

March 29, 2024

VIA WEB PORTAL

Federal Bureau of Investigation  
Attn: Initial Processing Operations Unit  
Record/Information Dissemination Section  
200 Constitution Drive  
Winchester, VA 22602

Dear FBI 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 Federal Bureau of Investigation (“FBI”).

EPIC requests the public release of a copy of the FBI’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”; and
- the House Judiciary Committee submitted in relation to that committee’s hearing on July 12, 2023, entitled “Oversight of the Federal Bureau of Investigation.”

The FBI’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 the NSA to conduct 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 NSA, the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the National Counterterrorism Center (NCTC).

Maybe the most controversial aspect of Section 702—and the central focus of the ongoing debate over reauthorizing the authority as a whole—is the FBI’s warrantless searching of

communications acquired pursuant to Section 702.<sup>1</sup> The FBI’s activities have garnered significant scrutiny because the extent of its querying dwarfs that of other agencies, with over 200,000 searches in 2022 alone.<sup>2</sup> Apart from the sheer scope of searches, the Foreign Intelligence Surveillance Court (FISC) has found that FBI engaged in “persistent and widespread” abuses of the rules governing searches of Section 702 databases.<sup>3</sup> These have included searches for racial justice protesters;<sup>4</sup> sitting members of Congress;<sup>5</sup> “business, religious, civic, and community leaders”;<sup>6</sup> a state judge;<sup>7</sup> and over 19,000 donors to a political campaign.<sup>8</sup>

The FBI has acknowledged that this noncompliance is “unacceptable.”<sup>9</sup> However, FBI and other government officials have advocated for continued access to Section 702 information—and against reforms that would require judicial oversight for some of its searches for Americans’ communications—based on reforms to its internal oversight procedures.<sup>10</sup> However, given the general secrecy with which agencies operate pursuant to Section 702, there is little public information with which to corroborate the adequacy of these measures. Often, what little transparency is offered—through declassified government reports and FISC opinions—lag years behind, depriving Americans of critical, up-to-date information about internal FBI reforms amid the fierce public debate over reauthorizing this authority.

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<sup>1</sup> See Priv. & C.L. Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 10 (Sept. 28, 2023), [https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20\(002\).pdf](https://documents.pclob.gov/prod/Documents/OversightReport/054417e4-9d20-427a-9850-862a6f29ac42/2023%20PCLOB%20702%20Report%20(002).pdf) (“U.S. person queries present some of the most serious privacy and civil liberties harms.”).

<sup>2</sup> Off. of the Dir. of Nat’l Intel., *Annual Statistical Transparency Report Regarding the Intelligence Community’s Use of National Security Surveillance Authorities: Calendar Year 2022* 24 (2023), [https://www.dni.gov/files/CLPT/documents/2023\\_ASTR\\_for\\_CY2022.pdf](https://www.dni.gov/files/CLPT/documents/2023_ASTR_for_CY2022.pdf).

<sup>3</sup> In re [Redacted], Mem. Op. & Order, No. [Redacted] 49 (FISA Ct. Apr. 21, 2022), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021\\_FISC\\_Certification\\_Opinion.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/21/2021_FISC_Certification_Opinion.pdf).

<sup>4</sup> Devlin Barrett, *FBI misused surveillance tool on Jan. 6 suspects, BLM arrestees and others*, Wash. Post (May 19, 2023), <https://www.washingtonpost.com/national-security/2023/05/19/fbi-digital-surveillance-misuse-jan6-blm/>.

<sup>5</sup> Martin Matishak, *FBI improperly used warrantless search powers on US senator, others*, Record (July 21, 2023), <https://therecord.media/section-702-senator-improper-fbi-search-white-house>; Dell Cameron, *The FBI’s Most Controversial Surveillance Tool Is Under Threat*, Wired (Feb. 10, 2023), <https://www.wired.com/story/fbi-section-702/>.

<sup>6</sup> In re [Redacted], Mem. Op. & Order, No. [Redacted] 39–40 (FISC Nov. 18, 2020), [https://repository.library.georgetown.edu/bitstream/handle/10822/1061209/gid\\_c\\_00289.pdf?sequence=1&isAllowed=y](https://repository.library.georgetown.edu/bitstream/handle/10822/1061209/gid_c_00289.pdf?sequence=1&isAllowed=y).

<sup>7</sup> Rebecca Beitsch, *FBI improperly used Section 702 surveillance powers on US senator*, Hill (July 21, 2023), <https://thehill.com/homenews/administration/4110850-fbi-improperly-used-702-surveillance-powers-on-us-senator/>.

<sup>8</sup> Tyler McBrien, *Unsealed Surveillance Court Document Reveals 702 Misuse*, Lawfare (May 22, 2023), <https://lawfaremedia.org/article/unsealed-surveillance-court-document-reveals-702-misuse>.

<sup>9</sup> Letter from Christopher Wray, Director of the Federal Bureau of Investigation, to [Redacted], U.S. Senate 1 (July 21, 2023), <https://www.fbi.gov/file-repository/redacted-section-702-director-wray-senate-letter-072123.pdf>.

<sup>10</sup> Rebecca Beitsch, *FBI director makes plea for 702 reauthorization without a warrant requirement*, Hill (Dec. 5, 2023), <https://thehill.com/policy/national-security/4343634-fbi-director-makes-plea-for-702-reauthorization/>.

Given this secrecy, 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. 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 NSA, CIA, FBI, DOJ, and ODNI.<sup>11</sup> During this hearing, members of Senate Judiciary asked agencies substantive questions about Section 702, as well as the effects of potential legislative reforms. FBI Deputy Director Paul Abbate focused on the value of Section 702, while emphasizing the FBI’s relationship with overseers and its latest internal reforms steps to prevent further violations.<sup>12</sup>

On July 12, 2023, the House Judiciary Committee held a hearing on oversight of the FBI, featuring FBI Director Christopher Wray.<sup>13</sup> One of the focal points of the hearing—for Director Wray and members of the committee—was Section 702. During his testimony, Director Wray raised the value of Section 702, stressing that “nobody more deeply shares Members’ concerns regarding past FBI compliance violations related to FISA, including the rules for querying Section 702 collection using U.S. person identifiers, than I do.”<sup>14</sup> According to Director Wray, “[t]hese violations never should have happened and preventing recurrence is a matter of utmost priority.”<sup>15</sup> However, Director Wray argued against proposals to require judicial oversight of the FBI’s searches, emphasizing the effectiveness of the FBI’s internal reforms.<sup>16</sup>

Members, however, scrutinized the FBI’s history of noncompliance and questioned the adequacy of the Bureau’s internal reforms. When several members questioned the FBI’s warrantless purchase of Americans’ data—a practice that would be restricted under many of the current legislative proposals to reauthorize Section 702—Director Wray declined to answer but promised on multiple occasions to have staff follow up and brief members on the FBI’s data purchases.<sup>17</sup> As Rep. Pramila Jayapal emphasized to Director Wray, “[t]his is a critically important issue for the American people to understand [ . . . ] and unless we really understand what measures the FBI is taking to

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<sup>11</sup> Oversight of Section 702 of the Foreign Intelligence Surveillance Act and Related Surveillance Authorities: Hearing Before the Sen. Comm. on Jud., 118 Cong. (2023).

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

<sup>13</sup> Oversight of the Federal Bureau of Investigation: Hearing Before the House of Rep. Jud. Comm., 118 Cong. (2023).

<sup>14</sup> *Id.* (statement of Christopher Wray, Director, Federal Bureau of Investigation).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Oversight of the Federal Bureau of Investigation: Hearing Before the House of Rep. Jud. Comm., 118 Cong. (2023).

ensure that people’s privacy is protected, I think it is going to be a very difficult reauthorization process[.]”<sup>18</sup>

However, despite the ongoing debate over reauthorizing this authority, the FBI’s responses to these Committees’ QFRs have not been made public, nor is there any public indication that the FBI has even responded to those QFRs. According to a recent report, the FBI has still not followed up with members of the House Judiciary Committee on Director Wray’s promise to brief them on the FBI’s purchase of Americans’ data.<sup>19</sup> This apparent lack of responsiveness to overseers in Congress—at a time where the FBI is advocating for a clean reauthorization of the very surveillance activities at issue—is deeply troubling. The public has a right to transparency concerning oversight of the FBI in the context of Section 702 of FISA.

### Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA.<sup>20</sup> 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.”<sup>21</sup>

First, EPIC’s request “is relevant to a subject of public urgency concerning an actual or alleged Federal Government activity.”<sup>22</sup> Recent events underscore the extent to which the FBI’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 ahead of its April 19, 2024 sunset date.<sup>23</sup> As both the Senate and House Judiciary

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<sup>18</sup> Jordain Carney, *House GOP spars with FBI chief on Hunter Biden, Jan. 6 and more*, Politico (July 12, 2023), <https://www.politico.com/news/2023/07/12/house-gop-fbi-director-00105916>.

<sup>19</sup> See Justin Hendrix, *Is the Biden Administration Reaching a New Consensus on What Constitutes Private Information?*, Just Sec. (Mar. 19, 2024), <https://www.justsecurity.org/93572/is-the-biden-administration-reaching-a-new-consensus/>.

<sup>20</sup> 5 U.S.C. §§ 552(a)(6)(E)(i)(I), 552(a)(6)(E)(v)(II).

<sup>21</sup> 28 C.F.R. § 16.5(e)(ii).

<sup>22</sup> *Id.*

<sup>23</sup> 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 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),

Committees' hearings underscore, the public and Congress are intensely focused on oversight of intelligence agencies—and the FBI in particular—in this context. This has resulted in significant media coverage of these oversight hearings, with coverage focusing on members' concerns with the FBI's compliance record and government officials' responses to overseers on its internal reforms.<sup>24</sup>

In response to these concerns, members of Congress have introduced legislation that would reauthorize and reform Section 702.<sup>25</sup> Some of the central proposed reforms, including a warrant requirement for certain U.S. person queries, would affect the FBI's activities pursuant to Section 702.<sup>26</sup> Further, much of the discussion surrounding some of the marquee legislative reforms—such as a warrant requirement—is explicitly framed around the adequacy of the FBI's internal oversight and reform measures in light of its “persistent and widespread” abuses under Section 702.<sup>27</sup> And as members of Congress have noted, a full understanding of the FBI's current practices and compliance record are vital to the decision of whether and how to reauthorize this authority.<sup>28</sup>

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<https://www.wired.com/story/section-702-house-bills-plewsa-frra/>; 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/>.

<sup>24</sup> See Ryan Tarinelli, *FBI director defends surveillance tool at House Judiciary hearing*, *Roll Call* (July 12, 2023), <https://rollcall.com/2023/07/12/fbi-director-defends-surveillance-tool-at-house-judiciary-hearing/>; Brandon Gillespie, *House Dem Jayapal grills FBI's Wray on collecting Americans' data, warns of 'difficult' FISA reauthorization*, *Fox News* (July 12, 2023), <https://www.foxnews.com/politics/house-democrat-jayapal-grills-fbi-director-collecting-americans-data-warns-difficult-fisa-reauthorization>; 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/>.

<sup>25</sup> 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).

<sup>26</sup> 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/>.

<sup>27</sup> See Dell Cameron, *US Congress Report Calls for Privacy Reforms After FBI Surveillance 'Abuses'*, *Wired* (Nov. 16, 2023), <https://www.wired.com/story/house-intelligence-section-702-reform/>; Tonya Riley, *Privacy watchdog recommends court approval for FBI searches of spy data*, *CyberScoop* (Sept. 28, 2023), <https://cyberscoop.com/pcllob-section-702-court-approval/>; Ellen Nakashimma & Tim Starks, *Limit FBI's access to powerful spy tool, White House panel says*, *Wash. Post* (July 31, 2023), <https://www.washingtonpost.com/national-security/2023/07/31/section-702-fbi/>.

<sup>28</sup> See *supra* note 17.

EPIC’s request thus satisfies the first standard for expedited processing because there is an urgency to inform the public of the FBI’s responses to the Senate and House Judiciary Committees’ 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.<sup>29</sup> 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*.<sup>30</sup>

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.<sup>31</sup>

#### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.<sup>32</sup> Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplications fees assessed.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup>

First, disclosure would “shed light on the operations or activities of the government.”<sup>36</sup> Because the request pertains to the operations and procedures of the FBI, it speaks to “operations or activities of the government.”<sup>37</sup>

Second, disclosure would be “likely to contribute significantly to public understanding” of the FBI’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.”<sup>38</sup> Disclosure of this information would be “meaningfully

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<sup>29</sup> 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>30</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>31</sup> 5 U.S.C. § 552(a)(6)(E)(vi).

<sup>32</sup> *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>33</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(I); 28 C.F.R. § 16.10(d)(1).

<sup>34</sup> 28 C.F.R. § 16.10(k); 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>35</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1).

<sup>36</sup> 28 C.F.R. § 16.10(k)(2)(i).

<sup>37</sup> *Id.*

<sup>38</sup> 28 C.F.R. § 16.10(k)(2)(ii).

informative” because there is little publicly available information about recent oversight of the FBI’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.<sup>39</sup> Disclosure will also provide the public with an insight into how responsive the FBI is to these overseers at a time where the agency—along with other intelligence agencies—are pushing for Congress to renew this authority.<sup>40</sup>

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 the FBI’s most recent compliance measures and activities pursuant to Section 702—as well as their responsiveness to overseers in Congress—is vital to securing U.S. confidence in the Intelligence Community.<sup>41</sup> Further, as demonstrated above, EPIC satisfies the second prong of this factor because EPIC is a news media requester.<sup>42</sup>

Third, disclosure of the requested information is “not primarily in the commercial interest” of EPIC.<sup>43</sup> Again, EPIC is a non-profit organization committed to privacy, open government, and civil liberties.<sup>44</sup> 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.<sup>45</sup> Please send any responsive documents via email to [FOIA@epic.org](mailto:FOIA@epic.org) cc: [jscott@epic.org](mailto:jscott@epic.org) in searchable PDF form. For questions regarding this request contact Jeramie Scott at 202- 483-1140 x108 or [FOIA@epic.org](mailto:FOIA@epic.org), cc: [jscott@epic.org](mailto:jscott@epic.org).

Respectfully submitted,

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/s Chris Baumohl  
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<sup>39</sup> *Id.*

<sup>40</sup> *See supra* note 18 and accompanying text.

<sup>41</sup> *See supra* note 9.

<sup>42</sup> 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.”).

<sup>43</sup> 28 C.F.R. § 16.10(k)(2)(iii).

<sup>44</sup> *See EPIC, supra* note 30.

<sup>45</sup> 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(a).