

United States Senate
WASHINGTON, DC 20510

July 24, 2014

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

Dear Director Clapper,

We write to express our concerns with the National Security Agency's (NSA) interpretation of Section 702 of the Foreign Intelligence Surveillance Act (FISA). In a recent examination by the Washington Post of over 100,000 intercepted communications, 90 percent of account holders in the intercepted communications were not targets, and nearly half of the communications reviewed belonged to US persons. This revelation raises significant doubts about whether we are striking the right balance between securing our nation and upholding the privacy and civil liberties of our citizens. Like many Americans, we have concerns about the lack of transparency and absence of any means of assessing the full scope of the collected data.

In 2008, Congress enacted a new section of FISA, now known as Section 702, which was extended in 2012. Numerous Senators raised concerns and ultimately opposed both the 2008 and 2012 legislation precisely because of key questions about the impact of this law on the privacy of law-abiding Americans. Regrettably, these concerns appear borne-out. The Privacy and Civil Liberties Oversight Board's (PCLOB) recently published report on NSA surveillance pursuant to Section 702, including "PRISM" and "upstream" data collection, highlights troubling aspects of the program. In addition, the President's Review Board (PRB) has also noted that Section 702 does not adequately protect the privacy interests of Americans.

The language and legislative history of Section 702 are clear: the statute is designed to target non-U.S. persons abroad. However, it appears that Section 702 is being used to collect and search the communications of American citizens. These private communications include personal correspondence, images, medical records, and other personal data, which are being stored and searched.

Of particular concern is "the unknown and potentially large scope of the incidental collection of U.S. persons' communications, the use of 'about' collection to acquire Internet communications that are neither to nor from the target of surveillance, and the use of queries to search for the communications of specific U.S. persons within the information that has been collected [...]."

Another distressing finding of the PCLOB report is that “there is no requirement that the government demonstrate probable cause to believe that an individual targeted is an agent of a foreign power, as is generally required in the ‘traditional’ FISA process under Title I of the statute.” Though information collected under Section 702 must meet the statutory definition of “foreign intelligence information,” the authorizations for targeting an individual under Section 702 require no such specifications. Therefore, law-abiding Americans are left vulnerable to collection efforts and the indefinite storage of their personal data. To us, this runs counter to the protections guaranteed by the Fourth Amendment, including the express right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures [...]”

While we understand that, due to technical limitations, these “incidental collections” may be unavoidable at the time of collection, we remain concerned that this personal data is being obtained and queried without a warrant, and stored for an unknown and possibly indefinite period of time. If that is the case, it is an unconstitutional violation of privacy rights wholly inconsistent with American values. The Intelligence Community’s (IC) inability or unwillingness to provide greater clarity to members of the Senate and to citizens of this country about how such information is being stored and utilized is troubling. It allows for the proliferation of conspiracy theories and misinformation that undermines the credibility of the democratic process, legitimate intelligence-gathering, and encourages some to leak classified information.

We support the PCLOB report’s recommendations to strengthen NSA’s targeting procedures, including requiring NSA to specify the expected foreign intelligence value of a particular target and to provide a written explanation for the basis for that determination. To better inform oversight efforts, we request answers to the following questions:

- What is the NSA’s legal interpretation of “incidental collection” and “inadvertent collection” that allows for the collection and indefinite storage of users content data pursuant to Section 702?
- What is NSA’s definition of “selector?” Please include any and all “selectors” that have been used to query NSA databases.
- In how many cases has intelligence collected through Section 702 been used to interfere or otherwise thwart a terrorist attack?
- In how many cases has NSA turned over data collected on an American to law enforcement under Section 702 because, during its search of the data, it discovered a crime not related to terrorism or espionage?
- What are the targeting and minimization procedures currently in place covering the acquisition, retention, use, and dissemination of any non-publicly available U.S. person information acquired under the Section 702 program?
- What steps are the Office of the Director of National Intelligence (ODNI) and the NSA taking to address the concerns and recommendations set forth in the PCLOB and PRB report? Specifically, which recommendations within the PCLOB and PRB reports do the NSA and ODNI plan to adopt, and what is the timeline for implementation of these recommendations?
- How many American citizens, located in the United States at the time their data was collected, have had information collected, searched and retained as a result of incidental collections and what steps is the ODNI taking to address these concerns?

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- What percent of targets are suspected to have engaged in terrorist activities versus believed to have other foreign intelligence value?
- Why is “incidentally” collected U.S. content retained when it does not appear to contain any foreign intelligence? As recent news articles have noted, the NSA appears to have retained pictures, emails and other communications that have no relevance to foreign intelligence. Please also advise what protocols the Agency follows so that data with no nexus to foreign intelligence is deleted within a reasonable period after collection.
- How much data collected pursuant to Section 702 is currently stored by the NSA, other members of the IC, or contractors working with the NSA or other members of the IC?
- What percent of communications obtained are to or from a target, as opposed to “about” a target?
- What percent of communications collected under Section 702 occur through PRISM collection and what percent are collected through upstream collection? What percent of communications obtained through Section 702 are “multiple communications transactions”?

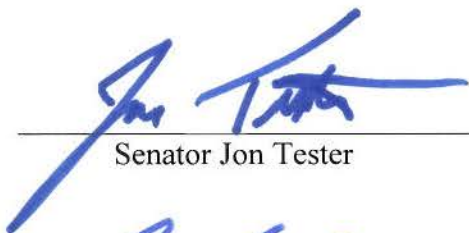
Furthermore, we are hopeful your office and the Attorney General will take clear and measured steps in order to:

- Provide more transparency on what information is being collected on American citizens, what the NSA is doing with that information, and how long it is storing that data.
- Implement procedures requiring the government to obtain a warrant prior to searching information collected under 702 with U.S. identifiers.
- Close the gap between what the law states and what NSA analysts actually do while collecting, storing, and querying information under Section 702.
- Erase all records obtained on American citizens that have been collected “incidentally” and contain no foreign intelligence.
- Develop a process by which “incidental collections” of the communications of law-abiding Americans are avoided.


We recognize that much of the information requested may be classified. Nevertheless, please provide a complete response for us to review at the TOP SECRET classification level, as well as a redacted copy for public dissemination.

Thank you for your attention to this important matter. We look forward to your response.


Sincerely,



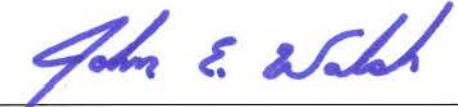
Senator Jon Tester



Senator Mark Begich



Senator Jeff Merkley



Senator John Walsh