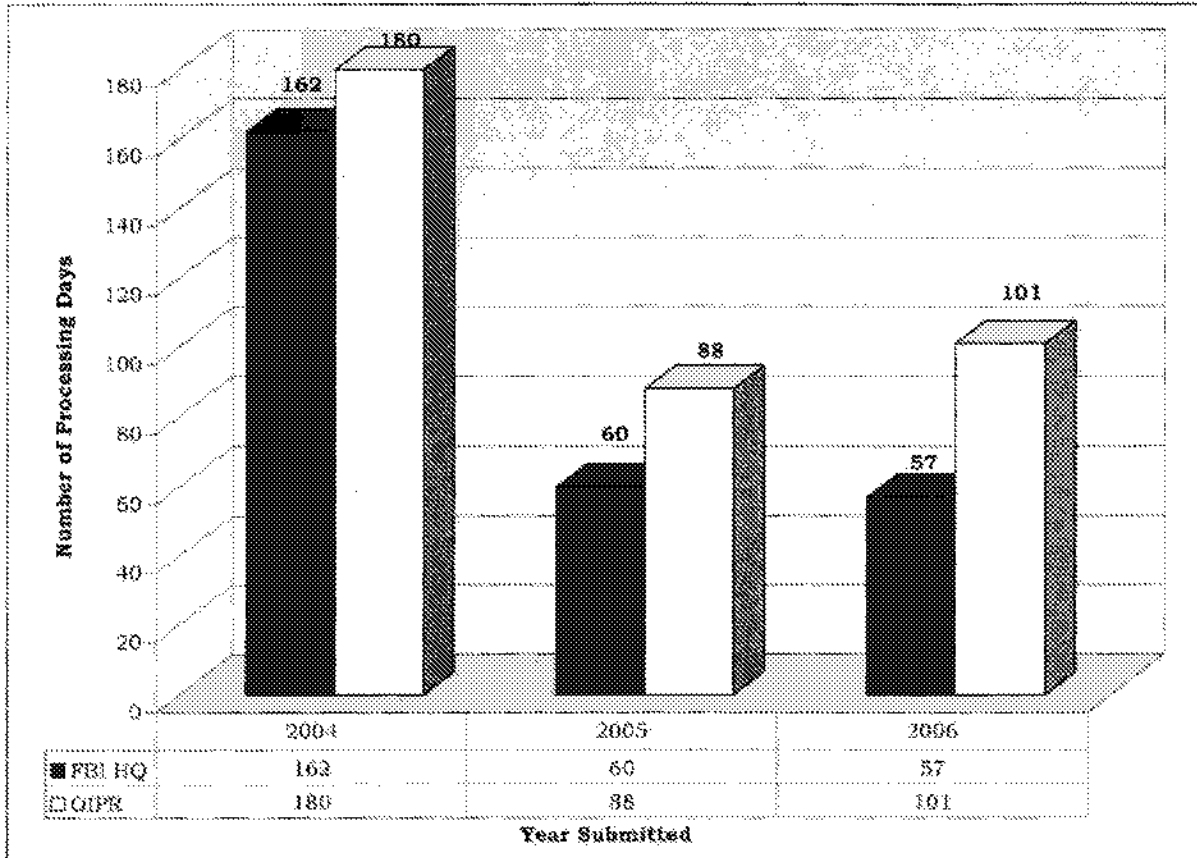
b1  
b3  
b7E

Eleven Section 215 orders were processed in 2006 and approved by the FISA Court. The average processing time at FBI Headquarters and OIPR for applications that resulted in orders from 2004 through 2006 is illustrated in Chart 5.4. Chart 5.4 illustrates that FBI Headquarters and OIPR processing time decreased significantly from 2004 to 2005 and has remained relatively constant in 2005 and 2006. Processing time in OIPR increased slightly in 2006.<sup>42</sup> (U)

<sup>42</sup> We did not compare the average processing time for withdrawn requests between the FBI and OIPR because the FBI determines when and if to withdraw a request. (U)



**CHART 5.4**  
**FBI Headquarters and OIPR Average Processing Time for Section 215**  
**Orders from 2004 through 2006\* (U)**



Source: FBI and OIPR (U)

\*Note: Chart 5.4 includes the four Section 215 orders processed in 2006 and signed in 2007 and exclude [redacted]

(S)

b1  
b3  
b7E

We identified the same reasons for processing delays in 2006 as we described in our previous report – some FBI employees’ unfamiliarity with Section 215, too few resources, the multi-layered review process, and substantive issues regarding statutory interpretation. (U)

We discuss both the procedural and substantive delays below. (U)

**C. Bureaucratic and Procedural Impediments (U)**

**1. FBI Employees’ Unfamiliarity with Section 215 Requests and the Approval Process (U)**

Our review determined that FBI employees’ unfamiliarity with Section 215 requests was the primary cause of the delays that occur from the time a case agent initiated a Section 215 request until the time the request was assigned to the NSLB attorney responsible for business record applications. (U)

As previously noted, in order to initiate a request an agent must complete a Section 215 request form found on FISAMS which automatically directs the request through the proper chain of approvals in the field office and then to the substantive desk at FBI Headquarters. At FBI Headquarters, an NSLB supervisor assigns the request to the NSLB attorney responsible for business records. The NSLB attorney then drafts the Section 215 application package, which is reviewed by an NSLB supervisor before it is provided to OIPR. An OIPR line attorney and supervisor review and edit the Section 215 package before the "final" version is sent to NSLB for final review and signature. (U)

Most of the FBI agents we interviewed said their Section 215 request was the first submitted from their respective field office. Agents told us that because their supervisors were less familiar with Section 215 requests than with other more commonly used investigative tools such as national security letters, they took more time to review and approve each request. According to the data we collected in this review, the average processing time for Section 215 requests in FBI field offices in 2006 was 30 days. (U)

We also determined that [redacted] of the 17 Section 215 requests processed in 2006 were delayed because they were not properly routed after they were approved by the field office and sent to FBI Headquarters. Several requests were delayed because FBI Headquarters did not assign the Section 215 request to the designated NSLB attorney. For example, [redacted] requests were delayed between 2 and 6 weeks because FBI Headquarters sent the request directly to OIPR instead of routing the request through the designated NSLB attorney.<sup>43</sup> (S) (U)

(S)

b1  
b3  
b7E

(S)

Another Section 215 request was delayed or misdirected at four different points before it was withdrawn. The substantive desk at FBI Headquarters did not assign the request to NSLB for approximately 2 months. NSLB assigned the request to the wrong attorney, and therefore the request was delayed for an additional 11 months. The same request was then sent to OIPR before NSLB reviewed, drafted, and approved the application. One month after the request was returned to OIPR, the request was assigned to the appropriate NSLB attorney, who was then told by the substantive desk not to work on the package until further notice. The substantive desk withdrew the request for the Section 215 order approximately 10 weeks later. (U)

<sup>43</sup> As of July 2007, the FBI FISAMS included an automated work flow for business records requests. The FBI stated that the dedicated work flow should reduce the routing errors discussed above. (U)

## 2. OIPR Resources (U)

According to e-mail traffic we reviewed, several delays in submitting Section 215 applications by OIPR were attributable to the fact that during 2006 business record applications were assigned to a single OIPR attorney who had other responsibilities. As of November 2007, OIPR had two attorneys assigned to process business records but both attorneys have other responsibilities. (U)

## 3. Multi-Layered Review Process (U)

Since our last report, the multi-layered review process for 215 applications has not changed. As a result, Section 215 requests may be delayed at any one of several levels. We found delays at the field office level, at FBI Headquarters, and at OIPR. (U)

For the most part, the multi-layered review process is self-imposed because the only statutorily required review is that of the FISA Court. The other multiple levels of review leading to submission of an application to the FISA Court were established by DOJ and the FBI. OIPR reviews all Section 215 applications because OIPR attorneys present the applications to the FISA Court. According to OIPR, the FISA Court Rules of Procedures provide that the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys have not been authorized by the Attorney General to practice before the FISA Court for this purpose. In turn, the FBI requires that its NSLB attorneys draft the applications because Section 215 provides that only the FBI Director or his designee may apply for a Section 215 order.<sup>44</sup> (U)

At the field level, the multiple levels of approval are similar to those required for other investigative tools, including NSLs and other FISA Court applications. (U)

We found that inefficiencies caused by the FBI's and OIPR's multi-layered review process are magnified by the general nature of the Section 215 request. Because the standard for a business record request is relevance, Section 215 applications do not contain the detailed factual allegations found in other FISA applications that require a showing of probable cause, a higher evidentiary standard. In order to better understand the request, reviewers at the FBI, OIPR, and the FISA Court

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<sup>44</sup> The Director of the FBI has delegated to the following FBI officials the authority to apply for a Section 215 order: the FBI General Counsel; the FBI Deputy Director; the Executive Assistant Director for National Security; the Assistant Directors and Deputy Assistant Directors of the Counterterrorism, Counterintelligence, and Cyber Divisions; the Deputy General Counsel for National Security Affairs; and the Senior Counsel for National Security Affairs. (U)

often have questions about details of the investigation that are not always included in the initial application. Many of the questions may have already been asked by other reviewers, but the answers are not incorporated into the application because of the low standard of review. As a result, the review process can be slower when different reviewers ask similar questions about the application. (U)

**D. Substantive Delays (U)**

In addition to delays inherent in a multi-layered review process, many of the delays are also attributable to the issues presented by individual Section 215 requests. Of the 17 approved and withdrawn Section 215 requests processed in 2006 and described in the body of this report, [ ] were delayed because they raised substantive issues regarding the nature of the records and [ ] raised concerns regarding whether the application met the statutory requirements. ~~(S)~~ (U)

b7E

**1. Nature of the Record (U)**

[ ] of the requests were delayed because they involved unique substantive issues, including [ ]

b7E

[ ]

[ ] ~~(S)~~ (U)

A [ ] request raised a question as to whether a [ ] [ ] were business records within the meaning of Section 215. This request also raised a concern about the relevance of the request to international terrorism because the FBI did not know if [ ]

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b3  
b7E

[ ] In another case, a request for records from an [ ] raised an issue regarding whether it was appropriate to use a Section 215 request to determine if a company was an entity on which an NSL could be served. Another Section 215 request for [ ] raised concerns because of its scope and [ ]

(S)

Each of these [ ] requests raised new issues that took significant time to research, negotiate, and resolve. On average, the total processing time for these [ ] requests was 162 days. ~~(S)~~ (U)

b7E

**2. The Statutory Requirements (U)**

In addition, we found that FBI Headquarters or OIPR attorneys raised concerns that [ ] of the 17 applications did not meet the statutory requirements. When NSLB or OIPR attorneys have questions about a

b7E

request, they may contact each other, their supervisors, or the case agent. The resulting dialogue can affect the timing of the request. ~~(S)~~ (U)

(S) In [redacted] instances, the requests were eventually withdrawn (S)  
(S) for lack of predicate, with [redacted] withdrawn at NSLE [redacted] (S)  
(S) [redacted] withdrawn at OIPR after the FISA Court declined to sign two different (S)  
versions of the request [redacted] (S)  
[redacted] the FISA Court granted Section 215 orders for the [redacted] (S)  
applications. ~~(S)~~ (U)

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b3  
b7E

**a. Requests Withdrawn at NSLB (U)**

As noted above, [redacted] of these requests were withdrawn at NSLB. Before the requests were withdrawn, the FBI discussed the case with the case agent, and either the agent decided to withdraw the request on his own initiative or FBI Headquarters told the agent the request would not be approved. One case involved a request for information [redacted] [redacted] and the case agent agreed to withdraw the request on his own initiative. With regard to the requests [redacted] the agents did not agree to withdraw the requests until after FBI Headquarters told them that their applications would not be approved. The average processing time for these [redacted] requests was 398 days. ~~(S)~~ (U)

b7E

**b. Requests Withdrawn at OIPR (U)**

The single request withdrawn at OIPR was withdrawn by the FBI after the FISA Court declined to approve the application on two occasions. The former Acting Counsel for Intelligence Policy told the OIG that pursuant to the FISA statute, only the FBI is permitted to withdraw a FISA request. The former Acting Counsel cited Section 104(e)(1) of the FISA statute, which provides that the Director of the FBI may request that a FISA application be reviewed by the Attorney General if the Director states in writing that the FISA application meets the requirements in the statute. The former Acting Counsel stated that as a practical matter this provision requires that OIPR either work with the FBI until OIPR determines that the FISA request meets the statutory requirements or the FBI consents to withdraw the request.<sup>45</sup> (U)

<sup>45</sup> Only two other Section 215 requests were withdrawn. Both were withdrawn after the agent learned that the provider did not maintain the records requested. A request for information [redacted] was withdrawn at NSLB, while a request for [redacted] was withdrawn at OIPR. ~~(S)~~ (U)

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b3  
b7E

This policy may account in part for the processing time of requests for which OIPR identified concerns about whether they met statutory requirements. Of the 17 pure Section 215 requests processed in 2006, OIPR raised statutory concerns regarding [redacted] (S)

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b3  
b7E

[redacted] (S)

(S)

[redacted] On average, these requests were processed in 416 days. (S) (U)

**E. Expedited Requests (U)**

Two of the requests processed in 2006 were expedited by the FBI and OIPR. These two requests show that when the FBI identifies the need to expedite a Section 215 request, both the FBI and OIPR can expedite the task. The two requests, [redacted] were expedited because of a serious security threat and were processed in 10 and 17 days, respectively. (S) (U)

b7E

**F. Unremarkable Applications (U)**

[redacted] requests did not seek sensitive records, raise statutory questions, or involve exigent circumstances. [redacted] were signed by the FISA Court. [redacted] was a request for [redacted] [redacted] withdrawn once the agents learned the providers did not maintain [redacted] On average, these requests were processed in 113 days. (S) (U)

b7E

**II. Modified Pure and Combination Section 215 Orders (U)**

As required by the Reauthorization Act, we also reviewed how many times the FISA Court modified Section 215 orders. We examined information about the number and types of modifications for both pure and combination Section 215 orders discussed in the body of this report. We reviewed each Section 215 pure and combination order for handwritten changes signed by the FISA Court judge. In addition, we reviewed OIPR documents and e-mails and asked OIPR officials about revisions to Section 215 applications made at the request of the FISA Court. (U)

We found that the FISA Court modified four combination and five pure Section 215 applications and orders. We determined that six of the nine modifications were for substantive reasons. (U)



As noted in our first Section 215 report, OIPR considers modifications to be limited to the handwritten changes to orders made by FISA Court judges at the hearings in which the orders are signed. OIPR does not consider revisions to applications and orders made at the request of the FISA Court after it reviewed read copies to be modifications. In this review, we consider each handwritten notation or required revision to a Section 215 submission to be a modification. (U)

**A. Handwritten Modifications (U)**

The FISA Court made handwritten modifications to no pure Section 215 orders in 2006. It modified four combination orders. Two of the handwritten modifications to combination orders were substantive. One required the FBI to provide OIPR with information to be sequestered with the FISA Court by a specified date. OIPR had previously notified the Court that it received records in response to, but beyond the scope of, one of the Court's previous orders in the same matter, but had not sequestered the information with the Court prior to requesting that the application be renewed. The second handwritten modification corrected the expiration date of the Court's order to reflect the 90-day duration requested in the application. Although the application correctly stated the order would expire in 90 days, the month of the expiration date in the order was incorrect and the Court modified the order so that the month correctly reflected the 90-day duration of the order. (U)

The other two handwritten modifications were made to combination orders [redacted]. These orders were signed the same day the Court issued an opinion holding that [redacted]. [redacted] The Court's handwritten notations referenced the Court's opinion. ~~(S)~~ (U)

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**B. Revised Applications and Orders (U)**

After reviewing the read copies of the 11 approved pure Section 215 orders discussed in the body of this report, the FISA Court required revisions to 5 of the applications.<sup>47</sup> Four of the five were substantive revisions. (U)

One revised application and order related to the request for [redacted]

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[redacted]

<sup>47</sup> We do not include [redacted] ~~(S)~~ (U)

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[Redacted]

(S)

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In another case, the Court required that an application be revised to describe the requested records more precisely. The request was for [Redacted]

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(S)

[Redacted]

(S)

Section 215 requires that orders describe the records requested with "sufficient particularity to permit them to be fairly identified." See 50 U.S.C. § 1861(b)(2)(A). ~~(S)~~ (U)

A third application and order was revised to extend the time for the provider to produce the records from 20 to 30 days. (U)

A fourth application was revised to include [Redacted]

[Redacted]

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[Redacted]

~~(S)~~ (U)

Revision to a fifth application was a stylistic change that we did not find to be substantive. (U)

### III. Use and Effectiveness of Information Obtained from Section 215 Orders (U)

The Reauthorization Act also directed that the OIG analyze the use and effectiveness of Section 215 as an investigative tool. In this section, we describe how the information produced pursuant to pure Section 215 orders was used in the investigation for which it was requested and whether the information was disseminated to the intelligence community or used in any criminal proceeding. (U)

#### A. Use in Investigations (U)

The FBI received records in response to [Redacted] of the 11 pure Section 215 orders processed in 2006, approved by the FISA Court, and discussed in the body of this report.<sup>48</sup> FBI agents told the OIG that the records were used to assist foreign governments with counterterrorism investigations, support future FBI investigative requests, and investigate leads. Most of the agents we interviewed said the records obtained fell in the last category and that the records typically provided negative information, meaning they did not provide additional investigative information but helped close a lead. Agents also stated that investigatory efforts that result in negative information are important and not unusual. ~~(S)~~ (U)

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<sup>48</sup> We do not include [Redacted]

[Redacted]

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**1. Assist Foreign Governments** ~~(S)~~ (U)

Two Section 215 requests were initiated by the FBI after receiving requests for assistance from foreign governments. In each instance, the foreign government sought to prosecute suspected terrorists and requested FBI assistance to obtain evidence. These applications requested records of

[redacted]

Both agents said that they provided information from the records obtained pursuant to the Section 215 orders to the foreign governments. Both agents stated that they provided the information pursuant to the Designated Intelligence Disclosure Officials' authority for lead purposes only. In addition, the case agent who provided a summary of

[redacted]

sent the summary to FBI Headquarters and another field office which was conducting a related investigation. Neither agent said the records were useful for their FBI investigations. ~~(S)~~ (U)

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**2. Support Additional Investigative Requests** (U)

[redacted] Section 215 requests were initiated to gather information to support future requests for information [redacted]

[redacted] a

The agent received [redacted] but told us that because of the additional records and the size [redacted] he has not yet been able to review the records produced. The second Section 215 request for [redacted]

[redacted]

The agent working on the matter said the records were useful because they contained information that enabled him to limit [redacted]

[redacted] which saved him time and decreased the risk of compromising the investigation. ~~(S)~~ (U)

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**3. Investigate Leads** (U)

[redacted] Section 215 requests were submitted in order to investigate leads. Of the [redacted] requests, agents received records in response to [redacted] in the remaining [redacted] requests, the providers did not maintain records for [redacted]

[redacted] ~~(S)~~ (U)

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**a. Requests for which Records Were Received** (U)

FBI agents said that records from the [redacted] Section 215 requests were used to investigate leads. Three agents said the records obtained were helpful and two said they were not. The agents who requested [redacted]

[redacted] told us that the records were not helpful. These agents said that while they used the records to follow and close leads, the information was not what they had hoped to

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receive. As discussed above, the agent who requested [redacted] (S)

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[redacted]

In contrast, FBI agents who requested records [redacted] (S)

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[redacted] told the OIG that the records were helpful in closing leads. [redacted] (S)

[redacted]

**b. Requests for which No Records Were Received (U)**

(S)

[redacted] Section 215 requests for which no records were received were requests for [redacted] (S)

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[redacted] According to the agent, and the Section 215 request was initiated over 6 months after the time period for which the information was requested. ~~(S)~~ (U) (S)

**B. Dissemination (U)**

We found that the FBI disseminated information obtained from pure Section 215 orders to foreign governments in two instances, discussed in Section A, above. ~~(S)~~ (U)

**C. Use in Criminal Proceedings (U)**

We did not identify any use in a criminal proceeding of records obtained from the Section 215 requests processed in 2006.<sup>49</sup> (U)

<sup>49</sup> As noted in our previous report, the FISA statute requires that the Attorney General approve the use of FISA information in criminal proceedings if the information is obtained from electronic surveillance, physical searches, or pen register/trap and traces. The FISA statute does not require that the Attorney General grant use approval for business records. (U)

OIPR attorneys raised several concerns regarding the lack of use authority for business records, including the fact that use authority may ensure that coordination among members of the intelligence community occurs and sensitive sources are not compromised. In contrast, the FBI General Counsel said she was not concerned with the lack of use authority for business records because these records have an independent existence and may be obtained in many different ways. (U)

**IV. Effectiveness of Section 215 (U)**

[Redacted]

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[Redacted] Our

analysis in this section does not address the use of Section 215 [Redacted]

[Redacted] (S)  
(S)

With regard to Section 215 uses described in the body of this report, we found that Section 215 can be a valuable investigative tool, but often is impractical because of the time it takes to obtain such an order. (U)

**A. Use of Section 215 Orders (U)**

Section 215 can be an impractical tool because of the lengthy time involved in developing, reviewing, and presenting the requests to the FISA Court. While no FBI agent we interviewed identified any harm to national security because of delays in the Section 215 process, many agents linked the value of Section 215 orders as an investigative tool to its efficiency as well as its effectiveness. As discussed below, several agents told us that they have other investigative tools available to them which in some cases can produce the same or comparable information more quickly. (U)

**1. Other Investigative Options (U)**

FBI agents told us that if delays in obtaining Section 215 orders caused their investigations to stall, they would seek the information through other means. Agents told us that they have other investigative tools available to them to obtain certain business records more quickly and with much less effort. Furthermore, one Special Agent in Charge of an FBI field office stated that in many instances agents are seeking information rather than a specific document; therefore, although the information may be included in a particular business record, the agent would likely seek comparable information using other faster investigative techniques. (U)

For speed, agents said they generally attempt to obtain information through voluntary compliance or an NSL. Both business record requests and NSLs can be issued in national security investigations for transactional records based on a relevance standard. Unlike business records, NSLs can be authorized by the Special Agent in Charge in a field office and do not require FBI Headquarters, OIPR, or FISA Court approval. Therefore, an NSL can be issued and the transactional records returned in a matter of weeks. In our review, we found that seven agents requested Section 215 orders [Redacted]

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[redacted] (S) (U)

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NSLs however are not available for all business records. NSLs may be issued to entities such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer and consumer transaction information. Section 215, in contrast, is not limited to specific categories of transactional records and can be used to obtain items which are not available through NSLs such as [redacted]

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[redacted] (S) (U)

Another investigative tool that can be quicker than a business record request is a grand jury subpoena. Agents conducting national security investigations with a criminal nexus do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena because they are issued under the signature of the prosecutor supervising the grand jury investigation. However, grand jury subpoenas also have limitations in certain contexts. The primary limitation is that the investigation must have a criminal nexus. In addition, information presented to a grand jury may be made public in subsequent court proceedings and with limited exceptions grand jury subpoenas do not obligate the recipient to maintain the secrecy of the investigation. For example, [redacted]

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[redacted]

[redacted] told the OIG that they chose not to use grand jury subpoenas in order to maintain the secrecy of the investigations. (S) (U)

**2. Effect of the Processing Delays (U)**

According to FBI agents and supervisors we interviewed, when working on a national security investigation an agent identifies the information required and then determines the fastest legal way to obtain that information. Some agents stated that a few months may be an acceptable delay for business records because they can continue working on other aspects of their investigation during that time frame. However, agents stated that an investigation is likely to stall with a delay of 6 months to a year in obtaining records, and that if this occurred they would look for other means to obtain the information. One agent noted that a 6-month delay is a particular concern with a preliminary investigation because although extensions may be granted, a preliminary investigation is expected either to become a full investigation or be closed in a 6-month period. (U)

One agent told us that while he was waiting for a Section 215 request for [redacted] he obtained the equivalent information through public sources such as Google. The agent also told us that if he had received the information through the Section 215 order, he could have used the time he invested in researching public databases to work on other leads and investigations. (S) (U)

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Another agent said she was too frustrated by her experience pursuing a previous Section 215 order to submit another. Instead, the agent decided to invest her time [redacted]

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[redacted] The agent told us that she thinks it likely that she obtained the same information that she would have with a business record request although she said she could not be certain. The agent stated that the [redacted] was time consuming, but that she would not use a Section 215 request unless she needed something specific that she could not obtain through other means. ~~(S)~~ (U)

In contrast, the agent who received [redacted] [redacted] told us that seeking the Section 215 order saved time. The agent stated that [redacted]

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[redacted] ~~(S)~~ (U)

**B. Value of Section 215 Orders (U)**

According to FBI agents we interviewed, when they need a particular business record and it is not available by another investigative tool, Section 215 can be an invaluable tool. As noted above, seven agents told us they could not have obtained the records for their investigations without the provision. In each case, the agents were told [redacted]

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[redacted] Although no agent suggested that the records obtained pursuant to the order resulted in a major case development, many stated that every investigative tool in an FBI agent's tool box is important and that when it is the only tool that will produce the information, it is invaluable even if the process is burdensome. ~~(S)~~ (U)

**V. Summary (U)**

We determined that the processing time for Section 215 requests in 2006 was similar to that in 2005, with an average of 169 days in 2006 for the approved orders and 312 days for the withdrawn requests. Similar reasons to those we identified in our previous report explained the procedural delays in 2006, including the FBI's unfamiliarity with the Section 215 process, too few resources to handle requests expeditiously, a multi-layered review process, and various substantive issues regarding whether certain applications met the statutory requirements. We also found that FBI agents generally attempted to obtain records through other, quicker investigative processes, including voluntary compliance, NSLs, and grand jury subpoenas. When providers require a court order, however, agents must obtain orders through the Section 215 review process. We also



found that when the FBI identified emergency circumstances, the FBI and OIPR were able to process a Section 215 request quickly. (U)

In 2006, pure Section 215 orders processed were used primarily to exhaust investigative leads. However, the FBI used Section 215 orders to obtain information to assist foreign governments and to support other investigative requests. ~~(S)~~ (U)

We did not identify any instance in which information obtained from a Section 215 order was used in a criminal proceeding in 2006. In addition, we found that the FBI disseminated information obtained from pure Section 215 to foreign governments in two instances in 2006. ~~(S)~~ (U)

In sum, we found, like in our previous report, that Section 215 orders can be a valuable investigative tool to obtain records that are not available through other means. However, Section 215 orders are not used frequently because of the time it takes to obtain the order. ~~(S)~~



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**CHAPTER SIX  
IMPROPER OR ILLEGAL USE OF SECTION 215 AUTHORITY  
AND OTHER NOTEWORTHY FACTS (U)**

The Reauthorization Act also directed the OIG to identify "any noteworthy facts or circumstances relating to orders under such section, including any illegal or improper use of the authority." In this review, we did not identify any illegal use of Section 215 authority. However, we identified two instances where the provider produced records that were in response to, but were outside the scope of, a FISA Court order. These two cases raise concerns about the FBI's identification and handling of such additional material. (U)

Also discussed in this chapter are two additional "noteworthy facts" regarding the FBI's use of Section 215 authority in 2006. The first relates to the FBI's use of a national security letter to obtain information about a subject after the FISA Court rejected a Section 215 order for records concerning the same subject based on First Amendment concerns. [REDACTED]

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[REDACTED] (S)

**I. Two Instances in which the FBI Received More Information than it had Requested in Response to a Section 215 Order (U)**

Through our review of FBI and OIPR documents, we identified two instances in which the FBI received more information than it had requested in response to a Section 215 order. One instance occurred in connection with a combination order and the other occurred pursuant to a pure Section 215 order. The FBI determined that the matter that involved the combination order was reportable to the President's Intelligence Oversight Board (IOB). The FBI determined that the matter that involved the pure Section 215 order was not reportable to the IOB. (U)

As discussed in detail in our March 2007 Section 215 report, the FBI is required to report any improper use of Section 215 authority to the IOB. In 1976 the IOB was created by Executive Order and charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863.<sup>50</sup> The Executive Order also requires the FBI's General Counsel to report to the

<sup>50</sup> For more information about the IOB, see the OIG's report titled *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act*, pages 20-24 (March 2006). (U)

IOB on at least a quarterly basis intelligence activities the General Counsel has "reason to believe may be unlawful or contrary to executive order or Presidential directive," which are referred to as "IOB violations." (U)

#### A. Case 1 (U)

As previously noted, combination orders are business record requests attached to pen register/trap and trace requests. We found that in one matter involving a combination order, the [redacted] b7E  
 [redacted] that was not requested in the Section 215 application or authorized by the FISA Court order. [redacted] had been authorized and received pursuant to a previous combination order for the subject. Neither the FBI agent who had requested the pen register/trap and trace order nor OIPR, however, was aware that the [redacted] had been provided pursuant to the previous order. As a result, the renewal application specifically stated that it did not seek [redacted] because the FBI had requested that information in a previous order but had not received it. Despite the fact that the renewal application did not seek and the court's order did not authorize production of [redacted] [redacted] company continued to provide the [redacted] after the renewal order was executed. ~~(S)~~ (U)

The agent told the OIG that she did not know the [redacted] b7E  
 was being produced pursuant to the renewal order until approximately 2 months after the order was signed by the FISA Court. She said she first learned that the FBI had received [redacted] with respect to either order when an analyst in her field office informed her that the FBI was receiving [redacted] pursuant to, but not authorized by, the pen register/trap and trace order. After the analyst reported the matter to the agent, both NSLB and OIPR were informed. ~~(S)~~ (U)

The agent told us that the provider [redacted] b7E  
 [redacted] According to a technician [redacted]  
 [redacted]  
 [redacted] ~~(S)~~ (U)

The FBI concluded that "information was improperly collected" and reported the incident to the IOB. The FBI also stated that the matter was reportable because records of [redacted] are statutorily protected. OIPR reported the incident to the FISA Court and provided the material that was not requested by the FBI or authorized by the FISA Court to the FISA Court for sequestration. ~~(S)~~ (U) b7E

An FBI Electronic Communication (EC) approved by the FBI Deputy General Counsel stated that the mistake was made by the provider and not the FBI. While we agree that the initial error was made by the provider, the FBI continued to receive and retain unauthorized information about a U.S. person for approximately 2 months. In this instance, the FBI continued to collect information about a U.S. person without review by the agent to ensure that it was authorized by the court order. (U)

(S) This case gave us concern that FBI agents may be unknowingly (S) receiving in other cases [redacted] that has not been authorized by (S) the FISA Court. We therefore interviewed each of the [redacted] agents who (S) received combination orders for [redacted] in 2006. [redacted] said that (S) they received [redacted] as directed by the FISA Court. [redacted] other (S) agents (including the agent in the matter described above) told us they did (S) not know the FISA Court order had included a request for [redacted] (S) [redacted] and they did not think they received it. One agent told us that (S) he knew the information was requested, but that he thought he had to (S) enforce the order in order to receive [redacted] b1 ~~(S)~~ (U)

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(S) Because business records produced electronically pursuant to (S) combination orders are not first reviewed by the agents before they are (S) provided to FBI technicians, agents may be receiving [redacted] (S) when it is not authorized and also may not realize that they have [redacted] (S) [redacted] when it is authorized. Moreover, the FBI does not have (S) procedures that require FBI agents or technicians to review business (S) records (or pen register/trap and trace information) when they are first (S) produced to ensure they have received only what is authorized by the FISA (S) Court order. In addition, the FBI does not require agents to review court- (S) ordered material before it is uploaded into FBI databases. (S) (U)

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(S) This matter also illustrates the need for better communication (S) between OIPR attorneys, NSLB attorneys, and FBI case agents. As noted (S) above [redacted] agents told us that they were not aware that OIPR had attached (S) a request for [redacted] to their pen register. Other agents we (S) interviewed stated that they were not aware that OIPR or NSLB attorneys (S) had added requests for subscriber information to their pen register/trap (S) and trace requests. Our March 2007 Section 215 report also found that (S) agents were not aware that OIPR added requests for subscriber information (S) to their pen register/trap and trace requests. If agents do not know that (S)

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<sup>51</sup> Our concern is not limited to the business record portion of the combination order, but also applies to pen register/trap and trace records when the records are [redacted] (S)

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[redacted]

business record requests have been added, they will not know they should be or are receiving subscriber or [redacted] The lack of knowledge may contribute to IOB violations and the failure to identify IOB violations. In addition, agents may unnecessarily issue NSL for information previously ordered to be produced by the FISA Court.<sup>52</sup> ~~(S)~~ (U)

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**B. Case 2 (U)**

In response to a pure Section 215 order processed in 2006 and signed by the FISA Court in 2007, the FBI received information beyond the time period authorized by the order. (U)

The Section 215 order at issue required a company to produce records

[redacted]

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[redacted] The agent submitted the Section 215 request after the company refused to provide the business records on a voluntary basis. Although the order required the production of documents for a specified 5-month period, the company produced the records for 2 additional months. ~~(S)~~ (U)

According to the FBI case agent, he realized that he received additional records beyond the scope of the FISA Court order a few days after he received the records. On October 2, 2007, the agent sent an EC to NSLB and the FBI Inspection Division reporting the matter as a potential IOB. The agent stated that he also reported the matter to OIPR. The agent told the OIG that he reviewed the records and created a copy of the data that did not include the 2 months of the unauthorized records. (U)

We discussed this matter with the FBI and OIPR. The FBI informed the OIG that it had determined that this matter was not reportable to the IOB. When we asked for documentation of this decision the FBI reported that it had none because it had determined that the incident should not have been reported to the NSLB as a potential IOB. We also asked whether the matter had been reported to the FISA Court. OIPR stated that it had not yet determined whether the matter was a compliance incident that should be reported to the FISA Court. (U)

<sup>52</sup> We found another matter involving a combination order for pen register/trap and trace and subscriber information. The day after a FISA Court order expired, the provider continued its practice of faxing to the FBI agent a list of the phone numbers collected as a result of the surveillance order. The agent did not recall if he received subscriber information as required by the FISA Court order. Because we could not determine whether the fax included subscriber information, we did not include this matter in our analysis. (U)

FBI officials stated that the FBI's receipt of 2 extra months of records is not reportable to the IOB because there is no statute prohibiting the company from voluntarily producing [redacted] to the FBI and thus the incident did not violate any statute, nor did it violate any Executive Order. The FBI stated that because there is no such violation, it should be able to treat the additional 2 months of records as a voluntary production independent of the FISA Court order. (S) (U)

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We disagree and believe that the production of these additional records should not be considered as voluntary and independent of the FISA Court order without further inquiry. First, the provider refused to produce any records to the FBI without a court order. Second, the FBI has chosen not to ask the provider whether the additional 2 months of records were produced inadvertently or voluntarily. Third, the collection includes information of U.S. persons who are not the subjects of any FBI national security investigation. Therefore, we believe that if the FBI wants to keep and use these records, it should either: (1) obtain written confirmation from the provider that the records were produced voluntarily, or (2) obtain a 215 order from the FISA Court for the production of the additional records. If the provider states that the production was not voluntary and the FISA Court declines to issue an additional order, the FBI should revisit its IOB determination and sequester the additional records with the FISA Court.<sup>53</sup> (U)

FBI officials also suggested to us that they should be able to treat any non-statutorily protected records obtained pursuant to, but outside the scope of, a Section 215 order as a voluntary production of records independent of the order. We are troubled by this approach because [redacted]

[Large redacted block]

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<sup>53</sup> In its response to our report, the NSD stated that in both matters discussed in this Section "the FBI took the steps necessary to ensure that the over-produced information would not be used." However, this is only partially accurate. As discussed above, in Case 2 the agent initially isolated the additional material. However, the FBI later concluded that it should be able to use these additional records under the theory that they should be treated similar to materials that are voluntarily produced. We disagree with this analysis. Because of our concerns that the FBI should not use the material without either contacting the provider about the material or seeking an expanded FISA order, we made the recommendation discussed above. We look forward to the NSD's and FBI's specific response to that recommendation and how they intend to treat such material. (U)

[REDACTED] (S)

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FBI officials expressed the view that [REDACTED] (S)

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[REDACTED] However, we are concerned by the lack of any comprehensive policy memorializing this position and providing guidance to case agents. (S)

(S)

~~(S)~~ (U)

In summary, we found two instances in which the FBI received more information than it had requested in response to Section 215 orders. In one case the FBI did not discover the incident for 2 months. [REDACTED] (S)

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[REDACTED] The FBI reported the matter to the IOB, and OIPR reported the matter to and sequestered the material with the FISA Court. ~~(S)~~ (U)

In the other instance, the FBI quickly discovered the incident after the FBI had received the information from the provider. However, in this case, the FBI did not consider the matter to be reportable to the IOB because the records were not statutorily protected, and OIPR has not made a decision regarding whether this is a compliance incident reportable to the FISA Court. (U)

We recommend that the FBI develop procedures for reviewing materials received from Section 215 orders to ensure that it has not received information that is not authorized by the orders. (U)

Furthermore, we recommend that the FBI develop procedures for handling material that is produced in response to, but outside the scope of, a Section 215 order. The procedures should include the FBI's justification for handling any class of material provided in response to, but outside the scope of, a Section 215 order differently from other classes. We believe the FBI should not base the procedures for handling such material solely on whether the material is or is not statutorily protected. Instead, the procedures should also address such factors as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures. In addition, these procedures should be incorporated in the minimization procedures required by the Reauthorization Act, a subject we discuss further in Chapter Seven. (U)



II. Other Noteworthy Items (U)

A. Request for a [redacted] (S)

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(S) [redacted] considered the Section 215 request for [redacted] (S) discussed earlier in this report at pages 33 to 34 to be a noteworthy item. In this case, the FISA Court had twice declined to approve a Section 215 application based on First Amendment concerns. However, the FBI subsequently issued NSLs for information [redacted] even though (S) the statute authorizing the NSLs contained the same First Amendment restriction as Section 215 and the ECs authorizing the NSLs relied on the same facts contained in the Section 215 applications. We therefore describe this case in more detail in this section. (S) (U)

1. The FBI Investigation (U)

[redacted] (S)

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[redacted] (S)

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(S) When the FBI's Section 215 application was sent to OIPR for review, the assigned OIPR attorney initially raised First Amendment concerns with regard to the Section 215 application.<sup>56</sup> The NSLB attorney e-mailed the OIPR attorney on two occasions stating that she thought that the underlying FBI investigation [redacted] was legitimate. ~~(S)~~ (U)

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According to the OIPR attorney, OIPR attorneys had different views regarding how the First Amendment affected this Section 215 application and that these discussions delayed the submission of the application.<sup>59</sup> (U)

<sup>56</sup> Section 215 states that the FBI can apply for an order for the production of business records "for an investigation . . . to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment of the Constitution." 50 U.S.C. § 1861(a)(1). (U)

<sup>59</sup> We asked the former Acting Counsel for Intelligence Policy how the First Amendment concerns were resolved, and she told us that the initial application was submitted after a meeting between the former Counsel of Intelligence Policy and the FBI General Counsel. However, neither the former Counsel for Intelligence Policy nor the FBI General Counsel said they recalled such a meeting. (U)

**2. The FISA Court's Objections to the Section 215 Application on First Amendment Grounds (U)**

The Section 215 request was presented to the FISA Court as a read copy application in February and March 2006. On both occasions the Court declined to approve the application and order. ~~(S)~~ (U)

The first Section 215 application presented to the FISA Court included

[Redacted]

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The FISA Court declined to approve the first application. OIPR and NSLB e-mails state that the FISA Court decided that "the facts were too 'thin' and that this request implicated the target's First Amendment rights."  
(U)

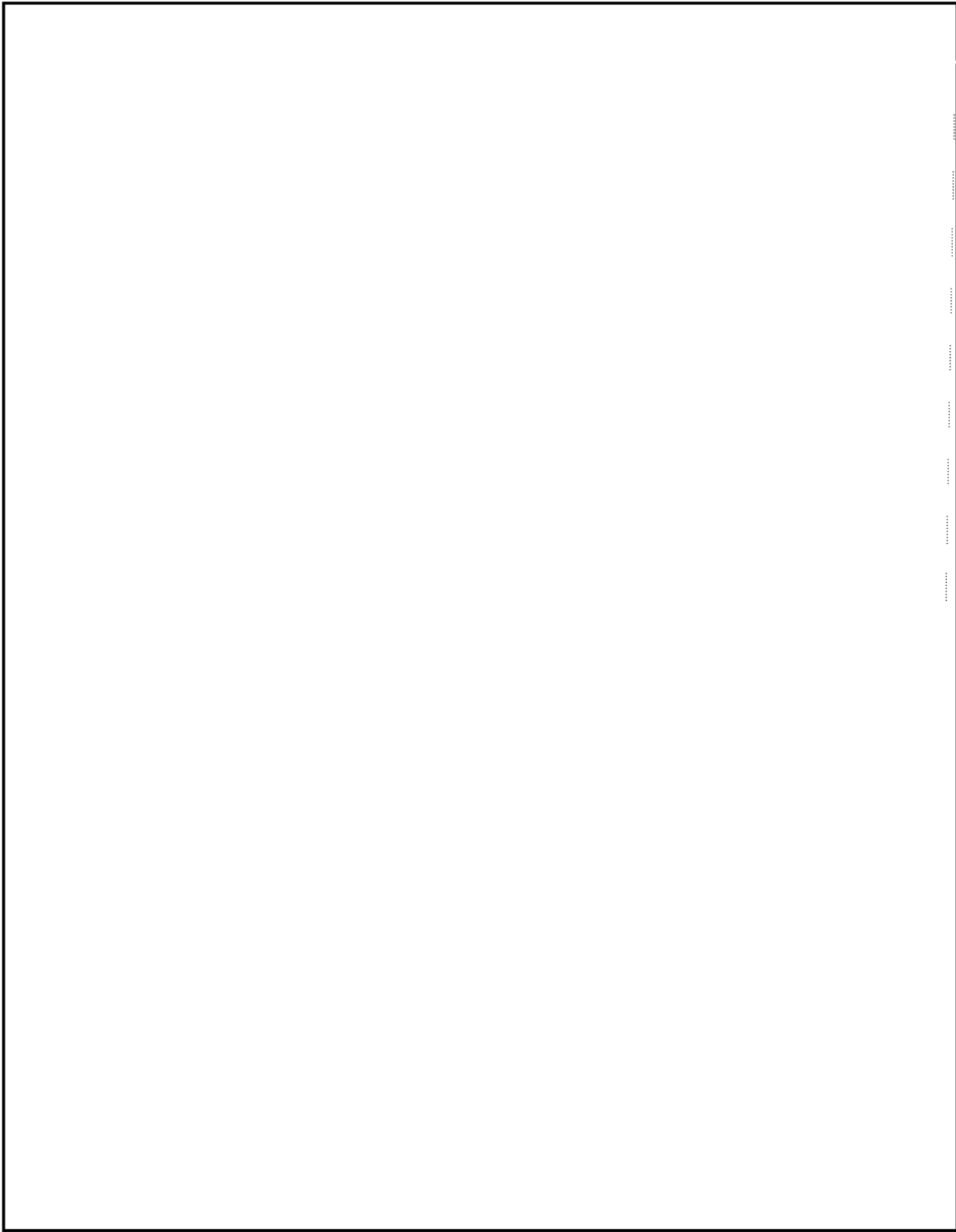
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**3. FBI and OIPR's Response (U)**

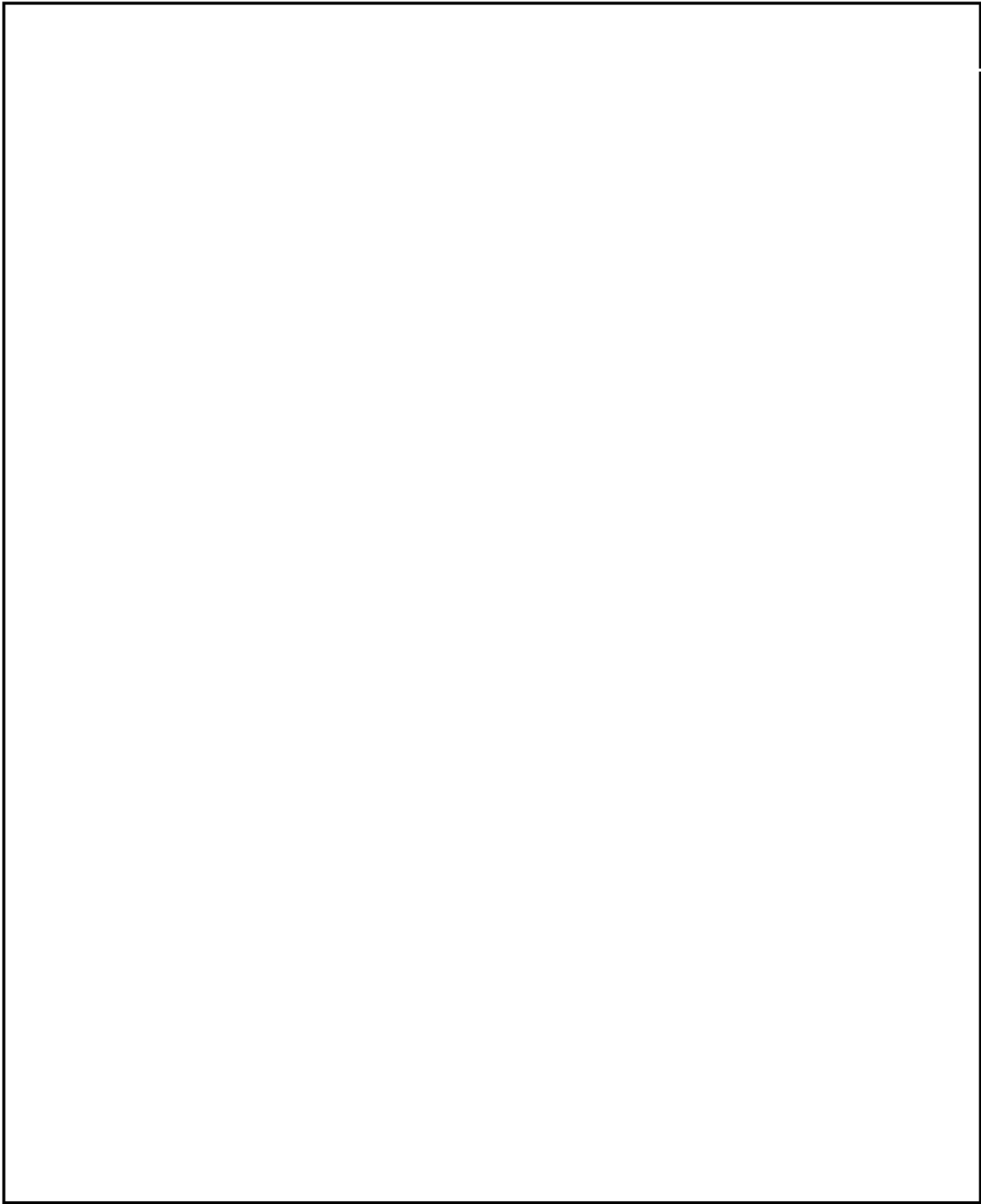


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<sup>63</sup> The FBI General Counsel told the OIG that the FISA Court does not have the authority to close an FBI investigation. (U)

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We asked both the FBI General Counsel and the former Counsel for Intelligence Policy whether, in light of the Court's decision, they had reviewed the underlying investigation [redacted] to ensure that it was not being conducted in violation of the First Amendment caveat. The FBI General Counsel told us that she did not review the underlying investigation (S) [redacted] because, for the reasons stated above, she believed there was enough information to predicate the investigation. She said she disagreed with the court and nothing in the court's ruling altered her belief that the investigation was appropriate. (S) (U)

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In contrast, the former Counsel for Intelligence Policy stated that OIPR should have examined the underlying investigation after the Court's decision regarding the Section 215 request. However, he said that with the increase in national security investigations and FISA requests, OIPR had not been able to fully serve such an oversight role.<sup>65</sup> (U)

In addition, the former Acting Counsel for Intelligence Policy stated that there is a history of significant pushback from the FBI when OIPR questions agents about the assertions included in FISA applications.<sup>66</sup> The OIPR attorney assigned to Section 215 requests also told us that she routinely accepts the FBI's assertions regarding the underlying investigations as fact and that the FBI would respond poorly if she questioned those assertions. (U)

We also asked the FBI General Counsel whether it was appropriate to issue NSLs in this investigation based on the same factual predicate as the Section 215 application given that the statutory provisions authorizing NSLs and Section 215 requests contain the same First Amendment caveat.<sup>67</sup> The FBI General Counsel told the OIG that she believed that it was appropriate to issue NSLs because she disagreed with the FISA Court and because the FBI was responsible for investigating the [redacted] with other subjects of national security investigations. She stated that the FBI would (S)

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<sup>65</sup> According to the former Counsel for Intelligence Policy, he raised his concerns about OIPR's inability to fulfill its oversight role in late 2004 or early 2005. The former Acting Counsel for Intelligence Policy told us that, as of November 2007 OIPR developed a strategy for reviewing national security investigations and had begun conducting national security reviews. According to an OIPR attorney, OIPR has conducted all 15 of their planned national security reviews at approximately 14 field offices and FBI Headquarters. (U)

<sup>66</sup> The former Acting Counsel also stated that FBI agents are under significant pressure to respond to national security threats and that some agents are angry that FBI agents have been accused of failing to identify these threats. (U)

<sup>67</sup> The FBI requested three NSLs [redacted] pursuant to the *Right to Financial Privacy Act* (RFPA), 12 U.S.C. § 3414. RFPA requires that the individual issuing the NSL certify that the investigation is "not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States." (S) (U)

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have to close numerous investigations if it was not permitted to investigate individuals based on their contact with other subjects of FBI investigations. ~~(S)~~ (U)

The former Counsel for Intelligence Policy stated that investigations based on association with subjects of other national security investigations are weak, but "are not necessarily illegitimate." He stated that when OIPR receives cases that appear to be based solely on association, OIPR first attempts to identify specific conduct by the subject and asks "what makes you - the FBI - think that this guy did anything wrong." [redacted] (S)

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[redacted]

**4. OIG Analysis (U)**

We considered this matter to be noteworthy because the FISA Court twice refused to authorize Section 215 orders based on concerns that the investigation was premised on protected First Amendment activity, and the FBI subsequently issued NSLs to obtain information [redacted] based on the same factual predicate without first reviewing the underlying investigation to ensure it did not violate the First Amendment caveat. ~~(S)~~ (U)

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Section 215 allows the FBI to seek a business records order for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution." See 50 U.S.C. § 1861(a)(1) and (a)(2)(B). Similarly, the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414, allows the FBI to issue NSLs to obtain financial records for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution." (U)

In this matter, both FBI and OIPR personnel had raised First Amendment concerns regarding the predicate for the investigation of [redacted] before and after the first Section 215 read application was submitted to the FISA Court. Once the Court expressed similar concerns and rejected the successive applications, we believe it was incumbent upon the FBI and OIPR re-evaluate the investigation before seeking additional information about [redacted] using NSLs. Instead, the FBI issued NSLs based on the same factual predicate contained in the Section 215 applications and without additional information about [redacted] activities, despite the Court's rejection on two occasions of requests for a Section 215 order. ~~(S)~~ (U)

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We were also concerned by [redacted]

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(S) B. [Redacted] of Some Section 215 Requests (S) (U)

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(S) We also considered the [Redacted] of several Section 215 orders issued during 2006 to be a noteworthy item.

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[Redacted]

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[Redacted]

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## CHAPTER SEVEN MINIMIZATION PROCEDURES (U)

The Reauthorization Act required the Attorney General to adopt minimization procedures for business records obtained pursuant to Section 215 orders. 50 U.S.C. § 1861(g)(1). The Act also directed the OIG to examine the minimization procedures to determine whether they “protect the constitutional rights of United States persons.” See Pub. L. No. 109-177, § 106A. In this chapter, we describe our review of the minimization procedures adopted by the Department. (U)

### I. Minimization Mandate (U)

The Reauthorization Act defined minimization procedures as: (U)

(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of non-publicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;<sup>69</sup> (U)

(B) procedures that require that non-publicly available information, which is not foreign intelligence information as defined in section 1801(e)(1) of this title, shall not be disseminated in a manner that identifies any United States person without such person’s consent, unless such person’s

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<sup>69</sup> Foreign Intelligence information is defined as:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against –

(a) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(b) sabotage or international terrorism by a foreign power or an agent or foreign power; or

(c) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to –

(a) the national defense or the security of the United States; or

(b) the conduct of the foreign affairs of the United States.

50 U.S.C. § 1801(e). (U)

identity is necessary to understand foreign intelligence information or assess its importance; and (U)

(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes. 50 U.S.C § 1861(g)(2). (U)

The minimization procedures were required to be adopted by the Attorney General within 180 days of enactment of the Reauthorization Act (that is, by September 5, 2006). 50 U.S.C § 1861(g)(1). (U)

As noted above, the Act also required that the OIG examine "the minimization procedures adopted by the Attorney General . . . and whether such minimization procedures protect the constitutional rights of United States persons." (U)

## II. Draft Minimization Procedures (U)

Several months after enactment of the Reauthorization Act, the Office of Intelligence Policy and Review (OIPR) and the FBI – both of whom had been developing minimization procedures related to Section 215 orders – exchanged draft procedures. The drafts differed in fundamental respects, ranging from definitions to the scope of the procedures. At a meeting held on August 21, 2006, approximately 2 weeks before the statutory deadline, FBI and OIPR officials were unable to reach agreement on minimization procedures. Present at the meeting were the FBI General Counsel and the former Counsel for Intelligence Policy, along with attorneys from their respective offices and representatives from the Deputy Attorney General's Office, the Criminal Division, the Office of the Director of National Intelligence, and the Central Intelligence Agency. (U)

Unresolved issues included the time period for retention of information, definitional issues of "U.S. person identifying information," and whether to include procedures for addressing material received in response to, but beyond the scope of, the FISA Court order; uploading information into FBI databases; and handling large or sensitive data collections. (U)

For example, the Reauthorization Act calls for minimization procedures that prohibit the dissemination of non-public U.S. person information in a manner that would identify the U.S. person in certain circumstances. However, OIPR and the FBI could not agree on a definition of "U.S. person identifying information." [REDACTED]

[REDACTED]

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[Redacted]

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In addition, OIPR and the FBI could not agree on the time period for retention of business records obtained by Section 215 orders.

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In an effort to meet the statutory deadline after the August 21 meeting the former Counsel for Intelligence Policy suggested that the Attorney General adopt sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections of October 31, 2003, (NSI Guidelines) as interim minimization procedures. According to OIPR and FBI attorneys, the suggestion was adopted for several reasons. First, it allowed the Attorney General to meet the statutory deadline. Second, compliance with the NSI Guidelines in their entirety was already a prerequisite to obtaining a Section 215 order. Third, the suggestion allowed the parties to continue efforts to resolve their differences in other forums. (U)

During this period the FBI and OIPR also were discussing some of the same issues with respect to updating the minimization procedures for full FISA orders. FBI and OIPR attorneys told us that they believed that the minimization procedures for full FISA orders could supersede or at least serve as a model for the minimization procedures for Section 215 business records since the discussions regarding full FISA orders required the resolution of broader and more complex issues.<sup>70</sup> (U)

In addition, the Office of the Director of National Intelligence convened a working group composed of representatives from the intelligence community to discuss, among other things, the lack of consistency in their guidelines for national security investigations and the need to develop common definitions for terms including "U.S. person identifying information."<sup>71</sup> (U)

<sup>69</sup> Particularized minimization procedures were included in Section 215 application [Redacted] (S)

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<sup>70</sup> As of early February 2008, the Department had not finalized the updated minimization procedures for full FISA orders. [Redacted] (S)

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<sup>71</sup> As of early December 2007, the working group had not defined "U.S. person identifying information." (U)



**III. The Interim Standard Minimization Procedures (U)**

On September 5, 2006, the Attorney General signed the Interim Standard Minimization Procedures (Interim Procedures) and filed the procedures with the FISA Court. The Interim Procedures adopted four sections of the NSI Guidelines and stated that the sections are to be "construed" to meet the statutory definitions of minimization procedures contained in the Reauthorization Act. (U)

The four sections of the NSI Guidelines included in the Interim Procedures are: (1) Respect for Legal Rights; (2) Determination of United States Person Status; (3) Retention and Dissemination of Information; and (4) Definitions.<sup>72</sup> (U)

The Respect for Legal Rights section states that the NSI Guidelines do not authorize investigating or maintaining U.S. person information solely for the purpose of monitoring protected First Amendment activities or the lawful exercise of Constitutional or statutory rights. In addition, this section requires that investigations be conducted in conformity with applicable authorities including the Constitution, statutes, executive orders, Department regulations and policies, and Attorney General Guidelines. (U)

The Determination of United States Person Status section defines a "United States Person" as including U.S. citizens and aliens lawfully admitted for permanent residence. The section also provides guidance in determining a person's status [redacted] (S)

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The Retention and Dissemination of Information section contains three subsections: Information Systems and Databases; Information Sharing; and Special Statutory Requirements. The Interim Standard Minimization Procedures adopt only the first and second sections.<sup>73</sup> (U)

The Information Systems and Databases subsection requires that the FBI retain records of investigations in accordance with a plan approved by the National Archives and provides for OIPR oversight of information obtained in the course of a national security investigation. (U)

<sup>72</sup> See, respectively, NSI Guidelines Parts I.B.3; I.C; VILA.1 and B; and VII. (U)

<sup>73</sup> The Special Statutory Requirements section requires that FISA-derived information be disseminated pursuant to the minimization procedures approved by the FISA Court and as specified in the FISA statute. Although not formally adopted in the Interim Standard Minimization Procedures, this section - as with every section in the NSI Guidelines - governs the use of Section 215 derived information because compliance with the NSI Guidelines in their entirety is already a prerequisite to obtaining a Section 215 order. (U)

The Information Sharing subsection identifies the Department's policy to share information with relevant agencies unless there is a specific provision limiting such information sharing. To that end, the section provides that the FBI may disseminate information within the Department, with other federal, state, and local entities, and with foreign authorities when the information relates to the recipient's authorized responsibilities and is consistent with national security interests. (U)

The Definition section of the NSI Guidelines defines terms such as "foreign intelligence," "international terrorism," and "publicly available." However, the Guidelines do not define "U.S. person identifying information." (U)

We asked FBI and OIPR officials whether they believed the interim procedures met the minimization requirements of the Reauthorization Act. We specifically inquired whether the interim procedures could meet the statutory requirements when adherence to the NSI Guidelines was already a statutory requirement for obtaining a Section 215 order, the NSI Guidelines were not specific, and the NSI Guidelines applied to all documents the FBI collected in the course of a national security investigation and were not "designed in light of the purpose and technique" of Section 215 requests, as required by the Reauthorization Act. (U)

OIPR and FBI attorneys responded that they believed the interim procedures met the statutory requirement because the Reauthorization Act did not require that the minimization procedures be "new" or "in addition to" existing requirements. (U)

When we asked how an agent would determine, for example, whether the disclosure of U.S. person identifying information is necessary to understand foreign intelligence or assess its importance, the FBI General Counsel stated that the determination must be made on a case-by-case basis. The former Counsel for Intelligence Policy stated that pursuant to the interim procedures the FBI employee disseminating the information would make a judgment call. The former Counsel for Intelligence Policy also noted that this was one of the unresolved issues and that he hoped these issues would be addressed as the FBI and OIPR updated the minimization procedures for full FISA orders. (U)

We also asked the FBI whether the retention plan approved by the National Archives required FBI agents to examine records received pursuant to a Section 215 order upon receipt to ensure compliance with the order. As discussed previously, we believe such a requirement could prevent the retention of U.S. person information that was produced pursuant to but not authorized by a Section 215 order. However, we were told that the FBI does not have a current retention policy for counterterrorism cases and until such a policy is developed, the FBI will rely on a default retention policy which addresses only the duration of retention and does not address the

need to review the material. According to the FBI's default retention policy for counterterrorism cases, the FBI will retain information obtained during a national security investigation for [redacted] before the issue of further retention is re-evaluated. ~~(S)~~ (U)

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**IV. OIG ANALYSIS (U)**

As discussed above, because of a series of disagreements about how the FBI should retain and disseminate business records obtained pursuant to a Section 215 order, in September 2006 the Department issued "interim" minimization procedures for business records produced pursuant to Section 215 orders. These interim minimization procedures use general hortatory language stating that all activities conducted in relation to national security investigations must be "carried out in conformity with the Constitution." However, we believe this broad standard does not provide the specific guidance for minimization procedures that the Reauthorization Act appears to contemplate. (U)

When discussing the issue raised by the Reauthorization Act of whether the minimization procedures "protect the constitutional rights of United States persons," OIPR and FBI attorneys asserted that most government requests for business records do not raise constitutional concerns. They noted that the Supreme Court has held that individuals have no legitimate expectation of privacy for information voluntarily turned over to third parties. See e.g., *United States v. Miller*, 425 U.S. 435, 442-444 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979); *Couch v. United States*, 409 U.S. 332, 335-336 (1973). Yet, not every business record obtainable through a Section 215 order falls under this rubric. For example, a request by the government for business records created and maintained by a sole proprietor may raise Fifth Amendment concerns. *Bellis v. United States*, 417 U.S. 85 (1974).<sup>74</sup> Business record requests also may affect First Amendment rights of individuals. In addition, the Supreme Court also has not ruled on the appropriate privacy interest to be afforded to [redacted]

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[redacted] ~~(S)~~ (U)

Moreover, the Reauthorization Act required the Department to adopt "specific procedures" reasonably designed "to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." We believe that the interim procedures do not adequately address this

[redacted] (S)

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requirement, and we recommend that the Department continue its efforts to construct specific minimization procedures relating to Section 215 orders, rather than rely on general language in the Attorney General's NSI Guidelines. (U)

First, the interim procedures do not provide specific guidance regarding the retention of U.S. person information. The FBI acknowledged that its practice under the NSI Guidelines sections is to retain all information obtained in the course of a national security investigation for a period of [redacted]. However, the Reauthorization Act requires the Department to adopt "specific procedures" designed to minimize the retention of non-publicly available information concerning unconsenting United States persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. The Department's failure to distinguish the retention of U.S. person information from any other information obtained in the course of national security investigations appears inconsistent with the language of the Reauthorization Act. Moreover, while OIPR proposed retaining the business records [redacted] and the FBI recommended retaining them for [redacted] the interim guidelines simply follow general archives practices and allow the information to be retained without further evaluation for [redacted] (~~S~~) (U)

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Similarly, the interim procedures do not contain procedures that prohibit the dissemination of U.S. person information unless disclosure is necessary to understand or address the importance of the intelligence information. The FBI's assertion that agents can make this determination on a case-by-case basis conflicts with the statutory requirements that specific minimization procedures be developed to address this concern. (U)

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[redacted] ignores the Reauthorization Act's statutory requirement that the Department adopt procedures "that are reasonably designed in light of the purpose and technique" of business records orders to minimize the retention and prohibit the dissemination of U.S. person information." We believe that standard procedures should be specifically adopted for [redacted] in accord with the requirements and intent of the Reauthorization Act.<sup>75</sup> (~~S~~) (U)

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As a result, we recommend that the FBI and OIPR continue to work to develop appropriate standard minimization procedures for business records. Pursuant to the Reauthorization Act, the Department should replace the interim procedures with final standard minimization procedures that provide specific guidance for the retention and dissemination of U.S. person information. In addition, we recommend that the FBI and OIPR monitor Section 215 requests to ensure that if a request implicates the rights of U.S. persons, that specific and particularized minimization procedures be included in the Section 215 application and implemented in a manner that protects the U.S. person's constitutional rights. (U)

[Redacted]

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### CHAPTER EIGHT CONCLUSIONS (U)

As required by the Reauthorization Act, the OIG conducted this review of the FBI's use of Section 215 requests for business records in 2006. The Reauthorization Act required the OIG to examine how many requests were prepared by the FBI; how many applications were approved, denied, or modified by the Foreign Intelligence Surveillance Act (FISA) Court; whether bureaucratic or other impediments hindered the FBI's use of Section 215; and the effectiveness of the FBI's use of Section 215. The Act also directed that the OIG examine any improper use of Section 215 authority and identify any noteworthy facts or circumstances concerning Section 215 requests. Finally, the Act required the OIG to examine whether the minimization procedures adopted by the Department protect the constitutional rights of U.S. persons. As required by the Reauthorization Act, our review covered Section 215 requests processed in calendar year 2006. (U)

We found that in 2006 the FBI and OIPR processed a total of 21 pure Section 215 applications and 32 combination applications. All but six of the pure Section 215 applications were formally submitted to the FISA Court. Each of the 47 Section 215 applications (15 pure requests and 32 combination requests) formally submitted to the FISA Court were approved.<sup>76</sup> (U)

The six pure Section 215 requests that were not formally presented to the FISA Court were withdrawn either while they were pending approval at the FBI's National Security Law Branch (NSLB) or at the Office of Intelligence and Policy Review (OIPR) because they lacked sufficient predicate or the provider did not maintain the records requested. The FBI obtained a wide variety of records using Section 215 orders in 2006, including credit card records. [redacted]

[redacted] ~~SECRET~~ (U)

Unlike in previous years [redacted] (S)

[redacted] (S)

<sup>76</sup> Four of the pure Section 215 applications processed in 2006 were signed by the FISA Court in 2007. (U)

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We determined that when FBI agents submitted Section 215 requests processed in 2006, they encountered similar processing delays as those identified in our March 2007 report. These delays were caused by unfamiliarity with Section 215 orders, too few resources to handle requests expeditiously, the multi-layered review process, and substantive issues regarding whether the application met the statutory requirements. Overall, the average processing time for Section 215 orders in 2006 was 147 days, which was similar to the processing time for 2005. However, the FBI and OIPR were able to expedite certain Section 215 requests in 2006, and when the FBI identified two emergency requests the FBI and OIPR processed both Section 215 requests quickly. (U)

We uncovered no evidence of harm to national security in any specific cases caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in Section 215 requests. However, agents expressed frustration about the amount of time and effort involved in obtaining a Section 215 order and stated that they would first pursue the information through other more efficient investigative techniques such as voluntary compliance and national security letters. (U)

We again examined how the FBI in 2006 used information obtained through Section 215 orders in national security investigations. Aside from

[redacted] Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information to support additional FBI investigative requests and to assist foreign governments pursuing criminal investigations of non-U.S. persons. The evidence showed no instance where the information obtained from a Section 215 order described in the body of the report resulted in a major investigative development. However, [redacted]

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[redacted] We did not identify any illegal use of Section 215 authority. However, we identified two instances where the FBI received information inadvertently that was not authorized by the FISA Court order. In one instance, the FBI did not realize for 2 months that it was continuously receiving information that was not authorized by the FISA Court order. The FBI reported this matter to the IOB, and OIPR reported the matter to and sequestered the material with the FISA Court. (U)

In the other instance the FBI recognized the matter quickly and took steps to immediately sequester the additional material. However, in this case, the FBI did not consider the matter to be reportable to the IOB because the records were not statutorily protected. OIPR has not made a decision regarding whether this is a compliance incident reportable to the FISA Court. (U)



We recommend the FBI should develop procedures that require FBI employees to review materials received from Section 215 orders to ensure that the material they receive pursuant to a Section 215 is authorized by the Section 215 order. (U)

Furthermore, we recommend that the FBI develop procedures for identifying and handling material that is produced pursuant to, but outside the scope of, Section 215 orders. The procedures should include the FBI's justification for handling any class of such material differently from other classes and should consider factors in addition to whether the material is or is not statutorily protected. For example, the procedures should also address such factors as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures. These procedures should be incorporated in the minimization procedures required by the Reauthorization Act. (U)

(S) We identified two other "noteworthy" items. The first involved a request [redacted] We found the request [redacted] to be noteworthy because the FISA Court twice refused to approve Section 215 applications for [redacted] citing First Amendment concerns [redacted] (S)

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The second noteworthy item concerned [redacted] (S)

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Finally, we examined whether the interim standard minimization procedures adopted by the Department for Section 215 orders are consistent with the requirements of the Reauthorization Act. Because of differences between the FBI and OIPR, the Department's interim procedures merely adopt the general language contained in the Attorney General's National Security Guidelines. However, these general standards do not provide specific guidance for minimization procedures that the Reauthorization Act appears to contemplate. We believe that these interim

guidelines do not adequately address the intent and requirements of the Reauthorization Act for minimization procedures, and we recommend that the Department continue its efforts to develop specific standard minimization procedures relating to Section 215 orders. (U)

**UNCLASSIFIED APPENDIX**

UNCLASSIFIED

DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC 20511

MAR 07 2008

The Honorable Glenn A. Fine  
Inspector General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Fine:

(U) Thank you for providing us a copy of your draft report dated January 28, 2008 titled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records in 2006." We have also reviewed the subsequent draft provided to us on February 19. We appreciate the opportunity to comment, and note that this comment addresses the draft dated February 19, 2008.

(U) As you note in your report, Section 215 orders are an invaluable tool the Federal Bureau of Investigation uses to obtain information in national security investigations. In many cases, the information obtained through this investigative technique cannot be obtained by other means. We thank you for the extensive review your office has conducted of the use of this authority.

Sincerely,



J.M. McConnell

UNCLASSIFIED

DOJ-OIG-00920



U.S. Department of Justice

National Security Division

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Washington, D.C. 20530

March 3, 2008

The Honorable Glenn A. Fine  
Inspector General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Fine:

Thank you for the opportunity to respond to your report entitled, "A Review of the Federal Bureau of Investigation's use of Section 215 Orders for Business Records in 2006." We are pleased that your report recognizes the importance of this valuable tool to the Federal Bureau of Investigation's (FBI) conduct of national security investigations.

As you find in your report, FBI agents depend on Section 215 orders to support FBI national security investigations and to follow through on investigative leads. The process for obtaining these orders was designed to protect the privacy and civil liberties of Americans and to ensure that applications comply with statutory requirements. We appreciate your finding that this careful, measured approach—while resulting in some delay—has not caused any harm to the national security. In order to help ensure that the Department takes full advantage of this important tool in the future, the National Security Division (NSD) has augmented the number of attorneys handling Section 215 applications, and is collaborating with the FBI to increase the efficiency with which requests for Section 215 authority are prepared. Indeed, as you note, the FBI and the NSD were able to work together to obtain Section 215 authority expeditiously in 2006 when circumstances required immediate collection.

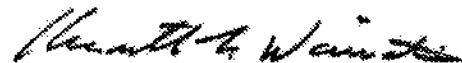
Your report also discusses the interim minimization procedures adopted by the Attorney General to govern Section 215 requests. As you note, at the time these procedures were adopted, the Department was in the process of revising its standard minimization procedures for other types of FISA collection. To allow Department attorneys the time to produce Section 215 minimization procedures consistent with that revision while ensuring that Americans' privacy and civil liberties interests are protected, the current interim procedures were adopted. The Interim Standard Minimization Procedures apply the requirements of four sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections (October 31, 2003) to records obtained pursuant to Section 215. Since their adoption, the Foreign Intelligence Surveillance Court (FISC) has ordered the government to follow these minimization procedures in numerous Section 215 orders. With the revision of the procedures for other FISA collections now complete, the Department will commence work to

replace these interim procedures with standard minimization procedures specifically tailored to collection under Section 215.

Finally, we are pleased that your report confirms there were no illegal uses of Section 215 authority in 2006. Your report does note two instances in which a third party over-produced certain records in response to a court-authorized Section 215 request. As you discuss in your report, the FBI did not solicit the additional business records in either case and therefore cannot be faulted for the recipients' production of records beyond the scope of the court order. Indeed, in both instances you identify, the FBI took the steps necessary to ensure that the over-produced information would not be used.

Thank you for your efforts and for the opportunity to convey our comments on this report.

Sincerely,



Kenneth L. Wainstein  
Assistant Attorney General



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

March 5, 2008

Honorable Glenn Fine  
Inspector General  
United States Department of Justice  
950 Pennsylvania Ave. N.W., Suite 4706  
Washington, D.C. 20530

Re: Office of Inspector General Report: A Review of the  
Federal Bureau of Investigation's Use of Section 215 Orders

Dear Mr. Fine:

The FBI appreciates this opportunity to respond to the findings and recommendations made in a "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders" (215 Report), a report that was Congressionally mandated by the USA PATRIOT Improvement and Reauthorization Act of 2005. This letter conveys the FBI's response to the findings and recommendations of the Report, and I request that it be appended to the Report.

We are pleased that your office has concluded that the FBI did not engage in any illegal use of its authority to gather third party business records during national security investigations. We also appreciate your findings, with which we concur, that "Section 215 can be a valuable investigative tool" even though delays in obtaining such orders have, at times, undercut that value. Finally, we appreciate your conclusion that emergency requests were handled very quickly and that the average processing time for business record applications was reduced slightly during 2006 as compared to 2004 and 2005 because "FBI and OIPR attorneys developed a procedure and working relationship that allowed them to process business records orders more efficiently." We are hopeful these processing times will continue to fall in the coming years.

Thank you for the opportunity to respond to the report.

Very truly yours,

Robert S. Mueller, III  
Director



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**CLASSIFIED APPENDIX 1 (U)**

**I. Background (U)**

On May 23, 2006, the U.S. Department of Justice (Department) filed an application with the Foreign Intelligence Surveillance Court (FISA Court) seeking a Section 215 order requiring the production of certain records to the National Security Agency (NSA). Specifically, the application sought telephone call-detail records, also known as telephony metadata, relating to all telephone communications maintained by certain telecommunications providers. The records were sought for investigations against international terrorism concerning the activities of (b)(1), (b)(3) persons in the United States and abroad. (TS//SI//NF)

Prior to the May 23 application, since approximately October 2001, (b)(1), (b)(3) telephone call-detail records as part of a larger surveillance and collection program ("NSA program") authorized by the President on October 4, 2001, in response to the September 11 terrorist attacks. For several reasons, including the public disclosure of one aspect of the NSA program in a December 2005 New York Times article, the government decided to seek collection of the telephone call-detail records under the authority of FISA and cease collection under the Presidentially-authorized NSA program. (TS//SI-SW//NF)

This appendix summarizes the May 23, 2006, FISA application, the FISA Court's May 24, 2006, order authorizing the collection, and the subsequent modifications to and renewals of the order. The facts and circumstances surrounding the events preceding the application, as well as the implementation of the order approving the Section 215 request, are the subject of an ongoing OIG review of the Department's and FBI's involvement in the NSA program. This appendix addresses the 2005 Reauthorization Act's requirement that the OIG examine the FBI's use of Section 215, one of which was the Section 215 application for telephone records from certain telecommunications providers. (TS//SI-SW//NF)

**II. The May 23, 2006, Section 215 Application (TS//SI//NF)**

The records sought by the FBI on behalf of the NSA in the May 23, 2006, Section 215 application were all telephone call-detail records, or telephony metadata, maintained as business records by certain telecommunications carriers. The application sought the production of metadata on an ongoing basis for the duration of the period covered by the

Court order. This metadata essentially consists of routing information that includes the originating and terminating telephone number of each call, and the date, time, and duration of each call. Telephony metadata does not include the substantive content of any communication or the name, address, or financial information of a subscriber or customer. According to the application, (b)(1), (b)(3) the telephony metadata provided to the NSA was expected to involve communications that were (1) between the United States and abroad, or (2) wholly within the United States, including local telephone calls. (TS//SI//NF)

The purpose of this bulk collection of data, as explained in the application, was to allow metadata analysis, which the application called a significant tool available to the U.S. government in (b)(1), (b)(3). According to the application, the call-detail records provided to the NSA on an ongoing basis would be placed in an archive. The NSA could then run "queries" against this archive to identify (b)(1), (b)(3) operatives. The queries would attempt to identify communications links to individuals reasonably suspected of being (b)(1), (b)(3) (an intelligence technique known as "contact chaining") (b)(1), (b)(3)

application, the telephone numbers selected by the NSA to query the archive would be known telephone numbers for which, "based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with (b)(1), (b)(3) (b)(1), (b)(3). The application stated that the identification of any such number believed to be used by a U.S. person would not be based solely on activities protected by the First Amendment to the Constitution. (TS//SI//NF)

The FISA application stated that the Section 215 order over the course of a year would result in the collection of telephony metadata pertaining to (b)(1), (b)(3) telephone communications (approximately (b)(1), (b)(3) call-detail records per day), including records of communications of U.S. persons located within the United States who were not the subject of any FBI investigation. The stated justification for this broad collection was the NSA's determination that a data archive was needed for the NSA to perform analysis to find known operatives and to identify unknown operatives of (b)(1), (b)(3) some of whom may be in the United States or in communication with U.S. persons. The application stated that the primary advantage of metadata analysis – the ability to identify past connections (b)(1), (b)(3) – was possible only if the NSA "has collected and archived a broad set of metadata that contains within it the subset of communications that can later be identified

as terrorist-related.” According to the application, the NSA estimated that only a tiny fraction (0.000025 percent or one in four million) of the call-detail records included in the archive were expected to be analyzed. The results of any such analysis would be provided, or “tipped,” to the FBI or other federal agencies. The application stated that the NSA expected to provide on average approximately two telephone numbers per day to the federal agencies. The application also stated that the FBI would handle tipped information in a manner consistent with The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. (TS//SI//NF)

The FISA application proposed restrictions on access to, and the processing and dissemination of, the data collected. The restrictions included the requirement that queries be approved by one of seven NSA officials or managers, and that queries only be performed with telephone numbers for which there was a reasonable, articulable suspicion that they were associated with [REDACTED] (b)(1), (b)(3) In addition, the application stated that the NSA’s Office of the General Counsel would review and approve proposed queries of telephone numbers reasonably believed to be used by U.S. persons. The application also pointed to several mechanisms for oversight of the use of metadata, including controls on the dissemination of any U.S. person information, the creation of a capability to audit NSA analysts with access to the metadata, and the destruction of collected metadata after a period of 5 years. The application also stated that the Director of the NSA would inform the Congressional Intelligence Oversight Committees of the FISA Court’s order, if granted, requiring the communications carriers to produce the call-detail records. (TS//SI//NF)

### **III. The May 24, 2006, FISA Court Order (TS//SI//NF)**

The FISA Court approved the Department’s Section 215 application on May 24, 2006. The Court found that there were reasonable grounds to believe that the records sought – the telephony metadata – were relevant to authorized investigations being conducted by the FBI to protect against international terrorism. The Court’s order also incorporated each of the procedures proposed in the government’s application relating to access to and use of the archived metadata. This included a requirement that any application to renew or reinstate the authority for the bulk collection include a report describing (1) the queries made since the Order was granted; (2) the manner in which the procedures relating to access and use of the metadata were applied; and (3) any proposed changes in the way in which the call-detail records would be received from the communications carriers. (TS//SI//NF)

The Court's order was accompanied by (b)(1), (b)(3) secondary orders to the telecommunications providers directing each to produce the records identified in the order and to continue producing such on an ongoing daily basis for the duration of the order, which was set to expire on August 18, 2006. (TS//SI//NF)

**IV. Modifications to and Renewals of the May 24, 2006, FISA Court Order (TS//SI//NF)**

On August 8, 2006, the FBI presented to the FISA Court a Verified Motion for an Amended Order authorizing the use of the telephony metadata "to protect against the threat of international terrorism posed by (b)(1), (b)(3)

(b)(1), (b)(3) The terms of the prior May 23 application and May 24 Order (b)(1), (b)(3) The proposed modification would allow the NSA also to query the archive of telephony metadata for information associated with (b)(1), (b)(3) persons in the United States and abroad. The government's motion asked that all other provisions of the FISA Court's May 24, 2006, Order remain in place. The motion was supported by a declaration of the Director of the National Counterterrorism Center describing the use of telephone communications by (b)(1), (b)(3) The Court granted the government's motion for an amended order on August 8, 2006. (TS//SI//NF)

On August 18, 2006, the FBI filed a renewal application requesting that the FISA Court authorize the continued collection of the telephony metadata authorized in the May 24, 2006, Order, as amended by the Court's August 8, 2006, Order. However, the August 18 application modified the prior applications in a few respects, including a request that the FISA Court increase the number of individuals at the NSA authorized to approve queries of the telephony metadata from seven to eight, and that the FISA Court authorize the collection and use of (b)(1), (b)(3)

(b)(1), (b)(3) The August 8 application also included the report required by the FISA Court's May 24, 2006, Order describing the queries that had been made since the May 24 order was granted, the manner in which the procedures relating to access and use of the metadata has been applied, and any proposed changes in the way in which the call-detail records would be received from the communications carriers. (TS//SI//NF)

The Court approved the government's August 18 application the same day it was filed and issued the accompanying secondary orders to the

communication carriers. The August 18, 2006, order was set to expire on November 15, 2006. (TS//SI//NF)

On November 14, 2006, the FBI filed a renewal application requesting that the FISA Court reauthorize the collection of the telephony metadata authorized in the August 18, 2006, Order. [REDACTED]

(b)(1), (b)(3)

[REDACTED] and that the NSA expected to provide an average of approximately [REDACTED] telephone numbers per day to the FBI, an increase of [REDACTED] from the estimate provided in the May 23, 2006, application. The November 14 application also included the report required by the FISA Court's May 24, 2006, order describing the queries that had been made since the August 18 order was granted, the manner in which the procedures relating to access and use of the metadata had been applied, and any proposed changes in the way in which the call-detail records would be received from the communications carriers. (TS//SI//NF)

The Court approved the government's application on November 15, 2006, and issued the accompanying secondary orders to the communications carriers. Since that time, the government has filed five additional renewal applications – on February 7, May 3, July 25, October 18, and January 10, 2008 – each of which was approved by the Court. (TS//SI//NF)

In June 2007, the government presented a proposed modification to the telephony metadata collection that sought to add additional foreign powers to those against whom the collection was targeted. This modification was approved and incorporated into the Court's July 25, 2007, Order. The government anticipates filing the next renewal application for the collection of telephony metadata in April 2008. (TS//SI//NF)

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**Section 552**

**Section 552a**

- (b)(1)
- (b)(2)
- (b)(3) \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- (b)(4)
- (b)(5)
- (b)(6)

- (b)(7)(A)
- (b)(7)(B)
- (b)(7)(C)
- (b)(7)(D)
- (b)(7)(E)
- (b)(7)(F)
- (b)(8)
- (b)(9)

- (d)(5)
- (j)(2)
- (k)(1)
- (k)(2)
- (k)(3)
- (k)(4)
- (k)(5)
- (k)(6)
- (k)(7)

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