

## Americans find swift stonewall on whether NSA vacuumed their data

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The sign outside the National Security Agency (NSA) campus in Fort Meade, Md.

PATRICK SEMANSKY — ASSOCIATED PRESS

WASHINGTON — Since last year's revelations about the National Security Agency's massive communications data dragnets, the spy agency has been inundated with requests from Americans and others wanting to know if it has files on them. All of them are being turned down .

The denials illustrate the bind in which the disclosures have trapped the Obama administration. While it has pledged to provide greater transparency about the NSA's communications collections, the NSA says it cannot respond to individuals' requests without tipping off terrorists and other targets.

As a result, Americans whose email and telephone data may have been improperly vacuumed up have no way of finding that out by filing open records requests with the agency. Six McClatchy reporters who filed requests seeking any information kept by the NSA on them all received the same response.

"Were we to provide positive or negative responses to requests such as yours, our adversaries' compilation of the information provided would reasonably be expected to cause exceptionally grave damage to the national security," the NSA wrote last month in response to a McClatchy national security reporter who requested his own records. "Therefore, your request is denied because the fact of the existence or non-existence of responsive records is a currently and properly classified matter."

In an apparent reaction to former NSA contractor Edward Snowden's revelations of the NSA's data collections, the number of open records requests filed with the agency more than tripled – from 1,065 to 4,060 – between 2010 and 2013, according to data supplied by the NSA. The denial rate during the same period skyrocketed from an estimated 33 percent to 82 percent because of the higher number of people seeking their own intelligence records. The NSA does approve other types of records requests, such as academics asking for historic records and former workers seeking their employment records.

The high rejection rate of requests seeking individuals' own records sharply contrasts with Director of National Intelligence James R. Clapper's pledge to "lean in the direction of transparency, wherever and whenever we can." It also clashes with the NSA's own public assertion that laws enacted in 1974 entitle "individuals to access federal agency records or to request an amendment to records that are maintained in a file retrievable by an individual's name."

In what is known as a Glomar denial, the NSA and other federal agencies can respond to records requests that by acknowledging the existence of relevant documents, vital secrets would be disclosed. The term stems from a salvage ship, the Glomar Explorer, which was built with the secret mission of recovering a Soviet nuclear submarine that sank in the Pacific Ocean in 1968.

A subsequent Freedom of Information court suit seeking CIA records on the operation established the loophole when a court upheld the CIA's refusal to confirm or deny the existence of those files on national security grounds.

"Theoretically, these agencies could argue that al Qaida could get everyone on Earth to file a request (for documents) and by process of elimination find out who they're really spying on," said Kel McClanahan, an attorney who specializes in suing intelligence agencies under open records laws. "It may be a ludicrous argument, but it's one that the agencies are able to assert."

NSA spokeswoman Vanee Vines said that although her agency must deny individuals' requests for their own intelligence files, her agency releases as much information as it deems possible in other cases.

"The administration's push for transparency is taken very seriously by the FOIA (Freedom of Information Act) Office at NSA," she said. "Because it is not possible to use discretion to release classified information, the FOIA Office does its best to release other information that could potentially be protected under another exemption if a specific harm to the agency is not identified."

Vines also said the numbers cited by McClatchy might be misleading because they do not reveal the number of pages of documents or the significance of the information released. The number of cases where the NSA released all of the documents requested has increased from 49 in 2010 to 82 in 2013, she pointed out.

"Looking at the growing numbers of partial denials or full denials does not mean that NSA is releasing less information," Vines said.

Some transparency advocates, however, said the NSA's ability to sidestep individuals' requests allows the agency to hide its own abuses.

"This is part of the reason why intelligence agencies are spiraling out of control," said Mark Rumold, an attorney with the Electronic Frontier Foundation, a nonprofit group that has pressed the administration to release documents related to surveillance. "These agencies have an ability to operate in utter secrecy."

Documents released by the administration in response to Snowden's leaks have confirmed that the NSA violated its own rules in some cases, including by improperly collecting at least 56,000 domestic emails as part of its massive surveillance program to combat terrorism. A federal court ruled the program unconstitutional, forcing the NSA to change its practices by segregating collections most likely to contain Americans' emails.

The NSA has not publicly revealed details about those cases, however.

Other agencies have kept such collection under wraps as well.

The Drug Enforcement Administration trained its agents how to conceal evidence used in criminal investigations but gathered from various sources, including from NSA intercepts, the Reuters news agency found last year. As a result, the DEA did not notify defendants and even some prosecutors and judges how it had obtained the evidence.

Separately, the Justice Department had concluded that some criminal defendants did not need to be told about NSA surveillance unless email or telephone records gathered during the intercepts were filed as evidence in a criminal case, according to a New York Times report. The policy applied to surveillance authorized under the 2008 law that permitted warrantless eavesdropping on overseas communications.

After media reports drew attention to the loophole, the Justice Department late last year for the first time notified a criminal defendant that evidence against him would include NSA intercepts. The defendant, Jamshid Muhtorov, was accused in 2012 of providing material support to an Uzbek terrorist group. The American Civil Liberties Union is now seeking to have the evidence thrown out as part of its challenge to the constitutionality of the NSA's programs.

During the George W. Bush administration, the Justice Department's inspector general uncovered widespread abuses in FBI programs that relied on administrative or emergency orders to obtain telephone records. As a result of the scrutiny, the FBI disclosed in 2008 that it had improperly collected the phone records of Washington Post and New York Times reporters four years earlier. It's unknown whether other journalists have been monitored improperly.

Last month, the FBI refused to rule out whether it had information about several McClatchy journalists, although it's likely that the FBI had records at some point related to one of the reporters. In 2007, the FBI opened a leak investigation to determine the sources for the reporter's stories on a public corruption investigation.

"We were unable to identify main file records," the bureau said in its responses to that reporter and others, adding that it could neither confirm nor deny that any of the journalists were on watch lists.

To prevent future surveillance abuses, Congress might need to allow certain categories of American citizens to request their records, such as in cases where there is evidence of misconduct by an agency, some experts said.

"You can't do effective oversight of NSA surveillance on a retail basis by submitting lots and lots of individual Freedom of Information Act requests," said Steven Aftergood, head of the Federation of the American Scientists' Project on Government Secrecy. "This is a policy issue that needs to be debated and resolved in Congress."

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