

**Comments of**

**The Wikimedia Foundation**

**In the Matter of**

*PCLOB Oversight Project Examining Section 702 of the Foreign Intelligence Surveillance Act*

DOCKET ID: PCLOB-2022-0009

**November 3, 2022**

## Introduction

The Wikimedia Foundation (Foundation) submits these comments to the Privacy and Civil Liberties Oversight Board (PCLOB) as it conducts its oversight project of Section 702 of the Foreign Intelligence Surveillance Act (FISA) and the surveillance program conducted thereunder (Docket No. 2022-0009). The review of Section 702 could not be more timely, considering Section 702's sunset date in December of 2023 and Congress' planned debate surrounding the statute's reauthorization. The Wikimedia Foundation is an organization dedicated to privacy and deeply concerned about overbroad mass government surveillance. The Foundation welcomes PCLOB's review and hopes the Board at a minimum will recommend additional safeguards and limitations to the surveillance conducted under Section 702.

## Statement of Interest

The Foundation is a charitable, nonprofit organization which hosts, and provides the technical infrastructure for twelve (12) online projects dedicated to creating and providing free knowledge to a worldwide audience. The Foundation hosts global websites that invite contributions from people all over the world and strive toward sharing the sum of human knowledge. In the course of fulfilling that mission, the contributors to the projects it hosts (i.e., Wikimedians) and the Foundation's staff communicate with one another as well as with government officials, journalists, activists, and civil society across borders.

These communications are deeply impacted by the surveillance programs operated under Section 702. We take burdensome and costly measures to attempt to protect our communications from surveillance. Because the Foundation and the community engaged in creating the projects cannot engage in domestic or international advocacy without considering the surveillance to which we might be subject, we are cautious about the content of our communications, and may edit messages or even choose to travel and communicate in person. Mass surveillance, specifically Upstream surveillance, one of the surveillance programs operated pursuant to Section 702, also reduces the likelihood that journalists, activists, experts, and others who might want to contribute their knowledge to Wikimedia projects will do so, thereby further impeding the Foundation's mission.

Research substantiates our concerns. Jonathon W. Penney of York University in Toronto, Canada, released the first original empirical study of the regulatory chilling effects associated with online government surveillance. The study, "[Chilling Effects: Online Surveillance and Wikipedia Use](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769645),"<sup>1</sup> successfully quantified the impact of such surveillance on Wikipedia users and articles, and web traffic data more generally, resulting from the June 2013 National Security Agency (NSA) surveillance program revelations. Penney chose to focus on Wikipedia because it is an "essential source of information and knowledge online" and an "important public tool in promoting collective understanding, decision-making, and deliberation." Therefore, as he

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<sup>1</sup> Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech, L.J. Vol. 1, 117 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2769645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769645).

argues, any demonstrated chilling effect on Wikipedia users has broader implications for the global free knowledge movement and democratic processes.

Because mass surveillance impedes our mission by interfering with the Foundation's relationship with the community of volunteers, imposing a chilling effect on the development and consumption of the free knowledge projects we host, and generally invading privacy and harming human rights, the Foundation has sued the NSA in federal court, challenging the legitimacy and constitutionality of Upstream surveillance. The Foundation [has petitioned](#) the Supreme Court to hear the case.

### **Wikimedia's Questions for PCLOB's Oversight Project**

The Foundation attached as Annexure I a list of questions we urge the PCLOB to address in its review. The Foundation attached as Annexure II a list of recommendations for changes to the Section 702 program that we urge the PCLOB to make to both the executive branch and to Congress as it reconsiders Section 702 in 2023.

Thank you for the opportunity to participate in this process. Please do not hesitate to reach out to Kate Ruane, Lead Public Policy Specialist for the United States, [kruane@wikimedia.org](mailto:kruane@wikimedia.org), with any questions.

Sincerely,

The Wikimedia Foundation

## Annexure I

### Questions:

- Until 2017, the NSA used Upstream surveillance to collect communications to and from targeted selectors as well as communications that were merely “about” targeted selectors. These “about” communications were not necessarily from surveillance targets, but may have simply mentioned the selectors in their text. This practice, known as “about” collection, involved the NSA searching the entire contents of international communications and then retaining those that contained any mention of the NSA’s thousands of selectors. The [intelligence community](#) announced that it would cease “about” collection in 2017, after the FISA Court addressed serious violations of court-imposed rules.

- How, if at all, has the end of “about” collection in 2017 changed the process for collecting communications via the Upstream surveillance program?

- Recently, the United States (U.S.) issued the [Declaration for the Future of the Internet](#). The Wikimedia Foundation [commended](#) the signatory governments for their strong support for a free, open, and interoperable internet, but noted that many of the countries had failed to always live up to the principles the document espoused. In the Declaration, the government pledged that human rights should be respected online and stated that it would refrain from using unlawful surveillance that does not align with international human rights principles.

Has Upstream surveillance or any other surveillance practice purportedly authorized by section 702 ever undergone a Human Rights Impact Assessment?

- If so, will the assessment be made public?
  - If not, why not and will the [intelligence community](#) consider conducting such an assessment now in keeping with the pledge made in the Declaration for the Future of the Internet?
  - What chilling effect do the surveillance programs authorized by Section 702 have upon internet usage and free expression, including the abilities to both send and find information? Has any component of the United States intelligence community ever conducted a study of the impacts of its surveillance practices on free expression domestically or internationally?
- The Wikimedia Foundation is committed to protecting the privacy of the communities that create the projects the Foundation hosts. These communities are located all over the

world, including in places where contributing to the projects can lead to great personal risk, heightening the importance of ensuring privacy on Wikimedia projects. In the White House's recent executive order implementing a new European Union-United States [Data Privacy Framework](#) to replace the Privacy Shield framework struck down by the Court of Justice for the European Union (CJEU), the White House acknowledged that all people, regardless of their country of residence, have a right to privacy. Yet Section 702 surveillance programs authorize suspicionless surveillance of any foreign national.

In keeping with the new Data Privacy Framework, will the PCLOB recommend that the government narrow the scope of foreign nationals that could be targets of Section 702 surveillance?

## Annexure II

### Recommendations

- The PCLOB should recommend that the Section 702 surveillance programs undergo a Human Rights Impact Assessment, not only with respect to the rights of U.S. citizens, but also taking into account the impact on foreign citizens' rights, if that has not already happened. This recommendation aligns strongly with the Administration's commitments under the Declaration for the Future of the Internet. It would also help to ensure the protection of the human rights of Wikimedians around the globe.
- The PCLOB should recommend that the government follow the recommendations any human rights impact assessment produces.
- The PCLOB should recommend narrowing the scope of individuals that can be targeted for surveillance under Section 702 to "foreign powers" and "agents of foreign powers." Following this recommendation will significantly narrow the number of foreign nationals and people within the United States whose communications could be swept up in suspicionless surveillance under Section 702. These additional safeguards will support the exchange of free knowledge and the creation of reliable information on the internet.
- The PCLOB should recommend imposing additional restrictions on the retention of information collected under Section 702. Currently, information collected under Section 702 can be retained as long as five years by default. The PCLOB should recommend that the retention period be shortened to two years and that information cannot be retained past that period unless the government can demonstrate that the information is foreign intelligence information. As the Foundation has said in previous comments to the US government, data minimization is good cybersecurity practice and less data held means less data that could be used improperly.
- The PCLOB should recommend expanding the role of the amicus before the Foreign Intelligence Surveillance Court (FISC) in cases that raise heightened concerns for privacy, free expression, racial and ethnic bias, political activities, religious freedom, and academic freedom. The amicus is currently the only representative the public has in the review process for Section 702 surveillance programs. It is imperative to ensure the public has a representative in the review and authorization of Section 702 programs in all circumstances that create a significant risk to human rights.
- The PCLOB should recommend promptly identifying and purging the communications of U.S. citizens and people within the United States. If adopted, this recommendation would primarily benefit the privacy rights of people located in the United States and U.S. citizens but, by simply reducing the number of communications held under Section 702, would also benefit the privacy of any of the people involved in the communications.

- The PCLOB should recommend ending warrantless searches of Section 702's database for the communications of people located within the United States—known as “backdoor” searches. These searches are specifically designed to circumvent critical Fourth Amendment constitutional protections and are highly controversial. Moreover, the government's own transparency reports have [revealed](#) that the Federal Bureau of Investigation (FBI) frequently fails to abide by existing requirements for obtaining this data. The only solution is to limit the FBI's access to this database in the first instance.