

PCLOB Report on FISA Section 702: In the PCLOB's Words

The Privacy and Civil Liberties Oversight Board, an independent agency charged with ensuring that the federal government's counterterrorism efforts respect Americans' rights, recently released a [report](#) on Section 702 of the Foreign Intelligence Surveillance Act. The controversial law, which expires at the end of this year, allows intelligence agencies to perform warrantless "backdoor" searches for Americans' private communications. Below are some of the PCLOB's most important observations and conclusions about the impact of Section 702 on Americans' privacy.

On the nature of Americans' communications that are "incidentally" collected:

- **"Americans' communications captured through surveillance can include discussions of political and religious views, personal financial information, mental and physical health information, and other sensitive data.** Moreover, ordinary Americans may be in contact with Section 702 targets for business or personal reasons even if **the Americans have no connection to, or reason to suspect, any wrongdoing** by their foreign contacts and even when the government has no reason to believe the target has violated any U.S. law or engaged in any wrongdoing."

On the privacy risks and abuses of U.S. person queries:

- "The collection and examination of U.S. persons' communications represents a privacy intrusion even in the absence of misuse for improper ends."
- "The government may use Section 702 information in criminal prosecutions including prosecutions unrelated to the purpose of the original targeting."
- "FBI has treated Section 702 databases essentially as a search engine for routine use."
- "[T]here have been several examples where oversight mechanisms have **identified incidents involving improper intent in seeking to circumvent or violate the procedures, related rules, or statutory requirements.**"
- "In the reporting period of November 2020 to December 2021, **non-compliant queries related to civil unrest numbered in the tens of thousands.**"
- "The Board recognizes and welcomes the fact that the FBI has recently implemented several reforms designed to improve compliance, but **these changes have not been sufficient to protect privacy and civil liberties.**"

On the ineffectiveness of U.S. person queries:

- **“The FBI . . . struggled to provide the Board with affirmative examples of the unique value of U.S. person queries of Section 702 information** in criminal investigations, and to date, the government has been unable to identify a single criminal prosecution arising from U.S. person queries.”
- **“[T]here was little justification provided to the Board** on the relative value of the close to 5 million [U.S. person queries] conducted by the FBI from 2019 to 2022.”
- “[T]he most serious privacy and civil liberties risks result from U.S. person queries and batch queries, and the government has not demonstrated that such queries have nearly as significant value as the Section 702 program overall.”
- “The government’s difficulty in providing examples of the value of U.S. person queries stands in stark contrast with the government’s ability to demonstrate the overall value and importance of the Section 702 program in protecting national security. For this reason, the claims that requiring FISC approval of U.S. person query terms will damage the Section 702 program . . . ring hollow.” *(from Separate Statement of Chair Sharon Bradford Franklin)*

On so-called “defensive” queries:

- “[I]n most cases [‘defensive queries’] still raise the same privacy risks as other queries for information about specific Americans.”
- “[I]n the strongest examples offered by the FBI, such as the ‘victim’ or ‘defensive’ query examples . . . the government would likely be able to meet a probable cause standard or one of the exceptions contemplated in Recommendation 3 [for consent or exigent circumstances].” *(from Separate Statement of Chair Sharon Bradford Franklin)*
- “[T]here have been examples where the FBI has actually reached out to potential victims to voluntarily inform them of potential threats, and asked those potential victims to provide their email addresses and other selectors so that agents could conduct queries to assess whether the individuals were the subject of a planned attack. **The Board is not aware of any instance in which the potential victim declined to provide the requested selector information to the FBI.**”

On other authorities that could be used as a workaround if Congress prohibits warrantless queries under Section 702:

- “[I]n some circumstances, **the government may be able to use E.O. 12333 or, for certain metadata, National Security Letters, to obtain information similar to that collected under Section 702.** . . . [I]t is worth emphasizing that Section 702 provides stronger privacy safeguards than either E.O. 12333 or National Security Letters.”

The PCLOB’s report makes clear that Congress should not reauthorize Section 702 without significant surveillance reforms to protect Americans’ privacy. More than 30 privacy, civil liberties, and civil rights groups have proposed a [comprehensive set](#) of such reforms.

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