

March 29, 2024

VIA FACSIMILE

National Security Agency
Attn: FOIA/PA Office
9800 Savage Road, Suite 6932
Fort George G. Meade, MD 20755-6932

Dear NSA 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 National Security Agency (“NSA”).

EPIC requests the public release of a copy of the NSA’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 NSA’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).

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 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—

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.

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.² During this hearing, members of Senate Judiciary asked agencies substantive questions about Section 702, as well as the effects of potential legislative reforms. NSA Deputy Director George Barnes focused on the value of Section 702 while also the NSA's "deep culture of compliance" and relationship with overseers.³ 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 the NSA in the context of Section 702 of FISA.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA.⁴ Specifically, EPIC's request satisfies DOD regulation 32 C.F.R. § 286.8(e)(1)(i)(B) because this information is "urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity."⁵

First, EPIC's request "is relevant to a subject of public urgency concerning an actual or alleged Federal Government activity."⁶ Recent events underscore the extent to which the NSA'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.⁷ 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 5 U.S.C. §§ 552(a)(6)(E)(i)(I), 552(a)(6)(E)(v)(II).

⁵ 32 C.F.R. § 286.8(e)(1)(i)(B); *see also* NSA, NSA/CSS Freedom of Information Act Program Policy 1-5 § 14(b) (2004) (noting that "urgently needed" means that "the information has a particular value that shall be lost if not disseminated quickly").

⁶ *Id.*

⁷ *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*

Congress are intensely focused on oversight of intelligence agencies—including the NSA—in this context.⁸ This has resulted in significant media coverage of these oversight hearings.⁹

Indeed, oversight of the NSA’s operations and activities pursuant to Section 702 is a particularly urgent matter of public concern for two reasons. First, the NSA has a unique role in conducting surveillance pursuant to Section 702. Second, because of the NSA’s own history of noncompliance with Section 702 rules¹⁰—along with its involvement in other controversial surveillance activities¹¹—the agency is often the focus of media coverage.¹²

In response to these concerns, members of Congress have introduced legislation that would reauthorize and reform Section 702.¹³ Some of the central proposed reforms, including a warrant

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/>.

⁸ See *supra* note 2.

⁹ 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/>.

¹⁰ See Robyn Greene, *A History of FISA Section 702 Compliance Violations*, New Am. Open Tech. Inst. (Sept. 28, 2017), <https://www.newamerica.org/oti/blog/history-fisa-section-702-compliance-violations/> (compiling violations); see also *A Powerful Tool US Spies Misused to Stalk Women Faces Its Potential Demise*, *supra* note 7 (highlighting the revelation that in 2022, an NSA analyst had misused access to Section 702-acquired information to search for individuals they had met through an online dating service).

¹¹ See, e.g., Charlie Savage, *N.S.A. Buys Americans’ Internet Data Without Warrants*, Letter Says, N.Y. Times (Jan. 25, 2024), <https://www.nytimes.com/2024/01/25/us/politics/nsa-internet-privacy-warrant.html>.

¹² See, e.g., Dell Cameron, *Senate Leaders Plan to Prolong NSA Surveillance Using a Must-Pass Bill*, Wired (Nov. 10, 2023), <https://www.wired.com/story/section-702-nsa-surveillance-senate/>.

¹³ 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).

requirement for certain U.S. person queries, would affect the NSA’s surveillance pursuant to Section 702.¹⁴

Finally, effective oversight of agencies—including the NSA—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 urgency to inform the public of the NSA’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.¹⁵ 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*.¹⁶

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.¹⁷

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.¹⁸ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplications fees assessed.¹⁹

In addition, because EPIC’s request satisfies the standards in 32 C.F.R. § 286.12(l) for granting a fee waiver, any duplication fees should also be waived.²⁰

EPIC satisfies § 286.12(l) 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.²¹

¹⁴ See Martin Matishak, *Senators propose compromise over hot-button Section 702 renewal*, Record (Mar. 14, 2024), <https://therecord.media/senators-durbin-lee-propose-section-702-compromise>; 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/>.

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

¹⁶ See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

¹⁷ 5 U.S.C. § 552(a)(6)(E)(vi).

¹⁸ *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.12(e)(1).

²⁰ 32 C.F.R. § 286.12(l); 5 U.S.C. § 552(a)(4)(A)(iii).

²¹ 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.12(l)(1).

First, disclosure would “shed light on the operations or activities of the government.”²² Because the request pertains to the operations and procedures of the NSA, it speaks to “operations or activities of the government.”²³

Second, disclosure would be “likely to contribute significantly to public understanding” of the NSA’s role in Section 702 and its relationship to congressional overseers. Pursuant to DOD’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.”²⁴ Disclosure of this information would be “meaningfully informative” because there is little publicly available information about recent oversight of the NSA’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.²⁵ Disclosure will also provide the public with an insight into how responsive NSA 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.²⁶ Further, as demonstrated above, EPIC satisfies the second prong of this factor because EPIC is a news media requester.²⁷

Third, disclosure of the requested information is “not primarily in the commercial interest” of EPIC.²⁸ Again, EPIC is a non-profit organization committed to privacy, open government, and civil liberties.²⁹ 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.

²² 32 C.F.R. § 286.12(1)(2)(i).

²³ *Id.*

²⁴ 32 C.F.R. § 286.12(1)(2)(ii).

²⁵ *Id.*

²⁶ *See supra* note 9.

²⁷ 32 C.F.R. § 286.12(1)(2)(ii)(B) noting that “DoD Components will presume that a representative of the news media satisfies this criterion.”).

²⁸ 32 C.F.R. § 286.12(1)(2)(iii).

²⁹ *See EPIC, supra* note 16.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days.³⁰ 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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/s Chris Baumohl

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³⁰ 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 286.8(a).