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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE STANDARD MINIMIZATION  
PROCEDURES FOR FBI ELECTRONIC  
SURVEILLANCE AND PHYSICAL SEARCH  
CONDUCTED UNDER THE FOREIGN  
INTELLIGENCE SURVEILLANCE ACT

Docket Nos.: Multiple, including (b)(1); (b)(3)  
10/17/16

### OPINION AND ORDER

On August 8, 2014, the Government filed its “Motion to Amend the Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act (FISA).” The Government requests modifications to the Standard Minimization Procedures (SMPs) for the purpose of disseminating information to the National Center for Missing and Exploited Children (NCMEC) for a law enforcement purpose, and to amend the retention provisions to exempt information from destruction that the Government determines must be retained for litigation-related reasons. The Court will grant the Motion as modified, below.

#### NCMEC

FISA defines “minimization procedures” as those that, notwithstanding other restrictions, “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.” 50 U.S.C. § 1801(h)(3). The Government has identified, and continues to identify, FISA-acquired information that is “indicative of a crime related to child exploitation material, including child pornography,” and the Attorney General has adopted amendments to the SMPs that would permit the Government to disseminate to NCMEC, for law enforcement purposes, such information that “reasonably appears to be evidence of a crime.” Mot. at 4. Modification of the SMPs is required because NCMEC is a non-governmental organization and the SMPs generally restrict disseminations to governmental entities. See SMPs § IV.A.

Congress established NCMEC in 1984 as a non-governmental organization and it is funded through grants administered by the Department of Justice. One of its purposes is to assist

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law enforcement in identifying victims of child pornography and other sexual crimes. Indeed, Congress has mandated Department of Justice coordination with NCMEC on these and related issues. See Mot. at 5-8. Furthermore, this Court has approved modifications to these SMPs in individual cases to permit the Government to disseminate information to NCMEC. See Docket Nos. [REDACTED]. Because of its unique role as a non-governmental organization with a law enforcement function, and because it will be receiving what reasonably appears to be evidence of specific types of crimes for law enforcement purposes, the Government's amendment to the SMPs comply with FISA under Section 1801(h)(3).<sup>1</sup>

FISA requires that any disclosure of FISA information for a law enforcement purpose must be accompanied by a statement that "such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General." 50 U.S.C. § 1806(b). Beyond this statutory restriction, the Government's Motion states that there are policies and practices in place that will prohibit disseminations of FBI-obtained information from NCMEC to Interpol's International Child Sexual Exploitation (ICSE) database, and that more generally if FISA-obtained information were to be used "in a proceeding," advance approval from the Attorney General will be required. Mot. at 8 n.2 & 12. If the Government intends to change these policies or practices, the Government is directed to give prior notice and explanation to the Court.

#### Litigation Hold

Section III.G. of the SMPs establishes timelines for the destruction of FISA-acquired information. The Government seeks to modify this requirement by adding a provision to Section III.G. that would permit the FBI to retain information temporarily that would otherwise have to be destroyed if the FBI and the Department of Justice's National Security Division "determine[s] that such information is reasonably believed to be necessary for, or potentially discoverable in, administrative, civil, or criminal litigation." Mot. at 15. Such a determination would be made in writing, and would identify the information to be retained and the litigation involved. The information retained under this provision would be accessed only by those involved in the litigation matter and only for a litigation purpose.

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<sup>1</sup>These amended SMPs would also permit the FBI to (b)(1); (b)(3); (b)(7)(E)

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] III.C.2.(d).

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On October 31, 2013, this Court granted similar relief in the above-captioned docket from the destruction requirement of Section III.G.1(a) on a temporary basis for case files subject to a litigation hold. Since that time the Government has reported to the Court concerning the number of litigation matters and the number of products subject to such holds. The Court also granted separate relief for the retention of information related to (b)(1); (b)(3); (b)(7)(E)

The Government requests that the specific relief granted in those matters to remain in effect and that the amended provisions for retention pursuant to this Motion not apply.

The Government requests this relief to eliminate the tension between the destruction requirements contained in the SMPs and obligations to preserve information for litigation in other courts. The restrictions on access that the Government proposes, along with the reporting requirements that would be required, strike an appropriate balance between the competing concerns of not retaining data longer than necessary and having the Government comply with its litigation obligations.

The Court having reviewed the Government's Motion, and finding that the modified minimization procedures proposed in the Motion meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) and 1821(4), it is HEREBY ORDERED that the Motion is GRANTED. In addition, the Court ORDERS as follows:

- (1) On or before December 31 of each calendar year, the Government shall submit in writing a report to the Court containing the following information: (a) the number of FISA-acquired products disseminated or disclosed to NCEMC; (b) the number of FISA dockets from which collected information was disseminated or disclosed to NCEMC; and, (c) the number of disseminations or disclosures by NCEMC to other law enforcement entities of FISA-acquired information.
- (2) Prior to implementing changes to policies or practices concerning: (i) the release of FISA-acquired information to Interpol's ICSE; or (ii) approval to use FISA-acquired information disseminated to NCMEC in any proceeding, the Government shall make a written submission to the Court describing such changes and explaining why implementing them would be consistent with applicable minimization procedures and statutory minimization requirements.
- (3) On or before December 31 of each calendar year, the Government shall submit in writing a report to the Court containing the following information: (a) all administrative, civil, or criminal litigation matters necessitating a "litigation hold" of FBI investigative case files associated with FISA dockets; (b) the docket numbers and court information for

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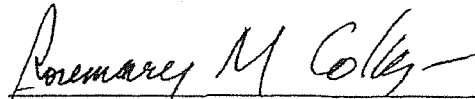
those administrative, civil, or criminal litigation matters; (c) all FISA dockets (and the dates of their expiration) associated with the FBI investigative case files subject to a "litigation hold;" and (d) a description of the status of the litigation matters discussed in the report.

(4) The terms of the Orders issued in (b)(1); (b)(3); (b)(7)(E)

shall remain in effect, notwithstanding the approval of these Standard Minimization Procedures.

(5) The Court's Order of October 31, 2013, in this docket granting the Government's "Motion to Temporarily Exempt Unreviewed Communications in Multiple Dockets from Section III.G.(1)(a) of the FBI Standard Minimization Procedures for Electronic Surveillance and Physical Search" is hereby rescinded.

Entered this 11th day of August, 2014.



ROSEMARY M. COLLYER

Judge, United States Foreign  
Intelligence Surveillance Court

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(b)(6)  
Deputy Clerk,  
FISC, certify that this document is a  
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(b)(6)