UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

NOTICE OF FILING OF GOVERNMENT'S RESPONSES TO FISC QUESTIONS RE: AMENDED 2011 SECTION 702 CERTIFICATIONS

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, respectfully submits the attached responses to the questions provided by this Court to the Government on November 7, 2011, concerning the above-referenced matters. The Government is prepared to provide any additional information the Court believes would aid it in reviewing these matters. The Government may also seek to

~~Classified by: Tashina Gauhar, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4(c)~~
~~Declassify on: 15 November 2036~~

supplement and/or modify the attached responses as appropriate during any hearing that the Court may hold in the above-captioned matters. ~~(S//OC/NF)~~

Respectfully submitted,

National Security Division
United States Department of Justice

VERIFICATION

I declare under penalty of perjury that the facts set forth in the attached Government's Responses to FISC Questions re: Amended 2011 Section 702 Certifications are true and correct based upon my best information, knowledge, and belief. Executed pursuant to Title 28, United States Code, § 1746, on this 15th day of November, 2011. (S)

Signals Intelligence Directorate Compliance Architect
National Security Agency

GOVERNMENT'S RESPONSES TO FISC QUESTIONS RE: AMENDED 2011 SECTION 702 CERTIFICATIONS

1. ~~(S)~~ **The government previously indicated to the Court that it lacked the capacity to conduct some of the activities that are now required by the amended NSA minimization procedures. Please confirm that the NSA is fully complying with those procedures.**

   (U) Confirmed. NSA is fully complying with the amended minimization procedures, but is working to implement all the capabilities more specifically described in section 3(b)(5).

2. ~~(TS//SI)~~ **The Court's Memorandum Opinion defined "active user" to be "the individual using the electronic communications account/address/identifier to interact with his/her Internet service provider." See Oct. 3, 2011 Memorandum Opinion at 35 n. 34 (emphasis added). However, the amended minimization procedures state that NSA will identify and segregate through technical means MCTs where "the active user of the transaction (i.e., the electronic communications account/address/identifier used to send or receive the Internet transaction to or from a service provider) is reasonably believed to be located in the United States; or the location of the active user is unknown." See Section 3(b)(5)(a). Please confirm that NSA's "technical means" for identification and segregation will focus on the location of the individual using the account.**

   ~~(TS//SI//NF)~~ Confirmed. NSA's technical means for identification and segregation will focus on [redacted] indicative of the location of the individual using the electronic communication account/address/identifier. This is true whether the individual is [redacted]

3. ~~(TS//SI)~~ **Section 3(b)(5)(a)(1)(a) prohibits NSA from using a segregated Internet transaction "for foreign intelligence purposes" unless it has been determined that the transaction does not contain any wholly domestic communications. It is the Court's understanding that segregated Internet transactions may be used only for the purpose of determining whether any communication within the transaction is wholly domestic. Is this understanding correct? If not, please fully describe any other uses.**

   ~~(TS//SI//NF)~~ The Court's understanding is partly correct. The Court is correct that pursuant to section 3(b)(5)(a)(1)(a) any information contained in a segregated Internet transaction (including metadata) may not be moved or copied from the segregated repository or otherwise used for foreign intelligence purposes unless it has first been reviewed and determined by a specially trained analyst that the transaction does not contain any discrete communication as to which the sender and all intended recipients were reasonably believed to be located in the United States at the time NSA acquired the communication (a wholly domestic communication). If upon review any segregated transaction is determined by a specially trained analyst to contain a discrete wholly domestic communication, such transaction shall be destroyed upon recognition. For those segregated transactions reviewed by a specially trained analyst and determined not to contain any discrete wholly domestic

~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20070108~~
~~Declassify On: 20361101~~

communications, such transactions may be moved or copied from the segregated repository (after having first been appropriately marked, tagged, or otherwise identified as having been previously segregated) into repositories more generally accessible to NSA analysts and will be processed in accordance with section 3(b)(5)b. Consistent with section 3(b)(5)a, NSA may also be required to process [redacted] the segregated Internet transactions in order to render them intelligible to the specially trained analysts. Additionally, the specially trained analysts may also access and use the segregated Internet transactions for purposes of ensuring data integrity, compliance, ensuring appropriate segregation, and improving the technical means employed by NSA to reasonably identify Internet transactions containing single, discrete communications.

4. ~~(TS//SI)~~ **What circumstances will trigger review by a specially-trained NSA analyst to determine whether a particular Internet transaction contains a discrete wholly domestic communication? It is the Court's understanding that such review occurs only when a segregated Internet transaction is responsive to a query designed to elicit foreign intelligence information. Is this understanding correct?**

~~(TS//SI//NF)~~ The Court's understanding is partly correct. In addition to those circumstances in which a segregated transaction is reviewed because it is responsive to a query designed to elicit foreign intelligence information, NSA analysts also might review transactions in an effort to move additional communications into repositories more generally accessible to other NSA analysts. In other words, in a variety of circumstances, the specially trained analysts may make efforts to move segregated transactions into other repositories regardless of whether those particular transactions have been singled out through a foreign intelligence query.

5. ~~(TS//SI)~~ **Please confirm that any transactions reviewed under Section 3(b)(5)(b)(1) will be destroyed if the analyst determines that the transaction contains a wholly domestic communication.**

Confirmed.

6. ~~(TS//SI)~~ **Section 3(b)(5)(b)(2)(c) indicates that NSA analysts will document certain determinations "if technically possible or reasonably feasible." Please explain under what circumstances documentation would be considered technically possible but not reasonably feasible.**

~~(TS//SI//NF)~~ Within the context of documenting a determination under section 3(b)(5)(b)(2)(c) in the relevant analytic repository or tool, the provision "if technically possible or reasonably feasible" is intended to require documentation only under circumstances where the analytic repository or tool enables analysts to record such information (in this instance, that the transaction contains one or more communications to or from an identifiable U.S. person or a person inside the United States) in circumstances where such documentation would be accessible and usable by other analysts. In addition, the Government does not intend to apply this provision to require NSA to reconstruct or reconfigure all tools currently used by NSA analysts to perform foreign intelligence analysis

of section 702 collection, nor to limit analytic efforts to only such tools that could be designed or retrofitted with such capabilities in the future.

7. ~~(TS//SI)~~ **Section 3(c)(2) states, in the context of destruction of raw data: "[t]he internet transactions that may be retained include those that were acquired because of limitations on NSA's ability to filter communications." Please explain the meaning of this statement[.]**

~~(TS//SI)~~ This statement applies to Internet transactions containing wholly domestic communications that NSA acquires despite the operation of the technical means that NSA uses to prevent the acquisition of such communications. The amended minimization procedures require Internet transactions containing wholly domestic communications to be destroyed "upon recognition." See NSA amended 702 minimization procedures §§ 3(b)(5)(a)(1)(a), 5. However, Internet transactions containing wholly domestic communications may go "unrecognized" because, for example, the Internet transaction, in whole or in part, has not been relevant/responsive to a query and, therefore, not reviewed by any NSA analysts. This statement in section 3(c)(2) permits NSA to retain for two years Internet transactions containing wholly domestic communications that are never recognized as such.

8. ~~(S//SI//NF)~~ **Please explain whether, and if so under what circumstances, NSA will share unminimized communications acquired through its upstream collection under Section 6(c) (sharing with CIA and FBI) or under Section 8 of the procedures.**

~~(S//SI//NF)~~ NSA will not share, under section 6(c) or 8 of the procedures, unminimized communications acquired through NSA upstream collection.

9. ~~(TS//SI)~~ **Section 3(b)(5)(b)(4) of the amended NSA minimization procedures allows NSA to use metadata extracted from Internet transactions without first determining whether the metadata was extracted from a wholly domestic communication or a non-target communication. Please fully describe what constitutes "metadata" within the meaning of this provision.**

~~(TS//SI//NF)~~ Set forth below are descriptions of the categories and types of metadata[1] the Government extracts from Internet transactions, including single, discrete communications contained within a multi-communication Internet transaction (hereinafter, collectively, "Internet transactions"), acquired through NSA's Internet upstream collection techniques. As the precise metadata transmitted with each particular Internet transaction varies, each type or category of metadata listed below may not be available for extraction by NSA in every particular instance.

---

[1] ~~(TS//SI//NF)~~ For the purposes of this response, the term "metadata," when used in reference to an Internet transaction, is information about [redacted].

Metadata Category	Metadata Category Description
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[redacted]

10. ~~(TS//SI)~~ It is the Court's understanding that metadata extracted in accordance with Section 3(b)(5)(b)(4) may otherwise be retained, used, and disseminated in accordance with the other provisions of the amended NSA minimization procedures. Is this understanding correct?

(U) This understanding is correct.

a. ~~(TS//SI)~~ For example, is metadata that has been extracted from Internet transactions pursuant to Section 3(b)(5)(b)(4) subject to the two-year retention limit set forth in Section 3(c) of the amended NSA minimization procedures? If not, how long is such metadata retained? If such metadata (including metadata extracted from discrete, non-target communications) is retained for longer than two years, how is Section 3(b)(5)(b)(4) consistent with the requirements of 50 U.S.C. § 1801(h)(1)?

~~(TS//SI)~~ Metadata that has been extracted from Internet transactions consistent with Section 3(b)(5)(b)(4) is subject to the two-year retention limit set forth in Section 3(c) of the amended NSA minimization procedures.

b. ~~(TS//SI)~~ Is metadata consisting of U.S. person information disseminated only if such information constitutes foreign intelligence information or is necessary to understand foreign intelligence information or assess its importance? If not, how is Section 3(b)(5)(b)(4) consistent with the requirements of 50 U.S.C. § 1801(h)(1)-(2)?

~~(TS//SI)~~ Metadata consisting of U.S. person information is disseminated only if such information constitutes foreign intelligence information, or is necessary to understand foreign intelligence information or assess its importance.

11. ~~(TS//SI)~~ Under Section 3(b)(5)(b)(4), NSA will not extract or use metadata from segregated Internet transactions. Will this limitation impair NSA's ability to determine when the users of targeted facilities have entered the United States?

~~(TS//SI)~~ It is not expected that this limitation will impair NSA's ability to determine when the users of targeted facilities have entered the United States because Internet transactions where the active user is the target (i.e., the user of the tasked selector) will not be sequestered. Therefore, [redacted]