

Civil Liberties Advocates' Statement on PCLOB Section 702 Report

September 28, 2023

Today, the Privacy and Civil Liberties Oversight Board (PCLOB) issued its long-awaited report on Section 702 of the Foreign Intelligence Surveillance Act. The report, endorsed by a majority of the Board's members, sheds new light on abuses over the past few years, revealing that, "[i]n the reporting period covering November 2020 to December 2021, non-compliant queries related to civil unrest numbered in the tens of thousands."

The report includes recommendations that Congress enact robust reforms as part of any reauthorization of Section 702. Among other reforms, it urges Congress to (1) require the government to obtain individualized judicial approval to access communications retrieved through U.S. person queries (commonly known as "backdoor searches"), with exceptions for consent and exigent circumstances; (2) codify President Biden's executive order specifying the legitimate objectives of surveillance; (3) improve the workings of the FISA Court, including by strengthening the role of amici; (4) prohibit the government from re-starting "abouts" collection; and (5) impose a deadline for declassifying significant FISA Court opinions.

Privacy, civil rights, and civil liberties groups issued the following statement responding to the report:

"The message of the Board's report is clear: individualized judicial review of U.S. person queries is critical to protect Americans' rights and prevent further abuses. The report flatly rejects the government's self-serving claim that individualized judicial review is unworkable. It also rejects the baseless notion that broad categories of these searches, such as searches for foreign intelligence or so-called 'defensive' searches for potential victims' information, should be exempted from this requirement. And it rejects the fallacy that the FBI's tweaks to its internal procedures are sufficient to address the acute risks posed by backdoor searches.

"Three members of the Board stated that they would support a probable cause standard for U.S. person queries in any criminal investigation, including those related to foreign intelligence. In her statement, the Chair of the Board compellingly explained why the full 'probable cause' standard is required by the Fourth Amendment and necessary to safeguard Americans' privacy. We believe the same logic supports a requirement for a probable cause order for any U.S. person query.

"We note that the Board limited its inquiry and its recommendations to Section 702. It did not address many of the other issues that are very much part of the current debate, including the government's use of data brokers to circumvent legal protections for Americans' privacy and the use of overseas surveillance to collect Americans' information without statutory authority or

judicial oversight. Congress, however, must address these issues. If it limits itself to reforms of Section 702, the government will simply continue its warrantless surveillance of Americans using these other methods.”

More than thirty organizations from across the political spectrum [have called for a range of reforms](#) as a precondition for any reauthorization of Section 702. Those reforms include:

- Requiring the government to obtain a warrant before searching the content of Americans’ communications collected under intelligence authorities;
- Establishing legislative safeguards for surveillance affecting Americans that is conducted overseas under Executive Order 12333—an authority that raises many of the same concerns as Section 702, as previously noted by PCLOB members;
- Closing the data broker loophole, through which intelligence and law enforcement agencies purchase Americans’ sensitive location, internet, and other data without any legal process or accountability;
- Bolstering judicial review in FISA-related proceedings, including by shoring up the government’s obligation to give notice when information derived from FISA is used against a person accused of a crime; and
- Codifying reasonable limits on the scope of intelligence surveillance.

Statement above attributable to the following organizations:

- Access Now
- American Civil Liberties Union
- Asian American Scholar Forum
- Brennan Center for Justice at NYU School of Law
- Center for Democracy & Technology
- Defending Rights & Dissent
- Demand Progress
- Due Process Institute
- Electronic Frontier Foundation
- Electronic Privacy Information Center (EPIC)
- Fight for the Future
- Free Press Action
- Freedom of the Press Foundation
- FreedomWorks
- National Association of Criminal Defense Lawyers
- New America’s Open Technology Institute
- Project for Privacy and Surveillance Accountability (PPSA)
- Project On Government Oversight
- Restore the Fourth
- X-Lab

