

May 15, 2017

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Dear Ms. Mallory,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Justice National Security Division (“NSD”).

EPIC seeks the U.S. government’s reports on Federal Bureau of Investigation (“FBI”) queries of Section 702 acquired data concerning U.S. persons used for routine criminal investigations. The Foreign Intelligence Surveillance Court (“FISC”) has ordered the government to submit a report in writing for “each instance after December 4, 2015, in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information.”<sup>1</sup>

The NSD is responsible for coordinating and facilitating national security investigations. Specifically, the NSD Office of Intelligence represents the government before the FISC. The reports submitted in accordance with the November 6, 2015 FISC Memorandum Opinion and Order should be in the possession of the NSD.

### Documents Requested

All reports submitted pursuant to the November 6, 2015 FISC Memorandum Opinion and Order concerning FBI receipt and review of Section 702-acquired information.

### Background

Section 702 of the Foreign Intelligence Surveillance Act (“FISA”) authorizes surveillance targeting non-U.S. persons located abroad for foreign intelligence purposes.<sup>2</sup>

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<sup>1</sup> Memorandum Opinion and Order, [docket no. redacted], slip op. at 78 (FISC Nov. 6, 2015), [https://www.dni.gov/files/documents/20151106-702Mem\\_Opinion\\_Order\\_for\\_Public\\_Release.pdf](https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf).

<sup>2</sup> 50 U.S.C. § 1881a.

Nonetheless, the Government has admitted that U.S. persons' communications are collected under the Section 702 program, and that evidence of ordinary criminal offenses may be acquired, retained, and disseminated under the statute.<sup>3</sup> Permitting the FBI to query and use Section 702 data in routine criminal investigations could create an end run around the Fourth Amendment warrant requirement. The FISA Court of Review ("FISCR") has held that "the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes."<sup>4</sup>

In July 2015 the U.S. government sought reauthorization of the statutorily required Section 702 certifications, including associated targeting and minimization procedures.<sup>5</sup> The FISC determined the certifications were likely to present one or more "novel or significant interpretation[s] of the law," possibly requiring appointment of an *amicus curiae* under the USA Freedom Act.<sup>6</sup> The FISC delayed review and appointed Amy Jeffress as *amicus* to assist the court in evaluating the statutory and constitutional validity of the FBI's procedures for querying Section 702 acquired information to return information concerning United States persons.<sup>7</sup> Ms. Jeffress raised concerns about the procedures' compliance with the FISA and also concluded that, without further safeguards, the procedures were inconsistent with the Fourth Amendment.<sup>8</sup>

The FISC ultimately approved the FBI's Section 702 minimization procedures in the November 6, 2015 Memorandum Opinion and Order.<sup>9</sup> The Court based the decision, in part, on a finding that the risk to U.S. persons' was relatively low. Based on information provided by the U.S. government, the Court concluded the FBI would rarely, if ever, view or use the results of a query of Section 702-acquired data concerning U.S. persons for investigations unrelated to national security. However, to monitor whether the risk assessment was correct, FISC introduced the following reporting requirement:

The government shall promptly submit in writing a report concerning each instance after December 4, 2015, in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United

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<sup>3</sup> *Memorandum Opinion and Order*, [docket no. redacted], slip op. at 33-35 (FISC Nov. 6, 2015), [https://www.dni.gov/files/documents/20151106-702Mem\\_Opinion\\_Order\\_for\\_Public\\_Release.pdf](https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf). See § 1881a(g)(2)(v) (requiring that the Attorney General and Director of National Intelligence certify only that "a significant purpose of the acquisition is to obtain foreign intelligence information"); §§ 1801(h)(3), 1821(4)(c) (defining minimization procedures, incorporated in Section 702, which must "allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes").

<sup>4</sup> *In re Sealed Case*, 310 F.3d 717, 736 (FISA Ct. Rev. 2002).

<sup>5</sup> *Memorandum Opinion and Order*, slip op. at 1.

<sup>6</sup> *Id.* at 5; 50 U.S.C. § 1803(i)(2).

<sup>7</sup> *Memorandum Opinion and Order*, slip op at 5-7.

<sup>8</sup> *Id.* at 30, 39-40.

<sup>9</sup> *Id.* at 36-44.

States person in response to a query that is not designed to find and extract foreign intelligence information. The report should include a detailed description of the information at issue and the manner in which it will be used for analytical, investigative, or evidentiary purposes. It shall also identify the query terms used to elicit the information and provide the FBI's basis for concluding that the query is consistent with the applicable minimization procedures.<sup>10</sup>

In the annual "Statistical Transparency Report Regarding Use of National Authorities," the DNI releases statistics on the use of national security authorities.<sup>11</sup> The Report on calendar year 2016 included the number of "instance[s] in which FBI personnel receive[d] and review[ed] Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information" – one.<sup>12</sup> However, the DNI did not release any further information about this query.

### Request for Expedition

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). Under the DOJ's FOIA regulations, a FOIA request should be granted expedited processing when 1) there is an "urgency to inform the public about an actual or alleged federal government activity," and 2) where the request is "made by a person who is primarily engaged in disseminating information." § 16.5(e)(1)(ii). This request satisfies both requirements.

First, there is an "urgency to inform the public about an actual or alleged federal government activity." § 16.5(e)(1)(ii). The "actual...federal government activity" at issue is FBI's querying, review, and use of Section 702 acquired data. This activity is acknowledged in the 2016 ODNI Transparency Report, which confirms that in 2016 the FBI received and reviewed Section 702 data concerning a U.S. person based on query for non-foreign intelligence purposes.<sup>13</sup>

"Urgency" to inform the public about this activity is clear given the quickly developing public debate over the reauthorization of Section 702. On Dec. 31, 2017, the FISA Amendments Act, including Section 702, will sunset if the Congress does not act.<sup>14</sup> Following political controversies over the Section 702's use, public interest in Section 702 reauthorization has reached a critical juncture.<sup>15</sup> Indeed, the debate over whether to

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<sup>10</sup> *Id.* at 78.

<sup>11</sup> Office of the Dir. Of Nat'l Intelligence, Statistical Transparency Report Regarding the Use of National Security Authorities for Calendar Year 2016 (2017), [https://icontherecord.tumblr.com/transparency/odni\\_transparencyreport\\_cy2016](https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 50 U.S.C. §1881 note.

<sup>15</sup> April Doss & Susan Hennessey, *What intelligence officials really mean when they talk about 'unmasking,'* Wash. Post (Apr. 7, 2017),

reauthorize and, if so, whether and how to amend Section 702 has been a repeated subject at recent congressional hearings.<sup>16</sup>

Any new information about the federal activities under the FISA must be released, and released quickly, to preserve the public's opportunity to meaningfully participate in the reauthorization debate. The report EPIC is seeking concerns a controversial practice of the FBI relevant to this debate: review and use of Section 702 acquired data concerning U.S. persons for ordinary criminal investigations. Indeed, the FISC order requiring continuous monitoring of the FBI's practice underscored the need for greater oversight. As explained by the Privacy and Civil Liberties Oversight Board, "the collection and examination of U.S. persons' communications *represents a privacy intrusion even in the absence of misuse for improper ends.*"<sup>17</sup> The documents at issue in this request never before been released to the public. The public has a right to know how this Section 702 data is being queried, reviewed, and used before Congress votes on reauthorization.

Second, EPIC is an organization "primarily engaged in disseminating information." § 16.5(e)(1)(ii). As the Court explained in *EPIC v. Dep't of Def.*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 16.5(e)(3); § 552(a)(6)(E)(vi).

#### Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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[https://www.washingtonpost.com/posteverything/wp/2017/04/07/what-intelligence-officials-really-mean-when-they-talk-about-unmasking/?utm\\_term=.db6f17b774bc](https://www.washingtonpost.com/posteverything/wp/2017/04/07/what-intelligence-officials-really-mean-when-they-talk-about-unmasking/?utm_term=.db6f17b774bc);  
Arthur Rizer & Daniel Semelsberger, *Is reform on the horizon for Section 702 surveillance?*, Hill (Apr. 12, 2017),  
<http://thehill.com/blogs/pundits-blog/technology/328351-is-reform-on-the-horizon-for-section-702-surveillance>; Holly Yan, *What is the FISA court, and why is it so secretive?*, CNN (Apr. 12, 2017), <http://www.cnn.com/2017/04/12/politics/fisa-court-explainer-trnd/>.  
<sup>16</sup> See, e.g., *Hearing: Section 702 of the Foreign Intelligence Surveillance Act*, House Judiciary Committee (Mar. 1, 2017), <https://judiciary.house.gov/hearing/section-702-fisa-amendments-act/> (posting notice of hearing).

<sup>17</sup> Privacy and Civil Liberties Oversight Bd, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 133 (2014), <https://www.pclob.gov/library/702-report.pdf>.

Further, any duplication fees should also be waived because disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest” of EPIC. 28 C.F.R. § 16.10(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies the three considerations for the DOJ to grant a fee waiver. § 16.10(k)(2).

The DOJ evaluates the three considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure must be “likely to contribute significantly to public understanding of those operations or activities”; and (iii) “disclosure must not be primarily in the commercial interest of the requester.” §§ 16.10(k)(2)(i)–(iii).

First, disclosure of the Section 702 query report(s) to the FISC “concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” § 16.10(k)(2)(i). The requested documents self-evidently relate to federal government activities: a court imposed duty on the federal government to report to the FISC and surveillance and use of surveillance data by the federal government conducted according to federal statute, 50 U.S.C. §1881a.

Second, disclosure would be “would be likely to contribute significantly to public understanding of those operations or activities” according to the two sub-factors. § 16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be “meaningfully informative about government operations or activities” because, despite the practice’s significant implications for civil liberties, there is little public information about the FBI’s use of Section 702 data concerning a U.S. person based on non-foreign intelligence queries. While the ODNI published the number of instances where FBI personnel received and reviewed such information in calendar year 2016, the Office did not provide any further information, such as the information at issue in that instance, the manner in which it would be used, or the justification for the query.<sup>18</sup>

The requested information will, therefore, meaningfully and significantly inform the public understanding of FBI’s Section 702 activities. As to the second sub-factor, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because, as stated in the relevant FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B).

Third, disclosure of the requested information is not “primarily in the commercial interest” of EPIC according to the two sub-factors. § 16.10(k)(2)(iii)(A-B). As to the first sub-factor, EPIC has no “commercial interest...that would be furthered by the requested disclosure.” § 16.10(k)(2)(iii)(A). EPIC is a registered non-profit organization committed

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<sup>18</sup> Office of the Dir. Of Nat’l Intelligence, *supra* note 11.

to privacy, open government, and civil liberties.<sup>19</sup> As to the second sub-factor, “the component must determine whether that is the primary interest furthered by the request” because, as stated in the FOIA regulations, DOJ components “ordinarily will presume that where a news media requester has satisfied [the public interest standard], the request is not primarily in the commercial interest of the requester.” § 16.10(k)(2)(iii)(B). As already described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

### Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

Eleni Kyriakides  
Eleni Kyriakides  
EPIC Fellow

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<sup>19</sup> *About EPIC*, <https://epic.org/epic/about.html>.