

NSA surveillance

22. The Committee is concerned about the surveillance of communications in the interests of protecting national security, conducted by the National Security Agency (NSA) both within and outside the United States through the bulk phone metadata program (Section 215 of the PATRIOT Act) and, in particular, the surveillance under Section 702 of Amendments to the Foreign Intelligence Surveillance Act (FISA) conducted through PRISM (collection of the contents of communications from U.S.-based companies) and UPSTREAM (tapping of fiber-optic cables in the U.S. that carry internet traffic) programs and their adverse impact on the right to privacy. The Committee is concerned that until recently, judicial interpretations of FISA and rulings of the Foreign Intelligence Surveillance Court (FISC) have largely been kept secret, thus not allowing affected persons to know the law with sufficient precision. The Committee is concerned that the current system of oversight of the activities of the NSA fails to effectively protect the rights of those affected. While welcoming the recent Presidential Policy Directive (PPD-28) that will now extend some safeguards to non-US persons “to the maximum extent feasible consistent with the national security”, the Committee remains concerned that such persons enjoy only limited protection against excessive surveillance. Finally, the Committee is concerned that those affected have no access to effective remedies in case of abuse (arts. 2, 5(1), and 17).

The State party should:

(a) take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance;

(b) ensure that any interference with the right to privacy, family, home or correspondence be authorized by laws that (i) are publicly accessible; (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (iii) are sufficiently precise specifying in detail the precise circumstances in which any such interference may be permitted; the procedures for authorizing; the categories of persons who may be placed under surveillance; limits on the duration of surveillance; procedures for the use and storage of the data collected; and (iv) provide for effective safeguards against abuse;

(c) reform the current system of oversight over surveillance activities to ensure its effectiveness, including by providing for judicial involvement in authorization or monitoring of surveillance measures, and considering to establish strong and independent oversight mandates with a view to prevent abuses;

(d) refrain from imposing mandatory retention of data by third parties;

(e) ensure that affected persons have access to effective remedies in cases of abuse.