OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

23 December 2015

Ms. Elizabeth Goitein
Co-Director, Liberty & National Security Program
Brennan Center for Justice
1140 Connecticut Ave., NW
11th Floor, Suite 1150
Washington, D.C. 20036

Dear Ms. Goitein:

Thank you for submitting the letter dated 29 October 2015 to Director of National Intelligence James Clapper, signed by a number of civil society organizations. Director Clapper asked me to respond on his behalf. Please share this response with the organizations that signed that letter.

We share your interest in ensuring transparency sufficient to enable informed public discussion about Section 702 of the Foreign Intelligence Surveillance Act. As you know, we are committed to enhancing intelligence transparency, consistent with our recently published plan for implementing the Principles of Intelligence Transparency for the Intelligence Community. As laid out in that plan—as well as in the Third Open Government National Action Plan—the Intelligence Community will work with civil society to establish a structured series of engagements to discuss issues of public interest.

Director Clapper has requested that we hold a meeting with civil society as soon as mutually convenient, so that we can discuss the matters raised in your letter that are within the Intelligence Community's purview. We would like to ensure we fully understand your requests and the concerns that underlie them, and to explain the status of our existing efforts. We believe we have made progress in addressing certain aspects of your requests, but remaining challenges constrain our ability to provide the information requested. Accordingly, we would also like to explore with you whether there might be alternative approaches to address your concerns.

I will work with your representatives to schedule this meeting, which will include officials from the relevant elements of the Intelligence Community. In the meantime, I would like to provide some initial information in advance of that meeting.

Your letter requests that we disclose additional information regarding "the number of communications or transactions involving American citizens and residents subject to Section 702 surveillance on a yearly basis." As discussed in your letter, this topic has been the subject of prior reviews. Indeed, the Privacy and Civil Liberties Oversight Board (PCLOB) examined this issue as part of its examination of Section 702 implementation. The Intelligence Community worked intensively over many months to provide the PCLOB with the information it requested in order to carry out this review and publish its *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (2 July 2014).

Regarding requests that the government disclose information about how many communications of U.S. persons are incidentally acquired under Section 702, the PCLOB noted:

> [T]he executive branch has responded that it cannot provide such a number—because it is often difficult to determine from a communication the nationality of its participants, and because the large volume of collection under Section 702 would make it impossible to conduct such determinations for every communication that is acquired. The executive branch also has pointed out that any attempt to document the nationality of participants to communications acquired under Section 702 would actually be invasive of privacy, because it would require government personnel to spend time scrutinizing the contents of private messages that they otherwise might never access or closely review.

The PCLOB issued a recommendation focused on this topic:

> **Recommendation 9:** The government should implement five measures to provide insight about the extent to which the NSA acquires and utilizes the communications involving U.S. persons and people located in the United States under the Section 702 program. Specifically, the NSA should implement processes to annually count the following: (1) the number of telephone communications acquired in which one caller is located in the United States; (2) the number of Internet communications acquired through upstream collection that originate or terminate in the United States; (3) the number of communications of or concerning U.S. persons that the NSA positively identifies as such in the routine course of its work; (4) the number of queries performed that employ U.S. person identifiers, specifically distinguishing the number of such queries that include names, titles, or other identifiers potentially associated with individuals; and (5) the number of instances in which the NSA disseminates non-public information about U.S. persons, specifically distinguishing disseminations that includes names, titles, or other identifiers potentially associated with individuals. These figures should be reported to Congress in the NSA Director's annual report and should be released publicly to the extent consistent with national security.

In its *Recommendations Assessment Report* (29 January 2015), the PCLOB subsequently reported that NSA was assessing how to implement this recommendation. In particular, the PCLOB noted:

> Subparts (1) and (2) of the recommendation involve counting how many telephone calls and upstream Internet communications the NSA acquires in which one participant is located in the United States. As noted in the Board's report, questions remain about whether such figures can accurately be recorded. The NSA has committed to studying this question, and staff from the NSA and the PCLOB have made arrangements to discuss the ongoing progress of its efforts.

NSA has been reviewing how to implement subparts (1)–(3) of this recommendation and is continuing to engage with the PCLOB in that regard. Regarding subpart (4), the USA FREEDOM Act requires the DNI to annually (and publicly) report, with respect to NSA and CIA, numerical information regarding the number of queries that employ U.S. person identifiers. We are in the process of implementing that requirement. Regarding subpart (5), NSA already tracks and reports the number of instances in which it disseminates non-public information regarding U.S. persons. We are reviewing this for potential inclusion in public reporting.

Your letter also requests that we disclose additional information regarding "[t]he number of times each year that the FBI uses a U.S. person identifier to query databases that include Section 702 data, and the number of times the queries return such data." The PCLOB examined this issue carefully with the FBI during its review of Section 702. As discussed in the PCLOB's 702 report, FBI systems do not track the number of queries using U.S. person identifiers. The PCLOB made a two-part recommendation with respect to such queries by the FBI:

> **Recommendation 2:** The FBI's minimization procedures should be updated to more clearly reflect actual practice for conducting U.S. person queries, including the frequency with which Section 702 data may be searched when making routine queries as part of FBI assessments and investigations. Further, some additional limits should be placed on the FBI's use and dissemination of Section 702 data in connection with non–foreign intelligence criminal matters.

In its January 2015 assessment report, the PCLOB stated that the Administration has committed to implementing both parts of this recommendation. With the recent reauthorization of the 702 Certification, many of the Board's recommendations, including this recommendation 2, have been implemented.

Finally, your letter asks about "[p]olicies governing agencies' notification of individuals that they intend to use information 'derived from' Section 702 surveillance in judicial or administrative proceedings." I am informed by the Department of Justice that it has been notifying individuals who are "aggrieved persons" if it intends to use information against them that is either obtained or derived from FISA—including Section 702—in legal or administrative proceedings, and remains committed to fulfilling its notice obligations under the law. According to the Department of Justice, in determining whether information is "obtained or derived from" FISA collection, the appropriate standards and analyses are similar to those appropriate in the context of surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522. The courts have interpreted Title III's "derived from" standard effectively to codify the fruit-of-the-poisonous-tree doctrine.

You also asked about the language in FISA requiring that such notice be provided when FISA information is used against an aggrieved person in "any trial, hearing or other proceeding." We understand from the Department of Justice that further guidance on this issue can be found in a June 2011 OLC opinion regarding FISA notice requirements for administrative proceedings. See *Applicability of the Foreign Intelligence Surveillance Act's Notification Provision to Security*

Clearance Adjudications by the Department of Justice Access Review Committee (3 June 2011) available at http://www.justice.gov/olc/opinion/applicability-foreign-intelligence-surveillance-acts-notification-provision-security. We defer any further discussions on these topics to the Department of Justice.

Again, we appreciate your reaching out to us to engage on these important transparency topics and look forward to engaging with you to discuss how we might be able to enhance transparency in these and related areas.

Sincerely,

Alexander W. Joel
Civil Liberties Protection Officer
Office of the Director of National intelligence