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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

[REDACTED]

ORDER

On August 17, 2007, the government filed a set of procedures with this Court pursuant to 50 U.S.C. § 1805C. Those procedures pertain to a certification by the Attorney General and the Director of National Intelligence, styled DNI/AG 105B Certification 07-01, filed under seal on August 10, 2007, pursuant to § 1805B(c). Under that certification, and following those procedures ("07-01 procedures"), the National Security Agency (NSA) acquires foreign intelligence information regarding [REDACTED]

[REDACTED]

[REDACTED]

These submissions provide the first occasion for Court review of such procedures under 50 U.S.C. § 1805C(b). Under that provision, the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805B do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous." Evidently, it is the government's view that acquisitions under the above-referenced procedures will not constitute electronic surveillance because they will be "directed at a person reasonably believed to be located outside of the United States," and therefore will be excluded from the definition of electronic surveillance by § 1805A.

Because [REDACTED] procedures are similar in many respects, the Court intends to consider all [REDACTED] procedures jointly for purposes of review under § 1805C(b).

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In furtherance of that consideration, it is hereby ORDERED as follows:

1. The government shall file supplemental briefing and information on the following questions, which the Court has identified as the principal issues for purposes of its review of these procedures under § 1805C(b):

(a) Under what circumstances is it envisioned that, under Part IV. of all [REDACTED] procedures, an "immediate threat to the national security" would require departure from the procedures? What provisions of the procedures would have to be disregarded in such circumstances in order to respond to such a threat? Is a delegation to NSA of authority to decide when it is justified to "depart" from these procedures consistent with statutory requirements?

(b) Footnote 1, page 1, of the 07-01 procedures appears to exempt from those procedures facilities "properly tasked for collection" under certain prior authorities from the 07-01 procedures. To what extent did that prior tasking involve a determination of the user's location under procedures comparable to those now before the Court? Are such facilities permanently exempted from all requirements of the 07-01 procedures? Or, for example, are they exempted from requirements for the initiation of collection, but are subject to post-initiation procedures (see subparagraph (c) below) designed to verify that the user of a facility is still outside of the United States?

(c) The procedures state that NSA will "routinely" undertake certain activities that together will constitute an "analysis designed to detect those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States." [REDACTED]

(i) At what time intervals will each of the various steps be taken?

(ii) It appears that NSA may continue to regard a facility - [REDACTED] - as being used by a person outside of the United States, even after it becomes aware of indications that it may be used by someone in the United States. To what extent do these procedures embody a presumption that a user who is initially assessed to be outside of the United States remains outside of the United States, even if there are later indications to the contrary? If there is such a presumption, why is it reasonable?

(d) The procedures describe circumstances "where NSA seeks to acquire communications about the target," but "not to or from the target." [REDACTED] Does this acquisition involve the interception of one or more types of "about communications," as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [REDACTED]? Who is the "person from whom [NSA] seeks to obtain

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foreign intelligence information" in this context? [REDACTED]

[REDACTED] May NSA acquire such communications, as long as it is reasonably believed that at least one party (sender or recipient) to the communication is outside of the United States? Or should the location of the sender be determinative?

(e) The procedures state that "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance . . . shall be purged from NSA databases." [REDACTED]

[REDACTED] Does this mean that all records or copies of such information, in any form, shall be destroyed?

2. Some of the differences between the [REDACTED] procedures require no explanation (for example, [REDACTED])

However, there are other differences in wording, the effect of which is uncertain.¹ To the extent that these differences in wording are intended to reflect a substantive difference in how the procedures are implemented, the government is directed to explain in its submission the differences in implementation and reasons therefor. To the extent that these differences in wording are not intended to reflect a substantive difference, but rather, e.g., reflect drafting refinements that took place after the submission of the 07-01 procedures, the government's submission shall so state, and shall include revised versions of the procedures to the extent necessary to make each set of procedures fully accurate and current.

3. The government shall make its submission, in conformance with paragraphs 1. and 2. above, on or before October 26, 2007.

SO ORDERED this 11th day of October, 2007, regarding [REDACTED]

Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign
Intelligence Surveillance Court

[REDACTED]

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