

THE INTELLIGENCE COMMUNITY CONTINUES TO PRETEND IGNORANCE OF ITS DELIBERATE 702 SPYING

As I noted in an update to this post, over the last several months, the Brennan Center has led an effort among privacy organizations to get the Intelligence Community to provide the transparency over its Section 702 surveillance that it dodged under the USA Freedom Act. On October 29, 2015, it send James Clapper a letter asking for:

- A public estimate of the number of communications or transactions involving American citizens and residents subject to Section 702 surveillance on a yearly basis.
- The number of times each year that the FBI uses a U.S. person identifier to query databases that include Section 702 data, and the number of times the queries return such data.
- Policies governing agencies' notification of individuals that they intend to use information "derived from" Section 702 surveillance in judicial or administrative proceedings.

On December 23, Privacy Officer Alex Joel responded on behalf of Clapper, largely dodging the requests but offering to have a meeting at which he could further dodge the request. Then yesterday, Brennan replied, calling out some of those dodges and posing new questions in advance of any meeting.

While the reply asks some worthwhile new questions, I wanted to look at some underlying background to the response Joel and ODNI gave.

The number of communications or transactions involving American citizens and residents subject to Section 702 surveillance on a yearly basis

In response to Brennan's request for the number of US persons sucked up in 702, Joel points back to the PCLOB 702 report (which was far more cautious than the earlier 215 report) and its report on the status of recommendations from January 2015 and basically says, "we're still working on that." Brennan deemed the response non-responsive and noted that the IC is still working on 4 of PCLOB's 5 recommendations 18 months after they issued it.

I would add one important caveat to that: PCLOB's fifth recommendation was that the government provide,

the number of instances in which the NSA disseminates non-public information about U.S. persons, specifically distinguishing disseminations that includes names, titles, or other identifiers potentially associated with individuals.

We've just learned – through curiously timed ODNI declassification – that the numbers FBI

gives to Congress on 702 dissemination are dodgy, or at least were dodgy in 2012, in part because they had been interpreting what constituted US person information very narrowly. For whatever reason, PCL0B didn't include FBI in this recommendation, but they should be included, especially given the issues of notice to defendants dealt with below.

More importantly, there's something to remember, as the IC dawdles in its response to this recommendation. In 2010, John Bates issued a ruling stating that knowingly collecting US person content constituted an illegal wiretap under 50 USC 1809(a). Importantly, he said that if the government didn't know it was conducting electronic surveillance, that was okay, but it shouldn't go out of its way to remain ignorant that it was doing so.

When it is not known, and there is no reason to know, that a piece of information was acquired through electronic surveillance that was not authorized by the Court's prior orders, the information is not subject to the criminal prohibition in Section 1809(a)(2). Of course, government officials may not avoid the strictures of Section 1809(a)(2) by cultivating a state of deliberate ignorance when reasonable inquiry would likely establish that information was indeed obtained through unauthorized electronic surveillance.

The following year, Bates held that when it collected entirely domestic communications via upstream Section 702 collection, that collection was intentional (and therefore electronic surveillance), not incidental, though Clapper's lawyer Bob Litt likes to obfuscate on this point. The important takeaway, though, is that the IC can illegally collect US person data so long as it avoids getting affirmative knowledge it is doing so, but it can't be too obvious in its efforts to remain deliberately ignorant.

I'd say 18 months begins to look like willful ignorance.

The number of times each year that the FBI uses a U.S. person identifier to query databases that include Section 702 data, and the number of times the queries return such data

Brennan asked for solid numbers on back door searches, and Joel pointed to PCLOB's recommendations that pertain to updated minimization procedures, a totally different topic.

And even there Joel was disingenuous in a way that the Brennan letter did not note.

Joel asserts that "with the recent reauthorization of the 702 Certification ... this recommendation 2 [has] been implemented." The recommendation included both additional clarity in FBI's minimization procedures as well as further limits on what non-national security crimes FBI can use 702 data for.

Back in February 2015, Bob Litt revealed the latter information, what FBI could use 702 data for:

crimes involving death, kidnapping, substantial bodily harm, conduct that is a specified offense against a minor as defined in a particular statute, incapacitation or destruction of critical infrastructure, cyber security, transnational crimes, or human trafficking.

But *after* Litt made that disclosure, and either after or during the process of negotiating new 702 certificates, the ODNI released updated minimization procedures. But they were the MPs

for 2014, not 2015! (See this post for a discussion of new disclosures in those documents.) Joel's answer makes clear that FBI's minimization procedures were updated significantly in the 2015 application beyond what they had been in 2014 (because that's the only way they could have not fulfilled that recommendation last January but have since done so).

In other words, Joel answers Brennan's question by boasting about fulfilling PCLOB's recommendations, but not Brennan's answer. But even there, if ODNI had just released the current FBI MPs, rather than year-old ones, part of Brennan's questions would be answered – that is, what the current practice is.

I think the recent new disclosures about the limits on FBI's very limited disclosure reporting (at least until 2012) provide some additional explanation for why FBI doesn't count its back door searches. We know:

- At least until 2012, it appears FBI did not consider reports based off the content of a message ("about") not including the US person mentioned, certain kinds of identifiers (probably including phone numbers and Internet identifiers), or metadata to be sharing non-public US person information.
- At least until the most recent certification, FBI was permitted to use metadata to analyze communications and transfer "all such metadata to other

FBI electronic and data storage systems for authorized and foreign intelligence purposes" (page 11) without marking it as disseminated Section 702 data (footnote 2). This likely increases the chance that FBI does not treat metadata derived from Section 702 – and analysis integrating it and other data – to be 702 derived (especially given its apparent belief that such metadata does not equate to person identifying information).

- FBI's databases surely include redundant information for people whose communications are collected – either as target or incidentally – under both Section 702 and traditional FISA (and possibly even under Title III warrants). If, as Charlie Savage reported last year, FBI is now acquiring raw EO 12333 data, it may be in the same databases as well. This is undoubtedly even more true with respect to metadata. Given known practice on the NSA side, FBI likely uses the multiple designations to

avoid disclosure rules.

In other words, there is a great deal of room to launder where data comes from, particularly if it has been used for metadata link analysis as an interim step. To try to count the specifically Section 702 queries, even just of content, though all the more so of metadata, would require revealing these overlaps, which FBI surely doesn't want to do.

Policies governing agencies' notification of individuals that they intend to use information "derived from" Section 702 surveillance in judicial or administrative proceedings

All that's also background to Brennan's request for information about notice to defendants. Joel pretty much repeated DOJ's unhelpful line, though he did direct Brennan to this OLC memo on notice to those who lose clearance. Not only does that memo reserve the right to deem something otherwise subject to FISA's notice requirements privileged, it also cites from a 1978 House report excluding those mentioned in, but not a party to, electronic surveillance from notice.

[A]s explained in a FISA House Report, "[t]he term specifically does not include persons, not parties to a communication, who may be mentioned or talked about by others."

That, of course, coincides with one of the categories of people that it appears FBI was not counting in FISA dissemination reports until at least 2012 (and, of course, metadata does not count as electronic surveillance).

All of which is to say this appears to hint at

the scope of how FBI has collected and identified people using 702 derived data that nevertheless don't get 702 notice.

None of that excuses ODNI for refusing to respond to these obvious questions. But it does seem to indicate that the heart of FBI's silence about its own 702 practices has a lot to do with its ability to arbitrage the multiple authorities it uses to spy.