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Office of the Director of National Intelligence
1500 Tysons McLean Drive
McLean, VA 22102

General Timothy D. Haugh, Director
National Security Agency
9800 Savage Rd., Suite 6272
Fort George G. Meade, MD 20755-6000

October 15, 2024.

Dear Director Haines and General Haugh,

As civil society organizations concerned about the intelligence community's acquisition and use of U. S. persons' personal information, we are writing to follow up with you regarding promises made by NSA to supply a **public estimate of the number of U. S. persons' communications** that are "incidentally" collected as part of NSA's surveillance under Section 702 of the FISA Amendments Act.

This information has been requested repeatedly by legislators since at least 2011,¹ and by civil society organizations since at least 2015.² In February 2017, at his confirmation hearing, future DNI Dan Coats pledged that he would "do everything I can to work with Admiral Rogers in NSA to get you that number."³ NSA Deputy Director Richard Ledgett

¹ See <https://www.wyden.senate.gov/imo/media/doc/2011-07-14%20Clapper%20FISA%20Letter.pdf>, dated July 14, 2011, and the response of Inspector-General I. Charles McCullough that such an estimate would be infeasible, https://web.archive.org/web/20120711032322/https://www.wired.com/images_blogs/dangerroom/2012/06/IC-IG-Letter.pdf, dated June 15, 2012; then, as it emerged that such an estimate would not in fact be infeasible, see https://www.brennancenter.org/sites/default/files/legal-work/Letter_to_Director_Clapper_4_22.pdf, dated April 22, 2016.

² See <https://www.pogo.org/policy-letters/civil-society-pushes-back-to-get-answers-on-surveillance>, dated January 13, 2016, referring to previous correspondence dated October 29, 2015.

³ See https://na-production.s3.amazonaws.com/documents/CoatsResponseLetter_6_12.pdf, referring to testimony by future DNI Coats available here: <https://www.intelligence.senate.gov/hearings/open-hearing-nomination-daniel-coats-be-director-national-intelligence>.

also pledged publicly in March 2017 to provide an estimate by the end of 2017.⁴ By the summer of 2017, DNI Coats, having received Senate confirmation, was backtracking on this commitment.⁵ The House Judiciary Committee then reiterated the request, and conveyed to the public the committee members' understanding from ODNI that the estimate would be provided "early enough to inform the debate" about Section 702, "in a form that can be shared with the public."⁶ The estimate was not in fact provided in time for the 2017-18 renewal debate.

In 2022, Princeton researchers published a paper convincingly establishing a viable methodology for an estimate of U. S. persons under Section 702.⁷ Nonetheless, there was still no estimate provided by ODNI nor NSA in time for the 2023-24 Section 702 renewal debate. Supplementary evidence of the practicability of an estimate is provided by the NSA's own practices. According to the Privacy and Civil Liberties Board,

"the NSA uses IP addresses, in combination with other techniques, to filter out domestic communications when conducting Upstream surveillance of Internet transactions. The FISC found that such filtering was constitutionally required, and the NSA apparently considers this method of identifying the location of communicants sufficient for purposes of complying with the Constitution and with the FISC's orders."⁸

The same technique could be used to determine the percentage of communications obtained through Upstream surveillance under Section 702 that involve at least one person inside the United States. While this information would be only a partial proxy for

⁴ See <https://www.reuters.com/article/us-usa-intelligence-nsa-idUSKBN16T034/>, dated March 21, 2017.

⁵ See https://na-production.s3.amazonaws.com/documents/CoatsResponseLetter_6_12.pdf, dated June 12, 2017.

⁶ See <https://web.archive.org/web/20170613044507/https://judiciary.house.gov/press-release/goodlatte-conyers-seek-answers-americans-swept-foreign-intelligence-programs/>, dated June 16, 2017.

⁷ See <https://www.usenix.org/system/files/sec22-kulshrestha.pdf>, by Princeton professors Ananay Kulshrestha and Jonathan Mayer, dated August 10-12, 2022.

⁸ See PCLOB, "Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act", [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), dated September 28, 2023.

the number of U.S. persons' communications obtained under Section 702, it would be a meaningful start to providing the rough estimate that members of Congress have repeatedly requested. The technique proposed by Princeton researchers would fill the remaining gap and help Congress obtain the full estimate it should have.

As a consequence of ODNI's and NSA's refusal to provide this estimate, substantial misinformation regarding this authority persists among members of Congress and the public. For example, Congressman Mike Turner, Chair of the House Permanent Select Committee on Intelligence, in the floor debate on the "Reforming Intelligence and Securing America Act" ("RISAA") in April, made the following statements:

"There is no place in this statute where Americans' data becomes at risk. [...] There already is a warrant requirement for the protection of Americans and people who are here in the United States. [...] Americans' data in the United States is already protected by the Constitution. [...] Section 702 is used only to target bad actors overseas and our adversaries who are not protected under the 4th Amendment. It is not used to **surveil or** target Americans." [emphasis ours]⁹

An estimate of the number of U.S. persons' communications obtained under Section 702 is vital to correct such misinformation, and to convey to Congress and to people across America the truth of the matter—namely, that there is substantial warrantless "incidental" collection of U.S. person communications under this authority. This estimate must be provided *before* the congressional debate over the next reauthorization of Section 702. The authority is scheduled to expire in April 2026, and the debate will likely begin well in advance of that date—perhaps as early as next spring.

Under the Intelligence Community's 2015 Transparency Principles,¹⁰ the Intelligence Community is supposed to "[b]e proactive and clear in making information publicly

⁹ See transcript of House floor debate on the warrant amendment to RISAA, April 12, 2024, available at <https://www.congress.gov/congressional-record/volume-170/issue-63/house-section/article/H2328-1>.

¹⁰ See <https://www.dni.gov/index.php/ic-legal-reference-book/the-principles-of-intelligence-transparency-for-the-ic>, accessed September 25, 2024.

available through authorized channels, including taking affirmative steps to . . . provide timely transparency on matters of public interest.” ODNI similarly states, “Public trust is essential to the IC’s mission,”¹¹ and NSA similarly describes the key role for its work of “public trust and confidence.”

ODNI and NSA cannot expect that public trust to be unconditional. If ODNI and NSA continue to renege on pledges to members of Congress, and to withhold information that lawmakers, civil society, academia and the press have persistently sought over the course of thirteen years, that public trust will be fatally undermined. It is time to follow through, and to convey a public commitment by a date certain in early 2025 to provide to the public and to Congress the estimate in question.

Sincerely,

Restore The Fourth
Access Now
Advocacy for Principled Action in
Government
American Civil Liberties Union
Americans for Prosperity
The Brennan Center for Justice
Center for Democracy & Technology
Defending Rights & Dissent
Demand Progress
Due Process Institute

Electronic Frontier Foundation
Electronic Privacy Information Center
(EPIC)
Freedom of the Press Foundation
Free Government Information (FGI)
Muslim Advocates
New America’s Open Technology Institute
Project On Government Oversight
The Project for Privacy and Surveillance
Accountability (PPSA)
Surveillance Technology Oversight
Project

¹¹ See <https://www.dni.gov/index.php/who-we-are/organizations/clpt/clpt-what-we-do>, accessed September 25, 2024.