



U.S. Department of Energy
Office of Inspector General
Office of Audits and Inspections

Inspection Report

Alleged Violations of Executive Order
12333, U.S. Intelligence Activities –
Improper Retention and Dissemination
of Information on U.S. Persons



Department of Energy

Washington, DC 20585

July 1, 2011

MEMORANDUM FOR THE SECRETARY

FROM: 
Gregory H. Friedman
Inspector General

SUBJECT: INFORMATION: Inspection Report on "Alleged Violations of Executive Order 12333, U.S. Intelligence Activities—Improper Retention and Dissemination of Information on U.S. Persons"

BACKGROUND

The collection, retention and dissemination of intelligence data involving U.S. Persons is generally governed by Presidential Executive Order (E.O.) 12333, United States Intelligence Activities, July 2008, as amended. U.S. Persons include United States citizens, aliens known to be permanent resident aliens, or companies incorporated in the United States. The E.O., which emphasizes protecting the legal rights of all U.S. Persons, authorizes Federal entities to collect information to protect the Nation against threats of espionage, terrorism and the use of weapons of mass destruction.

Within the Department of Energy, the Office of Intelligence and Counterintelligence (CI) is responsible for collecting, reviewing, analyzing, investigating and acting on concerns ranging from foreign intelligence to potential and actual terrorist activities. As part of its process, CI established what it termed "SPOT Reports" as an urgent communications system to capture intelligence data of national-level significance (emphasis supplied). The stated purpose was to: (1) improve the sharing of such information; and, (2) enhance incident awareness. The Department's procedures regarding treatment of information it collects on U.S. Persons require that unless a foreign nexus can be established, such information is not to be retained beyond established timeframes.

The Office of Inspector General received an allegation that the rights of U.S. Persons had been violated during the course of current Department intelligence gathering efforts. In response, we initiated a review of the facts and circumstances surrounding the allegation.

RESULTS OF INSPECTION

We substantiated aspects of the allegation. While we took no exception to collection techniques, we found that the Department had not always adequately managed SPOT Reports. We discovered that the dissemination, review, retention and deletion of SPOT Reports containing information on U.S. Persons did not always comport with the Department's *Procedures for Intelligence Activities*, October 1992, and its *Counterintelligence Directorate's Counterintelligence Professional Guide*, March 2009. Based on the 28 SPOT Reports available to us, we examined and reviewed CI practices. We found that:

- Even though the primary purpose of SPOT Reports was to communicate critical, national level intelligence matters, reviews of reports developed by field intelligence officers were either not timely or, in some cases, were never performed;
- Action was not always taken to determine whether a foreign nexus existed regarding SPOT Reports containing information on U.S. Persons;
- Some SPOT Reports were sometimes retained beyond the maximum one-year action or retention deadline;
- Officials were unable to affirmatively track and monitor SPOT Reports because they did not maintain a required dissemination list; and,
- Annual purges conducted to delete SPOT Reports that were no longer needed were not completely effective.

CI officials informed us that as a result of our inspection they had discontinued the use of SPOT Reports on U.S. Persons as of October 2010. These officials also indicated that effective January 2011, CI discontinued the use of all SPOT Reports, including those involving cyber-related events. These actions, if sustained, should address most of the problems we observed. Additional attention, however, is necessary to ensure that retained information is completely and timely purged and that CI staff is provided additional guidance on the retention of U.S. Persons information. The report contains two recommendations in this regard.

Review of SPOT Reports

Our review revealed that, in some cases, CI officials never reviewed information contained in several of the SPOT Reports we reviewed. Even in those instances when the information was reviewed, the analysis was not timely. The CI Professional Guide required that these reports be promptly reviewed to determine if a foreign nexus existed and/or whether investigative action was necessary. SPOT Reports were to be transmitted to Headquarters within 24 hours of detecting or being notified of a major case, threat or incident. Upon receipt, Headquarters was required to acknowledge and provide any necessary guidance to senior CI officials within seven days after receiving the SPOT Reports. The CI Professional Guide also specified that follow-on update reporting from the CI Field office was to occur within seven days and that the follow-on reporting would continue until no longer required by Headquarters. In spite of these very specific timelines, some SPOT Reports were never reviewed, and, as noted, the review process, even when initiated, was not carried out on a timely basis. In response to our inquiries, CI officials acknowledged that they failed to promptly complete required reviews of SPOT Reports prepared by Field CI officers.

Control and Use of SPOT Reports

As noted in CI's procedures, the Department adopted SPOT Reports as a means of quickly disseminating and acting on items of critical intelligence. As an aid in tracking and controlling SPOT Reports, CI procedures required the maintenance of a dissemination list for all reports.

However, during our inspection, we determined that CI officials had not properly tracked and monitored all SPOT Reports and that they had not maintained a dissemination list. Due to the absence of the dissemination list, CI officials could not determine, on a real time basis, the total number of SPOT Reports for the period encompassing calendar years 2006 through 2010. Based on subsequent data calls to each of its Field Intelligence Officers, CI officials later told us that its Field Offices generated 416 SPOT Reports from July 2006 to January 2011. While CI could not furnish all of the reports because of the passage of time and various actions to purge records, we were able to gather and review 28 SPOT Reports.

Our testing of 28 SPOT Reports revealed that 12 reports (almost 43 percent) contained information on U.S. Persons. Of the 12 reports, 10 appeared to relate only to routine or general security matters. Two reports provided a foreign nexus. In our judgment, the use of SPOT Reports to capture routine security matters was inconsistent with the underlying purpose of the SPOT Report process as established by the Department, namely to report on issues related to urgent national-level intelligence matters.

Retention and Deletion of SPOT Reports

CI's Professional Guide indicated that information on U.S. Persons collected during the course of an inquiry that is never elevated to an investigation may be retained temporarily for up to one year to determine whether it met the foreign nexus requirements and/or whether further investigation was needed. However, officials were required to immediately delete information at any time during that year if they concluded that there was no indication of foreign activity or contact and/or an investigative case is not to be opened. The Professional Guide also provided for an annual review designed to purge all information on U.S. Persons that should not have been maintained. The guidance further explained that CI should only retain information from the SPOT Reports documenting the actual referral, generic activity and outcome of the inquiry, but no identifying information on U.S. Persons.

We found, however, that processes intended to ensure that information on U.S. Persons contained in SPOT Reports was completely purged when no longer needed were not always effective. Specifically, we determined that SPOT Reports lingered on servers and backup tapes even after routine annual purges were conducted. SPOT Reports, some containing information on U.S. Persons, were reportedly purged by the Field offices as a part of a pre-established annual process or sooner if they were determined not to be needed. However, CI officials were able to retrieve specific reports that they told us had been deleted during the annual purge. In our view, this confirmed that the annual purges were not entirely effective in eliminating data retained on U.S. Persons.

We determined that certain other reports were retained because Field offices assumed that SPOT Reports in the intelligence information system were being tracked and completely deleted by Headquarters officials, while Headquarters officials believed that those requirements were being monitored and accomplished by the Field offices. In addition, CI officials acknowledged that they retained SPOT Reports locally in e-mail folders, spreadsheets and/or databases.

IMPACT

While trying to determine the underlying cause of the problems with review, retention and dissemination of SPOT Reports, we found that some CI officials were not fully conversant with laws, regulations, executive orders and procedures concerning retention of information gathered on U.S. Persons. Current CI management acknowledged that there was some lingering discomfort with the SPOT Report process; however, due to a number of pressing issues, management was unable to address the situation prior to our inspection. The failure to promptly review SPOT reports and take appropriate follow-on action increases the risk that the Department may improperly retain information on U.S. Persons. In addition, delay in reviewing and acting on information contained in such reports increased the risk that important intelligence-related events may have gone unnoticed; although, no such matter came to our attention during the inspection.

RECOMMENDATIONS

To help improve the purge/deletion process and ensure that information on U.S. Persons that is not needed is completely and finally deleted, we recommend that the Director, Office of Intelligence and Counterintelligence, take immediate action to:

1. Ensure all retrievable SPOT Reports that contained information on U.S. Persons that are no longer needed are promptly deleted from all electronic media and paper files; and,
2. As appropriate, provide staff with additional guidance or clarify policies regarding restrictions of the use and retention of information on U.S. Persons.

MANAGEMENT AND INSPECTOR COMMENTS

The Department's Office of Intelligence and Counterintelligence concurred with the report's recommendations. We consider management's comments responsive to our recommendations. Management comments are included in their entirety in Attachment 3.

Attachments

cc: Deputy Secretary
Associate Deputy Secretary
Chief of Staff
Director, Office of Intelligence and Counterintelligence
Acting General Counsel

OBJECTIVE, SCOPE AND METHODOLOGY

OBJECTIVE

Determine whether Executive Order 12333 and/or related procedures were violated by Counterintelligence (CI) officials and/or staff at multiple Department of Energy (Department) locations. Specifically, it was alleged that CI officials retained and disseminated information on U.S. Persons via SPOT Reports without a foreign nexus.

SCOPE

We conducted our inspection between October 2010 and March 2011. This allegation-based inspection focused on 8 of the 18 CI Field Office locations:

- Washington Field Office (WFO), Washington, DC
- Oak Ridge Field Office (ORFO), Tennessee;
- Kansas City Field Office (KCFO), Missouri;
- Sandia Field Office (SFO), located in California and New Mexico;
- Lawrence Livermore Field Office (LLFO), California;
- Lawrence Berkley Field Office (LBFO), California;
- Albuquerque Field Office (AFO), New Mexico; and,
- Pantex Field Office (PFO), Texas.

METHODOLOGY

To accomplish the objective, we interviewed 27 Department CI officials, Federal and contractors, from 8 of the Field offices reviewed. We also reviewed 28 subject SPOT Reports that were referenced by the complainant or was developed during the course of our review.

This inspection was conducted in accordance with the Council of the Inspectors General on Integrity and Efficiency's "Quality Standards for Inspection and Evaluation," January 2011.

We held an exit conference with management on May 25, 2011.

PRIOR INSPECTION REPORTS

The following Department of Energy (Department), Office of Inspector General, reports are related to the handling of information on U.S. Persons and Foreign Intelligence Surveillance Act policies and procedures concerning tracking and controlling of Federal Bureau of Investigation cases by the Office of Intelligence and Counterintelligence (IN) Directorate:

- [*Selected Aspects of the Department of Energy's Activities Involving the Foreign Intelligence Surveillance Act*](#) (INS-L-09-05, May 2009). We initiated an inspection of selected aspects of the IN support in providing analytical support to the Federal Bureau of Investigation (FBI) concerning an information collection request under the Foreign Intelligence Surveillance Act (FISA) of 1978, as amended on July 10, 2008. We found that one of the four FISA cases the FBI referred for analysis was not completed in a timely manner and IN management was not aware of this situation. We also found that IN did not have written procedures for processing FISA cases and lacked any IN-wide process for tracking and following up on FISA cases. This likely was at least a contributing factor to management not being aware that IN's analysis of the above case was not handled in a timely manner.
- [*Inspection of Intelligence Oversight Activities at Selected Field Sites*](#) (INS-O-04-01, August 2004). The objective of this inspection was to determine if Federal and contractor personnel affiliated with intelligence and counterintelligence activities at selected Department Field sites were in compliance with pertinent policies and procedures regarding intelligence activities. We concluded that the Federal and contractor personnel at those sites were generally in compliance with pertinent Department policies and procedures for intelligence activities. However, we found that only 4 of 29 intelligence and counterintelligence analysts we interviewed from 2 sites could accurately define a "U.S. Person," a concept key to the operation of Executive Order (E.O.) 12333; in several instances, not all records were completely reviewed by analysts to ensure adherence with retention restrictions outlined in E.O. 12333; and, none of the analysts we interviewed at two sites could correctly describe the process pursuant to the *Department of Energy Procedures for Intelligence Activities* for reporting conduct that may violate E.O. 12333.

MANAGEMENT COMMENTS



Department of Energy
Washington, DC 20585

June 27, 2011

MEMORANDUM FOR: GREGORY H. FRIEDMAN
INSPECTOR GENERAL
DEPARTMENT OF ENERGY

FROM: E. BRUCE HELD 
DIRECTOR
OFFICE OF INTELLIGENCE AND COUNTERINTELLIGENCE

SUBJECT: Office of Intelligence and Counterintelligence (IN) Management
Comments Regarding the Office of the Inspector General (IG) Review of
Alleged Violation of Executive Order 12333

Thank you for the opportunity to comment on the inspection report regarding alleged violations of Executive Order 12333 by the Department of Energy's Office of Intelligence and Counterintelligence (IN). IN takes extremely seriously our responsibilities regarding the handling of information on US persons. In that context, we appreciate the constructive recommendations made in the IG review of alleged violations of Executive Order 12333 and concur with them.



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