

DEC 17 2019

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT LeeAnn Flynn Hall, Clerk of Court
WASHINGTON, D.C.

IN RE ACCURACY CONCERNS REGARDING
FBI MATTERS SUBMITTED TO THE FISC

Docket No. Misc. 19-02

ORDER

This order responds to reports that personnel of the Federal Bureau of Investigation (FBI) provided false information to the National Security Division (NSD) of the Department of Justice, and withheld material information from NSD which was detrimental to the FBI's case, in connection with four applications to the Foreign Intelligence Surveillance Court (FISC) for authority to conduct electronic surveillance of a U.S. citizen named Carter W. Page.¹ When FBI personnel mislead NSD in the ways described above, they equally mislead the FISC.

In order to appreciate the seriousness of that misconduct and its implications, it is useful to understand certain procedural and substantive requirements that apply to the government's conduct of electronic surveillance for foreign intelligence purposes. Title I of the Foreign Intelligence Surveillance Act (FISA), codified as amended at 50 U.S.C. §§ 1801-1813, governs such electronic surveillance. It requires the government to apply for and receive an order from the FISC approving a proposed electronic surveillance. When deciding whether to grant such an application, a FISC judge must determine, among other things, whether it provides probable cause to believe that the proposed surveillance target is a "foreign power" or an "agent of a foreign power." See § 1805(a)(2)(A). Those terms are defined by FISA. See § 1801(a)-(b). A finding of probable cause to believe that a U.S. citizen (or other "United States person" as defined at Section 1803(i)) is an agent of a foreign power cannot be solely based on activities protected by the First Amendment. See § 1805(a)(2)(A).

¹ The government reported to the FISC certain misstatements and omissions in July 2018, see Department of Justice Office of Inspector General, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 9, 2019), at 167-68, 230-31 (OIG Report); however, the FISC first learned of the misstatements and omissions discussed herein on December 9, 2019, or, in the case of the conduct of the FBI attorney discussed below, from submissions made by the government on October 25, 2019, and November 27, 2019.

An electronic surveillance application must “be made by a Federal officer in writing upon oath or affirmation.” § 1804(a).² When it is the FBI that seeks to conduct the surveillance, the Federal officer who makes the application is an FBI agent, who swears to the facts in the application. The FISC judge makes the required probable cause determination “*on the basis of the facts submitted by the applicant.*” § 1805(a)(2) (emphasis added); *see also* § 1804(c) (a FISC judge “may require *the applicant* to furnish such other information as may be necessary to make the determinations required by” Section 1805) (emphasis added). Those statutory provisions reflect the reality that, in the first instance, it is the applicant agency that possesses information relevant to the probable cause determination, as well as the means to potentially acquire additional information.

Notwithstanding that the FISC assesses probable cause based on information provided by the applicant, “Congress intended the pre-surveillance judicial warrant procedure” under FISA, “and particularly the judge’s probable cause findings, to provide an external check on executive branch decisions to conduct surveillance” in order “to protect the fourth amendment rights of U.S. persons.”³ The FISC’s assessment of probable cause can serve those purposes effectively only if the applicant agency fully and accurately provides information in its possession that is material to whether probable cause exists. Accordingly, “the government . . . has a heightened duty of candor to the [FISC] in *ex parte* proceedings,”⁴ that is, ones in which the government does not face an adverse party, such as proceedings on electronic surveillance applications. The FISC “expects the government to comply with its heightened duty of candor in *ex parte* proceedings at all times. Candor is fundamental to this Court’s effective operation”⁵

With that background, the Court turns to how the government handled the four applications it submitted to conduct electronic surveillance of Mr. Page. The FISC entertained those applications in October 2016 and January, April, and June 2017. *See* OIG Report at vi.

On December 9, 2019, the government filed with the FISC public and classified versions of the OIG Report.⁶ The OIG Report describes in detail the preparation of the four applications for electronic surveillance of Mr. Page. It documents troubling instances in which FBI personnel provided information to NSD which was unsupported or contradicted by information in their

² The application must also be approved by the Attorney General, Deputy Attorney General or, upon designation, the Assistant Attorney General for National Security (who is the head of NSD) “based upon his finding that it satisfies the criteria and requirements” of Title I of FISA. §§ 1801(g), 1804(a).

³ Docket No. [Redacted], Order and Mem. Op. issued on Apr. 3, 2007, at 14 (footnotes and internal quotation marks omitted), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052774/gid_c_00012.pdf?sequence=1&isAllowed=y.

⁴ Docket No. BR 14-01, Op. and Order issued on Mar. 21, 2014, at 8, *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052715/gid_c_00098.pdf?sequence=1&isAllowed=y.

⁵ Docket No. [Redacted], Mem. Op. and Order issued on Nov. 6, 2015, at 59, *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052707/gid_c_00121.pdf?sequence=1&isAllowed=y.

⁶ This Order cites the public version of the OIG Report.

possession.⁷ It also describes several instances in which FBI personnel withheld from NSD information in their possession which was detrimental to their case for believing that Mr. Page was acting as an agent of a foreign power.⁸

In addition, while the fourth electronic surveillance application for Mr. Page was being prepared, an attorney in the FBI's Office of General Counsel (OGC) engaged in conduct that apparently was intended to mislead the FBI agent who ultimately swore to the facts in that application about whether Mr. Page had been a source of another government agency. *See id.* at 252-56. The information about the OGC attorney's conduct in the OIG report is consistent with classified submissions made to the FISC by the government on October 25, 2019, and November 27, 2019. Because the conduct of the OGC attorney gave rise to serious concerns about the accuracy and completeness of the information provided to the FISC in any matter in which the OGC attorney was involved, the Court ordered the government on December 5, 2019, to, among other things, provide certain information addressing those concerns.

The FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor described above. The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable. The FISC expects the government to provide complete and accurate information in *every* filing with the Court. Without it, the FISC cannot properly ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis.

THEREFORE, the Court ORDERS that the government shall, no later than January 10, 2020, inform the Court in a sworn written submission of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects

⁷ *See* OIG Report at 157-59, 365-66 (in September 2016, an FBI agent provided an NSD attorney with information about the timing of Mr. Page's source relationship with another government agency and its relevance to the FISA proffer that was contradicted by a memorandum received from the other agency in August 2016); *id.* at 160-62, 364, 367 (FBI personnel exaggerated the extent to which Christopher Steele's reporting had been corroborated and falsely represented that it had been used in criminal proceedings).

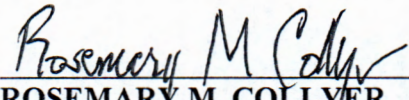
⁸ *See, e.g., id.* at 186-90, 368-70 (statements made by Mr. Steele's primary sub-source that undermined Mr. Steele's reporting); *id.* at 168-69, 364, 366-67 (statements made by Mr. Page to an FBI source in August 2016 that he had never met or spoken with Paul Manafort and that Mr. Manafort did not return his emails were first provided to NSD in June 2017; all four applications included reporting that Mr. Manafort used Mr. Page as an intermediary with Russia but did not include those statements by Mr. Page); *id.* at vii, 170-71, 364-65, 367 (statements made by Mr. Page to an FBI source in October 2016 that he had never met with Igor Sechin or Igor Divyekin were first provided to NSD in January 2017; all four applications included reporting that he met with both men in Russia in July 2016 and discussed lifting sanctions against Russia with the former and receiving derogatory information about Hillary Clinton with the latter, but did not include the denials by Mr. Page). Moreover, all four applications omitted statements made by Mr. Steele in October 2016 that detracted from the reliability of another of his sub-sources whose reporting was included in the applications, even though the FBI provided a document to an NSD attorney that included those statements prior to the submission of the first application. *See id.* at 163-64, 364-65, 367.

information possessed by the FBI that is material to any issue presented by the application. In the event that the FBI at the time of that submission is not yet able to perform any of the planned steps described in the submission, it shall also include (a) a proposed timetable for implementing such measures and (b) an explanation of why, in the government's view, the information in FBI applications submitted in the interim should be regarded as reliable.

IT IS FURTHER ORDERED, pursuant to FISC Rule of Procedure 62(a), that the government shall, no later than December 20, 2019, complete a declassification review of the above-referenced order of December 5, 2019, in anticipation of the FISC's publishing that order. In view of the information released to the public in the OIG Report, the Court expects that such review will entail minimal if any redactions.

SO ORDERED.

Entered this 17th day of December, 2019.


ROSEMARY M. COLLYER
Presiding Judge, United States Foreign
Intelligence Surveillance Court