UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE [redacted] :

[redacted] : Docket Number: [redacted]

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(U) MOTION TO AMEND

~~(TS//SI//OC,NF)~~ The United States of America, through the undersigned Department of Justice attorney, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, Title 50, United States Code (U.S.C.), §§ 1801-1811, (FISA or the Act), for an amended order in the above-captioned docket number for the purpose of clarifying the scope of the electronic surveillance authority granted by the Court.

1. ~~(TS//SI//OC,NF)~~ Upon consideration of an application by the United States, on May 31, 2007, the Honorable Roger Vinson of this Court issued an Order in the above-captioned docket number authorizing electronic surveillance of telephone

Classified by: Margaret A. Skelly-Nolen, Acting Counsel for Intelligence Policy, NSD, DOJ
Reason: 1.4(c)
Declassify on: 27 July 2032

numbers and e-mail [redacted] used by [redacted] [redacted] In the Order, the Court authorized the National Security Agency (NSA) to conduct electronic surveillance of, *inter alia*, "telephone numbers or e-mail [redacted] the nature and location of which are not specified [in the Order] because they were unknown to the NSA as of May 24, 2007 (the date the application was filed), where there is probable cause to believe that each additional telephone number or e-mail [redacted] is being used, or is about to be used" by the targeted foreign powers. Order, sub-paragraph I.b., at 11. The Court limited this authority to surveillance of additional telephone numbers and e-mail [redacted] that the NSA reasonably believes are being used, or are about to be used, by non-United States persons located outside the United States. Id., sub-paragraph I.b., at 11-12.

2. ~~(TS//SI//OC,NF)~~ The Court further ordered that notice of any additional telephone number or e-mail [redacted] at which electronic surveillance is directed pursuant to the authority granted in sub-paragraph I.b. of the Order shall be provided to the Court, in accordance with 50 U.S.C. § 1805(c)(3), within twenty-one days of the date on which such surveillance begins. Order at 16. The Court ordered that the first such report shall be submitted on Wednesday, June 13, 2007, and that the report shall provide notice of additional telephone numbers and e-mail [redacted]

[redacted] for which electronic surveillance was initiated from May 24, 2007, through June 2, 2007. Id. Subsequent reports shall be submitted on a weekly basis and shall cover surveillance initiated during an earlier one-week period. Id. The Court further ordered that all such reports shall include:

> (A) the nature and location of each new facility or place at which electronic surveillance is directed;
>
> (B) the facts and circumstances relied upon by the United States to justify its belief that the new facility or place at which electronic surveillance is directed is or was being used, or is about to be used, by a target of surveillance;
>
> (C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and
>
> (D) the total number of electronic surveillances that have been or are being conducted under the authority of this Order.

Id. at 16-17.

3. ~~(TS//SI//OC,NF)~~ To date, the Government has submitted seven reports to the Court concerning the Government use of the electronic surveillance authority granted in sub-paragraph I.b. of the Order. In response to the first report, which the Government filed on June 13, 2007, the Court (Judge Kazen) issued an order on June 22, 2007, expressing concern that "the descriptions of the targeted e-mail [redacted] [discussed in the June 13 report] suggest that many of the newly initiated e-mail [redacted] may have been known to the

National Security Agency prior to May 24, 2007." The same concern was raised by the orders of July 6, 2007 (Judge Bates), July 6, 2007 (Judge Benson), July 13, 2007 (Judge Scullin), and July 20, 2007 (Judge Kollar-Kotelly) regarding subsequent reports filed by the Government. These orders have raised the question of what it means for a facility "at which the electronic surveillance will be directed" to be "unknown," a question that the Government did not address in the supplemented and revised application filed in the above-captioned docket number on May 24, 2007.

4. ~~(TS//SI//OC,NF)~~ Attached in support of this motion is a memorandum of law that addresses the question of what it means for the "nature and location of the facility or place at which electronic surveillance will be directed" to be "[un]known" to the NSA. For the reasons set for in the memorandum of law, the Government requests that the Court amend its May 31 Order to clarify that the NSA may initiate electronic surveillance of a facility in accordance with the May 31 Order if the NSA, or the FBI at the request or recommendation of the NSA, had not as of May 24, 2007: applied to this Court for authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1804(a) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; obtained authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1805(f) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; or tasked that facility for collection under the Terrorist Surveillance Program as of December 31, 2006, or under the authority granted

by this Court in docket number [redacted] All other provisions of this Court's original orders, dated May 31, 2007, will remain unaffected, including the date and time of expiration of the electronic surveillance. ~~(TS//SI//OC,NF)~~

~~(TS//SI//OC,NF)~~ WHEREFORE, the United States of America, through the undersigned attorney, moves this Court to issue an amended Order. A proposed order effecting this request regarding [redacted] is attached.

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General

(b)(6) [redacted]
Acting Deputy Assistant Attorney General

(b)(6) [redacted]
Attorney-Advisor

National Security Division
U.S. Department of Justice

(U) APPROVAL

~~(S)~~ I find that this motion regarding [redacted] satisfies the criteria and requirements set forth in the Foreign Intelligence Surveillance Act of 1978, as amended, and hereby approve its filing with the United States Foreign Intelligence Surveillance Court.

/Kenneth L. Wainstein

Kenneth L. Wainstein
Assistant Attorney General for National Security

7/27/07
Date

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE [redacted] :

[redacted] : Docket Number: [redacted]

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO AMEND

The Government submits this memorandum in support of its motion to amend the Order of May 31, 2007, in *In re* [redacted] No. [redacted] This memorandum addresses an issue raised by subsequent orders of the Foreign Intelligence Surveillance Court ("Court") concerning electronic surveillance of telephone numbers and e-mail [redacted] initiated after the Government's second application.[1] Specifically, these orders have raised the question of what it means for a facility "at which the electronic surveillance will be directed" to be "unknown," a question that the Government did not address in its application. As set forth more fully

[1] See Orders of June 22, 2007 (Judge Kazen), July 6, 2007 (Judge Bates), July 6, 2007 (Judge Benson), July 13, 2007 (Judge Scullin), and July 20, 2007 (Judge Kollar-Kotelly). In light of the clarification requested by this motion and the requirements of the FISA as explained in this memorandum, the Government requests relief from that part of the Order of June 22, 2007, that directs the Government to "confirm when NSA first knew of the existence of each of [redacted]' discussed in the report filed on June 13, 2007. Order of June 22, 2007, at 2. The Government will, however, provide the Court with a statement confirming that as of May 24, 2007, NSA did not know that it would direct electronic surveillance at those [redacted] facilities.

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below, the Government requests that the Court amend its May 31 Order to clarify that the NSA may initiate electronic surveillance of a facility in accordance with the May 31 Order if the NSA, or the FBI at the request or recommendation of the NSA, had not as of May 24, 2007: applied to this Court for authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1804(a) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; obtained authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1805(f) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; or tasked that facility for collection under the Terrorist Surveillance Program as of December 31, 2006, or under the authority granted by this Court in docket number [redacted] ~~(TS//SI//OC,NF)~~.

The electronic surveillance that the Court approved in No. [redacted] allowed the Government to continue surveillance vital to the nation's security under the terms of FISA, as interpreted in the Court's Order and Memorandum Opinion of April 3, 2007. In part, the May 31 Order allowed the Government to initiate surveillance of new e-mail addresses and telephone numbers during the period of authorized surveillance and to report this initiation to the Court. This authority was critical to allowing the Government to continue the surveillance with the speed and agility necessary for its effective operation. Specifically, the Order authorized the Government, when it had the requisite probable cause, "to conduct electronic surveillance of any other telephone numbers or e-mail [redacted] the nature and location of which are not specified herein because they were unknown to the NSA as of May 24, 2007 (the date the application was filed) . . . ." The Court limited this authority to those facilities reasonably believed to be used by non-United States persons outside the United States. The authority was predicated on section 1805(c)(1)(B), which states that the order authorizing electronic surveillance shall specify "the nature and location of the facilities or places at which the electronic surveillance will be directed, *if known*." *Id.* (emphasis added). This language is mirrored in the section 1805(c)(3)(B) reporting requirement, which applies "where the nature and location of each of the facilities or places at which the surveillance will be directed is unknown. . . ." *Id.* ~~(TS//SI//OC,NF)~~.

Pursuant to this reporting requirement and the Court's May 31 Order, the Government submitted its first report on June 13, 2007. The Court (Judge Kazen) then

issued an order on June 22 expressing concern that "the descriptions of the targeted e-mail [redacted] suggest that many of the newly initiated e-mail [redacted] may have been known to the National Security Agency prior to May 24, 2007." The same question was raised by the orders of July 6, 2007 (Judge Bates), July 6, 2007 (Judge Benson), July 13, 2007 (Judge Scullin), and July 20, 2007 (Judge Kollar-Kotelly). The Government submits this memorandum to address the question of what it means for the "nature and location of the facility or place at which electronic surveillance will be directed" to be "[un]known." ~~(TS//SI//OC,NF)~~

The terms of FISA indicate that what NSA must not know at the time of the application is that it will direct electronic surveillance authorized by the order at the particular facility or place that it later adds to the surveillance. The terms "if known" in section 1805(c)(1)(B) and "unknown" in section 1805(c)(3)(B) refer to the immediately preceding phrase, "the nature and location of the facility or place at which the electronic surveillance will be directed." The words "at which the electronic surveillance will be directed" qualify the meaning of "nature and location of the facility or place." Thus, what must be not "known" or "unknown" to NSA is that it will direct "the electronic surveillance" at the facilities. The phrase "the electronic surveillance," in turn, refers back to electronic surveillance approved under FISA in that particular order. *Id.* § 1805(c)(1) ("An order approving an electronic surveillance under this section shall specify . . . the nature and location of each of the facilities at which the electronic surveillance will be directed, if known . . . ."). Under the terms of FISA, then, NSA may direct surveillance at a new facility provided that it did not know, at the time of the application, that it would do so as part of the surveillance authorized by the order. ~~(TS//SI//OC,NF)~~

There are a variety of reasons why the NSA might not know at the time of the application that it would not direct electronic surveillance at a particular facility. First, the NSA might never have come across the telephone number or e-mail address. For example, [redacted] Second, the NSA might have had the e-mail address stored in a database but have lacked reason or the probable cause required to initiate surveillance. Third, the NSA may have had reason to initiate surveillance under another of its

programs outside FISA, but did not know at the time of the application that the telephone number was linked to the foreign power targets of this authorized collection. In this case, for instance, later analysis and collection could have revealed that the number was used by [redacted] There may be other circumstances as well in which NSA will not have known at the time of the application that it will direct surveillance at a facility it later wants to include. In some of these cases, the phone number or e-mail [redacted] will be known to NSA generally and in others the phone number or e-mail [redacted] will not be known to NSA. But in all of these cases, NSA did not know at the time of the application that it would direct electronic surveillance at this facility. Moreover, in many instances, when an NSA analyst decides to initiate surveillance of a facility under this Order, the analyst will simply not know whether the facility was the subject of previous collection in another of NSA's programs.[2] ~~(TS//SI//OC,NF)~~

Other interpretations of section 1805(c)(1)(B) and 1805(c)(3) would not only be inconsistent with their plain terms, but would be unworkable for NSA. Requiring that no part of NSA had ever known of the existence of the e-mail address or telephone number would ignore that the complete phrase that immediately precedes "unknown" and "if known" is "the nature and location of the facility or place at which the electronic surveillance will be directed," not just "the nature and location of the facility or place." ~~(TS//SI//OC,NF)~~

In other types of surveillance where the Government uses the authority that triggers the section 1805(c)(3) reporting requirement, this reading of FISA would have absurd results. For instance, the Court authorizes the Government to conduct mobile audio surveillance although the "nature and location of each of the facilities or places at

(b)(3) [redacted]

which the electronic surveillance will be directed" is unknown at the time of the application. The Government may then use this authority to conduct surveillance of the target in a park. It then reports to the Court that it directed the surveillance at that park. Of course, the Government knew of the park at the time of the application. But what it did not know is that it would be directing surveillance authorized by the order at that park. In the same way, the NSA may know of an e-mail [redacted] or telephone number, but not know, at the time of the application, that it would be directing surveillance at that facility under the Court's order. ~~(TS//SI//OC,NF)~~

Such a requirement would also mean that NSA would have to check multiple databases concerning all of its other programs to ensure that it had not come across the e-mail address or telephone number previously. If it had, NSA could not utilize the authority. More seriously, NSA is not able to undertake this burdensome task of verification. Because NSA can not ensure that it never previously knew of the facility through any of its surveillance programs, the implication of any such requirement would be that NSA could not utilize the authority envisioned by FISA and granted by the Court—an authority necessary to conduct the surveillance with the speed and agility needed to protect the nation's security. ~~(TS//SI//OC,NF)~~

Although FISA requires only that NSA not have known that it would direct surveillance at a facility as part of the authorized surveillance, the Government requests a more limited use of this authority. In order to ensure that NSA complies with this statutory requirement in a manner that is easy to administer, the Government requests that the Court amend its order to make clear that the NSA may use the authority to initiate electronic surveillance of a facility if the NSA, or the FBI at the request or recommendation of the NSA, had not as of May 24, 2007: applied to this Court for authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1804(a) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; obtained authority to conduct electronic surveillance of that facility under 50 U.S.C. § 1805(f) as a facility used by one of the foreign power targets of this surveillance or by one of their agents; or tasked that facility for collection under the Terrorist Surveillance Program as of December 31, 2006, or under the authority granted by this

Court in docket number [redacted].[3] This authority would be consistent with but more limited than that allowed by FISA, because NSA could not use the authority even if it did not know at the time of the application that it would want to direct the surveillance authorized by the Court in [redacted] at the facility. But the limitation the Government proposes makes the determination an objective one that is easier for the Government to administer and the Court to verify. ~~(TS//SI//OC,NF)~~

For the reasons set forth above, the Government respectfully requests that the Court grant its motion for clarification and to amend. (U)

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General

(b)(6) [redacted]
Acting Deputy Assistant Attorney General

(b)(6) [redacted]
Attorney-Advisor

National Security Division
U.S. Department of Justice

[3] Several of the facilities at which NSA directed surveillance using the authority discussed in this memorandum were facilities that had previously been tasked under FISA. See 13 June Report Pursuant to 50 U.S.C. § 1805(c)(3), Attachment B Bates Numbers [redacted]. For the reasons explained above, this surveillance was consistent with FISA. Nevertheless, their continued tasking would be inconsistent with the clarification the Government now proposes. Therefore, the Government will discontinue conducting surveillance of these facilities using this authority. (TS//SI//OC,NF)