~~TOP SECRET//COMINT//ORCON,NOFORN//X1~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

[redacted] : Docket No.: [redacted]

ORDER AND MEMORANDUM OPINION

This matter is before the Court on the Motion to Amend filed by the government in the above-captioned docket on July 27, 2007.

This motion concerns just one of the difficult issues presented by this effort to apply FISA to a complex, large-scale surveillance program. This case has required, and continues to require, an extraordinary expenditure of time and effort by NSA, the Department of Justice, and this Court, notwithstanding that it concerns electronic surveillance that is overwhelmingly directed at non-U.S. persons operating outside of the United States. In my view (a view I believe to be shared by all of the judges of this Court), legislative action is urgently needed to refocus the FISA process on surveillances that – unlike this one – significantly involve interests protected by the Fourth Amendment.

Background

This order is intended to clarify and supplement the earlier orders entered in this docket on April 3, 2007, and May 31, 2007. The May 31 order authorized electronic surveillance of particular, identified telephone numbers and e-mail addresses, on the basis of my finding probable cause to believe that such numbers and addresses were being or about to be used by one of the targets. May 31, 2007 Order at 8-9. It established procedures that were novel and were designed to meet the complex requirements of insuring that the requested surveillance by the NSA complied with the statutory provisions of FISA. That order also provided for adding additional numbers or addresses:

> in accordance with 50 U.S.C. § 1805(c)(1)(B) and § 1805(c)(3), the United States is authorized 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), 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 [one of the targeted foreign powers]. This authority shall be limited to the surveillance of telephone numbers and e-mail [redacted] which the NSA reasonably believes are being used, or about to be used, by persons outside of the United States and shall not include the surveillance of telephone numbers and e-mail [redacted] that the NSA reasonably believes are being used, or about to be used, by U.S. persons, as defined in 50 U.S.C. § 1801(i).

Id. at 11-12 (emphasis added). That order also established a schedule for the government to submit, pursuant to 50 U.S.C. § 1805(c)(3), weekly reports on the initiation of electronic surveillance of such additional facilities. Id. at 16-17.

Upon reviewing these reports, several judges of this Court have ordered supplementation with regard to whether NSA had knowledge prior to May 24, 2007, that would call into question whether it properly invoked the above-quoted provision of the May 31 Order.[1] The pending motion seeks clarification of what it means, under that provision, for the "nature and location" of a facility to have been "unknown to the NSA as of May 24, 2007." I conducted a hearing on this motion on the record on August 2, 2007.

Discussion

With the benefit of some two months of implementation, it can be seen that this provision of the May 31 Order requires clarification. As stated in the motion, and further addressed at the hearing, NSA has encountered different situations in which it has found the proper interpretation of this provision to be uncertain. The following hypothetical examples illustrate some of these concerns:

[redacted]

[1] See No. [redacted], Orders Dated June 22, 2007 (J. Kazen); July 6, 2007 (J. Bates); July 6, 2007 (J. Benson); July 13, 2007 (J. Scullin); July 20, 2007 (J. Kollar-Kotelly). For a number of reported facilities, the government was also ordered to supplement the stated basis for finding probable cause to believe that a targeted foreign power was using or about to use the facility. The adequacy of the probable cause statements is not presented by the instant motion.

[2] For example, [redacted] (b)(3); (b)(6) an NSA official, testified at the hearing that NSA maintains

(continued...)

[redacted]

I am persuaded that, in all three of these scenarios, NSA could properly initiate surveillance under the above-quoted authority for "later-identified" facilities. For purposes of this provision of the May 31 Order, NSA obtains knowledge of the "nature and location" of a facility when it first assesses that there is probable cause to believe that the facility is being used or about to be used by a targeted foreign power. Thus, "known" in this context applies to both the fact that the target has been found or identified, and a "connecting-the-dots" or understanding of that fact's significance. A more limited interpretation of this provision would preclude NSA from initiating surveillance under this authority for a facility that, even with the exercise of due diligence, it could not have presented in the original application. I conclude that, under the limited circumstances where this authority applies – only to facilities reasonably believed to be used by non-U.S. persons outside of the United States, on behalf of one of the targeted foreign powers – it is appropriate to grant the government as much latitude in initiating surveillance as the statute can reasonably be construed to permit.

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[2](..continued)
databases [redacted]

[3] At the hearing, [redacted] testified that, since February 2007, NSA had tasked approximately [redacted] e-mail addresses and phone numbers for non-FISA collection under Executive Order No. 12333 because they were associated with one of the targeted foreign powers – [redacted] than the total number of facilities targeted for surveillance under the probable cause standards of the May 31 Order.

However, I am not able to grant the government the precise relief that its motion requests. The motion proposes that a facility should be eligible for this "later-identified" authority if it had not been the subject of a FISA application or emergency authorization prior to May 24, 2007, or tasked for collection under the authority granted in Docket No. [redacted], or under the Terrorist Surveillance Program as of December 31, 2006. Motion at 4-5. These criteria, by their terms, would not preclude the strategic withholding from pre-surveillance judicial review of facilities that were already intended to be subjected to the FISA surveillance at the time the application was submitted. There is no reason to believe that the government has engaged, or would engage, in this practice. However, I conclude that the statute does not permit such an unlimited grant of authority that would, by its terms, allow the initiation of surveillance in those circumstances. The motion is GRANTED only to the extent set out herein.

Accordingly, it is hereby ORDERED that, for purposes of the authority granted pursuant to 50 U.S.C. § 1805(c)(1)(B) and § 1805(c)(3) on pages 11 and 12 of the May 31 Order, NSA shall be deemed to obtain knowledge of the nature and location of a facility when NSA first is able to determine that there is probable cause to believe that the facility is being used or about to be used by a targeted foreign power. Such determination may be made on the basis, in whole or in part, of analysis of information acquired by NSA on or before May 24, 2007, so long as the analysis that first results in such probable cause assessment was completed after May 24, 2007.

In his order in this docket entered on July 27, 2007, Judge Nathaniel M. Gorton noted the pendency of this motion as a reason for not requiring supplementation of the report filed by the government on July 18, 2007, regarding compliance with this requirement. Accordingly, it is hereby ORDERED that, by August 10, 2007, the government shall supplement that report by providing a statement whether, for each of the reported facilities, NSA was first able to determine that there was probable cause to believe that the facility was being used or about to be used by a targeted foreign power based on an analytical assessment NSA completed subsequent to May 24, 2007. In my view, an affirmative statement in this form should generally suffice to show that this requirement was satisfied. Similar supplementation may be sufficient with respect to the reports required by Judges Kazen, Bates, Benson, Scullin, and Kollar-Kotelly, see footnote 1 above, but I do not decide those issues now.

Done and ordered this 2nd day of August, 2007, in Docket No. [redacted]

ROGER VINSON
Judge, United States Foreign
Intelligence Surveillance Court