

**§ 115.404**

recommendations for any required corrective action.

(e) Auditors shall redact any personally identifiable inmate or staff information from their reports, but shall provide such information to the agency upon request, and may provide such information to the Department of Justice.

(f) The agency shall ensure that the auditor’s final report is published on the agency’s Web site if it has one, or is otherwise made readily available to the public.

**§ 115.404 Audit corrective action plan.**

(a) A finding of “Does Not Meet Standard” with one or more standards shall trigger a 180-day corrective action period.

(b) The auditor and the agency shall jointly develop a corrective action plan to achieve compliance.

(c) The auditor shall take necessary and appropriate steps to verify implementation of the corrective action plan, such as reviewing updated policies and procedures or re-inspecting portions of a facility.

(d) After the 180-day corrective action period ends, the auditor shall issue a final determination as to whether the facility has achieved compliance with those standards requiring corrective action.

(e) If the agency does not achieve compliance with each standard, it may (at its discretion and cost) request a subsequent audit once it believes that it has achieved compliance.

**§ 115.405 Audit appeals.**

(a) An agency may lodge an appeal with the Department of Justice regarding any specific audit finding that it believes to be incorrect. Such appeal must be lodged within 90 days of the auditor’s final determination.

(b) If the Department determines that the agency has stated good cause for a re-evaluation, the agency may commission a re-audit by an auditor mutually agreed upon by the Department and the agency. The agency shall bear the costs of this re-audit.

(c) The findings of the re-audit shall be considered final.

**Subpart F—State Compliance**

**§ 115.501 State determination and certification of full compliance.**

(a) In determining pursuant to 42 U.S.C. 15607(c)(2) whether the State is in full compliance with the PREA standards, the Governor shall consider the results of the most recent agency audits.

(b) The Governor’s certification shall apply to all facilities in the State under the operational control of the State’s executive branch, including facilities operated by private entities on behalf of the State’s executive branch.

**PART 200—ALIEN TERRORIST REMOVAL PROCEDURES**

AUTHORITY: Pub. L. 105-277, 112 Stat. 2681.

SOURCE: 64 FR 8496, Feb. 19, 1999, unless otherwise noted. Redesignated by Order No. 2662-2003, 68 FR 9846, Feb. 28, 2003.

**§ 200.1 Eligibility for Protection under the Convention Against Torture.**

A removal order under Title V of the Act shall not be executed in circumstances that would violate Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277. Convention-based claims by aliens subject to removal under this Title shall be determined by the Attorney General, in consultation with the Secretary of State.

**PART 201—DATA PROTECTION REVIEW COURT**

- Sec.
- 201.1 Purpose.
- 201.2 Definitions.
- 201.3 Appointment of judges and rules of procedure.
- 201.4 Appointment of Special Advocates.
- 201.5 Administrative support for the DPRC.
- 201.6 Applications for review.
- 201.7 Convening of panels, conduct of judges, and independence of the DPRC.

## Department of Justice

## § 201.4

- 201.8 Special Advocates.
- 201.9 Consideration of applications and decisions.
- 201.10 Guiding principles of law.
- 201.11 Information security and classified national security information.
- 201.12 Disclaimer.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510-512; Executive order of October 7, 2022.

SOURCE: AG Order No. 5517-2022, 87 FR 62305, October 14, 2022, unless otherwise noted.

### § 201.1 Purpose.

This part establishes an independent and impartial Data Protection Review Court (DPRC) to consider, in classified proceedings, applications for review of determinations made by the Civil Liberties Protection Officer of the Office of the Director of National Intelligence (ODNI CLPO) in response to qualifying complaints submitted through the redress mechanism established pursuant to section 3 of the Executive order of October 7, 2022, “Enhancing Safeguards for United States Signals Intelligence Activities.”

### § 201.2 Definitions.

The terms “appropriate remediation,” “covered violation,” “element of the Intelligence Community,” “Intelligence Community,” “national security,” and “qualifying complaint” shall have the same meanings as they have in the Executive order of October 7, 2022. The term “qualifying state” means a country or regional economic integration organization designated as a qualifying state by the Attorney General pursuant to section 3(f) of the Executive order of October 7, 2022.

### § 201.3 Appointment of judges and rules of procedure.

(a) The Attorney General shall, in consultation with the Secretary of Commerce, the Director of National Intelligence, and the Privacy and Civil Liberties Oversight Board (PCLOB), appoint not fewer than six individuals to serve as judges on the DPRC for four-year renewable terms, choosing individuals who at the time of their initial appointment have not been employees of the executive branch in the previous two years.

(b) The Attorney General’s appointments shall be informed by the criteria used by the executive branch in assessing candidates for the Federal judiciary, giving weight to any prior judicial experience, and shall be of individuals with appropriate experience in the fields of data privacy and national security law. The Attorney General shall endeavor to ensure that at least half of the judges at any given time have prior judicial experience, and all persons appointed as judges shall be active members in good standing of the bar of a State, Commonwealth, Territory, or Possession, or of the District of Columbia and shall be duly licensed to practice law.

(c) During their term of appointment as judges on the DPRC, such judges shall not have any official duties or employment within the United States Government other than their official duties and employment as judges on the DPRC.

(d) The DPRC shall review and adopt by majority vote rules of procedure consistent with the Executive order of October 7, 2022 and this part, which thereafter shall be made publicly available and applied by each DPRC panel convened under § 201.7(a). The rules of procedure may thereafter be amended at such times and in such ways as a majority of the judges may deem necessary and appropriate to accomplish the work of the DPRC. A quorum of six judges shall be required for the initial adoption of and any amendments to the rules of procedure.

### § 201.4 Appointment of Special Advocates.

(a) The Attorney General shall, in consultation with the Secretary of Commerce, the Director of National Intelligence, and the PCLOB, appoint no fewer than two individuals to serve as Special Advocates for two-year renewable terms, choosing individuals who at the time of their initial appointment have not been employees of the executive branch in the previous two years.

(b) All persons appointed as Special Advocates shall have appropriate experience in the fields of data privacy and national security law, shall be experienced attorneys and active members in good standing of the bar of a State,

## § 201.5

Commonwealth, Territory, or Possession, or of the District of Columbia, and shall be duly licensed to practice law.

### § 201.5 Administrative support for the DPRC.

(a) The Office of Privacy and Civil Liberties of the Department of Justice (OPCL) shall be responsible for providing administrative support to the DPRC and the Special Advocates.

(b) The administrative support provided by OPCL shall include the following functions:

(1) Facilitating the Attorney General's consultations with other officials regarding the appointment of judges and Special Advocates;

(2) Drafting in consultation with relevant agencies rules of procedure and, when requested by the DPRC, any amendments thereto for consideration by the DPRC;

(3) Receiving applications for review of determinations made by the ODNI CLPO and receiving from the ODNI CLPO its record of review;

(4) Receiving and maintaining the confidentiality of any written information that a complainant filing an application for review wishes to provide to the DPRC and of any responses the complainant or their counsel provides to questions from the Special Advocate;

(5) Coordinating with the ODNI CLPO as needed on matters arising from an application for review;

(6) Securely maintaining records pursuant to applicable law;

(7) Making publicly available information about the DPRC, including the names of the judges and Special Advocates, the rules of procedure, and the process for filing an application for review, and such other information as the DPRC in its discretion deems appropriate for its function; and

(8) Providing other administrative support to the DPRC, its panels and judges, and the Special Advocates.

### § 201.6 Applications for review.

(a) A complainant may apply for review by the DPRC of a determination made by the ODNI CLPO in response to a qualifying complaint submitted by the complainant by filing an applica-

## 28 CFR Ch. I (7-1-25 Edition)

tion for review with the appropriate public authority in a qualifying state, for forwarding to OPCL, no later than sixty (60) days after the date, as reported to OPCL by the appropriate public authority in a qualifying state, on which the complainant receives notification that the ODNI CLPO has completed its review.

(b) The complainant shall submit with the application for review, through the appropriate authority in a qualifying state, any information, including argument on questions of law or the application of law to the facts, that the complainant wishes to provide to the DPRC. The complainant may be represented by counsel in submitting this information. OPCL shall maintain the confidentiality of such information.

(c) An element of the Intelligence Community may apply for review by the DPRC of a determination made by the ODNI CLPO by filing an application for review with OPCL no later than sixty (60) days after the date on which the element of the Intelligence Community receives notification from the ODNI CLPO that the ODNI CLPO has completed its review of the qualifying complaint. An application for review filed by an element of the Intelligence Community may include any information that the element of the Intelligence Community wishes to provide to the DPRC, including argument on questions of law or the application of law to the facts. To prevent the disclosure of classified or otherwise privileged or protected information, the DPRC, Special Advocates, and OPCL shall not provide to the complainant any information relating to the existence, review, or outcome of any application for review filed by an element of the Intelligence Community.

### § 201.7 Convening of panels, conduct of judges, and independence of the DPRC.

(a) Upon receipt of an application for review, OPCL shall convene a panel of the DPRC by selecting three judges on a rotating basis, while ensuring if possible that at least one of the judges selected has prior judicial experience.

## Department of Justice

## § 201.8

(b) The three judges on a DPRC panel shall select a presiding judge by unanimous agreement. If agreement is not reached within five (5) days of the convening of the DPRC panel, the presiding judge shall be the judge who was selected first by OPCL who has prior judicial experience; if no judge on the DPRC panel has such experience, the presiding judge shall be the judge selected first by OPCL.

(c) Judges on a DPRC panel shall conduct themselves in accordance with the Code of Conduct for United States Judges, except that a judge may participate in extrajudicial activities, including business activities, financial activities, non-profit fundraising activities, fiduciary activities, and the practice of law, where such extrajudicial activities do not interfere with the impartial performance of the judge's duties or the effectiveness or independence of the DPRC.

(d) A DPRC panel and its judges shall not be subject to the day-to-day supervision of the Attorney General. The Attorney General shall not remove a judge from a DPRC panel, remove a judge from the DPRC prior to the end of the judge's term of appointment under § 201.3(a), or take any other adverse action against a judge arising from service on the DPRC, except for instances of misconduct, malfeasance, breach of security, neglect of duty, or incapacity, after taking due account of the standards in the Rules for Judicial-Conduct and Judicial-Disability Proceedings promulgated by the Judicial Conference of the United States pursuant to the Judicial Conduct and Disability Act (28 U.S.C. 351 *et seq.*).

### § 201.8 Special Advocates.

(a) After a DPRC panel is convened under § 201.7(a), the presiding judge shall select a Special Advocate to assist the panel in the consideration of the application for review.

(b) The Special Advocate shall upon selection receive from OPCL the application for review and any information that the complainant provided under § 201.6(b). The Special Advocate shall not be the agent of the complainant, consistent with the rules of professional responsibility, and there shall be no attorney-client relationship be-

tween the Special Advocate and the complainant.

(c) The Special Advocate shall also have access to the record of the ODNI CLPO's review and any information or submissions provided to the DPRC panel by an element of the Intelligence Community.

(d) To prevent the disclosure of classified or otherwise privileged or protected information, the Special Advocate shall adhere to the following rules on communications with the complainant or the complainant's counsel:

(1) If the complainant did not file an application for review, the Special Advocate shall not communicate with the complainant or the complainant's counsel.

(2) If the complainant did file an application for review, the Special Advocate may at any stage submit to OPCL written questions for the complainant or the complainant's counsel. OPCL shall, in consultation with relevant elements of the Intelligence Community, review any such questions to ensure they do not disclose any classified or otherwise privileged or protected information and, subject to that limitation, shall convey the questions through the appropriate public authority in a qualifying state to the complainant or the complainant's counsel, with an invitation to provide written responses to the Special Advocate through the appropriate public authority in a qualifying state.

(e) The Special Advocate shall assist the DPRC panel in its consideration of the application for review, including by advocating regarding the complainant's interest in the matter and by ensuring that the DPRC panel is well informed of the issues and the law with respect to the matter. Where the complainant has filed an application for review, the submissions of the Special Advocate to the DPRC shall include the complainant's application for review and the information and responses to questions submitted to the Special Advocate by the complainant.

(f) Affected elements of the Intelligence Community shall be provided an opportunity to respond to submissions made by the Special Advocate.

## § 201.9

## 28 CFR Ch. I (7–1–25 Edition)

### § 201.9 Consideration of applications and decisions.

(a) A DPRC panel shall consider an application for review in a manner that is timely, impartial, and consistent with the Executive order of October 7, 2022 and this part in order to determine whether a covered violation occurred and, if so, to determine any appropriate remediation.

(b) A DPRC panel shall conduct its review based on the record of the ODNI CLPO's review and any information or submissions provided by the complainant, the Special Advocate, or an element of the Intelligence Community. A DPRC panel may request that the ODNI CLPO supplement the record with specific explanatory or clarifying information and that the ODNI CLPO make additional factual findings where necessary to enable the DPRC panel to conduct its review.

(c) If the DPRC panel finds no evidence in the record indicating that signals intelligence activities occurred involving personal information of or about the complainant, the DPRC panel shall render a decision to that effect.

(d) In all other cases, the DPRC panel shall determine:

(1) Whether, under the applicable law as set forth in the definition of a covered violation in the Executive order of October 7, 2022, the ODNI CLPO's determination whether a covered violation occurred was legally correct and supported by substantial evidence; and

(2) Whether, in the event of a covered violation, the ODNI CLPO's determination as to the appropriate remediation was consistent with the Executive order of October 7, 2022.

(e) If a DPRC panel decides that a determination by the ODNI CLPO does not meet the standard set out in paragraph (d) of this section, the DPRC panel shall issue its own determination.

(f) Prior to determining an appropriate remediation under paragraph (e) of this section, a DPRC panel shall seek through the ODNI CLPO the views of affected elements of the Intelligence Community regarding the appropriate remediation, including an assessment of impacts on the operations of the Intelligence Community and the national

security of the United States. The panel shall take due account of these views as well as customary ways of addressing a violation of the type identified.

(g) A DPRC panel shall make its decision by majority vote. Each DPRC panel shall issue a written decision setting out its determinations and the specification of any appropriate remediation. The decision of each DPRC panel shall be final and binding with respect to the application for review before it and shall be controlling only as to that application for review.

(h) After the issuance of a written decision under paragraph (g) of this section, OPCL shall forward the decision to the ODNI CLPO. If the complainant submitted an application for review in the case, OPCL shall notify the complainant through the appropriate public authority in a qualifying state, without confirming or denying whether the complainant was subject to signals intelligence activities, that:

(1) The DPRC completed its review;

(2) The review either did not identify any covered violations or the Data Protection Review Court issued a determination requiring appropriate remediation; and

(3) The notification to the complainant constitutes the final agency action in the matter.

(i) A DPRC panel shall provide a classified report on information indicating a violation of any authority subject to the oversight of the Foreign Intelligence Surveillance Court to the Assistant Attorney General for National Security, who shall report violations to the Foreign Intelligence Surveillance Court in accordance with its rules of procedure.

(j) For each application for review, OPCL shall maintain a record of the information reviewed by the DPRC panel and the decision of the DPRC panel, which records shall be made available for consideration as non-binding precedent to future DPRC panels considering applications for review.

### § 201.10 Guiding principles of law.

(a) The Executive order of October 7, 2022 and its terms shall be interpreted by the DPRC exclusively in light of United States law and the United

## Department of Justice

Pt. 202

States legal tradition, and not any other source of law.

(b) In a DPRC panel's review of an application under §201.9, the DPRC panel shall be guided by relevant decisions of the United States Supreme Court in the same way as are courts established under Article III of the United States Constitution, including those decisions regarding appropriate deference to relevant determinations of national security officials.

### §201.11 Information security and classified national security information.

(a) All proceedings before and other activities of the DPRC and all activities of the Special Advocates shall be governed by Executive Order 13526 of December 29, 2009, "Classified National Security Information," or any successor order, and this part.

(b) Judges may serve on a DPRC panel convened under §201.7(a), and Special Advocates may be selected to assist a DPRC panel under §201.8(a), only if they hold the requisite security clearances to access classified national security information. The DPRC and Special Advocates shall have no authority to declassify or grant any person access to any classified or otherwise privileged or protected information, including the information reviewed in or information about the existence or outcome of any proceedings before the DPRC or any information that would tend to reveal whether a complainant was subject to signals intelligence activities.

(c) The Department of Justice Security Officer shall be responsible for establishing security procedures for proceedings before and other activities of the DPRC and the Special Advocate, and for amending those procedures as necessary.

### §201.12 Disclaimer.

This part governs the ability to obtain review of the ODNI CLPO's determinations by the DPRC in accordance with the redress mechanism established in section 3 of the Executive order of October 7, 2022. This part is not intended to, and does not, create any other entitlement, right, or benefit, substantive or procedural, enforceable at law or in equity by any party

against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This part is not intended to, and does not, modify the availability or scope of any judicial review of the decisions rendered through the redress mechanism, which is governed by existing law.

## PART 202—ACCESS TO U.S. SENSITIVE PERSONAL DATA AND GOVERNMENT-RELATED DATA BY COUNTRIES OF CONCERN OR COVERED PERSONS

### Subpart A—General

- Sec.
- 202.101 Scope.
- 202.102 Rules of construction and interpretation.
- 202.103 Relation of this part to other laws and regulations.
- 202.104 Delegation of authorities.
- 202.105 Amendment, modification, or revocation.
- 202.106 Severability.

### Subpart B—Definitions

- 202.201 Access.
- 202.202 Attorney General.
- 202.203 Assistant Attorney General.
- 202.204 Biometric identifiers.
- 202.205 Bulk.
- 202.206 Bulk U.S. sensitive personal data.
- 202.207 CFIUS action.
- 202.208 China.
- 202.209 Country of concern.
- 202.210 Covered data transaction.
- 202.211 Covered person.
- 202.212 Covered personal identifiers.
- 202.213 Cuba.
- 202.214 Data brokerage.
- 202.215 Directing.
- 202.216 Effective date.
- 202.217 Employment agreement.
- 202.218 Entity.
- 202.219 Exempt transaction.
- 202.220 Former senior official.
- 202.221 Foreign person.
- 202.222 Government-related data.
- 202.223 Human biospecimens.
- 202.224 Human genomic data.
- 202.225 IEEPA.
- 202.226 Information or informational materials.
- 202.227 Interest.
- 202.228 Investment agreement.
- 202.229 Iran.
- 202.230 Knowingly.
- 202.231 Licenses; general and specific.
- 202.232 Linked.