

March 29, 2024

VIA EMAIL

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
Phone: (202) 616-3837

Dear FOIA Officer:

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 (“DOJ”).

EPIC requests the public release of a copy of the DOJ’s responses to Questions for the Record from the Senate Judiciary Committee submitted in relation to that committee’s hearing on June 13, 2023, entitled “Oversight of Section 702 of the Foreign Intelligence Surveillance Act and Related Surveillance Authorities.” The DOJ’s responses to congressional overseers are critical to the public debate over reauthorizing Section 702 of FISA ahead of its potential sunset on April 19, 2024.

Background

FISA Section 702 authorizes warrantless surveillance targeting non-U.S. persons reasonably believed to be outside the United States to acquire “foreign intelligence information” with the compelled cooperation of U.S. service providers. While Section 702 is a foreign intelligence surveillance authority, the government has conceded that it also collects a significant amount of U.S. persons’ communications under Section 702 surveillance programs. Four agencies have access to information acquired pursuant to Section 702: the CIA, the National Security Agency (NSA), the Federal Bureau of Investigation (FBI), and the National Counterterrorism Center (NCTC). The DOJ, along with the ODNI, oversee internal compliance with the rules of Section 702.

Because of the serious implications for Americans’ privacy and the general secrecy with which programs operate pursuant to Section 702, oversight by Congress—including through public oversight hearings and questions for the record—has played a key role in the debate over reauthorizing this sweeping and controversial authority.

Indeed, intelligence agencies routinely emphasize that the government’s use of Section 702 is subject to “extensive and rigorous oversight,” including by Congress.¹ And questions for the record

¹ NSA et al., *Section 702 of the Foreign Intelligence Surveillance Act 14*, https://www.intelligence.gov/assets/documents/702%20Documents/FISA_Section_702_Booklet.pdf.

are an integral part of this oversight process. In particular, agencies have previously emphasized the importance of improving their responsiveness to Congress—including to questions for the record—given the vital role this inter-branch dialogue plays in oversight efforts. In the context of Section 702 surveillance in particular, agency responses to these questions are crucial to understanding the true scope of privacy and civil liberties risks associated with this surveillance and informing Congressional and public debate over reforms.

On June 13, 2023, the Senate Judiciary Committee held an oversight hearing on Section 702 surveillance, with witnesses from the DOJ, ODNI, NSA, CIA, and FBI.² During this hearing, members of Senate Judiciary asked agencies substantive questions about Section 702, as well as the effects of potential legislative reforms. Assistant Attorney General Matt Olsen focused on the remedial measures implemented by the DOJ and FBI in response to violations of Section 702.³ In particular, Attorney General Olsen responded to questions from Senate Judiciary Chairman Dick Durbin on why Congress and the American people should trust the sufficiency of internal Executive Branch oversight given the track record of violations of Section 702.⁴ However, despite the ongoing debate over reauthorizing this authority, the responses to the Committee’s QFRs have not been made public, nor is there any public indication that agencies have even responded to those QFRs.

The public has a right to transparency concerning oversight of and by the DOJ in the context of Section 702 of FISA.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA.⁵ Specifically, EPIC’s request satisfies the agency regulation 28 C.F.R. § 16.5(e)(ii) because it involves “an urgency to inform the public about an actual or alleged Federal Government activity,” and because the request is “made by a person primarily engaged in disseminating information.”⁶

First, EPIC’s request “is relevant to a subject of public urgency concerning an actual or alleged Federal Government activity.”⁷ Recent events underscore the extent to which the DOJ’s activities pursuant to Section 702 are a patent “subject of public urgency.” There is significant media scrutiny of Section 702 as Congress continues to debate whether and how to reform and reauthorize the authority.⁸ As the Senate Judiciary Committee’s hearing itself underscores, the public and

² Oversight of Section 702 of the Foreign Intelligence Surveillance Act and Related Surveillance Authorities: Hearing Before the Sen. Comm. on Jud., 118 Cong. (2023).

³ *Id.*

⁴ *Id.*

⁵ 5 U.S.C. §§ 552(a)(6)(E)(i)(I), 552(a)(6)(E)(v)(II).

⁶ 28 C.F.R. § 16.5(e)(ii).

⁷ *Id.*

⁸ See Dell Cameron, *Sinking US Wiretap Program Offered One Last Lifeboat*, Wired (Mar. 15, 2024), <https://www.wired.com/story/section-702-safe-act-compromise/>; Charlie Savage, *U.S. to Ask Court to Reauthorize Disputed Surveillance Program for a Year*, N.Y. Times (Feb. 28, 2024), <https://www.nytimes.com/2024/02/28/us/politics/nsa-fbi-surveillance-program.html>; Luke Goldstein, *Crunch Time for Government Spying*, Am. Prospect (Feb. 23, 2024), <https://prospect.org/politics/2024-02-23-crunch-time-government-spying-fisa/>; Jordain Carney & Olivia Beavers, *Johnson considers new vote on spy powers*

Congress are intensely focused on oversight of intelligence agencies in this context.⁹ This has resulted in significant media coverage of these oversight hearings.¹⁰ Because the DOJ, along with ODNI, oversees compliance with the rules of Section 702, so many questions raised by members of Congress, the media, and the public, about the adequacy of current oversight efforts are focused on DOJ.

In response to these concerns, members of Congress have introduced legislation that would reauthorize and reform Section 702.¹¹ Some of the central proposed reforms, including a warrant requirement for certain U.S. person queries, would affect the DOJ's role in overseeing surveillance pursuant to Section 702.¹² Further, much of the discussion surrounding some of the marquee legislative reforms—such as a warrant requirement—is explicitly framed around whether current Executive Branch oversight—led by the DOJ and ODNI—is sufficiently effective to protect Americans' privacy.

Finally, effective oversight of agencies is a key part of Congress's discussions surrounding FISA Section 702 and related intelligence surveillance ahead of Section 702's expiration on April 19, 2024. EPIC's request thus satisfies the first standard for expedited processing because there is an

for next week, Politico (Feb. 7, 2024), <https://www.politico.com/live-updates/2024/02/07/congress/spy-powers-redux-in-the-house-00140257>; Martin Matishak, *House GOP lawmakers scramble to find path forward on Section 702 extension*, Record (Feb. 8, 2024), <https://therecord.media/house-gop-lawmakers-scramble-to-find-path-for-section-702-extension>; Kia Hamadanchy, *Opinion: Before the feds surveil Americans for Gaza protests, rein in warrantless spying*, L.A. Times (Feb. 8, 2024), <https://www.latimes.com/opinion/story/2024-02-08/section-702-fisa-gaza-cease-fire-protesters-nancy-pelosi>; J.D. Tuccille, *Controversial Surveillance Law Up for Renewal (Again) in April*, Reason (Jan. 31, 2024), <https://reason.com/2024/01/31/controversial-surveillance-law-up-for-renewal-again-in-april/>; Dell Cameron, *Congress Clashes Over the Future of America's Global Spy Program*, Wired (Dec. 11, 2023), <https://www.wired.com/story/section-702-house-bills-plewsa-fra/>; Dell Cameron, *A Powerful Tool US Spies Misused to Stalk Women Faces Its Potential Demise*, Wired (Oct. 24, 2023), <https://www.wired.com/story/section-702-nsa-abuses-reauthorization/>.

⁹ See *supra* note 2.

¹⁰ See Martin Matishak, *Senators say Biden administration isn't close on overhauling surveillance law*, Record (June 13, 2023), <https://therecord.media/section-702-surveillance-hearing-senate-judiciary>; Sean Lyngaas, *FBI announces new curbs on controversial surveillance program as Congress considers whether to renew it*, CNN (June 13, 2023), <https://www.cnn.com/2023/06/13/politics/fbi-surveillance-program-congress/index.html>; John Sakellariadis, *In the Senate, Biden's spy pitch falls on deaf ears*, Politico (June 13, 2023), <https://www.politico.com/news/2023/06/13/senate-biden-foreign-surveillance-00101749>; Tim Starks, *National security officials make case for keeping surveillance powers*, Wash. Post (June 13, 2023), <https://www.washingtonpost.com/national-security/2023/06/13/section-702-fisa-biden-warrant/>; Zeba Siddiqui, *Renewal of US surveillance program faces resistance from both parties*, Reuters (June 13, 2023), <https://www.reuters.com/world/us/us-officials-call-spy-program-key-big-cases-give-few-details-2023-06-13/>; Ryan Tarinelli, *Senators want privacy safeguards in renewing surveillance tool*, Roll Call (June 13, 2023), <https://rollcall.com/2023/06/13/senators-want-privacy-safeguards-in-renewing-surveillance-tool/>.

¹¹ See generally Security And Freedom Enhancement Act of 2024, S. 3961, 118th Cong. (2024); Government Surveillance Reform Act of 2023, H.R. 6262, 118th Cong. (2023); Protect Liberty and End Warrantless Surveillance Act of 2023, H.R. 6570, 118th Cong. (2023); FISA Reform and Reauthorization Act of 2023, H.R. 6611, 118th Cong. (2023).

¹² See Rebecca Beitsch, *Freedom Caucus pushes for warrant amendment to new FISA bill*, Hill (Feb. 13, 2024), <https://thehill.com/homenews/house/4466251-freedom-caucus-pushes-for-warrant-amendment-to-new-fisa-bill/>.

urgency to inform the public of the DOJ's responses to the Senate Judiciary Committee's questions for the record on the agency's role and oversight mechanisms for surveillance conducted pursuant to Section 702.

Second, as the Court explained in *EPIC v. DOD*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA.¹³ EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.¹⁴

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.¹⁵

Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes.¹⁶ Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplications fees assessed.¹⁷

In addition, because EPIC's request satisfies the standards in 28 C.F.R. § 16.10(k) for granting a fee waiver, any duplication fees should also be waived.¹⁸

EPIC satisfies § 16.10(k) because disclosure 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 interests of" EPIC, the requester.¹⁹

First, disclosure would "shed light on the operations or activities of the government."²⁰ Because the request pertains to the operations and procedures of the DOJ, it speaks to "operations or activities of the government."²¹

Second, disclosure would be "likely to contribute significantly to public understanding" of the DOJ's role in Section 702 and its relationship to congressional overseers. Pursuant to DOJ's FOIA regulations, this factor is satisfied where disclosure is "meaningfully informative" about the government operations or activities in question, and where disclosure "contribute[s] to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester."²² Disclosure of this information would be "meaningfully informative" because there is little publicly available information about recent oversight of the

¹³ 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁴ See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

¹⁵ 5 U.S.C. § 552(a)(6)(E)(vi).

¹⁶ *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(I); 28 C.F.R. § 16.10(d)(1).

¹⁸ 28 C.F.R. § 16.10(k); 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1).

²⁰ 28 C.F.R. § 16.10(k)(2)(i).

²¹ *Id.*

²² 28 C.F.R. § 16.10(k)(2)(ii).

DOJ's activities pursuant to Section 702, and answers to these QFRs would ensure the public is apprised of important recent changes in policies or activities pursuant to these authorities.²³ Disclosure will also provide the public with an insight into how responsive the DOJ is to these overseers at a time where the agency—along with other intelligence agencies—are pushing for Congress to renew this authority. Given criticism of the Intelligence Community's for misuse and abuse of information collected pursuant to Section 702, as well as concerns over a lack of transparency and oversight, the fullest understanding of intelligence agencies' policies and procedures governing their activities under Section 702—as well as their responsiveness to overseers in Congress—is vital to securing U.S. confidence in the Intelligence Community.²⁴ Further, as demonstrated above, EPIC satisfies the second prong of this factor because EPIC is a news media requester.²⁵

Third, disclosure of the requested information is “not primarily in the commercial interest” of EPIC.²⁶ Again, EPIC is a non-profit organization committed to privacy, open government, and civil liberties.²⁷ As demonstrated above, EPIC is a news media requester and satisfies the public interest standard under agency regulations.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days.²⁸ Please send any responsive documents via email to FOIA@epic.org cc: jscott@epic.org in searchable PDF form. For questions regarding this request contact Jeramie Scott at 202- 483-1140 x108 or FOIA@epic.org, cc: jscott@epic.org.

Respectfully submitted,

/s Jeramie Scott

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²³ *Id.*

²⁴ *See supra* note 9.

²⁵ 32 C.F.R. § 16.10(k)(2)(ii)(B) noting that “[c]omponents will presume that a representative of the news media satisfies this consideration.”).

²⁶ 28 C.F.R. § 16.10(k)(2)(iii).

²⁷ *See EPIC, supra* note 14.

²⁸ 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(a).