

34 YEARS LATER, TREASURY IS STILL OPERATING WITHOUT PROCEDURES TO PROTECT AMERICANS UNDER EO 12333

With almost no explanation, PCLOB just released this table ODNI compiled showing the status of procedures Agencies follow to protect US person information when using data obtained under EO 12333. This is something PCLOB has been pushing for since August 2013, when it sent a letter to Attorney General Holder pointing out that some agencies weren't in compliance with the EO.

As you know, Executive Order 12333 establishes the overall framework for the conduct of intelligence activities by U.S. intelligence agencies. Under section 2.3 of the Executive Order, intelligence agencies can only collect, retain, and disseminate information about U.S. persons if the information fits within one of the enumerated categories under the Order and if it is permitted under that agency's implementing guidelines approved by the Attorney General after consultation with the Director of National Intelligence.

The Privacy and Civil Liberties Oversight Board has learned that key procedures that form the guidelines to protect "information concerning United States person" have not comprehensively been updated, in some cases in almost three decades, despite dramatic changes in information use and technology.

So I assume the release of this table is designed to pressure the agencies that have been

stalling this process.

The immediate takeaway from this table is that, 34 years after Ronald Reagan ordered agencies to have such procedures in Executive Order 12333 and 18 months after PCL0B pushed for agencies to follow the E0, several intelligence agencies still don't have Attorney General approved procedures. Those agencies and the interim procedures they're using are:

The Department of Homeland Security's notoriously shoddy Office of Intelligence and Analysis: Pending issuance of final procedures, I&A is operating pursuant to Interim Intelligence Oversight Procedures, issued jointly by the Under Secretary for Intelligence and Analysis and the Associate General Counsel for Intelligence (April 3, 2008).

United States Coast Guard (USCG)- Intelligence and counterintelligence elements: Pending issuance of final procedures, operating pursuant to Commandant Instruction – COMDINST 3820.12, Coast Guard Intelligence Activities (August 28, 2003).

Department of Treasury Office of Intelligence and Analysis (OIA): Pending issuance of final procedures. While draft guidelines are being reviewed in the interagency approval process, the Office of Intelligence and Analysis conducts intelligence operations pursuant to E0 12333 and statutory responsibilities of the IC element, as advised by supporting legal counsel.

Drug Enforcement Administration, Office of National Security Intelligence (ONSI): Pending issuance of final procedures, operates pursuant to guidance of the Office of Chief Counsel, other guidance, and: Attorney General approved "Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons" (September 23, 2002); Attorney General approved "Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in

the Course of a Criminal Investigation”
(September 23, 2002).

I’m not surprised about DHS I&A because – as I noted – most people who track it know that it has never managed to do what it claims it should be doing. And I’m not all that worried about the Coast Guard; how much US person spying are they really doing, after all?

One should always worry about the DEA, and the fact that DEA has only had procedures affecting some of its use of E.O. 12333 intelligence is par for the course. I mean, limits on what it can share with CIA, but no guidelines on what it can share with FBI? And no guidelines on what it has dragnet collected overseas, where it is very active?

But I’m most troubled by Treasury OIA. In part, that’s because it doesn’t have anything in place – it has just been operating on E.O. 12333, apparently, in spite of E.O. 12333’s clear requirement that agencies have more detailed procedures in place. But Treasury’s failure to develop and follow procedures to protect US persons is especially troubling given the more central role OIA has – which expanded in 2004 – in researching and designating terrorists, weapons proliferators, and drug kingpins.

OIA makes intelligence actionable by supporting designations of terrorists, weapons proliferators, and drug traffickers and by providing information to support Treasury’s outreach to foreign partners. OIA also serves as a unique and valuable source of information to the Intelligence Community (IC), providing economic analysis, intelligence analysis, and Treasury intelligence information reports to support the IC’s needs.

As it is, such designations and the criminalization of US person actions that might violation sanctions imposed pursuant to such

designations are a black box largely devoid of due process (unless you're a rich Saudi businessman). But Treasury's failure to establish procedures to protect US persons is especially troubling given how central these three topics – terrorists, weapons proliferation, and drugs – are in the intelligence communities overseas collection. This is where bulk collection happens. And yet any US persons suck up in the process and shared with Treasury have only ill-defined protections?

Treasury's role in spying on Americans may be little understood. But it is significant. And apparently they've been doing that spying without the required internal controls.