A Review of the FBI's Use of Section 215 Orders for Business Records in 2006

Office of the Inspector General
March 2008

UNCLASSIFIED

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CHAPTER ONE
INTRODUCTION

The *USA PATRIOT Improvement and Reauthorization Act of 2005* (Reauthorization Act or the Act) directed the Department of Justice (Department or DOJ) Office of the Inspector General (OIG) to conduct "a comprehensive audit of the effectiveness and use, including improper or illegal use" of the Federal Bureau of Investigation's (FBI) investigative authority that was expanded by Section 215 of the Patriot Act.[1] See Pub. L. No. 109-177, § 106A. Section 215 of the Patriot Act allows the FBI to seek orders from the Foreign Intelligence Surveillance Court (FISA Court) for "any tangible things," including books, records, and other items from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. The Reauthorization Act also required the OIG to review the FBI's use of Section 215 for two time periods – calendar years 2002 through 2004 and 2005 through 2006.[2]

On March 9, 2007, the OIG issued our first report, which reviewed the use of Section 215 in 2002 through 2005.[3] This is the OIG's second report required by the Reauthorization Act. This report examines the FBI's requests for Section 215 orders in 2006. In addition, as required by the Reauthorization Act, this report examines the minimization procedures for business records which the Reauthorization Act required the Attorney General to adopt in 2006.

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* This report includes information that the Department of Justice considered to be classified and therefore could not be publicly released. To create this public version of the report, the OIG redacted (deleted) the portions of the report that the Department considered to be classified, and we indicated where those redactions were made. In addition, the OIG has provided copes of the full classified report to the Department, the Director of National Intelligence, and Congress.

[1] The term "USA PATRIOT Act" is an acronym for the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). It is commonly referred to as "the Patriot Act."

[2] The *USA PATRIOT Improvement and Reauthorization Act of 2005* (Reauthorization Act or the Act) also directed the OIG to conduct reviews on the use and effectiveness of the FBI's use of national security letters (NSL), another investigative authority that was expanded by the Patriot Act. The OIG reviews of the FBI's use of NSL authority are contained in separate reports. The OIG's first report on NSLs, issued in March 2007, reviewed the FBI's use of NSLs in 2003 through 2005. The OIG is issuing a second report on NSLs that examines the FBI's and Department's corrective actions taken in response to our first NSL report and the FBI's use of NSLs in 2006. In addition, the OIG is completing a third report on the FBI's use of "exigent letters."

[3] Although we were only required to review 2002 through 2004 in the first review, we elected to include data from 2005 in that report.

I. The Patriot Act and the Patriot Reauthorization Act of 2005

Enacted after the September 11, 2001, terrorist attacks, the Patriot Act states that it seeks to provide federal authorities "with the appropriate tools required to intercept and obstruct terrorism." Several Patriot Act provisions, including Section 215, were originally scheduled to sunset on December 31, 2005. On March 9, 2006, the President signed into law the Reauthorization Act, which, among other things, made permanent or extended several Patriot Act provisions. However, Section 215 was not made permanent but was extended for 4 years until December 31, 2009. The Reauthorization Act also resulted in several substantive changes to Section 215, which we discuss in Chapter Two of this report.

II. Methodology of the OIG Review

In this review of the use of Section 215 orders, the OIG examined documents obtained from the FBI and the Department's Office of Intelligence Policy and Review (OIPR) relating to each instance of the FBI's use or attempted use of Section 215 authorities during 2006.[4] In addition, we reviewed Department reports concerning the FBI's use of Section 215 authorities.

In this review, the OIG conducted over 60 interviews of FBI, Department, and other officials. The OIG also visited FBI field offices in New York City and suburban Maryland to review investigative case files from which requests for Section 215 applications originated and to interview FBI employees, including FBI Special Agents in Charge (SAC), Assistant Special Agents in Charge, Chief Division Counsels, Supervisory Special Agents, case agents, and intelligence analysts.[5] We also conducted telephone interviews of FBI employees in several other field offices who had initiated Section 215 requests.

The OIG also interviewed senior FBI and OIPR officials who participated in implementing procedures and processing requests for Section 215 orders, including OIPR's former Acting Counsel and former Counsel for Intelligence Policy, the FBI General Counsel and the Deputy

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[4] Until fall 2006, the Office of Intelligence Policy Review (OIPR) was a separate component of the Department. In March 2006, the Reauthorization Act authorized the creation of a National Security Division (NSD) within the Department. In September 2006, Kenneth L. Wainstein was confirmed as the first Assistant Attorney General for the NSD, and shortly after that OIPR was moved to the NSD. OIPR's and NSD's intelligence functions will be reorganized within NSD's planned Office of Intelligence. Because the reorganization is not yet complete, we refer to OIPR in this report.

[5] FBI field offices are also referred to as "divisions." The Chief Division Counsel is the chief legal officer for the field office.

General Counsel of the FBI Office of General Counsel's National Security Law Branch (NSLB), other attorneys and personnel from NSLB and OIPR, and officials responsible for administering the FBI and OIPR Section 215 tracking systems.

III. Organization of the Report

This report is divided into eight chapters followed by one unclassified appendix and two classified appendices. After this introduction, we describe in Chapter Two the legal background related to Section 215 authority and the processes for seeking Section 215 orders and for retaining and disseminating records received pursuant to those orders.

In Chapter Three, we provide an overview of the instances in which the FBI sought to obtain Section 215 orders in 2006, including the number of FBI requests, the number of orders obtained, and the type of information requested.

In Chapter Four, we provide a detailed description of the FBI's requests for Section 215 orders processed in 2006. We describe the records requested; the purpose of the requests; the processing time for the requests; whether the applications were granted, modified, or withdrawn; whether the records were produced; and if so, how they were used.

In Chapter Five, we present our findings and analysis of the 2006 applications and orders, including their processing time, Foreign Intelligence Surveillance Court modifications, and their use and effectiveness.

In Chapter Six, we identify any improper, illegal, or noteworthy use of Section 215, and in Chapter Seven we examine the minimization procedures adopted by the Attorney General in response to the Reauthorization Act.

Chapter Eight contains our conclusions.

The Unclassified Appendix to the report contains the comments on the report by the Director of National Intelligence, the Assistant Attorney General for the National Security Division, and the Director of the FBI.

The two Classified Appendices describe other uses of Section 215 orders to collect [redacted].

IV. Summary of OIG Findings

Our review determined that, similar to the findings of our first report on Section 215 orders, the FBI and OIPR processed various FBI requests for the use of both "pure" and "combination" Section 215 orders in 2006.[6] In 2006, the FBI and OIPR processed 15 pure Section 215 applications and 32 combination applications which were formally submitted to the FISA Court. All 47 Section 215 applications submitted to the FISA Court were approved.[7] The Section 215 applications requested a variety of information, including credit card records, [redacted].

Unlike in previous years, [redacted].

We also determined that during the period covered by this report FBI agents encountered similar processing delays for Section 215 applications as those identified in our previous report. These delays were caused by unfamiliarity with the Section 215 process, too few resources to handle requests expeditiously, a multi-layered review process, and various substantive issues regarding whether certain applications met the statutory requirements. Overall, the average processing time for Section 215 orders in 2006 was 147 days, which was similar to the processing times for 2005. However, the FBI and OIPR were able to expedite certain Section 215 requests in 2006, and when the FBI identified two emergency requests the FBI and OIPR processed both Section 215 requests quickly.

Similar to our previous report, we examined how the FBI has used information obtained from Section 215 orders in national security investigations. Aside from [redacted], we found that in 2006 Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information to support additional FBI investigative requests and to [redacted].

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[6] Pure Section 215 requests are not associated with applications for the use of any other *Foreign Intelligence Surveillance Act* (FISA) authority. Combination Section 215 requests are business record requests added to or combined with a FISA application for pen register/trap and trace orders.

[7] Four of the pure Section 215 applications processed in 2006 were signed by the FISA Court in 2007.

We did not identify any illegal use of Section 215 authority. However, our review identified two instances in which the provider produced records that were in response to, but outside the scope of, Section 215 orders. In one of these two instances, the FBI quickly determined that it had inadvertently received information not authorized by the Section 215 orders and took appropriate steps to address the matter. In the other case, approximately 2 months passed before the FBI recognized and addressed the matter. As a result, we recommend that the FBI develop and implement procedures to ensure that FBI employees check that they are not receiving or using information that is not authorized by the Section 215 order.

Our review also identified that the FBI reported only one of the two matters to the President's Intelligence Oversight Board (IOB).[8] The FBI determined that only one of the two instances involved statutorily protected material and that only the instance involving the statutorily protected material was reportable to the IOB. The FBI also determined that the non-statutorily protected material should be considered as voluntarily produced material even though the provider had refused to produce the material without a court order.

As a result, we recommend that the FBI develop procedures for identifying and handling material that is produced in response to, but outside the scope of, Section 215 orders. The procedures should include the FBI's justification for handling any class of such material differently from other classes. We believe the FBI should not base the procedures for handling such material solely on whether the material is or is not statutorily protected. For example, the procedures should address additional factors such as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures.

We also identified two other "noteworthy" issues. First, we found that the FBI had issued national security letters (NSL) for information about [redacted] after the FISA Court, citing First Amendment concerns, had twice declined to sign Section 215 orders in the same investigation. We questioned the appropriateness of the FBI's issuing these NSLs after the Court's decision because NSLs have the same First Amendment caveat as Section 215 requests and the FBI issued the NSLs based on the same factual predicate, without further reviewing the underlying investigation to ensure that it was not premised solely on protected First Amendment conduct.

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[8] In 1976 the Intelligence Oversight Board (IOB) was created by Executive Order and charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863.

The second noteworthy issue [redacted].

Finally, as directed by the Reauthorization Act, we also examined whether the interim minimization procedures adopted by the Department for Section 215 orders protect the constitutional rights of U.S. persons. We concluded that the standard minimization procedures adopted in September 2006, which are interim procedures, do not adequately address the intent and minimization requirements of the Reauthorization Act, and we recommend that the Department develop specific standard minimization procedures relating to Section 215 orders.

CHAPTER TWO
BACKGROUND

I. Introduction

This chapter provides a brief description of the legal background related to Section 215 authority and the process for obtaining Section 215 orders.

II. Legal Background

Pursuant to Section 215 of the Patriot Act, the FBI may obtain "any tangible things," including books, records, and other items from any business, organization, or entity provided that the item or items are for an authorized investigation. The tangible things are available "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." 50 U.S.C. § 1861. Section 215 did not create any new investigative authority but instead expanded existing authority found in the *Foreign Intelligence Surveillance Act of 1978* (FISA). 50 U.S.C. § 1801 et seq.

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court) in order to conduct electronic surveillance to collect foreign intelligence information.[9] In 1998, Congress amended FISA to authorize the FBI to apply to the FISA Court for orders compelling four kinds of businesses to "release records in its possession" to the FBI: common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities. The amendment did not further define "records." This provision, which was codified at 50 U.S.C. § 1862, became known as the "business records" provision and was the provision expanded by Section 215 of the Patriot Act.[10]

The 1998 business records amendment required a FISA application to specify that the records were sought for an investigation to gather foreign intelligence information or an investigation concerning international

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[9] OIPR prepares and presents applications for Section 215 orders to the FISA Court on behalf of the FBI. According to the FISA Court Rules of Procedures, the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys have not been authorized to appear before the Court for this purpose.

[10] 50 U.S.C. § 1862(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001).

terrorism, and that there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." 50 U.S.C. § 1862 (2000 ed.). This language meant that the FBI was limited to obtaining information regarding a specific person or entity the FBI was investigating and about whom the FBI had individualized suspicion. In addition, the amendment prohibited the entity complying with the order from disclosing either the existence of the order or any information produced in response to the order.

Subsequent to the 1998 FISA amendment creating this investigative authority and prior to passage of the Patriot Act in October 2001, the FBI obtained only one FISA order for business records. This order was obtained in 2000.

Section 215 of the Patriot Act significantly expanded the scope of the FBI's investigative authority pursuant to the business records provision of FISA and lowered the standard of proof required to obtain this type of business record. The pertinent part of Section 215 provides:

> The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.[11] 50 U.S.C. § 1861(a)(1).

While the 1998 language limited the reach of this type of investigative authority to four types of entities, the new language did not explicitly limit the type of entity or business that can be compelled by an order. Section 215 of the Patriot Act also expanded the categories of documents that the FBI can obtain under the business records provision of FISA, because it no longer was limited to "records" and provides that the FBI may obtain an order for "the production of any tangible things (including books, records, papers, documents, and other items)." Id.

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[11] "United States person" is defined as a citizen, legal permanent resident, an unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, or corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(i).

Section 215 also lowered the evidentiary threshold to obtain such an order. As a result, the number of people whose information could be obtained was expanded because the FBI is no longer required to show that the items being sought pertain to a person whom the FBI is investigating. Instead, the items sought need only be requested "for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). This standard, referred to as the relevance standard, permits the FBI to seek information concerning persons not necessarily under investigation but who are connected in some way to a person or entity under investigation.

The Reauthorization Act further amended Section 215 by requiring that an application establish "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." Id. At the same time, the Reauthorization Act provided for a presumption of relevance for four specified entities or individuals: foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, and individuals known to associate with subjects of such investigations. Id. When an application involves one of the four entities or individuals referenced in the presumption, the applicant need not establish reasonable grounds to believe the requested items are relevant.

The Reauthorization Act included other substantive amendments to Section 215. For example, the Act specifically authorized the collection of certain sensitive records, including library, medical, educational, and tax return records. The Act also required that an application for these sensitive records be approved by the FBI Director or a specified designee, and specific congressional reporting.[12] In addition, the Reauthorization Act specifically provided that Section 215 orders must, among other things, contain a particularized description of the items sought and provide for a reasonable time to assemble them. The Act also established a detailed judicial review process for recipients of Section 215 orders to challenge their legality before a FISA Court judge and extended Section 215 for 4 years until December 31, 2009.

Additional changes to Section 215 were adopted with the enactment of the *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*. For example, the 2006 amendments provided that a recipient of a Section 215 order may petition the FISA Court to modify or set aside the nondisclosure

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[12] As permitted by the Reauthorization Act, the FBI Director delegated approval authority for these records to the Deputy Director and the Executive Assistant Director for the FBI's National Security Branch.

requirement after 1 year from the issuance of the order if certain findings are made.[13]

III. The Process for Seeking Section 215 Orders

As we described in our March 2007 report regarding the use of Section 215 orders from 2002 through 2005, the process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, FISA Court review, and FBI service of the order.

The process to obtain a Section 215 order normally begins when an FBI case agent in a field office prepares a business records request form, which requires the agent to provide, among other things, the following information: a brief summary of the investigation, a specific description of the items requested, an explanation of the manner in which the requested items are expected to provide foreign intelligence information, and the identity of the custodian or owner of the requested items. The request form must be approved by the squad's Supervisory Special Agent, the Chief Division Counsel, and the SAC at the FBI field office. The approval process is automated through the FBI's FISA Management System (FISAMS), which sends electronic notifications to each individual responsible for taking the next action in order to process the business record in the field office. After the approvals are completed in the field office, the FISAMS notifies the "substantive desk" (in the Counterterrorism Division or Counterintelligence Division) at FBI Headquarters.

At FBI Headquarters, the business records request form is reviewed and approved by both the substantive desk and the Office of General Counsel's NSLB. Once the FISAMS delivers the request to the substantive desk, it is assigned to an NSLB attorney who works with the case agent and other FBI personnel to obtain the information the NSLB attorney believes is necessary to include in the draft application and order. The draft application package is then reviewed by NSLB supervisors and forwarded to OIPR, where the request is assigned to an OIPR attorney.

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[13] *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*, Pub. L. No. 109-178. The Court may grant a petition to modify or set aside a petition if the Court finds there is no reason to believe that disclosure may endanger the national security, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety any person. However, if the Attorney General, Deputy Attorney General, or FBI Director certifies that the disclosure may endanger the national security or interfere with diplomatic relations, the certification will be treated as conclusive unless the Court finds that such a certification was made in bad faith.

The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to obtain the information the OIPR attorney believes is necessary to include in the draft application and order. An OIPR supervisor then reviews the draft application package. The final application package is returned to the FBI for an accuracy review and additional edits may be made based on the FBI's review of the final package. Upon completion of the final version, signatures of designated senior FBI personnel are obtained and an OIPR attorney prepares the package for presentation to the FISA Court.

While the final signatures are collected, OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with an advance copy of the application and order, which is called a "read" copy. The FISA Court, through a FISA Court legal advisor, may identify concerns and request changes to the documents after reviewing the "read" copy. OIPR and the FBI then address the Court's questions or concerns and make revisions to the application or order. If the FISA Court deems it necessary, OIPR then formally presents the application package to the FISA Court at the scheduled hearing.[14] If the FISA Court judge approves the application, the judge signs the order. At the hearing, the judge may make handwritten changes to the order and, if so, will sign the order with the handwritten modifications.

The order is then entered into the FISAMS and served by the FBI field office nearest to the provider designated in the order. Among other things, the order sets forth the time period for producing the items.

IV. How Section 215 Information is Collected, Analyzed, Retained, and Disseminated

The FBI continues to collect, analyze, and retain Section 215 information as described in our previous report. In brief, a Section 215 order is served by the FBI office nearest the custodian of records named in the Court order. The records are either provided to the FBI in hard copy or in electronic format. Upon receipt, the records may be uploaded into the Automated Case Support (ACS) system, the FBI's electronic case file system, or reviewed and analyzed by the case agent or an FBI analyst. If the records are provided in electronic format, they may be uploaded into the ACS system by a technician prior to an agent's review. If the records are provided in paper format, the agent may review them and if the case agent determines no further investigation is warranted, the agent may store the information with the rest of the investigative case file. Whether provided in paper or electronic format, the case agent may write an Electronic

[14] [redacted].

Communication (EC) summarizing the information obtained for purposes of documenting the existence of the records electronically in the ACS system.

If the information warrants dissemination within the FBI, the agent prepares an EC to the relevant field office or offices. If the information warrants dissemination outside of the FBI, [redacted], the agent provides the records to the appropriate FBI office for approval. [redacted].

CHAPTER THREE
OVERVIEW OF SECTION 215 REQUESTS PROCESSED IN 2006

I. Introduction

As part of the OIG's review of the use and effectiveness of Section 215 authorities, the Reauthorization Act directed the OIG to examine the following:

- Every business record application submitted to the FISA Court including whether: (a) the FBI requested that the Department of Justice submit a business record application to the FISA Court and the application was not submitted, and (b) whether the FISA Court granted, modified, or denied any business record application;
- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions;
- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority;
- The effectiveness of the business record requests as an "investigative tool," including: (a) what types of records are obtained and the importance of those records in the intelligence activities of the FBI and the DOJ; (b) the manner in which the information obtained through business record requests is collected, retained, analyzed, and disseminated by the FBI; (c) whether and how often the FBI used information obtained from business record requests to produce an "analytical intelligence product" for distribution to, among others, the intelligence community or federal, state, and local governments; and (d) whether and how often the FBI provided information obtained from business record requests to law enforcement authorities for use in criminal proceedings; and
- With respect to 2006, an examination of the minimization procedures adopted by the Attorney General pursuant to the Reauthorization Act and whether such minimization procedures protect the constitutional rights of United States persons.[15]

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[15] The Reauthorization Act also directed that the OIG examine the justification for the failure of the Attorney General to issue implementing procedures governing requests for (Cont'd.)

In this chapter we provide an overview of FBI requests for Section 215 orders that were processed in 2006. We describe the number of requests submitted by FBI agents, the number of Section 215 orders obtained, the type of information requested, and the number of requests that were withdrawn.

II. Two Uses of Section 215 Authority

In 2006, as in previous years, FBI Headquarters and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: "pure" and "combination" Section 215 applications.

A "pure" Section 215 application is a term used by OIPR to refer to a Section 215 application for any tangible item that is not associated with applications for any other FISA authority. For example, a Section 215 request for driver's license records from state departments of motor vehicles would constitute a pure Section 215 request.

A "combination" application is a term used by OIPR to refer to a Section 215 request that is added to or combined with a FISA application for pen register/trap and trace orders.[16] The use of the combination request evolved from OIPR's determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through the orders.[17]

A. Pure Section 215 Applications

We reviewed all pure Section 215 applications that NSLB or OIPR processed in 2006 for submission to the FISA Court. In this section, we describe the number of pure Section 215 requests; the number of pure applications formally submitted to and approved by the FISA Court; the number of U.S. and non-U.S. persons that were the subjects of these applications; the types of records obtained; the FBI field offices that requested Section 215 applications; and the types of investigations that generated Section 215 requests.

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business records applications and whether such delay harmed national security. We addressed this request in our March 2007 Section 215 report.

[16] A pen register is a surveillance device that captures the phone numbers dialed on outgoing telephone calls; trap and trace devices capture the numbers identifying incoming calls.

[17] We discuss the origin of combination requests in more detail in Chapter Three of our March 2007 report.

1. Number of Pure Section 215 Applications

In 2006, the FBI or OIPR processed 21 requests for pure Section 215 applications. Of these, 15 were formally submitted to the FISA Court for approval – 11 were submitted in 2006 and 4 were submitted in 2007.[18] The six additional requests were "withdrawn." Withdrawn applications are those which are either not presented or not formally presented to the FISA Court for approval.[19]

Each of the 15 formal submissions processed in 2006 was approved by the FISA Court. Table 3.1 illustrates this information.

[redacted]

TABLE 3.1
Pure Section 215 Applications
Processed by NSLB or OIPR in 2006

	2006*
Number of applications processed during 2006 and formally submitted to the FISA Court	15
Number of applications processed during 2006 and withdrawn	6
Total applications processed during 2006	**21**

Source: OIPR and FBI
*Note: The 15 applications processed during 2006 include 4 that the FISA Court approved in 2007. The six withdrawn applications processed during 2006 include one that was withdrawn in 2007.

In total, between 2002 and 2006, 36 Section 215 applications were processed and formally submitted to the FISA Court. Each of the 36 was approved, as indicated in Table 3.2.

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[18] OIPR formally submitted interim standard minimization procedures to the FISA Court in 2006. Although this submission was given a business record docket number, it was not a Section 215 application and therefore we do not count it as a business record application. We discuss the interim standard minimization procedures in Chapter Seven of this report.

[19] One of the six withdrawn applications was presented to the FISA Court twice as a "read" copy before it was withdrawn. We discuss the reasons for the withdrawn applications in Chapter Four.

TABLE 3.2
Pure Section 215 Orders Issued by the Foreign Intelligence Surveillance Court

	2002	2003	2004	2005	2006*	Total
Total number of applications submitted to and approved by the FISA Court	0	0	7	14	15	**36**

Source: OIPR and FBI
*Note: The 15 applications processed during 2006 include 4 that the FISA Court approved in 2007.

2. Subjects of Pure Section 215 Applications

We compiled the number of U.S. and non-U.S. persons who were identified as the subject of the Section 215 request and the underlying FBI investigation. We relied on the information provided in the Section 215 applications for this information.[20] Table 3.3 shows the results for applications processed in 2006.

TABLE 3.3
Number of U.S. Persons and Non-U.S. Persons Identified as Subjects in Section 215 Applications Processed in 2006*

	Approved applications	Withdrawn applications	Total
U.S. Person	[redacted]	[redacted]	[redacted]
Non-U.S. Person	[redacted]	[redacted]	[redacted]

Source: OIPR and FBI
*Note: Table 3.3 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

The number of persons referenced in Table 3.3 is greater than the number of applications approved by the FISA Court because Section 215 applications can name more than one subject, and we counted each subject separately. [redacted] of the applications requested business records for more than one subject. [redacted] applications requested business records for [redacted] different subjects.

Moreover, Table 3.3 does not present the full universe of U.S. persons and non-U.S. persons named as subjects or otherwise affected by Section 215 applications processed in 2006 for two reasons. First, Table 3.3 does

[20] As previously stated, the FISA statute defines a "United States person" as a citizen, legal permanent resident, unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, or corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(i).

not include individuals who were the subject of a Section 215 application but not the subject of an FBI investigation (a "non-subject"). We did not include the number of non-subjects because [redacted] Section 215 applications requested records of non-subjects, but [redacted] identified whether the non-subjects were U.S. or non-U.S. persons.[21]

Second, Table 3.3 does not reflect the number of U.S. persons and non-U.S. persons about whom information was collected as a result of [redacted].

In our March 2007 report, we reported that in 2004 (the first calendar year in which pure applications were submitted to the FISA Court) [redacted]. With these important caveats, Table 3.4 shows the number of subjects that were identified as U.S. and non-U.S. persons for 32 of the 36 Section 215 applications processed from 2002 through 2006 and approved by the FISA Court.

TABLE 3.4
Number of U.S. Persons and Non-U.S. Persons Identified as Subjects in Section 215 Orders Processed from 2002 through 2006

	2002	2003	2004	2005	2006*	Total
U.S. Person	0	0	[redacted]	[redacted]	[redacted]	[redacted]
Non-U.S. Person	0	0	[redacted]	[redacted]	[redacted]	[redacted]
Total	**0**	**0**	[redacted]	[redacted]	[redacted]	[redacted]

Source: OIPR and FBI
*Note: CY 2006 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

[21] [redacted] Section 215 applications requested records for non-subjects. [redacted].

3. Types of Records Requested in Section 215 Applications

We also identified the types of business records that were sought in Section 215 applications processed in 2006. Table 3.5 shows the types of records requested, as well as the number of requests for each type of record in Section 215 applications processed in 2006 and approved by the FISA Court, excluding [redacted]. Table 3.6 shows the same information for the withdrawn Section 215 applications processed in 2006.

TABLE 3.5
Types of Records Requested in Pure Section 215 Applications Processed in 2006 and Approved by the FISA Court*

Type of Record Requested	Approved Applications
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Total	**11**

Source: OIPR and FBI
*Note: Table 3.5 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

TABLE 3.6
Types of Records Requested in Pure Section 215 Applications Processed in 2006 and Withdrawn*

Type of Record Requested	Withdrawn Applications)
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Total	**6**

Source: OIPR and FBI
*Note: Table 3.6 includes an application processed in 2006 but withdrawn in 2007.

In total, 16 different types of records were requested in the Section 215 orders processed between 2002 and 2006 and approved by the FISA Court. The types of records are illustrated in Table 3.7.

TABLE 3.7
Types of Records Requested in Pure Section 215 Orders between 2002 and 2006 and Approved by the FISA Court*

Type of Record Requested	Approved Applications
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Total	[redacted]

Source: OIPR and FBI
*Note: Table 3.7 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

4. FBI Field Offices that Submitted Requests for Section 215 Applications

The OIG also analyzed how many FBI field offices submitted requests for pure Section 215 applications. We determined that [redacted] of the FBI's 56 field offices ([redacted] percent) applied for the 17 pure Section 215 orders processed in 2006. A total of [redacted] FBI field offices ([redacted] percent) have requested Section 215 orders since 2002.[22]

[22] As discussed in our first Section 215 report, there were no Section 215 orders approved in 2002 or 2003. The first Section 215 order was approved in May 2004.

5. Types of Investigations from which Section 215 Requests Originated

We also examined the types of investigations from which pure requests originated. The pure Section 215 applications originated from either counterintelligence (CI), counterterrorism (CT), or cyber investigations. Table 3.8 shows the types of investigations from which pure Section 215 applications processed in 2006 and approved by the FISA Court originated, excluding [redacted].

TABLE 3.8
Types of Investigations that Generated Pure Section 215 Requests Processed in 2006 and Approved by the FISA Court

Case Type	2002	2003	2004	2005	2006*	Totals
CI	0	0	3	6	4	**13**
CT	0	0	4	4	6	**14**
Cyber	0	0	0	1	1	**2**

Source: OIPR and FBI
*Note: For 2006, Table 3.8 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

B. Combination Section 215 Applications and Orders in 2006

In this section, we describe the number and types of applications for combination orders that were submitted to the FISA Court in 2006. A combination application is a term used by OIPR to refer to a Section 215 request that was added to or combined with a FISA application for a pen register/trap and trace. The use of the combination request evolved from OIPR's determination that FISA pen register/trap and trace orders did not require providers to turn over subscriber information associated with telephone numbers obtained through those orders. As a result, Section 215 requests were added to pen register/trap and trace orders to seek subscriber information. OIPR also used combination orders in 2005 and 2006 to obtain [redacted].[23]

After passage of the Reauthorization Act on March 9, 2006, combination orders became unnecessary for subscriber information and [redacted]. Section 128 of the Reauthorization Act amended the FISA statute to authorize subscriber information to be provided in response to a pen

[23] [redacted].

register/trap and trace order. Therefore, combination orders for subscriber information were no longer necessary. In addition, OIPR determined that substantive amendments to the statute undermined the legal basis for which OIPR had received authorization [redacted] from the FISA Court. Therefore, OIPR decided not to request [redacted] pursuant to Section 215 until it re-briefed the issue for the FISA Court.[24] As a result, in 2006 combination orders were submitted to the FISA Court only from January 1, 2006, through March 8, 2006.

1. Number of Combination Applications Submitted to and Approved by the FISA Court

From January 1, 2006, through March 8, 2006, the FISA Court approved 32 combination business record applications. Of the 32 combination applications, 7 were new requests for combination orders and 25 were requests to renew or extend previous orders.

2. Types of Records Requested in Combination Orders

We determined that each business record application attached to the pen register/trap and trace applications included a request for subscriber information for the telephone numbers captured in the pen register/trap and trace. Some of the business record requests also included requests [redacted]. The 32 combination applications requested subscriber information [redacted] of those phone numbers.

3. Number of U.S. Persons Identified as Subjects in Combination Orders

As with the pure Section 215 orders, we identified the number of U.S. and non-U.S. persons identified as "subjects" in combination orders. We found that [redacted] subjects were named in the 32 combination orders. Of the [redacted] subjects, [redacted] were "U.S. persons" and [redacted] were "non-U.S. persons."

[24] OIPR first briefed the issue to the FISA Court in February 2006, prior to the Reauthorization Act. [redacted].

4. FBI Field Offices that Initiated Requests for Combination Orders

We determined that [redacted] FBI field offices submitted 32 combination applications approved by the FISA Court from January 1, 2006, through March 8, 2006.

5. Types of Investigations from which Combination Orders Originate

Of the 32 combination orders we reviewed, 25 were issued in counterterrorism cases and 7 were issued in counterintelligence cases.

CHAPTER FOUR
SECTION 215 REQUESTS PROCESSED IN 2006

In this chapter, we discuss the FBI's requests for Section 215 orders processed in 2006. We first describe pure section 215 requests and identify the types of records requested and any delays in the processing time.[25] If a Section 215 request was withdrawn, we identify the reasons for the withdrawal and at what stage it was withdrawn. If a Section 215 application and order was presented to the FISA Court, we identify whether the Court granted, modified or denied the request. If a Section 215 order was issued and records were received by the agent, we describe how the records were used. We then briefly discuss Section 215 combination orders.

I. Pure Section 215 Requests

In this section we discuss 11 of the 15 pure Section 215 requests processed in 2006 for which Section 215 orders were obtained and the 6 requests that were withdrawn. We do not discuss [redacted].

A. Requests for which Section 215 Orders Were Obtained

1. Request for [redacted]

An FBI agent submitted a Section 215 request for a [redacted] in a counterintelligence investigation. [redacted].

The Section 215 request was processed in 188 days. [redacted]

[25] We do not discuss every delay in processing, only those which had a significant and identifiable effect on the overall processing time.

[redacted]

After reviewing the read application and order, the FISA Court requested that OIPR clarify the specialized minimization procedures and indicate that the specialized minimization procedures were in addition to the interim standard minimization procedures adopted by the Attorney General in September 2006.

In response to the Section 215 order, [redacted]. The agent told the OIG that through this Section 215 request he learned that [redacted].

2. Request for [redacted]

An FBI agent submitted a Section 215 request for [redacted] in a counterintelligence investigation. [redacted]

[redacted]

[26] Minimization procedures limit access, retention, and dissemination of business records. The Attorney General's interim standard minimization procedures applicable to all business records that were issued in September 2006 are discussed in Chapter Seven.

This Section 215 request was processed in 175 days. The case was delayed initially for almost 2 months at the field office because the agent thought the request was pending at NSLB when it was actually awaiting approval by a field office supervisor. Once the request was drafted by NSLB and sent to OIPR, the two offices disagreed as to whether [redacted].

According to the agent, the information received pursuant to the Section 215 order did not further the counterintelligence investigation.

3. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterintelligence investigation [redacted].

This request was processed in 203 days. [redacted]. Ultimately, the FBI did neither. According to the FBI General Counsel, additional minimization procedures were not necessary because of the limited manner in which the FBI intended to use the information from this Section 215 request.

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[27] A full FISA is a request for authority to conduct electronic surveillance or physical searches and is more detailed than a Section 215 request because the application must establish probable cause to believe, among other things, that the target is a foreign power or an agent of a foreign power.

After reviewing the read application and order, the FISA Court requested that OIPR explain the relevance of an aspect of the request. According to OIPR e-mails, the OIPR attorney had previously asked NSLB the same question and was able to explain the relevance to the FISA Court. The court granted the Section 215 request. According to the case agent, the [redacted] produced an additional 2 months of records not authorized by the FISA Court order.

The agent told the OIG that he made a copy of the [redacted] records that did not include the two additional months of [redacted] produced to the FBI but not authorized by the FISA Court order. The agent then sealed the [redacted] records that he had originally received from the provider into an envelope.

The agent stated that he sent the redacted copy of the records to FBI [redacted]. The agent stated that the additional records and the size [redacted] had delayed his evaluation of the portion of records appropriately produced pursuant to the Court order; however, he stated that he expected that these records would be useful.

The FBI informed the OIG that it had determined that the receipt of additional records beyond the scope of the FISA Court order was not reportable to the Intelligence Oversight Review Board (IOB) and that the FBI would consider the additional material to be a voluntary production by the provider. OIPR had not yet decided whether the incident was reportable to the FISA Court.[28]

4. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterintelligence investigation [redacted]

[28] We discuss this collection of additional records again in Chapter Six.

[redacted].

This Section 215 request was processed in 120 days. The request raised questions concerning the appropriate use of a Section 215 order. [redacted]. Instead, the NSLB attorney decided to request the records through a Section 215 application. [redacted].

As a result of the Section 215 order, [redacted].

5. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterterrorism investigation [redacted].

[redacted]

[redacted]. [29]

This Section 215 request, processed in 125 days, raised 2 substantive issues. The first was a legal question as to whether [redacted] were business records within the meaning of Section 215. [redacted]. According to e-mail communications we reviewed, the NSLB attorney assigned to this case stated that it was unnecessary to establish probable cause since the [redacted]. The NSLB attorney noted that the [redacted] would accept an NSL for [redacted] but decided not to issue an NSL because of concerns that [redacted].[30]

The second substantive issue was whether [redacted] was associated with a terrorist organization and therefore whether the records were relevant to a national security investigation. [redacted].

According to the FBI agent, [redacted].

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[29] A Section 215 order may be issued for a tangible thing that is also obtainable pursuant to a grand jury subpoena or court order directing the production of records or tangible things. 50 U.S.C. § 1861 (c)(2)(D).

[30] [redacted].

6. Request for [redacted]

An FBI agent submitted a Section 215 request for records related to [redacted] counterterrorism case. The Section 215 request was generated at FBI Headquarters [redacted].

This request was processed in 72 days. After reviewing the read application and order, the FISA Court requested that OIPR revise the application and order to more precisely identify the records requested. [redacted] Section 215 requires that orders describe the records requested with "sufficient particularity to permit them to be fairly identified." 50 U.S.C. § 1861(b)(2)(A).

The case agent told the OIG that he provided [redacted] with [redacted] over 1 month before the defendants pled guilty and 4 months after the trial was originally scheduled to begin. According to the case agent, some of the delay in obtaining the business records occurred because the request [redacted].

Because [redacted] was not provided until after the trial began and a month or two before the defendants pled guilty, the agent told us that he did not think the records were used at the trial. The agent also told the OIG that [redacted]. The agent told the OIG that the records produced in response to the Section 215 order were not relevant to any FBI investigations of U.S. persons.

7. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterterrorism investigation [redacted]

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31 [redacted].

[redacted].

This Section 215 request was processed in 212 days. According to the NSLB attorney who handled the matter, the agent who submitted the request established the relevance of the [redacted] records for [redacted], but did not provide any information to establish the relevance of the records for [redacted] Although the agent eventually persuaded the NSLB attorney to include [redacted] because the subject was in telephone contact with [redacted], OIPR raised a concern [redacted]. After discussions between the NSLB attorney and an OIPR supervisor, OIPR submitted to the FISA Court an application for [redacted] and omitted [redacted] but included [redacted].

This request was further delayed when it was not properly entered into the FISAMS, OIPR added and then removed detailed facts from a related FISA application, the assigned OIPR attorney went on vacation, and OIPR modified the Section 215 template to conform to the requirements of the newly enacted Reauthorization Act.

In response to this Section 215 order, [redacted]. The agent told the OIG that the information received from the Section 215 order did not show evidence of terrorist activities, but that obtaining the information helped close a lead.

8. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterterrorism investigation [redacted]

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32 [redacted].

[redacted]

The Section 215 request was processed in 604 days. According to an NSLB attorney's e-mail, the draft application was sent to OIPR 1 year before the OIPR attorney began communicating with NSLB about the request. The former Acting Counsel for Intelligence Policy told the OIG that on several occasions during the first year the Section 215 application was pending at OIPR, she spoke to the FBI Deputy General Counsel regarding the status of the application. In an e-mail to NSLB from OIPR, the OIPR attorney expressed concerns that the application lacked a nexus to terrorism. OIPR requested additional information regarding the request, such as an [redacted]

In response to the Section 215 order, the agent received records [redacted]. However, the agent did not receive information [redacted]

9. and 10. Requests for [redacted]

An FBI agent submitted [redacted] Section 215 requests for [redacted] as part of a counterterrorism investigation. The requests were deemed urgent based on the serious and credible nature of the threat reported. [redacted]

[redacted].

The Section 215 request for [redacted] was processed in 10 days. The Section 215 request for [redacted] was processed in 17 days. [redacted].[33] The FBI then requested full FISA orders for the information, but NSLB suggested seeking Section 215 orders instead. [redacted].

The agent received no records in response to the Section 215 orders. According to the agent, [redacted], and the agent had initiated his Section 215 request approximately 6 months after the time period he was investigating.

11. Request for [redacted]

An FBI agent submitted a Section 215 request for [redacted] intelligence investigations. [redacted].

This request was processed in 137 days. After reviewing the read application and order, the FISA Court requested that OIPR extend the time for the provider to produce the records from 20 to 30 days.

According to the case agent, upon receipt of the records [redacted]

[33] 18 U.S.C. § 2709 authorizes NSLs for subscriber information and toll billing records information, or electronic communication transactions records.

[redacted]. Nevertheless, the case agent stated that the information was useful because it closed the lead and corroborated other information.

B. Section 215 Requests that were Withdrawn

In the following section, we describe the six withdrawn Section 215 requests. We discuss the type of records requested, the processing time, and the reason the request was withdrawn. Based on our interviews and document review, we identified two primary reasons for the withdrawal of FBI requests for Section 215 applications: the request lacked sufficient predicate or the provider did not maintain the records requested.[34] We also identify whether the request was withdrawn at NSLB or OIPR.

1. Request for [redacted]

An FBI agent submitted a Section 215 request [redacted] in a counterterrorism case. [redacted].

This Section 215 request was withdrawn from OIPR by the FBI after 434 days. [redacted]. The Section 215 request was presented to the FISA Court as a read copy application on two occasions. On both occasions, the FISA Court indicated it would not sign the order because of First Amendment concerns.

[redacted]

[34] We use the term "primary reason" because two investigations changed course while NSLB or OIPR attorneys were working with FBI agents to develop sufficient information to support the request. We consider the change of course to be a secondary reason because both cases changed course before the FBI case agents provided the information required by NSLB or OIPR to submit the Section 215 request to the FISA Court.

[redacted].[35]

2. Request for [redacted]

An FBI agent submitted a Section 215 request in a preliminary counterterrorism investigation [redacted]

This Section 215 request was withdrawn from NSLB by the FBI after 426 days. Prior to it being withdrawn, the NSLB attorney sent several e-mails to the agent requesting additional information to support the Section 215 request. In response, the agent indicated, among other things, [redacted]. FBI e-mail indicates that the General Counsel and Deputy General Counsel for NSLB "legally killed" the Section 215 request.[36]

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[35] We discuss this case in detail in Chapter Six at pages 65-74.

[36] In addition, an e-mail from the assigned NSLB attorney indicates that the FBI Deputy General Counsel questioned whether the investigation was properly opened.

3. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterterrorism investigation [redacted], the FBI agent e-mailed FBI Headquarters and confirmed that he was pursuing the Section 215 business record request.

This Section 215 request was withdrawn from NSLB by the FBI after 608 days. The case agent told the OIG that FBI Headquarters informed him that the case would not be approved because the subject was a naturalized U.S. citizen and there was no connection to a foreign power. Although this request was initially provided to OIPR without prior approval by the NSLB attorney, it subsequently was re-routed to and later withdrawn at NSLB.

4. Request for [redacted]

An FBI agent submitted a Section 215 request in a counterterrorism investigation [redacted] decided to try the Section 215 request since he had not previously used this investigative tool.

This Section 215 request was withdrawn from NSLB by the FBI after 160 days. The request was withdrawn after several e-mails from the NSLB attorney to the case agents.[37] In the e-mails, the NSLB attorney identified several concerns regarding the request, including [redacted]. Eventually, the case agent to whom the investigation had been transferred asked to withdraw the request because he did not see the need for the records requested.

[37] NSLB was in contact with two case agents because the case was reassigned while the application was pending.

5. Request for [redacted]

An FBI agent submitted a Section 215 request in a cyber-terrorism investigation [redacted].

This Section 215 request was withdrawn from NSLB by the FBI after 186 days when the agent learned that the provider did not maintain the records requested.

6. Request for [redacted]

An FBI agent submitted a Section 215 request for [redacted] as part of a counterintelligence investigation. [redacted].

This Section 215 request was withdrawn from OIPR by the FBI after 58 days when the agent learned that the [redacted].

II. Combination Section 215 Requests

As previously discussed, as a result of the March 2006 Reauthorization Act, combination orders for subscriber information became unnecessary and OIPR ceased preparing combination orders [redacted]. Therefore, in 2006 combination orders were submitted to the FISA Court only from January 1 through March 8, 2006. Below we present a brief overview of the use of combination orders. We also describe the modifications or handwritten notations by the FISA Court to those orders.

A. Use of Combination Orders

[redacted].[38]

[38] Telephone Applications is an investigative tool that also serves as the central repository for all telephone data collected during the course of FBI investigations.

Combination applications are drafted at OIPR and after they are signed by the FISA Court, the orders are sent to the field office nearest the custodian of records for service. The most common combination order is for subscriber information, which identifies the person whose phone was used to contact the subject of an investigation. The subscriber information is only for records that are maintained by the communication provider upon whom the order was served. If the phone number of interest belongs to another provider, other investigative tools such as NSLs can be used to obtain the subscriber information related to that phone number. [redacted].

Combination orders are also used to obtain [redacted]. Four agents told us that they received [redacted] as directed by the FISA Court in 2006. Of the four agents who said they received [redacted] only two told us that the information was helpful. One agent told us that the [redacted].

Two agents told us the [redacted] was not useful. [redacted]. The other agent said he never attempted to utilize the information because his subject moved out of the country.

As we noted in our March 2007 report, agents were not always aware when OIPR added a business record request to their pen register/trap and trace request. We spoke to agents who submitted both initial and renewal requests for pen register/trap and trace orders in 2006. Many agents who submitted initial requests could not tell us whether OIPR added a business record to their pen register/trap and trace requests or whether they received subscriber information pursuant to the order. Agents who submitted renewal applications were more likely to be aware of the addition of the business record. If an agent is not aware of the addition of the business record request and the provider does not produce the information required in the court order, then the agent does not know to enforce the Section 215 order.

B. Modifications and Notations to Combination Orders

The following section describes the number of Section 215 applications and orders modified by the FISA Court. We identified modifications or notations on four combination orders.

The FISA Court handwrote modifications or notations on four combination applications and orders in 2006. With regard to one combination order, the FBI had informed the FISA Court that it received records in response to, but beyond the scope of, the FISA Court order but had not provided the additional material to OIPR when the FBI sought to renew the order. The FISA Court modified the order to require that the FBI provide the material to OIPR by a specific date.

The second combination order contained a handwritten correction to the expiration date of the Court's order. Although the application correctly stated the order would expire in 90 days, the month of the expiration date in the order was incorrect and the FISA Court modified the order so that the month correctly reflected the 90-day duration of the order.

The remaining two combination orders requested [redacted]. The Court's handwritten notations on the two combination orders reference the Court's opinion.

CHAPTER FIVE
OIG ANALYSIS

In this chapter, we provide our analysis of FBI requests for Section 215 orders processed in 2006. In addition, as required by the Reauthorization Act, we discuss bureaucratic and other impediments to obtaining a Section 215 order, FISA Court modifications to the applications and orders, and the use and effectiveness of the information received pursuant to the Section 215 orders.

I. Delays in Implementing Section 215 Authority and Other Impediments to Use

The Reauthorization Act directed the OIG to identify bureaucratic or procedural impediments that negatively affected the FBI's ability to obtain Section 215 orders. In this section, we identify the processing time for Section 215 requests in 2006 and then compare our findings for 2006 to the findings in our previous report, which covered Section 215 requests from 2004 through 2005.[39] We then discuss the causes for the delays.

A. Pure Section 215 Processing Times in 2006

In order to calculate the processing time for each Section 215 request in 2006, we sought to determine how long each request was pending at an FBI field office, FBI Headquarters, and OIPR. Initially, we expected to identify the relevant dates through the FBI's FISA Management System (FISAMS) and OIPR's OASIS case management database, the FISA tracking systems used by the FBI and OIPR. However, we learned that the dates recorded in the FBI and OIPR tracking systems were not always reliable. For example, Section 215 requests were not always entered into FISAMS when they were actually initiated in the FBI field office. Other requests were initiated at FBI Headquarters and entered into FISAMS at an arbitrary future date. When this occurred, FISAMS reflected the date the request was entered into the system as opposed to the actual initiation date. For example, FISAMS indicates that one particular Section 215 request was first initiated more than 2 weeks after the FISA Court signed the order. FISAMS also indicates that another Section 215 request was initiated after NSLB sent a completed draft application to OIPR.

Similarly, OIPR's tracking system does not always contain accurate processing dates. For example, OASIS reflects the date on which OIPR first receives an application from FBI Headquarters. However, FBI Headquarters erroneously sent three requests to OIPR before the Section 215 applications

[39] The first Section 215 request was approved in 2004.

and orders were drafted and approved by NSLB. As a result, these three requests were returned to NSLB for drafting and approvals. OASIS shows the date that OIPR received the misdirected request and not the date it received and began reviewing the draft Section 215 application and order approved by NSLB.[40]

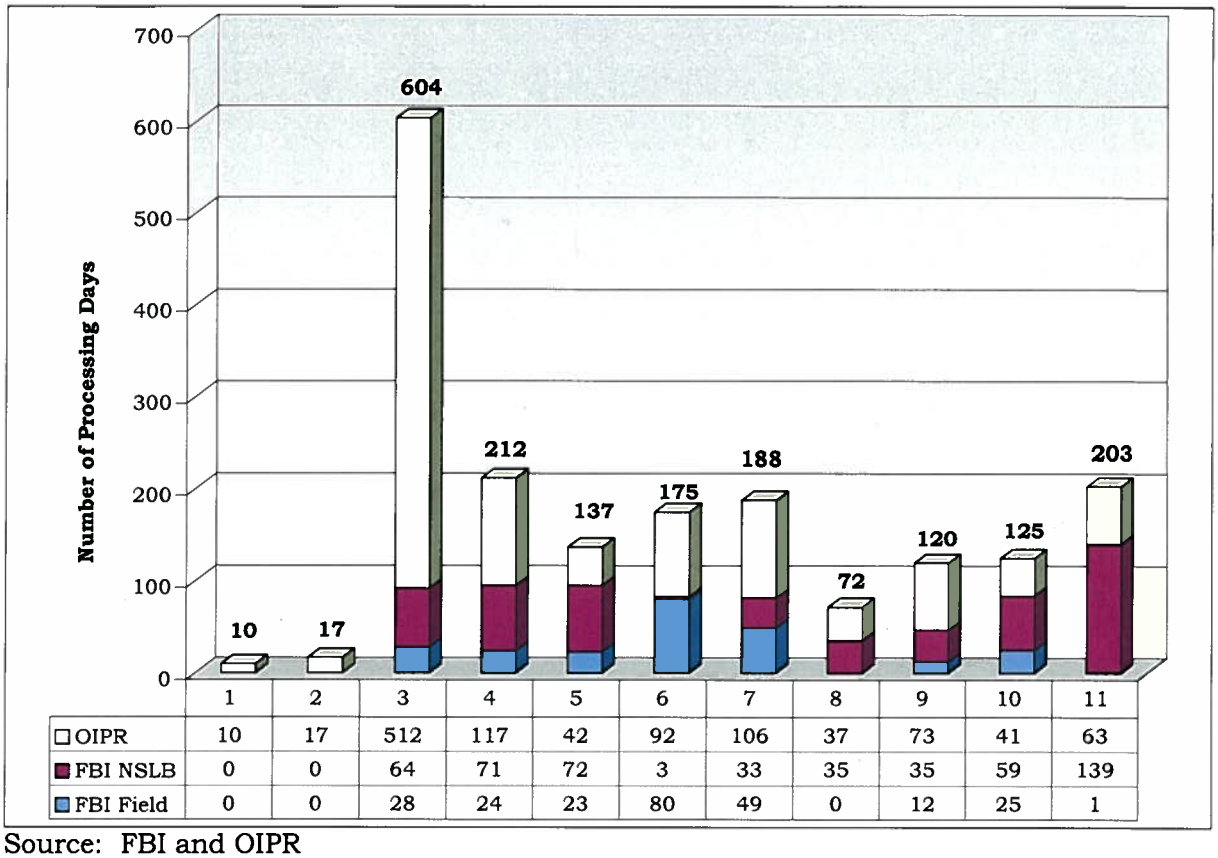
Therefore, the dates we relied upon to identify the processing time for Section 215 applications in 2006 reflect information from our interviews of FBI and OIPR staff, contemporaneous e-mails, and the FBI and OIPR tracking systems.

As used in this report, the "processing time" for a request includes the number of days that elapsed from the date the agent initiated the Section 215 business record request to the date the request was signed by the FISA Court or withdrawn. We did not include the time required to serve the order on the recipient in our processing time calculation because that information was not available for each request.

Chart 5.1 illustrates the total processing time for the 11 of the 15 approved Section 215 orders processed in 2006. The chart provides the processing time for each entity involved in the process. The chart does not include [redacted].

[40] In addition, in 2006 neither the FBI's nor OIPR's tracking systems included information that tracks applications related to [redacted]. OIPR began to include a reference to applications related to [redacted] in 2007 after the OIG questioned how OIPR could accurately track and report the total number of Section 215 applications in its semi-annual reports to Congress if the recordkeeping system did not include applications related to [redacted].

CHART 5.1
Processing Time for 11 "Pure"
Section 215 Requests Processed in 2006

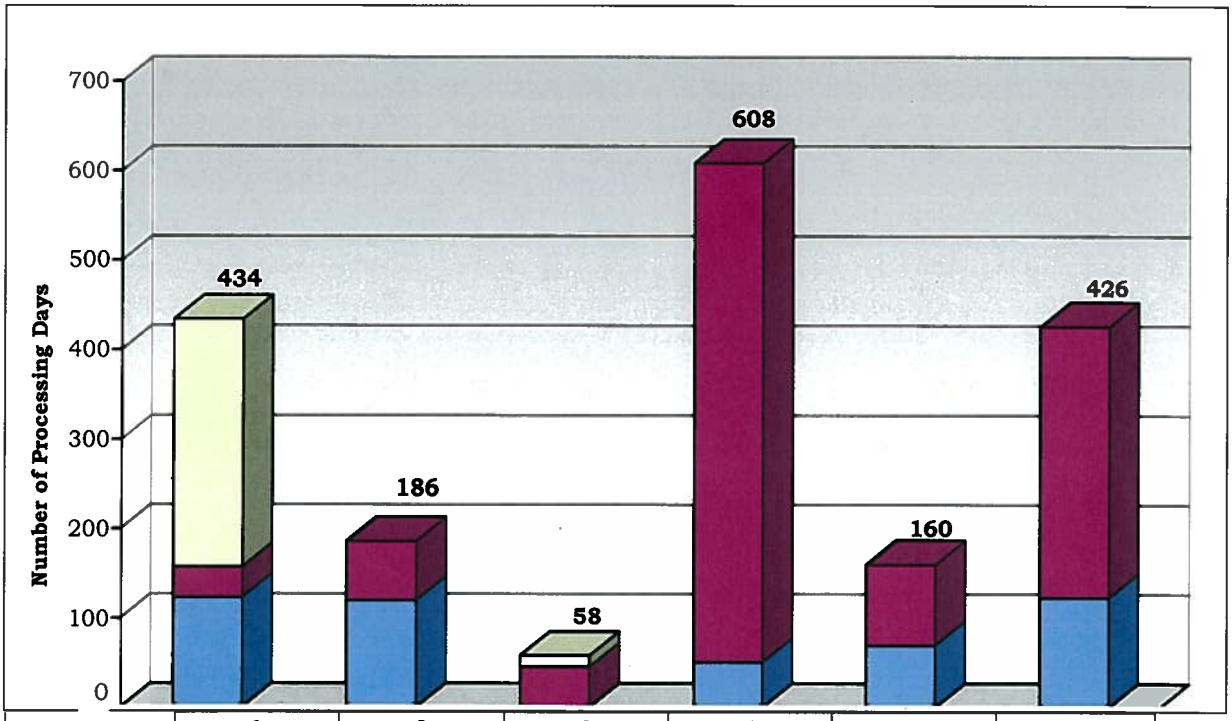


	1	2	3	4	5	6	7	8	9	10	11
OIPR	10	17	512	117	42	92	106	37	73	41	63
FBI NSLB	0	0	64	71	72	3	33	35	35	59	139
FBI Field	0	0	28	24	23	80	49	0	12	25	1

Source: FBI and OIPR

Chart 5.2 illustrates the total processing time for the six withdrawn requests processed in 2006.

CHART 5.2
Processing Time for Six Withdrawn "Pure" Section 215 Requests Processed in 2006



	1	2	3	4	5	6
OIPR	277	0	13	0	0	0
FBI NSLB	34	66	45	557	90	303
FBI Field	123	120	0	51	70	123
6 Cases						

Source: FBI and OIPR

NSLB and OIPR attorneys told us that the experience both agencies have gained in handling Section 215 requests resulted in efficiencies in the review and approval process. By 2005, NSLB and OIPR had assigned specific attorneys to process the business record applications in their respective offices. The dedicated FBI and OIPR attorneys developed a procedure and a working relationship that allowed them to process business record applications more efficiently.[41]

[41] The process has since changed at both the FBI and OIPR. In early 2007, the FBI decided not to dedicate a specific attorney to Section 215 requests and now assigns routine requests to one of four designated attorneys who either provide a preliminary draft of the business record application to OIPR or assist a colleague in doing so. In addition, in October 2007 the OIPR attorney assigned to Section 215 requests left OIPR and OIPR assigned the Section 215 responsibilities to two other attorneys.

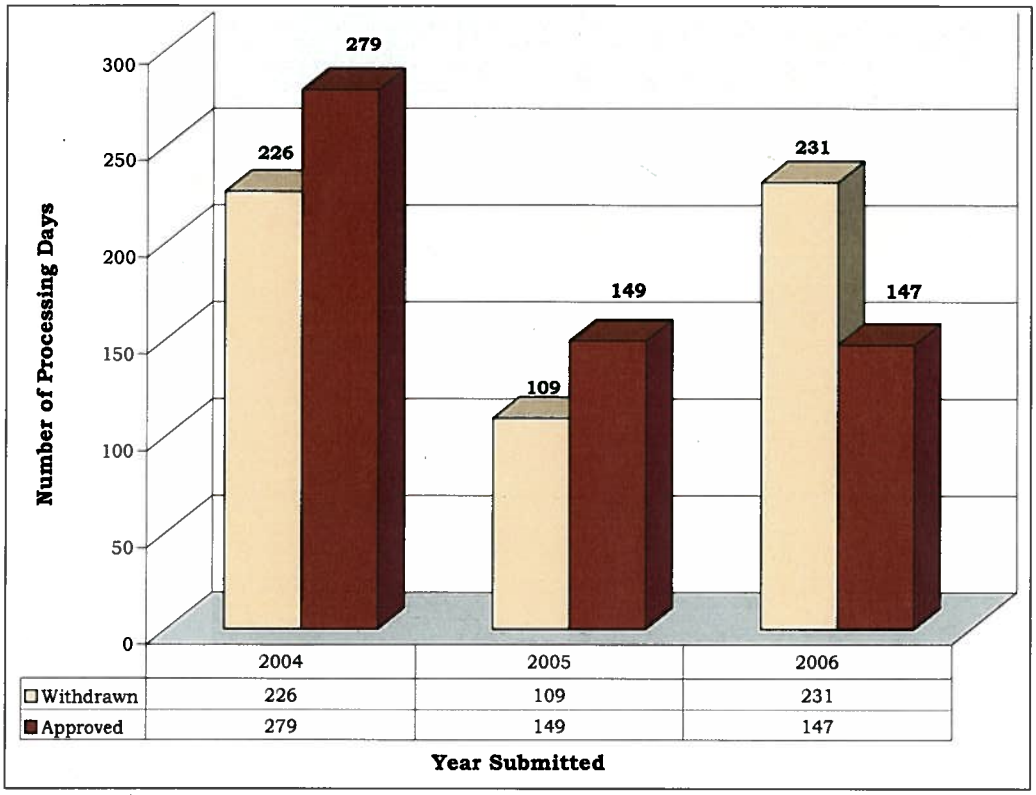
However, we found that several requests were delayed at FBI Headquarters in 2006 because they were prematurely sent to OIPR, held up by the substantive unit at FBI Headquarters, or assigned to the wrong NSLB attorney. We also found some processing delays at OIPR as well. We discuss both types of processing delays in the following section.

B. Pure Section 215 Processing Times 2004-2006

The FBI and OIPR processed 21 pure Section 215 requests in 2006. In this section, we discuss only 17 of the 21 applications. [redacted]. The processing time for these requests ranged from 10 days to 608 days, with an average of 169 days for the approved orders and 312 days for the withdrawn requests. These statistics are not directly comparable to those in our previous report because we have included the time spent preparing the application in an FBI field office in our calculations for 2006.

However, if we exclude FBI field office time, the 2006 processing time average is 147 days for approved orders and 231 days for withdrawn requests. Chart 5.3 illustrates the combined FBI Headquarters and OIPR processing time for Section 215 requests from 2004 through 2006, excluding FBI field time. Chart 5.3 shows that the processing time for approved Section 215 requests has decreased each year since 2004, although the processing time for withdrawn requests rose in 2006.

CHART 5.3
FBI Headquarters and OIPR Average Processing Time for Section 215 Requests from 2004 through 2006*

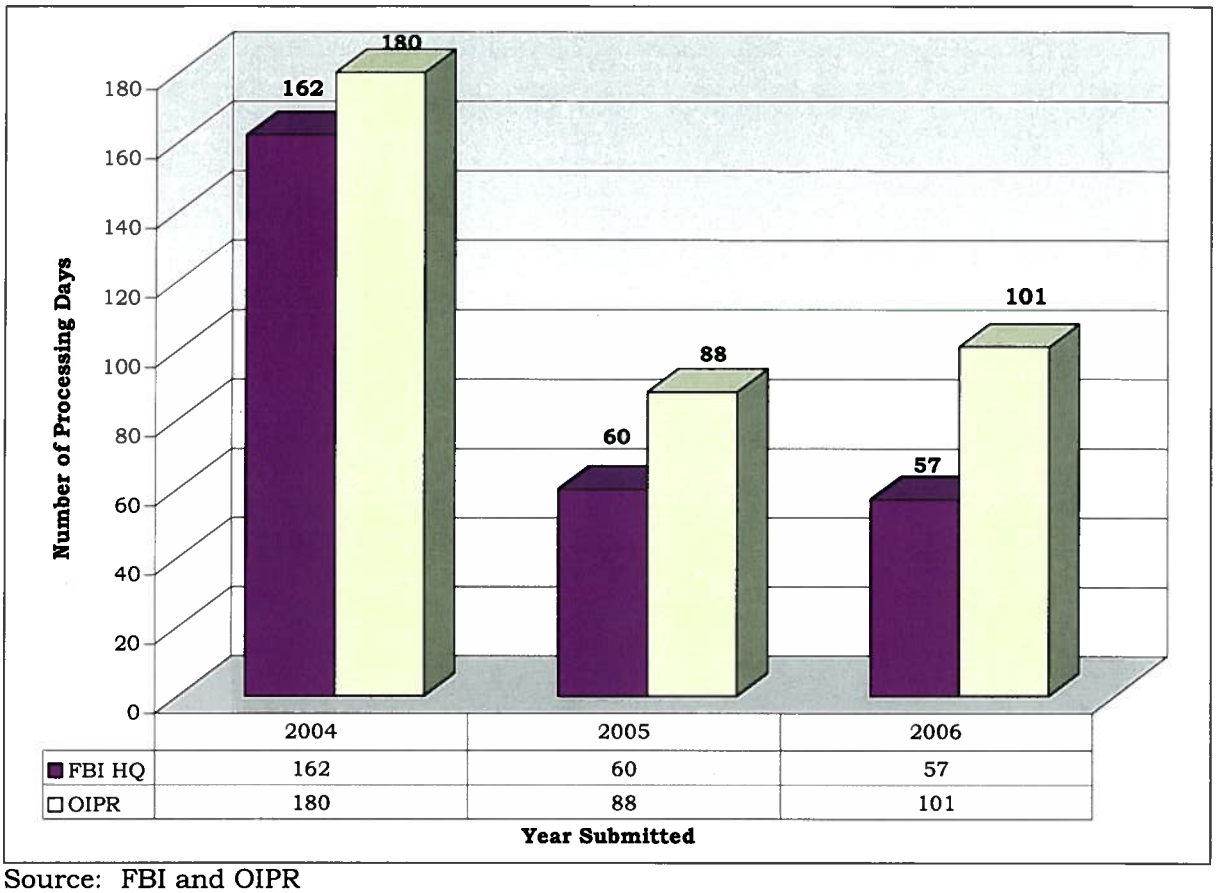


Source: FBI and OIPR
*Note: Chart 5.3 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

Eleven Section 215 orders were processed in 2006 and approved by the FISA Court. The average processing time at FBI Headquarters and OIPR for applications that resulted in orders from 2004 through 2006 is illustrated in Chart 5.4. Chart 5.4 illustrates that FBI Headquarters and OIPR processing time decreased significantly from 2004 to 2005 and has remained relatively constant in 2005 and 2006. Processing time in OIPR increased slightly in 2006.[42]

[42] We did not compare the average processing time for withdrawn requests between the FBI and OIPR because the FBI determines when and if to withdraw a request.

CHART 5.4
FBI Headquarters and OIPR Average Processing Time for Section 215 Orders from 2004 through 2006*



Source: FBI and OIPR
*Note: Chart 5.4 includes the four Section 215 orders processed in 2006 and signed in 2007 and excludes [redacted].

We identified the same reasons for processing delays in 2006 as we described in our previous report – some FBI employees' unfamiliarity with Section 215, too few resources, the multi-layered review process, and substantive issues regarding statutory interpretation.

We discuss both the procedural and substantive delays below.

C. Bureaucratic and Procedural Impediments

1. FBI Employees' Unfamiliarity with Section 215 Requests and the Approval Process

Our review determined that FBI employees' unfamiliarity with Section 215 requests was the primary cause of the delays that occur from the time a case agent initiated a Section 215 request until the time the request was assigned to the NSLB attorney responsible for business record applications.

As previously noted, in order to initiate a request an agent must complete a Section 215 request form found on FISAMS which automatically directs the request through the proper chain of approvals in the field office and then to the substantive desk at FBI Headquarters. At FBI Headquarters, an NSLB supervisor assigns the request to the NSLB attorney responsible for business records. The NSLB attorney then drafts the Section 215 application package, which is reviewed by an NSLB supervisor before it is provided to OIPR. An OIPR line attorney and supervisor review and edit the Section 215 package before the "final" version is sent to NSLB for final review and signature.

Most of the FBI agents we interviewed said their Section 215 request was the first submitted from their respective field office. Agents told us that because their supervisors were less familiar with Section 215 requests than with other more commonly used investigative tools such as national security letters, they took more time to review and approve each request. According to the data we collected in this review, the average processing time for Section 215 requests in FBI field offices in 2006 was 30 days.

We also determined that [redacted] of the 17 Section 215 requests processed in 2006 were delayed because they were not properly routed after they were approved by the field office and sent to FBI Headquarters. Several requests were delayed because FBI Headquarters did not assign the Section 215 request to the designated NSLB attorney. For example, [redacted] requests were delayed between 2 and 6 weeks because FBI Headquarters sent the request directly to OIPR instead of routing the request through the designated NSLB attorney.[43]

Another Section 215 request was delayed or misdirected at four different points before it was withdrawn. The substantive desk at FBI Headquarters did not assign the request to NSLB for approximately 2 months. NSLB assigned the request to the wrong attorney, and therefore the request was delayed for an additional 11 months. The same request was then sent to OIPR before NSLB reviewed, drafted, and approved the application. One month after the request was returned to OIPR, the request was assigned to the appropriate NSLB attorney, who was then told by the substantive desk not to work on the package until further notice. The substantive desk withdrew the request for the Section 215 order approximately 10 weeks later.

[43] As of July 2007, the FBI FISAMS included an automated work flow for business records requests. The FBI stated that the dedicated work flow should reduce the routing errors discussed above.

2. OIPR Resources

According to e-mail traffic we reviewed, several delays in submitting Section 215 applications by OIPR were attributable to the fact that during 2006 business record applications were assigned to a single OIPR attorney who had other responsibilities. As of November 2007, OIPR had two attorneys assigned to process business records but both attorneys have other responsibilities.

3. Multi-Layered Review Process

Since our last report, the multi-layered review process for 215 applications has not changed. As a result, Section 215 requests may be delayed at any one of several levels. We found delays at the field office level, at FBI Headquarters, and at OIPR.

For the most part, the multi-layered review process is self-imposed because the only statutorily required review is that of the FISA Court. The other multiple levels of review leading to submission of an application to the FISA Court were established by DOJ and the FBI. OIPR reviews all Section 215 applications because OIPR attorneys present the applications to the FISA Court. According to OIPR, the FISA Court Rules of Procedures provide that the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys have not been authorized by the Attorney General to practice before the FISA Court for this purpose. In turn, the FBI requires that its NSLB attorneys draft the applications because Section 215 provides that only the FBI Director or his designee may apply for a Section 215 order.[44]

At the field level, the multiple levels of approval are similar to those required for other investigative tools, including NSLs and other FISA Court applications.

We found that inefficiencies caused by the FBI's and OIPR's multi-layered review process are magnified by the general nature of the Section 215 request. Because the standard for a business record request is relevance, Section 215 applications do not contain the detailed factual allegations found in other FISA applications that require a showing of probable cause, a higher evidentiary standard. In order to better understand the request, reviewers at the FBI, OIPR, and the FISA Court

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[44] The Director of the FBI has delegated to the following FBI officials the authority to apply for a Section 215 order: the FBI General Counsel; the FBI Deputy Director; the Executive Assistant Director for National Security; the Assistant Directors and Deputy Assistant Directors of the Counterterrorism, Counterintelligence, and Cyber Divisions; the Deputy General Counsel for National Security Affairs; and the Senior Counsel for National Security Affairs.

often have questions about details of the investigation that are not always included in the initial application. Many of the questions may have already been asked by other reviewers, but the answers are not incorporated into the application because of the low standard of review. As a result, the review process can be slower when different reviewers ask similar questions about the application.

D. Substantive Delays

In addition to delays inherent in a multi-layered review process, many of the delays are also attributable to the issues presented by individual Section 215 requests. Of the 17 approved and withdrawn Section 215 requests processed in 2006 and described in the body of this report, [redacted] were delayed because they raised substantive issues regarding the nature of the records and [redacted] raised concerns regarding whether the application met the statutory requirements.

1. Nature of the Record

[redacted] of the requests were delayed because they involved unique substantive issues, including [redacted].

[redacted] request raised a question as to whether a [redacted] were business records within the meaning of Section 215. [redacted] also raised a concern about the relevance of the request to international terrorism because the FBI did not know if [redacted] a request for records from an [redacted] raised an issue regarding whether it was appropriate to use a Section 215 request to determine if a company was an entity on which an NSL could be served. [redacted] Section 215 request for [redacted] raised concerns because of its scope and [redacted].

Each of these [redacted] requests raised new issues that took significant time to research, negotiate, and resolve. On average, the total processing time for these [redacted] requests was 162 days.

2. The Statutory Requirements

In addition, we found that FBI Headquarters or OIPR attorneys raised concerns that [redacted] of the 17 applications did not meet the statutory requirements. When NSLB or OIPR attorneys have questions about a

request, they may contact each other, their supervisors, or the case agent. The resulting dialogue can affect the timing of the request.

In [redacted] instances, the requests were eventually withdrawn for lack of predicate, with [redacted] withdrawn at NSLB. [redacted] withdrawn at OIPR after [redacted].[45] The FISA Court granted Section 215 orders for the [redacted] applications.

a. Requests Withdrawn at NSLB

As noted above, [redacted] of these requests were withdrawn at NSLB. Before the requests were withdrawn, the FBI discussed the case with the case agent, and either the agent decided to withdraw the request on his own initiative or FBI Headquarters told the agent the request would not be approved. One case involved a request for information [redacted], and the case agent agreed to withdraw the request on his own initiative. With regard to the requests [redacted], the agents did not agree to withdraw the requests until after FBI Headquarters told them that their applications would not be approved. The average processing time for these [redacted] requests was 398 days.

b. Requests Withdrawn at OIPR

The single request withdrawn at OIPR was withdrawn by the FBI after the FISA Court declined to approve the application on two occasions. The former Acting Counsel for Intelligence Policy told the OIG that pursuant to the FISA statute, only the FBI is permitted to withdraw a FISA request. The former Acting Counsel cited Section 104(e)(1) of the FISA statute, which provides that the Director of the FBI may request that a FISA application be reviewed by the Attorney General if the Director states in writing that the FISA application meets the requirements in the statute. The former Acting Counsel stated that as a practical matter this provision requires that OIPR either work with the FBI until OIPR determines that the FISA request meets the statutory requirements or the FBI consents to withdraw the request.[46]

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[45] Only two other Section 215 requests were withdrawn. Both were withdrawn after the agent learned that the provider did not maintain the records requested. A request for information [redacted] was withdrawn at NSLB, while a request for [redacted] was withdrawn at OIPR.

[46] [redacted].

This policy may account in part for the processing time of requests for which OIPR identified concerns about whether they met statutory requirements. Of the 17 pure Section 215 requests processed in 2006, OIPR raised statutory concerns regarding [redacted]. On average, these requests were processed in 416 days.

E. Expedited Requests

Two of the requests processed in 2006 were expedited by the FBI and OIPR. These two requests show that when the FBI identifies the need to expedite a Section 215 request, both the FBI and OIPR can expedite the task. The two requests, [redacted], were expedited because of a serious security threat and were processed in 10 and 17 days, respectively.

F. Unremarkable Applications

[redacted] requests did not seek sensitive records, raise statutory questions, or involve exigent circumstances. [redacted] were signed by the FISA Court. [redacted] was a request for [redacted] withdrawn once the agents learned the providers did not maintain [redacted]. On average, these requests were processed in 113 days.

II. Modified Pure and Combination Section 215 Orders

As required by the Reauthorization Act, we also reviewed how many times the FISA Court modified Section 215 orders. We examined information about the number and types of modifications for both pure and combination Section 215 orders discussed in the body of this report. We reviewed each Section 215 pure and combination order for handwritten changes signed by the FISA Court judge. In addition, we reviewed OIPR documents and e-mails and asked OIPR officials about revisions to Section 215 applications made at the request of the FISA Court.

We found that the FISA Court modified four combination and five pure Section 215 applications and orders. We determined that six of the nine modifications were for substantive reasons.

As noted in our first Section 215 report, OIPR considers modifications to be limited to the handwritten changes to orders made by FISA Court judges at the hearings in which the orders are signed. OIPR does not consider revisions to applications and orders made at the request of the FISA Court after it reviewed read copies to be modifications. In this review, we consider each handwritten notation or required revision to a Section 215 submission to be a modification.

A. Handwritten Modifications

The FISA Court made handwritten modifications to no pure Section 215 orders in 2006. It modified four combination orders. Two of the handwritten modifications to combination orders were substantive. One required the FBI to provide OIPR with information to be sequestered with the FISA Court by a specified date. OIPR had previously notified the Court that it received records in response to, but beyond the scope of, one of the Court's previous orders in the same matter, but had not sequestered the information with the Court prior to requesting that the application be renewed. The second handwritten modification corrected the expiration date of the Court's order to reflect the 90-day duration requested in the application. Although the application correctly stated the order would expire in 90 days, the month of the expiration date in the order was incorrect and the Court modified the order so that the month correctly reflected the 90-day duration of the order.

The other two handwritten modifications were made to combination orders [redacted]. These orders were signed the same day the Court issued an opinion holding that [redacted]. The Court's handwritten notations referenced the Court's opinion.

B. Revised Applications and Orders

After reviewing the read copies of the 11 approved pure Section 215 orders discussed in the body of this report, the FISA Court required revisions to 5 of the applications.[47] Four of the five were substantive revisions.

One revised application and order related to the request for [redacted]

[47] We do not include [redacted].

[redacted].

In another case, the Court required that an application be revised to describe the requested records more precisely. The request was for [redacted] Section 215 requires that orders describe the records requested with "sufficient particularity to permit them to be fairly identified." See 50 U.S.C. § 1861(b)(2)(A).

A third application and order was revised to extend the time for the provider to produce the records from 20 to 30 days.

A fourth application was revised to include [redacted].

Revision to a fifth application was a stylistic change that we did not find to be substantive.

III. Use and Effectiveness of Information Obtained from Section 215 Orders

The Reauthorization Act also directed that the OIG analyze the use and effectiveness of Section 215 as an investigative tool. In this section, we describe how the information produced pursuant to pure Section 215 orders was used in the investigation for which it was requested and whether the information was disseminated to the intelligence community or used in any criminal proceeding.

A. Use in Investigations

The FBI received records in response to [redacted] of the 11 pure Section 215 orders processed in 2006, approved by the FISA Court, and discussed in the body of this report.[48] FBI agents told the OIG that the records were used to [redacted], support future FBI investigative requests, and investigate leads. Most of the agents we interviewed said the records obtained fell in the last category and that the records typically provided negative information, meaning they did not provide additional investigative information but helped close a lead. Agents also stated that investigatory efforts that result in negative information are important and not unusual.

[48] We do not include [redacted].

1. [redacted]

[redacted] Section 215 requests were initiated by the FBI after [redacted]. These applications requested records of [redacted]. Neither agent said the records were useful for their FBI investigations.

2. Support Additional Investigative Requests

[redacted] Section 215 requests were initiated to gather information to support future requests for information. [redacted]. The agent received [redacted] but told us that because of the additional records and the size [redacted], he has not yet been able to review the records produced. [redacted] Section 215 request for [redacted]. The agent working on the matter said the records were useful because they contained information that enabled him to limit [redacted], which saved him time and decreased the risk of compromising the investigation.

3. Investigate Leads

[redacted] Section 215 requests were submitted in order to investigate leads. Of the [redacted] requests, agents received records in response to [redacted]. In the remaining [redacted] requests, the providers did not maintain records for [redacted].

a. Requests for which Records Were Received

FBI agents said that records from the [redacted] Section 215 requests were used to investigate leads. Three agents said the records obtained were helpful and two said they were not. The agents who requested [redacted] told us that the records were not helpful. These agents said that while they used the records to follow and close leads, the information was not what they had hoped to

receive. As discussed above, the agent who requested [redacted].

In contrast, FBI agents who requested records [redacted] told the OIG that the records were helpful in closing leads. [redacted].

b. Requests for which No Records Were Received

[redacted] Section 215 requests for which no records were received were requests for [redacted]. According to the agent, [redacted] and the Section 215 request was initiated over 6 months after the time period for which the information was requested.

B. Dissemination

We found that the FBI disseminated information obtained from pure Section 215 orders [redacted].

C. Use in Criminal Proceedings

We did not identify any use in a criminal proceeding of records obtained from the Section 215 requests processed in 2006.[49]

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[49] As noted in our previous report, the FISA statue requires that the Attorney General approve the use of FISA information in criminal proceedings if the information is obtained from electronic surveillance, physical searches, or pen register/trap and traces. The FISA statute does not require that the Attorney General grant use approval for business records.

OIPR attorneys raised several concerns regarding the lack of use authority for business records, including the fact that use authority may ensure that coordination among members of the intelligence community occurs and sensitive sources are not compromised. In contrast, the FBI General Counsel said she was not concerned with the lack of use authority for business records because these records have an independent existence and may be obtained in many different ways.

IV. Effectiveness of Section 215

[redacted]. Our analysis in this section does not address the use of Section 215 [redacted].

With regard to Section 215 uses described in the body of this report, we found that Section 215 can be a valuable investigative tool, but often is impractical because of the time it takes to obtain such an order.

A. Use of Section 215 Orders

Section 215 can be an impractical tool because of the lengthy time involved in developing, reviewing, and presenting the requests to the FISA Court. While no FBI agent we interviewed identified any harm to national security because of delays in the Section 215 process, many agents linked the value of Section 215 orders as an investigative tool to its efficiency as well as its effectiveness. As discussed below, several agents told us that they have other investigative tools available to them which in some cases can produce the same or comparable information more quickly.

1. Other Investigative Options

FBI agents told us that if delays in obtaining Section 215 orders caused their investigations to stall, they would seek the information through other means. Agents told us that they have other investigative tools available to them to obtain certain business records more quickly and with much less effort. Furthermore, one Special Agent in Charge of an FBI field office stated that in many instances agents are seeking information rather than a specific document; therefore, although the information may be included in a particular business record, the agent would likely seek comparable information using other faster investigative techniques.

For speed, agents said they generally attempt to obtain information through voluntary compliance or an NSL. Both business record requests and NSLs can be issued in national security investigations for transactional records based on a relevance standard. Unlike business records, NSLs can be authorized by the Special Agent in Charge in a field office and do not require FBI Headquarters, OIPR, or FISA Court approval. Therefore, an NSL can be issued and the transactional records returned in a matter of weeks. [redacted]

[redacted].

NSLs however are not available for all business records. NSLs may be issued to entities such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer and consumer transaction information. Section 215, in contrast, is not limited to specific categories of transactional records and can be used to obtain items which are not available through NSLs such as [redacted].

Another investigative tool that can be quicker than a business record request is a grand jury subpoena. Agents conducting national security investigations with a criminal nexus do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena because they are issued under the signature of the prosecutor supervising the grand jury investigation. However, grand jury subpoenas also have limitations in certain contexts. The primary limitation is that the investigation must have a criminal nexus. In addition, information presented to a grand jury may be made public in subsequent court proceedings and with limited exceptions grand jury subpoenas do not obligate the recipient to maintain the secrecy of the investigation. For example, [redacted] told the OIG that they chose not to use grand jury subpoenas in order to maintain the secrecy of the investigations.

2. Effect of the Processing Delays

According to FBI agents and supervisors we interviewed, when working on a national security investigation an agent identifies the information required and then determines the fastest legal way to obtain that information. Some agents stated that a few months may be an acceptable delay for business records because they can continue working on other aspects of their investigation during that time frame. However, agents stated that an investigation is likely to stall with a delay of 6 months to a year in obtaining records, and that if this occurred they would look for other means to obtain the information. One agent noted that a 6-month delay is a particular concern with a preliminary investigation because although extensions may be granted, a preliminary investigation is expected either to become a full investigation or be closed in a 6-month period.

One agent told us that while he was waiting for a Section 215 request for [redacted], he obtained the equivalent information through public sources such as Google. The agent also told us that if he had received the information through the Section 215 order, he could have used the time he invested in researching public databases to work on other leads and investigations.

Another agent said she was too frustrated by her experience pursuing a previous Section 215 order to submit another. Instead, the agent decided to invest her time [redacted]. The agent told us that she thinks it likely that she obtained the same information that she would have with a business record request although she said she could not be certain. The agent stated that the [redacted] was time consuming, but that she would not use a Section 215 request unless she needed something specific that she could not obtain through other means.

In contrast, the agent who received [redacted] told us that seeking the Section 215 order saved time. The agent stated that [redacted].

B. Value of Section 215 Orders

According to FBI agents we interviewed, when they need a particular business record and it is not available by another investigative tool, Section 215 can be an invaluable tool. [redacted] told us they could not have obtained the records for their investigations without the provision. In each case, the agents were told [redacted]. Although no agent suggested that the records obtained pursuant to the order resulted in a major case development, many stated that every investigative tool in an FBI agent's tool box is important and that when it is the only tool that will produce the information, it is invaluable even if the process is burdensome.

V. Summary

We determined that the processing time for Section 215 requests in 2006 was similar to that in 2005, with an average of 169 days in 2006 for the approved orders and 312 days for the withdrawn requests. Similar reasons to those we identified in our previous report explained the procedural delays in 2006, including the FBI's unfamiliarity with the Section 215 process, too few resources to handle requests expeditiously, a multi-layered review process, and various substantive issues regarding whether certain applications met the statutory requirements. We also found that FBI agents generally attempted to obtain records through other, quicker investigative processes, including voluntary compliance, NSLs, and grand jury subpoenas. When providers require a court order, however, agents must obtain orders through the Section 215 review process. We also

found that when the FBI identified emergency circumstances, the FBI and OIPR were able to process a Section 215 request quickly.

In 2006, pure Section 215 orders processed were used primarily to exhaust investigative leads. However, the FBI used Section 215 orders to obtain information [redacted] and to support other investigative requests.

We did not identify any instance in which information obtained from a Section 215 order was used in a criminal proceeding in 2006. In addition, [redacted] in 2006.

In sum, we found, like in our previous report, that Section 215 orders can be a valuable investigative tool to obtain records that are not available through other means. However, Section 215 orders are not used frequently because of the time it takes to obtain the order. [redacted].

CHAPTER SIX
IMPROPER OR ILLEGAL USE OF SECTION 215 AUTHORITY AND OTHER NOTEWORTHY FACTS

The Reauthorization Act also directed the OIG to identify "any noteworthy facts or circumstances relating to orders under such section, including any illegal or improper use of the authority." In this review, we did not identify any illegal use of Section 215 authority. However, we identified two instances where the provider produced records that were in response to, but were outside the scope of, a FISA Court order. These two cases raise concerns about the FBI's identification and handling of such additional material.

Also discussed in this chapter are two additional "noteworthy facts" regarding the FBI's use of Section 215 authority in 2006. The first relates to the FBI's use of a national security letter to obtain information about a subject after the FISA Court rejected a Section 215 order for records concerning the same subject based on First Amendment concerns. [redacted].

I. Two Instances in which the FBI Received More Information than it had Requested in Response to a Section 215 Order

Through our review of FBI and OIPR documents, we identified two instances in which the FBI received more information than it had requested in response to a Section 215 order. One instance occurred in connection with a combination order and the other occurred pursuant to a pure Section 215 order. The FBI determined that the matter that involved the combination order was reportable to the President's Intelligence Oversight Board (IOB). The FBI determined that the matter that involved the pure Section 215 order was not reportable to the IOB.

As discussed in detail in our March 2007 Section 215 report, the FBI is required to report any improper use of Section 215 authority to the IOB. In 1976 the IOB was created by Executive Order and charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to executive order or Presidential Directives." See Executive Order 12863.[50] The Executive Order also requires the FBI's General Counsel to report to the

[50] For more information about the IOB, see the OIG's report titled *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act*, pages 20-24 (March 2006).

IOB on at least a quarterly basis intelligence activities the General Counsel has "reason to believe may be unlawful or contrary to executive order or Presidential directive," which are referred to as "IOB violations."

A. Case 1

As previously noted, combination orders are business record requests attached to pen register/trap and trace requests. We found that in one matter involving a combination order, the [redacted] that was not requested in the Section 215 application or authorized by the FISA Court order. [redacted] had been authorized and received pursuant to a previous combination order for the subject. Neither the FBI agent who had requested the pen register/trap and trace order nor OIPR, however, was aware that the [redacted] had been provided pursuant to the previous order. As a result, the renewal application specifically stated that it did not seek [redacted] because the FBI had requested that information in a previous order but had not received it. Despite the fact that the renewal application did not seek and the court's order did not authorize production of [redacted] company continued to provide the [redacted] after the renewal order was executed.

The agent told the OIG that she did not know the [redacted] was being produced pursuant to the renewal order until approximately 2 months after the order was signed by the FISA Court. She said she first learned that the FBI had received [redacted] with respect to either order when an analyst in her field office informed her that the FBI was receiving [redacted] pursuant to, but not authorized by, the pen register/trap and trace order. After the analyst reported the matter to the agent, both NSLB and OIPR were informed.

The agent told us that the provider [redacted]. According to a technician, [redacted].

The FBI concluded that "information was improperly collected" and reported the incident to the IOB. The FBI also stated that the matter was reportable because records of [redacted] are statutorily protected. OIPR reported the incident to the FISA Court and provided the material that was not requested by the FBI or authorized by the FISA Court to the FISA Court for sequestration.

An FBI Electronic Communication (EC) approved by the FBI Deputy General Counsel stated that the mistake was made by the provider and not the FBI. While we agree that the initial error was made by the provider, the FBI continued to receive and retain unauthorized information about a U.S. person for approximately 2 months. In this instance, the FBI continued to collect information about a U.S. person without review by the agent to ensure that it was authorized by the court order.

This case gave us concern that FBI agents may be unknowingly receiving in other cases [redacted] that has not been authorized by the FISA Court. We therefore interviewed each of the [redacted] agents who received combination orders for [redacted] in 2006. [redacted] said that they received [redacted] as directed by the FISA Court. [redacted] other agents (including the agent in the matter described above) told us they did not know the FISA Court order had included a request for [redacted] and they did not think they received it. One agent told us that he knew the information was requested, but that he thought he had to enforce the order in order to receive [redacted].[51]

Because business records produced electronically pursuant to combination orders are not first reviewed by the agents before they are provided to FBI technicians, agents may be receiving [redacted] when it is not authorized and also may not realize that they have [redacted] when it is authorized. Moreover, the FBI does not have procedures that require FBI agents or technicians to review business records (or pen register/trap and trace information) when they are first produced to ensure they have received only what is authorized by the FISA Court order. In addition, the FBI does not require agents to review court-ordered material before it is uploaded into FBI databases.

This matter also illustrates the need for better communication between OIPR attorneys, NSLB attorneys, and FBI case agents. As noted above, [redacted] agents told us that they were not aware that OIPR had attached a request for [redacted] to their pen register. Other agents we interviewed stated that they were not aware that OIPR or NSLB attorneys had added requests for subscriber information to their pen register/trap and trace requests. Our March 2007 Section 215 report also found that agents were not aware that OIPR added requests for subscriber information to their pen register/trap and trace requests. If agents do not know that

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[51] Our concern is not limited to the business record portion of the combination order, but also applies to pen register/trap and trace records when the records are [redacted].

business record requests have been added, they will not know they should be or are receiving subscriber or [redacted]. The lack of knowledge may contribute to IOB violations and the failure to identify IOB violations. In addition, agents may unnecessarily issue NSL for information previously ordered to be produced by the FISA Court.[52]

B. Case 2

In response to a pure Section 215 order processed in 2006 and signed by the FISA Court in 2007, the FBI received information beyond the time period authorized by the order.

The Section 215 order at issue required a company to produce records [redacted]. The agent submitted the Section 215 request after the company refused to provide the business records on a voluntary basis. Although the order required the production of documents for a specified 5-month period, the company produced the records for 2 additional months.

According to the FBI case agent, he realized that he received additional records beyond the scope of the FISA Court order a few days after he received the records. On October 2, 2007, the agent sent an EC to NSLB and the FBI Inspection Division reporting the matter as a potential IOB. The agent stated that he also reported the matter to OIPR. The agent told the OIG that he reviewed the records and created a copy of the data that did not include the 2 months of the unauthorized records.

We discussed this matter with the FBI and OIPR. The FBI informed the OIG that it had determined that this matter was not reportable to the IOB. When we asked for documentation of this decision the FBI reported that it had none because it had determined that the incident should not have been reported to the NSLB as a potential IOB. We also asked whether the matter had been reported to the FISA Court. OIPR stated that it had not yet determined whether the matter was a compliance incident that should be reported to the FISA Court.

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[52] We found another matter involving a combination order for pen register/trap and trace and subscriber information. The day after a FISA Court order expired, the provider continued its practice of faxing to the FBI agent a list of the phone numbers collected as a result of the surveillance order. The agent did not recall if he received subscriber information as required by the FISA Court order. Because we could not determine whether the fax included subscriber information, we did not include this matter in our analysis.

FBI officials stated that the FBI's receipt of 2 extra months of records is not reportable to the IOB because there is no statute prohibiting the company from voluntarily producing [redacted] to the FBI and thus the incident did not violate any statute, nor did it violate any Executive Order. The FBI stated that because there is no such violation, it should be able to treat the additional 2 months of records as a voluntary production independent of the FISA Court order.

We disagree and believe that the production of these additional records should not be considered as voluntary and independent of the FISA Court order without further inquiry. First, the provider refused to produce any records to the FBI without a court order. Second, the FBI has chosen not to ask the provider whether the additional 2 months of records were produced inadvertently or voluntarily. Third, the collection includes information of U.S. persons who are not the subjects of any FBI national security investigation. Therefore, we believe that if the FBI wants to keep and use these records, it should either: (1) obtain written confirmation from the provider that the records were produced voluntarily, or (2) obtain a 215 order from the FISA Court for the production of the additional records. If the provider states that the production was not voluntary and the FISA Court declines to issue an additional order, the FBI should revisit its IOB determination and sequester the additional records with the FISA Court.[53]

FBI officials also suggested to us that they should be able to treat any non-statutorily protected records obtained pursuant to, but outside the scope of, a Section 215 order as a voluntary production of records independent of the order. We are troubled by this approach because [redacted]

[53] In its response to our report, the NSD stated that in both matters discussed in this Section "the FBI took the steps necessary to ensure that the over-produced information would not be used." However, this is only partially accurate. As discussed above, in Case 2 the agent initially isolated the additional material. However, the FBI later concluded that it should be able to use these additional records under the theory that they should be treated similar to materials that are voluntarily produced. We disagree with this analysis. Because of our concerns that the FBI should not use the material without either contacting the provider about the material or seeking an expanded FISA order, we made the recommendation discussed above. We look forward to the NSD's and FBI's specific response to that recommendation and how they intend to treat such material.

[redacted].

FBI officials expressed the view that [redacted]. However, we are concerned by the lack of any comprehensive policy memorializing this position and providing guidance to case agents.

In summary, we found two instances in which the FBI received more information than it had requested in response to Section 215 orders. In one case the FBI did not discover the incident for 2 months. [redacted]. The FBI reported the matter to the IOB, and OIPR reported the matter to and sequestered the material with the FISA Court.

In the other instance, the FBI quickly discovered the incident after the FBI had received the information from the provider. However, in this case, the FBI did not consider the matter to be reportable to the IOB because the records were not statutorily protected, and OIPR has not made a decision regarding whether this is a compliance incident reportable to the FISA Court.

We recommend that the FBI develop procedures for reviewing materials received from Section 215 orders to ensure that it has not received information that is not authorized by the orders.

Furthermore, we recommend that the FBI develop procedures for handling material that is produced in response to, but outside the scope of, a Section 215 order. The procedures should include the FBI's justification for handling any class of material provided in response to, but outside the scope of, a Section 215 order differently from other classes. We believe the FBI should not base the procedures for handling such material solely on whether the material is or is not statutorily protected. Instead, the procedures should also address such factors as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures. In addition, these procedures should be incorporated in the minimization procedures required by the Reauthorization Act, a subject we discuss further in Chapter Seven.

II. Other Noteworthy Items

A. Request for [redacted]

We considered the Section 215 request for [redacted] discussed earlier in this report at pages 33 to 34 to be a noteworthy item. In this case, [redacted]. However, the FBI subsequently issued NSLs for information [redacted] even though the statute authorizing the NSLs contained the same First Amendment restriction as Section 215 and the ECs authorizing the NSLs relied on the same facts contained in the Section 215 applications. We therefore describe this case in more detail in this section.

1. The FBI Investigation

[redacted].

[redacted].[54]

[redacted].[55]

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[54] [redacted].

[55] [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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56 [redacted]

57 [redacted]

[redacted]:

When the FBI's Section 215 application was sent to OIPR for review, the assigned OIPR attorney initially raised First Amendment concerns with regard to the Section 215 application.[58] The NSLB attorney e-mailed the OIPR attorney on two occasions stating that she thought that the underlying FBI investigation [redacted] was legitimate.

According to the OIPR attorney, OIPR attorneys had different views regarding how the First Amendment affected this Section 215 application and that these discussions delayed the submission of the application.[59]

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[58] Section 215 states that the FBI can apply for an order for the production of business records "for an investigation . . . to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment of the Constitution." 50 U.S.C. § 1861(a)(1).

[59] We asked the former Acting Counsel for Intelligence Policy how the First Amendment concerns were resolved, and she told us that the initial application was submitted after a meeting between the former Counsel of Intelligence Policy and the FBI General Counsel. However, neither the former Counsel for Intelligence Policy nor the FBI General Counsel said they recalled such a meeting.

2. The FISA Court's Objections to the Section 215 Application on First Amendment Grounds

[redacted].

[redacted].[60]

The FISA Court declined to approve the first application. OIPR and NSLB e-mails state that the FISA Court decided that "the facts were too 'thin' and that this request implicated the target's First Amendment rights."

[redacted]

[redacted]

[redacted]

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[60] [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

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61 [redacted]

62 [redacted]

[redacted]

[redacted]

3. FBI and OIPR's Response

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[63] The FBI General Counsel told the OIG that the FISA Court does not have the authority to close an FBI investigation.

[64] [redacted]

We asked both the FBI General Counsel and the former Counsel for Intelligence Policy whether, in light of the Court's decision, they had reviewed the underlying investigation [redacted] to ensure that it was not being conducted in violation of the First Amendment caveat. The FBI General Counsel told us that she did not review the underlying investigation [redacted] because, for the reasons stated above, she believed there was enough information to predicate the investigation. She said she disagreed with the court and nothing in the court's ruling altered her belief that the investigation was appropriate.

In contrast, the former Counsel for Intelligence Policy stated that OIPR should have examined the underlying investigation after the Court's decision regarding the Section 215 request. However, he said that with the increase in national security investigations and FISA requests, OIPR had not been able to fully serve such an oversight role.[65]

In addition, the former Acting Counsel for Intelligence Policy stated that there is a history of significant pushback from the FBI when OIPR questions agents about the assertions included in FISA applications.[66] The OIPR attorney assigned to Section 215 requests also told us that she routinely accepts the FBI's assertions regarding the underlying investigations as fact and that the FBI would respond poorly if she questioned those assertions.

We also asked the FBI General Counsel whether it was appropriate to issue NSLs in this investigation based on the same factual predicate as the Section 215 application given that the statutory provisions authorizing NSLs and Section 215 requests contain the same First Amendment caveat.[67] The FBI General Counsel told the OIG that she believed that it was appropriate to issue NSLs because she disagreed with the FISA Court and because the FBI was responsible for investigating [redacted] with other subjects of national security investigations. She stated that the FBI would

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[65] According to the former Counsel for Intelligence Policy, he raised his concerns about OIPR's inability to fulfill its oversight role in late 2004 or early 2005. The former Acting Counsel for Intelligence Policy told us that, as of November 2007 OIPR developed a strategy for reviewing national security investigations and had begun conducting national security reviews. According to an OIPR attorney, OIPR has conducted all 15 of their planned national security reviews at approximately 14 field offices and FBI Headquarters.

[66] The former Acting Counsel also stated that FBI agents are under significant pressure to respond to national security threats and that some agents are angry that FBI agents have been accused of failing to identify these threats.

[67] The FBI requested three NSLs, [redacted], pursuant to the *Right to Financial Privacy Act* (RFPA), 12 U.S.C. § 3414. RFPA requires that the individual issuing the NSL certify that the investigation is "not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States."

have to close numerous investigations if it was not permitted to investigate individuals based on their contact with other subjects of FBI investigations.

The former Counsel for Intelligence Policy stated that investigations based on association with subjects of other national security investigations are weak, but "are not necessarily illegitimate." He stated that when OIPR receives cases that appear to be based solely on association, OIPR first attempts to identify specific conduct by the subject and asks "what makes you – the FBI – think that this guy did anything wrong." [redacted].

4. OIG Analysis

We considered this matter to be noteworthy because the FISA Court twice refused to authorize Section 215 orders based on concerns that the investigation was premised on protected First Amendment activity, and the FBI subsequently issued NSLs to obtain information [redacted] based on the same factual predicate without first reviewing the underlying investigation to ensure it did not violate the First Amendment caveat.

Section 215 allows the FBI to seek a business records order for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution." See 50 U.S.C. § 1861(a)(1) and (a)(2)(B). Similarly, the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414, allows the FBI to issue NSLs to obtain financial records for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution."

In this matter, both FBI and OIPR personnel had raised First Amendment concerns regarding the predicate for the investigation of [redacted] before and after the first Section 215 read application was submitted to the FISA Court. Once the Court expressed similar concerns and rejected the successive applications, we believe it was incumbent upon the FBI and OIPR re-evaluate the investigation before seeking additional information about [redacted] using NSLs. Instead, the FBI issued NSLs based on the same factual predicate contained in the Section 215 applications and without additional information about [redacted] activities, despite the Court's rejection on two occasions of requests for a Section 215 order.

We were also concerned by [redacted]

[redacted]

B. [redacted] of Some Section 215 Requests

We also considered the [redacted] of several Section 215 orders issued during 2006 to be a noteworthy item. [redacted]

[redacted]

CHAPTER SEVEN
MINIMIZATION PROCEDURES

The Reauthorization Act required the Attorney General to adopt minimization procedures for business records obtained pursuant to Section 215 orders. 50 U.S.C. § 1861(g)(1). The Act also directed the OIG to examine the minimization procedures to determine whether they "protect the constitutional rights of United States persons." See Pub. L. No. 109-177, § 106A. In this chapter, we describe our review of the minimization procedures adopted by the Department.

I. Minimization Mandate

The Reauthorization Act defined minimization procedures as:

> (A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of non-publicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;[68]
>
> (B) procedures that require that non-publicly available information, which is not foreign intelligence information as defined in section 1801(e)(1) of this title, shall not be disseminated in a manner that identifies any United States person without such person's consent, unless such person's

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[68] Foreign Intelligence information is defined as:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against –

> (a) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (b) sabotage or international terrorism by a foreign power or an agent or foreign power; or
>
> (c) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to –

> (a) the national defense or the security of the United States; or
>
> (b) the conduct of the foreign affairs of the United States.

50 U.S.C. § 1801(e).

identity is necessary to understand foreign intelligence information or assess its importance; and

(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to committed and that is to be retained or disseminated for law enforcement purposes. 50 U.S.C § 1861(g)(2).

The minimization procedures were required to be adopted by the Attorney General within 180 days of enactment of the Reauthorization Act (that is, by September 5, 2006). 50 U.S.C § 1861(g)(1).

As noted above, the Act also required that the OIG examine "the minimization procedures adopted by the Attorney General . . . and whether such minimization procedures protect the constitutional rights of United States persons."

II. Draft Minimization Procedures

Several months after enactment of the Reauthorization Act, the Office of Intelligence Policy and Review (OIPR) and the FBI – both of whom had been developing minimization procedures related to Section 215 orders – exchanged draft procedures. The drafts differed in fundamental respects, ranging from definitions to the scope of the procedures. At a meeting held on August 21, 2006, approximately 2 weeks before the statutory deadline, FBI and OIPR officials were unable to reach agreement on minimization procedures. Present at the meeting were the FBI General Counsel and the former Counsel for Intelligence Policy, along with attorneys from their respective offices and representatives from the Deputy Attorney General's Office, the Criminal Division, the Office of the Director of National Intelligence, and the Central Intelligence Agency.

Unresolved issues included the time period for retention of information, definitional issues of "U.S. person identifying information," and whether to include procedures for addressing material received in response to, but beyond the scope of, the FISA Court order; uploading information into FBI databases; and handling large or sensitive data collections.

For example, the Reauthorization Act calls for minimization procedures that prohibit the dissemination of non-public U.S. person information in a manner that would identify the U.S. person in certain circumstances. However, OIPR and the FBI could not agree on a definition of "U.S. person identifying information." [redacted]

[redacted]

In addition, OIPR and the FBI could not agree on the time period for retention of business records obtained by Section 215 orders. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In an effort to meet the statutory deadline after the August 21 meeting the former Counsel for Intelligence Policy suggested that the Attorney General adopt sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections of October 31, 2003, (NSI Guidelines) as interim minimization procedures. According to OIPR and FBI attorneys, the suggestion was adopted for several reasons. First, it allowed the Attorney General to meet the statutory deadline. Second, compliance with the NSI Guidelines in their entirety was already a prerequisite to obtaining a Section 215 order. Third, the suggestion allowed the parties to continue efforts to resolve their differences in other forums.

During this period the FBI and OIPR also were discussing some of the same issues with respect to updating the minimization procedures for full FISA orders. FBI and OIPR attorneys told us that they believed that the minimization procedures for full FISA orders could supersede or at least serve as a model for the minimization procedures for Section 215 business records since the discussions regarding full FISA orders required the resolution of broader and more complex issues.[70]

In addition, the Office of the Director of National Intelligence convened a working group composed of representatives from the intelligence community to discuss, among other things, the lack of consistency in their guidelines for national security investigations and the need to develop common definitions for terms including "U.S. person identifying information."[71]

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[69] Particularized minimization procedures were included in Section 215 applications [redacted].

[70] As of early February 2008, the Department had not finalized the updated minimization procedures for full FISA orders. [redacted]

[71] As of early December 2007, the working group had not defined "U.S. person identifying information."

III. The Interim Standard Minimization Procedures

On September 5, 2006, the Attorney General signed the Interim Standard Minimization Procedures (Interim Procedures) and filed the procedures with the FISA Court. The Interim Procedures adopted four sections of the NSI Guidelines and stated that the sections are to be "construed" to meet the statutory definitions of minimization procedures contained in the Reauthorization Act.

The four sections of the NSI Guidelines included in the Interim Procedures are: (1) Respect for Legal Rights; (2) Determination of United States Person Status; (3) Retention and Dissemination of Information; and (4) Definitions.[72]

The Respect for Legal Rights section states that the NSI Guidelines do not authorize investigating or maintaining U.S. person information solely for the purpose of monitoring protected First Amendment activities or the lawful exercise of Constitutional or statutory rights. In addition, this section requires that investigations be conducted in conformity with applicable authorities including the Constitution, statutes, executive orders, Department regulations and policies, and Attorney General Guidelines.

The Determination of United States Person Status section defines a "United States Person" as including U.S. citizens and aliens lawfully admitted for permanent residence. The section also provides guidance in determining a person's status [redacted].

The Retention and Dissemination of Information section contains three subsections: Information Systems and Databases; Information Sharing; and Special Statutory Requirements. The Interim Standard Minimization Procedures adopt only the first and second sections.[73]

The Information Systems and Databases subsection requires that the FBI retain records of investigations in accordance with a plan approved by the National Archives and provides for OIPR oversight of information obtained in the course of a national security investigation.

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[72] See, respectively, NSI Guidelines Parts I.B.3; I.C; VII.A.1 and B; and VII.

[73] The Special Statutory Requirements section requires that FISA-derived information be disseminated pursuant to the minimization procedures approved by the FISA Court and as specified in the FISA statute. Although not formally adopted in the Interim Standard Minimization Procedures, this section – as with every section in the NSI Guidelines – governs the use of Section 215 derived information because compliance with the NSI Guidelines in their entirety is already a prerequisite to obtaining a Section 215 order.

The Information Sharing subsection identifies the Department's policy to share information with relevant agencies unless there is a specific provision limiting such information sharing. To that end, the section provides that the FBI may disseminate information within the Department, with other federal, state, and local entities, and with foreign authorities when the information relates to the recipient's authorized responsibilities and is consistent with national security interests.

The Definition section of the NSI Guidelines defines terms such as "foreign intelligence," "international terrorism," and "publicly available." However, the Guidelines do not define "U.S. person identifying information."

We asked FBI and OIPR officials whether they believed the interim procedures met the minimization requirements of the Reauthorization Act. We specifically inquired whether the interim procedures could meet the statutory requirements when adherence to the NSI Guidelines was already a statutory requirement for obtaining a Section 215 order, the NSI Guidelines were not specific, and the NSI Guidelines applied to all documents the FBI collected in the course of a national security investigation and were not "designed in light of the purpose and technique" of Section 215 requests, as required by the Reauthorization Act.

OIPR and FBI attorneys responded that they believed the interim procedures met the statutory requirement because the Reauthorization Act did not require that the minimization procedures be "new" or "in addition to" existing requirements.

When we asked how an agent would determine, for example, whether the disclosure of U.S. person identifying information is necessary to understand foreign intelligence or assess its importance, the FBI General Counsel stated that the determination must be made on a case-by-case basis. The former Counsel for Intelligence Policy stated that pursuant to the interim procedures the FBI employee disseminating the information would make a judgment call. The former Counsel for Intelligence Policy also noted that this was one of the unresolved issues and that he hoped these issues would be addressed as the FBI and OIPR updated the minimization procedures for full FISA orders.

We also asked the FBI whether the retention plan approved by the National Archives required FBI agents to examine records received pursuant to a Section 215 order upon receipt to ensure compliance with the order. As discussed previously, we believe such a requirement could prevent the retention of U.S. person information that was produced pursuant to but not authorized by a Section 215 order. However, we were told that the FBI does not have a current retention policy for counterterrorism cases and until such a policy is developed, the FBI will rely on a default retention policy which addresses only the duration of retention and does not address the need to review the material. According to the FBI's default retention policy

for counterterrorism cases, the FBI will retain information obtained during a national security investigation for [redacted] before the issue of further retention is re-evaluated.

IV. OIG ANALYSIS

As discussed above, because of a series of disagreements about how the FBI should retain and disseminate business records obtained pursuant to a Section 215 order, in September 2006 the Department issued "interim" minimization procedures for business records produced pursuant to Section 215 orders. These interim minimization procedures use general hortatory language stating that all activities conducted in relation to national security investigations must be "carried out in conformity with the Constitution." However, we believe this broad standard does not provide the specific guidance for minimization procedures that the Reauthorization Act appears to contemplate.

When discussing the issue raised by the Reauthorization Act of whether the minimization procedures "protect the constitutional rights of United States persons," OIPR and FBI attorneys asserted that most government requests for business records do not raise constitutional concerns. They noted that the Supreme Court has held that individuals have no legitimate expectation of privacy for information voluntarily turned over to third parties. See e.g., *United States v. Miller*, 425 U.S. 435, 442-444 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979); *Couch v. United States*, 409 U.S. 332, 335-336 (1973). Yet, not every business record obtainable through a Section 215 order falls under this rubric. For example, a request by the government for business records created and maintained by a sole proprietor may raise Fifth Amendment concerns. *Bellis v. United States*, 417 U.S. 85 (1974).[74] Business record requests also may affect First Amendment rights of individuals. In addition, the Supreme Court also has not ruled on the appropriate privacy interest to be afforded to [redacted].

Moreover, the Reauthorization Act required the Department to adopt "specific procedures" reasonably designed "to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." We believe that the interim procedures do not adequately address this requirement, and we recommend that the Department continue its efforts to

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74 [redacted].

construct specific minimization procedures relating to Section 215 orders, rather than rely on general language in the Attorney General's NSI Guidelines.

First, the interim procedures do not provide specific guidance regarding the retention of U.S. person information. The FBI acknowledged that its practice under the NSI Guidelines sections is to retain all information obtained in the course of a national security investigation for a period [redacted]. However, the Reauthorization Act requires the Department to adopt "specific procedures" designed to minimize the retention of non-publicly available information concerning unconsenting United States persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. The Department's failure to distinguish the retention of U.S. person information from any other information obtained in the course of national security investigations appears inconsistent with the language of the Reauthorization Act. Moreover, while OIPR proposed retaining the business records [redacted] and the FBI recommended retaining them [redacted], the interim guidelines simply follow general archives practices and allow the information to be retained without further evaluation [redacted].

Similarly, the interim procedures do not contain procedures that prohibit the dissemination of U.S. person information unless disclosure is necessary to understand or address the importance of the intelligence information. The FBI's assertion that agents can make this determination on a case-by-case basis conflicts with the statutory requirements that specific minimization procedures be developed to address this concern.

[redacted] ignores the Reauthorization Act's statutory requirement that the Department adopt procedures "that are reasonably designed in light of the purpose and technique" of business records orders to minimize the retention and prohibit the dissemination of U.S. person information." We believe that standard procedures should be specifically adopted [redacted], in accord with the requirements and intent of the Reauthorization Act.[75]

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75 [redacted].

As a result, we recommend that the FBI and OIPR continue to work to develop appropriate standard minimization procedures for business records. Pursuant to the Reauthorization Act, the Department should replace the interim procedures with final standard minimization procedures that provide specific guidance for the retention and dissemination of U.S. person information. In addition, we recommend that the FBI and OIPR monitor Section 215 requests to ensure that if a request implicates the rights of U.S. persons, that specific and particularized minimization procedures be included in the Section 215 application and implemented in a manner that protects the U.S. person's constitutional rights.

CHAPTER EIGHT
CONCLUSIONS

As required by the Reauthorization Act, the OIG conducted this review of the FBI's use of Section 215 requests for business records in 2006. The Reauthorization Act required the OIG to examine how many requests were prepared by the FBI; how many applications were approved, denied, or modified by the Foreign Intelligence Surveillance Act (FISA) Court; whether bureaucratic or other impediments hindered the FBI's use of Section 215; and the effectiveness of the FBI's use of Section 215. The Act also directed that the OIG examine any improper use of Section 215 authority and identify any noteworthy facts or circumstances concerning Section 215 requests. Finally, the Act required the OIG to examine whether the minimization procedures adopted by the Department protect the constitutional rights of U.S. persons. As required by the Reauthorization Act, our review covered Section 215 requests processed in calendar year 2006.

We found that in 2006 the FBI and OIPR processed a total of 21 pure Section 215 applications and 32 combination applications. All but six of the pure Section 215 applications were formally submitted to the FISA Court. Each of the 47 Section 215 applications (15 pure requests and 32 combination requests) formally submitted to the FISA Court were approved.[76]

The six pure Section 215 requests that were not formally presented to the FISA Court were withdrawn either while they were pending approval at the FBI's National Security Law Branch (NSLB) or at the Office of Intelligence and Policy Review (OIPR) because they lacked sufficient predicate or the provider did not maintain the records requested. The FBI obtained a wide variety of records using Section 215 orders in 2006, including credit card records, [redacted].

Unlike in previous years, [redacted].

[76] Four of the pure Section 215 applications processed in 2006 were signed by the FISA Court in 2007.

We determined that when FBI agents submitted Section 215 requests processed in 2006, they encountered similar processing delays as those identified in our March 2007 report. These delays were caused by unfamiliarity with Section 215 orders, too few resources to handle requests expeditiously, the multi-layered review process, and substantive issues regarding whether the application met the statutory requirements. Overall, the average processing time for Section 215 orders in 2006 was 147 days, which was similar to the processing time for 2005. However, the FBI and OIPR were able to expedite certain Section 215 requests in 2006, and when the FBI identified two emergency requests the FBI and OIPR processed both Section 215 requests quickly.

We uncovered no evidence of harm to national security in any specific cases caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in Section 215 requests. However, agents expressed frustration about the amount of time and effort involved in obtaining a Section 215 order and stated that they would first pursue the information through other more efficient investigative techniques such as voluntary compliance and national security letters.

We again examined how the FBI in 2006 used information obtained through Section 215 orders in national security investigations. Aside from [redacted], Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information to support additional FBI investigative requests and to [redacted]. The evidence showed no instance where the information obtained from a Section 215 order described in the body of the report resulted in a major investigative development. However, [redacted].

We did not identify any illegal use of Section 215 authority. However, we identified two instances where the FBI received information inadvertently that was not authorized by the FISA Court order. In one instance, the FBI did not realize for 2 months that it was continuously receiving information that was not authorized by the FISA Court order. The FBI reported this matter to the IOB, and OIPR reported the matter to and sequestered the material with the FISA Court.

In the other instance the FBI recognized the matter quickly and took steps to immediately sequester the additional material. However, in this case, the FBI did not consider the matter to be reportable to the IOB because the records were not statutorily protected. OIPR has not made a decision regarding whether this is a compliance incident reportable to the FISA Court.

We recommend the FBI should develop procedures that require FBI employees to review materials received from Section 215 orders to ensure that the material they receive pursuant to a Section 215 is authorized by the Section 215 order.

Furthermore, we recommend that the FBI develop procedures for identifying and handling material that is produced pursuant to, but outside the scope of, Section 215 orders. The procedures should include the FBI's justification for handling any class of such material differently from other classes and should consider factors in addition to whether the material is or is not statutorily protected. For example, the procedures should also address such factors as whether the material contains non-public information about U.S. persons who are not the subjects of FBI national security investigations, and whether the underlying Section 215 order included particularized minimization procedures. These procedures should be incorporated in the minimization procedures required by the Reauthorization Act.

We identified two other "noteworthy" items. The first involved a request [redacted].

The second noteworthy item concerned the [redacted].

Finally, we examined whether the interim standard minimization procedures adopted by the Department for Section 215 orders are consistent with the requirements of the Reauthorization Act. Because of differences between the FBI and OIPR, the Department's interim procedures merely adopt the general language contained in the Attorney General's National Security Guidelines. However, these general standards do not provide specific guidance for minimization procedures that the Reauthorization Act appears to contemplate. We believe that these interim

guidelines do not adequately address the intent and requirements of the Reauthorization Act for minimization procedures, and we recommend that the Department continue its efforts to develop specific standard minimization procedures relating to Section 215 orders.

UNCLASSIFIED APPENDIX

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

MAR 0 7 2008

The Honorable Glenn A. Fine
Inspector General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Fine:

(U) Thank you for providing us a copy of your draft report dated January 28, 2008 titled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records in 2006." We have also reviewed the subsequent draft provided to us on February 19. We appreciate the opportunity to comment, and note that this comment addresses the draft dated February 19, 2008.

(U) As you note in your report, Section 215 orders are an invaluable tool the Federal Bureau of Investigation uses to obtain information in national security investigations. In many cases, the information obtained through this investigative technique cannot be obtained by other means. We thank you for the extensive review your office has conducted of the use of this authority.

Sincerely,

J.M. McConnell

U.S. Department of Justice

National Security Division

Washington, D.C. 20530

March 3, 2008

The Honorable Glenn A. Fine
Inspector General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Fine:

Thank you for the opportunity to respond to your report entitled, "A Review of the Federal Bureau of Investigation's use of Section 215 Orders for Business Records in 2006." We are pleased that your report recognizes the importance of this valuable tool to the Federal Bureau of Investigation's (FBI) conduct of national security investigations.

As you find in your report, FBI agents depend on Section 215 orders to support FBI national security investigations and to follow through on investigative leads. The process for obtaining these orders was designed to protect the privacy and civil liberties of Americans and to ensure that applications comply with statutory requirements. We appreciate your finding that this careful, measured approach—while resulting in some delay—has not caused any harm to the national security. In order to help ensure that the Department takes full advantage of this important tool in the future, the National Security Division (NSD) has augmented the number of attorneys handling Section 215 applications, and is collaborating with the FBI to increase the efficiency with which requests for Section 215 authority are prepared. Indeed, as you note, the FBI and the NSD were able to work together to obtain Section 215 authority expeditiously in 2006 when circumstances required immediate collection.

Your report also discusses the interim minimization procedures adopted by the Attorney General to govern Section 215 requests. As you note, at the time these procedures were adopted, the Department was in the process of revising its standard minimization procedures for other types of FISA collection. To allow Department attorneys the time to produce Section 215 minimization procedures consistent with that revision while ensuring that Americans' privacy and civil liberties interests are protected, the current interim procedures were adopted. The Interim Standard Minimization Procedures apply the requirements of four sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections (October 31, 2003) to records obtained pursuant to Section 215. Since their adoption, the Foreign Intelligence Surveillance Court (FISC) has ordered the government to follow these minimization procedures in numerous Section 215 orders. With the revision of the procedures for other FISA collections now complete, the Department will commence work to

replace these interim procedures with standard minimization procedures specifically tailored to collection under Section 215.

Finally, we are pleased that your report confirms there were no illegal uses of Section 215 authority in 2006. Your report does note two instances in which a third party over-produced certain records in response to a court-authorized Section 215 request. As you discuss in your report, the FBI did not solicit the additional business records in either case and therefore cannot be faulted for the recipients' production of records beyond the scope of the court order. Indeed, in both instances you identify, the FBI took the steps necessary to ensure that the over-produced information would not be used.

Thank you for your efforts and for the opportunity to convey our comments on this report.

Sincerely,

Kenneth L. Wainstein
Assistant Attorney General

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

March 5, 2008

Honorable Glenn Fine
Inspector General
United States Department of Justice
950 Pennsylvania Ave. N.W, Suite 4706
Washington, D.C. 20530

Re: Office of Inspector General Report: A Review of the Federal Bureau of Investigation's Use of Section 215 Orders

Dear Mr. Fine:

The FBI appreciates this opportunity to respond to the findings and recommendations made in a "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders" (215 Report), a report that was Congressionally mandated by the USA PATRIOT Improvement and Reauthorization Act of 2005. This letter conveys the FBI's response to the findings and recommendations of the Report, and I request that it be appended to the Report.

We are pleased that your office has concluded that the FBI did not engage in any illegal use of its authority to gather third party business records during national security investigations. We also appreciate your findings, with which we concur, that "Section 215 can be a valuable investigative tool" even though delays in obtaining such orders have, at times, undercut that value. Finally, we appreciate your conclusion that emergency requests were handled very quickly and that the average processing time for business record applications was reduced slightly during 2006 as compared to 2004 and 2005 because "FBI and OIPR attorneys developed a procedure and working relationship that allowed them to process business records orders more efficiently." We are hopeful these processing times will continue to fall in the coming years.

Thank you for the opportunity to respond to the report.

Very truly yours,

Robert S. Mueller, III
Director