

Section 702: Backdoor Search Loophole

Section 702 of the Foreign Intelligence Surveillance Act (“FISA”) was authorized for purposes of collecting foreign intelligence information about non-U.S. persons abroad, but the government is using the program to access information about U.S. persons located in the United States without judicial oversight.

Although U.S. persons cannot be targeted under Section 702, their communications with non-U.S. persons can be collected and retained for years. The NSA, CIA, and FBI can query 702-acquired information using a U.S.-person identifier, without a warrant or court order. This loophole allows the government to bypass the Fourth Amendment’s protection against warrantless searches.

Despite six years of requests from Congress and civil society, the Intelligence Community (“IC”) has refused to provide an estimate of the number of US persons whose communications are collected under Section 702. The FBI also does not report on the number of backdoor searches it conducts on Americans every year.

Backdoor searches circumvent Americans’ Constitutional rights:

- The FBI and other agencies can query 702-collected information without a warrant or court order to access U.S. persons’ communications. The Fourth Amendment requires law enforcement to get a probable cause warrant to search the contents of Americans’ communications. However, 702 information is collected without a warrant because the statute only targets non-U.S. persons for foreign intelligence purposes. But these limits do not apply to subsequent queries of 702-collected data, which *can* target U.S. persons. Thus, backdoor searches of 702-collected information create an end-run around the Fourth Amendment.
- U.S. persons’ communications obtained via warrantless queries of 702-collected data can be used to investigate and prosecute Americans for crimes unrelated to terrorism. Although there are some limits on the use of 702 data against U.S. persons in court, the information can be used to investigate any crime and to develop suspicion for a warrant.
- Backdoor searches of U.S. persons’ communications were prohibited by the FISA Court until 2011.

The IC has precluded oversight of backdoor searches by withholding information about their frequency

- Members of Congress have been asking the IC for six years to disclose an estimate of the number of U.S. persons whose information is collected under Section 702 every year, but the IC has refused.
- The FBI has also refused to disclose the number of backdoor searches it performs using U.S. person queries every year.
- We also do not know how often 702-collected information is used to criminal investigations targeting Americans. The government must notify individuals if it intends to use information “obtained or derived” from Section 702 against them in legal or administrative proceedings, but such notifications have occurred only five times since October 2013, and the IC has not disclosed how it interprets the term “derived from.” Moreover, there are no such notice requirements for the querying and use of information early in investigations to build suspicion for a warrant application.

For more information, visit [our Section 702 issue page](#) or contact Michelle Richardson, CDT’s Deputy Director of the Freedom, Security & Technology Project, at mrichardson@cdt.org.