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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

2014 FEB -5 AM 11:50

LEEANN FLYNN HALL
CLERK OF COURT

~~(TS//NF)~~ IN RE APPLICATION OF THE
FEDERAL BUREAU OF INVESTIGATION FOR
AN ORDER REQUIRING THE PRODUCTION
OF TANGIBLE THINGS

Docket Number: BR 14-01

(U) MOTION FOR AMENDMENT TO PRIMARY ORDER

~~(TS//SI//NF)~~ The United States of America, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978 (the "Act"), Title 50, United States Code (U.S.C.), § 1861, as amended, for an amendment to the Primary Order issued in the above-captioned docket number. Specifically, the Government requests that the Primary Order be amended to require the Government to obtain the Court's permission, by motion, to use specific selection terms (or "seeds") to query the BR metadata for purposes of obtaining foreign intelligence information, except in cases of emergency. In addition, going forward, authorized queries of the BR metadata to obtain foreign intelligence information will return only that metadata within two "hops" of the seed.¹

¹ (U//FOUO) The first "hop" from a seed returns results including all identifiers (and their associated metadata) with a contact and/or connection with the seed. The second "hop" returns

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Classified by: John P. Carlin, Acting Assistant
Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: [REDACTED]

1. ~~(TS//SI//NF)~~ Upon consideration of the Application by the United States, on January 3, 2014, the Honorable Thomas F. Hogan of this Court issued orders in the above-captioned docket number requiring the production to the National Security Agency (NSA) of certain call detail records or "telephony metadata" created by certain specified telecommunications providers. That authority expires on March 28, 2014, at 5:00 p.m. Eastern Time. The application, including all exhibits and the resulting orders, is incorporated herein by reference.

2. ~~(TS//SI//NF)~~ The Primary Order in the above-captioned docket number requires NSA to strictly adhere to the enumerated minimization procedures. Among the minimization procedures is subparagraph (3)C, which, in summary, authorizes NSA to access the BR metadata for purposes of obtaining foreign intelligence information only through queries of the BR metadata to obtain contact chaining information (as described) using selection terms approved as "seeds" pursuant to the RAS approval process described in subparagraph (3)C.

3. ~~(TS//SI//NF)~~ The Government moves this Court for an amendment to the Primary Order in docket number BR 14-01 that will require the Government to first obtain the Court's approval, by motion, to use specific selection terms to the query the

results that include all identifiers (and their associated metadata) with a contact and/or connection with an identifier revealed by the first "hop."

BR metadata for purposes of obtaining foreign intelligence information, except in cases determined to be an emergency. The Government further moves this Court for an amendment to the Primary Order restricting queries of the BR metadata to obtain foreign intelligence information to return only that metadata within two "hops" of an approved seed. The Government is seeking these amendments to the Primary Order based on direction from the President of the United States of America concerning the manner in which the Government will implement this program going forward.

4. ~~(TS//SI//NF)~~ Specifically, the Government requests that the Court strike subparagraph (3)C from the Primary Order in docket number BR 14-01 and replace it with the following new subparagraph (3)C:

C. The government may request, by motion and on a case-by-case basis, permission from the Court for NSA^[FN1] to use specific selection terms that satisfy the reasonable articulable suspicion (RAS) standard^[FN2] as "seeds" to query the BR metadata to obtain contact chaining information, within two hops of an approved "seed", for purposes of obtaining foreign intelligence information. In addition, the Director or Acting Director of NSA may authorize the emergency querying of the BR metadata with a selection term for purposes of obtaining foreign intelligence information, within two hops of a "seed", if: (1) the Director or Acting Director of NSA reasonably determines that an emergency situation exists with respect to the conduct of such querying before an order authorizing such use of a selection term can with due diligence be obtained; and (2) the Director or Acting Director of NSA reasonably determines that the RAS standard has been met with respect to the selection term. In any case in which this emergency authority is exercised, the government shall make a motion in accordance with this

amendment to Primary Order to the Court as soon as practicable, but not later than 7 days after the Director or Acting Director of NSA authorizes such query. ^[FN3]

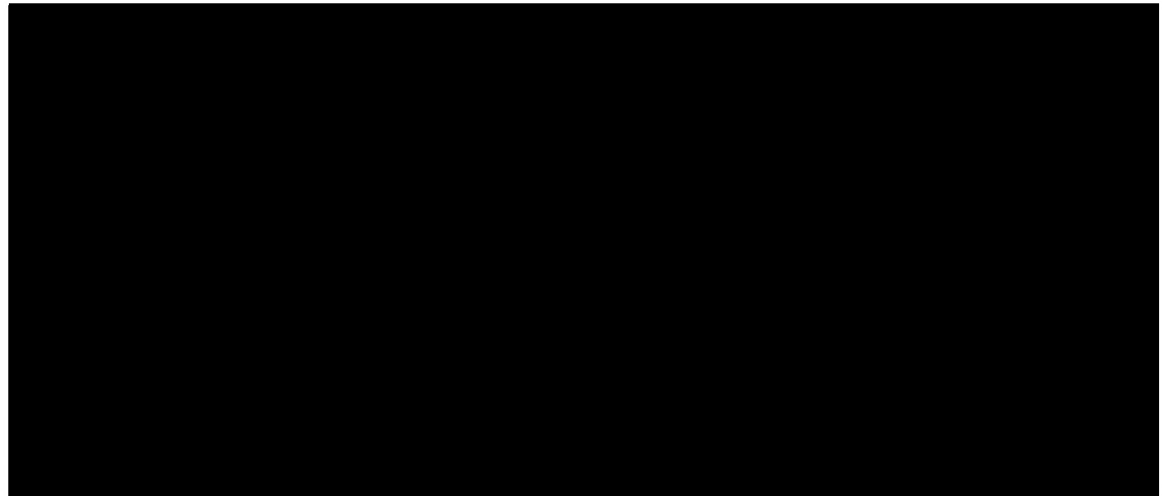
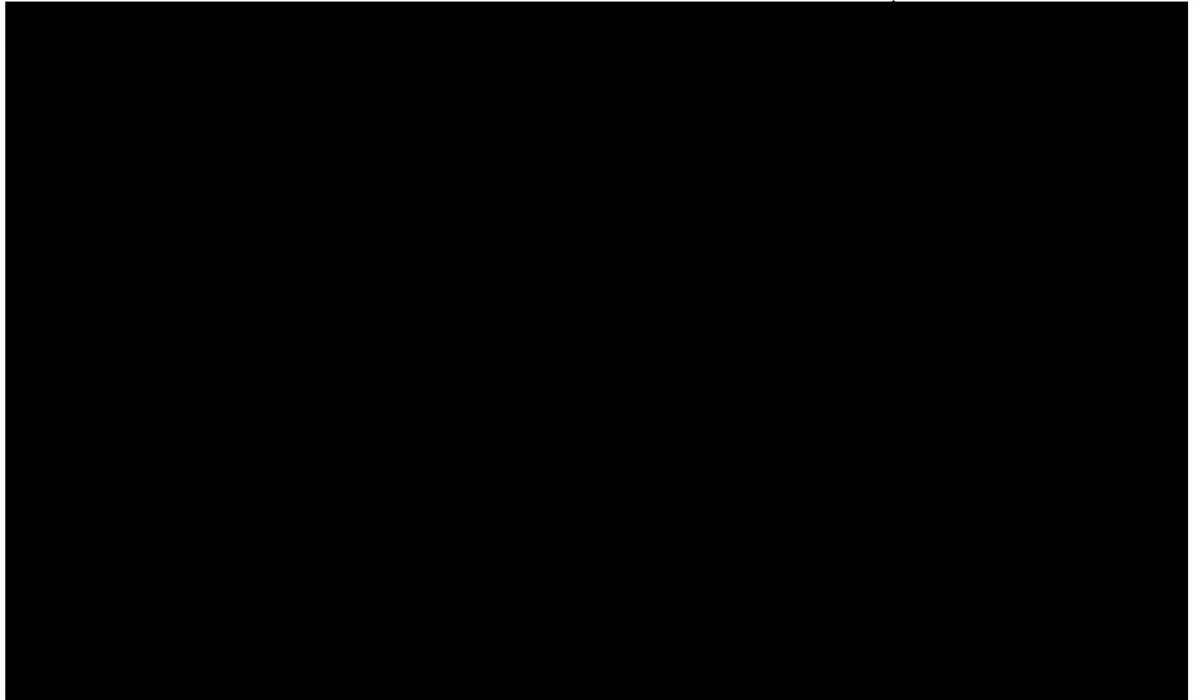
(i) Any submission to the Court under this paragraph shall, at a minimum, specify the selection term for which query authorization is sought or was granted, provide the factual basis for the NSA's belief that the reasonable articulable suspicion standard has been met with regard to that selection term and, if such query has already taken place, a statement of the emergency necessitating such query. ^[FN4]

(ii) NSA shall ensure, through adequate and appropriate technical and management controls, that queries of the BR metadata for intelligence analysis purposes will be initiated using only a selection term that has been RAS-approved. Whenever the BR metadata is accessed for foreign intelligence analysis purposes or using foreign intelligence analysis query tools, an auditable record of the activity shall be generated. ^[FN5]

(iii) The Court's finding that a selection term is associated with [REDACTED] shall be effective for: one hundred eighty days for any selection term reasonably believed to be used by a U.S. person; and one year for all other selection terms. ^{[FN6],[FN7]}

(iv) Queries of the BR metadata using RAS-approved selection terms may occur either by manual analyst query or through the automated query process described below. In either case, queries of the BR metadata to obtain foreign intelligence information shall return only that metadata within two "hops" of an approved seed. ^[FN8] This automated query process queries the collected BR metadata (in a "collection store") with RAS-approved selection terms and returns the hop-limited results from those queries to a "corporate store." The corporate store may then be searched by appropriately and adequately trained personnel for valid foreign intelligence purposes, without the requirement that those searches

use only RAS-approved selection terms. The specifics of the automated query process, as described in the [REDACTED] Declaration and modified by this Order, are as follows:



^[FN1] For purposes of this Order, “National Security Agency” and “NSA personnel” are defined as any employees of the National Security Agency/Central Security Service (“NSA/CSS” or “NSA”) and any other personnel engaged in Signals Intelligence (SIGINT)

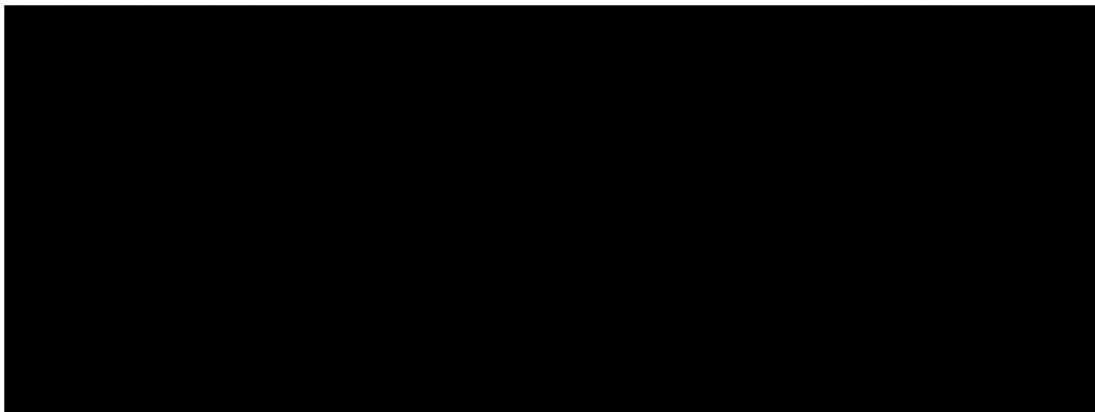
operations authorized pursuant to FISA if such operations are executed under the direction, authority, or control of the Director, NSA/Chief, CSS (DIRNSA). NSA personnel shall not disseminate BR metadata outside the NSA unless the dissemination is permitted by, and in accordance with, the requirements of this Order that are applicable to the NSA.

(FN2) The reasonable articulable suspicion standard is met when, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion (RAS) that the selection term to be queried is associated with [REDACTED]

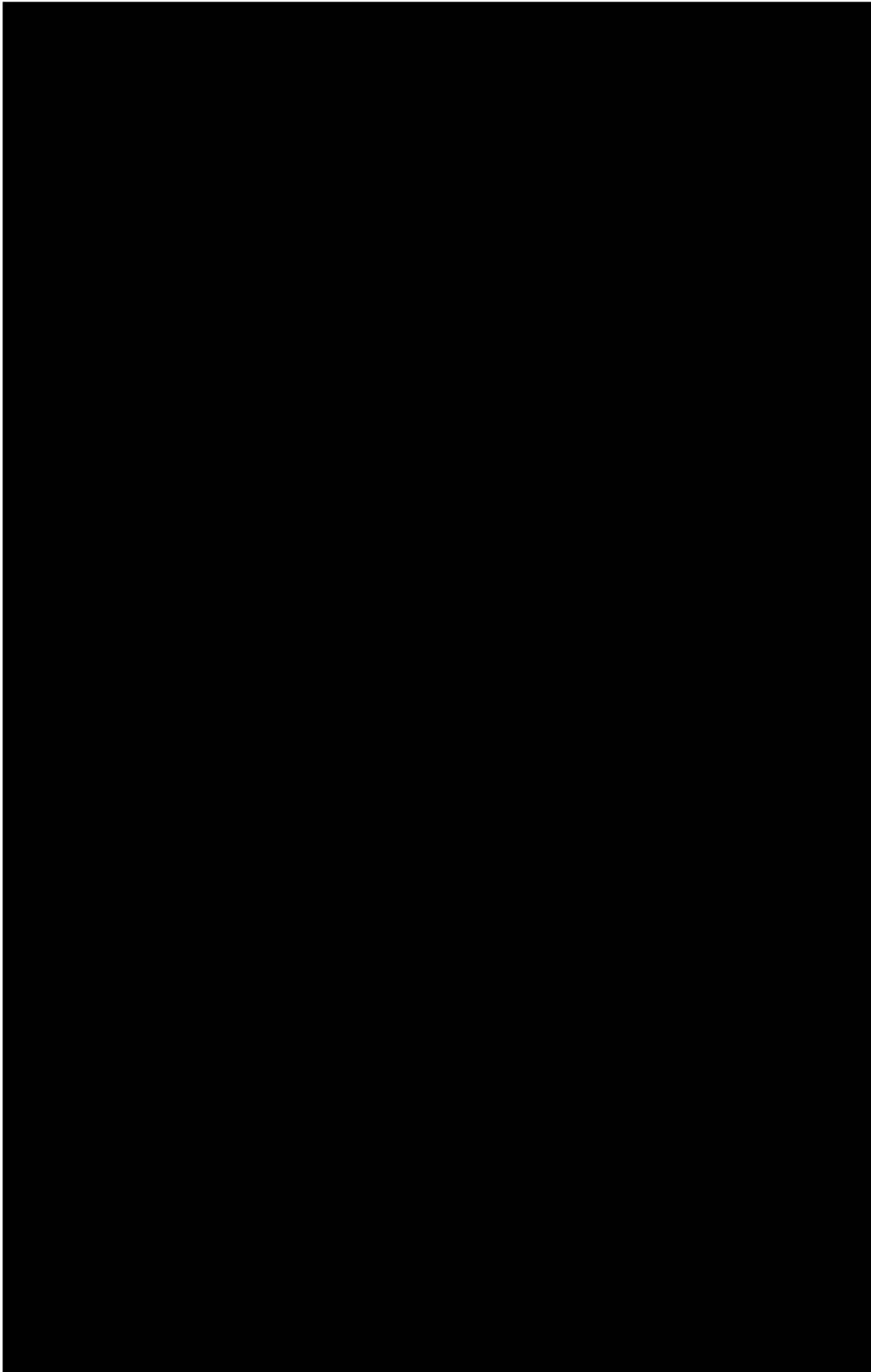
[REDACTED] provided, however, that any selection term reasonably believed to be used by a United States (U.S.) person shall not be regarded as associated with [REDACTED]

[REDACTED] solely on the basis of activities that are protected by the First Amendment to the Constitution. In the event the emergency provisions of any amendment to the Court's Primary Order are invoked by the Director or Acting Director, NSA's Office of General Counsel (OGC), in consultation with the Director or Acting Director will first confirm that any selection term reasonably believed to be used by a United States (U.S.) person is not regarded as associated with [REDACTED]

[REDACTED] solely on the basis of activities that are protected by the First Amendment to the Constitution.





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[FN3] In the event the Court denies such motion, the government shall take appropriate remedial steps, including any steps the Court may direct.

[FN4] For any selection term that is subject to ongoing Court-authorized electronic surveillance, pursuant to 50 U.S.C. § 1805, based on this Court's finding of probable cause to believe that the selection term is being used or is about to be used by 


[REDACTED] including those used by U.S. persons, the government may use such selection terms as "seeds" during any period of ongoing Court-authorized electronic surveillance without first seeking authorization from this Court as described herein. Except in the case of an emergency, NSA will first notify the Department of Justice, National Security Division of its proposed use as a seed any selection term subject to ongoing Court-authorized electronic surveillance.

[FN5] This auditable record requirement shall not apply to accesses of the results of RAS-approved queries.

[FN6] The Court understands that from time to time the information available to NSA will indicate that a selection term is or was associated with a Foreign Power only for a specific and limited time frame. In such cases, the government's submission shall specify the time frame for which the selection term is or was associated with [REDACTED]

[REDACTED] In the event the Court finds that the RAS standard is met, the automated query process described herein shall limit the first hop query results to the specified time frame, and analysts conducting manual queries using that selection term shall continue to properly minimize information that may be returned within query results that fall outside of that timeframe.

[FN7] The Court understands that NSA receives certain call detail records pursuant to other authority, in addition to the call detail records produced in response to this Court's Orders. NSA shall store, handle, and disseminate call detail records produced in response to this Court's Orders pursuant to this Order, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[FN8] The first "hop" from a seed returns results including all identifiers (and their associated metadata) with a contact and/or connection with the seed. The second "hop" returns results that include all identifiers (and their associated metadata) with a contact and/or connection with an identifier revealed by the first "hop."

[FN9]



[FN10]



[FN11]



[FN12] The Court understands that to date NSA has not implemented, and for the duration of this authorization will not as a technical matter be in a position to implement, the automated query process authorized by prior orders of this Court for analytical purposes. Accordingly, this amendment to the Primary Order authorizes the use of this automated query process for development and testing purposes only. No query results from such testing shall be made available for analytic purposes. Use of this automated query process for analytical purposes requires further order of this Court.

5. (TS//SI//NF) The Government respectfully submits that the procedures set forth in the Court's Primary Order, as amended by this motion, would meet the statutory definition of minimization procedures. Section 1861(c)(1) requires that upon approval of an application the Court direct that minimization procedures adopted pursuant to subsection (g) be followed. Subsection (g) requires the adoption of minimization procedures which are reasonably designed in light of the purpose and technique of a tangible things order to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons, consistent with the need of the Government to obtain, produce and disseminate foreign intelligence information. To further enhance privacy and civil liberty protections concerning the information produced to and retained by the Government pursuant to the Court's orders issued in this matter, the Government seeks an amendment to the Court's Primary Order requiring prior judicial review and approval, except in an emergency, to use specific selection terms to query the BR metadata for purposes of obtaining foreign intelligence information, and to restrict queries of the BR metadata to return only that metadata within two "hops" of an approved seed. As the Government has acknowledged, the applications seeking the bulk production of call detail records are not routine due to the nature and scope of the production. In light of the bulk nature of the production for which authority has been

granted, the Government is proposing amendments which, if approved, will require prior judicial review and approval of the Government's RAS determinations and a further limitation on hops. The Government respectfully submits that these proposed additional limitations on the minimization procedures previously approved by this Court are consistent with Section 1861(g)'s definition of minimization procedures because they seek to further ensure (1) that the Government's access to and analysis of the BR metadata is for appropriate counterterrorism purposes consistent with the Court's authorization; (2) that query results containing nonpublicly available information concerning unconsenting United States persons are limited, consistent with the needs of the counterterrorism purpose of the production; and (3) that NSA's disseminations of such United States person information be as limited as possible consistent with the needs of the Government to disseminate counterterrorism information. The proposed minimization procedures are similar to those approved and adopted as binding by order of this Court in docket numbers BR 09-01, BR 09-06, and BR 09-09.

~~(TS//SI//NF)~~ For the reasons set out above, the Government respectfully submits that consistent with section 1861(g) the proposed amendments are reasonably designed in light of the nature and purpose of the bulk telephony metadata production to further protect United States person information, and to further ensure that the information

produced is used and disseminated in furtherance of the counterterrorism purpose of the production.

6. ~~(TS//SI//NF)~~ By this motion, the Government does not seek to modify any other provisions of the Primary Order in docket number BR 14-01.² The Government will continue to comply with all of the other restrictions and procedures described in the Court's Primary Order.

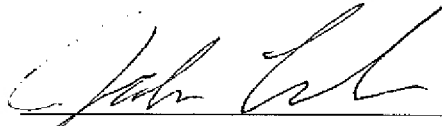
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² ~~(TS//SI//NF)~~ In particular, this motion does not seek to modify the provisions of subparagraph (3)B of the Primary Order. Consistent with that subparagraph, appropriately trained and authorized technical personnel will access the BR metadata (including via queries using non-RAS-approved selection terms) to perform those processes needed to make the BR metadata usable for intelligence analysis

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~~(TS//SI//NF)~~ WHEREFORE, the United States of America, through the undersigned attorney, moves for an amendment to the Primary Order in docket number BR 14-01 striking paragraph (3)C of the Primary Order and replacing it with a new subparagraph (3)C set forth above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John P. Carlin", written over a horizontal line.

John P. Carlin
Acting Assistant Attorney General
National Security Division
U.S. Department of Justice

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(U) APPROVAL

(S) I find that the foregoing Motion for Amendment to Primary Order 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.

Date

2/5/14

Date

Eric H. Holder, Jr.
Attorney General of the United States



James M. Cole
Deputy Attorney General of the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL
BUREAU OF INVESTIGATION FOR AN
ORDER REQUIRING THE PRODUCTION OF
TANGIBLE THINGS

Docket No. BR 14-01

**ORDER GRANTING THE GOVERNMENT'S MOTION TO AMEND
THE COURT'S PRIMARY ORDER DATED JANUARY 3, 2014**

This matter is before the Court on the motion of the government to amend the Primary Order issued on January 3, 2014, in the above-captioned docket ("January 3 Primary Order" or "Jan. 3 Primary Order"), which was submitted on February 5, 2014 ("Motion"). In the January 3 Primary Order, the Court approved the government's application pursuant to Section 501 of the Foreign Intelligence Surveillance Act of 1978 ("FISA" or "the Act"), codified at 50 U.S.C. § 1861, as amended (also known as Section 215 of the USA PATRIOT Act),¹ for orders requiring the production to the National Security Agency ("NSA"), in bulk and on an ongoing basis, of call detail records or

¹ "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("PATRIOT Act"), amended by, "USA PATRIOT Improvement and Reform Act of 2005," Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006); "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006," Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006); and Section 215 expiration extended by "Department of Defense Appropriations Act, 2010," Pub. L. No. 111-118 (Dec. 19, 2009); "USA PATRIOT—Extension of Sunsets," Pub. L. No. 111-141 (Feb. 27, 2010); "FISA Sunsets Extension Act of 2011," Pub. L. No. 112-3 (Feb. 25, 2011); and, "PATRIOT Sunsets Extension Act of 2011," Pub. L. No. 112-14, 125 Stat. 216 (May 26, 2011).

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“telephony metadata” created by certain telecommunications carriers. The January 3 Primary Order approved and adopted a detailed set of minimization procedures restricting NSA’s access to and use of the telephony metadata produced in response to the Court’s orders. The purpose of the Motion is to modify the applicable minimization procedures. For the reasons set forth below, the Motion is granted.

Before discussing the changes proposed by the government in the Motion, some background discussion is warranted. An application by the government for a production order under Section 215 must include, among other things, “an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) of this section that are applicable to the retention and dissemination” of the tangible things that are received as part of the production. 50 U.S.C. § 1861(b)(2)(B). Subsection (g) defines the term “minimization procedures” as follows:

(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 1803(e)(1) of this title, shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance; and

(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.

Id. § 1861(g)(2).

To approve an application under Section 215, this Court must find that the application “meets the requirements of subsections (a) and (b),” including the

requirement that the application provide an enumeration of minimization procedures that have been adopted by the Attorney General and that meet the definition set forth in subsection (g). See id. § 1861(c)(1). Upon approval, the Court must, among other things, "direct that minimization procedures adopted pursuant to subsection (g) of this section be followed." Id.

As required by FISA, the application filed by the government in this docket enumerated detailed minimization procedures for proposed use in connection with telephony metadata received in response to the requested production orders. See Application for Certain Tangible Things for Investigations to Protect Against International Terrorism (filed Jan. 3, 2014) at 15-25. The Court concluded that those procedures, which were adopted by the Attorney General, satisfied the above-described requirements of subsection (g), and directed that the government "strictly adhere" to them. See Jan. 3 Primary Order at 4. Among other things, the minimization procedures proposed by the government and approved by the Court in the January 3 Primary Order authorize NSA analysts to access the telephony metadata only through a query process that requires a reasonable, articulable suspicion (RAS), as determined by a limited set of NSA personnel, that each selection term or "seed" (e.g., a telephone number) that will be used to search the data is associated with an international terrorist organization listed in the order. See id. at 4-12. The minimization procedures proposed by the government and adopted by the Court also effectively limit the results of queries to identifiers (e.g., telephone numbers) within three "hops" of the identifier used to conduct the query. See id. at 11-12.²

In the Motion, the government proposes two changes to the previously-

² The first "hop" from a seed returns results including all identifiers (and their associated metadata) that have been in contact or are connected with the seed. See Application for Certain Tangible Things for Investigations to Protect Against International Terrorism (filed Jan. 3, 2014), Tab A ([REDACTED]) at 9 n.5. The second hop returns results that include all identifiers (and their associated metadata) that have been in contact or are connected with an identifier revealed by the first hop. See id. The third hop returns results that included all identifiers (and their associated metadata) that have been in contact or are connected to an identifier at the second hop. See id.

approved minimization procedures. The first change would generally preclude the government from querying the telephony metadata without first having obtained, by motion, a determination by this Court that each selection term to be used satisfies the RAS standard. See Motion at 2-3.³ The second change would limit the results of each query to metadata associated with identifiers that are within two, rather than three, “hops” of the approved seed used to conduct the query. See id. at 3.⁴ To effectuate these changes, the government proposes striking subparagraph (3)C from the January 3 Primary Order and replacing it with a new subparagraph (3)C that is set forth in the Motion. See id. at 3-10.

³ The proposal includes a provision that would allow the Director or Acting Director of NSA to authorize the “emergency querying” of a seed upon determining that (1) “an emergency exists with respect to the conduct of such querying before an order authorizing such use of a selection term can with due diligence be obtained” and (2) “the RAS standard has been met with respect to the selection term.” Motion at 3. As soon as practicable, but not later than seven days following any use of this emergency provision, the government would be required to make a motion to the Court for approval of the query based on a determination that the RAS standard was satisfied. See id. at 3-4. In the event the Court were to determine that RAS was lacking, the government would be required to take appropriate remedial measures, including any steps the Court might direct (e.g., destroying the results of the emergency query and recalling any reports or other disseminations based on those results). See id. at 8.

⁴ Other important aspects of the process would remain largely the same. For example, NSA would still be required to ensure through “adequate and appropriate technical and management controls” that queries of the telephony metadata are conducted only using RAS-approved selection terms. See Motion at 4. RAS approvals made by the Court (like RAS approvals made by NSA under the current process) would be effective for 180 days for any selection term reasonably believed to be used by a United States person; other RAS approvals would be effective for one year. See id. NSA would be permitted to use as a querying seed any selection term that is the subject of ongoing Court-authorized electronic surveillance pursuant to 50 U.S.C. § 1805, based on the Court’s finding of probable cause to believe that the selection term is being used or is about to be used by an agent or agents of one of the terrorist groups enumerated in the Primary Order in this docket. See id. at 8-9.

Both proposed changes have been adopted by the Attorney General, as required by subsection (b)(2)(B). See Motion at 15.⁵ Furthermore, both bear directly on the balancing of privacy and national security interests that is required by the first component of the definition of “minimization procedures” set forth in subsection (g). That portion of the definition requires:

specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information

50 U.S.C. § 1861(g)(2)(A).

Limiting query results to two, rather than three, “hops” will have the effect of enhancing the protection of “nonpublicly available information concerning unconsenting United States persons.” Id. Eliminating the third hop will reduce the amount of metadata – including metadata of or concerning United States persons – that is accessed by NSA analysts. Of course, metadata that is never accessed cannot be used or disseminated by the government.⁶

Regarding the requirement that the proposed procedures be “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information,” id., the Court observes that metadata returned at the third hop is less likely to have foreign intelligence value than the metadata returned at the first and second hops. That is because identifiers that are three steps removed from a RAS-

⁵ The Deputy Attorney General approved the proposed amendments. See Motion at 15. FISA defines “Attorney General” to include the Deputy Attorney General. 50 U.S.C. § 1801(g).

⁶ For this reason, limiting query results to two hops also will help to limit the dissemination of United States-person identifying information in accordance with the second component of the definition of “minimization procedures” that is set forth on page 2 above. See 50 U.S.C. 1861(g)(2)(B).

approved selection term are less likely to have a connection to international terrorism than those that are more closely connected to the seed identifier. For these reasons, the Court has no difficulty concluding that the proposed reduction in the number of hops from three to two is consistent with the applicable definition of "minimization procedures."

The government's proposal to require RAS determinations by the FISC is less straightforward. To be sure, this change would enhance the protection of "nonpublicly available information concerning unconsenting United States persons," *id.*, that is included in the telephony metadata received by NSA. In applying the warrant requirement of the Fourth Amendment in the context of more intrusive investigative measures used in criminal investigations, the Supreme Court has recognized the value of having a "neutral and detached magistrate" determine whether the circumstances justify the intrusion:

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Although the protection of the Fourth Amendment does not extend to the government's acquisition or use of the telephony metadata at issue here, *see Smith v. Maryland*, 442 U.S. 735 (1978), the Supreme Court's reasoning in *Johnson* can plausibly be extended to the RAS determinations that are required to query the data. Having a disinterested judicial officer determine whether each selection term has the requisite connection to international terrorism can reasonably be expected to minimize the risk of erroneous queries and the attendant risk that United States-person information will be accessed or disseminated without adequate justification.

The proposed judicial approval requirement is also "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1861(g)(2)(A). The substantive standard for querying the metadata – the RAS standard – will remain the same. Although requiring that RAS determinations be

made by an entity outside NSA will burden the approval process to some degree, the Executive Branch, which has primary responsibility for safeguarding our national security, proposed this change and thus presumably believes it to be workable. Further, the emergency exception described in footnote 3 above will give the government reasonable flexibility in appropriate situations to act expeditiously when obtaining prior judicial approval for particular queries is not feasible.

Although the Court is satisfied that the effect of the government's proposal to require RAS approvals by the FISC would be consistent with Section 215's definition of "minimization procedures," that is not the end of the discussion. FISA contemplates that the Executive Branch, which formulates the minimization procedures and receives the tangible things from the recipient of the production order, will apply those procedures, with appropriate oversight by the FISC. See 50 U.S.C. § 1861(b)(2)(B); see also 50 U.S.C. § 1803(h). Historically, the minimization procedures proposed by the government and approved by the Court under FISA have reflected this allocation of responsibilities, which also recognizes the distinct roles of the Executive Branch and the Judiciary in our system of government. The government's proposal to require RAS determinations by the FISC as a prerequisite to NSA queries of the database would deviate from this framework by giving the Court a more prominent role not just in overseeing Executive Branch compliance with FISC-approved procedures, but in the actual application of those procedures. It could also impose substantial new burdens on the FISC that are not contemplated by FISA.

The Executive Branch, of course, cannot unilaterally compel the FISC, an Article III court, to assume the RAS-approval function, and the Court would be within its discretion under FISA to reject this aspect of the Motion. See 50 U.S.C. § 1861(c)(1) (permitting the Court to grant the government's application "as modified"). The Court is cognizant of the fact that this program is under review by the other branches of government and that changes may result from the review. While this policymaking assessment is ongoing, the Executive Branch is asking the Court for additional assistance in reassuring the public that adequate protection is afforded to information concerning United States persons that is being acquired pursuant to a FISC order.

The Court sees nothing in the language of the Act that would preclude it from accepting the Executive Branch's invitation to assume responsibility for making RAS determinations. This role in fact parallels the FISC's core judicial function of

determining whether applications for authority to conduct electronic surveillance or physical search are supported by probable cause. See 50 U.S.C. §§ 1805, 1824.⁷ Indeed, the Court has previously approved query requests in this matter, albeit under distinct circumstances and pursuant to different authority.⁸ Provided that the number of

⁷ This matter is distinguishable from In Re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002), in which the FISC, under the rubric of “minimization procedures” and over the government’s objection, prohibited law enforcement officials from directing or controlling the use of FISA proceedings to enhance criminal investigations or prosecutions. Id. at 720. To effectuate that prohibition, the FISC required that certain Executive Branch officials participate, effectively as “chaperones,” in meetings and consultations between other Executive Branch officials. Id. The Foreign Intelligence Surveillance Court of Review held that the prohibition imposed by the FISC was inconsistent with language of FISA, and that by asserting authority to govern the internal organization and investigative procedures of the Executive Branch, the FISC “may well have exceeded the constitutional bounds that restrict an Article III court.” Id. at 731. Here, the Executive Branch is asking the Court to undertake what is essentially a core judicial function, and one which, as discussed in the text above, is not inconsistent with the language of the Act.

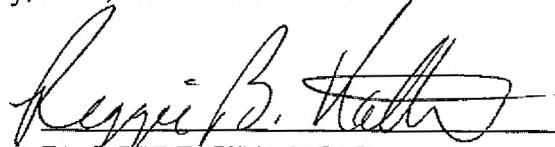
⁸ In 2009, after the Executive Branch reported widespread noncompliance by NSA with the RAS-approval provisions of the FISC’s orders in this matter, the Court, on its own motion, mandated that all queries of the telephony metadata be approved by the Court pending investigation of the incident and restoration of the Court’s confidence that NSA was prepared to comply with its orders. See Docket No. BR 08-13, Order dated March 2, 2009, at 18-19. In taking this unusual step, the Court expressly invoked its “authority and responsibility to ‘determine [and] enforce compliance’ with Court orders and Court-approved procedures [under] 50 U.S.C. § 1803(i),” which has since been renumbered as 50 U.S.C. § 1803(h). See id. at 14. Once adequate remedial measures had been implemented by the Executive Branch, NSA was permitted to resume making RAS determinations on its own, with oversight by the FISC and other elements of the Executive Branch. See Docket No. BR 09-13, Primary Order (Sept. 3, 2009) at 6-18. Insofar as the Court is aware, there is at present no similar pattern of pervasive noncompliance.

selectors used to query the metadata remains relatively close to the present level, the Court is satisfied that it will be able to undertake the additional work that will be required, at least until the expiration of the January 3 Primary Order. In consideration of the unique facts and circumstances that are now presented, the Court will approve the Executive Branch's proposal to require RAS approvals by the FISC as a prerequisite to queries of the telephony metadata acquired pursuant to the Court's orders in this matter.

For the foregoing reasons, the Motion to amend the January 3 Primary Order is granted. Subsection (3)C of that Primary Order shall be stricken and replaced with the revised subsection (3)C that is set forth in the Motion.

In light of the ongoing public interest in this matter and the President's recent public remarks regarding the proposed changes that are the subject of the Motion, the government is directed to review this Order for declassification in anticipation of likely publication by the Court pursuant to FISC Rule 62(a). The Court understands that a declassification review of the January 3 Primary Order is already underway. Because the revised subsection (3)C of the Primary Order is set forth in the Motion, the government is also directed to conduct a declassification review of the Motion. The government shall complete its declassification reviews of this Order, the January 3 Primary Order, and the Motion as promptly as is practicable and report to the Court with the results of such review no later than February 17, 2014.

SO ORDERED, this 5th day of February, 2014, in Docket Number BR 14-01.



REGGIE B. WALTON

Presiding Judge, United States Foreign
Intelligence Surveillance Court