

How FISA Section 702's Compliance & Oversight Have Grown to Strengthen Privacy and Civil Liberties Protections for U.S. Persons

Section 702 allows the Intelligence Community (IC) to collect communications of targeted foreign persons who are located outside of the United States:

- Based on an assessment that those persons are likely to communicate foreign intelligence.
- Using specific communications identifiers, such as an email address or phone number.
- Subject to court-approved targeting rules and multiple layers of oversight.

There are three certifications covering foreign governments and related entities, counterterrorism, and combatting proliferation.

In targeting foreign persons outside the United States, Section 702 may result in the collection of incidental U.S. person communications. The IC dedicates substantial compliance resources to protecting the privacy and civil liberties of U.S. persons in handling these communications. This includes significant safeguards added by Congress as a part of the 2018 FISA Section 702 reauthorization.

Section 702 – Safeguards Implemented Since 2018 Reauthorization

SEPARATE QUERY PROCEDURES

The 2018 reauthorization includes a new requirement for the Attorney General (AG) and Director of National Intelligence (DNI) to adopt procedures, reviewed and approved by the Foreign Intelligence Surveillance Court (FISC), governing how agencies query unminimized information acquired via Section 702.

RESTRICTIONS ON FBI'S "EVIDENCE OF A CRIME" QUERIES

The 2018 reauthorization includes a new requirement for FBI to obtain a court order (called an "f(2) order") before an analyst is permitted to review the contents returned by a U.S. person query when the purpose of the query is to retrieve evidence of a crime in a non-national security related FBI criminal investigation.

LIMITING 702'S USE IN CRIMINAL PROCEEDINGS

The 2018 reauthorization includes new restrictions on the U.S. government's use of Section 702 information in a criminal proceeding, except where FBI has obtained a court order or in the case of certain serious crimes like murder or child exploitation.

NOTIFICATION TO CONGRESS IF NSA RESTARTS "ABOUTS" COLLECTION

Since 2017, when NSA ended "abouts" collection, all Section 702 collection must be "to" or "from" the target of the collection. The 2018 reauthorization requires that NSA must inform Congress 30 days prior to resuming "abouts" collection with an emergency exception provision.

FBI COMPLIANCE CHANGES IMPLEMENTED SINCE 2020

1. Established the Office of Internal Auditing.
2. Updated its policies, training, and technology to address the root causes of several compliance challenges:
 - Requiring analysts to "opt-in" before their queries run against Section 702-acquired information;
 - Requiring prior legal approval for batch jobs that result in 100 or more queries;
 - Clarifying guidance and enhancing training regarding the query standard; and
 - Documenting case-specific justifications before reviewing contents returned by a U.S. person query.
3. Requiring pre-approval for sensitive queries, including personal approval by the Deputy Director for certain sensitive queries.

ADDITIONAL TRANSPARENCY ACTIVITIES

The 2018 reauthorization increases transparency by directing the DNI to publicly release significant or novel FISC opinions and agency minimization procedures. It also expands Congressional reporting, directing the AG to provide the total number of subjects targeted by electronic surveillance, as well as requires FBI to report to Congress the number of times the FBI opens a criminal investigation into a U.S. person based in whole, or in part, on Section 702-acquired information.

ADDITIONAL PRIVACY & CIVIL LIBERTIES SAFEGUARDS

The 2018 reauthorization requires Privacy and Civil Liberties officers for NSA and FBI, allows the Privacy and Civil Liberties Oversight Board to exercise oversight functions even if the Chair is vacant, and permits the FISC to compensate amici and technical experts.

Section 702 – Current Safeguards for Civil Liberties and Privacy

POLICIES & PROCESSES

In addition to the FISC approved Targeting, Minimization, and Query Procedures, each Agency has strengthened its policies and technology, implementing internal controls that provide more detailed directions to analysts on how to handle Section 702 information.

TARGETING POLICIES:

Two pairs of Eyes: NSA and FBI, the only agencies with Targeting Procedures, each have at least two personnel review before a selector can be tasked for collection under Section 702.

Post Tasking Reviews: All agencies receiving Section 702 information conduct initial and subsequent reviews of the collection to ensure that the targeted selector is and continues to be likely to produce foreign intelligence information and is not used by a U.S. person or a person in the U.S.

NSA USP QUERY POLICIES & TECHNOLOGY:

- The NSA Office of the General Counsel must approve all U.S. person query terms prior to the query of Section 702 contents.
- NSA issued additional guidance for reviewing and approving sensitive query terms.

OVERSIGHT & ACCOUNTABILITY

All three branches of the Government play a key role in overseeing the Section 702 program. This oversight structure helps refine policies, training, and technology to ensure agencies are operating in the most compliant way possible.

DOJ reviews documentation and justification for all new targeting decisions. ODNI and DOJ perform joint 60-day reviews of the documentation and justification for new NSA targeting decisions, U.S. person queries, and disseminations. The Targeting, Querying, and Minimization Procedures for each element are reviewed annually by the FISC.

FBI NOTICE REQUIREMENTS, USP QUERY REQUIREMENTS, & TECHNOLOGY:

- **Technology:** FBI users affirmatively "opt-in" if they are seeking to query Section 702 information. FBI also redesigned the user interface in its FISA database systems to include "pop-up" prompts to remind users in real time of the query rules and any necessary approvals they need to obtain.
- **Requirements for Evidence of a Crime Only Queries:** FBI must seek a court order before an analyst is permitted to review the contents of a U.S. person query when the purpose of the query is to retrieve evidence of a crime in a non-national security related FBI criminal investigation.
- **Notice to Defendants:** DOJ provides notice to defendants when Section 702 information will be used against a defendant in a criminal prosecution. This has been done in nine criminal prosecutions since the beginning of the Section 702 program and all defendants were given notice and an opportunity to challenge its use.

Every six months, the intelligence and oversight committees in Congress are provided with a semiannual report by the Attorney General describing all identified compliance incidents, as well as a Joint Assessment by DOJ and ODNI that identifies trends and remedial efforts.

Reports of intentional violations, which are very rare, are referred for investigation and further action—up to and including suspension, loss of security clearance, or termination.

TRAINING & ACCESS

Access to Section 702 information is limited to personnel with mission need who have completed mandatory training and who have been specifically granted access to the system(s) that store the information.

TRAINING

Personnel must complete training on how to use Section 702 information, as well as instruction on the appropriate use of intelligence systems and privacy protections to retain access to raw Section 702 information.

EXPERT RESOURCES

Each agency designates FISA-trained attorneys to answer questions related to technical, policy, or operational aspects of the program, as well as expert compliance personnel to assist analysts.

Each agency that has access to Section 702 information has a statutorily mandated Privacy and Civil Liberties Officer who reports to the head of the Agency.

TRANSPARENCY

To enhance public understanding of the IC, ODNI and DOJ provide the public with a broad range of information on intelligence activities and authorities—including Section 702. No other nation provides more transparency about its intelligence activities.

The IC has published all historic FISC opinions with significant interpretations of law spanning the last 20 years, along with Section 702 procedures for Targeting, Querying, and Minimization.

TECHNICAL CONTROLS

To enforce the above restrictions, all unminimized Section 702 information is stored in approved repositories with controls designed to prevent unauthorized access by those, within or outside the relevant agency, who do not meet the necessary requirements.

Agencies further tag or segregate the information as a security measure and the systems maintain audit logs that can be reviewed in the event of a possible compliance incident related to access and use of Section 702 information.

ODNI publishes the Annual Statistical Transparency Report each April, which provides not only statutorily required information, but also other information that the DNI has determined can be released regarding the IC's use of national security authorities.

ODNI, FBI, CIA, and NSA have statutory Privacy and Civil Liberties Officers who produce semi-annual public reports on their activities.

