U.S. Department of Justice

National Security Division

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2011 SEP 13 PM 3:08
LEEANN FLYNN HALL
CLERK OF COURT

Washington, D.C. 20530

September 13, 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 this supplement to its correspondence to the Court dated September 9, 2011 regarding the above-captioned matters which are currently pending with the Court. ~~(S)~~

On page 6 of the Government's September 9 correspondence, with respect to the possibility of wholly domestic "abouts" communications being acquired among single, discrete communications, the Government stated "[t]hus, while there are limited situations in which wholly domestic "abouts" communications will be acquired by NSA's upstream techniques, NSA assesses it is highly unlikely that the maximum number of wholly domestic communications that might be acquired within transactions containing only a single, discrete communication would be higher than those contained within MCTs [Multi-Communication Transactions]." As described in the Government's prior filings, the interception of an MCT can result in the acquisition of several communications, some of which are not to, from, or about NSA's tasked selector. Such communications would not have been acquired had they been transmitted as single, discrete communications because they do not contain a tasked selector. In contrast, a single, discrete communication that is wholly domestic would be acquired only if it is "about" a tasked selector, is sent and received by non-targeted persons in the United States, and [redacted]

~~TOP SECRET//COMINT//NOFORN~~

~~Classified by: Tashina Gauhar, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4(c)~~
~~Declassify on: 13 September 2036~~

[redacted].[1] It is reasonable, therefore, to conclude that the probability of encountering wholly domestic communications in transactions that feature only a single, discrete communication should be smaller -- and certainly no greater -- than potentially encountering wholly domestic communications within MCTs. Indeed, all of the wholly domestic communications discovered during NSA's manual review were single, discrete communications within MCTs that were neither to, from, nor about the tasked selector. The basis for NSA's analytical assessment is grounded in its experience, its collection and analysis of Internet communications, and the information gleaned from the manual review more particularly described in the Government's September 9, 2011 correspondence and the Government's prior submissions of August 16, 2011 and August 30, 2011. ~~(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 continued 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, b(6) and b(7)(C)

[redacted]

Office of Intelligence
National Security Division

[1] To be sure, it is possible that NSA could also acquire single, discrete communications to or from a tasked selector that are wholly domestic if, unbeknownst to NSA, the user of the tasked selector has entered the United States and sends a communication to another person located in the United States and that communication is [redacted]. This Court has previously found that the acquisition of such communications under a reasonable but mistaken belief that the target is located outside the United States does not run afoul of the limitations in section 702. See In re DNI/AG Certification [redacted] Docket No. 702(i)-08-01, Mem. Op. at 26. (USFISC Sept. 4, 2008). ~~(TS//SI//OC,NF)~~