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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

[redacted]

OPINION ON MOTION FOR DISCLOSURE OF PRIOR DECISIONS

On [redacted] 2014, [redacted] "Motion for Disclosure of Prior Decisions" ("Motion for Disclosure"). The Court denied this Motion on the record at the adversary hearing held on the underlying matter on [redacted] 2014. It writes this Opinion to explain its reasoning.

I. BACKGROUND

This case came before the Court on the Government's "Petition for an Order to Compel Compliance with Directives of the Director of National Intelligence and Attorney General," submitted on [redacted] 2014 ("Petition"). The directives that the Government is seeking to

enforce were issued pursuant to Section 702(h)(1) of the Foreign Intelligence Surveillance Act, as amended (FISA)[1] and served on [redacted]

Pursuant to a schedule set by order of the Court on [redacted] 2014, [redacted] ("Response") on [redacted] 2014, [redacted] (collectively "Reply") on [redacted] 2014.[2] In its Reply, the Government repeatedly cited and quoted two opinions of the FISC that do not appear to have been made public in any form: one issued on September 4, 2008, [redacted] and the other issued on August 26, 2014, [redacted] (hereinafter "the Requested Opinions").

Both of the Requested Opinions resulted from the FISC's ex parte review of certifications and attendant targeting and minimization procedures pursuant to Section 702(i). The August 26, 2014 opinion approved the certifications and procedures now in effect, and the directives [redacted] pursuant to those certifications. The September 4, 2008 opinion approved [redacted] certifications and procedures.

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[1] FISA is codified at 50 U.S.C. §§ 1801-1885c, within which Section 702 appears at § 1881a.

[2] [redacted]

[redacted] Motion for Disclosure, in which it sought "immediate access to [the Requested Opinions] (in appropriately redacted form) to adequately prepare for the hearing scheduled for [redacted] th." Motion for Disclosure at 1.[3] Pursuant to the Court's scheduling order of [redacted] 2014, the Government submitted its opposition to the Motion for Disclosure ("Opposition") on [redacted] 2014.

II. DISCUSSION

As explained below, the Court concluded that neither FISA nor the Foreign Intelligence Surveillance Court (FISC) Rules of Procedure ("FISC Rules") require, or provide for discretionary, disclosure of the Requested Opinions in the circumstances of this case. Similarly, the Due Process Clause of the Fifth Amendment does not compel the requested disclosure and, assuming that the Court has some discretion on this matter, no prudential considerations counsel otherwise.

A. FISA and the FISC Rules

The cases handled by the FISC involve classified intelligence gathering operations. From a security perspective, FISC operations "are governed by FISA, by Court rule,[4] and by statutorily mandated security procedures issued by the Chief Justice of the United States.

[redacted] its counsel has a Top Secret security clearance [redacted] seeking access to the Requested Opinions with any redactions necessary to downgrade the Requested Opinions to a Top Secret, non-compartmented level.

[4] The FISC explicitly has the authority to establish rules for its proceedings under 50 U.S.C. § 1803(g)(1).

Together, they represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." In re Motion for Release of Court Records, 526 F. Supp.2d 484, 488 (FISA Ct. 2007).

Specifically applicable to this case is the requirement that, in any proceeding under Section 702, "the Court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information." 50 U.S.C. § 1881a(k)(2). The FISC Rules reiterate this statutory requirement and further provide: "Except as otherwise ordered, if the government files ex parte a submission that contains classified information, the government must file and serve on the non-governmental party an unclassified or redacted version. The unclassified or redacted version, at a minimum, must clearly articulate the government's legal arguments." FISC Rule 7(j).

FISC Rule 3 provides: "In all matters, the Court and its staff shall comply with . . . Executive Order 13526, 'Classified National Security Information' (or its successor)." Under that executive order, a person may be given access to classified information only if

> (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;
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> (2) the person has signed an approved nondisclosure agreement; and
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> (3) the person has a need-to-know the information.

Executive Order 13526 § 4.1(a). "Need-to-know" is defined as "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective

recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Id. § 6.1(dd) (emphasis added).

B. Analysis

The Court has reviewed the redacted copies of the Government's Reply (to include the supporting affidavit) and finds that it clearly articulates the Government's legal arguments. [redacted] without the Requested Decisions, it "cannot adequately understand the guidance, and limitations thereof, that this Court has previously issued." Motion for Disclosure at 1. The Government responds that the Requested Opinions do not bear on the application of its targeting and minimization procedures [redacted] further contends that its counsel "has a 'need to know' with regard to the prior relevant caselaw." Motion for Disclosure at 1. The government retorts [redacted] does not have a need-to-know more about the contents of the Requested Decisions. Opposition at 3.

The Court has carefully reviewed the Requested Opinions in the context of the issues presented by the Petition[5] and the parties' respective arguments on those issues and compared the citations to and quotations from the Requested Opinions that appear in the Government's Reply to the underlying texts. In no instance does the Reply quote or reference the Requested Opinions

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5 [redacted] "to comply with [each] directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of [Section 702] and is otherwise lawful." 50 U.S.C. § 1881a(h)(5)(C).

in a manner that is incomplete, wrenched from necessary context or otherwise misleading with regard to the point being addressed. Based on that review, the Court finds that the Requested Opinions would be of little, if any, assistance to [redacted] arguments it makes on the merits.[6]

Given that FISC Rule 3 requires the Court to follow the Executive Order, the Court will not lightly second-guess the Government's need-to-know determination, which the Executive Order specifically commits to the Executive Branch. Moreover, there is no indication that the Government is exploiting the need-to-know requirement to mislead or otherwise gain a strategic advantage [redacted] For these reasons, the Court concludes [redacted] does not have the requisite need-to-know the requested information.

Other aspects of the Section 702 framework support [redacted] not entitled to access to the Requested Opinions. The statute and the FISC Rules provide detailed guidance for the conduct of proceedings initiated by a petition to compel compliance with, or to modify or set aside, a Section 702 directive, see 50 U.S.C. § 1881a(h); FISC Rules 20-31, but they provide no mechanism for the recipient of a directive to seek discovery or disclosure of classified information. They do provide for nondisclosure in the

[6] The Court finds that this would especially be the case once compartmented information was redacted from the Requested Opinions.

context of the FISC's ex parte review of certifications and accompanying procedures. See 50 U.S.C. § 1881a(g)(1)(A); FISC Rule 30.[7] In the context of a petition to compel compliance with (or to modify or set aside) a directive, in fact, FISA and Rule 7(j) provide just the opposite, i.e., they permit the Government to withhold classified information from the recipient of the directive. See 50 U.S.C. § 1881a(k)(2); FISC Rule 7(j).[8]

Finally, the statute provides a 30-day period for the completion of FISC review of the Petition in this case. See § 1881a(h)(5)(C). That 30-day period ends on [redacted]2014, a deadline that is incompatible, as a practical matter, with the Government's making redactions of the Requested Opinions for disclosure [redacted] and

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[7] For the most part, the Requested Opinions pertain to classified material that the Government submitted under seal, as required by 50 U.S.C. § 1881a(g)(1)(A), for ex parte and in camera review under § 1881a(i). In a prior case, the FISC observed that "the Congressional judgment embodied" in a comparable statutory provision for ex parte review of procedures suggested that the FISC "should not lightly override the government's opposition to the release of" a classified FISC opinion containing classified information that "directly relates to what the government [previously] submitted for ex parte and in camera review." [redacted] Order issued on [redacted]2008, at 2 n.2. The same logic is applicable here.

[8] Moreover, the detailed statutory provisions regarding FISC proceedings under Section 702 do not provide for [redacted] disclosure of opinions arising from the Court's ex parte review of Section 702 certifications and procedures. Section 702 makes clear that, in the ordinary course, the FISC will have reviewed and approved a certification and accompanying procedures prior to the issuance of a directive pursuant to that certification. See 50 U.S.C. § 1881a(a), (g)(1)(A), (h)(1), (i)(3). If Congress had thought access to such prior FISC opinions were necessary for the recipient of a directive to challenge its lawfulness, it could have provided for such access.

consideration of whatever additional argument such counsel would make after reviewing the Requested Opinions.[9]

C. Due Process

In its Motion for Disclosure [redacted] presents no argument and cites no authority for its suggestion that due process requires the requested disclosure. Motion for Disclosure at 1-2. The weight of authority indicates otherwise. For example, with respect to challenges to the lawfulness of electronic surveillance brought by an aggrieved person,[10] the district court is required to review the application, order, and other materials relating to the electronic surveillance in camera and ex parte if "the Attorney General files an affidavit under oath that disclosure . . . would harm the national security." 50 U.S.C. § 1806(f). Such materials bear directly on any claim that a surveillance was unlawful; nevertheless, disclosure may only occur – even a partial disclosure "under appropriate security procedures and protective orders" – "where such disclosure is necessary to make an accurate

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[9] The Court may extend that 30-day period "as necessary for good cause and in a manner consistent with national security," § 1881a(j)(2), but [redacted] not shown good cause to delay the proceeding to accommodate the requested disclosure. Moreover, [redacted] it is doubtful that delaying resolution of the lawfulness of the Directives would be consistent with national security.

[10] "Aggrieved person" is defined as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

determination of the legality of the surveillance," when the court has found that the surveillance was unlawful or "to the extent that due process requires discovery or disclosure." § 1806(f), (g). Courts have found non-disclosure of surveillance materials under these provisions to comport with due process, see, e.g., United States v. El-Mezain, 664 F.3d 467, 567-68 (5th Cir. 2011); United States v. Abu-Jihaad, 630 F.3d 102, 129 (2d Cir. 2010); United States v. Damrah, 412 F.3d 618, 623-24 (6th Cir. 2005), even when the attorneys seeking access have security clearances. See United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987). [redacted] presented no reason to reach a different conclusion here.

Beyond what is compelled by the Due Process Clause, the Court is satisfied that withholding the Requested Opinions does not violate common-sense fairness. As stated above, each quotation or reference to the Requested Opinions in the Government's Reply fairly represents what those opinions say on the discrete point addressed. And the Government properly adduced each of those points in reply to [redacted] Response. In these circumstances, the Court would decline to compel disclosure of the Requested Opinions as a matter of discretion, assuming for the sake of argument that indeed the Court would have discretion to compel disclosure in a proper case.

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[redacted] Motion for Disclosure was DENIED.[11]

ISSUED this [redacted] 2014, [redacted]

ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court

[11] Because the Court finds no basis to conclude that the Government is improperly withholding the Requested Decisions, [redacted] "to ask the government to show cause why these decisions should not be provided" and to "strike any portions of pleadings that refer to materials that have not been provided [redacted] in appropriately redacted form," see Motion for Disclosure at 1 n.2, is also denied.