

~~TOP SECRET//SI//ORCON//NOFORN~~

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT  
NOV -2 AM 11:52  
LEEANN FLYNN HALL  
CLERK OF COURT

IN RE APPLICATION OF THE FEDERAL  
BUREAU OF INVESTIGATION FOR AN  
ORDER REQUIRING THE PRODUCTION  
OF TANGIBLE THINGS

Docket No. b1, b3 [50  
Docket No. b1, b3 [50

SUPPLEMENTAL MEMORANDUM BY AMICUS CURIAE REGARDING THE  
GOVERNMENT'S AUGUST 27, 2015, APPLICATIONS

Undersigned, as *Amicus Curiae*, respectfully submits this supplement to the Memoranda filed by undersigned on October 29, 2015 and October 30, 2015 in the Dockets identified above.

Additional legislative history for the USA FREEDOM Act of 2015 (USFA), not cited in the October 29 Amicus Memoranda,<sup>1</sup> supports the discussion of USFA § 104 set forth at page 20 of that memorandum. The House Judiciary Committee Report, with respect to Section 104 of the Act, states:

This section provides that the court may evaluate the adequacy of minimization procedures under Section 501. Under current law, the court is only empowered to determine whether the government has minimization procedures in place. This section also makes clear that the FISC may require additional, particularized minimization procedures beyond those required under Section 501 with regard to the production, retention, or dissemination of certain business records, including requiring the destruction of such records within a reasonable time period. This language is intended to capture an existing practice at the FISC to require heightened minimization procedures when appropriate.

<sup>1</sup> This material was cited in the October 30 Memorandum at 11-12.

~~TOP SECRET//SI//ORCON//NOFORN~~

~~TOP SECRET//SI//ORCON//NOFORN~~

H.R. Rep. No. 114-109 pt. 117 (May 8, 2015).<sup>2</sup>

In addition, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, Docket No. [b1, b3 [50 USC 3024(i)]] (Eagan J.) (Eagan Opinion), addresses the pre-USFA statutory framework of the FISA business records provisions, including the balancing function and protections conferred by the post-production minimization procedures. See Eagan Opinion at 9-12, 23. That decision also cites the legislative re-enactment/ratification doctrine discussed at page 19 of the October 29 Amicus Memorandum, in support of its analysis of the constitutionality of the Section 215 bulk telephony program. See Eagan Opinion at 23-28.

Finally, as discussed in both Amicus Memoranda, the oversight authority set forth in Section 104 is not limited to bulk collection programs; it applies to any FISA business records request.<sup>3</sup> In undersigned's experience, government or internal investigations of business entities, even businesses with substantial compliance programs and procedures and regulatory reporting

---

<sup>2</sup> Generally, committee reports are given substantially greater weight than other aspects of legislative history. See George A. Costello, *Average Voting Members and Other "Benign Fictions": the Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 Duke Law. J. 39, 41 and 65 n.125. But see *Blanchard v. Bergeron*, 489 U.S. 87, 99-100 (1989) (Scalia, J., concurring) (positing that committee reports are often authored by congressional staff in order to influence judicial construction).

[b1, b3 [50 USC 3024(i)]]

~~TOP SECRET//SI//ORCON//NOFORN~~

~~TOP SECRET//SI//ORCON//NOFORN~~

obligations, often expose areas where the entity and its employees have become complacent or where compliance can be improved. Undersigned's suggested minimization inquiries are intended to identify areas the Court may consider worthy of some additional review, notwithstanding prior review of the adequacy of those provisions by other judges of this Court. The information obtained by the government through the FISA business records process, be it bulk or targeted, routinely includes sensitive personal information of millions of U.S. persons. If minimization procedures are not adequate, that information can be misused or potentially hacked, leaked, or otherwise accessed by or disseminated to unauthorized third parties. Procedures that may have once been deemed sensible or sufficient may not be today, particularly as technology develops. With a fresh examination of the minimization procedures (including those required for other business records productions), the Court can better exercise its oversight function. The enactment of Section 104 marks an opportunity to do so.

Dated: November 2, 2015

Respectfully submitted,



Preston Burton  
D.C. Bar No. 426378  
Poe & Burton PLLC  
The Executive Building  
1030 Fifteenth Street, N.W., Suite 580 West  
Washington, D.C. 20005  
Telephone: (202) 583-2500  
Fax: (202) 583-0565  
Email: [pburton@poeburton.com](mailto:pburton@poeburton.com)

*Amicus counsel*

~~TOP SECRET//SI//ORCON//NOFORN~~

b6 [redacted] Chief Deputy Clerk,  
FBI certify that this document is a  
true and correct copy of the original

b6 [redacted]

~~TOP SECRET//SI//ORCON//NOFORN~~

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2d day of November, 2015, I filed a true and correct copy of the foregoing Supplemental Memorandum with the Clerk of Court and requested that the Clerk provide a true copy by appropriate secure means to:

Stuart J. Evans  
Deputy Assistant Attorney General  
National Security Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Room 7300  
Washington, DC 20530



Preston Burton  
D.C. Bar No. 426378  
Poe & Burton PLLC  
The Executive Building  
1030 Fifteenth Street, N.W., Suite 580 West  
Washington, D.C. 20005  
Telephone: (202) 583-2500  
Fax: (202) 583-0565  
Email: pburton@poeburton.com

~~TOP SECRET//SI//ORCON//NOFORN~~