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Follow-up Questions Regarding Section 702 Certifications

June 17, 2011

1. The government's Response to the Court's Briefing Order of May 9, 2011 ("June 1 Submission") states that Internet transactions acquired by NSA in its upstream collection may contain not only multiple discrete communications (some of which are neither to, from, nor about a tasked selector), but also [REDACTED]

[REDACTED] June 1 Submission at 25.

a. Please provide some examples of the [REDACTED]

For instance, could such acquisitions include [REDACTED]

b. What is the likelihood that such [REDACTED] pertain to persons other than the users of tasked selectors, including persons in the United States or U.S. persons?

2. The June 1 Submission states that "no NSA analyst has yet discovered in NSA's repositories a wholly domestic communication." June 1 Submission at 9.

a. What is meant by "wholly domestic communication" in this statement? Does the term include the discrete communications that might be embedded within acquired transactions?

b. What is the likelihood that an analyst viewing information obtained through a transactional acquisition would have a basis for determining that a discrete communication embedded within the transaction is purely domestic?

3. a. Might the non-targeted portion of a transaction ever be the sole basis for that transaction being responsive to an analyst's query?

b. Upon retrieving information in response to a query, can an analyst readily distinguish that portion of a transaction that contains the targeted selector from other portions of a transaction?

4. a. Please describe the manner in which the government minimizes discrete communications and other information that is contained within acquired Internet transactions but that is neither to, from, nor about the user of a targeted selector.

b. In particular, please explain how the government applies the provisions of NSA's minimization procedures that use the term "communication" to the discrete communications and other non-target information contained within the transactions that are acquired. See, e.g., NSA Minimization Procedures § 2(c) (defining "[c]ommunications of a United States person"); § 2(e) (defining "foreign communication" and "domestic communication[]"), § 3(b)(4) (discussing determination whether a communication is "foreign" or "domestic"), and § 5 (discussing handling of domestic communications).

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- c. Would all communications and [REDACTED] within a transaction be treated the same when the minimization procedures are applied, or would there be different treatment?
5. a. Once NSA has identified a portion of a transaction that does not contain targeted information, is it possible to mask or otherwise minimize the non-target information contained within the transaction?
b. Why is NSA unable to delete and replace, or alter, an original transaction that contains non-target information? See June 1 Submission at 27-28.
6. The government states that an Internet transaction that is acquired “is . . . not divisible into the discrete communications within it even once it resides in an NSA corporate store.” June 1 Submission at 22. Please reconcile that statement with the government’s acknowledgment that “an analyst would . . . be able to copy a portion of the rendered view of a transaction contained in a NSA corporate store and then paste it into a new record on a different system.” Id. at 27 n.25.
7. Please reconcile the government’s statement that the “communicants” of to/from communications are “the individual users of particular selectors” (see June 1 Submission at 30) with [REDACTED] elsewhere in its response to the Court’s questions (see, e.g., id. at 6 (discussing application of IP filtering)).
8. What is the factual basis for NSA’s assertions that “a United States person would use [REDACTED] only in a minute percentage of cases” and that “[REDACTED]”
See June 1 Submission at 11, 12.
9. What is the factual basis for NSA’s suggestion that [REDACTED]
[REDACTED] See June 1 Submission at 8 n.9
10. The government repeatedly characterizes as “unintentional” NSA’s collection of discrete non-target communications as part of transactional acquisitions, [REDACTED]. Assuming arguendo that such collection can fairly be characterized as unintentional, please explain how 50 U.S.C. § 1806(i) applies to the discrete, wholly domestic communications that might be contained within a particular transaction.
11. Please provide a thorough legal analysis supporting your view that the knowing and intentional acquisition of large volumes of Internet transactions containing discrete communications that are neither to, from, nor about a targeted selector (as well as other information not pertaining to the users of targeted selectors) is merely “incidental” to the authorized purpose of the collection as a whole, and therefore reasonable under the Fourth Amendment.

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12. The statute requires the targeting procedures to “be reasonably designed to ensure that any acquisition . . . is limited to targeting persons reasonably believed to be located outside the United States and [to] prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.” 50 U.S.C. § 1881a(d)(1). How can procedures that contemplate the knowing acquisition of huge volumes of transactions that will include quantifiable amounts of information relating to non-targets, including information of or about U.S. persons abroad or persons located in the United States, meet this statutory requirement?

13. In its discussion of the Fourth Amendment, the government asserts that “upstream collection” in general is “an essential and irreplaceable means of acquiring valuable foreign intelligence information that promotes the paramount interest of protecting the Nation and conducting its foreign affairs.” June 1 Submission at 16.

- a. To what extent can the same be said for the acquisition of Internet transactions [REDACTED] in particular?
- b. Is the acquisition of Internet transactions via upstream collection the only source for certain categories of foreign intelligence information? If so, what categories?
- c. Please describe with particularity what information NSA would acquire, and what information NSA would not acquire, if NSA were, in comparison to its current collection, to limit its acquisition of Internet communications to: (1) acquisitions conducted with the assistance of [REDACTED]; and (2) the upstream collection of discrete communications to, from, or about tasked selectors that are [REDACTED] (*id.* at 2, n.2).

14. The Fourth Amendment also requires the Court to examine the nature and scope of the intrusion upon protected privacy interests. How can the Court conduct such an assessment if the government itself is unable to describe the nature and scope of the information that is acquired or the degree to which the collection includes information pertaining to U.S. persons or persons located in the United States?

15. In light of the government’s emphasis on the limited querying of Section 702 acquisitions that is currently permitted (*see* June 1 Submission at 23), why is it reasonable and appropriate to broaden the targeting procedures to permit querying using U.S.-person identifiers?

16. The government acknowledges that it previously “did not fully explain all of the means by which . . . communications are acquired through NSA’s upstream collection techniques” (June 1 Submission at 2), yet states that the “[Attorney General] and [Director of National Intelligence] have confirmed that their prior authorizations remain valid” (*id.* at 35). At the time of each previous Certification under Section 702, were the Attorney General and the Director of National Intelligence aware that the acquisitions being approved included Internet “transactions” [REDACTED]? If so, why was the Court not informed. If not, why are the prior Certifications and collections still valid?

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