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U.S. Department of Justice

National Security Division

Washington, D.C. 20530

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2011 SEP -9 PM 5:06
LEEANN FLYNN HALL
CLERK OF COURT

September 9, 2011

The Honorable John D. Bates
Presiding Judge
United States Foreign Intelligence Surveillance Court
333 Constitution Avenue, N.W.
Washington, DC 20001

[redacted]

Dear Judge Bates:

The Government is pleased to provide certain additional information related to questions raised by the Court and discussed during the September 7, 2011, hearing on the above captioned matters which are currently pending with the Court. ~~(S)~~

I. Total Items Collected Versus Total Items Purged Between January 1 and June 30, 2011 (S)

In its August 16, 2011 Submission, the Government advised the Court that it had identified 140,974,921 Internet communications as having been acquired under section 702 -- i.e., both from NSA upstream collection and PRISM collection[1] -- between January 1 through June 30, [redacted] and present within the relevant NSA SIGINT Collection Source System of Record ([redacted]) as of July 14, 2011. Of these, 127,718,854 (or approximately 91%) were acquired from PRISM collection, and 13,256,067 (or approximately 9%) were acquired through NSA's upstream collection. The Court was also advised that the 140,974,921 did not include Internet communications that were acquired between January 1 and June 30, 2011, but purged prior to July 14, 2011, the date the sample was drawn. In drawing the sample in this fashion, it

[1] "PRISM collection" refers to the acquisition of communications from Internet service providers [redacted] (S)

Classified by: Tashina Gauhar, Deputy Assistant Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 9 September 2036

was NSA's intent to capture for further manual review a truly representative sample of Internet communications acquired through NSA's upstream collection. Nevertheless, in order to ensure that the Government drew an appropriately representative sample of Internet communications with which to conduct its manual review, the Court requested to know the total number of Internet communications acquired by NSA during this six month period and the total number of Internet communications purged during this six month period. NSA reports that from January 1, 2011, to June 30, 2011, approximately 18,446 upstream transactions were acquired and thereafter purged from [redacted] during that same time period.[2] The 18,446 transactions were purged for various reasons, such as a target traveling to the United States and other matters more specifically reported pursuant to Rule 13(b) of the Rules of the Foreign Intelligence Surveillance Court, including the Quarterly Reports Concerning Compliance Matters under Section 702 of FISA. For example, many related to two over-collection incidents previously reported to the Court on February 9, 2011 and June 24, 2011. Aside from the possibility of a target traveling to the United States, as otherwise reported to the Court, none of the transactions which were purged related to NSA's discovery of a wholly domestic communication acquired through its upstream techniques. ~~(TS//SI//NF)~~

NSA further reports that this information does not alter the statistically high degree of confidence (i.e., a simultaneous confidence level of 95%) and statistical conclusions previously reported to the Court in the Government's August 16, 2011 Submission.[3] ~~(TS//SI//NF)~~

II. NSA Assesses that There is no Basis to Believe Any of The 224 "Unknowable" Multi-Communication Transactions (MCTs) Include Wholly Domestic Communications ~~(S)~~

In its August 16th Submission, the Government advised the Court that NSA conducted a manual review of a statistically representative sample of Internet communications acquired through NSA's section 702 upstream collection. As explained in the August 16th Submission, NSA identified 5,081 transactions within the representative sample as being MCTs. NSA determined that of those 5,081 MCTs, 4,847 contained discrete communications believed to be to or from persons located outside the United States and thus not believed to contain any wholly domestic communications.[4] NSA further determined that 10 of the 5,081 MCTs appeared to contain at least one wholly domestic communication. However, NSA was unable to definitively determine whether the remaining 224 MCTs contained wholly domestic communications, because those MCTs lacked information sufficient to positively identify the active user or

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[2] This number is over-inclusive because it includes all transactions purged during the period of January 1 to July 14, 2011, some of which were acquired before January 1, 2011. ~~(TS//SI//NF)~~

[3] As stated in Appendix B of the Government's August 16th Submission, "a simple random sample... serve[d] as the basis for conclusions...about the true proportions of the 13.25 million-transaction universe." That simple random sample of 50,440 transactions did not include any transactions purged prior to the date of the sample; thus, all of NSA's representations regarding the 13.25 million upstream transaction-universe are unaffected by the fact that the random sample similarly did not include transactions purged from [redacted] prior to July 14, 2011. ~~(TS//SI//NF)~~

[4] This figure 4,847 is the sum of 713 MCTs reviewed by NSA analysts as containing a tasked selector as the active user and 4,134 MCTs reviewed by NSA analysts as containing discrete communications believed to be to or from non-targeted persons located outside the United States. *See* August 16th Submission at 5 nn.15 & 16. ~~(TS//SI//NF)~~

determine the active user's location. Nevertheless, NSA asserted that it had no basis to believe any of these 224 MCTs contained wholly domestic communications. ~~(TS//SI//NF)~~

Except as noted below, in analyzing each single, discrete communication within these 224 MCTs to determine whether any were wholly domestic, NSA's team of experienced analysts considered all technical data (such as [redacted]) present within the MCTs, performed the same sort of technical analysis NSA would perform before tasking an electronic communications account/address/identifier in accordance with its section 702 targeting procedures, and scrutinized the content of each discrete communication for any information which would be indicative of the location of the communicants (such as [redacted]). Despite this exhaustive review, NSA was unable to positively determine whether any of the remaining 224 MCTs contained wholly domestic communications. However, based upon the totality of the information reviewed, NSA analysts had no analytical basis to believe that any of the 224 MCTs contained wholly domestic communications. ~~(TS//SI//NF)~~

More specifically, in addition to the content analysis described above for all 224 MCTs, NSA analysts performed the same sort of technical analysis NSA would perform before tasking an electronic communications account/address/identifier in accordance with its section 702 targeting procedures for all available accounts/addresses/identifiers included in the MCT ([redacted]) for each discrete communication within the MCT for 183 of the 224 MCTs referenced on pages 7-8 of the August 16th Submission (i.e., [redacted].[5] In all instances where location information was available for such accounts/addresses/identifiers, NSA analysts assessed that at least one communicant of each discrete communication within these MCTs was located outside of the United States. ~~(TS//SI//NF)~~

Despite this intensive review, NSA was unable to conclusively determine whether any of the 224 MCTs contained wholly domestic communications. However, based upon the totality of the analysis described above and in the Government's August 16th and August 30th Submissions, NSA assesses that it is highly likely that each discrete communication included in these MCTs includes foreign communicants, although given the absence of certain technical identifying data NSA cannot state this conclusively. Nevertheless, NSA believes that its manual review of the content of each discrete communication contained within these MCTs, at a

[5] As previously explained to the Court, the same sort of technical analysis was not performed for 23 of the 224 MCTs because, although part of the sample drawn on July 14, 2011, these 23 MCTs had been purged and/or placed on NSA's Master Purge List subsequent to the date of the sample. As noted during the September 7 hearing, the majority of these 23 MCTs (19) had been purged subsequent to July 14 as part of the [redacted] overcollection incident previously addressed in the Government's June 1 Submission. *See also* Government's August 16th Submission at 8. The technical analysis was, however, performed on each selector available within the 18 of the 224 MCTs that could not be further characterized by NSA analysts. *See id.* However, for these MCTs not all communicant account/address/identifiers were available because each of these MCTs contained corrupted data to varying degrees. ~~(TS//SI//NF)~~

minimum, support its assessment that there is no basis to believe any of these 224 MCTs include wholly domestic communications. ~~(TS//SI//NF)~~

III. Regarding the Possibility of Wholly Domestic "Abouts" Communications Among the Single, Discrete Communications not Further Analyzed During the NSA Manual Review ~~(S)~~

In its August 16, 2011 Submission, the Government advised the Court that of the 50,440 transactions reviewed, 45,359 (approximately 90%) were determined to be single, discrete communications. Because NSA's focus during the manual review was the assessment of MCTs, the Court was further advised that after determining that a transaction was a single, discrete communication to, from, or about a tasked selector, no further analysis of those transactions was done by NSA. ~~(TS//SI//NF)~~

As in the case of MCTs, the possibility does exist that in certain limited circumstances single, discrete "abouts" communications acquired via NSA's section 702 upstream collection could be wholly domestic in nature. For this possibility to be realized, a communication's sender and all intended recipients must be located in the United States, the communication must contain a section 702 tasked selector, and it must [redacted] Furthermore, as described in the Government's June 1, 2011 Submission in greater detail, given the way in which [redacted] the communication [redacted] ~~(TS//SI//NF)~~

On the basis of the foregoing and NSA's experience collecting Internet communications, NSA had assessed that it would be extremely unlikely for its upstream collection of single, discrete communications to result in the acquisition of wholly domestic communications, and not at a rate higher than wholly domestic communications may be contained within MCTs acquired through upstream collection. To investigate this further in response to the Court's questions, between the close of the September 7, 2011 hearing and the submission of this correspondence an experienced team of NSA analysts rapidly worked through a 48-hour period to evaluate the 45,359 single, discrete communications described above. As a result, NSA was able to conclude based on technical analysis that 41,272 of these communications were not wholly domestic in nature. The findings of NSA's technical analysis revealed that 4,087 of these single discrete communications lacked information sufficient for NSA to immediately identify the active user through technical means as reasonably believed to be located outside the United States.[6] ~~(TS//SI//NF)~~

NSA analysts manually reviewed each of these 4,087 transactions to attempt to determine the nature of the communication as either to, from, or about NSA's tasked selector. Only 25 of the 4,087 transactions reviewed appeared to be a communication not specifically to or from a

[6] More specifically, 10,628 featured a tasked selector as the active user who by operation of the NSA targeting procedures is a person reasonably believed to be located the United States, 2,239 featured an active user that was not a tasked selector but nonetheless an electronic account/address/identifier reasonably believed to be located outside the United States, 3,926 featured [redacted] and 24,479 featured [redacted] ~~(TS//SI//NF)~~

tasked selector.[7] NSA analysts then subjected all available selectors within those 25 "abouts" communications to the same sort of technical analysis they would perform before tasking an electronic account/address/identifier in accordance with its FAA section 702 targeting procedures to attempt to determine the location of the communicants within those 25 communications (i.e. additional technical analysis was performed on all of the single, discrete communications that appeared to analysts be a communication "about" NSA's target between two or more non-tasked accounts/addresses/identifiers).[8] Notably, none of the reviewed transactions featured an account/address/identifier that resolved to the United States. Further, each of the 25 communications contained location information for at least one account/address/identifier such that NSA's analysts were able assess that at least one communicant for each of these 25 communications was located outside of the United States. ~~(TS//SI//NF)~~

Given the United States' status as the "world's premier electronic communications hub," and further based on NSA's knowledge of Internet routing patterns, the Government has already asserted that "the vast majority of communications between persons located in the United States are not routed through servers outside the United States." See the Government's June 1, 2011 Submission at 11. As a practical matter, it is a common business practice for Internet and web service providers alike to attempt to deliver their customers the best user experience possible by reducing latency and increasing capacity. Latency is determined in part by the geographical distance between the user and the server, thus, providers frequently host their services on servers close to their users, and users are frequently directed to the servers closest to them. While such practices are not absolute in any respect and are wholly contingent on potentially dynamic business practices of particular service providers and users,[9] if all parties to a communication are located in the United States and the required services are available in the United States, in most instances those communications will be routed by service providers through infrastructure wholly within the United States. [redacted]

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[7] More specifically, 20 of these transactions featured a [redacted] to or from a tasked selector, and 5 of these transactions included a [redacted] (i.e., potentially alternate accounts/addresses/identifiers for current NSA targets). (TS//SI//NF)

[8] To determine the location of these communicants, NSA performed the same sort of technical analysis it would perform before tasking an electronic communications account/address/identifier in accordance with its FAA section 702 targeting procedures. ~~(TS//SI//NF)~~

[9] According to NSA, [redacted] ~~(TS//SI//NF)~~

[redacted] will be filtered out by NSA's IP filters, even if they contain a 702 tasked selector, and the wholly domestic communications therein will not be collected. [redacted] ~~(TS//SI//NF)~~

These additional clarifications support the Government's conclusion detailed in the 30 August Notice of Clarifications to the Court that NSA's acquisition of foreign intelligence information through upstream collection, including the acquisition of MCTs, is reasonable and consistent with the Act and the Fourth Amendment. ~~(TS//SI//NF)~~

NSA has reviewed this letter and confirmed its accuracy. (U)

The Government would like to thank both you and your staff for your consideration of the Government's Certifications and the complex factual and legal questions related thereto. Should the Court have any additional questions, comments or concerns, please do not hesitate to contact me. (U)

Sincerely,

[redacted]

Office of Intelligence
National Security Division

b(6) and b(7)(C)