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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

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[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 Reauthorization 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).

"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;
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> (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
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> (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-

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[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]t 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.

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[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-

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[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

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[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

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