

May 31, 2018,

Dear Chairman Goodlatte and Ranking Member Nadler,

Enclosed please find a letter from 24 civil liberties groups urging the Office of the Director of National Intelligence (ODNI) to report data regarding call detail records collected, as required under Section 602 of the *USA FREEDOM Act*.¹ This information is critical to inform Congress' decision regarding whether to renew Section 215 when it is set to expire next year.

In 2015, the House Judiciary Committee was instrumental in pressing for passage of the *USA FREEDOM Act*, which ended the NSA's bulk call detail record collection under Section 215 of the Patriot Act and included important transparency provisions to help prevent similar surveillance abuses in the future. Specifically, the bill required that the NSA report the number of unique identifiers – i.e. unique accounts, devices, or persons – collected under Section 215's call detail record provisions. This information was designed to help measure whether the *USA FREEDOM Act* is achieving its goal of preventing bulk collection of call records.

Obtaining this data is particularly important given that the number of call detail records collected under Section 215 has surged to over 540 million in 2017 - more than triple what was reported for 2016. Because the NSA has failed to report the number of unique identifiers impacted, we are left with no way to assess whether this surge is due to duplication, over-reporting, or an abuse of the government's authority.

We are also concerned that the NSA's failure to provide this information is further indicative of disregard of Congress' oversight role. Just last year, the ODNI and NSA reneged on their commitment to your Committee to provide critical information regarding surveillance under Section 702 of the Foreign Intelligence Surveillance Act, undermining a robust public debate of the program. Now, they are ignoring Congressional reporting mandates written into law concerning an authority that Congress will debate next year.

We urge you to use all the tools at your disposal to ensure that the ODNI and NSA report this number as required by the *USA FREEDOM Act* and provide a public explanation for the increase in the number of call detail records being collected sufficiently in advance of the Section 215 expiration to inform the public debate.

If you have questions, please contact Neema Singh Guliani, Legislative Counsel at the ACLU, at nguliani@aclu.org.

¹ UNITING AND STRENGTHENING AMERICA BY FULFILLING RIGHTS AND ENSURING EFFECTIVE DISCIPLINE OVER MONITORING ACT OF 2015 OR THE USA FREEDOM ACT OF 2015, PUBLIC LAW 114-23 (June 2, 2015).

Sincerely,

Access Now

American Civil Liberties Union

American-Arab Anti-Discrimination Committee

Archivists Roundtable of Metropolitan New York (ART)

Brennan Center for Justice at NYU School of Law

Campaign for Liberty

Center for Democracy & Technology

Constitutional Alliance

Defending Rights & Dissent

Due Process Institute

Electronic Frontier Foundation

Electronic Privacy Information Center (EPIC)

Government Accountability Project

Government Information Watch

Liberty Coalition

National Association of Criminal Defense Lawyers

National Coalition Against Censorship

New America's Open Technology Institute

Open the Government

R Street Institute

Reporters Committee for Freedom of the Press

Restore The Fourth, Inc.

TechFreedom

The Constitution Project at POGO

May 31, 2018

Hon. Daniel Coats
Director, Office of the Director of National Intelligence
Washington, DC 20511

Dear Director Coats,

The undersigned groups write to express our objection to the Office of the Director of National Intelligence's continued failure to publicly report data as required under Section 602 of the *USA FREEDOM Act*.¹ We urge you to report this information (including retroactively for 2016 and 2017) sufficiently in advance of Section 215's expiration next year to inform the public debate over the law.

The *USA FREEDOM Act* was passed in direct response to disclosures that revealed that the NSA had been systematically abusing its authority in order to unlawfully spy on Americans. For over a decade, the NSA collected call detail records of virtually every single American on an ongoing basis. The NSA justified this expansive program based on its flawed reading of Section 215 of the Patriot Act – an interpretation that was ultimately ruled unlawful by a Court of Appeals which characterized it as “unprecedented and unwarranted.”² Independent overseers noted that the program persisted in part due to efforts by the intelligence community to keep it secret from the public and members of Congress, undermining public debate and oversight.³

The *USA FREEDOM Act* ended this illegal program and included transparency provisions to help ensure that the public and Congress were never again left in the dark about such staggering abuses of Section 215. Key among these transparency provisions is a requirement that the NSA report the number of “unique identifiers” – i.e. unique accounts, persons, or devices – that are swept up in the NSA's Section 215 call detail record program. This data point is critical to measure the number of individuals impacted by the program and the extent to which the bill has successfully prevented bulk collection under this authority. Importantly, the number can also serve as a warning sign in the event the NSA attempts to resurrect unlawful surveillance practices under Section 215. Yet, almost two years after *USA Freedom's* enactment, the NSA still has not complied with this requirement.

¹ UNITING AND STRENGTHENING AMERICA BY FULFILLING RIGHTS AND ENSURING EFFECTIVE DISCIPLINE OVER MONITORING ACT OF 2015 OR THE USA FREEDOM ACT OF 2015, PUBLIC LAW 114-23, June 2, 2015.

² *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

³ Privacy and Civil Liberties Oversight Board, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2014), https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf (last visited May 9, 2018).

At the time that the *USA FREEDOM Act* was being considered in Congress, your office endorsed the bill and its corresponding transparency requirements. Specifically, the Office of the Director of National Intelligence stated, "...we are comfortable with the transparency provisions in this bill, because, among other things, they recognize the technical limitations on our ability to report certain types of information."⁴ Given this endorsement, the NSA has no justifiable excuse for continuing to shirk its responsibility to publicly report this number.

We are now faced with precisely the situation this provision was designed to address. In the last year, the number of call detail records collected under Section 215 has surged to over 540 million – over three times what was reported in the previous year.⁵ However, without a reporting of the number of unique identifiers impacted, we cannot even partially assess whether this surge is due to easily explainable factors like duplication, or surveillance abuses the *USA FREEDOM Act* explicitly rejected. Your office's public explanation of this surge provides no clear answers to this question.

We write to request that you report the number of unique identifiers (including retroactively for 2016 and 2017) used to communicate information collected under Section 215's call detail record provision sufficiently in advance of the May 30, 2019 reauthorization deadline to inform the public debate. In addition, we request a meeting to discuss the surge in the number of call detail records collected under Section 215, including (1) the factors contributing to the surge, including an estimate of what percent of the increase corresponds to each factor; and (2) a timeline for when the NSA will report this number, as required by law.

If you have questions, please contact Neema Singh Guliani, Legislative Counsel at the ACLU, at nguliani@aclu.org.

Sincerely,

Access Now
American Civil Liberties Union

⁴ This statement was made in reference to S.2685, a modified version of the USA Freedom Act that ultimately passed and was also endorsed by the administration. Similar to the final version of the USA FREEDOM Act, this version also required a reporting of a good faith estimate of the number of individuals whose communications were collected under the Section 215 call detail record program and allowed for this estimate to be based on the number of unique identifiers. Attorney General Eric Holder and Director James Clapper, DEPARTMENT OF JUSTICE AND INTELLIGENCE COMMUNITY'S VIEWS ON S.2685, THE USA FREEDOM ACT (Sept. 2, 2014), <https://cdt.org/files/2014/09/2014-9-2-FISA-letter-from-AG-and-Clapper-to-Leahy-on-S.-2685-USA-Freedom....pdf>.

⁵ OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING USE OF NATIONAL SECURITY AUTHORITIES, CALENDAR YEAR 2017, pp.33 (2018), <https://www.dni.gov/files/documents/icotr/2018-ASTR----CY2017----FINAL-for-Release-5.4.18.pdf> (last visited May 9, 2018).

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Open the Government
R Street Institute
Reporters Committee for Freedom of the Press
Restore The Fourth, Inc.
TechFreedom
The Constitution Project at POGO

cc:

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