

~~TOP SECRET//COMINT//ORCON,NOFORN~~

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

ORDER

This matter is before the Court on the "Government's Ex Parte Submission of [REDACTED] and Related Procedures and Request for an Order Approving [REDACTED] and Procedures," filed on [REDACTED] 2009, and the "Government's Ex Parte Statement Concerning DNI/AG 702(g) [REDACTED]" filed on [REDACTED] 2009 (collectively, the "Ex Parte Submission"). Based on its preliminary review of the Ex Parte Submission, the Court has identified a number of legal and factual questions that merit briefing by the government. Accordingly, the government is hereby directed to file a brief with appropriate supporting documentation, no later than 10:00 a.m., on Monday, [REDACTED] 2009, addressing the questions listed below.

I. General Questions Concerning [REDACTED]

1. Approximately how many selector [REDACTED]

2. Is it anticipated that the scope [REDACTED]

3. [REDACTED]

~~TOP SECRET//COMINT//ORCON,NOFORN~~

~~TOP SECRET//COMINT//ORCON,NOFORN~~II. Effect of Non-Compliance on the Court's Consideration of [REDACTED]

4. How, in light of the non-compliance incidents identified in the Rule 10(c) Notice filed by the government on [REDACTED] 2008 (the "Rule 10(c) Notice"), can the Court find that the targeting procedures filed as part of the Ex Parte Submission are "reasonably designed to – (i) ensure that an acquisition authorized under [50 U.S.C. § 1881(a)] is limited to targeting persons reasonably believed to be located outside the United States; and (ii) 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."? See 50 U.S.C. § 1881a(i)(2)(B).
5. How do the non-compliance incidents identified in the Rule 10(c) Notice affect the government's ability to comply with the statutory requirement that it "may not intentionally target a United States person"? See 50 U.S.C. § 1881a(b)(3).
6. How, in light of the non-compliance incidents identified in the Rule 10(c) Notice, can the Court find that the minimization procedures filed as part of the Ex Parte Submission "meet the definition of minimization procedures" under 50 U.S.C. §§ 1801(h) or 1821(4)? See 50 U.S.C. § 1881a(i)(2)(c).
7. How, in light of the non-compliance incidents identified in the Rule 10(c) Notice, can the Court find that the targeting and minimization procedures filed as part of the Ex Parte Submission are "consistent . . . with the fourth amendment to the Constitution of the United States"? See 50 U.S.C. § 1881a(i)(3)(A).
8. In footnote 2 of the "Government's Ex Parte Statement Concerning DNI/AG 702(g) [REDACTED] the government states that it "made representations concerning the [REDACTED] acquisitions under [prior FAA] certifications." Please describe the representations made, either in written submissions or orally

~~TOP SECRET//COMINT//ORCON,NOFORN~~

-2-

~~TOP SECRET//COMINT//ORCON,NOFORN~~

at the hearing on [REDACTED] 2008, that bear on the non-compliance incidents described in the Rule 10(c) Notice. In what way(s) were those representations incorrect at the time or in hindsight?

9. What parts of the hearing held on [REDACTED] 2008, relate to the non-compliance incidents described in the Rule 10(c) Notice? For example, does the discussion [REDACTED] on page 31 of the transcript of the hearing relate to issues discussed in the Rule 10(c) Notice?

10. Has any unauthorized collection been identified with regard to selectors other than the [REDACTED] identified in the Rule 10(c) Notice?

11. What steps have been taken to identify other instances of unauthorized collection? Is it the government's assessment that all unauthorized collections have been identified? If so, what is the basis for this assessment and what degree of confidence can reasonably be ascribed to it?

12. What is the scope of known unauthorized collection, in terms of the amount of data acquired, and the time period during which unauthorized collection took place?

13. What has NSA done to identify and purge information acquired from unauthorized collections? Has any such information been disseminated, in minimized or un-minimized form, outside of NSA? If so, what has been done to identify and purge such shared information? Has the information also been purged from archival files?

14. With regard to each known instance of unauthorized collection:

- What steps have been taken to identify how the unauthorized collection occurred?
- What is the government's assessment of how the unauthorized collection occurred?
- What steps have been or will be taken to prevent a similar recurrence?
- What steps have been or will be taken to ensure prompt identification of an

~~TOP SECRET//COMINT//ORCON,NOFORN~~

-3-

~~TOP SECRET//COMINT//ORCON,NOFORN~~

unauthorized collection, in the event of a similar recurrence?

15. If the problem causing the unauthorized collection has not yet been corrected, what steps are being taken in the interim to ensure that each unauthorized acquisition is identified as promptly as possible?

16. With regard to "FAA upstream collection," as referenced in the Rule 10(c) Notice:

- Provide a description of the intended functioning of [REDACTED] as referenced in the Rule 10(c) Notice.
- What, if any, are the foreign intelligence (or other) advantages of [REDACTED]
[REDACTED]
[REDACTED]
- To what extent, if any, does [REDACTED] involve different or greater risks of unauthorized collection, as compared to other means of acquiring electronic communications that are being, or could be, implemented under the FAA?
- Approximately what percentage of information acquired through FAA upstream collection is reviewed by a human analyst within 10 days of acquisition? Within 30 days? Within 90 days?

III. Effect of Revised Minimization Procedures on the Court's Consideration of [REDACTED]

17. Paragraph e.3 of the FBI Minimization Procedures filed as part of the Ex Parte Submission provides that communications acquired in a manner "inconsistent with the limitations set forth" in FISA section 702(b) need not be immediately removed from archival back-up systems. Is a similar exception meant to apply to communications that otherwise "shall be removed from FBI systems" pursuant to paragraph e.2?

~~TOP SECRET//COMINT//ORCON,NOFORN~~

-4-

~~TOP SECRET//COMINT//ORCON,NOFORN~~

18. The government declines to incorporate its prior statements concerning the FBI minimization procedures. This raises questions concerning certain provisions in those procedures:

- Section I.C of the revised FBI Standard Minimization Procedure adopts certain presumptions regarding U.S.-person status. Will these presumptions be applied in connection [REDACTED] after the exercise of due diligence? See Sept. 4, 2008 opinion at 10 (NSA invokes comparable presumption only after exercising due diligence); *id.* at 17 n.13 (FBI minimization presumption applied in same manner).
- Paragraph e.2 of the FBI Minimization Procedures filed as part of the Ex Parte Submission provides that the FBI Director or Deputy Director may authorize the retention of certain communications upon a “determin[ation] in writing that such communication is reasonably believed to contain significant foreign intelligence information, evidence of a crime . . . , or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes.” With regard to the comparable provision under prior FAA certifications, the government represented that such determinations would be made on a case-by-case basis, Sept. 4, 2008 opinion at 25 n.24, and in accordance with the government’s explanations of the effect of 50 U.S.C. § 1806(i). *Id.* at 27 n.28. Is the government prepared to make the same representation here?

19. Paragraph i of the FBI Minimization Procedures filed as part of the Ex Parte Submission modifies the attorney-client minimization rules in Section III.E of the FBI Standard Minimization Procedures by substituting “DOJ-NSD” for references to the “FISC.” One of the effects of this--

~~TOP SECRET//COMINT//ORCON,NOFORN~~

-5-

~~TOP SECRET//COMINT//ORCON,NOFORN~~


substitution is to permit NSD to approve exceptions and modifications to the minimization rules for attorney-client communications in criminal matters, without having to obtain FISC approval.

Why is it appropriate for NSD, rather than the Court, to approve such exceptions or modifications?

IV. Other Issues Pertinent to the Court's Consideration

20. Is there any other information that should be brought to the Court's attention while it is considering [REDACTED]

IT IS SO ORDERED, this [REDACTED] 2009.


Mary A. McLaughlin
Judge, Foreign Intelligence Surveillance Court

[REDACTED] exempt under b(6)

[REDACTED] Deputy Clerk
FISC, certify that this document
is a true and correct copy of
the original.

[REDACTED] exempt under b(6)

~~TOP SECRET//COMINT//ORCON,NOFORN~~

-6-