

The FISA Amendments Reauthorization Act of 2017: Enhanced Privacy Safeguards for Personal Data Transfers Under Privacy Shield

In 2008, Congress passed updates to the Foreign Intelligence Surveillance Act (FISA), including the addition of Section 702, which authorized the acquisition of electronic communications of non-U.S. persons located outside the United States for the express purpose of collecting foreign intelligence information, under FISA Court-approved procedures and subject to FISA Court oversight. On January 19, 2018, Congress reauthorized Section 702 for six years.

In addition to reauthorizing Section 702, the FISA Amendments Reauthorization Act of 2017 (the “Act”) expands privacy safeguards under FISA and other U.S. intelligence laws. These new safeguards are discussed below.

Limitations on Collection, Use, and Processing

Congressional Review and Oversight of “Abouts” Collection

The Government terminated “abouts” collection in April 2017, as has been publicly disclosed. “Abouts” collection refers to a communication that is acquired based on it containing a reference to a Section 702-tasked selector (such as an email address), not because the communication is to or from the Section 702-tasked selector. The Act requires that if the government wants to resume acquiring “abouts” communications, absent an emergency situation, certain steps must be taken. First, the government must inform Congress thirty days prior to commencing such collection; during this period, Congress may hold hearings and review the proposed collection. Second, the government must also inform and obtain approval from the FISA Court. Prior to the FISA Court approving the government’s request, the Act directs the FISA Court to consider appointing an *amicus curiae* to advocate for individual privacy and civil liberties interests during its review of any such proposed collection.

Querying Procedures Required

The Act now requires the Attorney General and the Director of National Intelligence (DNI) to adopt querying procedures for information acquired pursuant to Section 702. These procedures must be reviewed and approved by the FISA Court. Section 702 querying constraints are already in place for information concerning persons of any nationality, as set forth in relevant agencies’ publicly available “minimization procedures.” The minimization procedures place certain limits on agencies’ ability to query, retain, or disseminate Section 702-acquired information. Those procedures require, for example, (1) strict controls on access to and querying of Section 702-acquired data, regardless of the nationality of the individual to whom the data pertains; (2) in-depth training for all personnel with access to raw Section 702 data; and (3) deletion of data

acquired when the statutory requirements have not been met (e.g., a non-U.S. person Section 702 target who is outside of the United State unexpectedly travels to the United States) or based on errors in the application of Section 702 targeting or minimization procedures.

The Act also imposes additional querying and use restrictions for incidentally acquired Section 702 information concerning U.S. persons, who may not be targeted under Section 702. The FBI must now obtain a FISA Court order to access the contents of U.S. person queries of Section 702 acquired information when the purpose of the query is to retrieve evidence of a crime in connection with a criminal investigation unrelated to national security. Additionally, information concerning a U.S. person acquired under Section 702 may not be used against that U.S. person in a criminal proceeding unless such a FISA Court order was obtained prior to reviewing the query results or the proceeding involves national security or specified serious crimes.

Enhanced Oversight Mechanisms

Privacy and Civil Liberties Oversight Board

The Act makes two changes to the enabling statute for the Privacy and Civil Liberties Oversight Board (PCLOB) that allows the PCLOB to better exercise its advisory and oversight functions. First, the Act provides that remaining members of the Board may appoint new staff in the absence of a Chairman. Previously, the authority to appoint staff members resided solely with the Chairman. The PCLOB staff currently provides important assistance to the Board and continues its work while the Board is without a quorum.

Second, the Act enhances the PCLOB members' authority to meet and deliberate in private by clarifying that, notwithstanding the open meetings and procedural requirements of the Sunshine Act (5 U.S.C. 552b), Board members may meet or otherwise communicate in any number to confer or deliberate in a manner that is closed to the public. The PCLOB continues to be required to submit public reports and hold public hearings.

Privacy and Civil Liberties Officers

An existing statute requires a number of agencies to establish and maintain Privacy and Civil Liberties Officers (PCLOs) to serve as principal advisor to their agencies on certain matters related to privacy and civil liberties and to ensure that there are adequate procedures to receive, investigate, respond to, and redress complaints from individuals who allege that the agency violated their privacy or civil liberties. Such PCLOs are also to report directly to the head of the agency. Although the Office of the Director of National Intelligence, the Department of Defense,

the Department of Justice, and the Central Intelligence Agency were included in the earlier statute, the National Security Agency (NSA) and Federal Bureau of Investigation (FBI), which are within the departments of Defense and Justice respectively, were not. The Act adds the FBI and the NSA to this list of agencies that are required to establish and maintain PCLOs.

Before the change in the Act, the NSA and the FBI had, as a matter of policy and practice, already established and maintained PCLOs. NSA's PCLO, named in February 2014, has prepared and published several important reports on NSA's surveillance authorities and activities, and maintains a robust public presence: <https://www.nsa.gov/about/civil-liberties/>. Likewise, the FBI has long maintained a PCLO.

The Act represents Congressional ratification of existing practices at both the NSA and the FBI, and reinforces the sense of Congress of the importance of maintaining a PCLO at these agencies.

Whistleblower Protections for Contractors of the Intelligence Community

The Act extends whistleblower protections to contract employees at intelligence agencies. It prohibits management to retaliate against contractors who report to Inspectors General, Congress, or other senior officials on violations of law, gross mismanagement, or abuses of authority. Contractors were previously protected from agency management retaliation in the security clearance process. The Act extends protections to personnel actions taken by a contractor's employer.

New Oversight Provisions Complement Existing Oversight Mechanisms

These new oversight provisions in the Act complement the many intelligence oversight mechanisms already in place, including the FISA Court's review of compliance with its orders authorizing surveillance programs and related procedures. Compliance at each intelligence agency is further secured through requirements to report violations of FISA orders, PCLOs (who serve as internal privacy officers), independent Inspectors General, independent oversight bodies (such as the PCLOB), and by Congress through its legislative and oversight role.

Enhanced Transparency Mechanisms

Additional Reporting Requirements.

The Act increases transparency by imposing several additional disclosure requirements on the government, including annual good faith estimates of the number of (1) Section 702 targets, (2) non-U.S. persons targeted pursuant to certain FISA Court orders, including those involving the content of communications, and (3) criminal proceedings in which the government provides notice to a person, regardless of nationality, of its intent to disclose information acquired or derived from FISA acquisition. It also requires the publication of the FISA Court-approved Section 702 minimization procedures after a classification review and application of necessary redactions.

Many of these new provisions mandate transparency measures that the government previously had undertaken voluntarily. For example, the government has already published partially redacted versions of the Section 702 targeting and minimization procedures. Additionally, the government already releases good faith estimates of the number of Section 702 targets and of other non-U.S. persons targeted under other certain FISA provisions; these statistics have been published in the DNI's annual *Statistical Transparency Reports*.

These documents and a wealth of other information related to intelligence activities, including thousands of pages of documents on FISA Court proceedings and other intelligence-related matters, may be found at the ODNI internet site called "*IC on the Record*." The U.S. intelligence agencies' commitment to openness—including its commitment to the IC's *Principles of Intelligence Transparency*—is unsurpassed by any intelligence service in the world and facilitates public scrutiny and oversight of U.S. intelligence activities.