

Administration Priorities to Implement its FISA Section 215 Telephony Metadata Reform Proposal

As the Administration announced on March 27th, the President has decided on a proposal that will allow, with the passage of appropriate legislation, the government to end bulk collection of telephony metadata records under Section 215 of the Patriot Act (Section 501 of the Foreign Intelligence Surveillance Act (FISA)), while ensuring that the government has access to the information it needs to meet its national security requirements.

Key Attributes of the President's Proposal

The Administration released a “fact sheet” to accompany the announcement of the President’s proposal. This “fact sheet” identified five key program attributes that will best ensure that we have the information we need to meet our intelligence requirements while enhancing public confidence in the manner in which this information is collected and held:

1. The government will not collect these telephone records in bulk; rather, the records would remain at the telephone companies for the length of time they currently do today;
2. Absent an emergency situation, the government would obtain the records only pursuant to individual orders from the Foreign Intelligence Surveillance Court (FISC) approving the use of specific numbers for such queries, if a judge agrees based on national security concerns;
3. The records provided to the government in response to queries would only be within “two hops” of the selection term being used, and the government’s handling of any records it acquires will be governed by minimization procedures approved by the FISC;
4. The court-approved numbers could be used to query the data over a limited period of time without returning to the FISC for approval, and the production of records would be ongoing and prospective; and
5. The companies would be compelled by court order to provide technical assistance to ensure that the records can be queried and that results are transmitted to the government in a usable format and in a timely manner.

Detailed Legislative Principles

We look forward to continuing to work with Congress to pass a bill that achieves the goals and contains the attributes that the President has identified. As the

Administration consults with Congress on potential legislation, we have identified more detailed legislative principles below that are necessary to enact the President's proposal.

Legislation should specify the elements of the Government's requests for records.

Under the President's proposal, the government would seek records pursuant to individual orders from the FISC approving query terms. Similar to other provisions of FISA, such as Section 501(b), new legislation should specify several key elements required for FISC approval of such government requests:

- **Identify Authorizing Officials:** Legislation should identify specific government officials authorized to make an application for such records (i.e., senior-level officials at the NSA or the FBI).
- **Define a Standard for Acceptable Requests:** Legislation should mandate that the government make a specific factual showing to the FISC justifying the basis for each query term a recipient will then use to search against its business records.
- **Mandate Minimization:** Legislation should require government applications to the FISC to include minimization procedures.
- **Authorize Two "Hops":** Legislation should permit the government to request phone records up to two "hops" from the phone number being used to search.
- **Allow for Defined and Limited Prospective Searches:** Legislation should permit the government, when supported by a factual justification, to request the ongoing and prospective querying and production of records for a limited period of time. For example, under the existing program FISC approval of each query term is valid for either 180 days or one year, depending on the nature of the query term. The legislation should also permit the court to specify the intervals at which the companies must query the data.

Legislation should specify details related to judicial review of the Government's applications. Similar to other provisions of FISA, such as Sections 501(c), 501(d), 501(f) and 702(h)(5), new legislation should specify key details of the judicial review required and the orders that could be issued by the FISC:

- **Issuance of Court Order:** Legislation should indicate that a judge shall enter an order, as requested or as modified, approving the production of records when the requirements of the government's application are satisfied.

- **Elements of Court Order:** Legislation should outline the specific elements the judge's order should contain, including query identifiers, the frequency of queries if such queries are to be conducted prospectively, a description of the records to be produced, a time period for such production, and the minimization procedures to be followed.
- **Technical Assistance by Recipients:** Legislation should require that the recipient of the order (i.e. the telecommunications company) provide the government with technical assistance to ensure that the records can be queried and the results transmitted to the government in a usable format
- **Timely Response by Recipients:** Legislation should require that the recipient of the order transmit results to the government and in a timely manner.
- **Compensation for Court Order Recipients:** Legislation should require that the government compensate the recipient for providing technical assistance.
- **Handling Requirements for Court Orders:** Legislation should identify the obligations placed on recipients to handle court orders appropriately, including that recipients may disclose receipt of the order only in certain circumstances, such as to obtain legal advice regarding the order.
- **Right to Judicial Review:** Legislation should make clear that recipients of court orders have a right to seek judicial review from the FISC, with appeals to the Foreign Intelligence Surveillance Court of Review (FISC-R), and to consult with counsel about the court orders.
- **Authority to Compel Compliance:** Legislation should specify procedures enabling the government to compel compliance with an order to produce records.

Legislation should ensure that the Government can access records quickly in an emergency. Similar to other provisions of FISA, such as Sections 105(e) and 403, legislation should specify the procedures governing emergency situations requiring the production of records before a Court order can be obtained:

- **Designating Officials with Emergency Authority:** Legislation should identify specific government officials who may authorize emergency requests.
- **Defined Emergency Criteria and Procedures:** Legislation should define the circumstances in which the government may make such emergency requests, and the procedures the government should follow to do so.

- **Limited Duration of Emergency Authorization:** Legislation should designate the time period following such authorizations in which an application must be submitted to the Court (under the existing program, and under other provisions of FISA, this is currently 7 days).
- **Procedures After the Emergency Period:** Legislation should specify the procedures for handling any information the government obtained through the emergency authorization, should the Court decide not to grant a subsequent order.

Legislation should require the Government to report its use of the program. Similar to other provisions of FISA, the legislation should specify the government's Congressional and public reporting obligations regarding the use of this authority. For example, this could include information such as:

- **Number of Terms Queried:** Legislation could require the government to report the number of query terms that were specified in court orders during the preceding year.
- **Number of Terms Associated with Americans:** Legislation could require the government to report the number of query terms reasonably believed to be associated with U.S. persons during the preceding year.

Legislation should make clear that any person who complies in good faith with an order to produce records on the program shall not be liable for the production of such records. This provision would be similar to other provisions of FISA, such as Section 501(e).

Legislation should address the availability of records. As the "fact sheet" accompanying the President's proposal noted, under the Administration's proposal the records would remain at the telephone companies for the length of time they currently do today and the companies would be compelled by courts order to ensure that the records can be queried and that results are transmitted to the government in a usable format and in a timely manner. Legislation should keep this requirement in mind and may therefore address existing practice in this regard.

Legislation should provide for a transition period. In order to maintain operational continuity, legislation should provide for a reasonable time period to transition from the existing program to the new authority.