

memorandum

DATE: May 6, 2009
REPLY TO:
ATTN OF: IG-40
SUBJECT: Letter Report on "Selected Aspects of the Department of Energy's Activities Involving the Foreign Intelligence Surveillance Act," INS-L-09-05 (S09IS014)
TO: Director, Office of Intelligence and Counterintelligence

This report provides the results of our review of selected aspects of the Foreign Intelligence Surveillance Act activities of the Department of Energy's Office of Intelligence and Counterintelligence.

BACKGROUND

In conjunction with the Department of Energy's (DOE's) role as part of the U.S. intelligence community, the Office of Intelligence and Counterintelligence (IN) provides technical intelligence analyses on all aspects of foreign nuclear weapons, nuclear materials, and energy issues. IN has played an increasingly significant role in a number of intelligence related areas, such as counter-proliferation, counterintelligence, cyber security, and combating nuclear terrorism.

The Foreign Intelligence Surveillance Act (FISA) of 1978, as amended on July 10, 2008, placed certain review requirements on the Inspectors General of each element of the intelligence community authorized to acquire foreign intelligence information by targeting certain persons outside of the U.S. We determined that, in fact, DOE is not authorized to acquire foreign intelligence information by targeting certain persons outside of the U.S. However, DOE does provide analytical support to the Federal Bureau of Investigation (FBI), Department of Justice, with respect to its FISA collection activities. Specifically, in accordance with Executive Order 12333, "United States Intelligence Activities," as amended by Executive Order 13470, IN is authorized to: (1) collect overtly, analyze, produce, and disseminate information, intelligence, and counterintelligence to support national and departmental missions; and (2) provide expert scientific, technical, analytic, and research capabilities to other agencies within the intelligence community, as appropriate.

We initiated an inspection of selected aspects of IN's FISA support activities. Our field work included interviews with several Headquarters intelligence and counterintelligence officers and managers who had corporate knowledge of intelligence activities throughout the Department, as well as employees of the FBI, the Department of Justice, and the Central Intelligence Agency. We reviewed the four cases IN identified as having been referred by the FBI for analysis of raw data collected under FISA court orders, as well as applicable IN policies and procedures.

RESULTS OF INSPECTION

Our inspection did not disclose any evidence that IN handled FISA-related casework in a manner that was inconsistent with FISA. IN officials advised us that IN had not conducted physical or electronic surveillance and had not disseminated any reports to the intelligence community containing a reference to a U.S. person's identity when the U.S. person was not the subject of investigation, all of which are prohibited under FISA. We were also advised that IN had not maintained any file of raw, non-minimized data collected by the FBI after completion of its analysis. No evidence came to our attention that contradicted these assertions by responsible IN officials.

We did find, however, that one of the four FISA cases the FBI referred for analysis was not completed in a timely manner and IN management was not aware of this situation. We also found that IN did not have written procedures for processing FISA cases and lacked any IN-wide process for tracking and following up on FISA cases. This likely was at least a contributing factor to management not being aware that IN's analysis of the above case was not handled in a timely manner.

Timely Case Analysis

On August 29, 2007, FBI officials met with officials in the Counterintelligence Directorate (IN-20) and requested the above cited case analysis. On October 17, 2007, IN-20 forwarded the materials to an analyst in the Intelligence Directorate (IN-10) for analysis. On February 27, 2008, IN-10 provided the FBI some preliminary review information. On June 25, 2008, an IN-20 status check revealed that no further action had been taken. During our field work, the IN-10 analyst who was assigned the work stated that a full analysis was not completed because he had priority work to complete and the FISA work had lesser priority. He also indicated that he had provided the FBI some "pointers" regarding the case. IN did not complete its analysis of the FISA case until January 22, 2009, almost 17 months after the FBI transmitted relevant material to DOE and 1½ months after we brought to IN's attention the delay in responding to the FBI.

The FBI official who requested that IN conduct the analysis of the FISA case informed us that the case was important to national security and that he had expected IN would complete its analysis in less than a year. He acknowledged, however, that he did not provide IN with a deadline for completion of the work and did not make any status checks with IN during the period that it was pending.

Written Procedures

We brought the timeliness issue to the attention of an IN-10 senior official. The official stated that he recalled being briefed on the case when it was referred to IN-10 by IN-20, but he was unaware that IN-10's analysis was not completed. He indicated that, once his office accepted the assignment, it was obliged to complete the work in a timely manner. The official stated that most FISA-related work is referred to his office from IN-20 through an informal process. He indicated that, in the particular case at issue, IN-20

should have expressed its expectations regarding a completion date for IN-10's analysis. He also stated, however, that if the IN-10 analyst assigned the case was unable to complete the work within 90 days, the analyst should have informed senior management of the situation, so the work could be reassigned. The official indicated that IN-10 does not have a "tickler system" to track items such as FISA assignments or special access program assignments. He said that IN's Computerized Action Tracking System, used for tracking projects, was unsuitable to track FISA or special access program assignments because they are handled through special sensitive channels.

We also discussed this matter with an IN-20 senior official, who acknowledged that he had not paid attention to periodic status checks that were made by his staff. The IN-20 official stated that, after learning from his staff that the IN-20 Procedures Guide, dated December 21, 2004, only required status checks every 120 days, he decided that these status checks should be run every 90 days. IN has informed us that this change was incorporated into a revision of the Procedures Guide.

We are not making any formal recommendations to management; however, we suggest that the Director, Office of Intelligence and Counterintelligence, develops IN-wide written procedures for processing FISA case requests. These procedures should include protocols to ensure an IN-wide process for tracking and following up on FISA cases.



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Attachment

cc: Chief of Staff
Director, Office of Internal Review (CF-1.2)