

USA FREEDOM Act Reinstates Expired USA PATRIOT Act Provisions but Limits Bulk Collection

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Following a contentious debate and [passage](#) in the Senate, the USA FREEDOM Act ([H.R. 2048](#)) was signed into law on June 2, 2015. The new law contains eight titles, spanning a range of national security topics from reauthorizing expired investigative authorities under the Foreign Intelligence Surveillance Act of 1978 (FISA) to enhancing criminal prohibitions against maritime and nuclear terrorism. But, the legislative history and debate surrounding the Act indicate that the principal focus of the legislation was to address the bulk collection of telephone metadata by the National Security Agency (NSA) under [Section 215](#) of the USA PATRIOT Act.

Section 215 generally allows the government to apply for a court order compelling any person or entity to turn over records that are relevant to a foreign intelligence investigation. Since 2006, orders under Section 215 have been used by the government to acquire large amounts of telephone metadata (excluding the audio contents of such calls). This bulk dataset was held by the NSA and could be queried by foreign intelligence investigators to, among other things, identify links between known and unknown terrorists. In June of 2013, Edward Snowden leaked information about this use of Section 215 to several media outlets, resulting in an unanticipated legislative debate regarding the use of this authority and whether it should be allowed to continue.

To that end, the USA FREEDOM Act will generally prohibit the use of Section 215 for collection activities, such as bulk collection, that are not limited “to the greatest extent reasonably practicable” by a “specific selection term” (SST), defined as “a term that specifically identifies a person, account, address, or personal device, or any other specific identifier.” The Act also expressly prohibits orders under Section 215 that are limited only by broad geographic terms (such as a state or zip code) or named communications service providers (such as Verizon or AT&T). A slightly relaxed standard can be used under the amended Section 215 to obtain telephone metadata in furtherance of international terrorism investigations. Similar SST-requirements are also added to other provisions of FISA and national security letter statutes in order to prevent those authorities from being used for bulk collection.

What remains to be seen in the coming weeks, months, and years, is how the new statutory language in the USA FREEDOM Act will be implemented by the government. In anticipation of that inevitable legislative debate, whether as part of reauthorization in 2019 or driven by external events, this post seeks to highlight a number of sources of information regarding that implementation which may be relevant both for those who wish to determine whether the USA FREEDOM Act is having the intended effect on bulk collection and for those who fear that the law’s new restrictions may result in unintended consequences.

In the short term, the changes to Section 215 will not become effective until November 29, 2015 (180 days after enactment). [Ongoing litigation](#) may be a complicating factor during this interim period. The United States Court of Appeals for the Second Circuit [recently](#) ruled that the bulk collection of telephone metadata was not authorized by Section 215. However, the Second Circuit declined to issue an injunction as reauthorization or expiration of that provision was imminent, and the panel remanded the question of injunctive relief to the district court. Now that Section 215 has been extended in its pre-existing form for 180 days, it remains to be seen how this legislative action will inform the district court’s decision. Two other cases are also pending in the United States Courts of Appeals for the Ninth Circuit and the D.C. Circuit.

Assuming that an injunction against the program is not issued, it is expected that the telephone metadata program will operate as it did under the *status quo ante* until November 29, 2015. Since the program’s existence became widespread in June of 2013, announcements about renewals of the Section 215 orders supporting the telephone metadata program,

and redacted versions of the orders themselves, have been [posted online](#) by the Office of the Director of National Intelligence. The most recently disclosed Section 215 [order](#) expired on June 1, 2015. Typically, renewal announcements have been posted within a few days of the issuance of the order, followed by the redacted order in a matter of weeks.

Once the substantive amendments to Section 215 made by the USA FREEDOM Act become effective, it is not yet known whether every order issued for call detail records under the new legal regime will be similarly announced or made public. However, the USA FREEDOM Act directs the Administration to make opinions of the Foreign Intelligence Surveillance Court (FISC) or the Foreign Intelligence Surveillance Court of Review (FISCR) available in a redacted form if the opinion “includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term ‘specific selection term.’” It seems likely that the first application for an order under the new USA FREEDOM Act would qualify for declassification under this standard as it would be a “novel” interpretation of “specific selection term.” The USA FREEDOM Act permits such an opinion to remain classified if it is determined necessary to protect the national security of the United States, and if an unclassified summary of the opinion is made publicly available. The Intelligence and Judiciary committees of Congress are separately entitled to such opinions under existing law.

Finally, the USA FREEDOM Act requires periodic reporting by the government, and authorizes periodic disclosures by the private sector, of aggregate statistics regarding the use of the authorities added and modified by the USA FREEDOM Act. In many cases the timing of this type of reporting may lag behind the actual use of such authorities, but over time the statistics can be helpful in estimating the number of individuals that may have had their data subject to collection, the types of information and communications that may be at issue, and the comparative utilization of different authorities by the government.