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June 16, 2015

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Judge Patricia M. Wald, Board Member
Privacy and Civil Liberties Oversight Board
2100 K Street, NW, Suite 500
Washington, DC 20427

Re: Notice PCLOB-2015-01: Activities Under Executive Order 12333

Dear Chairman Medine and Members of the Privacy and Civil Liberties Oversight Board:

The Reporters Committee for Freedom of the Press appreciates this opportunity to comment on counterterrorism-related activities conducted by the Intelligence Community under Executive Order 12333. The Reporters Committee submits these comments in response to your invitation for public comment.

The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to preserving the First Amendment's guarantee of a free and unfettered press. As a representative of journalists and media organizations that investigate and report on national security and other issues of public concern, the Reporters Committee supports and defends legal protections for journalists, as well as the public's right to be informed, through the news media, about the government. Accordingly, it urges the Board to make public as much information as possible about the counterterrorism activities taking place under Executive Order 12333, both to enhance appropriate public oversight of the Intelligence Community's activities and to ensure that the press and the public are informed about activities that may tread upon First Amendment rights and threaten confidential reporter-source relationships.

While the press and the public are generally aware that broad surveillance activities are conducted pursuant to Executive Order 12333, the dearth of

specific information available to the public concerning the scope and nature of those activities chills speech and fosters public distrust. Although activities that are understood to take place pursuant to this authority are the subject of public discussion, that discussion is necessarily both vague and incomplete.¹ Many of the procedures that guide the Intelligence Community in implementing its programs pursuant to Executive Order 12333 remain classified.² The guidelines that are available give only vague and general guidance as to what protections are in place for First Amendment activity.³ The widespread secrecy concerning programs conducted pursuant to Executive Order 12333 is itself an issue of First Amendment concern, because misinformation and uncertainty about surveillance create a chilling effect that impedes newsgathering and reporting. Additionally, without more information about how and why information is acquired and used by the Intelligence Community pursuant to Executive Order 12333, it is impossible to meaningfully analyze the impact of those programs on First Amendment rights.

Broadly speaking, the acquisition of individuals' communications records, whether through bulk or targeted means, damages journalists' ability to safeguard the confidentiality of their communications and raises serious concerns about their ability to pursue constitutionally protected newsgathering activities free from government interference. This Board has already recognized that bulk collection of telephony metadata pursuant to Section 215 of the PATRIOT Act resulted in "a chilling effect created by the *collection* of telephone calling records."⁴ This chilling effect is not confined to the bulk telephony metadata program alone. Intelligence Community surveillance of communications metadata, under the auspices of any program, calls into question journalists' ability to assure their sources of confidentiality.⁵

Further, searches and seizures of the *content* of communications, whether pursuant to Executive Order 12333 or any other authority, raise serious concerns. Collection and/or monitoring of, for example, the content of telephone calls, email, and documents stored in the cloud not only raise constitutional issues, they also implicate important legislative protections against searches and seizures of materials related to newsgathering.⁶ The Privacy Protection Act of 1980 ("PPA") generally prohibits government searches of work

¹ See, e.g., John Napier Tye, *Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans*, Wash. Post (July 18, 2014), <http://wapo.st/Ug0kLS>; Alexander W. Joel, *The Truth About Executive Order 12333*, Politico (August 18, 2014), <http://politi.co/1B6aRhN>.

² See Privacy and Civil Liberties Oversight Board, Status of Attorney General Approved U.S. Person Procedures Under E.O. 12333 (Feb. 10, 2015), <http://bit.ly/1I7tYVI>.

³ See Attorney General's Guidelines for Domestic FBI Operations (Sept. 29, 2008), <http://1.usa.gov/1sKxsVN> ("These Guidelines do not authorize investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment.").

⁴ Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* 163 (Jan. 23, 2014), <http://bit.ly/1SRiPke> (emphasis in original).

⁵ Recognizing that "freedom of the press can be no broader than the freedom of reporters to investigate and report the news," the Attorney General has also imposed additional constraints on the use of subpoenas and warrants to obtain records from or that belong to members of the news media, including communications metadata such as telephone toll records. See 28 C.F.R. § 50.10.

⁶ See Privacy Protection Act of 1980, 42 U.S.C. § 2000aa.

product and documentary materials “possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”⁷ Without knowing more about the types of activities that the Intelligence Community engages in pursuant to Executive Order 12333, it is impossible for the press and the public to know whether or not these activities constitute “searches” or “seizures” under the meaning of the PPA, and therefore whether the safeguards of that statute are being properly applied.

The most troubling aspect of Executive Order 12333 for journalists and media organizations is the inability for them to know whether and to what extent their communications are being collected or monitored pursuant to that authority. Opaque Intelligence Community activities create fear and uncertainty concerning what the government considers authorized and lawful surveillance, chill speech, and impede the exercise of First Amendment rights, including the rights of association and expression, among others. And, as the Supreme Court has recognized, “[i]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.”⁸ The near-total lack of information about the programs taking place pursuant to Executive Order 12333 makes it exceedingly difficult for journalists to know whether their promises of confidentiality to sources are meaningful. Unlike in the context of warrants or subpoenas in criminal cases, members of the news media whose records, documents, or work product are searched and/or seized under programs that take place pursuant to Executive Order 12333 do not receive notice or an opportunity to be heard.⁹ Nor is it possible for them to ascertain whether the government is complying with constitutional and statutory constraints on surveillance and monitoring.

As the Supreme Court has recognized, national security cases “often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.”¹⁰ Constitutional and statutory protections for newsgathering do not vanish whenever counter-terrorism justifications are asserted. And the secrecy surrounding Intelligence Community programs that may involve surveillance of journalists and news organizations does not minimize the threat those programs pose to our most cherished First Amendment freedoms. To the contrary, it inflicts unique harm.

Because of the broad secrecy surrounding the Intelligence Community activities taking place pursuant to Executive Order 12333, the opportunities for the press and the public to raise constitutional and statutory concerns are few and far between, and their ability to safeguard First Amendment rights limited. This Board, however, is in a position to make public additional information that would assuage the concerns of the press and the public

⁷ *Id.*

⁸ *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring).

⁹ See 28 C.F.R. § 50.10 (Department of Justice policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media).

¹⁰ *United States v. United States Dist. Court for the E. Dist. Mich.*, 407 U.S. 297, 313 (1972).

that the Intelligence Community may be disregarding and violating First Amendment rights and statutory protections, and lessen the chilling effect that those concerns are having on the exercise of free speech and expression, and the right to gather the news. The Board should consider the importance of public knowledge and understanding of government activities, as well as the vital and constitutionally recognized role of the press in gathering and disseminating information to the public, as it considers how best to shed light on these government programs.

We appreciate the Board's commitment to reviewing the privacy and civil liberties implications of counterterrorism programs and to making additional information about those programs available to the press and to the public. The Reporters Committee is available to assist you with your work in any way moving forward.

Sincerely,

Bruce D. Brown
Katie Townsend
Hannah Bloch-Wehba
The Reporters Committee for Freedom of the Press