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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

2007 OCT 26 PM 4:38

CLERK



**GOVERNMENT'S RESPONSE TO
THE COURT'S ORDER OF OCTOBER 11, 2007**

The United States of America, through the undersigned Department of Justice attorney, respectfully submits this response to the questions the Court posed in its Order dated October 11, 2007, in the above-captioned matter. (S)

Pursuant to 50 U.S.C. § 1805C, the Government has filed [redacted] procedures used to determine that certain acquisitions of foreign intelligence information concern persons reasonably believed to be located outside of the United States and, therefore, do not constitute electronic surveillance. See 50 U.S.C. § 1805A ("Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.") These [redacted] procedures correspond to [redacted] certifications – captioned [redacted] respectively – authorizing the National Security Agency (NSA) to acquire foreign

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Classified by: Margaret A. Skelly-Nolen, Acting Counsel for Intelligence Policy, NSD, DOJ

Reason: 1.4(c)

Declassify on: 26 October 2032

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intelligence information regarding various targets. In accordance with 50 U.S.C. § 1805C(b), the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 105B do not constitute electronic surveillance." This review is limited to whether the Government's determination is "clearly erroneous." *Id.* The following responses to the Court's questions are based primarily on information provided by NSA. ~~(S)~~

Question 1(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? ~~(TS//SI//OC,NF)~~

Answer 1(a) Part IV of each set of procedures was inserted to allow for an emergency situation in which the Government must acquire foreign intelligence information on an emergency basis in order to protect against an immediate threat to the national security, but is unable to comply with the procedures at the time of the acquisition. For example, due to an emergency situation, the NSA analyst requesting that a facility be tasked may not [redacted]

[redacted] due to the emergency situation and the need for immediate collection of information. Under such circumstances, the Government would continue to adhere to the statutory limitation that it could only direct surveillance at a target reasonably believed to be located outside of the United States. ~~(TS//SI//OC,NF)~~

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The Government believes this provision is consistent with statutory requirements because, as noted above, the Government will adhere to the statutory limitation in the Protect America Act of 2007 (PAA) in any case in which it departs from the procedures to protect against an immediate threat. Further, Part IV of the procedures requires that action under this provision only be taken in the event that obtaining a timely modification of the procedures from the Director of National Intelligence (DNI) and the Attorney General (AG) is not feasible. In addition, Part IV of the procedures requires prompt notification of NSA's departure from the procedures to the representatives of the DNI and AG. Accordingly, to the extent NSA has been delegated the authority to decide if a departure from the procedures is necessary, there will be an opportunity for the DNI and AG to review any such decision by NSA.

~~(TS//SI//OC,NF)~~

Question 1(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? ~~(TS//SI//OC,NF)~~

Answer 1(b) NSA determined that the users of facilities tasked for collection under docket numbers [REDACTED] and [REDACTED] were reasonably believed to be located outside the United States based on the same categories of information (i.e., [REDACTED]

[REDACTED] described in the 07-01 procedures. However, at the time the foreignness

¹ In docket number [REDACTED] telephone numbers and e-mail accounts tasked for collection were referred to as "selectors" rather than facilities. For ease of reference, telephone numbers and e-mail accounts tasked for collection under [REDACTED] are referred to herein as "facilities." ~~(TS//SI//OC,NF)~~

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determination was made for each of those facilities tasked for collection under docket numbers [REDACTED] and [REDACTED] every database that is mentioned in the 07-01 procedures did not necessarily exist, or contain the same types of information. The fact that each of the facilities was presented to the Court in docket numbers [REDACTED] and [REDACTED] means that NSA reasonably believed that the facilities were being used outside the United States and that NSA had discovered no information indicating that the facilities were being used in the United States. However, NSA did not have in place, prior to the PAA, the formalized and repeatable pre-tasking procedures it has in place now with respect to such determinations. Most significantly, NSA had no requirement that such determinations be documented or that the information which formed the basis for the determinations be maintained at NSA in a way that could be retrieved and provided to those conducting oversight. Nor did NSA have any systematic post-tasking procedures to ensure that NSA became aware of any discrepancies between NSA's pre-tasking foreignness determination for a target and the target's actual location. ~~(TS//SI//OC,NF)~~

Facilities that had been tasked for collection under docket numbers [REDACTED] and [REDACTED] and are now tasked under the PAA are not permanently exempted from all requirements of the 07-01 procedures. Specifically, facilities initially tasked pursuant to footnote 1 of the 07-01 procedures are subjected to the same post-tasking procedures designed to verify that their location is outside of the United States and to notify NSA of any changes to their location as are other facilities. ~~(TS//SI//OC,NF)~~

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Question 1(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] (TS//SI//OC,NF)

Question 1(c)(i) At what time intervals will each of the various steps be taken?
(TS//SI//OC,NF)

Answer 1(c)(i) Electronic communications accounts/addresses/identifiers tasked pursuant to the procedures are all checked against the [REDACTED] database (as described in the procedures, [REDACTED])

[REDACTED] in order to try to detect whether a tasked electronic communications account/address/identifier has been used from a location inside the United States. The results of these checks are reviewed [REDACTED]

(TS//SI//OC,NF)

Telephone selectors are likewise processed [REDACTED] and the results are reviewed [REDACTED] for the purpose of attempting to verify the user's location.


[REDACTED]

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Question 1(c)(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? ~~(TS//SI//OC,NF)~~

Answer 1(c)(ii) Once NSA determines that the user of a facility is reasonably believed to be outside the United States, it will presume that the user remains outside the United States, unless it becomes aware of indications to the contrary. The post-tasking procedures contained in Part I of the procedures, and also described in response to the Court's question 1(c)(i), are designed to alert NSA to any indications that the user is no longer outside the United States. However, there are cases in which information NSA receives may indicate a user is in the United States, but NSA may still reasonably believe, based on analysis of additional information in NSA's possession, that the user is located outside of the United States. For example, [REDACTED]

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Question 1(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 foreign intelligence information" in this context? [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? ~~(TS//SI//OC,NF)~~

Answer 1(d) The acquisition "where NSA seeks to acquire communications about the target," but "not to or from the target" involves the interception of "about" communications as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [REDACTED] ~~(TS//SI//OC,NF)~~

The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside the United States. NSA may acquire such communications as long as it reasonably believes at least one party (sender or recipient) is outside of the United States, and the location of the sender of the communication should not be determinative. As noted in the procedures, in those cases where NSA seeks to acquire communications about the target that are not to or from the target, NSA will [REDACTED]

[REDACTED] in order to ensure that

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the person from whom it seeks to obtain foreign intelligence information is located outside of the United States. ~~(TS//SI//OC,NF)~~

Question 1(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? ~~(TS//SI//OC,NF)~~

Answer (1)(e) In the event NSA determined that it had "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," NSA would purge the information from its databases and take steps designed to ensure that all other records or copies of such information, in any form, were destroyed. Data collected by NSA under PAA authority is precisely labeled and controlled, and it is stored in a limited number of known, established electronic repositories. If required to purge the data, NSA analysts would provide the system administrators of these repositories with the precise identifying information for the data to be purged in order to pinpoint the specific data that resulted from the inappropriate collection, and would continue to follow up until the purge was completed. ~~(TS//SI//OC,NF)~~

In addition, NSA would determine whether anything from this collection had been disseminated and would take steps to delete intelligence reports from NSA databases, subsequently issuing a report cancellation notice to all customers who would have received the original report, requesting that they delete it from their own holdings. NSA analysts are trained and tested on the handling requirements for data collected pursuant to the PAA, including the conditions under which the data must be purged, and the requirement to destroy any hard copies that they have retained. NSA relies on

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local managers, intelligence oversight officers, and the analysts who discover the problem selectors to ensure, to the extent possible, that these hard copies are destroyed. ~~(TS//SI//OC,NF)~~

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

[redacted] However, there are other differences in wording, the effect of which is uncertain.² 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. ~~(TS//SI//OC,NF)~~

Answer 2 No substantive differences were intended among the procedures. The differences identified by the Court reflect subtle refinements that took place as the procedures for each certification were drafted and finalized. [redacted]

[redacted]

² [redacted]

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As explained above, none of the differences in wording identified by the Court resulted from changes that were made to correct an inaccuracy or to make current

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information that had become outdated. Therefore, the Government has not provided revised versions of the procedures because the procedures presented to the Court, as approved by the DNI and the AG, are accurate and current, notwithstanding these minor differences. ~~(TS//SI//OC,NF)~~

Respectfully submitted,



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