

Privacy advocates seek more openness on NSA surveillance

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In this June 6, 2013 file photo, a sign stands outside the National Security Agency (NSA) campus in Fort Meade, Md. As Congress considers whether to extend the life of a government program that sweeps up American phone records, privacy advocates and civil liberties group fear too much about the surveillance still remains hidden from view to allow for a comprehensive public understanding. (AP Photo/Patrick Semansky, File)

As Congress considers whether to extend the life of a program that sweeps up American phone records, privacy advocates and civil liberties

groups say too much about government surveillance remains secret for the public to fully evaluate its reach or effectiveness.

The disclosure two years ago of the National Security Agency's surveillance efforts prodded the federal government to declassify reams of once-secret documents, including opinions from a secretive intelligence court laying out the program's origins and legal underpinnings. But critics say key language from the disclosed documents remains censored, the release of information has been selective, and the ongoing trickle of once-secret memos has raised concerns about how many other potentially illuminating records might yet remain outside the public's reach.

"That means the public lacks information it needs to understand the significance of the powers that government already has and the significance of the powers that the government is asking for," said Jameel Jaffer, deputy legal director of the American Civil Liberties Union.

The NSA program that collects and stores phone records is conducted under Section 215 of the USA Patriot Act. The extent of its reach remained secret until Edward Snowden, a former NSA systems administrator, disclosed details of the surveillance in 2013. Amid a public backlash, President Barack Obama has proposed that the NSA stop collecting the records in bulk and instead request them from phone companies as needed for terrorism investigations.

Congress is now deciding whether to renew or modify the phone records collection when the law authorizing it expires in June. Senate Republicans this week introduced a bill to allow the NSA to continue collecting the calling records of nearly every American, unveiling a measure that would bypass Senate committees and reauthorize sections of the Patriot Act.

Intelligence officials say the program—which collects the "to" and "from" information of most domestic landline phone calls but not their content—is critical to detecting terrorist plots and have sought to justify it through the ongoing declassification of materials, including from the Foreign Intelligence Surveillance Court.

Among documents released in the last two years are court opinions outlining how the NSA was first authorized to start collecting bulk phone and Internet records in the hunt for al-Qaida terrorists, previously classified testimony from intelligence officials and NSA analyst training materials.

The disclosures far surpass available public information on other secret programs such as targeted drone strikes against terror suspects. But there are gaps in the information that privacy advocates say prevent the public from being able to fully judge the program's effectiveness, including the extent to which Section 215 has been construed to allow for other types of bulk collection.

"If the government is asking for the renewal of this authority, the public has a right to know at least in general terms how the authority is being used, and right now the public doesn't have that," Jaffer said.

Last month, a federal judge in New York held in a public records lawsuit that the government could lawfully withhold any secret court ruling relating the use of Section 215 for bulk collection of records other than phone records. Judge William Pauley said the government had "offered a reasoned and persuasive argument for withholding" information that should not be second-guessed.

In that same case, the Justice Department earlier released a couple dozen surveillance court rulings but refused to turn over unspecified others, the exact number of which it said was classified.

The government continues to pull back the curtain with periodic new disclosures, such as the Justice Department's release in January of a 5-year-old memo that said the Commerce Department was not obligated under Section 215 to turn over confidential census data to federal law enforcement. But such disclosures, though welcomed by civil liberties groups, also hint at how much might still be unknown.

The NSA program has also highlighted broader concerns about what privacy advocates say is the government's overreliance on secretive court rulings and classified legal memos.

Sen. Ron Wyden, D-Ore., a member of the Senate Intelligence Committee who opposes the bulk phone records collection, said while he believed the government had released enough information about the law—albeit under pressure—for an informed debate, he was nonetheless concerned about the role of secret legal interpretations.

Though intelligence agencies should be able to conduct secret operations, he said, "they shouldn't be following secret law."

Stephen Vladeck, an American University law professor, said it was possible the debate about the phone records program distracts attention from other surveillance efforts that are perhaps more secretive, such as Executive Order 12333, which authorizes foreign intelligence collection overseas without a court order. He also said he thought the government had provided substantial information about what information it was collecting, but was less forthcoming about how that information was used.

"The conversation about collection and a conversation about use are very different conversations," he said. "And to have one without the other is to, I think, underappreciate the privacy consequences of each."

Liza Goitein, co-director of the liberty and national security program at the Brennan Center for Justice, said it was impossible to know how much information might be out there absent a complete index of how many memos, opinions or court orders even exist.

"We shouldn't be satisfied that we know everything" because, she said, "we have no way to assess that we know everything."

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