

March 29, 2024

VIA EMAIL

Gregory Koch
Director, Information Management Office
ATTN: FOIA/PA
Office of the Director of National Intelligence
Washington, D.C. 20511
dni-foia@dni.gov

Dear Mr. Koch:

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 Office of the Director of National Intelligence (“ODNI”).

EPIC requests the public release of a copy of the ODNI’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 ODNI’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 ODNI and 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—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 ODNI, NSA, CIA, FBI, and DOJ.² During this hearing, members of Senate Judiciary asked agencies substantive questions about Section 702, as well as the effects of potential legislative reforms. ODNI General Counsel Chris Fonzone focused on ODNI’s role in overseeing surveillance conducted pursuant to Section 702, detailing at length the government’s “robust safeguards designed to protect the privacy and civil liberties of Americans.”³ General Counsel Fonzone also emphasized that when the government has made mistakes, “including some important ones,” it has been required to “identify and confront those mistakes, disclose them to our overseers and the public and take remedial actions that make us better.”⁴ In response to questions from Senator Chuck Grassley, General Counsel Fonzone expressed the government’s commitment to making more information about Section 702 public to assist Congress and the American people in its consideration of renewing the authority.⁵ 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 ODNI in the context of Section 702 of FISA.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA.⁶ Specifically, EPIC’s request satisfies the agency regulation 32 C.F.R. § 1700.12(c)(2) because it involves “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” and because the request is “made by a person who is primarily engaged in disseminating information.”⁷

First, there is an “urgency to inform the public about an actual or alleged Federal Government activity.”⁸ Recent events create a patent “urgency to inform the public” about the ODNI’s role in overseeing government surveillance conducted pursuant to Section 702. There is

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.

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 *Id.*

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

⁷ 32 C.F.R. § 1700.12(c)(2).

⁸ *Id.*

significant media scrutiny of Section 702 as Congress continues to debate whether and how to reform and reauthorize the authority.⁹ As the Senate Judiciary Committee’s hearing itself underscores, the public and Congress are intensely focused on oversight of intelligence agencies in this context.¹⁰ This has resulted in significant media coverage of these oversight hearings.¹¹ And because ODNI and DOJ are the main overseers of Section 702 within the Executive Branch, much of the focus—directly or indirectly—is on the adequacy of these agencies’ oversight activities.

In response to these concerns, members of Congress have introduced legislation that would reauthorize and reform Section 702.¹² Some of the central proposed reforms, including a warrant requirement for certain U.S. person queries, would affect the ODNI’s role in overseeing surveillance pursuant to Section 702.¹³ And as noted above, the current debate in Congress and among the

⁹ 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), <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/>.

¹⁰ See *supra* note 2.

¹¹ 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/>.

¹² 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).

¹³ 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/>.

American people centers around whether the current oversight structure—led in large part by ODNI—is sufficiently protective, or whether further reforms are needed.

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 urgency to inform the public of the ODNI’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.¹⁴ 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*.¹⁵

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.¹⁶

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.¹⁷ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplications fees assessed.¹⁸

In addition, because EPIC’s request satisfies each of the two alternative standards in 32 C.F.R. § 1700.6(b) for granting a fee waiver, any duplication fees should also be waived.¹⁹

EPIC satisfies § 1700.6(b)(1) because the “interest of the United States Government would be served.”²⁰ 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.²¹

In the alternative, EPIC also satisfies § 1700.6(b)(2) because disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or

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

¹⁵ See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

¹⁶ 5 U.S.C. § 552(a)(6)(E)(vi); 32 C.F.R. § 1700.12(b).

¹⁷ *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

¹⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 1700.6(i)(2).

¹⁹ 32 C.F.R. § 1700.6(b); 5 U.S.C. § 552(a)(4)(A)(iii).

²⁰ 32 C.F.R. § 1700.6(b)(1).

²¹ See *supra* note 9.

activities of the United States Government and is not primarily in the commercial interests of” EPIC, the requester.²²

First, disclosure is “likely to contribute significantly to public understanding of the operations or activities of the United States Government.”²³ Because the request pertains to the operations and procedures of the ODNI, it speaks to “operations or activities of the Federal government.”²⁴ Disclosure would “contribute significantly to public understanding” of the ODNI’s role in Section 702 overseers because there is little publicly available information about recent ODNI oversight activities, 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 of the records requested will provide the public with a better understanding of the nature of ODNI’s role in Section 702, the adequacy of internal intelligence oversight. Disclosure will also provide the public with an insight into how responsive the ODNI is to these overseers at a time where the agency—along with other intelligence agencies—are pushing for Congress to renew this authority.

Second, 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

Jeramie Scott

Senior Counsel

Director, Project on Surveillance Oversight

/s Chris Baumohl

Chris Baumohl

EPIC Law Fellow

²² 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 1700.7(b)(2).

²³ 32 C.F.R. § 1700.6(b)(2).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See EPIC, *supra* note 15.

²⁸ 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 1700.12(b).