

DOJ CHANGED ITS FISA DISCLOSURE POLICY ON JANUARY 10, 2008

While wandering through FBI's Domestic Investigations and Operations Guide today, I realized that on January 10, 2008, DOJ changed its FISA use policy (at PDF 104) . In a memo announcing the new policy, Ken Wainstein explained that "this revised policy includes significant changes from current practice that will streamline the process for using FISA information in certain basic investigative processes, while still ensuring that important intelligence and law enforcement interests are protected."

It then lists 4 (entirely redacted) investigative processes for which FISA information could be used.

While I'm sure this letter has been reported in the past, it has far greater significance given several newly disclosed facts.

First, just days earlier, Attorney General Michael Mukasey reversed existing policy by permitting NSA to contact chain on US person data in EO 12333-collected information. That decision would make it far easier to identify existing communications implicating Americans.

Even more importantly, this move took place just weeks before the government revamped the PRISM program, such that FBI had a much more central role in the process and obtained selected PRISM material directly. In effect, Mukasey made it easier to use FISA information just weeks before FBI started getting a lot more of it, and getting it directly.

This change adds to the already significant evidence that the FBI started back door searches on PRISM information with that change in January 2008.

It's interesting, too, that FBI had already decided to make these changes before Colleen Kollar-Kotelly ruled the initial Protect America Act certifications met the statute on January 15, 2008. There's growing evidence that DOJ long planned to involve FBI more centrally, but waited on her decision (and the day the PAA was originally scheduled to expire) to roll out the change formally.

One more critical detail: The letter indicated that the new policy would be tied to a new interpretation of information "derived from" FISA.

The revised policy requires that it be reviewed one year from its effective date and requires NSD to issue guidance on what constitutes information "derived from" FISA collections by March 31, 2008.

Note that that initial annual review date would mean Bush's DOJ would conduct such a review in the last days before Obama came in.

In any case, the redacted parts of this letter are probably, arguably, unclassified and FOIAble at this point, since PCLOB has revealed that FBI uses its back door searches for assessments.