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A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records (U)

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EXECUTIVE SUMMARY (U)

In the USA PATRIOT Improvement and Reauthorization Act of 2005 (the Reauthorization Act), Congress directed the 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) use of 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 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.[2] Congress directed the OIG to review the use of Section 215 for two time periods – calendar years (CY) 2002 through 2004 and CY 2005 through 2006. The first report is due to Congress on March 9, 2007; the second is due on December 31, 2007.[3] (U)

In our first report, we describe the results of the first OIG review of the use of Section 215. Although we were only required to review calendar years 2002 through 2004 in this first review, we elected to include data from calendar year 2005. (U)

This Executive Summary summarizes the report, including its main findings. (U)

I. Methodology of the OIG Review (U)

In this review, the OIG conducted over 90 interviews of FBI and Department of Justice officials. During the field work phase of the review, OIG teams traveled to FBI field offices in New York, Chicago, Philadelphia, and San Francisco, where we interviewed over 50 FBI employees. We also

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[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." (U)

[2] Section 215 was originally scheduled to sunset on December 31, 2005. The Reauthorization Act extended Section 215 until December 31, 2009. (U)

[3] The Reauthorization Act also directed the OIG to conduct reviews for the same two time periods 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's first report on the use and effectiveness of national security letter authority is contained in a separate report. (U)

conducted telephone interviews of 25 FBI agents in other field offices. In Washington, D.C., the OIG interviewed senior FBI and Department of Justice officials who participated in implementing procedures and processing requests for Section 215 orders. (U)

The OIG also examined documents obtained from the Department's Office of Intelligence Policy and Review (OIPR) and the FBI relating to each instance of the FBI's use or attempted use of Section 215 authority during calendar years 2002 through 2005.[4] (U)

II. Background on Section 215 (U)

A. Legal Background (U)

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 the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Section 215 did not create any new investigative authority but instead expanded existing authority found in the Foreign Intelligence Surveillance Act (FISA) of 1978. 50 U.S.C. § 1801 et seq. (U)

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.[5] 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, or 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.[6] (U)

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[4] Until the fall 2006, the Office of Intelligence Policy and Review 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. Shortly after that, OIPR's functions were moved to the NSD. (U)

[5] Applications for FISA orders are prepared and presented to the FISA Court by OIPR. (U)

[6] 50 U.S.C. § 1862(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001). (U)

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

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

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: (U)

> 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. 50 U.S.C. § 1861(a)(1). (U)

While the 1998 language limited the reach of this type of investigative authority to four types of entities, the new language does 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 is not 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)." (U)

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.[7] (U)

B. Public Concerns about Section 215 (U)

After enactment of the Patriot Act, controversy focused on the scope of Section 215. Public concerns about the scope of the new Section 215 authority centered on the ability of the FBI to obtain library records, including books loaned to library patrons. Many public commentators began to refer to Section 215 as the "library provision." Librarians, their professional associations, and others voiced concerns about the potential First and Fourth Amendment implications of compelled production of library records.[8] These concerns related to the broad reach of Section 215 and also to the so-called "gag provision," which existed under the previous version of FISA and which forbids recipients of Section 215 orders from disclosing the existence of the order or any information obtained pursuant to an order. (U)

C. The Process for Seeking Section 215 Orders (U)

We determined that prior to passage of the Patriot Act in late 2001, no written policies, procedures, or templates for requests or applications for business records existed in the FBI or OIPR. After passage of the Patriot

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[7] The Reauthorization Act revised the language of Section 1861(b)(2) by providing that tangible things are presumptively relevant when they pertain to entities or individuals that are foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, or individuals known to associate with subjects of such investigations. (U)

[8] For example, the American Library Association (ALA) adopted a resolution declaring that the ALA "considers sections of the USA PATRIOT Act . . . a present danger to the constitutional rights and privacy rights of library users" and urged the Congress to provide additional oversight and amend or change portions of the Act." Resolution on the USA PATRIOT Act and Related Measures That Infringe on the Rights of Library Users (Jan. 29, 2003). (U)

Act, between 2002 and 2005 a general process for requesting Section 215 orders was developed and refined, as were templates for the field offices' requests for Section 215 orders and for applications to the FISA Court. The process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, the FISA Court review, and FBI service of the order. (U)

The process begins when an FBI case agent in a field office prepares a business records request form, which must be approved by the squad's Supervisory Special Agent and other managers in the FBI field office. The request is sent to FBI Headquarters, including the Office of General Counsel's National Security Law Branch (NSLB), for further review and approval. If the request is approved, an NSLB attorney drafts the application package, forwards the draft application package to OIPR, and the request is assigned to an OIPR attorney. The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to finalize the draft application package. The draft application package is then reviewed by an OIPR supervisor. The final application package is returned to the FBI for an accuracy review and any additional edits are 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 the package is prepared for presentation to the FISA Court by an OIPR attorney. (U)

OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with a copy of the application and order in advance. The application package is then formally presented to the FISA Court for its review and approval at the scheduled hearing. If the FISA Court judge approves the application, the judge signs the order approving the application. At the hearing, the judge may make handwritten changes to the order, such as the length of time for the recipient to produce the items, and, if so, will sign the order with the handwritten modifications. The order is returned to the requesting FBI field office for service on the entity in possession of the items. The order sets forth the time period allowed for producing the items. (U)

D. Different Types of Section 215 Requests (U)

During the period covered by our review, calendar years 2002 through 2005, the FBI and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: "pure" Section 215 applications and combination or "combo" Section 215 applications. (U)

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 license records from state departments of motor vehicles would constitute a pure Section 215 request. (U)

A "combo" 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 pen register/trap and trace orders. Pen register and trap and trace devices identify incoming and outgoing telephone numbers on a particular telephone line but do not allow the FBI to listen to the content of the telephone call. 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. Unlike criminal investigation pen register/trap and trace orders, which routinely included a clause requiring the provision of subscriber information, FISA pen register/trap and trace orders did not contain such provisions. FBI agents had to employ other investigative tools, such as national security letters, to obtain the subscriber information. In order to streamline the process for obtaining subscriber information, beginning in early 2005 OIPR began to append a request for Section 215 orders to applications for FISA pen register/trap and trace authority.[9] (U)

E. Other Investigative Authority Available to the FBI for Third Party Information (U)

In addition to Section 215 orders, the FBI has several other investigative tools that allow it to obtain information from third parties in national security investigations.[10] For example, as noted above, FISA pen register/trap and trace orders permit the FBI to identify incoming and outgoing telephone numbers on a particular telephone line. (U)

Some investigative authority rests directly with the field offices and does not require FBI Headquarters or FISA Court approval. For example, national security letters (NSL) are written commands from the FBI to communications providers, such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer

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[9] As of March 2006, Section 215 combination requests were no longer necessary because the Reauthorization Act authorized the disclosure of subscriber information in connection with FISA pen register/trap and trace orders. (U)

[10] For this report, national security investigations refer to investigations involving counterterrorism or counterintelligence components. (U)

and consumer transaction information. In the field, the FBI Special Agents in Charge are authorized to approve NSLs. (U)

In national security investigations with a criminal nexus, the FBI can also ask the United States Attorney's Office to obtain grand jury subpoenas for third party information. A grand jury subpoena is the criminal investigative tool that mostly closely resembles a Section 215 order. Generally speaking, a grand jury may obtain non-privileged evidence, including any records and tangible items, relevant to the grand jury's investigation. FBI agents conducting a national security investigation with a criminal nexus do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena. Grand jury subpoenas are issued under the signature of the prosecutor supervising the grand jury investigation. (U)

III. Examination of Section 215 Orders Sought and Obtained in Calendar Years 2002 through 2005 (U)

As part of the OIG's review of the use and effectiveness of Section 215 authority, Congress directed the OIG to examine: (U)

- 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; (U)

- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)

- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions; (U)

- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority; and, (U)

- 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. (U)

A. Pure Section 215 Requests and Orders for Calendar Years 2002 through 2005 (U)

Our review examined all Section 215 applications and orders. We found that in calendar years 2002 through 2005, OIPR submitted a total of 21 pure Section 215 applications for FISA Court approval. All of these applications were approved by the FISA Court. (U)

The first pure Section 215 order was approved by the FISA Court in May 2004, more than two years after the Patriot Act was passed. The FISA Court approved six more Section 215 applications in CY 2004, for a total of seven. The FISA Court approved 14 Section 215 applications in CY 2005. Although a total of 21 Section 215 orders were approved, they contained only 18 unique requests.[11] (U)

Examples of the types of business records that were obtained through these Section 215 orders include driver's license records, public accommodations records, apartment records, credit card records, and telecommunications subscriber information for telephone numbers. We also looked at the types of investigations from which the 18 pure approved

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[11] Two requests approved during the period of our review were for the same provider and the targets – Targets A and B – were connected in the same investigation. After the applications were approved by the FISA Court and before the orders were served, the FBI learned that there was a mistake in the application concerning Target A that needed to be corrected in a new application. The FBI decided to wait to serve the order for Target B when the new order for Target A was obtained. In early 2005, the FBI obtained a new order for Target A. Before the orders could be served, the FBI learned that a subcontractor of the provider was in possession of the records for both targets. The FBI then submitted new applications for the same records for both targets. Thus the FBI submitted two corrected applications for Target A and one for Target B, and we do not consider these corrected applications as unique. (U)

applications were submitted: 9 were from counterintelligence (CI) cases, 8 were from counterterrorism (CT) cases, and 1 was from a cyber case. (U)

In reviewing OIPR and FBI documents, we determined that there were 31 instances in which FBI agents sought Section 215 orders during this timeframe but did not obtain them. These requests were prepared by the FBI but were never finalized, either by the FBI's NSLB for submission to OIPR or by OIPR for presentation to the FISA Court.[12] (U)

We reviewed the documents concerning the 31 withdrawn requests and applications and interviewed FBI, NSLB, and OIPR personnel to determine why these Section 215 requests were not submitted to OIPR or to the FISA Court. We identified five categories of reasons that apply to the majority of the withdrawn requests and applications: (1) the investigation was closed or changed course; (2) an alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

We identified several requests or applications that were withdrawn because the field office closed the investigation or the investigation changed course and the information was no longer needed. We determined that most of these requests had been pending for several months, and in one case over a year, at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. In one case, at the time of the withdrawal an FBI Headquarters supervisor notified NSLB that the FBI was going to interview the target and wrote in an e-mail, "An interview is forthcoming and the records, although material six months ago, are moot at this point." (U)

We also identified several cases in which the FBI obtained the items sought in the Section 215 request through other investigative means. One of these requests was for information from a library. We found that an NSLB supervisor would not permit the request to go forward because of the controversy surrounding Section 215 requests for information from libraries. Once the field office was advised that NSLB would not send the application to OIPR, the field office obtained the information through other investigative means. (U)

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[12] For ease of reference, we describe all of these instances as "withdrawn" requests or applications, although in several cases we were unable to determine the reason the request or application did not make it to the next level and there did not appear to be an affirmative decision by anyone within the FBI not to proceed for a substantive reason. (U)

We determined that several of the FBI's Section 215 requests that were later withdrawn, including the first request submitted in April 2002, were affected by OIPR's interpretation of the Family Education Rights and Privacy Act of 1974 (FERPA), commonly referred to as "the Buckley Amendment." The Buckley Amendment applies to all educational agencies and institutions and governs the rights and privacy of students and parents in relation to access to and release of educational records.[13] See 20 U.S.C. § 1232g. (U)

OIPR was concerned that the Buckley Amendment might limit the reach of Section 215 with respect to educational records because Section 215 did not contain the proviso found in other parts of FISA stating that "notwithstanding any other provision of law," the government may obtain certain types of information. According to OIPR officials, because Section 215 did not contain this language, it could be construed to be superseded by the Buckley Amendment and disclosure of the records request to the student and parents would be required. OIPR officials told the OIG that other statutes that also state or imply that they provide the exclusive means of obtaining certain types of records, such as tax or medical records, could be similarly construed. Although some NSLB attorneys disagreed with OIPR's interpretation of the law, NSLB did not ask OIPR to finalize any of the applications concerning educational records. (U)

We also identified some cases in which a determination was made that a Section 215 request lacked sufficient or adequate information to go forward. Finally, we identified several instances in which we were unable to determine – from documents or interviews with NSLB or OIPR personnel – the reason that the request or application did not proceed to the next level or when the requests were withdrawn.[14] (U)

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[13] FERPA is called "the Buckley Amendment" after its principal sponsor, Senator James Buckley of New York. With respect to release of educational records, the Buckley Amendment provides that educational entities will not receive federal funds if they release educational records to third parties without written consent from the student's parents except in limited circumstances, such as in connection with a student's application for financial aid. 20 U.S.C. § 1232g (a)(1). The Buckley Amendment also provides that an educational entity does not have to obtain written consent to release educational records "in compliance with judicial order, or pursuant to any lawfully issued subpoena"; however, the entity must notify the student and parents of the order or subpoena in advance of complying with it unless the court orders the institution not to disclose the existence or content of the subpoena or the institution's response. 20 U.S.C. § 1232g (b)(1)(J)(i) and (ii) and (b)(2)(B); 20 U.S.C. § 1232g (a)(2). (U)

[14] We discuss the lengthy delays in processing Section 215 requests in Chapter Four of the report. (U)

We found that the FBI has not obtained a FISA Court order for the production of library records. However, FBI field offices submitted requests to FBI Headquarters to seek to obtain information from a library on a few occasions, one of which we discussed above. These requests were later withdrawn before any application was filed with the FISA Court. (U)

B. Combination Section 215 Applications and Orders for Calendar Years 2002 through 2005 (U)

In addition to the pure Section 215 requests, we found that a total of 141 combination business record applications were submitted and approved by the FISA Court in calendar year 2005. The first combination order was issued by the FISA Court in February 2005. However, with the enactment of Section 128 of the Reauthorization Act, which provides that FISA pen register orders now include the subscriber information, the number of combination applications should significantly decrease in CY 2006. (U)

C. Modified Section 215 Orders (U)

We also reviewed, as required by the congressional directive, how many times the FISA Court modified any Section 215 order. We found that two Section 215 orders were modified in 2004 and two were modified in 2005, for a total of four Section 215 orders modified by the FISA Court. The orders modified in 2004 were pure Section 215 orders, and the orders modified in 2005 were combination 215 orders. According to OIPR, modifications generally consist of handwritten changes to orders that are made by FISA Court judges at the hearing in which the order is signed. However, OIPR officials stated that OIPR does not usually consider revisions to applications and orders that OIPR makes based on feedback from the FISA Court's review of advance copies of FISA applications to be modifications. (U)

With respect to the orders modified in 2004, the first modified Section 215 order related to the time frame to produce the requested records to the FBI. The FISA Court modified the order by extending the time frame from 10 days to 60 days.[15] With respect to the other pure Section 215 modified order, the modification related to the records being requested. The FISA Court clarified the records to be produced by describing the records more precisely than the language in the order as presented to the Court. (U)

[15] The timeframe that recipients of Section 215 orders are given to produce the items is not determined by statute or regulation. Instead the FBI determines the number of days it believes is reasonable based on the type and volume of information that must be produced. (U)

With respect to the orders modified in 2005, both modified combination orders contained the same modification. In these applications, OIPR sought orders for a specialized type of telephone information. OIPR notified the FISA Court that federal judges in criminal cases had denied requests for this kind of information in certain instances. Although the FISA Court agreed to approve the applications, the Court directed the government to file a supplemental brief on this issue. Prior to the hearing on the applications, OIPR revised the applications and included a footnote setting forth a summary of the criminal case law with respect to this kind of information and revised the order to include a direction for the government to provide the FISA Court with a supplemental briefing on this subject. (U)

D. Improper Use of Section 215 Authority (U)

As part of this review, Congress directed the OIG to identify "any noteworthy facts or circumstances concerning the business records requests, including any illegal or improper use of the authority." Our review noted two instances of improper use of Section 215 authority, both of which involved the pen register/trap and trace portion of combination Section 215 orders. We did not identify any instances involving improper or illegal use in connection with pure Section 215 orders or authority. (U)

In the first instance of improper use, the field office had obtained an order for a pen register/trap and trace device on a telephone that was no longer used by the subject. This resulted in the FBI receiving unauthorized information, which is called "over collection," between March 2005 and October 2005. According to the FBI, the case agent for this investigation inadvertently overlooked documents in the file indicating that the telephone number no longer belonged to the target of the investigation. A new case agent discovered the problem, reported the over collection, and sequestered and destroyed the improperly collected data. (U)

In the second instance of improper use, the FBI inadvertently collected certain telephone numbers pursuant to a pen register/trap and trace order because the telephone company did not advise the FBI that the target had discontinued using the telephone line until several weeks after the fact. For a short period of time, the telephone number had been issued to someone else. The FBI identified the improperly collected information, removed it from its databases, and provided it to OIPR. (U)

We determined that the FBI had discovered both incidents and reported them, as required, to the Intelligence Oversight Board or IOB.[16] In addition, both incidents were reported to the FISA Court by OIPR.[17] (U)

We also identified a situation that we believe constitutes a "noteworthy fact" concerning a Section 215 combination order and several interrelated FISA electronic surveillance orders. In January 2006, OIPR filed a notice to the FISA Court stating that in connection with several cases, OIPR had learned in December 2005, that a source who had previously provided significant information about the targets reported that he did not believe that one of the targets, who was associated with all of the other targets, was a supporter of a particular terrorist organization.[18] (U)

OIPR reported to the FISA Court that the FBI had learned of this information in April 2005 from another intelligence agency but had "inadvertently failed to provide it at the time they received it." The FISA Court issued an order directing the government to explain the delay in reporting this information to the Court. In March 2006, OIPR filed an explanation stating that the case agents who were responsible for verifying the accuracy of the FISA renewal application submitted in April 2005 mistakenly believed that the problematic source information had already been provided to OIPR. Although the case agents had provided OIPR with several intelligence reports about the same source, these intelligence reports did not include the intelligence report containing the problematic information. According to the court filing, the FBI did not believe the omission was intentional because all other information obtained from the source, some of which was not favorable to the FBI's investigation, had been reported to OIPR. (U)

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[16] The Intelligence Oversight Board, created by Executive Order in 1976, is 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 Executive Order also requires the general counsels of the intelligence community, including the FBI's General Counsel, to report to the IOB on at least a quarterly basis intelligence activities they "have reason to believe may be unlawful or contrary to Executive order or Presidential directive," which are referred to as "IOB violations." (U)

[17] OIPR is required to report FISA compliance incidents to the FISA Court pursuant to Rule 10(c) of the FISA Court's Rules of Procedures that became effective February 17, 2006. (U)

[18] The OIPR notice also stated the reasons the government continued to believe that there was sufficient information to support FISA applications for all of the targets despite this source's information. (U)

IV. Delays in Implementing Section 215 Authority and Other Impediments to Use (U)

A. Delay in Implementing Procedures and Policies (U)

The Reauthorization Act directed us to examine "the justification for the failure of the Attorney General to issue implementing procedures governing requests for the production of tangible things . . . in a timely fashion, including whether such delay harmed national security." To respond to this directive, we first attempted to determine whether the Attorney General was required by statute, regulation or other directive to issue implementing procedures. In our review of documents and interviews with witnesses, we found no such requirement. However, we also found no evidence that the Attorney General or any Department official directed OIPR or the FBI to implement Section 215 procedures. (U)

Our review determined that after passage of the Patriot Act in 2001, neither the Department nor the FBI issued implementing procedures or guidance with respect to Section 215 authority. OIPR and the FBI eventually developed standard forms and applications for obtaining Section 215 orders. NSLB distributed a standard request form to field offices in October 2003, and NSLB and OIPR completed a standard application and order in the spring 2004. We determined that the delay occurred because the Department, including OIPR and the FBI, were focused on processing full content FISA requests, training, and hiring personnel to address the increased FISA workload and did not focus on the need for templates and procedures for Section 215 orders. (U)

B. Section 215 Processing Delays (U)

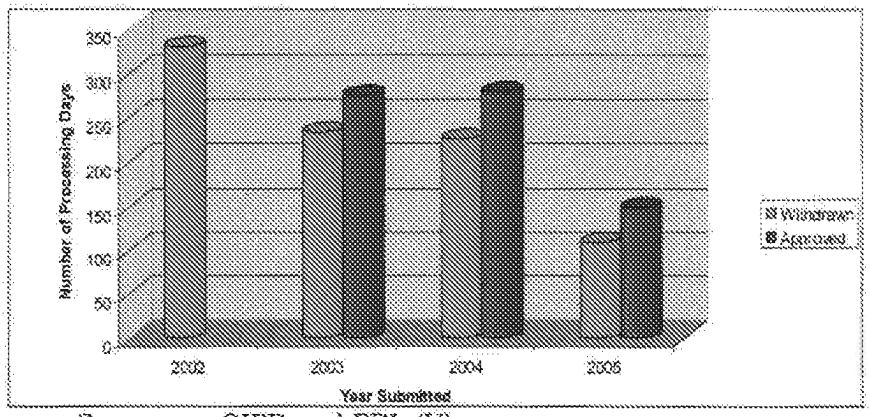
When FBI field offices began requesting Section 215 orders in April 2002, they encountered processing problems. For example, in many instances no one from NSLB responded to Section 215 requests for several months, if at all. In addition, in some cases NSLB sent draft applications to OIPR, but the applications were not finalized by OIPR for several months. In other cases in which a draft application was prepared, the field office did not receive any response from NSLB or OIPR. As a result of these delays, in some cases the information was no longer needed by the time the field office received a response from NSLB or OIPR, and the request was withdrawn. (U)

We sought to calculate how long requests remained pending in NSLB and in OIPR. However, the FBI's and OIPR's recordkeeping systems in place at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. Therefore, we have

incomplete information with respect to many of the requests. From the available data, we determined that the average processing time for approved requests was 275 days in 2003, 279 days in 2004, and 149 days in 2005.[19] For 2004 and 2005 we were able to calculate the average processing time for approved requests in both NSLB and OIPR. In 2004, the requests were pending in NSLB for 162 days and in OIPR for 180 days. In 2005, the average processing time at NSLB was 60 days and 88 days at OIPR. We determined that the average processing time for withdrawn requests was 330 days in 2002, 234 days in 2003, 226 days in 2004, and 109 days in 2005. (U)

The chart below reflects the average processing time of withdrawn requests and approved requests.[20] (U)

Average Processing Time (U)



Source: OIPR and FBI (U)

C. Impediments to Processing Section 215 Requests (U)

We found several impediments that hindered the FBI's ability to obtain Section 215 orders. Section 215 requests were delayed because NSLB and OIPR disagreed over interpretations of the law, and NSLB and OIPR lacked sufficient resources for handling Section 215 requests. The

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[19] All of the requests submitted in 2002 were withdrawn. (U)

[20] For each year listed on the chart, we calculated processing times based on how long it took to process the requests submitted in that year, whether they were approved in that same calendar year or were eventually approved in the next calendar year. For the requests submitted in 2002, we were only able to calculate processing time at OIPR and not also at the FBI, so this number reflects only OIPR processing times. Similarly, in 2003 for approved requests, we had data only for OIPR processing times. (U)

multi-layered process for obtaining Section 215 orders also contributed to the processing delays. In addition, we found a lack of knowledge in the field about Section 215 authority. (U)

1. Statutory Interpretation (U)

We found that the processing of Section 215 requests was slowed by the uncertainty in interpreting the Patriot Act. One of the legal issues that affected several of the first requests generated in 2002 and 2003 was the intersection of Section 215 with another statute that provides for the production of educational records. OIPR's interpretation of the statute was that Section 215 did not trump existing laws because, unlike other provisions of FISA, Section 215 did not include in the business records provision the phrase "notwithstanding any other provision of law." As discussed above, while some NSLB attorneys disagreed with this interpretation, NSLB was not willing to push the issue with the FISA Court, and as a result no request for educational records was presented to the FISA Court between calendar years 2002 and 2005. (U)

According to NSLB and OIPR attorneys, this impediment to obtaining educational records has since been addressed. The Reauthorization Act amended FISA by adding 50 U.S.C. § 1861(a)(3), which specifically addresses educational and other sensitive categories of business records. According to several NSLB and OIPR attorneys we interviewed, because this provision clarifies that educational records are obtainable through the use of a Section 215 order, the non-disclosure provisions of Section 215 apply rather than the notification provisions of the Buckley Amendment. (U)

Another cause for the delay in processing Section 215 requests was that NSLB and OIPR attorneys disagreed over the interpretation of the relevance standard and how much information had to be included in Section 215 applications about the items requested and their connection to the FBI's investigation. NSLB attorneys believed that the level of detail required by OIPR about the investigations in the applications was far beyond that needed to satisfy the relevance threshold. OIPR attorneys believed the information was necessary to persuade the FISA Court to approve the applications. NSLB and OIPR eventually agreed upon the content and form of a standard application after several months of back and forth about the issue. However, even after a standard application form was agreed upon, NSLB attorneys continued to have disagreements with OIPR attorneys in individual cases about the level of detail required. (U)

2. Insufficient Resources (U)

Another impediment to obtaining Section 215 was the insufficient resources devoted to this process. Neither NSLB nor OIPR had adequate resources to dedicate to the implementation of Section 215 requests after passage of the Patriot Act. The workload of both entities increased dramatically after the September 11 terrorist attacks and passage of the Patriot Act, and substantial resources were needed to process full content FISA applications. Both entities were authorized to hire large numbers of employees, and by 2004 both NSLB and OIPR grew substantially. However, by spring 2004 a significant backlog of full content FISA applications had developed, and the Attorney General directed OIPR and NSLB to create a task force to address the FISA backlog. NSLB was required to detail approximately 10 attorneys to OIPR to work on the backlogged full content FISA applications. (U)

As a result, NSLB did not focus on Section 215 requests or make obtaining a Section 215 order a priority until late 2003, when NSLB submitted four Section 215 applications to OIPR. In addition, around this same time an NSLB attorney was designated the point of contact within NSLB for Section 215 requests. (U)

Also in July 2004 OIPR attempted to address NSLB concerns about the processing of Section 215 requests by assigning a detailed NSLB attorney to handle Section 215 requests. This detailed attorney, however, was also assigned to handle full content FISA applications. In early 2005, two OIPR attorneys were assigned to handle Section 215 requests – a line attorney and a supervisor. According to OIPR and NSLB attorneys, the assignment of these two attorneys to Section 215 requests improved the process significantly. (U)

3. Multi-Layered Review Process (U)

The multiple layers of review for Section 215 applications also delayed their issuance. The process for obtaining a Section 215 order involves review in the FBI field office, in FBI Headquarters and NSLB, and in OIPR. To obtain a 215 order, a field agent must first obtain his supervisor's approval, then the field office's Special Agent in Charge and the Chief Division Counsel approval, before the request is forwarded to FBI Headquarters and NSLB. In NSLB, a line attorney drafts the application package, which is then reviewed by a supervisor before it is provided to OIPR. In OIPR, a line attorney prepares the package, and the work is reviewed by a supervisor before it is ready to be finalized for signature. After OIPR returns the "final" version to NSLB for signature, the application and

order are reviewed by NSLB personnel and changes may be requested as a result of this review. (U)

This review process can be lengthy. Without close management, an application can be delayed for weeks or months at any stage. Even with close management of the process, the process from beginning to end would likely take several weeks with respect to a simple or problem-free Section 215 request. (U)

4. Lack of Knowledge about Section 215 Authority (U)

Based upon our interviews in the field, we also determined that FBI field offices still do not fully understand Section 215 orders. Several agents told the OIG that they were only vaguely aware of Section 215 authority, and many agents stated that they did not know what the process was for obtaining a Section 215 order. (U)

D. Effect of Impediments (U)

The impediments discussed above contributed to the FBI not obtaining its first Section 215 order until spring 2004. Another effect of the impediments was that, in some instances, field offices were not contacted about Section 215 requests until several months after the requests had been submitted to NSLB. In various cases, once the agents were contacted the information was no longer needed because of developments in the case. In several instances agents were aware that NSLB had received their requests, but their requests remained pending for months due to disagreements between NSLB and OIPR about whether a particular request should go forward. In other instances, the requesting agents told the OIG that they never received a response back from NSLB or OIPR. (U)

We found that the processing delays and the lack of response to field office applications contributed to a perception among FBI field agents that the process was too slow and not worth the effort. We interviewed several agents who had never sought to obtain a Section 215 order, but they reported to the OIG that they had "heard" about the process taking far too long. Several agents also told us that if they could obtain the Section 215 order in a shorter time, they would be more encouraged to use Section 215 requests. Agents stated that if they were to identify an item that they needed quickly, they would seek to determine whether the item could be obtained through a national security letter, a grand jury subpoena, or other process that is faster than the Section 215 process. (U)

We asked FBI and OIPR employees whether they believed the problems in implementing Section 215 and the delays in obtaining Section

215 orders harmed their cases or national security. None of the FBI and OIPR officials we interviewed said that they were aware of any harm to national security caused by the delay in obtaining Section 215 orders. None of the agents who initiated the requests for Section 215 orders told the OIG that their cases were negatively affected by the inability to obtain the information sooner. The FBI's Deputy General Counsel of NSLB told us that the failure to obtain a business record order or to obtain it expeditiously may have negatively impacted the pace of national security investigations, but that she did not believe that this meant that there was harm to national security. (U)

We were provided no evidence of harm to national security in a specific case that was caused by the delay in obtaining Section 215 orders or by the FBI's inability to obtain information that was requested in a Section 215 request. However, we were concerned by the number of instances where the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay in obtaining an order. (U)

V. Use and Effectiveness of Information Obtained from Section 215 Orders (U)

Congress also directed the OIG to include in its review an examination of the types of records obtained by Section 215 orders and the importance of those records; the manner in which the information is collected, retained, analyzed, and disseminated by the FBI; whether and how often the FBI used information obtained from Section 215 orders to produce an "analytical intelligence product" for distribution to, among others, the intelligence community; and whether and how often the FBI provided information obtained from Section 215 orders to law enforcement authorities for use in criminal proceedings. (U)

A. Collection, Analysis, and Retention (U)

Before items subject to a Section 215 order can be obtained, the order must be served upon the entity that has custody of the records. Personal delivery or service of the order is typically accomplished by the requesting or "originating" FBI field office, unless the recipient of the order is outside the district. In that instance, the FBI field office where the recipient is located is asked by the originating field office to serve the order. (U)

The manner in which information from Section 215 orders is collected depends on the category of information sought. For pure Section 215 orders, the recipient produces the documents in hard copy or electronic

format. If after reviewing the information the case agent determines no further investigation is warranted, the agent stores the information with the rest of the investigative case file. The agent may prepare a document summarizing the information obtained for purposes of documenting the existence of the records. If the information warrants dissemination within the FBI, the agent prepares a written communication to the relevant field office or offices. If the information warrants dissemination outside of the FBI, such as to an intelligence agency, the agent prepares the appropriate form of communication. (U)

For "combination" orders, FBI personnel told us that if the recipient and the FBI have technological compatibility, the recipient will transfer the requested subscriber information electronically directly into the FBI computer system called "Telephone Applications."[21] If the FBI and recipient systems are not compatible, the information is provided to the FBI in another format, such as a computer diskette or hard copy. This information is then electronically uploaded or manually inputted into Telephone Applications and then searched by the case agent. (U)

Information stored in Telephone Applications and other FBI databases may be accessible by personnel from other law enforcement or intelligence agencies who are assigned on detail to the FBI in some capacity, such as a task force addressing terrorism matters. Access depends on the clearance level of the non-FBI personnel and whether the information is "restricted" in the computer systems. (U)

B. How the Information Obtained Has Been Used in Investigations (U)

We found that pure Section 215 orders were used primarily to exhaust investigative leads, although in some instances the FBI obtained information useful to the development of the case. We found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in three instances. However, the FBI did not create any analytical intelligence products based on the information obtained in response to Section 215 orders. We also obtained limited information about the dissemination of information produced in response to combination Section 215 orders. Because there were 141 combination orders, we were unable to interview all of the case agents associated with these orders. However, in our field office visits, we interviewed four agents who had

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

obtained combination orders. None of these agents reported disseminating information obtained in response to the combination orders. (U)

We also sought to determine whether any of the information obtained from any Section 215 order was used in any criminal proceeding. We did not identify any instance in which information obtained from a pure Section 215 order was used in a criminal proceeding. We identified only one instance in which use authority approval was sought for information from a combination Section 215 order. The field office sought and obtained Attorney General approval to use the FISA electronic surveillance and combination order information in a grand jury investigation and in grand jury subpoenas for one case. The FBI case agents told the OIG that although use authority was obtained for the FISA-derived information, no grand jury subpoenas were ever issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. (U)

We also interviewed the agents who obtained records from the Section 215 orders. The agents suggested that the records obtained were important and useful in two ways: (1) the records provided substantive information that was relevant to the investigation and either confirmed prior investigative leads or contributed to the development of additional investigative information; or (2) even if the records did not contribute to the development of additional investigative information, they were still valuable as "necessary steps to cover a lead." Most of the agents we interviewed said the records obtained under Section 215 orders fell in the second category because the records typically did not provide additional investigative information, although they helped the agents exhaust every lead. They also stated that the importance of the information is sometimes not known until much later in an investigation when the information is linked to some other piece of intelligence that is obtained. (U)

VI. OIG Conclusions (U)

In evaluating the effectiveness of Section 215 authority, we first considered the number of pure Section 215 orders obtained during CY 2002 through CY 2005. The FBI obtained only 18 unique Section 215 orders in the 3 calendar years following passage of the Patriot Act. (U)

However, we found that a significant number of Section 215 orders were not sought or obtained because of legal, bureaucratic or other impediments. The question concerning the applicability of the Buckley Amendment to Section 215 requests for educational records played a role in the FBI not obtaining Section 215 orders in several instances. Other

impediments, such as the disagreements between NSLB and OIPR about the amount of information sufficient to satisfy the relevance standard, insufficient resources to process Section 215 requests, and the multi-layered review process, resulted in many Section 215 requests not being processed for lengthy periods of time. We determined that with respect to several Section 215 requests that were withdrawn, the requests had been pending with NSLB or OIPR for several months, and in one instance over a year, at the time the field office notified NSLB that it was withdrawing the request because the investigation had changed course or was being closed. In addition, we identified several requests for Section 215 orders that were never responded to by NSLB or OIPR, and neither NSLB nor OIPR employees were able to explain what happened to those requests. (U)

These processing problems not only resulted in far fewer Section 215 orders being obtained than were requested, but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile in the investigation. Agents told the OIG that the length of the process to obtain a Section 215 order is a significant impediment to its use and that agents will typically attempt all other investigative tools before resorting to a Section 215 request. This negative perception about the Section 215 process may also have affected the number of Section 215 orders sought by the field offices. (U)

We examined the type of information that has been obtained through the use of pure Section 215 orders and how that information has been used and disseminated in national security investigations. We found no instance where the information obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to other intelligence agencies. However, we found that Section 215 orders have been used to obtain useful investigative information. (U)

Agents told us they believe that the kind of intelligence gathering from Section 215 orders was essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation, when the information is linked to some other piece of intelligence that is obtained. (U)

The field agents we interviewed described Section 215 authority as a "tool of last resort" that may be "critical" when other investigative authority or investigative methods do not permit the FBI to obtain the information. In many national security investigations, there is no criminal investigation and therefore the FBI is unable to seek grand jury subpoenas. In addition, national security letters are limited in scope and do not cover large

categories of third party information. Agents also told us that, in some instances, they had in fact used other investigative techniques, but these efforts were unsuccessful. (U)

We also interviewed other FBI officials and attorneys at the FBI and OIPR concerning the effectiveness of Section 215 orders. They stated that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means, such as grand jury subpoenas or national security letters. The head of OIPR described Section 215 authority as a "specialized tool that has its purpose." (U)

At the same time, however, the evidence showed that the FBI has not used this specialized tool as effectively as it could have because of the impediments to its use that we described above. Some of these impediments have since been addressed. For example, NSLB and OIPR cited the Reauthorization Act provision specifically allowing the FBI to obtain educational and other sensitive records through Section 215 orders. The FBI has also distributed a Section 215 request form to all field offices; and NSLB and OIPR have developed a template application form that is used in all Section 215 applications. (U)

We also evaluated the use of Section 215 authority to obtain subscriber information for telephone numbers that were the subject of pen register/trap and trace orders. OIPR obtained the first "combination" order in February 2005. A total of 141 combination applications were submitted and approved by the FISA Court in calendar year 2005. Several FBI and OIPR attorneys we interviewed, including OIPR Counsel, told us that this information was very important in FBI investigations. The Deputy General Counsel of NSLB agreed, stating that the addition of Section 215s to FISA pen register/trap and trace applications was a "huge boon because without the 215s, the FBI would have had to issue numerous [national security letters] to get the subscriber information."[22] (U)

We conducted this review mindful of the controversy concerning the possible chilling effect on the exercise of First Amendment rights posed by the FBI's ability to use Section 215 authorities, particularly the potential use of Section 215 orders to obtain records held by libraries. Our review found that the FBI did not obtain Section 215 orders for any library records

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[22] Congress has also recognized the importance of subscriber information in FISA pen registers. As part of the Reauthorization Act, Congress amended the FISA pen register provision to include subscriber information. (U)

from 2002 through 2005, in part because the few applications for such orders were withdrawn while undergoing the review process within NSLB and OIPR. (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. As directed by the Reauthorization Act, the OIG will continue to assess the FBI's use and effectiveness of Section 215 authority. (U)

CHAPTER ONE
INTRODUCTION (U)

In the USA PATRIOT Improvement and Reauthorization Act of 2005 (Reauthorization Act), Congress directed the 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 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. Congress directed the OIG to review the use of Section 215 for two time periods – calendar years (CY) 2002 through 2004 and CY 2005 through 2006. The first report is due to Congress on March 9, 2007, the second is due on December 31, 2007.[2] (U)

This report describes the results of the first OIG review of the use of Section 215. Although we were only required to review calendar years 2002 through 2004 in this first review, we elected to include data from calendar year 2005. (U)

I. The USA PATRIOT Improvement and Reauthorization Act of 2005 (U)

Enacted in the wake of 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

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[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." (U)

[2] The Reauthorization Act also directed the OIG to conduct reviews for the same two time periods on the use and effectiveness of the FBI's use of national security letters, another investigative authority that was expanded by the Patriot Act. The OIG's first report on the use and effectiveness of national security letter authority is contained in a separate report. (U)

Patriot Act provisions, including Section 215, were originally scheduled to sunset on December 31, 2005. (U)

On March 9, 2006, the President signed into law the USA PATRIOT Improvement and Reauthorization Act of 2005, which, among other things, made permanent or extended several Patriot Act provisions.[3] Section 215 was not made permanent but was extended for another four years, until December 31, 2009. The Reauthorization Act also resulted in some substantive changes to Section 215, which we discuss in Chapter Two. (U)

II. Methodology of the OIG Review (U)

In this review, the OIG examined documents obtained from the Department of Justice's (Department or DOJ) Office of Intelligence Policy and Review (OIPR) and the FBI relating to each instance of the FBI's use or attempted use of Section 215 authority during calendar years 2002 - 2005.[4] In addition, we reviewed Department reports concerning the FBI's use of Section 215 authorities. We also reviewed a classified report prepared by the staff of the Senate Select Committee on Intelligence (SSCI) in 2005 on the electronic surveillance process in counterterrorism and counterintelligence cases that included a discussion of the FBI's use of Section 215.[5] We also examined FBI, OIPR, and other DOJ documents regarding the implementation of procedures for obtaining Section 215 orders, including documents reflecting the obstacles encountered by FBI and OIPR personnel during the implementation process, improvements made to the process, and other issues. (U)

The OIG conducted approximately 91 interviews of FBI and Department officials as part of the review. During the field work phase of the review, OIG teams traveled to FBI field offices in New York, Chicago, Philadelphia, and San Francisco to review investigative case files from which

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[3] The provisions that had been scheduled to expire on December 31, 2005, were temporarily extended while Congress was attempting to finalize the reauthorization bill. (U)

[4] Until the fall 2006, the Office of Intelligence Policy and Review 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. Shortly after that, OIPR's functions were moved to the NSD. (U)

[5] Senate Select Committee on Intelligence, Committee Staff Audit and Evaluation of the Foreign Intelligence Surveillance Act Process (*SSCI Staff Audit*), SSCI report number 2005-4702, July 22, 2005. (U)

requests for Section 215 orders were initiated. While visiting these field offices, OIG personnel interviewed approximately 52 FBI employees, including FBI Assistant Directors in Charge, Special Agents in Charge, Assistant Special Agents in Charge, Chief Division Counsel, Supervisory Special Agents, case agents, intelligence analysts, and support personnel.[6] We also conducted telephone interviews of 25 FBI agents in other field offices who were responsible for seeking Section 215 orders. (U)

In Washington, D.C., OIG personnel interviewed 14 senior FBI and OIPR officials who participated in implementing procedures and processing requests for Section 215 orders, including the Counsel to OIPR, a former and the current Deputy General Counsel of the FBI Office of General Counsel's National Security Law Branch (NSLB), and other attorneys and personnel from NSLB and OIPR. (U)

III. Organization of the Report (U)

This report is divided into six chapters. Following this Introduction, we describe in Chapter Two the legal background related to Section 215 authority, the internal process in the FBI and in the Department for seeking Section 215 orders, and a comparison of Section 215 orders to other investigative tools, including criminal tools, which the FBI uses in counterterrorism and counterintelligence investigations. (U)

In Chapter Three, we provide a detailed examination of the instances in which the FBI obtained Section 215 orders from 2002 through 2005, including the number of orders obtained, the types of information obtained pursuant to the orders, and the number of applications submitted but for which orders were not obtained. At the end of Chapter Three, we discuss whether we identified any improper use of Section 215 authority. (U)

In Chapter Four, we describe our analysis of the implementation of procedures for obtaining Section 215 orders, the delays in processing Section 215 requests, and other problems that affected the FBI's ability to obtain Section 215 orders. (U)

In Chapter Five, we present our findings on the use and effectiveness of Section 215 orders, including our evaluation of methods and processes used to collect, retain, analyze, and disseminate information derived from

[6] FBI field offices are also referred to as "divisions." The Chief Division Counsel or CDC is the legal officer for the field office. (U)

these orders, and how the orders were used in counterterrorism and counterintelligence cases. Chapter Six contains our conclusions. (U)

The Appendix contains the comments of the Attorney General and the Director of National Intelligence in response to the report. (U)

CHAPTER TWO
BACKGROUND (U)

I. Introduction (U)

This chapter provides a description of the legal background related to Section 215 authority, the internal process in the FBI and in the Department for obtaining Section 215 orders, and a description of and comparison to other investigative tools, including criminal tools, available to the FBI at certain stages of its counterterrorism and counterintelligence investigations. (U)

II. Legal Background (U)

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 the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Section 215 did not create any new investigative authority but instead expanded existing authority found in the Foreign Intelligence Surveillance Act (FISA) of 1978. 50 U.S.C. § 1801 et seq. First we describe the authority as it existed in FISA prior to the Patriot Act. Next we describe the changes to the authority brought about by Section 215. Thereafter we briefly describe the controversy concerning Section 215 that arose after passage of the Patriot Act. (U)

A. Foreign Intelligence Surveillance Act of 1978 and the Business Records Provision (U)

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court) to conduct electronic surveillance to collect foreign intelligence information.[7] Generally, to obtain a FISA order, the FBI must show that there is probable cause to believe that the target of the

[7] FISA applications and orders are classified, and intelligence developed under FISA is also classified, generally at the Secret level. Foreign intelligence is defined as information that relates to the ability of the United States to protect against: (1) actual or potential attacks of a foreign power or an agent of a foreign power; (2) sabotage or international terrorism; or (3) clandestine intelligence activities; or information that relates to the national defense, security or conduct of the foreign affairs of the United States. 50 U.S.C. § 1801(e). (U)

surveillance is a foreign power or an agent of a foreign power, a term defined by FISA that includes terrorist organizations.[8] Applications for FISA orders are prepared and presented to the FISA Court by the Department's Office of Intelligence Policy and Review (OIPR).[9] (U)

Congress provided the FBI with additional investigative authorities pursuant to FISA in the mid-1990s. In 1994, FISA was amended to permit the FISA Court to approve applications for warrantless physical searches. 50 U.S.C. § 1822 et seq. In 1998, Congress amended FISA again to authorize the FBI to apply to the FISA Court for orders compelling certain kinds of businesses to "release records in its possession" to the FBI.[10] However, this amendment limited the scope of the authority to obtain business records from four types of entities – common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities. The amendment did not further define "records." This provision, which was originally 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. 50 U.S.C. § 1862(b)(2)(B) (1998), as amended, 50 U.S.C. § 1861 (2001). (U)

The 1998 business records amendment also required the FISA application to specify that the records were sought for an investigation to gather foreign intelligence information or an investigation concerning international 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 about whom the FBI had individualized suspicion. In addition, the amendment prohibited the entity complying with the order from disclosing either the

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[8] For a description of the requirements of FISA and how they were interpreted by the Department and the courts prior to the Patriot Act, see the OIG's report, "Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks", pages 44-53 (June 2006 – unredacted and unclassified version). For a description of how the Patriot Act expanded certain authorities under FISA, see the OIG's report titled "A Review of the FBI's Handling of the Brandon Mayfield Case", pages 221-224 (March 2006). (U)

[9] We discuss the process for obtaining a FISA order and OIPR's role in the process in more detail in Section III C below. (U)

[10] The 1998 amendment also allowed the FBI to obtain FISA orders to use pen register or trap and trace devices, which allow the FBI to obtain the telephone numbers dialed to and from a particular telephone number. 50 U.S.C. § 1842 et seq. We discuss pen register and trap and trace devices in Section IV below and in Chapter Three. (U)

existence of the order or any information produced in response to the order. (U)

Subsequent to the 1998 FISA amendment creating this investigative authority and prior to the passage of the Patriot Act on October 26, 2001, the FBI obtained only one FISA order for business records. This order was obtained in 2000 and related to the production of business records from an [redacted] ~~(S)~~ (U) b7E

B. Expansion of Business Records Authority by Section 215 (U)

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. The pertinent part of Section 215 provides: (U)

> 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. 50 U.S.C. § 1861(a)(1).[11] (U)

While the old language limited the reach of this type of investigative authority to common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities, the new language does not explicitly limit the type of entity or business that can be compelled by a Section 215 order. So, for example, [redacted] could be compelled to produce information under Section 215. ~~(S)~~ (U) b7E

[11] "United States person" is defined as a citizen, legal permanent resident, or unincorporated association in which a "substantial number" of members are citizens or legal permanent residents, and corporations incorporated in the United States as long as such associations or corporations are not themselves "foreign powers." 50 U.S.C. § 1801(i) (2005). (U)

Second, Section 215 of the Patriot Act expanded the categories of documents that the FBI can obtain under the business records provision of FISA. The FISA business records provision was limited to "records," while Section 215 provides that the FBI may obtain an order for "the production of any tangible things (including books, records, papers, documents, and other items)." This means the FBI may obtain pursuant to Section 215, for example, [redacted] ~~(S)~~ (U) b7E

Section 215 also lowered the evidentiary threshold to obtain an order and expanded the number of people whose information could be obtained through such an order. The pre-Patriot Act language required that the records sought pertain to a person about whom the FBI could show "specific and articulable facts" demonstrating that the person was a foreign power or an agent of a foreign power and that the information was for an investigation to gather foreign intelligence information or an investigation concerning international terrorism. Section 215 no longer requires 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 a 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.[12] (U)

C. Public Concerns about Section 215 (U)

Almost immediately after the Patriot Act was enacted, public controversy focused on the scope of Section 215. We briefly describe this controversy in order to provide context for the FBI's and OIPR's actions with respect to Section 215 authority between 2002 and 2005, which we describe in detail in Chapter Three. (U)

Public concerns about the scope of Section 215 authority quickly centered on the ability of the FBI to obtain library records, including books read by or loaned to library patrons. Many public commentators began to

[12] The Reauthorization Act revised the language of Section 1862(b)(2) further by providing that tangible things are presumptively relevant when they pertain to entities or individuals that are foreign powers, agents of foreign powers, subjects of authorized counterterrorism or counterintelligence investigations, or individuals known to associate with subjects of such investigations. We discuss additional changes to Section 215 by the Reauthorization Act in Section II D. (U)

refer to Section 215 as the "library provision." Librarians, their professional associations, and others voiced concerns about the potential First and Fourth Amendment implications of compelled production of library records.[13] The First Amendment concerns related to the broad reach of Section 215 and also to the so-called "gag provision," which existed under the previous version of FISA and which forbids recipients of Section 215 orders from disclosing the existence of the order or any information obtained pursuant to an order, thus prohibiting recipients from challenging the order. (U)

According to Department officials and our examination of all 215 applications submitted to the Department through 2005, the FBI has never obtained a FISA Court order for the production of library records. However, we discuss in Chapter Three [redacted] requests from FBI field offices asking FBI Headquarters to seek to obtain information from a library. One of the requests was forwarded to OIPR, but this request was never presented to the FISA Court. Another request was not presented to OIPR after review by FBI attorneys. ~~(S)~~ (U) b7E

D. Reauthorization Legislation Results in Additional Changes to Section 215 (U)

The Reauthorization Act included some substantive amendments to Section 215 in addition to extending it for four years until December 31, 2009. For example, the Reauthorization Act 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. In addition, the Act established a detailed judicial review process for recipients of Section 215 orders to challenge their legality before a FISA Court judge. (U)

Additional changes to Section 215 were adopted with the passage of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.[14]

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[13] For example, the American Library Association (ALA) adopted a resolution declaring that the ALA "considers sections of the USA PATRIOT Act . . . a present danger to the constitutional rights and privacy rights of library users" and urged the Congress to provide additional oversight and amend or change portions of the Act." Resolution on the USA PATRIOT Act and Related Measures That Infringe on the Rights of Library Users (Jan. 29, 2003). (U)

[14] Both the 2005 Reauthorization Act and the 2006 Reauthorizing Amendments Act were signed into law on March 9, 2006. Although the conference committee had approved the 2005 Reauthorization Act on December 15, 2005, the full Congress was unable to vote on the bill because of an 11-week filibuster in the Senate. During this 11-week period, (cont'd)

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 requirement after one year from the issuance of the order if certain findings are made.[15] (U)

III. The Process for Seeking Section 215 Orders (U)

The FBI had obtained only one FISA order for business records prior to passage of the Patriot Act in late 2001, and no written policies, procedures, or templates for requests or applications for Section 215 orders existed in the FBI or OIPR. The general process described below was developed and refined between 2002 and 2005, as were templates for the field offices' requests for Section 215 authority and for applications to the FISA Court for Section 215 orders.[16] (U)

As described below, the process to obtain a Section 215 order generally involves five phases: FBI field office initiation and review, FBI Headquarters review, OIPR review, the FISA Court review, and FBI service of the order. Each phase is discussed in the following sections. (U)

A. FBI Field Office Initiation and Review (U)

The process begins when an FBI case agent in a field office determines that in a counterterrorism or counterintelligence investigation there is a need for business records or other items for which the appropriate investigative authority is Section 215.[17] For example, [redacted] b7E

Congress twice temporarily extended the provisions of the Patriot Act that were scheduled to expire on December 31, 2005 – the first time until February 3, 2006, and the second time until March 10, 2006. Congress reached a compromise in early March 2006. As part of the compromise, Congress agreed to make some substantive changes to Section 215 that were included in a separate bill – the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. (U)

[15] USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178. Because these amendments were not in effect until 2006, we will discuss them in greater detail in our report concerning Section 215 orders obtained by the FBI in CY 2006, which is due to Congress by December 31, 2007. (U)

[16] We describe in detail in Chapter Four the facts concerning the development of this process and the FBI and OIPR templates. (U)

[17] The FBI and OIPR still refer to requests for investigative authority pursuant to Section 215 as "business records requests" or "business records applications." We primarily use the terms "Section 215 authority" or "Section 215 orders," but we may use the term "business records" interchangeably in this report. (U)

b7E

[redacted] (S) (U)

First, the agent must prepare a business records request form that 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 is reviewed and approved by the squad's Supervisory Special Agent, the Chief Division Counsel, and the Special Agent in Charge at the FBI field office. The request is then sent to FBI Headquarters for further review and processing.[19] (U)

B. FBI Headquarters Review (U)

The field office request is forwarded to FBI Headquarters to both the "substantive desk" (in the Counterterrorism Division or Counterintelligence Division) and the Office of General Counsel's National Security Law Branch (NSLB). Both review the request and determine whether it merits further processing. The field case agent may be contacted for additional information or clarification. If a request is rejected, no additional work is done by the substantive desk or NSLB. (U)

If the request is approved, an NSLB attorney drafts the application package that will be forwarded to OIPR. The application includes a specific description of the items requested, a description of the underlying investigation, a description of how the FBI expects the requested items to further the investigation, and the custodian of records. The NSLB attorney also drafts the order for the FISA Court judge's signature, which specifies the items to be produced and the time period within which the items must

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[18] The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection prescribe the investigative techniques available at each stage of an investigation. (U)

[19] The business records request form was not finalized and distributed with guidance to the field by the FBI's Office of General Counsel until October 29, 2003. Prior to that time, FBI field offices submitted an Electronic Communication or EC, the standard form of communication within the FBI, to FBI Headquarters setting forth the field office's request for Section 215 authority. ECs are "uploaded" into a computer system called Automated Case Support or ACS, which has been the FBI's centralized case management system since 1995. (U)

be produced. The NSLB attorney works with the case agent and other FBI personnel to obtain the information the NSLB attorney believes is necessary to include in the application. The draft application package is reviewed by NSLB supervisors and forwarded to OIPR after any additional revisions are made as a result of the NSLB supervisors' review. (U)

C. OIPR Review (U)

The NSLB attorney forwards the draft application package to OIPR, and the request is assigned to an OIPR attorney.[20] The OIPR attorney works with the NSLB attorney, case agents, and occasionally FBI intelligence analysts to finalize the draft application package. The OIPR attorney may ask for additional information about the items requested or about the underlying investigation and may include additional information in the application. The draft application package is then reviewed by an OIPR supervisor, called an Associate Counsel, who may also have concerns or questions that must be resolved.[21] Upon completion of the final version, the signatures of designated senior FBI personnel are obtained and the package is prepared for presentation to the FISA Court by an OIPR attorney. (U)

D. FISA Court Review (U)

OIPR schedules the case on the FISA Court's docket for a hearing and provides the FISA Court with a copy of the application and order, which is called a "read" copy. The FISA Court, through a FISA Court legal advisor, may contact OIPR prior to the hearing with additional questions or for clarification after reviewing the read copy of the application and order. OIPR and the FBI then address any of the Court's questions or concerns and make any necessary revisions to the application or order prior to the hearing. The application package is then formally presented to the FISA Court for its review and approval at the scheduled hearing. If the FISA Court judge approves the application, the judge signs the order approving the application. At the hearing, the judge may request additional information from the government. In addition, the judge may make handwritten changes to the order, such as the length of time for the recipient to produce the items, and, if so, will sign the order with the handwritten modifications.[22] (U)

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[20] NSLB and OIPR did not agree on a form or template Section 215 application until mid- to late-2004. (U)

[21] At the time of our review, in addition to Associate Counsels, OIPR also had three Deputy Counsels and was headed by the Counsel for Intelligence Policy. (U)

[22] We discuss modification of FISA orders in more detail in Chapter Three. (U)

E. FBI Field Office Service of the Order (U)

The order is returned to the requesting FBI field office or the field office closest to the recipient of the order for service on the recipient. A copy of the order is also maintained at OIPR for its records. The order is served on the provider designated in the order. The order sets forth the time period for producing the items. The provider must produce the items requested in the order to the FBI field office which served the order. (U)

IV. Other Investigative Authority Available to the FBI for Third-Party Information (U)

In addition to Section 215 orders, the FBI has several other investigative tools that allow it to obtain information from third parties in national security investigations.[23] For example, FISA permits the FBI to use pen register and trap and trace devices to identify incoming and outgoing telephone numbers on a particular telephone line. Pen register and trap and trace devices do not allow the FBI to listen to the content of the telephone call.[24] (U)

Some investigative authority rests directly with the field offices and does not require FBI Headquarters or FISA Court approval. For example, national security letters (NSL) are written commands from the FBI to entities such as telephone companies, financial institutions, and credit agencies to produce limited categories of customer and consumer transaction information. In the field, SACs are authorized to approve NSLs. Field offices may also send voluntary letters asking a third party to provide information that falls outside the scope of the NSL statutes. These letters are typically signed by the field office SAC. (U)

In national security investigations with a criminal nexus, the FBI can ask the United States Attorney's Office to obtain grand jury subpoenas for third-party information. The grand jury subpoena is the criminal investigative tool that mostly closely resembles a Section 215 order. Generally speaking, the law permits grand jurors to obtain non-privileged

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[23] For this report, national security investigations refer to investigations involving counterterrorism or counterintelligence components. (U)

[24] FISA permits the FISA Court to authorize collection of this information for up to one year in cases of non-U.S. persons and 90 days in cases of U.S. persons. Orders for non-U.S. persons may be renewed for one year, and orders for U.S. persons may be renewed for an additional 90 days. 50 U.S.C. § 1842(e). (U)

evidence, including any records and tangible items, relevant to the grand jury's investigation. Agents conducting a national security investigation with a criminal nexus, however, do not have to seek FBI Headquarters or NSLB approval to obtain a grand jury subpoena. Grand jury subpoenas are issued under the signature of the prosecutor supervising the grand jury investigation. (U)

CHAPTER THREE
EXAMINATION OF SECTION 215 ORDERS OBTAINED IN CALENDAR YEARS 2002 THROUGH 2005 (U)

I. Introduction (U)

As part of the OIG's review of the use and effectiveness of Section 215 authority, Congress directed the OIG to include an examination of the following: (U)

- 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; (U)

- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)

- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions; (U)

- Any noteworthy facts or circumstances concerning the business record requests, including any illegal or improper use of the authority; and, (U)

- 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. (U)

In the next three chapters – Chapters Three, Four, and Five – we set forth the information we obtained in connection with these directives, and our analysis of this information. We begin in Chapter Three with a detailed examination of the Section 215 orders obtained in CY 2002 through CY 2005. We discuss the number of orders obtained, the types of information obtained pursuant to the orders, the number of applications submitted to FBI Headquarters or to OIPR that were later withdrawn, and the number of Section 215 orders that were modified. At the end of the chapter, we discuss whether we identified any improper use of Section 215 orders. (U)

II. Two Uses of Section 215 Authority Between CY 2002 and CY 2005 (U)

During the period covered by our review, CY 2002 through CY 2005, the FBI and OIPR submitted to the FISA Court applications for two different kinds of Section 215 authority: "pure" Section 215 applications and combination or "combo" Section 215 applications. (U)

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. (U)

A "combo" 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 pen register/trap and trace orders. 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.[25] Unlike criminal investigation pen register/trap and trace orders, which routinely included a clause requiring the provision of subscriber information, FISA pen register/trap and trace orders did not contain such provisions. Thus, while the FBI could obtain the numbers dialed to and from the target number through FISA orders, FBI agents had to employ other investigative tools, such as national security letters, to obtain the subscriber information. In order to streamline the process for obtaining subscriber information, beginning in early 2005 OIPR began to append a request for Section 215

[25] As discussed above, the FBI did not obtain authority to use pen register and trap and trace devices in national security investigations until FISA was amended in 1998. (U)

orders to applications for FISA pen register/trap and trace authority. The result was that information obtained in a FISA pen register/trap and trace order was equivalent to the information obtained in a criminal pen register/trap and trace order.[26] As of March 2006, Section 215 combination requests were no longer necessary because the Reauthorization Act authorized the disclosure of subscriber information in connection with FISA pen register/trap and trace orders. (U)

III. Pure Section 215 Applications and Orders for Calendar Years 2002 Through 2005 (U)

We describe in this section the number of pure Section 215 applications submitted to the FISA Court during calendar years 2002 through 2005; how many of these applications were approved; the number of U.S. persons and non-U.S. persons referenced in these applications; the types of records obtained; and the FBI field offices that obtained Section 215 orders from the FISA Court. We then report the Section 215 requests for which orders were not obtained, which we call "withdrawn" applications, and the reasons for the withdrawal of the applications.[27] (U)

A. Number of Pure Section 215 Orders (U)

For calendar years 2002 through 2005, OIPR submitted a total of 21 pure Section 215 applications for FISA Court approval. All of these applications were approved. The first pure Section 215 order was approved by the FISA Court on May 21, 2004, more than two years after the Patriot Act was enacted.[28] The FISA Court approved six more Section 215 applications in CY 2004, for a total of seven. The FISA Court approved 14 Section 215 applications in CY 2005. ~~(S)~~ (U)

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[26] We interviewed several FBI agents who told us they were not aware of the addition of the Section 215 requests to pen register/trap and trace requests. Some agents we interviewed were not aware that the pen register orders had been modified to include subscriber information, and the agents told the OIG they were still using national security letters to obtain the subscriber information. (U)

[27] In Section V, we discuss the issue of modified orders in detail, after we examine the pure and combination orders, because both pure and combination orders were modified. (U)

[28] The FBI began submitting Section 215 requests to OIPR in spring 2002, but none of the requests initiated in CY 2002 were presented to the FISA Court. The first request for which a Section 215 order was obtained was submitted by the FBI to OIPR in October 2003. We discuss the delays in obtaining Section 215 orders in Chapter Four. (U)

Although a total of 21 Section 215 orders were approved, they concerned only 18 unique requests. Two of the requests were for the same provider, and the targets – Target A and Target B – were connected in the same investigation. After the applications were approved by the FISA Court and before the orders were served, NSLB learned that there was a mistake in the application concerning Target A that needed to be corrected.[29] In early 2005, OIPR submitted a corrected application and obtained an order in the spring 2005 for the same records for Target A. Before the orders were served, the FBI learned that a subcontractor, and not the provider listed in the orders, was in possession of the records for both Target A and Target B. The FBI then submitted new applications for both Target A and Target B for the same records but a different provider, and these applications were approved in summer 2005. Thus, the FBI submitted two corrected applications for Target A and one corrected application for Target B, and we do not consider these corrected applications as unique. (U)

One of the 18 unique requests was for telephone subscriber information. With respect to this request, the field office had prepared an application for a FISA pen register/trap and trace order and wanted to obtain the subscriber information without using national security letters. The field office supervisor dealt directly with OIPR's Counsel for Intelligence Policy, and they discussed the case with a FISA Court judge in person. As a result of these discussions, OIPR submitted an application for a Section 215 order for the subscriber information. The FISA Court approved two orders – one for the pen register and trap and trace devices and a Section 215 order for the related subscriber information. This order was signed on October 27, 2004. Thereafter OIPR began appending requests for Section 215 orders for subscriber information to FISA pen register/trap and trace applications. ~~(S)~~ (U)

[29] The FBI decided to wait to serve the order for Target B until the new order for Target A had been obtained. (U)

TABLE 3.1 (U)
Pure Section 215 Orders Issued by the Foreign Intelligence Surveillance Court (U)

	CY 2002(U)	CY 2003(U)	CY 2004(U)	CY 2005(U)	Total(U)
Total number of applications submitted to the FISA Court (U)	0 (U)	0 (U)	7 (U)	14 (U)	21 (U)
Unique number of applications submitted to the FISA Court (U)	0 (U)	0 (U)	7 (U)	11 (U)	18 (U)

Source: Office of Intelligence Policy and Review (U)

We also identified the number of U.S. persons and non-U.S. persons referenced in the pure Section 215 applications that were submitted and approved by the FISA Court.[30] The following table shows the results for calendar years 2002 through 2005. (U)

TABLE 3.2 (U)
Number of U.S. Persons and Non-U.S. Persons Referenced In Section 215 Orders (U)

	CY 2002(U)	CY 2003(U)	CY 2004(U)	CY 2005(U)	Total(U)
U.S. Person (U)	0 (U)	0 (U)			
Non-U.S. Person (U)	0 (U)	0 (U)			
Total (U)	0 (U)	0 (U)			

Source: OIPR (U)

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As the above table shows, in the first calendar year in which pure applications were submitted [redacted] non-U.S. persons were the subject of the applications. In the second year, applications presented to the FISA Court reflected [redacted] of U.S. persons and non-U.S. persons.[31] ~~(S)~~ (U) (S) b1 b3 b7E

[30] The OIG used the information that appeared in the Section 215 applications to determine if the subject was a U.S. person or non-U.S. person. As previously noted, for purposes of this report a U.S. person is defined as a U.S. citizen or lawful permanent resident. (U)

[redacted] (S) b1 b3 b7E

B. Types of Records Requested in Section 215 Applications Presented to the FISA Court (U)

We also identified the type of business records that were sought in the Section 215 applications submitted to the FISA Court during our review period.[32] Table 3.3 shows the nine types of records that were requested and the number of times those types of records were sought during calendar years 2002-2005.[33] Examples of the types of records obtained include driver's license records, public accommodations, apartment records, credit card records, and telecommunications subscriber information for telephone numbers. (U)

[3] [redacted] (S) In the first case, the FBI planned to submit a FISA pen register/trap and trace request but for investigative reasons did not want to use an NSL for the subscriber information. The Counsel for Intelligence Policy suggested that the FBI append a Section 215 request to the pen register/trap and trace application. The FISA Court approved the applications in two separate orders. Thereafter, OIPR began to regularly append Section 215 applications to FISA pen register/trap and trace applications. [redacted] (S)

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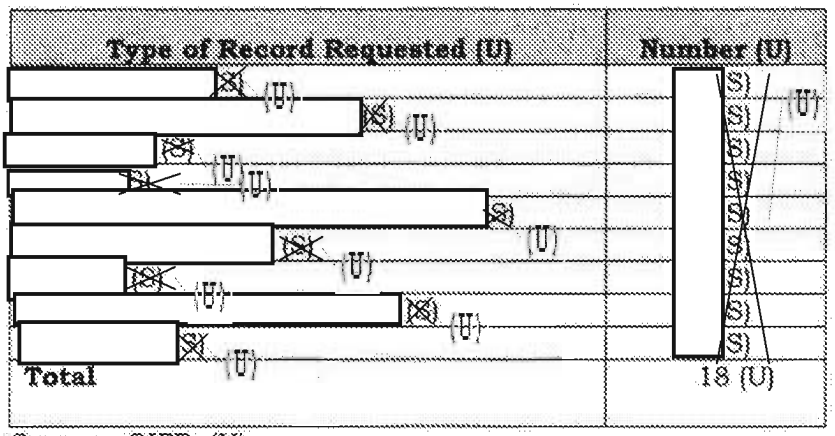
b3
b7E

[33] The totals in Table 3.3 match the number of unique applications approved by the FISA Court, not the total number of orders approved. (U)

TABLE 3.3 (U)
Types of Records Requested in Pure Section 215 Orders (U)



Source: OIPR (U)

C. FBI Field Offices That Submitted Section 215 Requests Approved by the FISA Court (U)

The OIG also analyzed how many FBI field offices submitted pure applications for Section 215 orders that were presented to and approved by the FISA Court. A total of [redacted] of the FBI's 56 field offices [redacted] percent) applied for the 18 unique pure Section 215 orders approved in calendar years 2004 and 2005. Table 3.4 illustrates the number of orders associated with each field office over the two calendar years in which pure applications were approved. (U)

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b7E

TABLE 3.4 (U)
FBI Field Offices That Submitted Pure Section 215 Requests Approved by the FISA Court (U)

FBI Field Office (U)	CY 2004 (U)	CY 2005 (U)	Number of Approved Pure Orders (U)
[redacted] (S)			
Totals (U)	7 (U)	11 (U)	18 (U)

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b3
b7E

Source: OIPR and the FBI. (U)

We also looked at the types of investigations from which pure applications were submitted and orders were issued. The 18 unique pure applications were grouped into three categories: counterintelligence (CI), counterterrorism (CT), and cyber investigations.[34] The following table shows the types of investigations that used pure Section 215 orders. (U)

TABLE 3.5 (U)
Types of Investigations that Generated Pure Section 215 Requests Approved by the FISA Court (U)

Case Type (U)	CY 2002 (U)	CY 2003 (U)	CY 2004 (U)	CY 2005 (U)	Totals (U)
CI (U)	0 (U)	0 (U)	3 (U)	6 (U)	9 (U)
CT (U)	0 (U)	0 (U)	4 (U)	4 (U)	8 (U)
Cyber (U)	0 (U)	0 (U)	0 (U)	1 (U)	1 (U)
Total (U)	**0 (U)**	**0 (U)**	**7 (U)**	**11 (U)**	**18 (U)**

Source: OIPR and the FBI. (U)

[34] The FBI's Cyber Division is responsible for overseeing traditional criminal investigations involving use of computers or the Internet, such as sexual predators who use the Internet to exploit children. The Cyber Division is also responsible for coordinating and supervising investigations of intrusions into government computer systems or networks that may be sponsored by foreign governments. Section 215 authority is not available in cyber criminal investigations but can be used in national security cyber investigations. (U)

D. Withdrawn Section 215 Applications (U)

In reviewing OIPR and FBI documents for calendar years 2002 through 2005, we also determined that there were 31 instances in which the FBI sought Section 215 orders but did not obtain them. These requests were prepared by the FBI but were never finalized either by NSLB for submission to OIPR or by OIPR for presentation to the FISA Court. For ease of reference, we describe all of these instances as "withdrawn" requests or applications, although in six cases we were unable to determine the reason the request or application did not make it to the next level and there did not appear to be an affirmative decision by anyone within the FBI not to proceed for a substantive reason.[35] We describe this category of withdrawn cases in more detail below in Section D 2 e. (~~S~~) (U)

First, we provide descriptive information about the withdrawn requests and applications, such as the types of records or other items sought in these withdrawn requests and applications and the field offices that sought these Section 215 orders.[36] We then describe in detail the reasons that Section 215 orders were not obtained for these requests and applications. (U)

1. Descriptive Data Concerning Withdrawn Section 215 Requests and Applications (U)

According to OIPR and FBI records, 13 FBI applications for Section 215 orders were submitted to OIPR but were never submitted to the FISA Court. Fifteen Section 215 requests from FBI field offices were submitted to FBI Headquarters but were never presented to OIPR for further processing. For three requests, we lacked sufficient information to determine whether the request was withdrawn while the request was pending at NSLB or whether the request was submitted to OIPR and was withdrawn while the request was pending at OIPR. Therefore, a total of 31 requests and applications were submitted during calendar years 2002 through 2005 for which no Section 215 order was obtained. (~~S~~) (U)

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[35] The FBI's and OIPR's recordkeeping systems at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. We determined the number of requests and how they were processed based on documents and interviews. (U)

[36] Section 215 requests that were submitted to NSLB but were never presented to OIPR are referred to as "withdrawn requests." Section 215 requests that were presented to OIPR as draft applications but that were never presented to the FISA Court are referred to as "withdrawn applications." (U)

a. Types of Items Sought (U)

We also examined the types of "tangible things" that were sought in the withdrawn requests and applications. The OIG identified 13 categories of items requested in these requests and applications, which included: library, educational [redacted] (S) b1 b3 b7E

[redacted] Table 3.6 shows how often each type of record was requested in the withdrawn applications. [redacted] (U)

TABLE 3.6 (U)
Types of Records Requested in Withdrawn Applications for Pure Section 215 Orders (U)

Type of Record Requested (U)	Number of Requests (U)
[redacted] (S)	8 (S)
	4 (S)
	3 (S)
	2 (S)
	2 (S)
	2 (S)
	2 (S)
	2 (S)
	2 (S)
	1 (S)
	1 (S)
	1 (S)
	1 (S)
Total (U)	**31 (U)**

b1 b3 b7E

Source: OIPR and the FBI (U)

FBI field offices sought but did not obtain Section 215 orders for library records on two occasions. In one of those instances, an FBI field

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[37] The FBI could not produce documentation on one of the withdrawn applications. (U)

[redacted] (S) b1 b3 b7E

office sought a library's [redacted] (S) b1 b3 b7E

[redacted] We discuss those requests in detail in Section 2 below. (S) (U)

b. Field Offices Originating the Withdrawn Requests and Applications (U)

We identified the FBI field offices that initially submitted the withdrawn Section 215 requests. Table 3.7 lists the field offices that submitted these requests. (U)

TABLE 3.7 (U)
Breakdown by FBI Field Office of Withdrawn Pure Section 215 Requests and Applications (U)

Originating FBI Field Office (U)	Withdrawn at FBI (U)	Withdrawn at OIPR (U)	Unknown (U)	Total (U)
(S) [redacted]	4 (S)	0 (S)	0 (S)	4 (S)
	1 (S) (U)	2 (S) (U)	0 (S) (U)	3 (S) (U)
	1 (S)	1 (S)	0 (S)	2 (S)
	2 (S)	1 (S)	0 (S)	3 (S)
	1 (S)	1 (S)	0 (S)	2 (S)
	0 (S)	2 (S)	0 (S)	2 (S)
	1 (S)	1 (S)	0 (S)	2 (S)
	0 (S)	1 (S)	1 (S)	2 (S)
	0 (S)	1 (S)	0 (S)	1 (S)
	0 (S)	0 (S)	1 (S)	1 (S)
	1 (S)	0 (S)	0 (S)	1 (S)
	0 (S)	1 (S)	0 (S)	1 (S)
	1 (S)	0 (S)	0 (S)	1 (S)
	1 (S)	0 (S)	0 (S)	1 (S)
	0 (S)	1 (S)	0 (S)	1 (S)
	1 (S)	0 (S)	0 (S)	1 (S)
	0 (S)	0 (S)	1 (S)	1 (S)
	1 (S)	0 (S)	0 (S)	1 (S)
	0 (S)	1 (S)	0 (S)	1 (S)
Totals (U)	**15 (S)**	**13 (S)**	**3 (S)**	**31 (U)**

Source: OIPR and the FBI (U)

(S) [redacted] of the FBI's 56 field offices (o[redacted]ercent) and [redacted] (S) (S) [redacted] originated the Section 215 requests and applications for which Section 215 orders were never obtained. (S) (U) b1 b3 b7E

2. Reasons for Withdrawn Requests and Applications (U)

We reviewed the documents concerning the 31 withdrawn requests and applications and interviewed FBI, NSLB, and OIPR personnel to determine why the Section 215 orders were withdrawn. Table 3.8 below shows the number of withdrawn applications associated with each reason. (U)

TABLE 3.8 (U)
Reasons for Withdrawn Applications for Pure Section 215 Orders (U)

Reason for the Withdrawal (U)	Number of Requests (U)
Investigation was closed or changed course (U)	9 (S) (U)
Other investigative tool was used (U)	5 (S)
Statutory interpretation (U)	4 (S)
Insufficient information to support request (U)	2 (S)
Request became a full FISA (U)	2 (S)
Provider told FBI agent it did not have the record (U)	1 (S)
FBI could not resolve OIPR's concern about appropriate storage of information (U)	1 (S)
Objection by another agency (U)	1 (S)
Unknown (U)	6 (S)
Total (U)	**31 (U)**

Source: OIPR and the FBI (U)

We identified five categories of reasons that apply to the majority of the requests and applications: (1) investigation was closed or changed course; (2) alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. Below we discuss each of these categories and provide descriptive examples. (U)

a. Closed case or investigation changed course (U)

The first category were cases in which the request was withdrawn because the field office closed the investigation or the investigation changed course and the information was no longer needed. We identified nine requests or applications that were withdrawn for this reason. Based on the information we were provided, we determined that most of these requests had been pending for several months, and in one case over a year, at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. We discuss a few examples below. ~~(S)~~ (U)

In one case the field office sent the Section 215 request to NSLB around July 2004 seeking [redacted] records from [redacted] and NSLB provided a draft application to OIPR on August 4, 2004. In January 2005, an NSLB attorney sent an e-mail to OIPR asking that the request be given "some priority" because it had "been in the pipeline forever." The e-mail also refers to a disagreement between NSLB and OIPR about the level of detail about the investigation that OIPR had requested for the application. On March 3, 2005, the OIPR attorney sent an e-mail to an FBI Headquarters supervisor in which she informed him that she was meeting with one of her managers about the request the next day and in preparation for this meeting asked the FBI Headquarters supervisor about the status of the investigation. The next day the supervisor replied, "I believe I have vented to you enough about this process and what a 'hindrance' it has been to our investigative efforts. That being said, I request that we withdraw our req [sic] for business records as [the case is] to the point now where the records are moot." The NSLB attorney who was copied on this e-mail exchange forwarded it to the FBI Deputy General Counsel on May 26, 2005, and the Deputy General Counsel responded, "I can understand the frustration. I will let [OIPR Deputy Counsel] know [it is] withdrawn." (S) (U)

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In another case, the field office sent the request to NSLB on July 14, 2004, and NSLB forwarded a draft application to OIPR on September 27, 2004. The request was for an order compelling [redacted] to produce [redacted] On January 12, 2005, an FBI Headquarters supervisor notified NSLB that the information was no longer needed because the FBI was going to interview the target. The supervisor wrote in an e-mail, "An interview is forthcoming and the records, although material six months ago, are moot at this point." (S) (U)

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In another case, the field office submitted to NSLB around August 2004 its request for [redacted] records concerning the [redacted] NSLB submitted a draft application to OIPR on September 27, 2004. Records show that an OIPR attorney had drafted an application and provided it to her management on November 5, 2004. In January and March 2005, e-mail traffic indicates that NSLB was addressing some issues in the application raised by OIPR. In June 2005, an NSLB attorney inquired about the status of the request with OIPR and was informed that a Deputy Counsel in OIPR was reviewing the draft application. In an e-mail dated October 31, 2005, the NSLB attorney notified the field agent that OIPR had asked for more information about the request and inquired whether the field office still needed the Section 215 order. On November 3, 2005, the field office responded that the Section 215 order should be withdrawn. In an EC explaining the status of the investigation, the field office reported that [redacted] (S)

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[redacted] (S)

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In a fourth case, the Section 215 request for [redacted] records (S) was sent to FBI Headquarters on June 6, 2005. NSLB did not receive the request until July 14, 2005. In August 2005, an NSLB attorney began requesting information from the case agent about the underlying case. The questions required the case agent to communicate with another intelligence agency, and the case agent experienced some delays in obtaining information from that agency. In late August, September, October, and November, the NSLB attorney sent e-mails to the case agent asking for a status on the requested information. On December 15, 2005, the field office (S) notified NSLB that [redacted] and the field office no longer considered [redacted] The field office asked to withdraw the Section 215 request. At the time of the withdrawal, NSLB had not yet forwarded a draft application to OIPR. (S) (U)

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b. Use of alternative investigative tool (U)

(S) We identified [redacted] cases in which the FBI obtained the items sought in the Section 215 request through other investigative means. We describe some examples of those requests below. (S) (U)

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(1) Library [redacted] (S)

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On November 25, 2003, a field office submitted to NSLB a Section 215 request for [redacted] library because the field office believed tha [redacted] (S) According to FBI employees in the field office, an NSLB supervisor would not permit the request to go forward because of the political controversy surrounding Section 215 requests for information from libraries. The NSLB attorney who reviewed the request told the OIG that she attempted to get approval for the request but that her supervisor denied it because it involved a library. The Deputy General Counsel for NSLB told the OIG that he believed OIPR and the Department would disapprove of the FBI seeking information from a library, especially since the FBI had not yet obtained its first Section 215 order. He said he inquired whether the field office could obtain the information through some other means. Once the field office was advised that NSLB would not send an application to OIPR, the field office sought [redacted] (S) and eventually obtained [redacted] (S)

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(2) [redacted] (S) b1 b3 b7E

[redacted] **records** ~~(S)~~ (U)

On December 18, 2003, a field office submitted a Section 215 request on a target business that we call Target E. Target E had hired a company we call Company X to provide [redacted] for (S) b1 b3 b7E Target E. The Section 215 request was for Company X to provide records concerning Target E's [redacted] (S) provided to Target E. On February 5, 2004, NSLB advised the field office that because [redacted] (S) the most appropriate tool for obtaining the records was a national security letter. The field office later issued an NSL for the information.[39] ~~(S)~~ (U)

c. OIPR's statutory interpretation (U)

(S) We determined that [redacted] of the FBI's Section 215 requests that were later withdrawn, including the first request, were affected by OIPR's interpretation of the Family Education Rights and Privacy Act of 1974 (FERPA), commonly referred to as "the Buckley Amendment." The Buckley Amendment applies to all educational agencies and institutions, including colleges and universities, and governs the rights and privacy of students and parents in relation to access to and release of educational records.[40] 20 U.S.C. § 1232g. With respect to release of educational records, the Buckley Amendment provides that educational entities will not receive federal funds if they release educational records to third parties without written consent from the student's parents except in limited circumstances, such as in connection with a student's application for financial aid. 20 U.S.C. § 1232g (a)(1). The Buckley Amendment also provides that an educational entity does not have to obtain written consent to release educational records "in compliance with judicial order, or pursuant to any lawfully issued subpoena"; however, the entity must notify the student and parents of the order or subpoena in advance of complying with it unless the court orders the institution not to disclose the existence or content of the subpoena or the institution's response. 20 U.S.C. § 1232g (b)(1)(J)(i) and (ii) and (b)(2)(B). ~~(S)~~ (U)

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[39] The field office did not notify NSLB that it was withdrawing this request until July 1, 2004. (U)

[40] FERPA is called "the Buckley Amendment" after its principal sponsor, then Senator James Buckley of New York. (U)

The Buckley Amendment became an issue in the FBI's first Section 215 request. In a Letterhead Memorandum (LHM) dated April 23, 2002, to OIPR, the FBI's Assistant Director for Counterterrorism requested educational records, including [redacted] (S) a university for Target D pursuant to Section 215. The OIPR attorney who handled this request told the OIG that she prepared a draft application and that it was approved by her supervisor in June 2002 and then provided to the Counsel for Intelligence Policy for his review. ~~(S)~~ (U)

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The Counsel for Intelligence Policy told the OIG that he was concerned that the Buckley Amendment might limit the reach of Section 215 with respect to educational records. He said that he was concerned because Section 215 did not contain the proviso contained in other parts of FISA stating that "notwithstanding any other provision of law," the government may obtain certain types of information. According to the Counsel for Intelligence Policy, because Section 215 did not contain this language, it could be superseded by the Buckley Amendment and disclosure of the records request to the student and parents would be required.[41] The Counsel for Intelligence Policy told the OIG that he believed that other statutes that also state or imply that they provide the exclusive means of obtaining certain types of records, such as tax or medical records, could be similarly construed. According to the staff audit report of FISA prepared by SSCI, this concern was shared by some of the lawyers at NSLB and elsewhere in the Department.[42] (U)

However, according to the Counsel for Intelligence Policy, OIPR did not refuse to seek Section 215 orders for educational records. He said that OIPR would have been willing to present an application to the FISA Court for educational records if the FBI considered the information important enough and wanted to press the issue with the FISA Court. (U)

According to OIPR records, the FBI's Section 215 request with respect to Target D was withdrawn on November 26, 2002. We were unable to

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[41] The Patriot Act added a new subsection to the Buckley Amendment. This subsection provides that the Attorney General may apply to a court of competent jurisdiction for an ex parte order requiring educational institutions to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism." 20 U.S.C. § 1232g(j). According to NSLB documents, OIPR took the position that this provision did not apply to FISA Court orders. The Counsel for Intelligence Policy told the OIG that, without the opportunity to review documents on this issue, he did not recall what, if any, position he took on this provision of the Patriot Act. (U)

[42] SSCI Staff Audit, supra note 4, at 140 n.86. (U)

determine who within the FBI made this decision. None of the NSLB attorneys we interviewed recalled this request or who handled it. The Counsel for Intelligence Policy told the OIG that the FBI may have decided not to pursue the Section 215 order because this request could be problematic with the FISA Court and because it was the FBI's first request for a Section 215 order.[43] (U)

OIPR's concerns about the Buckley Amendment affected [redacted] other Section 215 requests.[44] (S) (U) (S) b1 b3 b7E

(1) University library's records (S) (U)

In February 2003 the FBI sent a Section 215 request to OIPR for a university library's records concerning [redacted] (S) b1 b3 b7E

[redacted] In an e-mail dated April 28, 2003, to the Counsel for Intelligence Policy and others, an OIPR attorney wrote that she had spoken to an FBI Headquarters supervisor about the request and advised him that she was concerned that "the request would not be allowed under the

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[43] The OIPR attorney who worked on this case told the OIG that the Office of the Deputy Attorney General reviewed the application and determined that the application should not go forward and suggested that the Office of Legal Counsel (OLC) review the application. OIPR submitted the application to OLC with a request for an opinion in early July 2002. However, OLC never issued a written opinion in response to the request. The Counsel for Intelligence Policy told the OIG that he did not recall discussing this particular application with anyone from the Office of the Deputy Attorney General or whether anyone advised OIPR not to submit the application. In addition, he told the OIG that he did not recall submitting the application to OLC for review. (U)

[44] In [redacted] (S) the FBI requested educational records, but it was not directly affected by OIPR's interpretation of the Buckley Amendment. In this case, NSLB advised the field office that it lacked sufficient support for the request. We discuss this case in Section D.2.d below. b1 b3 b7E

[redacted] (S)

[45] We counted this request as a request for library records rather than a request for educational records. The field office sent its request to FBI Headquarters in an EC dated February 11, 2003. We were unable to determine when this request was provided to OIPR. (U)

Buckley Amendment." She wrote that she wanted to meet with the Counsel for Intelligence Policy to discuss the application. ~~(S)~~ (U)

Neither the Counsel for Intelligence Policy nor the OIPR attorney could recall what happened with the request and whether any additional information about the status of the request was communicated to the FBI. No one from NSLB we interviewed recalled this request. FBI documents show tha[redacted] and OIPR (S) documents show that the Assistant Director for the FBI's Counterintelligence Division sent a memorandum to OIPR dated November 14, 2003, rescinding its request for a Section 215 order. ~~(S)~~ (U)

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(2) University [redacted]records ~~(S)~~ (U) (S)

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On April 22, 2003, a field office sent an EC to FBI Headquarters requesting a Section 215 order compelling a university to produce [redacted] (S) [redacted] In an EC to FBI Headquarters dated January 16, 2004, the field office reported that there had been "months of discussion and debate" about the request between the field office, NSLB, and OIPR because of the Buckley Amendment. The NSLB attorney who was involved in this case told the OIG that in late 2003 and early 2004 the FBI had not yet obtained its first Section 215 order and did not want to use an educational records request as its test case because of the legal issues involved. Consequently, NSLB did not provide OIPR with an application for this request. ~~(S)~~ (U)

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(3) University [redacted] (S)
(S) **[redacted]other educational records ~~(S)~~** (U)

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In mid-2005, a field office submitted a request for educational records. OIPR records show that this request was received by OIPR on June 14, 2005.[46] FBI documents show that the field office and NSLB again discussed the issue of the Buckley Amendment and the problems the FBI might encounter with attempting to use Section 215 to obtain educational records. OIPR records show that the FBI withdrew the request on October 7, 2005. (U)

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[46] It is possible that the field office submitted the request directly to OIPR and to NSLB at the same time. We were unable to determine from FBI records when the field office submitted the request. (U)

According to NSLB and OIPR attorneys, this statutory interpretation issue has been addressed by Section 106(a)(2) of the Reauthorization Act, which amended Section 215. Section 106(a)(2) provides that applications for production of educational, medical, tax, library, and other sensitive categories of records must be personally approved by the FBI Director, the Deputy Director, or the Executive Assistant Director for National Security. See 50 U.S.C. § 1861(a)(3). The Counsel for Intelligence Policy told the OIG he had proposed more explicit language to clarify that Section 215 trumped existing laws concerning the production of these sensitive categories of records, but the Department did not approve this language. According to the Counsel for Intelligence Policy, this provision has not yet been challenged. NSLB and OIPR attorneys told the OIG, however, that they believe Section 215 as amended controls the production of educational records and, therefore, the Section 215 non-disclosure provisions apply, not the Buckley Amendment notification provisions. (U)

d. Insufficient information to support request (U)

We identified two cases in which a determination was made that the request lacked sufficient or adequate information to go forward. We describe these cases below. ~~(S)~~ (U)

(1) Educational records [redacted] (S) ~~(S)~~ (U)

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A field office sent a request to NSLB for educational records, including [redacted] (S) [47] In its summary of the investigation, the field office wrote that [redacted] In addition, the document stated that the [redacted] In its explanation of the reason for requesting the educational records, the field office wrote that it had reason to believe that [redacted] (S) The request noted that due to the [redacted] (S) The request did not further explain how the [redacted] educational records would be used to further the investigation [redacted] ~~(S)~~ (U)

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[47] We could not determine the date this request was submitted to NSLB. (U)

The NSLB attorney who handled this request told the OIG that she considered the request to be problematic because the field office was seeking educational record[redacted] (S) She stated that she recalled discussing the problems with this request with the field office. On April 13, 2005, the NSLB attorney sent an e-mail to several field office employees about the request and wrote, "Can I consider this request withdrawn, in light of the issues we've discussed?" The field office confirmed that it was withdrawing the request. ~~(S)~~ (U)

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(2) [redacted] information ~~(S)~~ (U)

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In July 2004, a field office submitted a request to FBI Headquarters for a [redacted] ecords that would indicate [redacted] (S) [redacted][48] One of the bases for the information supporting the investigation of the target was information obtained from a human source. In response to a request for information from the OIG, the field office reported that some time after the Section 215 request was submitted to FBI Headquarters, the field office determined that the source provided false information and was unreliable. The field office reported this development to FBI Headquarters and decided to withdraw the request for a Section 215 order. ~~(S)~~ (U)

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e. Unknown (U)

We identified six instances in which we were unable to determine – from documents or interviews with NSLB or OIPR personnel – the reason that the request or application did not proceed to the next level or when the requests were withdrawn. We were able to determine that five of those six requests were never sent to OIPR. ~~(S)~~ (U)

We sent requests for information to the field offices that had prepared these requests. In response, most of the field offices reported to the OIG that their requests were never responded to by NSLB, OIPR, or FBI Headquarters.[49] One of the case agents reported to the OIG that at some point after he submitted the request, he inquired about its status with the substantive desk at FBI Headquarters and was advised by a supervisor that

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[48] This information is called [redacted] We discuss [redacted] further in Section V. ~~(S)~~ (U)

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[49] According to OIPR documents, one of the requests involved two FBI field offices. We contacted both field offices, and both reported that they did not have a record of having made a Section 215 request in connection with this target. (U)

because of a backlog concerning Section 215 requests, his request "would not likely see the light of day."[50] Another field office reported to the OIG that it was assumed by the field office that the request had "died on the vine." (U)

IV. Combination Section 215 Applications and Orders for Calendar Years 2002 Through 2005 (U)

In this section, we describe the number of applications for "combination" orders that were submitted to the FISA Court during calendar year 2005, the first year this type of application was processed; how many were approved; the number of U.S. persons and non-U.S. persons referenced in the applications; and the number and identity of FBI field offices that obtained the approved orders. (U)

A. Number of Applications Submitted to the FISA Court for Combination Orders (U)

A total of 141 combination business record applications were submitted and approved by the FISA Court in calendar year 2005. The first combination order was issued by the FISA Court on February 10, 2005. (S) (U)

With the enactment of Section 128 of the Reauthorization Act, which provides that FISA pen register orders now include the subscriber information, the number of combination applications should significantly decrease in CY 2006. (U)

B. Number of U.S. Persons and Non-U.S. Persons Referenced in Combination Orders (U)

We next identified the number of U.S. persons and non-U.S. persons referenced in the "combination" applications.[51] [redacted] (S)

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[50] We discuss the lengthy delays in processing Section 215 requests in Chapter Four. (U)

[redacted] (S)

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(S) [redacted] 141 combination orders that were issued in 2005. For 2005, there were [redacted] "U.S. persons" and [redacted] "non-U.S. persons" for a total of [redacted] referenced in the 141 combination applications that were approved by the FISA Court. (S) (S) (U)

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C. Type of Records Requested in the Combination Orders (U)

Our review of all the "combination" applications presented to the FISA Court in 2005 indicated that the business record portion of the application was routine and was used to obtain telecommunications subscriber information for the telephone numbers that were captured by the pen register/trap and trace order. (U)

FBI agents and the Counsel for Intelligence Policy told us that that the subscriber information is limited to customers of the communications provider that is the recipient of the order. For example, [redacted] (S) (S)

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D. FBI Field Offices that Initiated Requests for Combination Orders (U)

The OIG also determined how many FBI field offices were associated with the "combination" applications that were presented to and approved by the FISA Court in 2005. Table 3.9 illustrates the results. (U)

[redacted] (S)

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TABLE 3.9 (U)
FBI Field Offices That Initiated Requests for Combination Section 215 Orders (U)

Originating FBI Field Office (U)	Number of Combination FR/TT 215 Orders (U)

(S) b1 b3 b7E

Source: OIPR and the FBI (U)

(S) of the 56 field offices (percent) and (S) "combination" orders in calendar year 2005. ~~(S)~~ (U) b1 b3 b7E

V. Modified Section 215 Orders (U)

We also reviewed, as required by the congressional directive, how many times the FISA Court modified any Section 215 order. We examined information about the number and types of modifications of both pure and combination Section 215 orders by the FISA Court. However, the Counsel for Intelligence Policy told the OIG that determining what is a "modification" is "more of an art than a science." He said that generally modifications are handwritten changes to orders that are made by FISA Court judges at the hearing in which the order is signed. OIPR witnesses stated that OIPR does not usually consider revisions to applications and orders based on feedback from the FISA Court's review of "read" or advance copies to be modifications. The Counsel for Intelligence Policy told the OIG that, for the most part, when OIPR makes changes to the applications in advance of the hearing, OIPR has agreed with the FISA Court's concern and the manner in which the Court suggests that the issue be addressed in the revision. The Counsel for Intelligence Policy stated that in these instances OIPR would not consider the revisions to be modifications. (U)

We attempted to identify the number of modifications by reviewing the Department's semi-annual reports to Congress in which the Department reports, among other things, the number of Section 215 orders obtained and any modifications to those orders. We also reviewed all of the Section 215 pure and combination orders for handwritten changes to the orders signed by the FISA Court judge, and we asked OIPR officials about the number of modified orders. We identified a total of four modified orders. Two pure Section 215 applications were modified by the Court, both in 2004. Two combination Section 215 applications were also modified, both in 2005. We first discuss the 2004 pure Section 215 orders that were modified and then the 2005 combination Section 215 orders that were modified. (U)

A. 2004 Section 215 Modified Orders (U)

The first modification of a Section 215 order in 2004 related to the time frame to produce the requested records to the FBI. The FISA Court (S) ordered [redacted] to produce four categories of items related to two different timeframes. The order submitted by OIPR to the FISA Court directed all 4 categories of items to be produced within 10 business days. The FISA Court modified the order by limiting the 10-day timeframe to the first 3 categories of items and extending the timeframe to 60 days for the fourth category of items. ~~(S)~~ (U)

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The timeframe that recipients of Section 215 orders are given to produce the items is not determined by statute or regulation. Instead, the FBI determines the number of days it believes is reasonable based on the

type and volume of information that must be produced. This timeframe is then specified in the order that is provided to the FISA Court with the application. FBI witnesses told the OIG that they received feedback from the FISA Court through OIPR about what the FISA Court believed reasonable timeframes were regarding compliance with Section 215 orders and that changes were made to orders in light of this feedback. (U)

With respect to the other pure Section 215 modified order, the modification related to the records being requested. The FISA Court clarified the records to be produced by describing the records more precisely than the language in the order as presented to the Court. This modification limited the scope of the records to [redacted] (S) b1 b3 b7E

B. 2005 Section 215 Modified Orders (U)

With respect to the modified combination orders in 2005, both orders contained the same modification. In these applications, OIPR sought orders directing [redacted] to produce [redacted] (S) b1 b3 b7E [redacted] OIPR notified the FISA Court that federal judges in criminal cases had denied requests for [redacted] (S) [redacted] Although the FISA Court agreed to approve the applications, the Court directed the government to file a supplemental brief on this issue. Prior to the hearing on the applications, OIPR revised the applications and included a footnote setting forth a summary of the relevant criminal case law regarding [redacted] (S) (S) [redacted] and revised the order to include a direction for the government to provide the FISA Court with a supplemental briefing on this subject. (S) ~~(S)~~ (U)

VI. Improper or Illegal Use of Section 215 Authority (U)

As part of this review, Congress also directed the OIG to identify "any noteworthy facts or circumstances concerning the business records requests, including any illegal or improper use of the authority." We found two instances of improper use of Section 215 authority, both of which involved combination Section 215 orders and arose out of the pen register/trap and trace authority contained in the orders. We did not identify any instances involving improper or illegal use in connection with pure Section 215 orders or authority. We also identified a situation that we

believe constitutes a "noteworthy fact" concerning a Section 215 combination order and several FISA electronic surveillance orders that were interrelated.[52] (U)

Because the FBI is required to report illegal or improper use of Section 215 authority to the Intelligence Oversight Board (IOB), we first briefly describe the IOB. Next, we describe in detail the two instances of improper use of Section 215 authority. Finally, we briefly discuss the noteworthy item we identified. (U)

A. Intelligence Oversight Board (U)

The Intelligence Oversight Board, created by Executive Order in 1976, is 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.[53] The Executive Order also requires the general counsels of the intelligence community, including the FBI's General Counsel, to report to the IOB on at least a quarterly basis intelligence activities they "have reason to believe may be unlawful or contrary to Executive order or Presidential directive," which are referred to as "IOB violations." Examples of IOB violations include conducting electronic surveillance on telephones beyond the time period allowed by the FISA order. (U)

Internal FBI policies and procedures require FBI employees to report potential IOB violations within 14 days of discovery to both NSLB and the Internal Investigations Section of the FBI Inspection Division. In addition, each FBI field office and FBI Headquarters' division is required to submit quarterly reports to NSLB certifying that all employees were contacted concerning the requirements to report possible IOB matters. NSLB reviews

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[52] After reviewing the draft report, OIPR officials told the OIG that because the instances of improper use and the noteworthy item arose out of the pen register/trap and trace authority of combination orders, they believe the OIG should not include these instances in this report. While we understand this argument, we believe that these instances should be included in this report because Section 215 authority was implicated. For example, with respect to the two instances of improper use, we found that subscriber information associated with the improperly collected telephone numbers was obtained. The OIG therefore included these instances in the report, while making clear that we found no instances of intentional misconduct or improper use of a pure Section 215 order. (U)

[53] 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). (U)

the incoming report describing the possible IOB violation and prepares a written opinion as to whether the matter should be reported to the IOB. If NSLB determines that the matter should be reported to the IOB, NSLB prepares correspondence to the IOB setting forth the basis for the notification. (U)

B. Improper Use of Section 215 Orders (U)

Through our review of FBI and OIPR documents, we identified two instances of improper use of Section 215 authority. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. To examine this issue, we obtained documents about these Section 215 orders as well as documents about reporting of IOB violations related to them. (U)

Based on our review of the Section 215 documents and our review of documents in four field offices, we found no other examples of improper use of Section 215 orders. In addition, we asked OIPR and FBI personnel if they were aware of any improper use of business record requests or orders. The Counsel for Intelligence Policy was the only FBI or OIPR employee we interviewed who told the OIG he recalled any IOB violation with respect to Section 215 orders. He recalled the IOB violation we describe in Section B 2 below. (U)

We determined that the FBI had discovered both incidents and reported them to the IOB. In addition, both incidents were reported to the FISA Court by OIPR.[54] (U)

1. First instance of improper use (U)

The OIG became aware of the first instance of improper use during our review of FBI case files at one of the field offices we visited. We learned that the field office had obtained an order for a pen register and trap and trace device on a telephone that was no longer used by the subject. This resulted in the FBI receiving unauthorized information, which is called "over collection," between March 2005 and October 2005. (U)

According to FBI documents, in January 2005 the case agent obtained the subscriber information for the telephone number in question

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[54] OIPR is required to report FISA compliance incidents to the FISA Court pursuant to Rule 10(c) of the FISA Court's Rules of Procedures that became effective February 17, 2006. (U)

through a national security letter. The response to the national security letter stated that while the telephone number had previously belonged to the target, it no longer did as of [redacted] 2004. Despite this reporting, on February [redacted] 2005, an application for a FISA pen register/trap and trace order for this telephone number that no longer belonged to the target was submitted to OIPR. Subsequent to filing the application, in an EC from another field office dated February [redacted] 2005, the case agent was again notified that the telephone number did not belong to the target. However, the agent did not withdraw the request, and on [redacted] 2005, the order was approved. (S)(U) b7E

The order was scheduled to expire in spring 2005, and before it expired the FBI obtained a full-content FISA order for the same telephone number and two others. In September 2005, the case agent transferred to another squad and a new case agent was assigned to the case. In early October 2005, the new case agent was advised by a translator, who had been assigned to the case for only two days, that the language being spoken on the telephone calls was not the language the FBI believed it to be. The new case agent became concerned and requested that the FISA coverage be terminated immediately. In addition, on that same day, he notified his squad supervisor and an attorney from OIPR about the possible over collection of information. (U)

Upon further investigation, including a review of the response to the NSL about the subscriber information, the new case agent learned on October 11, 2005, that the telephone number did not belong to the target. The FBI field office notified the Counterterrorism Division at FBI Headquarters of the possible over collection of information in an EC dated November 29, 2005. While reviewing the case file for another reason in March 2006, the new case agent saw for the first time the EC from another field office dated February [redacted] 2005, stating that the telephone number no longer belonged to the target. The new case agent discussed the matter with his supervisors and prepared an EC to report a possible IOB violation. This EC was sent to FBI Headquarters on April 3, 2006.[55] (S)(U) b7E

On June 29, 2006, NSLB reported the matter to the IOB. In its explanation to the IOB about the incident, the FBI reported, "It appears that [the case agent] overlooked the text in the NSL and EC." No other

[55] At the time of the OIG's visit to the field office (June 2006), FBI personnel were in the process of gathering the data obtained from the unauthorized over collection for sequestration with the FISA Court and were awaiting further instruction on how to process this matter. As of January 2007, the data had been purged and destroyed. (U)

information about the reason for the violation was reported. On July 7, 2006, the FBI informed OIPR of the IOB matter. On July 23, 2006, OIPR reported the matter to the FISA Court. (U)

2. Second instance of improper use (U)

The OIG became aware of the second instance of improper use during our review of the Section 215 combination applications that were provided to the OIG by OIPR. We learned that the FBI inadvertently collected certain telephone numbers pursuant to a pen register/trap and trace order because the telephone company did not advise the FBI that the target had discontinued using the telephone line until [redacted] weeks after the fact at (S) which time the FBI discontinued collecting information. For [redacted] during (S) this [redacted] period, the telephone number had been issued to someone else. (S) (U) b1 b3 b7E

The FBI obtained its first combination order for this telephone number on February [redacted] 2005, and it was renewed in June 2005 and again in September 2005. On November 30, 2005, the telephone company representative advised the FBI that the telephone number was disconnected on [redacted] 2005. The telephone company representative advised the FBI that the target had obtained a new telephone number on [redacted] 2005. The telephone company representative also advised the FBI that the old telephone number had not been reissued to anyone else. (S) (U) b7E

On December 1, 2005, [redacted] (S) However, [redacted] As a result, during this [redacted] period the FBI inadvertently collected telephone numbers from calls to and from [redacted] which was not covered by a FISA order.[56] (S) (U) b1 b3 b7E

On February [redacted] 2006, the FBI field office agent queried the FBI database that is the repository of telephone numbers obtained from pen register/trap and trace devices to determine what information the FBI had b7E

[56] The FISA order for this old telephone number was set to expire on December 2, 2005. In the renewal application, the FISA Court was advised of the reason for the change in telephone numbers, that the FBI had inadvertently already collected data concerning this new telephone number, and the reason for this over collection. The FISA Court approved the renewal application for the new telephone number on December 2, 2005. (S) (U)

intercepted on the target between October [redacted] 2005, and December [redacted] 2005.[57] According to the database, the FBI had in fact intercepted telephone numbers on the target for [redacted] between November [redacted] 2005, and November [redacted] 2005.[58] ~~(S)~~ (U) b7E

On March 9, 2006, the field office reported to FBI Headquarters and NSLB that a possible IOB violation had occurred and around this time provided to OIPR a compact disc containing the over-collected data. On April 7, 2006, OIPR notified the FISA Court of the over collection and provided to the FISA Court the disk containing the data that had been deleted from FBI databases. On July 17, 2006, NSLB reported the violation to the IOB. (U)

C. Noteworthy Item (U)

We also identified an issue concerning the accuracy of information provided to the FISA Court regarding several electronic surveillance FISA orders and a combination order based in part on one source's information. (U)

On January 6, 2006, OIPR filed a notice to the FISA Court stating that in connection with several cases, OIPR had learned on December 22 and 23, 2005, that the source who had previously provided significant information about the targets reported that he did not believe that one of the targets, who was associated with all of the other targets, was a supporter of a particular terrorist organization. The OIPR notice also stated the reasons the government continued to believe that there was sufficient information to support FISA applications for all of the targets despite this source's information. ~~(S)~~ (U)

OIPR reported to the FISA Court that the FBI had learned of this information in April 2005 from another intelligence agency but had "inadvertently failed to provide it at the time they received it." On January [redacted] 2006, the FISA Court issued an order directing [redacted] (S) [redacted] On March [redacted] 2006, OIPR filed an b1 b3 b7E

[57] According to another FBI document, this query of the database occurred on December [redacted] 2005. ~~(S)~~ (U) b7E

[58] According to the database, the data collected was on the old telephone number. According to FBI documents, this was a mistake in the database due to a glitch in the interception software and the data was in fact collected on the new telephone number the target began using on November [redacted] 2005. ~~(S)~~ (U) b7E

11-page declaration of a Deputy Assistant Director from the FBI's Counterterrorism Division providing an explanation from the case agents who were responsible for the FISA application on the primary target about which this source information was reported and case agents who were responsible for FISA applications that incorporated information from the primary target's FISA application. According to the declaration, the primary target case agents reviewed the April [redacted] 2005, intelligence report containing the source information on April [redacted] 2005. On April [redacted] 2005, the case agents had finalized the FISA renewal application on the primary target. On April [redacted] 2005, the case agents had provided OIPR with several intelligence reports about the same source. According to the declaration, when the case agents verified the accuracy of the renewal application on April [redacted] they mistakenly believed that the problematic source information had already been reported to OIPR. The declaration also stated that the FBI believed that the omission was not intentional because all other information obtained from the source, some of which was not favorable to the FBI's investigation, had been reported to OIPR. According to the declaration, case agents responsible for FISA applications that were related to the primary target's FISA application incorporated information from the primary target's FISA application and did not verify independently that the April [redacted] intelligence report had been reported to OIPR and incorporated into the FISA application. ~~(S)~~ (U) b7E

VII. Summary (U)

As discussed in this Chapter, from 2002 through 2005, OIPR submitted 21 pure Section 215 applications for FISA Court approval, all of which were approved. The first pure Section 215 order was approved by the FISA Court on May [redacted] 2004. These 21 Section 215 orders concerned 18 unique requests. Seven unique orders were obtained in CY 2004 and 11 unique orders were obtained in CY 2005. ~~(S)~~ (U) b7E

We also identified 31 Section 215 requests that were withdrawn. We identified five categories of reasons for the withdrawn that applied to the majority of the requests and applications: (1) investigation was closed or changed course; (2) alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

(S) We identified [redacted] requests or applications that were withdrawn because the investigation changed course or was closed. Most of these requests had been pending for several months at FBI Headquarters or OIPR at the time the field office closed the investigation or determined the items were no longer needed. We identified [redacted] cases in which the FBI obtained b1 b3 b7E

the items sought in the Section 215 request through some other investigative means, such as a voluntary disclosure letter or a national security letter. We also found that OIPR's interpretation of the Buckley Amendment was raised as a concern in connection with [redacted] withdrawn requests for educational records, although one of those requests was eventually withdrawn because [redacted] We identified [redacted] cases in which a determination was made that the request lacked sufficient or adequate information to go forward. We identified [redacted] instances in which we were unable to determine – from documents or interviews with NSLB or OIPR personnel – the reason that the request or application did not proceed to the next level. (S) (U)

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We also identified the total number of combination Section 215 orders sought and obtained. The FBI did not begin obtaining combination orders until February 10, 2005. Throughout the remainder of CY 2005, the FBI obtained a total of 141 combination orders. (S) (U)

We found that four Section 215 orders – two pure orders in 2004 and two combination orders in 2005 – were modified by the FISA Court. We determined that in addition to these reported instances of modifications, OIPR sometimes makes changes to applications or orders based on conversations with FISA Court judges and/or FISA Court legal advisors before the final application is filed with the FISA Court, and these changes are not generally considered to be modifications. (U)

Finally, we identified two instances of improper use of Section 215 orders. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. We did not find any instance of improper use of pure Section 215 authority. In both instances the FBI identified the improper use and reported it to the IOB. (U)

CHAPTER FOUR
DELAYS IN IMPLEMENTING SECTION 215 AUTHORITY AND OTHER IMPEDIMENTS TO USE (U)

I. Introduction (U)

Before passage of the Patriot Act, the FBI had obtained only one FISA order for business records. FISA had been amended in 1998 to allow for such orders, but no written policies, procedures, or forms had been issued by the FBI or OIPR with respect to FISA business records applications. After passage of the Patriot Act in 2001, neither the Attorney General nor OIPR issued implementing procedures or guidance with respect to Section 215 authority. (U)

In the Patriot Act reauthorization legislation, Congress directed the OIG to include the following in its review: (U)

- The justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing requests for business records applications and whether such delay harmed national security; (U)

- Whether bureaucratic or procedural impediments prevented the FBI from "taking full advantage" of the FISA business record provisions. (U)

In this chapter, we first set forth the facts concerning the implementation of policies and procedures concerning Section 215 authority, the delays in processing Section 215 requests, and other problems that have affected the FBI field offices' ability to obtain Section 215 orders. We then analyze the reasons why the Department did not issue implementing procedures concerning Section 215 authority. We also set forth our analysis concerning the bureaucratic and other impediments that affected the FBI's ability to obtain Section 215 orders. At the end of the chapter, we discuss what effect the processing delays and other impediments have had on the FBI's ability to obtain Section 215 orders. (U)

II. Factual Background (U)

A. Attorney General's Implementation of Section 215 Procedures (U)

On October 26, 2001, the same day the President signed the Patriot Act, the Department issued detailed guidance describing the changes brought about by the Patriot Act. At that time, the Department did not implement procedures for obtaining Section 215 orders. (U)

In October 2003, the FBI disseminated an internal standard request form for field offices to request Section 215 orders, along with guidance about how to use the form. In the spring of 2004, OIPR and the FBI issued a template for Section 215 applications and orders. (U)

B. Section 215 Processing Delays (U)

As noted above, the first Section 215 order was obtained in spring 2004. We found that when FBI field offices began requesting Section 215 orders, they encountered processing problems. For example, as described in Chapter Three, in several instances no one from NSLB responded to Section 215 requests for several months or did not respond at all. In addition, in some cases NSLB sent draft applications to OIPR, but the applications were not finalized for several months. In some cases, FBI Headquarters sent Section 215 requests directly to OIPR without notifying NSLB and never received a response from OIPR. In other cases in which a draft application was prepared, the field office did not receive any response from NSLB or OIPR. As a result of these delays, in some cases the information was no longer needed by the time the field office received a response from NSLB or OIPR, and the request was subsequently withdrawn. (U)

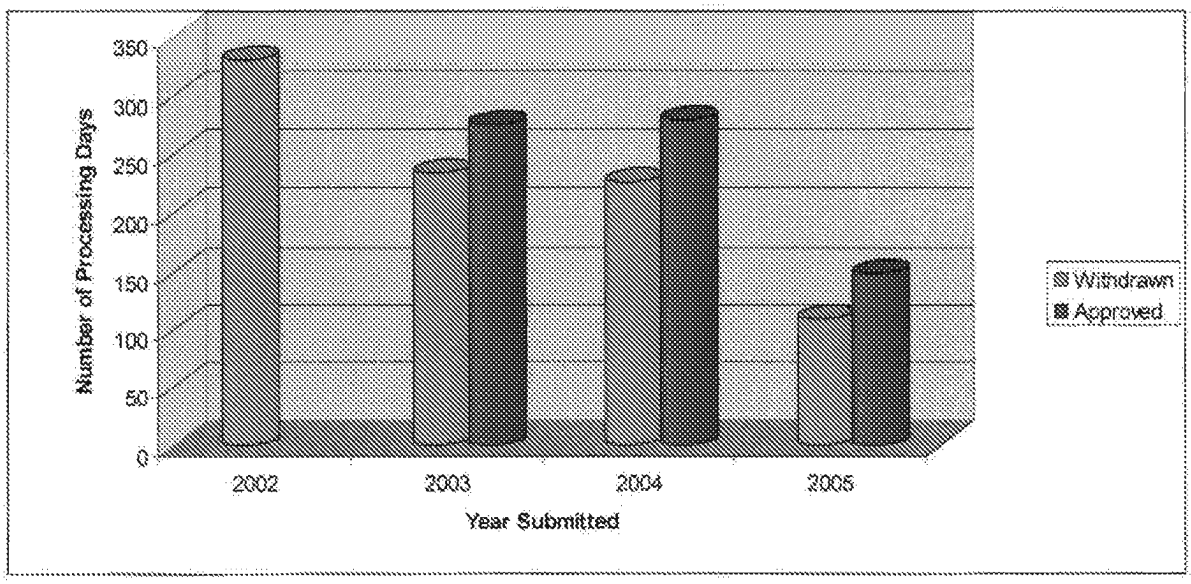
We sought to determine how long requests were pending in NSLB and in OIPR in order to calculate average processing times for requests for which orders were obtained and for withdrawn requests for Section 215 orders. However, the FBI's and OIPR's recordkeeping systems in place at the time had limited capabilities, and there was no system for tracking Section 215 requests either within the FBI or OIPR. Therefore, the information we provide below contains incomplete information with respect to many of the requests. The data below provides the average processing times we were able to calculate, with certain qualifications about the data. Thereafter, we describe in detail the difficulties the FBI and OIPR encountered in processing the first Section 215 requests submitted in 2002, NSLB's efforts to push for its first Section 215 order in 2003, the disagreements that arose between NSLB and OIPR about what was required in the template for

Section 215 applications, and other problems that affected the Section 215 process. (U)

The chart below reflects the average processing time of withdrawn requests and approved requests.[59] (U)

1. Average processing times (U)

DIAGRAM 4.1 (U)
Average Processing Time (U)



Source: OIPR and FBI (U)

- **CY 2002 (U)**

From documents obtained from OIPR and the FBI, we were able to determine that the FBI generated five Section 215 requests in CY 2002. No Section 215 orders were obtained for these requests because all five requests were subsequently withdrawn. As a result, we cannot calculate an average processing time for approved requests submitted in 2002. ~~(S)~~ (U)

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[59] For each year listed on the chart, we calculated processing times for requests submitted in that year, whether they were approved or withdrawn in that same calendar year or in the next calendar year. For the requests submitted in 2002, we were only able to calculate processing times at OIPR and not the total processing times. Similarly, in 2003 for approved requests, we had data only for OIPR processing times and not total processing times. (U)

Of the five withdrawn requests submitted in 2002, one of the requests was pending at NSLB when it was withdrawn, but we were unable to determine when it was withdrawn so we cannot calculate its processing time up to that point. The other four requests were pending at OIPR when they were withdrawn. We were able to determine for three of these four requests when they were submitted to OIPR and when the requests were withdrawn. Because we were unable to determine when these requests were submitted to NSLB, we cannot calculate the total processing time for these requests.[60] The average processing time in OIPR for these three requests was 330 days.[61] ~~(S)~~ (U)

- **CY 2003 (U)**

We were able to determine that the FBI generated four Section 215 requests in 2003 which were eventually approved in 2004. We were unable to determine when these requests were prepared by the field offices or submitted to NSLB; therefore we cannot calculate the total average processing time. However, we were able to determine when all four requests were submitted to OIPR and when Section 215 orders were obtained. Thus we are able to calculate only the OIPR processing time and not the total processing time. The average OIPR processing time for these four requests was 275 days. ~~(S)~~ (U)

The FBI generated ten Section 215 requests in CY 2003 that were later withdrawn. We have submission and withdrawal dates for only four of the ten requests. Of these four requests, three of the requests were submitted to NSLB and were withdrawn without any application being sent to OIPR and one was withdrawn after the request was submitted by the FBI field office directly to OIPR. The total average processing times for these four withdrawn requests was 234 days. ~~(S)~~ (U)

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[60] From the documents, it appears that these requests may have been submitted directly to OIPR and may not have been provided to NSLB. (U)

[61] With respect to one of these three requests, the FBI was unable to provide any information or documentation. OIPR records showed that the request was submitted on October 16, 2002, and was withdrawn on July 20, 2004, for a total of 643 days pending. A Deputy Counsel in OIPR told the OIG that the request was withdrawn because a full content FISA order was obtained; however, we do not have any information about when the full content FISA order was obtained. The full content FISA order could have been obtained several months before the request was actually withdrawn. The field office that handled the investigation of the target reported to the OIG that it never made a Section 215 request for this target. ~~(S)~~ (U)

- **CY 2004 (U)**

(S) The FBI generated at leas[redacted]ection 215 requests in CY 2004 for (S) which orders were obtained.[62] We know when the field offices submitted the requests to NSLB and when the orders were obtained fo[redacted] (S) requests. Thus, we are able to calculate the average total processing time. The average total processing time for these[redacted]requests was 279 days. For (S) [redacted]equests we were able to calculate how long the requests were pending in NSLB and in OIPR. The requests were pending in NSLB for 162 days and in OIPR for 180 days. ~~(S)~~ (U)

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The FBI generated[redacted]Section 215 requests in CY 2004 that were (S) later withdrawn. We have submission and withdrawal dates for all[redacted] requests. Of these[redacted]request[redacted]were submitted to NSLB and (S) withdrawn while the requests were still pending at NSLB[redacted]were pending at OIPR when they were withdrawn. For one of these requests, we were unable to determine whether it was pending at NSLB or OIPR when it was withdrawn. The total average processing time for these[redacted]requests was (S) 226 days. Of th[redacted]requests that were pending at OIPR when they were withdrawn, we had sufficient data fo[redacted]of the requests to track how long (S) the requests were pending at NSLB and at OIPR. These[redacted]equests were pending at NSLB for an average of 80 days before they were sent to OIPR. They were pending at OIPR for an average of 141 days before they were withdrawn. ~~(S)~~ (U)

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- **CY 2005 (U)**

(S) The FBI generated[redacted]Section 215 requests in CY 2005 that were approved. We know when the field offices submitted the requests to NSLB (S) and when the orders were obtained for[redacted]of the requests. The average total processing time for thes[redacted]equests was 149 days. For these (S) [redacted]equests, we were also able to determine the average time the (S) requests were pending at NSLB and at OIPR. The average processing time at NSLB was 60 days. The average processing time at OIPR was 88 days.[63] ~~(S)~~ (U)

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(S) [62] A possible[redacted]equest was generated in 2004 and submitted to OIPR on January 4, 2005. We do not have any data on when the field office submitted the request to NSLB. ~~(S)~~ (U)

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[63] For purposes of discussing processing times, we included all 21 Section 215 requests for which orders were obtained instead of only the 18 unique requests. (U)

(S) The FBI generated [redacted] requests for Section 215 orders in 2005 that were later withdrawn. We have submission and withdrawal dates for [redacted] requests. For [redacted] requests, however, we were unable to determine whether they were withdrawn at NSLB or OIPR. Of the [redacted] remaining requests, one was pending at NSLB when it was withdrawn and [redacted] were pending at OIPR when they were withdrawn. The average processing time for these [redacted] requests was 109 days.[64] For the [redacted] requests that were pending at OIPR when they were withdrawn, we were unable to determine how long the requests were pending in NSLB compared to OIPR. (S) (U)

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2. Processing delays with initial Section 215 requests in 2002 and 2003 (U)

We interviewed OIPR and FBI officials regarding the delay in obtaining Section 215 orders and the delay in developing guidance for obtaining Section 215 orders. The Counsel for Intelligence Policy told the OIG that after the September 11 attacks and passage of the Patriot Act, the number of requests for FISA electronic surveillance or "full content" FISA requests increased dramatically and that OIPR struggled to keep up with this demand. According to the Counsel for Intelligence Policy, OIPR responds to the priorities set by the Attorney General and by the Intelligence Community, including the FBI. He said that one of those priorities was the Attorney General's new procedures on intelligence information sharing, issued in March 2002, that resulted in significant changes in how intelligence information was handled. The Counsel for Intelligence Policy told the OIG that he discussed with the Office of the Deputy Attorney General the need for training on these new procedures, and that the Counsel for Intelligence Policy agreed to develop the training. In addition, in December 2002 the Deputy Attorney General issued a directive instructing OIPR, the FBI, and the DOJ Criminal Division, in consultation with the Intelligence Community, to implement a comprehensive training curriculum on the Patriot Act changes to the Foreign Intelligence Surveillance Act and related matters for all DOJ attorneys and FBI agents assigned to national security investigations.[65] OIPR developed a curriculum that addressed the

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(S) [64] It is possible that a [redacted] request was generated in 2005. It was withdrawn in April 2005, but we were unable to determine when it was generated, and for this reason we did not include it in this section. With respect to [redacted] other withdrawn requests, we were unable to determine when they were submitted to NSLB or when they were withdrawn. We also did not include these [redacted] requests in our calculations in this section. (S) (U)

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[65] See Memorandum from the Deputy Attorney General, Training on FISA and Related Matters (December 24, 2002). (U)

FISA process and information sharing procedures. The Counsel for Intelligence Policy told the OIG that training was provided to approximately 4,000 agents and attorneys in May and June 2003. The OIPR attorney responsible for developing the training told us that the new Section 215 authority was a minor component of the training.[66] The Counsel for Intelligence Policy said that another priority OIPR was directed to focus on was a task force to address FISA applications related to the "ramp up" to the war in Iraq. (U)

With respect to the FBI's ability to obtain Section 215 orders, the Counsel for Intelligence Policy told the OIG that the FBI "know[s] how to get what [it] want[s]" and that he regularly receives telephone calls from FBI executives, including the Director, when a particular application or type of application is a priority. He said that during this time period the FBI "was not beating down [OIPR's] door" for Section 215 orders. NSLB attorneys told the OIG that during this time, NSLB attorneys discussed on numerous occasions with OIPR officials the FBI's displeasure with the pace of processing Section 215 requests by OIPR. (U)

FBI employees also told the OIG that Section 215 requests were not a priority initially because the number of requests for full content FISA orders increased significantly after September 11, 2001, and NSLB attorneys were focused on addressing these cases. In addition, in 2002 NSLB did not have an attorney designated as a point of contact for Section 215 requests. NSLB was attempting to hire more attorneys to handle the increased workload. A former supervisor of NSLB told the OIG that when he became the supervisor in April 2002, the unit had approximately 10 attorneys and when he left in September 2003, NSLB had grown to approximately 30 attorneys.[67] (U)

In early 2003, an NSLB attorney volunteered to work on Section 215 requests. She began developing a standard request form for the field offices to use for submitting Section 215 requests to NSLB. Around the same time, the Chief Division Counsel for a large field office drafted a standard request form for his field office to use to make Section 215 requests. The Chief Division Counsel communicated with the NSLB attorney about the form, and she provided recommendations and suggestions. In addition, in an e-mail dated April 24, 2003, she recommended that once he obtained approval from his management to use the request form, his field office

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[66] The OIPR attorney responsible for developing the training told us that it focused on obtaining "full content" FISA orders, which the attorney termed a "more aggressive technique" than Section 215 orders. (U)

[67] At the time, NSLB was called the National Security Law Unit. (U)

should use the form until the FBI-wide standard request form she had developed was approved at FBI Headquarters. (U)

In 2003, the FBI generated a total of (S) Section 215 requests that were withdrawn. Through August 2003 when NSLB began to focus on obtaining a Section 215 order, which we discuss below, the FBI generated (S) requests for Section 215 orders. One of the requests was sent from the Counterintelligence Division to OIPR in February 2003.[68] This was the request previously discussed for a university library's records concerning (S) This request was determined by OIPR to be problematic because of issues arising out of the Buckley Amendment, and was withdrawn.[69] (S) (U)

(S) requests were sent to NSLB but were never forwarded to OIPR. One of the requests was for a university's (S) records and was submitted in April 2003. As previously mentioned, the NSLB attorney who handled this request told the OIG that because of the issues with the Buckley Amendment, the FBI did not want to push this case forward as its Section 215 test case with the FISA Court. Another request was submitted to NSLB in March 2003, but was later withdrawn. We were unable to determine the reason this request was withdrawn. (S) (U)

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3. NSLB's efforts in the summer 2003 to push for a Section 215 order (U)

In the summer 2003, NSLB began to focus more resources on Section 215 requests. In May 2003, a new Deputy General Counsel for NSLB was appointed. He told the OIG that at the time he was aware that the FBI had attempted to obtain a small number of Section 215 orders but had been unsuccessful. He said there was a sense within NSLB that the FBI needed to "break through and get [a Section 215 order]." In addition, he said that there was a recognition that the FBI needed to begin obtaining Section 215 orders because Section 215 was one of the Patriot Act provisions that was scheduled to sunset at the end of 2005 and Congress would be scrutinizing

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[68] Because there was no internal process in place directing field offices to submit Section 215 requests to NSLB in addition to the Counterterrorism Division or the Counterintelligence Division, field offices sometimes sent requests only to the FBI Headquarters operational divisions, and the FBI Headquarters operational division submitted the requests directly to OIPR. (U)

[69] OIPR documents show that this request was withdrawn by the FBI in November 2003 (S)

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the FBI's use of the authority in determining whether to renew the authority. (U)

In an effort to push the issue of obtaining a Section 215 order, in mid-October 2003 NSLB simultaneously submitted (S) Section 215 applications to OIPR. In addition, on October 29, 2003, NSLB distributed to all field offices the standard Section 215 request form that was developed by NSLB. Along with the standard request form, NSLB distributed detailed guidance concerning Section 215 requests that specified who within the FBI field office was required to approve the Section 215 request and directed the field offices to submit request forms to NSLB. ~~(S)~~ (U)

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4. Processing delays continue in OIPR and NSLB (U)

According to NSLB and OIPR attorneys we interviewed, NSLB and OIPR had several disagreements about the content and form of the Section 215 applications NSLB submitted to OIPR in mid-October 2003. First, NSLB attorneys told us that they believed the Section 215 applications should be streamlined and similar to a grand jury subpoena. However, when discussion with OIPR personnel began on the development of a template, OIPR wanted the application to include more information than NSLB proposed.[70] Disagreement revolved around differing interpretations of the relevance standard and the level of detail necessary in the application package to meet that standard. OIPR personnel told us that they believed the applications needed more detail to satisfy the scrutiny of the FISA Court. (U)

NSLB and OIPR personnel worked for several months to develop a template for Section 215 applications submitted by NSLB to OIPR. Among other things, the application includes a specific description of the items requested, a description of the underlying investigation, and a description of how the FBI expects the requested items to further the investigation.[71] (U)

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[70] An OIPR attorney who was involved in these discussions about the Section 215 applications said that she had prepared a template application for Section 215 requests in 2002 that was reviewed by an NSLB attorney. However, this template application was not used by the NSLB attorneys who prepared the applications that were submitted to OIPR in late 2003. (U)

[71] In addition to addressing issues that arose out of statutory interpretation, NSLB attorneys were also discussing the practical issues associated with serving classified Section 215 orders on individuals who did not have security clearances and businesses that did not have approved storage containers. NSLB considered many options, such as determining on a case-by-case basis whether the information listed in a Section 215 order is classified. NSLB eventually determined that all Section 215orders were to be treated as classified, although uncleared personnel could be shown the order for purposes of (cont'd)

NSLB attorneys told the OIG that even after a standard application form was agreed upon, they continued to believe that the amount of detail that OIPR required in the description of the investigation and the items requested in Section 215 applications was more than the law required to establish relevance. One NSLB attorney told the OIG that OIPR attorneys wanted "an inordinate amount of detail" in the applications. (U)

Another initial problem that arose with the applications submitted in mid-October 2003 concerned whether the FBI could present Section 215 requests to the FISA Court directly. NSLB attorneys had drafted the applications for the signature of the FBI's General Counsel and not an OIPR attorney. NSLB attorneys told us that they believed FBI attorneys could present the FBI's applications directly to the FISA Court without OIPR approval because Section 215 states that the FBI Director or his designee can make applications to the FISA Court for Section 215 orders.[72] See 50 U.S.C. § 1861. (U)

OIPR attorneys disagreed, stating that the FISA Court Rules of Procedures provide that the Attorney General determines who is permitted to appear before the FISA Court, and FBI attorneys had not been authorized by the Attorney General to practice before the FISA Court. Eventually, NSLB agreed to draft applications for the signature of an OIPR attorney, and OIPR attorneys would present the applications to the FISA Court. (U)

(S) All [redacted] of the initial applications submitted by NSLB to OIPR in October 2003 were eventually presented to and approved by the FISA Court but not until much later in 2004. At some point after the applications were first submitted, NSLB decided to focus on the application it believed was narrow in scope and presented the fewest problems. This request was for a [redacted] (S) This application was finalized by OIPR in spring 2004 and was approved by the FISA Court on May [redacted] 2004. [redacted] (S) [redacted] (U)

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collecting information in response to the order but could not maintain a copy of the order. In November 2004, NSLB revised the FBI's standard Section 215 request form and included authorization for service on persons without security clearances. (U)

[72] On October 10, 2003, the Director of the FBI designated the General Counsel of the FBI to make Section 215 applications to the FISA Court. Other officials who have been delegated this authority include the FBI's 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. (U)

Both OIPR and FBI personnel told the OIG that in addition to processing delays caused by disagreements concerning the content and form of the Section 215 applications, some delay occurred because the processing of business record requests was not a priority by either the FBI or OIPR at this time.[73] Instead, OIPR and the FBI were focusing on the "full content" FISA applications that had become backlogged.[74] Pursuant to an Attorney General directive issued in April 2004, OIPR was in the process of forming a FISA task force to address the backlog of full content FISA requests.[75] (U)

Section 215 requests continued to take several months to be processed in the remainder of 2004 and 2005. For example, [redacted] applications were submitted by NSLB to OIPR on August 4, 2004. On (S) September 23, 2004, and again on October 5, 2004, the NSLB attorney who handled Section 215 requests wrote an e-mail to her supervisors stating that NSLB had not heard anything about the applications from OIPR. Similarly, on November 9, 2004, the same NSLB attorney wrote an e-mail to (S) a CDC stating that [redacted] more applications had been submitted to OIPR in September but NSLB had not received any response from OIPR. NSLB attorneys were also frustrated by the edits recommended by OIPR attorneys and the amount of information and follow-up work that was being requested. ~~(S)~~ (U)

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In the fall of 2004, the new Deputy General Counsel of NSLB and OIPR Deputy Counsel for Operations met to discuss the problems with the processing of Section 215 requests. The NSLB Deputy General Counsel and the OIPR Deputy Counsel told us that they agreed to attempt to resolve their differences about the content of the FISA applications in order to address the backlog. OIPR and FBI management also implemented a "48-hour" rule, by which OIPR personnel were to contact FBI personnel within 48 hours of receipt of a business record application regarding any significant concerns

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[73] When we asked OIPR personnel about the delayed processing times, two attorneys told the OIG that a "moratorium" was placed in the spring of 2004 on the further processing of Section 215 applications and that the moratorium may have been connected to litigation. The Counsel for Intelligence Policy told the OIG he did not recall a moratorium on the processing of Section 215 applications from the FBI. (U)

[74] The Counsel for Intelligence Policy told the OIG that although OIPR was given authority to hire a significant number of employees, the majority of these employees did not begin working for OIPR until 2004. As a result, OIPR did not have sufficient personnel to handle the workload. (U)

[75] Memorandum from the Attorney General to the FBI Director and Counsel to the Office of Intelligence Policy and Review, Changes in Procedures for Implementing the Foreign Intelligence Surveillance Act (April 16, 2004). (U)

OIPR had with the request. However, NSLB personnel told us they did not observe any changes or improvements to the process as a result of the implementation of this rule. (U)

Processing delays were also experienced within NSLB, both with respect to requests for which orders were eventually obtained and with respect to requests that were withdrawn. For example, we found that with respect to a request that was submitted to NSLB by a field office on February 12, 2004, NSLB did not send an application to OIPR until January 14, 2005, almost a full year later.[76] (U)

5. OIPR and NSLB take steps to improve Section 215 process (U)

By early 2005, the Department faced the "sunset provision" of Section 215, pursuant to which the authority would lapse or "sunset" unless Congress affirmatively renewed the provision. In April 2005 FBI officials testified before Congress about the FBI's use of the authorities provided by the Patriot Act. This generated a renewed emphasis within the FBI's Office of General Counsel on the use of the Section 215 provision. Around this same time, the Deputy General Counsel for NSLB collected information on the status of the FBI's pending Section 215 requests and a summary of the history of the problems between NSLB and OIPR regarding Section 215 requests. (U)

Around this same time, the NSLB Deputy General Counsel met with a Deputy Counsel of OIPR and discussed the issue of the pending Section 215 requests. At this meeting, the OIPR Deputy Counsel informed the NSLB Deputy General Counsel that OIPR had recently assigned two experienced OIPR attorneys to address Section 215 requests. (U)

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[76] In addition, after the first Section 215 order was obtained in spring 2004, the NSLB attorney who was handling Section 215 requests wrote an e-mail dated June 1, 2004, to [redacted] agents stating, "I have received from each of you a business record request at some point in the past – some of these requests are quite old. I need to know from each of you whether you still need the information that you sought in the request that you made. Also, feel free to send me additional requests now that we have the ball rolling." [redacted] requests had been submitted in 2003, one had been submitted in January 2004 and another in February 2004. [redacted] of the agents responded that the requests should be withdrawn for different reasons. For example, in one case the custodian of records had reported to the FBI that it did not have the information and in another case [redacted] that would have been the recipient of the order refused to provide the records. Section 215 orders were eventually obtained for the oth[redacted] requests. (S) (U)

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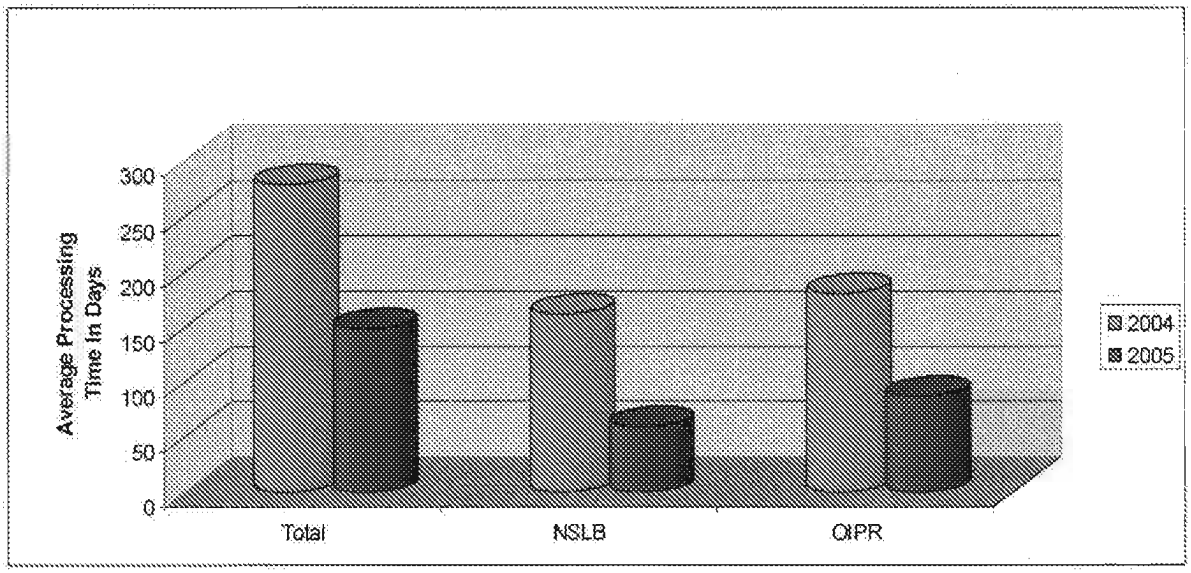
According to the OIPR Deputy Counsel for Operations, since these two OIPR attorneys have been assigned to handle Section 215 requests, she has received very few complaints about Section 215 requests. She said that ideally OIPR would like to process Section 215 requests in 60 days. NSLB attorneys also told the OIG that the process improved after the two new OIPR attorneys were assigned to handle Section 215 requests. ~~(S)~~ (U)

In fact, as the diagram below demonstrates, the time it took OIPR and NSLB to process withdrawn and approved Section 215 applications improved considerably comparing applications submitted in 2004 and applications submitted in 2005. (U)

DIAGRAM 4.2 (U)
Comparison of NSLB and OIPR Processing Time for Calendar Years 2004 and 2005 (U)



Source: OIPR and FBI (U)

III. OIG Analysis (U)

Congress directed the OIG to examine "the justification for the failure of the Attorney General to issue implementing procedures governing requests for the production of tangible things . . . in a timely fashion, including whether such delay harmed national security." To respond to this directive, we first attempted to determine whether the Attorney General was required by statute, regulation or other directive to issue implementing procedures. In our review of documents and interviews with witnesses, we found no such requirement. However, we also found no evidence that the

Attorney General or any Department official directed OIPR or the FBI to implement Section 215 procedures. We found that OIPR and the FBI eventually developed standard forms and applications for obtaining Section 215 orders. NSLB distributed a standard request form to field offices in October 2003, and NSLB and OIPR completed a standard application and order in the spring 2004. As discussed above, we determined that the Department, including OIPR, and the FBI were focused on processing full content FISA requests, training, and hiring personnel to address the increased workload and did not focus on the need for templates and procedures for Section 215 orders. (U)

A. Bureaucratic or Procedural Impediments (U)

Congress also directed the OIG to identify bureaucratic or procedural impediments that negatively affected the FBI's ability to obtain Section 215 orders. We found several impediments that hindered the FBI's ability to obtain Section 215 orders. First, we discuss these impediments in detail, including the legal disagreement concerning statutory interpretation, the lack of resources, the multi-layered process for obtaining Section 215 orders, and the lack of knowledge in the field about Section 215 authority. Thereafter we discuss the effects of these impediments on the implementation and use of Section 215. (U)

1. Statutory interpretation (U)

The first impediment was the uncertainty in interpreting the law. One of the legal issues that affected several of the first requests generated in 2002 and 2003 was the intersection of Section 215 with the Buckley Amendment that provides for the production of educational records. OIPR's interpretation of the statute was that Section 215 did not trump existing laws because, unlike other provisions of FISA, Section 215 did not include in the business records provision the phrase "notwithstanding any other provision of law." As discussed above, while some NSLB attorneys disagreed with this interpretation, NSLB was not willing to push the issue with the FISA Court, and as a result no request for educational records was presented to the FISA Court between CY 2002 and 2005. (U)

According to NSLB and OIPR attorneys, this legal impediment to obtaining educational records has been addressed. Section 106(a)(2) of the Reauthorization Act amended FISA by adding 50 U.S.C. § 1861(a)(3), which specifically addresses educational, medical, tax, and other sensitive categories of business records. The amendment provided that when the FBI is requesting such items, the request must be personally approved by the FBI Director, the FBI Deputy Director, or the Executive Assistant Director for National Security. According to several NSLB and OIPR attorneys we

interviewed, because this provision clarifies that educational records are obtainable through the use of a Section 215 order, the non-disclosure provisions of Section 215 apply rather than the notification provisions of the Buckley Amendment. (U)

NSLB and OIPR attorneys also disagreed over the interpretation of the relevance standard and how much information had to be included in Section 215 applications about the items requested and their connection to an FBI investigation. NSLB attorneys believed that the level of detail required by OIPR about the investigations in the applications was far beyond that needed to satisfy the relevance threshold. On the other hand, OIPR attorneys believed the information was necessary in order to persuade the FISA Court to approve the applications. NSLB and OIPR eventually agreed upon the content and form of a standard application after several months of back and forth about the issue. Even once a standard application form was agreed upon, NSLB attorneys continued to have disagreements with OIPR attorneys in individual cases about the level of detail required. However, once the two OIPR attorneys who were assigned to Section 215 requests in early 2005 took over, according to NSLB and OIPR attorneys, the number of disagreements on this issue has decreased significantly and the parties are working well together. (U)

2. Insufficient resources (U)

The second impediment to obtaining Section 215 was the lack of resources devoted to this process. Neither NSLB nor OIPR had adequate resources to dedicate to the implementation of Section 215 requests after passage of the Patriot Act. The workload of both entities increased dramatically after the September 11 attacks and passage of the Patriot Act, and substantial resources were needed to process full content FISA applications. Both entities were authorized to hire large numbers of employees, and by 2004 both NSLB and OIPR had grown substantially. However, by spring 2004 a significant backlog of full content FISA applications had developed, and the Attorney General ordered OIPR and NSLB to create a task force specifically to address the FISA backlog. NSLB was required to detail approximately 10 attorneys to OIPR to work on the backlogged full content FISA applications. (U)

As a result, NSLB did not focus on Section 215 requests or make obtaining a Section 215 order a priority until late 2003 when NSLB submitted a group of Section 215 applications to OIPR in October 2003. In addition, around this same time an NSLB attorney was finally designated as the point of contact within NSLB for Section 215 requests. (U)

In July 2004 OIPR attempted to address NSLB's concerns about the processing of Section 215 requests by assigning a detailed NSLB attorney to handle Section 215 requests. This detailed NSLB attorney, however, was also assigned to handle full content FISA applications, and NSLB attorneys told the OIG that this decision did not address the processing delays associated with Section 215 applications. In spring 2005, the Deputy Counsel for OIPR assigned two OIPR attorneys to handle Section 215 requests – a line attorney and a supervisor.[77] According to OIPR and NSLB attorneys, the dedication of these two attorneys to Section 215 requests has improved the process significantly. (U)

3. Multiple layers of review (U)

The multiple layers of review for Section 215 applications also delayed their issuance. The process for obtaining a Section 215 order involves multiple layers of review in the FBI field office, in FBI Headquarters and NSLB, and in OIPR. An agent must obtain his supervisor's approval, then the SAC and the CDC approval, before the request is forwarded to FBI Headquarters and NSLB. In NSLB, a line attorney drafts the application package, which is then reviewed by a supervisor before it is provided to OIPR. In OIPR, a line attorney prepares the package, and the work is also reviewed by a supervisor before it is ready to be finalized for signature. After OIPR returns the "final" version to NSLB for signature, the application and order are reviewed by NSLB personnel and changes may be requested as a result of this review. (U)

At each step the reviewers at the FBI or OIPR often have questions, which may require additional information from the originating field agent. If an OIPR attorney has a question, he or she usually communicates with the NSLB attorney, who contacts the agent for the information and then communicates the response back to OIPR. Supervisors at FBI Headquarters or in the field or CDCs in the field offices may also be involved in these communications if there are disagreements about the adequacy of the information provided or questions about the basis of the FBI's assertions in its applications. (U)

Because of the number of levels of review and the multitude of entities involved in preparing a Section 215 application, the review process can be lengthy. In addition, without close management an application can be delayed for weeks or months at any stage. Even with close management of the process, the process from beginning to end would likely take several

[77] Around this same time, the NSLB attorney detailed to OIPR returned to the FBI. (U)

weeks with respect to a simple or problem-free Section 215 request. An OIPR Deputy Counsel told the OIG that OIPR would like to complete its part of the process in 60 days. However, as detailed above, the OIPR process in 2005 for approved applications took much longer – on average 88 days. In addition, the Counsel for Intelligence Policy told us that for agents the process can seem unnecessarily complicated because the agents see "the layers of review [involved in obtaining a FISA business record order] as opposed to [the simpler process] to obtain a criminal grand jury subpoena."[78] (~~S~~) (U)

4. Field office knowledge about Section 215 orders (U)

Finally, based upon our interviews in the field, we also determined that FBI field offices still do not fully understand Section 215 orders. Several agents told the OIG that they were only vaguely aware of Section 215 authority, and many agents stated that they did not know what the process was for obtaining a Section 215 order. (U)

B. Effect of Impediments (U)

The bureaucratic, legal, and other impediments discussed above contributed to the FBI not obtaining its first Section 215 order until May 2004 despite the field generating its first request in April 2002. Another effect of the impediments was that in some instances field offices were not contacted about Section 215 requests until several months after the requests had been submitted to NSLB. In various cases, once the agents were contacted the information was no longer needed because of developments in the case, such as [redacted] (S) In several instances agents were aware that NSLB received their requests, but their requests remained pending for months due to disagreements between NSLB and OIPR about whether a particular request should go forward. In other instances, the requesting agents told the OIG that they never received a response back from NSLB or OIPR. (~~S~~) (U)

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We found that the processing delays and the lack of response to field office applications contributed to a perception among FBI field agents that

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[78] The Reauthorization Act also requires that minimization requirements be developed for all documents obtained pursuant to a FISA business record order. The Counsel for Intelligence Policy predicted that agents will likely be more reluctant to use the FISA business records provision because of the additional level of complexity to the process involved in minimization in the use of FISA business records. We will assess the effect, if any, of minimization procedures on the use of Section 215 authority in our review of Section 215 orders in CY 2006. (U)

the process is too slow and not worth the effort. We interviewed several agents who had never sought a Section 215 order, but they reported to the OIG that they had "heard" about the process taking far too long. Several agents told us that if they could obtain the Section 215 order in a shorter time, such as 30 days or 60 days, they would be more encouraged to use Section 215 requests. Agents also stated that if they were to identify an item that they needed quickly, they would seek to determine whether the item could be obtained through a national security letter, a grand jury subpoena, or other process that is faster than the Section 215 process. ~~(S)~~ (U)

We also asked FBI and OIPR employees whether they believed the problems in implementing Section 215 and the delays in obtaining Section 215 orders harmed their cases or national security. None of the FBI and OIPR officials we interviewed said that they were aware of any harm to national security caused by the delay in obtaining Section 215 orders. None of the agents who initiated the requests for Section 215 orders told the OIG that their cases were negatively affected by the inability to obtain the information sooner. The FBI's Deputy General Counsel of NSLB told us that the failure to obtain a business record order or to obtain it expeditiously may have negatively impacted the pace of national security investigations, but that she did not believe that this meant that there was harm to national security. (U)

We were provided 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 a Section 215 request. However, we were concerned by the number of instances in CY 2002 through CY 2005 that the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay or other impediment to obtaining an order. (U)

CHAPTER FIVE
USE AND EFFECTIVENESS OF INFORMATION OBTAINED FROM SECTION 215 ORDERS (U)

I. Introduction (U)

Congress also directed the OIG to include in its review an examination of the types of records obtained under Section 215 orders and the importance of those records; the manner in which the information is collected, retained, analyzed, and disseminated by the FBI; whether and how often the FBI used information obtained from Section 215 orders to produce an "analytical intelligence product" for distribution to, among others, the intelligence community; and whether and how often the FBI provided information obtained from Section 215 orders to law enforcement authorities for use in criminal proceedings. (U)

In this chapter, we first discuss the collection, analysis, and retention process with respect to Section 215 orders. Next, we describe in detail the types of information that have been obtained and how this information has been used in investigations, including whether any information has been disseminated to the intelligence community or used in any criminal proceeding. Finally, we evaluate the effectiveness of the FBI's use of Section 215 authority. (U)

II. How Section 215 Information is Collected, Analyzed, Retained, and Disseminated (U)

A. Collection, Analysis, and Retention (U)

Before items subject to a Section 215 order can be obtained, the order must be served upon the entity that has custody of the records. Personal delivery or service of the order is typically accomplished by the requesting or "originating" FBI field office, unless the recipient of the order is outside that district. In that instance, the FBI field office where the recipient is located is asked by the originating field office to serve the order. The manner in which information from Section 215 orders is collected depends on the category of information sought. (U)

For pure Section 215 orders, the records are typically obtained by the requesting FBI field office directly from the recipient, which either produces the documents in hard copy or electronic format.[79] The records obtained are reviewed and analyzed either by the initiating case agent or an FBI intelligence analyst. If after reviewing the information the case agent determines no further investigation is warranted, the agent stores the information with the rest of the investigative case file. The agent may write an Electronic Communication (EC) summarizing the information obtained for purposes of documenting the existence of the records electronically in ACS, the FBI's electronic case file 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, such as to an intelligence agency, the agent prepares a Letterhead Memorandum or other appropriate form of communication. (U)

For "combination" Section 215 orders, FBI personnel told us that if the recipient and the FBI have technological compatibility, the recipient will transfer the requested subscriber information electronically directly into the FBI computer system called "Telephone Applications."[80] If the FBI and recipient's systems are not compatible, the information is provided to the FBI in another format, such as a computer diskette or hard copy. This information is then electronically uploaded or manually inputted into Telephone Applications. The information may also be included in an EC and uploaded into ACS if the agent determines it has some relevance or significance that should be documented in the case file. (U)

In some instances, subscriber information is not automatically provided with the telephone toll information. In these instances, the agents go back to the communication provider to request the additional information for specific telephone numbers that they obtained from the order and have identified to be of interest.[81] This information is then either electronically uploaded or manually entered into Telephone Applications. (U)

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[79] In those instances where the requesting FBI field office is located in a different district than the recipient of the order, the FBI field office which serves the order is asked to personally retrieve the requested records and forward them to the requesting office. (U)

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

[81] The subscriber information obtained by a "combination" order 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 national security letters are used to obtain the subscriber information related to that phone number. (U)

With respect to combination orders, the subscriber information is reviewed by the case agent by querying Telephone Applications and determining what links there are between the information obtained and existing names, telephone numbers, and other identifying information. An intelligence analyst may assist the case agent in reviewing the information obtained and performing additional analyses of the data. (U)

Information stored in ACS and Telephone Applications may be accessible by personnel from other law enforcement or intelligence agencies who are assigned to the FBI in some capacity, such as a task force addressing terrorism matters. Access depends on the clearance level of the non-FBI personnel and whether the information is "restricted" in the computer systems. (U)

B. How the Information Obtained Has Been Used in Investigations (U)

As described in Chapter Three, the types of records FBI agents obtained through pure Section 215 orders included driver's license records, public accommodations, apartment records, credit card records, and telecommunications subscriber information for telephone numbers records. (S) The FBI was able to obtain records in only [redacted] cases.[82] ~~(S)~~ (U)

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We interviewed the agents who obtained records that were the subject of Section 215 orders. The agents stated the records obtained were important and useful in two ways: (1) the records provided substantive information that was relevant to the investigation and either confirmed prior investigative leads or contributed to the development of additional investigative information; or (2) even if the records did not contribute to the development of additional investigative information, they were still valuable as "necessary steps to cover a lead." Most of the agents we interviewed said the records obtained fell in the second category, because the records typically did not provide additional investigative information, but they helped the agents exhaust every lead. They also stated that the importance of the information is sometimes not known until much later in an

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[82] In one of the cases in which no records were obtained, the FBI field office had sought (S) [redacted] records. The FBI agent told the OIG that the [redacted] reported that it did not have the records that were the subject of the Section 215 order [redacted] (S) the Section 215 order was not served. The FBI field office sought [redacted] (S) and records related to [redacted] including [redacted] (S) The case agent told the OIG that service of the order was delayed because of legal issues raised by th[redacted] He said he did not serve the order because he was able to obtain information through other means. ~~(S)~~ (U)

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investigation when the information is linked to some other piece of intelligence that is obtained. We discuss four illustrative cases in detail below. (U)

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2. Case No. 2 (U)

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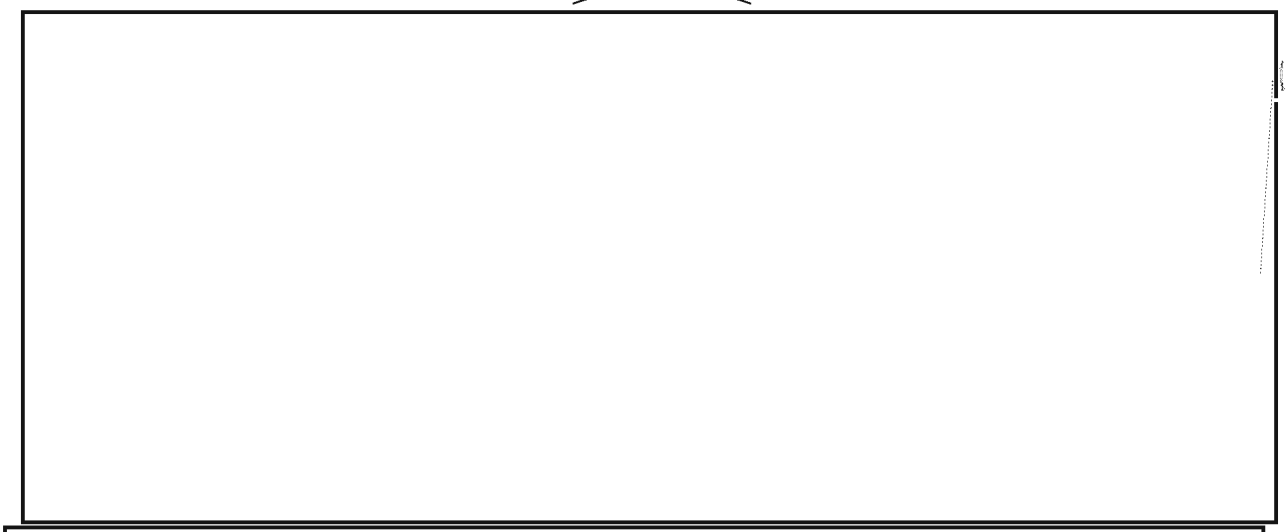

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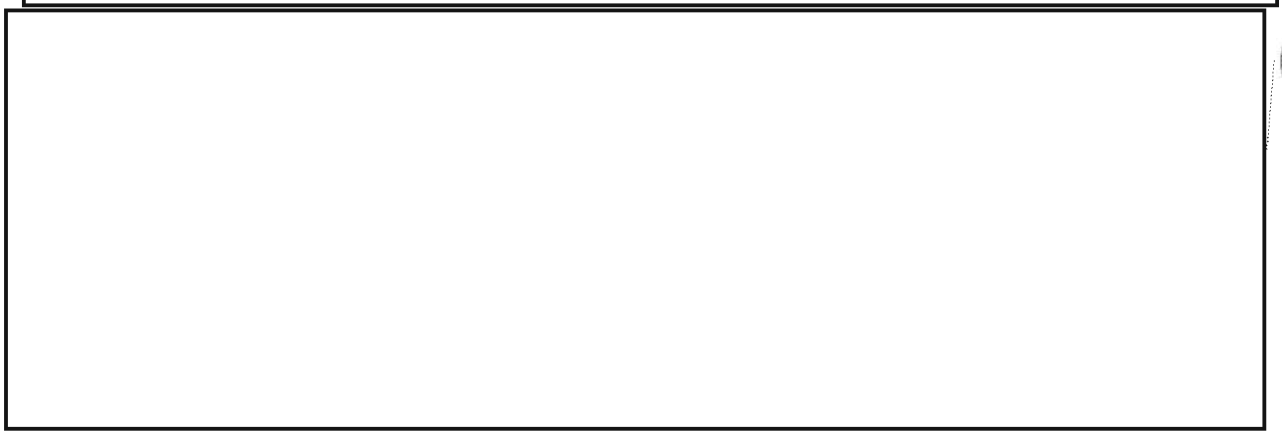

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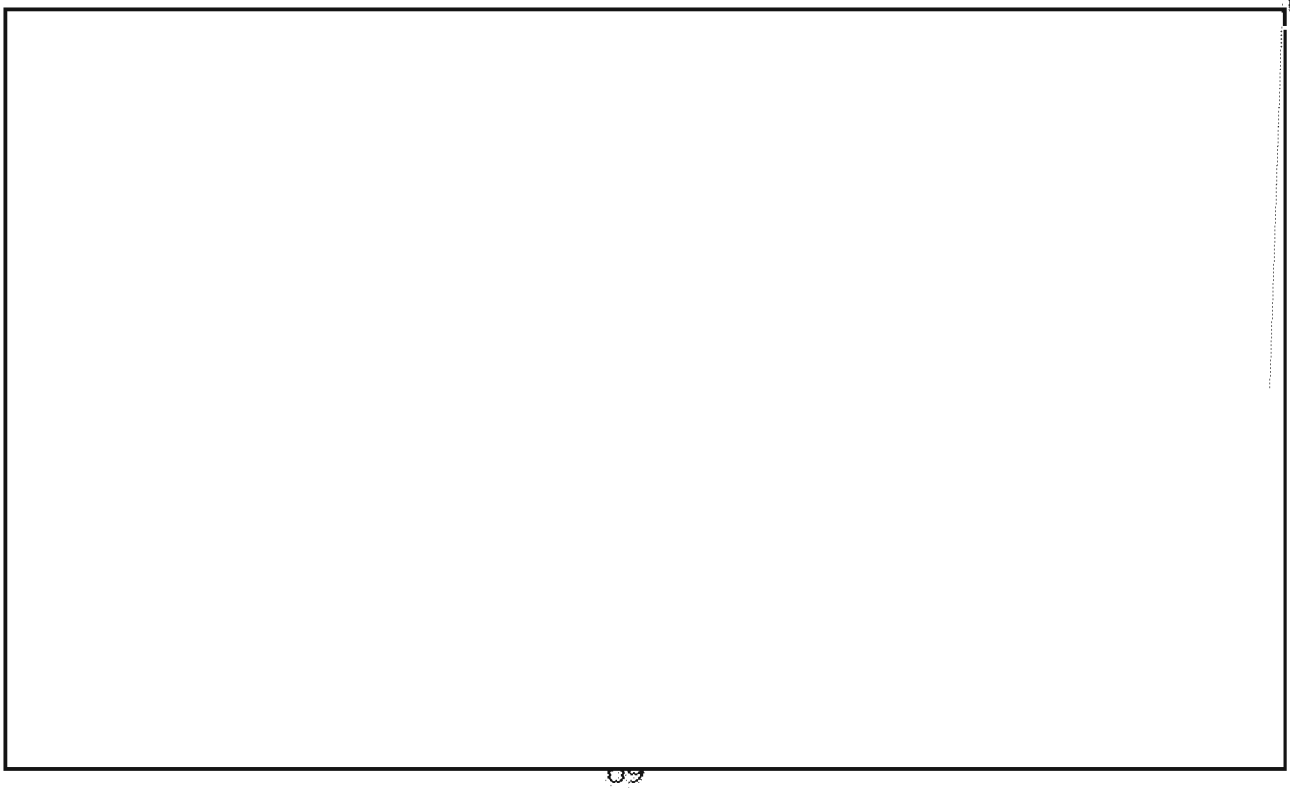
3. Case No. 3 (U)



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4. Case No. 4 (U)

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C. Dissemination (U)

We found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in three instances. However, the FBI did not create any analytical intelligence products based on the information obtained in response to Section 215 orders. In one counterterrorism case, the FBI agent obtained [redacted] (S) The agent received the information from [redacted] The agent sent the information to an outside intelligence agency to determine whether the agency could provide more information about [redacted] in response to the Section 215 order. The agent told the OIG that he did not receive a response back from the agency to his request. For the other two instances, the orders were sought by the FBI on behalf of another agency. The requesting intelligence agency had determined that [redacted] (S) In addition, the

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requesting intelligence agency had determined that [redacted] (S) The two orders that were eventually served were obtained in July 2005. The FBI obtained the information from the custodian of the information in November 2005, and the information was provided to the intelligence agency that requested the orders.[84] ~~(S)~~ (U)

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We also obtained limited information about the dissemination of information produced in response to combination Section 215 orders. Because there were 141 combination orders, we were unable to interview all of the case agents associated with these orders. However, in our field office visits we interviewed four agents who had obtained combination orders. None of these agents reported disseminating information obtained in response to the combination orders. However, as previously discussed, information obtained in response to combination orders is uploaded into Telephone Applications. We determined that personnel from other law enforcement and intelligence agencies who are assigned on detail to the FBI in some capacity, such as on a task force addressing terrorism matters, may have access to Telephone Applications. (U)

D. Use in Criminal Proceedings (U)

We also sought to determine whether any of the information obtained from any Section 215 order was used in any criminal proceeding. If a case agent wants Section 215 information to be used in a criminal proceeding, approval from the Attorney General must be obtained in certain instances. With respect to electronic surveillance, physical searches, and pen register/trap and trace devices, FISA provides that the Attorney General must approve use of the information in subsequent law enforcement proceedings. 50 U.S.C. §§ 1806 (b)(electronic surveillance), 1825(c)(physical searches), and 1845(b)(pen register/trap and trace devices).[85] However, FISA does not explicitly require Attorney General "use authority" for information obtained from Section 215 orders. With respect to use of information obtained from "combination" orders, "use authority" is required because these orders produce information derived from FISA pen

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[84] The recipient of the order had in its possession information for only one of the two targets of the orders – Target A. ~~(S)~~ (U)

[85] These sections of FISA provide that information acquired may not be disclosed for law enforcement purposes unless the disclosure "is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General." (U)

register/trap and trace devices which is subject to the "use authority" requirement. According to the Counsel for Intelligence Policy, whether the FBI would be required to obtain Attorney General approval to use information obtained from a pure Section 215 order is an open question because the FBI has not yet sought to use information from a pure Section 215 order in a criminal proceeding. According to NSLB attorneys, the FBI does not believe that the FBI is required to obtain Attorney General approval to use Section 215 information in a criminal proceeding because the statute does not contain any such requirement. (U)

With respect to use authority of other types of FISA-derived information, each request for use authority must be submitted to the Attorney General through OIPR. OIPR maintains a log book recording each request for use authority. ~~(S)~~ (U)

We did not identify any instance in which information obtained from a pure Section 215 order was used in a criminal proceeding. We identified only one instance in which use authority approval was sought for information from a combination Section 215 order. In this case, the field office had developed information of possible [redacted] (S) The field office sought and obtained Attorney General approval to use the FISA electronic surveillance and combination order information in a grand jury investigation and in grand jury subpoenas. The target of the combination order was not among the targets of the criminal investigation. The FBI case agents told the OIG that although use authority was obtained for the FISA-derived information, no grand jury subpoenas were issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. ~~(S)~~ (U)

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III. OIG Analysis (U)

In evaluating the effectiveness of Section 215 authority, we first considered the number of pure Section 215 orders obtained during CY 2002 through CY 2005.[86] The FBI obtained only 18 unique Section 215 orders in the 3 calendar years following passage of the Patriot Act.[87] (U)

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[86] We evaluate the use of Section 215 authority with FISA pen register/trap and trace orders separately below. (U)

[87] Unlike FISA electronic surveillance authority, which had been used by the FBI since 1978, the business records authority was relatively new and had not been widely used even (cont'd)

We found that a significant number of Section 215 orders were not sought or obtained because of the legal and bureaucratic impediments discussed in Chapter Four. The question concerning the applicability of the Buckley Amendment to Section 215 requests for educational records played a role in the FBI not obtaining Section 215 orders in four instances. The other impediments we discussed, such as the disagreements between NSLB and OIPR about the amount of information sufficient to satisfy the relevance standard, insufficient resources, and the multi-layered review process, resulted in many Section 215 requests not being processed for many months. We were able to determine that with respect to seven Section 215 requests that were withdrawn, the requests had been pending with NSLB or OIPR for several months, and in one instance over a year, at the time the field office notified NSLB that it was withdrawing the request because the investigation had changed course or was being closed.[88] In addition, we identified five field office requests for Section 215 orders that were never responded to by NSLB or OIPR, and neither NSLB nor OIPR employees were able to explain what happened to those requests.[89] (S) (U)

These processing problems not only resulted in far fewer Section 215 orders being obtained than were requested but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile. Agents told the OIG that the length of the process to obtain a Section 215 order is a significant impediment to its use and that agents will typically attempt all other investigative tools before resorting to a Section 215 request. This negative perception about the Section 215 process may also have affected the number of Section 215 orders sought by the field offices. (U)

Next, we considered the type of information that has been obtained through the use of pure Section 215 orders and how that information has been used and disseminated in national security investigations. We found no instance where the information obtained from a Section 215 order resulted in a major case development such as the disruption of a terrorist

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before passage of the Patriot Act. The FBI did not obtain business records authority until 1998 and had used it only once before passage of the Patriot Act. (U)

[88] We identified a total of nine instances in which requests were withdrawn because the investigation changed course or was closed. However, in two of these cases we were unable to determine when the request was withdrawn. (S) (U)

[89] We identified a total of six requests for which we were unable to determine the reason the request was withdrawn. We do not have sufficient information with respect to two of the requests to determine whether the field office received a response from NSLB or OIPR about the request. (S) (U)

plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to other intelligence agencies. However, we found that Section 215 orders have been used to obtain information that allowed the FBI to ascertain [redacted] (S) and to obtain information about the [redacted]. In addition, the FBI used information from a Section 215 order to try to identify [redacted] (S) [redacted] (S) (U)

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FBI agents told us they believe that the kind of intelligence gathering from Section 215 orders was essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation when the information is linked to some other piece of intelligence that is obtained. (U)

The field agents we interviewed described Section 215 authority as a "tool of last resort" that may be "critical" when other investigative authority or investigative methods do not permit the FBI to obtain the information. In many national security investigations, there is no criminal investigation and therefore the FBI is unable to seek grand jury subpoenas. In addition, national security letters are limited in scope and do not cover large categories of third party information. Agents also told us that in some instances they had in fact used other investigative techniques, but these efforts were unsuccessful. (U)

We also interviewed other FBI officials and attorneys at the FBI and OIPR concerning the effectiveness of Section 215 orders. These witnesses, including the Deputy General Counsel of NSLB, the Counsel of OIPR, and the NSLB Assistant General Counsel who serves as the point of contact for all Section 215 requests, told the OIG that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means, such as grand jury subpoenas or national security letters.[90] The Counsel for Intelligence Policy also described Section 215 authority as a "specialized tool that has its purpose." (U)

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[90] One OIPR attorney told us that the attorney believed "nothing would be lost" if the Section 215 provision was repealed. While agreeing that the use of the provision for the subscriber information was useful, the OIPR attorney stated that "only time will tell" if the "pure" requests will be useful. The OIPR attorney was of the opinion that with the passage of the Reauthorization Act allowing for challenges by recipients of the order, the FBI's use of Section 215 might decline. (U)

The evidence showed that Section 215 authorities provide a specialized tool to obtain information in national security investigations that cannot be obtained by other means. At the same time, however, the evidence showed that the FBI did not use this specialized tool effectively because of the impediments to its use that we described above. Some of these impediments have since been addressed. For example, NSLB and OIPR told the OIG that the Reauthorization Act provision specifically allowing the FBI to obtain educational and other sensitive records through Section 215 orders will allow the FBI to obtain these records; the FBI has a Section 215 request form that has been distributed to and is used by all field offices; and NSLB and OIPR have developed a template application form that is used in all Section 215 applications. In addition, NSLB and OIPR witnesses told the OIG that the attorneys assigned to Section 215 processing in both offices work well together. Because these impediments have been resolved, the FBI and OIPR should be able to process more Section 215 orders in the future. The most significant remaining impediment is the lengthy process for obtaining a Section 215 order. (U)

We recognize that the multiple layers of review to obtain Section 215 orders stems in part from the fact that business records in counterintelligence and counterterrorism cases can only be obtained through the FISA process. We also recognize that the multiple levels of review within the field office, NSLB and OIPR help to ensure that the field office is seeking to use Section 215 authority appropriately and that there is an adequate basis for the request. However, the multiple levels of review necessarily make the process slow and cumbersome. In order to ensure that extensive delays do not occur, the process must be closely managed from beginning to end. (U)

We also evaluated the use of Section 215 authority to obtain subscriber information for telephone numbers that were the subject of pen register/trap and trace orders. OIPR obtained the first "combination" Section 215 order on February [redacted] 2005. A total of 141 combination applications were submitted and approved by the FISA Court in calendar year 2005. Several FBI and OIPR attorneys we interviewed, including the Counsel for Intelligence Policy, told us that this information was very important in FBI investigations. The Deputy General Counsel of NSLB agreed, stating that the addition of Section 215s to FISA pen register/trap and trace applications was a "huge boon because without the 215s, the FBI

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would have had to issue numerous [national security letters] to get the subscriber information."[91] ~~(S)~~ (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. (U)

[91] As previously discussed, Congress has also recognized the importance of subscriber information in FISA pen registers. As part of the Reauthorization Act, Congress amended the FISA pen register provision to include subscriber information. (U)

CHAPTER SIX
CONCLUSIONS (U)

As required by the Patriot Act reauthorization legislation, the OIG conducted this review of the FBI's use of the authority to obtain business records as expanded by Section 215 of the Patriot Act. The Act required the OIG to examine how many requests were prepared by the FBI; how many applications were approved, denied, or modified by the FISA Court; any improper use of Section 215 authority; and any noteworthy facts or circumstances concerning Section 215 requests. Congress also directed the OIG to examine the Department's failure to issue implementing procedures governing Section 215 requests, whether this failure harmed national security, and whether bureaucratic or other impediments hindered the FBI's use of Section 215. Finally, Congress directed the OIG to review the effectiveness of the FBI's use of Section 215, including the types and importance of information obtained, whether information has been disseminated or used in analytical products, and whether the information has been used in any criminal proceedings. Our review covered calendar years 2002 through 2005. As required by the Reauthorization Act, we will report in late 2007 on the use of Section 215 in 2006. (U)

Our review found that the FBI did not obtain its first Section 215 order until May 2004. From then until the end of 2005, the period of our review, the FBI obtained a total of 21 pure Section 215 orders. However, in February 2005, the FBI also began attaching Section 215 requests to pen register/trap and trace applications to obtain subscriber information for the telephone numbers captured through the pen register and trap and trace devices. These Section 215 requests were called "combination" or "combo" requests. Throughout the remainder of 2005, the FBI obtained a total of 141 combination orders. We found that all 162 Section 215 applications (21 pure requests and 141 combination requests) submitted to the FISA Court were approved. (U)

We also identified 31 Section 215 requests that were withdrawn, either while they were pending approval at the FBI's National Security Law Branch or at OIPR. We identified five categories of reasons for the withdrawn requests: (1) the investigation was closed or changed course; (2) an alternative investigative tool was used; (3) statutory limitations; (4) insufficient information to support the request; and (5) unknown. (U)

Only four Section 215 orders – two pure orders in 2004 and two combination orders in 2005 – were modified by the FISA Court, and we found the modifications were not significant. (U)

We identified two instances of improper use of Section 215 orders. Both instances concerned combination orders in which the FBI obtained pen register/trap and trace authority in 2005. We did not find any instance of improper use of pure Section 215 authority. In one instance, the case agent overlooked documents in the file indicating that the telephone number no longer was being used by the target of the investigation. This error was not noticed until several months later when a new case agent took over the investigation. In the second instance, the FBI collected data for several weeks on a telephone number that did not belong to the target because the telephone company belatedly notified the FBI that the target had stopped using the telephone number. In both instances, the FBI sequestered and destroyed the improperly collected data. The FBI also reported both instances of improper use to the President's Intelligence Oversight Board (IOB), as required. In addition, both incidents were reported to the FISA Court by OIPR. (U)

The Reauthorization Act also directed the OIG to examine the justification for the failure of the Department of Justice Attorney General to issue implementing procedures governing Section 215 requests for business record applications and whether such delay harmed national security. We found that the Patriot Act did not specifically require implementing procedures, and no one in the Department directed OIPR or the FBI to develop such implementing procedures. However, our review determined that such guidance would have been useful. Eventually, OIPR and the FBI developed standard forms and applications for obtaining Section 215 orders. We found that the reason for this delay was that the Department, including OIPR and the FBI were focused on processing full content FISA requests, training, and hiring personnel to address the increased FISA workload and therefore did not focus on the need for templates and procedures for Section 215 orders. (U)

We also found that when FBI field offices began requesting Section 215 orders, they encountered processing problems and their ability to obtain Section 215 orders was affected by several impediments. These impediments included disagreements between the FBI and OIPR concerning statutory interpretation, insufficient resources to address Section 215 requests expeditiously, the multi-layered process for obtaining Section 215 orders, and the lack of knowledge throughout FBI field offices about Section 215 authority. These processing problems and impediments not only resulted in far fewer Section 215 orders being obtained than were requested, but also contributed to a perception within the FBI that Section 215 orders took too long to obtain to be worthwhile. Some, but not all, of these impediments have since been resolved. (U)

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, we found that the multi-layered review process, combined with the other impediments described above, resulted in long delays in obtaining Section 215 orders. As a result, in many instances the FBI did not receive approval to obtain the Section 215 information until many months after the original request was made. (U)

We also noted the number of instances in which the FBI identified a need for information in a national security investigation but was unable to obtain that information because of a processing delay or other impediment to obtaining a Section 215 order. (U)

With respect to the effectiveness of the FBI's use of Section 215 authority, the evidence showed that Section 215 authority provides the FBI with a specialized tool to obtain certain information in national security investigations that cannot be obtained by other means. We found that the FBI obtained a wide variety of records using Section 215 orders, such as driver's license records; apartment leasing records; credit card records; [redacted] (S) b1 b3 b7E

We examined how the FBI has used this information in national security investigations. We found that Section 215 orders have been used primarily to exhaust investigative leads, although in some instances the FBI obtained identifying information about suspected agents of a foreign power not previously known to the FBI. However, the evidence showed no instance where the information obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot. In addition, we found that the FBI disseminated information obtained from pure Section 215 orders to another intelligence agency in only three instances, and the FBI did not create any analytical intelligence products based on the information obtained in response to pure Section 215 orders. We identified only one instance in which the FBI sought to use information from a Section 215 order in a criminal proceeding. This information was derived from a combination Section 215 order. Although the FBI obtained Department approval to obtain grand jury subpoenas using this Section 215 information, no grand jury subpoenas were issued in this case and no FISA-derived information was used in the grand jury investigation or subsequent proceedings. (U)

We conducted this review mindful of the controversy concerning the possible chilling effect on the exercise of First Amendment rights posed by the FBI's ability to use Section 215 authorities, particularly the potential use of Section 215 orders to obtain records held by libraries. Our review

found that the FBI did not in fact obtain Section 215 orders for any library records from 2003 through 2005, in part because the few applications for such orders did not survive the review process within NSLB and OIPR. (U)

Finally, we are aware that the FBI began using Section 215 authority more widely in 2006. We will be assessing the effectiveness of this broader use in our next review. As directed by the Patriot Reauthorization Act, the OIG will continue to assess the FBI's use and effectiveness of Section 215 authority. (U)

APPENDIX

The Attorney General

Washington, D.C.

March 1, 2007

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

Dear Mr. Fine:

I welcome the opportunity to comment on your report entitled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records."

Your report demonstrates that the Department of Justice, including the FBI, has been responsible in using the authority granted by Congress to obtain business records under Section 215 of the USA PATRIOT Act. You offered no recommendations for improvements or other modifications to Department procedures and practices for the use of this authority.

Consistent with your findings, I believe that the initial delays in using this investigative tool, though unfortunate, have been largely if not entirely resolved and that no harm to national security resulted from those delays.

Your review found only two instances of "improper use" of the business records authority, and I respectfully submit that characterization is not apt. In both cases, errors which you describe as "inadvertent[]" (one by a case agent and the second by a third party) resulted in the FBI receiving information that was not authorized by the terms of the relevant order of the Foreign Intelligence Surveillance Court. You found that, in both cases, the FBI identified the mistakes, sequestered or destroyed the collected data, and reported the error to the Intelligence Oversight Board and to the Court. Therefore, these examples show that the oversight process is working as it should to identify and address inadvertent mistakes when they occur.

I appreciate the diligent effort by you and your staff to complete this report, and we look forward to working with you closely on the 2006 report. The Department must continually work to improve its use of these specialized investigative tools.

Sincerely,

Alberto R. Gonzales

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

E/S 00153

MEMORANDUM FOR: Glenn A. Fine
Inspector General, Department of Justice

SUBJECT: Review of the Department of Justice's Use of Section 215 Authority

REFERENCE: DOJ OIG Memorandum, Review of the Department of Justice's Use of Section 215 Authority 8 February 2007.

The Office of the Director of National Intelligence (ODNI) has reviewed your draft report entitled, "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records."

As you noted in your report, Section 215 orders are a specialized tool the Federal Bureau of Investigation (FBI) can use to obtain certain information in national security investigations that cannot be obtained by any other means. I commend your efforts in performing a comprehensive review and analysis of this critical national security investigative tool.

Your review highlighted several concerns regarding the timeliness and processing of Section 215 orders, and I believe that not only the FBI and Department of Justice, but also the Intelligence Community as a whole, would benefit from receiving your recommendations for improvements in this regard. I understand that those recommendations may be provided in your second report on this matter and I look forward to receiving them.

If you have any questions or require further assistance my Inspector General Edward Maguire can be contacted at (703) 482-4955.

J M McConnell

J. M. McConnell

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Date