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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION
and
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 ([redacted] Submission" [redacted]) pursuant to 50 U.S.C. § 1881a(g). For the reasons stated below, the government's request for approval is granted.

I. BACKGROUND

A. [redacted] Certifications Submitted Under Section 1881a

The [redacted] Submission includes [redacted] filed by the government pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), which was enacted as part of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (Jul. 10, 2008) ("FAA"), and is now codified at 50 U.S.C. § 1881a. Like the government's prior filings under

Section 702, the [redacted] Submission in the above-captioned docket includes [redacted] by the Attorney General and the Director of National Intelligence ("DNI"); supporting affidavits by the Director of the National Security Agency ("NSA"), the Director of the Federal Bureau of Investigation ("FBI"), and the Director of the Central Intelligence Agency ("CIA"); two sets of targeting procedures, for use by the NSA and FBI respectively; and three sets of minimization procedures, for use by the NSA, FBI, and CIA respectively.

[redacted] DNI and Attorney General authorization for the types of acquisitions [redacted] submitted [redacted] which governs the collection of foreign intelligence information [redacted] Like the acquisitions authorized in the certifications approved by the Court in all prior Section 702 dockets, [redacted] limited to "the targeting of non-United States persons reasonably believed to be located outside the United States." [redacted]

On September 4, 2008, [redacted] 2008, and April 7, 2009, the Court issued Memorandum Opinions and accompanying orders approving the certifications [redacted] On [redacted] 2009, respectively, the Director of National Intelligence and the Attorney General executed amendments to the certifications [redacted] for the purpose of authorizing the FBI to use, under those certifications, the same revised FBI minimization

procedures that were submitted to and approved by the Court in connection with [redacted] See [redacted] 2009 Memorandum Opinion at 3. On [redacted] 2009, the Court issued a Memorandum Opinion and accompanying order approving the amendments. Id. at 6. (Collectively, "Original 702 Dockets") Each of the Court's Memorandum Opinions in the Original 702 Dockets is incorporated by reference herein. On [redacted], 2009, the Court issued a Memorandum Opinion and Order and an accompanying order approving [redacted] and the use of the targeting and minimization procedures submitted [redacted] Memorandum Opinion")

B. The Government's Representations

On [redacted] 2009, following a meeting with the Court staff, the United States submitted the Government's Response to the Court's Questions Posed by the Court (the [redacted] Submission").[1] In that submission, the government indicates that each set of targeting and minimization procedures now before the Court is either substantively identical, or very similar, to procedures previously approved by the Court in the Original 702 Dockets.[2] [redacted]

[1] [redacted]

[2] See Procedures Used by NSA for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Targeting Procedures") (attached [redacted] as Exhibit A); Procedures Used by the FBI for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Targeting Procedures") (attached [redacted] as Exhibit C).

See Minimization Procedures Used by the NSA in Connection with Acquisitions of Foreign

(continued...)

Submission at 13-14. Notwithstanding such similarity, the government notes a few cross-cutting changes from the earlier approved procedures. First, in the various procedures submitted [redacted] the government throughout uses "will" rather than "shall," which had been used in the procedures submitted in the Original 702 Dockets. [redacted] Submission at 1.[3] The government avers that this change "[is] purely stylistic and ... not intended to suggest that each agency's obligation to comply with the requirements set forth in their respective targeting and/or minimization procedures submitted with [redacted] diminished in any way." Id. Second, the government has changed the deadline for complying with various reporting requirements from "seven days" to "five business days." Id. at 2. According to the government, this change "is intended to remove any potential ambiguity in calculating the deadline for reporting matters as required." Id. Finally, the government has added to the NSA and CIA Minimization Procedures an emergency provision similar to that which already had been included in the FBI Minimization Procedures [redacted]

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[2](...continued)
Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Minimization Procedures") (attached [redacted] as Exhibit B); Minimization Procedures Used by the FBI in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Minimization Procedures") (attached [redacted] as Exhibit D); Minimization Procedures Used by the CIA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("CIA Minimization Procedures") (attached [redacted] as Exhibit E).

[3]This change also is reflected in the Affidavit submitted by Lt. Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached [redacted] at Tab 1) at 3-4.

NSA Minimization Procedures at 1, CIA Minimization Procedures at 6; [redacted] Submission at 2.

Apart from these across-the-board changes, the government confirms that the NSA and FBI targeting procedures are virtually identical to those submitted to and approved by the Court [redacted] Submission at 13. Similarly, the government represents that the FBI Minimization Procedures now before the Court are in all material respects identical to the FBI Minimization Procedures approved by the Court [redacted] and again in connection with the [redacted] amendments to the certifications [redacted] Id. at 14. Likewise, the NSA Minimization Procedures at bar are nearly identical to the corresponding procedures approved by the Court in [redacted][4] Id. at 13-14.[5]

The CIA Minimization Procedures, while substantially similar to the procedures approved by the Court [redacted] include a few material

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[4] [redacted]

[5]In a departure from the minimization procedures submitted in the Original 702 Dockets, the NSA Minimization Procedures submitted in this docket do not characterize the transfer of unminimized information from NSA to the FBI and the CIA as "disseminations," but rather as the provision of information. The government made this change "so that the description of the information-sharing regime established by the NSA minimization procedures ... is consistent with the Court's opinion in [redacted] Submission at 4-5. The Court does not understand this change of wording to modify or limit the requirements governing such "provision" or "dissemination" of information.

differences. The procedures submitted in this Docket incorporate a handful of provisions that had not been in the Original 702 Docket minimization procedures but are part of the

[redacted]

6 [redacted]

7 [redacted]

The Court has carefully reviewed the instant Procedures and has found that, with the exception of the above-described differences and certain non-material changes, the procedures submitted in the current Docket, as informed by the [redacted] Submission, mirror those submitted and approved by the Court in the Original 702 Dockets and their amendments.

II. REVIEW [redacted]

The Court must review a certification submitted pursuant to Section 702 of FISA "to determine whether [it] contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A). The Court's examination [redacted] submitted in the above-captioned docket confirms that:

(1) [redacted] been made under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A) [redacted]

(2) [redacted] each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A), id. at 1-3;

(3) as required by 50 U.S.C. § 1881a(g)(2)(B), [redacted] accompanied by the applicable targeting procedures[8] and minimization procedures;[9]

(4) [redacted] supported by the affidavits of appropriate national security officials, as described in 50 U.S.C. § 1881a(g)(2)(C);[10] and

[8] See [redacted] SA Targeting Procedures and FBI Targeting Procedures.

[9] See [redacted] SA Minimization Procedures, FBI Minimization Procedures, and CIA Minimization Procedures.

[10] See [redacted] Affidavit of Lt. Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached [redacted] at Tab 1); Affidavit of Robert S. Mueller, III, Director,

(continued...)

(5) [redacted] includes an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D) [redacted] at 3.[11]

Accordingly, the Court finds that [redacted] submitted [redacted] all the required elements." 50 U.S.C. § 1881a(i)(2)(A).

III. REVIEW OF THE TARGETING AND MINIMIZATION PROCEDURES

The Court is required to review the targeting and minimization procedures to determine whether they are consistent with the requirements of 50 U.S.C. § 1881a(d)(1) and (e)(1). 50 U.S.C. § 1881a(i)(2)(B) and (C). Section 1881a(d)(1) provides that the targeting procedures must be "reasonably designed" to "ensure that any acquisition authorized under [the certification] 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." Section 1881a(e)(1) requires that the "minimization procedures [] meet the definition of minimization procedures under section 1801(h) or 1821(4) of [the Act]..." In addition, the Court must determine whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. Id. § 1881a(i)(3)(A).

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[10](...continued)
FBI (attached [redacted] at Tab 2); Affidavit of Leon E. Panetta, Director, CIA (attached [redacted] at Tab 3).

[11] The statement described in 50 U.S.C. § 1881a(g)(2)(E) is not required in this case because there has been no "exigent circumstances" determination under Section 1881a(c)(2).

Based on the Court's review of the targeting and minimization procedures in the above-captioned Docket, the representations of the government made in this matter and those carried forward from the Original 702 Dockets, and the analysis set out below and in the Memorandum Opinions of the Court in the Original 702 Dockets, the Court finds that the targeting and minimization procedures are consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment.

As discussed above, the targeting and minimization procedures are, in substantial measure, the same as those previously found to comply with the requirements of the statute and with the Fourth Amendment to the Constitution. The few substantive changes noted do not change the Court's assessment. There is no statutory or constitutional significance to the change from a seven day reporting deadline to five business days. Nor is the Court concerned about the government's use of "will" rather than "shall," given the government's assurance that the change is merely stylistic. And, the Court is satisfied that U.S. person information will be properly protected through the processes described in the CIA Minimization Procedures [redacted] In fact, only two changes even have the potential to require that the Court re-assess its prior determinations.

In a departure from the Minimization Procedures in the Original 702 Dockets, both NSA and CIA include a provision in their Minimization Procedures that allows the agency to act in apparent departure from the procedures to protect against an immediate threat to human life. See [redacted] NSA Minimization Procedures at 1, CIA Minimization Procedures at

6. However, these emergency provisions are virtually identical to a provision in the FBI Minimization Procedures that were approved [redacted] The government has informed the Court that the one substantive difference - the absence of a time frame by which the agency must notify the DNI and NSD of the exercise of the emergency authority - was inadvertent and that both the NSA and CIA have represented to the Department of Justice that they, like the FBI, will promptly report any emergency departure. [redacted] Submission at 2.

[redacted] The new standard, [redacted] continues to require a foreign intelligence purpose for retaining such information; the procedures only permit the retention of such identifying information when it serves to correlate foreign intelligence, i.e. only under circumstances that are "consistent with the need of the United States to ... produce and disseminate foreign intelligence information." 50 U.S.C. §1801(h)(1). As the Court noted in its September 4, 2008 Memorandum Opinion, procedures that meet this requirement contribute to

the Court's assessment that such procedures comport with the Fourth Amendment. Id. at 40.

In addition to the procedures themselves, however, the Court must examine the manner in which the government has implemented them. In its April 7, 2009 Memorandum Opinion, the Court acknowledged that while the potential for error was not a sufficient reason to invalidate surveillance, the existence of actual errors may "tip the scales toward prospective invalidation of the procedures under review..." Id. at 27. In its [redacted] Submission, the government reports on [redacted] compliance matters that had previously been the subjects of preliminary notices to the Court, [redacted] which involve NSA and one of which involves the CIA.[12] Id. at 5-11.

The NSA problems principally involve analysts improperly acquiring the communications of U.S. persons. Id. In response to these incidents, NSA's Office of Oversight and Compliance has instituted several procedures designed to ensure more rigorous documentation of targeting decisions in order to minimize the likelihood that NSA analysts will improperly target U.S. persons or persons located within the U.S. Id. at 7, 8. In addition, NSA has conducted remedial training not only of the individual analysts who committed the errors, but the offices and management chains involved. Id. at 6-9.

The CIA problem is more discrete although arguably more troubling because it reflects a profound misunderstanding of minimization procedures, the proper application of which contribute significantly to the Court's finding that such procedures comport with the statute and

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[12]The government reports that it is aware of no new compliance incidents resulting from [redacted] over-collection [redacted] See April 7, 2009 Memorandum Opinion at 17-27 for a full discussion [redacted] incident before the Court [redacted]

the Fourth Amendment. [redacted] no longer works with or has access to FISA information, improperly minimized at least [redacted] reports that were disseminated to NSA, FBI, and DOJ. [redacted] 2009, Preliminary Notice of Compliance Incident Regarding Collection Pursuant to Section 105B of the Protect America Act and Section 702 of the FISA, as Amended; [redacted] Submission at 9-11. Recognizing that if one person so significantly misunderstood the minimization regime, others might as well, the "ODNI, NSD, and CIA have been working together to implement procedures that will facilitate more comprehensive oversight of CIA's applications of its minimization procedures in the future." [redacted] Submission at 10. In addition, "CIA has made several process and training changes as a result of [this incident]. Id. at 11.

Given the remedial measures implemented in both agencies as a result of the compliance incidents reported to the Court, the Court is satisfied that these incidents do not preclude a finding that the targeting and minimization procedures submitted in the above-captioned docket satisfy the requirements of the FAA and the Fourth Amendment.

The Court, however, is aware that both NSA and FBI have identified additional compliance incidents that have not been previously reported to the Court. Through informal discussion between NSD attorneys and the Court staff, and later confirmed at a hearing held on [redacted] 2009 to address these compliance matters, the Court learned that the government's practice has been to report only certain compliance incidents to the Court: those that involve systemic or process issues, those that involve conduct contrary to a specific representation made to the Court, and those that involve the improper targeting of U.S. persons under circumstances

in which the analyst knew or should have known that the individual was a U.S. person.

Consistent with the government's practice, the Court was not notified of numerous incidents that involved the failure to de-task accounts once NSA learned that non-U.S. person targets had entered the United States. Indeed, in the [redacted] 2009 hearing, the government informed the Court that in addition to the [redacted] informally reported on [redacted], 2009 to the FISC staff, there were approximately [redacted] other similar incidents, all of which occurred since [redacted], 2008. The government reported at the hearing that while the de-tasking errors did not all stem from the same problem, NSA has instituted new [redacted] processes to minimize the likelihood of these types of de-tasking errors recurring. In addition, the government informed the Court that NSA's system for conducting post-targeting checks provides an effective backstop in the government's efforts to de-task accounts as soon as the government learns a target has entered the United States. Finally, the government confirmed to the Court that NSA has purged from its systems all communications acquired during the period of time when these accounts should have been de-tasked. Based on these representations, the Court is satisfied that these incidents do not rise to the level of undermining the Court's assessment that the targeting and minimization procedures comport with the statute and the Fourth Amendment.

However, the Court is concerned that incidents of this sort were not reported to the Court, in apparent contravention of Rule 10(c) of Foreign Intelligence Surveillance Court Rules of Procedures.[13] Section 702(i)(2)(B) specifically directs the Court to review the targeting

[13]The Court appreciates the assurances offered by the Department of Justice at the [redacted] (continued...)

procedures "to assess whether [they] are reasonably designed to ensure that any acquisition ... is limited to targeting persons reasonably believed to be located outside the United States and 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." Given the Court's obligations under the statute, and consistent with 50 U.S.C. § 1803(i), the Court

HEREBY ORDERS the government, henceforth, to report to the Court in accordance with Rule 10(c) of the Foreign Intelligence Surveillance Court Rules of Procedure, every compliance incident that relates to the operation of either the targeting procedures or the minimization procedures approved herein.

IV. CONCLUSION

For the foregoing reasons, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that [redacted] submitted in the above-captioned docket "in accordance with [Section 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [Section 1881a(d)-(e)] are consistent with the requirements of those

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[13](...continued)
[redacted] 2009 hearing that, henceforth, the government will work with the Court, through the Court's counsel, to ensure that the government's guidelines for notifying the Court of compliance incidents satisfy the needs of the Court to receive timely, effective notification of such incidents.

subsections and with the fourth amendment to the Constitution of the United States." A separate order approving [redacted] and the use of the procedures pursuant to Section 1881a(i)(3)(A) is being entered contemporaneously herewith.

ENTERED this [redacted] 2009.

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion and Order issued contemporaneously herewith, and in reliance on the entire record in this matter, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that the above-captioned [redacted] submitted in accordance with [50 U.S.C. § 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [50 U.S.C. § 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States."

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that [redacted] and the use of such procedures are approved.

ENTERED this [redacted] 2009.

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

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