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April 1, 2014

**Re: General Assembly Resolution 68/167  
“The Right to Privacy in the Digital Age”**

Dear Ms. Prouvez,

I refer to your letter of inquiry of February 26, 2014, seeking contributions from civil society relative to General Assembly resolution 68/167, The Right to Privacy in the Digital Age.

On behalf of the American Civil Liberties Union Foundation (“ACLU”), we enclose copies and links to two documents for your consideration:

1. Written Submission of Jameel Jaffer, Deputy Legal Director, American Civil Liberties Union Foundation, to the Privacy and Civil Liberties Oversight Board, dated March 19, 2014.<sup>1</sup>
2. The ACLU’s 2014 report, *Privacy Rights in the Digital Age: A Proposal for a New General Comment on the Right to Privacy under Article 17 of the International Covenant on Civil and Political Rights*.<sup>2</sup>

Mr. Jaffer’s written submission provides a comprehensive legal analysis of surveillance conducted by the government of the United States under Section 702 of the Foreign Intelligence Surveillance Act. Section 702, also known as the FISA Amendments Act (“FAA”), provides authorization for U.S. surveillance for “foreign intelligence” purposes of “non-U.S. persons” located outside the United States, to be conducted from U.S. telecommunications and internet facilities. The statute prohibits the targeting of any U.S. person anywhere in the world and of any person within the United States. It also prohibits surveillance of anyone outside the United States if that surveillance is aimed at acquiring information from a specific, known U.S. person. Notably,

<sup>1</sup> See [http://justsecurity.org/wp-content/uploads/2014/03/PCLOB\\_FISA\\_Sect\\_702\\_Hearing\\_-\\_Jameel\\_Jaffer\\_Testimony\\_-\\_3-19-14.pdf](http://justsecurity.org/wp-content/uploads/2014/03/PCLOB_FISA_Sect_702_Hearing_-_Jameel_Jaffer_Testimony_-_3-19-14.pdf)

<sup>2</sup> See <https://www.aclu.org/sites/default/files/assets/jus14-report-iccpr-web-rel1.pdf>

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the U.S. also conducts surveillance under a number of other authorities, including Presidential Executive Order 12333.<sup>3</sup> Mr. Jaffer's submission does not address these alternative frameworks, as it was initially provided to the Privacy Civil Liberties Oversight Board, an independent, bipartisan agency within the executive branch of the U.S. government.<sup>4</sup> The Board is in the process of reviewing U.S. surveillance practices. On January 23, 2014, the Board issued a report on the U.S. government's bulk collection of telephone records under Section 215 of the USA PATRIOT Act.<sup>5</sup> On March 19, 2014, in Washington, D.C., the Board held public hearings on surveillance conducted under Section 702, and it is expected to issue a report about its findings later this year. Mr. Jaffer's submission focuses solely on the requirements of domestic law. The ACLU intends to file a separate submission with the Board on or before April 12, 2014, analyzing Section 702 under principles of international human rights law. We will forward you a copy of this analysis at that time.

Our report, *Privacy in the Digital Age*, is addressed to the U.N. Human Rights Committee, and calls on the Committee to consider reviewing and updating General Comment 16 on the right to privacy. We recommend that the Committee publish a new General Comment on Article 17, which takes into consideration - among other developments - advances in information technologies that improperly employed may have detrimental impacts on the global protection of privacy. Our report argues that a new General Comment will provide needed guidance for the Committee in its Consideration of State Parties' reports on compliance with the Covenant and in addition provide a framework for States Parties considering enactment or amendment of legislation or policies or practices that implicate privacy interests. While our report is ostensibly aimed at the Human Rights Committee and advocates the adoption of a new General Comment on privacy, the analysis it sets forth is of more general application. In particular, drawing from the privacy jurisprudence of the U.N. system, regional human rights bodies and state practice, our report provides guidance on the application of arbitrariness and lawfulness standards to surveillance and other measures that interfere with privacy interests, and recommends that blanket and indiscriminate surveillance operations should be entirely prohibited. In short, our report makes the following findings in regards to surveillance practices:

- for an interference with privacy to be non-arbitrary, it must pursue a legitimate aim, have a rational connection to that aim, minimally impair the right to privacy, and strike a fair balance between pursuit of the aim and limitation of the right—in other words, it must satisfy a proportionality test;

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<sup>3</sup> See <http://www.archives.gov/federal-register/codification/executive-order/12333.html>

<sup>4</sup> See <http://www.pclob.gov/>

<sup>5</sup> See

<http://www.pclob.gov/All%20Documents/Report%20on%20the%20Telephone%20Records%20Program/PCLoB-Report-on-the-Telephone-Records-Program.pdf>



- surveillance and data collection practices must ensure minimum safeguards to prevent abuse and arbitrary interferences with privacy interests;
- indiscriminate mass surveillance is a disproportionate interference with the right to privacy and violates Article 17;
- mass collection and retention of personal data is a disproportionate interference with the right to privacy and violates Article 17; and
- surveillance and other measures for the collection and storage of personal data must be subject to judicial oversight and victims of privacy violations should be provided access to an effective remedy.

These findings were recently affirmed in Concluding Observations issued by the U.N. Human Rights Committee regarding the United States' Fourth Periodic Report on its compliance with the ICCPR:

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;

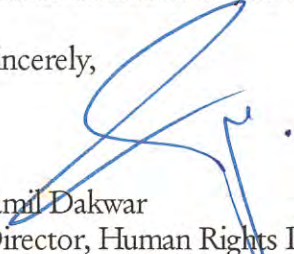
(e) ensure that affected persons have access to effective remedies in cases of abuse.<sup>6</sup>

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<sup>6</sup> U.N. Human Rights Comm., *Concluding Observations on the Fourth Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, 8-9 (Mar. 26, 2014).


We trust that the information contained in our submission will in turn prove useful in preparing your report to the General Assembly. If we can be of further assistance to you in this matter, please do not hesitate to contact us.

Sincerely,



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