

VIA MAIL

August 8, 2017

Director, Office of Info. Policy  
U.S. Department of Justice  
1425 New York Ave., Suite 11050  
Washington, DC 20530

## FOIA Appeal, NSD FOI/PA #17-186

This letter constitutes an appeal of under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(6)(E)(i). The FOIA request at issue was submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the DOJ’s National Security Division (“NSD”) on May 15, 2017.

EPIC requested the NSD reports on Federal Bureau of Investigation (“FBI”) queries of Section 702 acquired data concerning U.S. persons used for routine criminal investigations (the “EPIC FOIA Request”). The NSD disclosed to EPIC a copy one heavily redacted report, withholding all substantive portions of the report. In an accompanying letter from Chief of Records Management and FOIA Staff Kevin Tiernan, the NSD explained it withheld portions of the record pursuant to four FOIA Exemptions, including (b)(1) and (b)(3).

The NSD failed to carry its burden to justify the assertion of Exemptions (b)(1) and (b)(3) to withhold all substantive portions of the records requested by EPIC. The agency offered no explanation in support of its claim and also failed to provide reasonably segregable portions of the record requested. For this and other reasons set forth in detail below, the original agency determination regarding the application of Exemptions (b)(1) and (b)(3) should be withdrawn and the full report sought by EPIC should be disclosed.

### Procedural Background

On May 15, 2017, EPIC submitted the EPIC FOIA Request to the NSD via e-mail. EPIC explained that 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.” Memorandum Opinion and Order, [docket no. redacted], slip op. at 78 (FISC Nov. 6, 2015).<sup>1</sup> Accordingly, EPIC requested:

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<sup>1</sup> [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).

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

EPIC FOIA Request (Appendix A).

EPIC also requested expedited processing, news media status, and a fee waiver. The NSD acknowledged receipt of the FOIA request in an e-mail on June 8th, 2017, designating the matter FOIA/PA # 17-186.

In a letter dated July 19, 2017 and received by EPIC on July 25th, the NSD stated it had located one record responsive to EPIC's FOIA request and was releasing the record in part. Enclosing a nearly fully redacted copy of the report to EPIC, the NSD's letter stated the agency was asserting FOIA Exemptions (b)(1), (b)(3), (b)(6), and (b)(7)(A). The NSD provided no further explanation for these claims. The record enclosed left unredacted basic information such as document's subject line, addressee, a portion of the signature block, as well as one introductory paragraph describing the FISC's requirement in the November 2015 Memorandum Opinion and Order that the government to submit such a report to the Court. Redacted Report (Appendix C). In short, all substantive portions of the report were withheld by the NSD. A block above the name of the submitting party - presumably a signature - was indicated as redacted under (b)(6) and (b)(7)(C). All other redacted portions of the record were withheld citing (b)(1) and (b)(3).

EPIC does not appeal the application of Exemptions (b)(6) or (b)(7)(C), but challenges the NSD's application of Exemptions (b)(1) and (b)(3) and the failure to release reasonably segregable portions of the requested record.

*EPIC Appeals the NSD's Application of Exemption (b)(1)*

EPIC appeals the NSD's assertion of FOIA Exemption (b)(1) to withhold all substantive portions of the report to the FISC concerning Section 702 queries for non-foreign intelligence purposes. The NSD failed to carry its burden to establish that Exemption (b)(1) applies, offering *no* explanation to justify its withholding.

While the FOIA specifies that certain categories of information may be exempt from disclosure, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The "agency bears the burden of establishing that an exemption applies." *PETA v. NIH*, 745 F.3d 535 (D.C. Cir. 2014). An agency must describe its "justifications for withholding the information with specific detail." *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011)). For instance, it is insufficient that the agency support its claim to exemption before a court with "vague, conclusory affidavits, or those that merely paraphrase the words of a statute." *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) (*per curiam*). In short, the

FOIA “mandates a strong presumption in favor of disclosure.” *EPIC v. DOJ*, 511 F. Supp. 2d 56, 64 (D.D.C. 2007) (internal citations omitted).

Exemption (b)(1) covers information “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” that is “in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). The current operative classification order under Exemption 1 is Executive Order 13,526. *Judicial Watch*, 715 F.3d at 941. Information cannot be properly classified “unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security” to the degree necessary based on the classification level in Section 1.2. The information must also “pertain to one or more” of the listed categories in Section 1.4:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security;
- (f) United States Government programs for safeguarding nuclear materials or facilities;
- (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
- (h) the development, production, or use of weapons of mass destruction.

Exec. Order No. 13,526 § 1.4.

In the Exemption (b)(1) context, the agency must make a “plausible assertion that information is properly classified.” *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). At litigation, agency declaration can be deemed insufficient to support an Exemption 1 claim if it lacks “detail and specificity,” if there is evidence of “bad faith,” or if the declaration fails to “account for contrary record evidence.” *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). “[M]erely a ‘categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.’” *Id.* (quoting *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993)).

Here, the NSD clearly failed to carry its burden to establish that the requested record is in fact properly classified, as Exemption (b)(1) requires. Indeed, the NSD offered no support for its assertion of the exemption. Rather, in the letter to EPIC the agency merely paraphrased Exemption (b)(1). Specifically, NSD stated that it was “withholding the portions of the record pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b)” followed by a list including: “(1) which permits the withholding of information properly classified pursuant to Executive Order No. 12326.” The NSD did not offer any detail in support of classification - such as the

category or categories of Section 1.4 that may apply. Nor did the agency offer any evidence suggesting to EPIC the material is *properly* classified as required by the FOIA.

Further, there is no basis to properly classify this document. The report at issue concerns information on FBI's receipt and review of Section 702 acquired information concerning U.S. persons. However, by the terms of the FISC, this report concerns information returned from "queries designed to elicit evidence of crimes *unrelated to foreign intelligence*." Memorandum Opinion and Order, [docket no. redacted], slip op. at 44 (FISC Nov. 6, 2015). A report concerning the FBI's ordinary, domestic law enforcement responsibilities does not fall within within any of the Section 1.4's categories. Additionally, this report is a step divorced from any Section 702 acquired data; even if that original data was properly classified, it does not necessarily follow that a secondary description of the FBI's use of that data is properly classified.

For the foregoing reasons, NSD's withholding of the requested report to the FISC under Exemption (b)(1) must fail.

*EPIC Appeals the NSD's Application of Exemption (b)(3)*

EPIC also appeals the NSD's assertion of FOIA Exemption (b)(3) to withhold all substantive portions of the Section 702 query report to the FISC. As with Exemption (b)(1), the NSD failed to carry its burden to establish that the exemption applies, offering no explanation to justify its withholding.

Exemption 3 permits the withholding of records "specifically exempted from disclosure by statute... if that statute— (A) . . . (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." § 552(b)(3). Here, the NSD relies on Section 403-1(i)(1) of the National Security Act, which requires the Director of National Intelligence to protect sources and methods. "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.* 830 F.2d 331, 336 (D.C. Cir. 1987) (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978)). To assess an agency's assertion of Exemption 3, the D.C. Circuit uses a two-part test: (1) whether "the statute in question [is] a statute of exemption as contemplated by exemption 3," and (2) whether "the withheld material satisf[ies] the criteria of the exemption statute." *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C.Cir. 1990); *CREW v. DOJ*, 160 F. Supp. 3d 226, 236 (D.D.C. 2016). As with Exemption 1, an agency's "recit[ion] statutory standards" or "overly vague or sweeping" support "will not carry the government's burden." *Larson*, 565 F.3d at 864.

EPIC does not contest that Section 403-1(i)(1) of the National Security Act is an Exemption 3 statute. EPIC instead contests the NSD's application of the exemption because the agency failed to adequately support its Exemption (b)(3) claim. As with the assertion of Exemption (b)(1), the NSD merely paraphrased the text of Exemption (b)(3).

Specifically, the NSD merely listed as one of its four claimed exemptions “(3) which permits the withholding of information specifically exempted from disclosure by statute (the applicable statute is 50 U.S.C. § 403-1(i)(1) of the National Security Act of 1947). A conclusory restatement of an exemption does not satisfy the agency’s obligation to justify its action under the FOIA.

Further, EPIC challenges the application of Exemption (b)(3) because the requested report need not be withheld to protect sources and methods. As discussed at length above, this report concerns queries designed to elicit evidence of crimes unrelated to foreign intelligence. It is simply a step too far for the NSD to claim that information related to the FBI’s domestic law enforcement responsibilities – information which concerns United States persons, no less - must be withheld to protect sources and methods. Also, as laid out above this report to the FISC is divorced from Section 702 data itself; this is a secondary, descriptive report of agency use of Section 702 acquired data. It is far from clear that such a report must be withheld to protect sources and methods, particularly given the amount of publicly available material on the government’s Section 702 activities. *See, e.g.,* Privacy and Civil Liberties Oversight Bd, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (2014).<sup>2</sup>

For the foregoing reasons, NSD’s withholding of portions of the requested record under Exemption (b)(3) must also fail.

#### *EPIC Challenges the NSD’s Failure to Release Reasonably Segregable Material*

EPIC also challenges the scope of the Exemptions (b)(1) and (b)(3) exemptions asserted by the NSD. As with the agency’s assertion of the two exemptions, the NSD entirely failed to justify its failure to provide any reasonably segregable portion of the substance of the requested report.

Even if an agency has properly invoked the FOIA exemptions, which EPIC does not here concede, it must still disclose any “reasonably segregable portion” of the record requested. 5 U.S.C. § 552(b); *Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008); *Oglesby v. United States Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). “The burden is on the agency to “provide a detailed justification for its non-segregability.” *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal quotation marks omitted). This includes “a statement of [the government’s] reasons, and a “descri[ption of] what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.” *Mead Data Cent., Inc. v. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

The NSD made no attempt to explain its decision to withhold all substantive portions of the requested report. It did not, for instance, explain whether information the NSD claims is exempt from disclosure is inextricably entwined with nonexempt

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<sup>2</sup> <https://www.pclob.gov/library/702-report.pdf>.

information, or whether there is in fact non-exempt material in the withheld portions of the report. Rather, the NSD explained its segregability decision simply by stating that “We have reviewed this record and have determined to release it in part.” To the extent that the Director of the Office of Information Policy finds that Exemptions 1 and 3 only apply in part to the content withheld by the NSD, the NSD must still release any reasonably segregable portion of that content.

For these reasons set forth above, the NSD is required by the FOIA to release further, reasonably segregable portions of the requested report.

### Conclusion

Thank you for your consideration of this appeal. I anticipate your determination on our request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). For questions regarding this appeal I can be contacted at 202-483-1140 x111, or by email at [Kyriakides@epic.org](mailto:Kyriakides@epic.org), cc: [FOIA@epic.org](mailto:FOIA@epic.org).

Respectfully submitted,

/s/ Eleni Kyriakides

Eleni Kyriakides  
EPIC Law Fellow

# APPENDIX A

May 15, 2017

Arnetta Mallory  
FOIA Initiatives Coordinator  
National Security Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
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[nsdfoia@usdoj.gov](mailto:nsdfoia@usdoj.gov)

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 “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>.

# APPENDIX B



U.S. Department of Justice

National Security Division

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Washington, D.C. 20530

NSD FOI/PA #17-186

Ms. Eleni Kyriakides  
EPIC  
1718 Connecticut Avenue, N.W.  
Washington, D.C. 20009

JUL 19 2017

Dear Ms. Kyriakides:

This is in response to your May 15, 2017, Freedom of Information Act (FOIA) request for "all reports submitted pursuant to the November 6, 2015 FISC Memorandum Opinion and Order concerning FBI receipt and review of Section 702 acquired information."

We have conducted a search of the Office of Intelligence and located one record responsive to your request. We have reviewed this record and have determined to release it in part. We are withholding the portions of the record pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

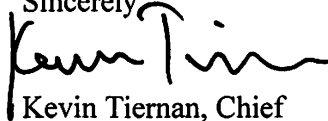
- (1) which permits the withholding of information properly classified pursuant to Executive Order No. 13526;
- (3) which permits the withholding of information specifically exempted from disclosure by statute (the applicable statute is 50 U.S.C. §403-1(i)(1) of the National Security Act of 1947);
- (6) which permits the withholding of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and,
- (7) which permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ...
- (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

For your information, Congress excluded three discrete categories of law enforcement information and national security records from the requirements of the FOIA. See 5 U.S.C. §552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact the Office of Government Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, or at [ogis@nara.gov](mailto:ogis@nara.gov), or 202-741-5770, or toll free at 1-877-684-6448, or facsimile at 202-741-5769. Or you may contact our Public Liaison at 202-233-0756.

If you are not satisfied with this response, you may administratively appeal by writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 11050, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA portal by creating an account at: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or transmitted electronically within 90 days of the date of my response to your request. If you submit an appeal by mail, both the letter and envelope should be clearly marked, "Freedom of Information Act Appeal."

Sincerely

A handwritten signature in black ink, appearing to read "Kevin Tiernan", with a stylized flourish at the end.

Kevin Tiernan, Chief  
Records Management and FOIA Staff



# APPENDIX C



## U.S. Department of Justice

National Security Division

U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT~~TOP SECRET//SI//NOFORN/FISA~~

2017 JAN 23 AM 11:53

Washington, D.C. 20530

January 23, 2017


LEEANN FLYNN HALL  
CLERK OF COURT

The Honorable Rosemary M. Collyer  
United States Foreign Intelligence Surveillance Court  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

Re: (U) Notice regarding FBI queries of Section 702-  
acquired information designed to return evidence of  
a crime unrelated to foreign intelligence

Dear Judge Collyer:

b(1) and b(3)



(U) In the 2015 702 Opinion and Order, the Court found, *inter alia*, that the query provisions of FBI's Section 702 Standard Minimization Procedures (FBI Section 702 SMPs) struck a reasonable balance between the privacy interests of United States persons and persons in the United States and the Government's national security interests. 2015 702 Opinion and Order, at 36. The Court determined that FBI's use of the provisions to conduct queries designed to return evidence of crimes unrelated to foreign intelligence did not preclude the Court from finding that, taken together, the FBI's targeting and minimization procedures submitted with the 2015 Section 702 Certifications were consistent with the requirements of FISA and the Fourth Amendment. *Id.* at 44-45. The Court also noted that, "according to the government, FBI queries designed to elicit evidence of crimes unrelated to foreign intelligence rarely, if ever, produce responsive results from the Section 702-acquired data." *Id.* at 44. To "reassure itself that this risk assessment is valid," the Court required the government to submit in writing a report concerning each instance after December 4, 2015, in which FBI personnel receive and review Section 702-acquired information that FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information. *Id.* at 44 and 78.

~~TOP SECRET//SI//NOFORN/FISA~~

Classified by: Chief, Oversight Section, OI, NSD, DOJ

Derived From: DOJ/NSI SCG-1, 1.6

Declassify on: 20420123


OI Tracking No. 144665

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b(1) and b(3)



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~~TOP SECRET//SI//NOFORN/FISA~~



~~TOP SECRET//SI//NOFORN/FISA~~

b(1) and b(3)

Respectfully submitted,

b(6) and b(7)(C)

Kevin J. O'Connor  
Chief, Oversight Section  
Office of Intelligence, NSD  
U.S. Department of Justice

b(1) and b(3)

~~TOP SECRET//SI//NOFORN/FISA~~