

# United States Senate

WASHINGTON, DC 20510

June 27, 2013

The Honorable James R. Clapper  
Director of National Intelligence  
Washington, D.C. 20511

Dear Director Clapper:

Earlier this month, the executive branch acknowledged for the first time that the “business records” provision of the USA PATRIOT Act has been secretly reinterpreted to allow the government to collect the private records of large numbers of ordinary Americans. We agree that it is regrettable that this fact was first revealed through an unauthorized disclosure rather than an official acknowledgment by the administration, but we appreciate the comments that the President has made welcoming debate on this topic.

In our view, the bulk collection and aggregation of Americans’ phone records has a significant impact on Americans’ privacy that exceeds the issues considered by the Supreme Court in *Smith v. Maryland*. That decision was based on the technology of the rotary-dial era and did not address the type of ongoing, broad surveillance of phone records that the government is now conducting. These records can reveal personal relationships, family medical issues, political and religious affiliations, and a variety of other private personal information. This is particularly true if these records are collected in a manner that includes cell phone locational data, effectively turning Americans’ cell phones into tracking devices. We are concerned that officials have told the press that the collection of this location data is currently authorized.

Furthermore, we are troubled by the possibility of this bulk collection authority being applied to other categories of records. The PATRIOT Act’s business records authority is very broad in its scope. It can be used to collect information on credit card purchases, pharmacy records, library records, firearm sales records, financial information, and a range of other sensitive subjects. And the bulk collection authority could potentially be used to supersede bans on maintaining gun owner databases, or laws protecting the privacy of medical records, financial records, and records of book and movie purchases. These other types of bulk collection could clearly have a significant impact on Americans’ privacy and liberties as well.

Senior officials have noted that there are rules in place governing which government personnel are allowed to review the bulk phone records data and when. Rules of this sort, if they are effectively enforced, can mitigate the privacy impact of this large-scale data collection, but they do not erase it entirely. Furthermore, over its history the intelligence community has sometimes failed to keep sensitive information secure from those who would misuse it, and even if these rules are well-intentioned they will not eliminate all opportunities for abuse.

It has been suggested that the privacy impact of particular methods of domestic surveillance should be weighed against the degree to which the surveillance enhances our national security. With this in mind, we are interested in hearing more details about why you believe that the bulk phone records collection program provides any unique value. We have now heard about a few cases in which these bulk phone records provided some information that was relevant to

investigators, but we would like a full explanation of whether or not the records that were actually useful could have been obtained directly from the appropriate phone companies in an equally expeditious manner using either a regular court order or an emergency authorization.

Finally, we are concerned that by depending on secret interpretations of the PATRIOT Act that differed from an intuitive reading of the statute, this program essentially relied for years on a secret body of law. Statements from senior officials that the PATRIOT Act authority is “analogous to a grand jury subpoena” and that the NSA “[doesn’t] hold data on US citizens” had the effect of misleading the public about how the law was being interpreted and implemented. This prevented our constituents from evaluating the decisions that their government was making, and will unfortunately undermine trust in government more broadly. The debate that the President has now welcomed is an important first step toward restoring that trust.

To ensure that an informed discussion on PATRIOT Act authorities can take place, we ask that you direct the Intelligence Community to provide unclassified answers to the following questions:

- How long has the NSA used PATRIOT Act authorities to engage in bulk collection of Americans’ records? Was this collection underway when the law was reauthorized in 2006?
- Has the NSA used USA PATRIOT Act authorities to conduct bulk collection of any other types of records pertaining to Americans, beyond phone records?
- Has the NSA collected or made any plans to collect Americans’ cell-site location data in bulk?
- Have there been any violations of the court orders permitting this bulk collection, or of the rules governing access to these records? If so, please describe these violations.
- Please identify any specific examples of instances in which intelligence gained by reviewing phone records obtained through Section 215 bulk collection proved useful in thwarting a particular terrorist plot.
- Please provide specific examples of instances in which useful intelligence was gained by reviewing phone records that could not have been obtained without the bulk collection authority, if such examples exist.
- Please describe the employment status of all persons with conceivable access to this data, including IT professionals, and detail whether they are federal employees, civilian or military, or contractors.

Thank you for your attention to this important matter. We look forward to further discussion in the weeks ahead.

Sincerely,

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Dick Durbin Patrick Leahy

Liz Neuharth Clare Kin

Jay Byrd Richard Blumenthal

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Tom Harkin

Jeffrey A. Murrill

Maria Cantwell

Al Franken

Margie Hironaka

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