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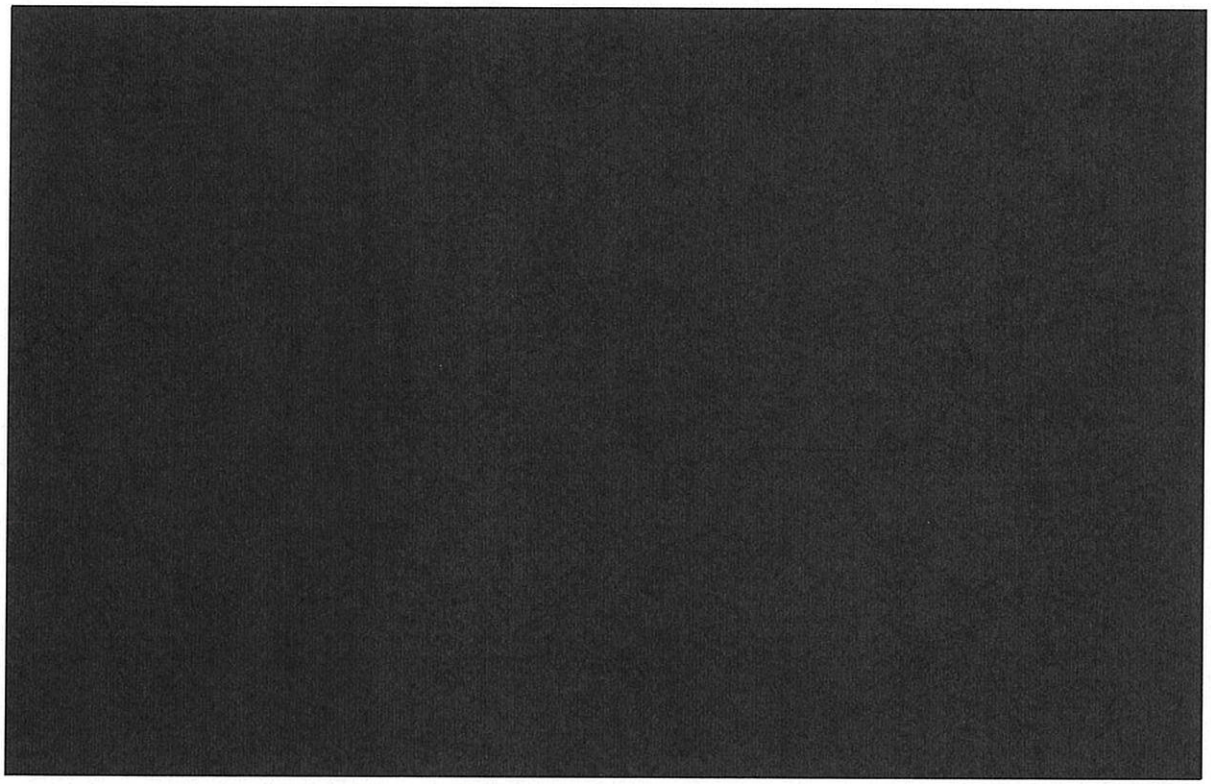
UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



BRIEFING ORDER

On October 3, 2011, this Court granted in part and denied in part the government's requests for approval of the certifications in the above-captioned dockets. See Oct. 3, 2011 Order at 2. This Court's Order and Memorandum Opinion found that the National Security Agency's (NSA) minimization procedures do not meet the requirements of 50 U.S.C. § 1881a(e) with respect to retention, and that NSA's targeting and minimization procedures are inconsistent

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with the requirements of the Fourth Amendment, as the government proposed to apply them to Multiple Communications Transactions (MCTs) for which the "active user" is not known to be the tasked selector. Furthermore, in the Memorandum Opinion issued simultaneously with its Order, this Court noted that "[t]he government's revelations regarding the scope of NSA's upstream collection implicate 50 U.S.C. § 1809(a)" and advised that the Court would address this and related issues in a separate order. Oct. 3, 2011, Mem. Op. at 17 n.15.

It is now clear that NSA has been acquiring MCTs since [redacted] while at the same time assuring the Court until May 2, 2011, that its upstream collection acquired only communications to or from a targeted selector and specified categories of "about" communications (i.e., individual communications that referenced [redacted] that NSA tasked for collection). See [redacted]; see also Oct. 3, 2011, Mem. Op. at 17; [redacted] Submission at 2.

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[1] In the Government's Response to the Court's Briefing Order of [redacted] 2011 ([redacted] Submission), the government acknowledged that it has been acquiring MCTs "throughout the entire timeframe of all certifications authorized under Section 702," the Protect America Act (PAA), and earlier Foreign Intelligence Surveillance Act (FISA) Title I cases. Id. at 2 (citing In re [redacted] Furthermore, it is worth noting that in Docket [redacted], the government represented that [redacted] would "ensure that all communications forwarded to NSA ... are indeed communications that have been sent or received using, and that 'refer to' or are 'about,' e-mail [redacted] for which there is probable cause to believe are being used, or are about to be used, by [the targets]." Docket [redacted] Declaration of Lieutenant General Keith B. Alexander at 21. The Court relied on this representation when it issued its Order approving the collection. Docket No. [redacted] Order at 22. MCTs, however, have been shown to contain communications that do not meet this standard.

Prior to this Court issuing its Order in the above-captioned dockets, the government argued that previous and ongoing collections of MCTs were in compliance with this Court's orders, did not violate 50 U.S.C. § 1881a, and were consistent with the Fourth Amendment, and that the use of such information did not violate Section 1809(a)(2), see June 1 Submission at 2-24 & 31-38, despite the fact that the government acknowledged that it did not fully inform the Court of this aspect of the collection prior to May 2, 2011, see id. at 2 & 31; [redacted] Submission) at 25. In fact, the government's May 2 Letter "disclosed to the Court for the first time that NSA's 'upstream collection' of Internet communications includes the acquisition of entire 'transaction[s]' [redacted] Oct. 3, 2011 Mem. Op. at 5 (emphasis added) (footnotes omitted). As a result, none of this Court's prior authorizations considered the collection and use of MCTs.

In light of this Court's Order and Memorandum Opinion issued on October 3, 2011, and in view of what appears to be a significant overcollection dating back to [redacted] including the content of communications of non-target U.S. persons and persons in the U.S., the government is hereby ORDERED to file a memorandum with any necessary supporting documentation no later than 5 p.m. on November 10, 2011, which shall address but not necessarily be limited to the following issues related to MCTs:

1. An analysis of the application of Section 1809(a) to each of the three different statutory schemes under which Internet transactions were acquired without the Court's knowledge. See supra note 1.

2. The extent to which information acquired under Section 1881a, the PAA, and Docket

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[redacted] falls within the criminal prohibitions set forth in Section 1809(a).

3. Whether the collections under Section 1881a, the PAA, and Docket [redacted] include information that was not authorized for acquisition but is not subject to the criminal prohibitions of Section 1809(a).

4. Whether any of the over-collected material has "aged off" NSA systems such that it is no longer retained by NSA or accessible to its analysts.

5. If the government has determined that it has acquired information that is subject to Section 1809(a) or was otherwise unauthorized:

   a. Describe how the government proposes to treat any portions of the prior unauthorized collection that are subject to the criminal prohibitions of Section 1809(a).

   b. What steps is NSA taking to ensure that such information subject to 1809(a) is not used in proceedings before the Court?

   c. What steps is the government taking to remediate any prior use of such information in proceedings before this Court?

   d. How does the government propose to treat any portions of the collection that are unauthorized but not subject to Section 1809(a), and explain why such treatment is appropriate.

6. Whether there are any other matters that should be brought to the Court's attention with regard to these collections that implicate Section 1809(a) or that were unauthorized.

IT IS SO ORDERED.

ENTERED this 13th day of October 2011.

JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

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

I, [redacted] Deputy Clerk, FISC, certify that this document is a true and correct copy of the origina[redacted]

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