

October 29, 2015

Hon. James R. Clapper
Director, Office of the Director of National Intelligence
Washington, DC 20511

Dear Director Clapper:

The undersigned organizations, which are dedicated to preserving privacy and civil liberties, write to request that you provide certain basic information about how Section 702 of the Foreign Intelligence Surveillance Act (FISA) affects Americans and other U.S. residents. Disclosing this information is necessary, we believe, to enable informed public debate in advance of any legislative reauthorization efforts in 2017.

We acknowledge that you have publicly released a significant amount of information about Section 702, as well as declassifying information from inclusion in the report of the Privacy and Civil Liberties Oversight Board (PCLOB). These disclosures have been helpful, and we appreciate them. However, there remains a significant and conspicuous knowledge gap when it comes to the impact of Section 702 surveillance on Americans.

Information about that impact is critical in light of official representations that Section 702 is aimed at foreign threats and that collection of Americans' information is merely "incidental." The American public must have the data necessary to evaluate and weigh these official claims. Moreover, it is unacceptable that the government itself has no idea how many Americans are caught up in an intelligence program ostensibly targeted at foreigners. We therefore ask that you disclose the following information, as discussed further below:

- x A public estimate of the number of communications or transactions involving American citizens and residents subject to Section 702 surveillance on a yearly basis.
- x The number of times each year that the FBI uses a U.S. person identifier to query databases that include Section 702 data, and the number of times the queries return such data.
- x Policies governing agencies' notification of individuals that they intend to use information "derived from" Section 702 surveillance in judicial or administrative proceedings.

¹ This request seeks an estimate corresponding to each of the following categories:

(1) The number of communications or transactions involving U.S. residents whose contents are transmitted to or received from a foreign person or entity.

Estimate of How Many Communications Involving U.S. Residents Are Subject to Surveillance

As you know, Senators Wyden and Mark Udall ~~and~~ have requested that you provide an estimate of how many American communications ~~are~~ collected under ~~Section~~ 702. In 2012, the NSA Inspector General studied whether such ~~an~~ assessment would be feasible. As relayed in a letter from the Inspector General (IG) ~~of the~~ Intelligence Community, the NSA IG concluded that dedicating sufficient resources to such an assessment “would likely impede the NSA’s mission.” He also concluded that

protecting privacy, believe that a one-time, ~~filed~~ sampling of these communications would be a net gain for privacy ~~if~~ conducted under appropriate

did so in only five cases, and there has not been a single notification in seventeen months. In addition, the Treasury Department's Office of Foreign Asset Control reportedly relies on Section 702-derived information but has never notified those affected by its proceedings. Reports also indicate that some agencies engage in "parallel construction": they reconstruct Section 702-derived information using less controversial methods in order to avoid disclosing the use of Section 702, on the dubious ground that reconstructed evidence is not "derived from" Section 702 surveillance.

Individuals should know whether they are being given a fair opportunity to challenge Section 702 surveillance when the fruit of such surveillance is used against them. We ask that you disclose how the Department of Justice and other agencies interpret the statutory notification requirement, including the legal interpretation that controls when those agencies consider evidence to be "derived from" Section 702 surveillance. These disclosures also should make clear whether evidence collected based on a tip arising from Section 702 surveillance is considered "derived" evidence, and the circumstances in which agencies permit investigators to reconstruct evidence originally obtained under Section 702 in order to avoid notification. Keeping these key legal interpretations secret prevents the public from understanding how Section 702 is used in practice, and perpetuates anti-democratic practice of secret law.

The Principles of Intelligence Transparency, adopted by your office in January and reaffirmed through an implementation plan issued by your office two days ago, state that the Intelligence Community will "[b]e proactive and clear in making information publicly available through authorized channels, including taking affirmative steps to . . . provide timely transparency on matters of public interest." This is exactly the case. The FISA Amendments Act is set to expire on December 31, 2017. Knowing the impact of the law on Americans is not only important to an informed public debate, it is essential. Disclosing the information requested above will remove three of the most significant barriers to that debate.

Sincerely,

Advocacy for Principled Action in Government
 American-Arab Anti-Discrimination Committee
 American Civil Liberties Union

Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Fight for the Future
Free Press
Government Accountability Project
Liberty Coalition
National Association of Criminal Defense Lawyers
National Security Counselors
New America's Open Technology Institute
Niskanen Center
OpenTheGovernment.org
PEN American Center
Project On Government Oversight
R Street
Restore the Fourth
The Sunlight Foundation
TechFreedom
World Privacy Forum
X-Lab