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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2015 NOV -6 PM 4:53
LEEANN FLYNN HALL
CLERK OF COURT

~~(S)~~ IN RE APPLICATION OF THE
FEDERAL BUREAU OF INVESTIGATION
FOR AN ORDER REQUIRING THE
PRODUCTION OF TANGIBLE THINGS

Docket Number ^{b1, b3} [REDACTED]

^{b1, b3} [50 USC 3024(i)]
[REDACTED]
[REDACTED]

**(U) RESPONSE OF THE UNITED STATES TO
THE MEMORANDUM OF LAW BY AMICUS CURIAE**

~~(S//OC/NF)~~ The United States of America submits this response to the
Memorandum of Law by Amicus Curiae regarding the Government's request for
authorization to retain and use after November 28, 2015, ^{b1, b3} [50 USC 3024(i)]
[REDACTED] previously produced pursuant to this Court's orders. The Court appointed the
amicus curiae and directed him to address whether the USA FREEDOM Act precludes
the Government's request to retain and use bulk ^{b1, b3} [50 USC 3024(i)] [REDACTED] after
November 28, 2015. The Government requests authorization to ^{b1, b3} [50 USC
3024(i)] [REDACTED]
[REDACTED] to meet ongoing foreign intelligence information needs.

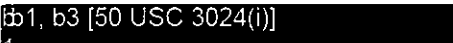
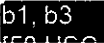
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Classified by: ~~Chief, Operations Section, OI, NSD, DOJ~~
Derived From: ~~Multiple Sources~~
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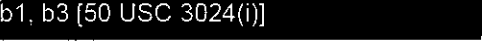
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b1, b3 [50 USC 3024(i)]



~~(S//OC/NF)~~ As described more fully below, the Government concurs with the conclusion of the amicus curiae that neither section 103 of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, nor any other provision of that Act, precludes the retention and use of the previously produced s after November 28, 2015. The Government further concurs with the conclusion of the amicus curiae that this Court is authorized under Title V of the Foreign Intelligence Surveillance Act (FISA), as amended by the USA FREEDOM Act, to impose particularized minimization procedures for the retention and use of the previously produced 



 The Government respectfully submits that the procedures it has proposed, 



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b1, b3 [50 USC 3024(i)] after November 28, 2015. Therefore, the Government requests that the Court approve them.

I. (U) Statement of Facts

~~(S//OC/NF)~~ The USA FREEDOM Act authorizes the Court to approve an application for the bulk production of b1, b3 [50 USC 3024(i)] pursuant to 50 U.S.C. § 1861 for a period ending 180 days after enactment of the USA FREEDOM Act, which is November 29, 2015. Op., docket number b1, b3 [50 See also Op. and Order, docket number b1, b3 [50 at 11 (holding that, in passing the USA FREEDOM Act, Congress “chose to allow a 180-day transitional period during which such collection could continue.”); American Civil Liberties Union v. Clapper, No. 14-42, slip op. at 21 (2nd Cir. Oct. 29, 2015) (“[t]he language of § 215 as amended by the Freedom Act indicates that Congress intended the telephone metadata program to continue during the transition period”). Beginning on November 29, 2015, the USA FREEDOM Act, among other things, prohibits the bulk production of tangible things under Section 1861 and provides a new mechanism for the Government to obtain a targeted production of call detail records relating to authorized investigations to protect against international terrorism. USA FREEDOM Act, § 109(a) (“The amendments made by sections 101 through 103 shall take effect on the date that is 180 days after the date of the enactment of this Act.”). The USA FREEDOM Act provides no specific, separate mechanism for the

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targeted production of b1, b3 [50 USC 3024(i)] The Government may submit applications requesting production of targeted records under 50 U.S.C. § 1861(b)(2)(B), b1, b3 [50 USC 3024(i)]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the

Government sought authorization for the continued production of such records until November 28, 2015, at 5:00 p.m. Eastern Time. This date was proposed in order to align the expiration of Court authorization with the end of the 180-day transition period authorized by the USA FREEDOM Act. On August 27, 2015, in docket number b1, b3 [50 USC 3024(i)]

[REDACTED] the Honorable Michael W. Mosman of this Court approved the Government's Application and issued orders requiring the production of the b1, b3 [50 USC 3024(i)]

[REDACTED] As requested by the Government, the Court's authorization expires on November 28, 2015, at 5:00 p.m. Eastern Time.

(S//OC/NF) The Government's Application in docket number b1, b3 [50 USC 3024(i)] sought Court approval to retain and use after November 28, b1, b3 [50 USC 3024(i)] [REDACTED] previously produced in response to orders of this Court. The Government would maintain access to the b1, b3 [50 USC 3024(i)] [REDACTED] after November 28,

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~~50~~

2015 in furtherance of predicated investigations to protect against the international terrorism activities of ~~b1, b3 [50 USC 3024(i)]~~
~~_____~~. In its Primary Order in docket number ~~b1, b3 [50 USC 3024(i)]~~, the Court stated that it was taking under advisement the request to retain and use the bulk ~~b1, b3 [50 USC 3024(i)]~~ after November 28, 2015, and that it would address the request in a subsequent order or orders. Primary Order, docket number ~~b1, b3 [50 USC 3024(i)]~~, at 13-14. Accordingly, the Primary Order did not authorize retention and use of the bulk ~~b1, b3 [50 USC 3024(i)]~~ after November 28, 2015. On September 17, 2015, the Court issued an order appointing an amicus curiae, pursuant to 50 U.S.C. § 1803(i)(2)(B), "to address whether the government's above-described requests to retain, search and analyze, for foreign intelligence purposes, ~~b1, b3 [50 USC 3024(i)]~~ after November 28, 2015, are precluded by section 103 of the USA FREEDOM Act or any other provision of that Act." Order Appointing an Amicus Curiae, docket number ~~b1, b3 [50 USC 3024(i)]~~, at 3.¹

¹ ~~(S//OC/NF)~~ The Court's order appointing the amicus curiae directed him to address whether the USA FREEDOM Act precludes the Government's requests to ~~b1, b3 [50 USC 3024(i)]~~
~~_____~~
~~_____~~
~~_____~~

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II. (U) Analysis of the USA FREEDOM Act

~~(S//OC/NF)~~ As the amicus curiae correctly notes, the text of the USA FREEDOM Act “does not preclude the government’s requested continued use of the [b1, b3 [50 USC 3024(i)]] [REDACTED] after November 28, 2015, but the Act does not permit such use in all contexts and subjects such requests to judicial review.” Mem. of Law by Amicus Curiae Regarding Government’s August 27, 2015, Application to Retain and Use Certain [b1, b3 [50 USC 3024(i)]] [REDACTED] after November 28, 2015, docket number [b1, b3 [50 USC 3024(i)]] b at 9 (Oct. 30, 2015) (Amicus Memorandum of Law). No provision of the USA FREEDOM Act requires any particular disposition, let alone immediate destruction, of records produced to the Government pursuant to a production order entered before the effective date of the USA FREEDOM Act. See id. at 9-10. The Government submits that, in the absence of a statutory requirement to dispose of previously produced information, the authorization to retain bulk [b1, b3 [50 USC 3024(i)]] [REDACTED] b previously produced in response to orders of this Court upon the effective date of the USA FREEDOM Act is a matter to be decided by this Court. See id. at 11 (USA FREEDOM Act Section 104 “empowers the Court to assess and supplement the government’s proposed minimization procedures”).²

² ~~(S//OC/NF)~~ Amicus curiae notes, and the Government agrees, [b1, b3 [50 USC 3024(i)]] [REDACTED]
[REDACTED]

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~~(S//OC/NF)~~ As discussed above, beginning on November 29, 2015, section 103 of the USA FREEDOM Act prohibits applications and orders for the bulk production of tangible things under Section 1861, see, e.g., § 103(a) (requiring that each application under Section 1861 include “a specific selection term to be used as the basis for the production of tangible things sought”), and section 101 provides for a separate process for applications for the targeted production of call detail records (but no similar process for applications for ~~b1, b3 [50 USC 3024(i)]~~ relating to authorized investigations to protect against international terrorism. USA FREEDOM Act, §109(a). The amendments described in sections 101 through 103 of the USA FREEDOM Act are prospective in nature: they prohibit applications and orders for the production of tangible things in bulk made or issued after November 28, 2015. See, e.g., H.R. REP. NO. 114-109, at 17 (section 101 of the USA FREEDOM Act “establish[es] a new, narrowly tailored mechanism for the targeted collection of telephone metadata”) (emphasis added). No provision of the Act, including Sections 101 and 103, addresses the disposition of tangible things produced in bulk pursuant to applications made or orders issued before November 29, 2015.

~~(S//OC/NF)~~ The USA FREEDOM Act’s silence regarding tangible things produced in bulk before November 29, 2015; cannot reasonably be read to prohibit the

~~b1, b3 [50 USC 3024(i)]~~ The USFA does not clearly proscribe such retention and usage.” Id. at 9.

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continued retention and use of such bulk productions. The bulk production of call detail records to NSA was a matter of public record at the time Congress considered the USA FREEDOM Act, and members of Congress, including Senate and House leadership from both parties, and relevant legislative committees b1, b3 [50 USC 3024(i)]

received classified briefings or written notifications b1, b3 [50

. Had it intended to require the destruction of prior bulk productions, Congress would have made any prohibition on the continued use of these records clear in the USA FREEDOM Act. The USA FREEDOM Act, however, is silent regarding prior bulk productions. The USA FREEDOM Act's silence regarding the disposition of prior bulk productions can be reasonably interpreted to mean only that Congress did not intend to mandate particular retention requirements for such productions. See Animal Legal Def. Fund. v. United States Dept. of Agriculture, 789 F.3d 1206, 1217 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (quoting In re Haas, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other ground by In re Griffith, 206 F.3d 1389 (11th Cir. 2000)).

~~(S//OC/NF)~~ The Court has issued particularized minimization procedures for the retention and use of b1, b3 [50 USC 3024(i)] in its first order approving the collection and every order since then. The USA FREEDOM Act made the

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~~SECRET//b1, b3 [REDACTED] ORCON/NOFORN~~

Court's authority to issue such procedures even more express. Section 104(a)(1) of the USA FREEDOM Act requires that, before entering an order for the production of tangible things, the Court must find that the proposed minimization procedures meet the statutory definition of minimization procedures set forth in 50 U.S.C. § 1861(g).

Section 104(a)(2) adds to 50 U.S.C. § 1861(g) a rule of construction:

Nothing in this subsection shall limit the authority of [the FISA Court] to impose additional, particularized minimization procedures with regard to the production, retention, or dissemination of nonpublicly available information concerning unconsenting United States persons, including the additional, particularized minimization procedures related to the destruction of information within a reasonable time period.

The Government agrees with the amicus curiae that this Court may direct the Government to follow particularized minimization procedures for the retention and use of ~~b1, b3 [50 USC 3024(i)]~~ after November 28, 2015. See Amicus Mem. of Law at 11. The Government requests that the procedures it proposed in its Application in docket number ~~b1, b3 [50 USC 3024(i)]~~ be the procedures that the Court directs it to follow.

III. ~~(S//OC/NF)~~ Response to Amicus' Minimization Proposals

~~(S//OC/NF)~~ The amicus curiae suggests that the Court may want to consider or inquire about certain aspects of the proposed minimization procedures (discussed in detail below). The proposed minimization procedures are based on the particularized minimization procedures ~~b1, b3 [50 USC 3024(i)]~~

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b1, b3 [50 USC] to be consistent with the Constitution and FISA b1, b3 [50 USC 3024(i)]

[REDACTED]

Government respectfully submits that the proposed minimization procedures also meet the statutory definition of minimization procedures and no additional procedures are necessary.

A. ~~(S//OC/NF)~~ b1, b3 [50 USC 3024(i)] Is Unnecessary Because the Existing Querying Restrictions Provide Sufficient Protections.

~~(S//OC/NF)~~ The amicus curiae suggests that the Court consider imposing as a new minimization procedure a requirement t b1, b3 [50 USC 3024(i)]

[REDACTED]

[REDACTED]. Amicus Mem. of Law at 15. The Government respectfully submits that b1, b3 [50 USC] is not necessary given the effective existing procedures. b1, b3 [50 USC 3024(i)]

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b1, b3 [50 USC 3024(i)]



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~~SECRET~~ [REDACTED] //ORCON//NOFORN

b1, b3 [50 USC 3024(i)]



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~~SECRET~~ ~~b1~~ //ORCON//NOFORN

b1, b3 [50 USC 3024(i)]



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b1, b3 [50 USC 3024(i)]



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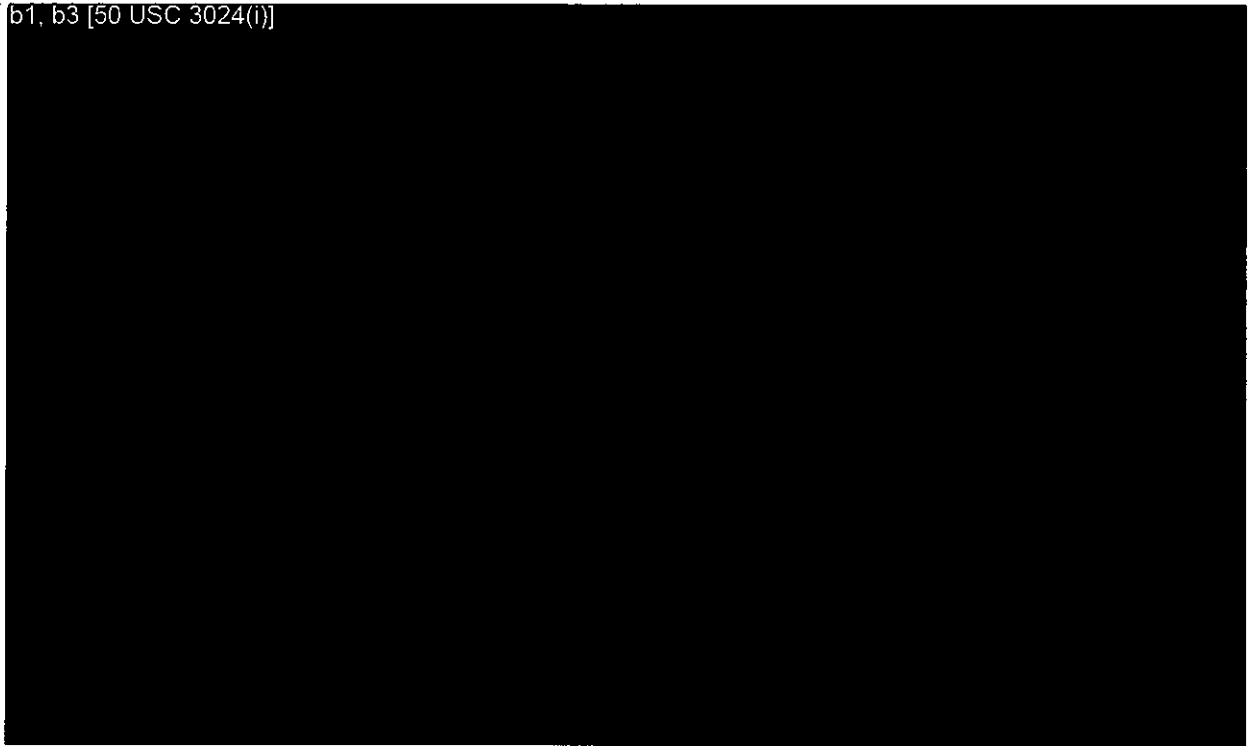
b1, b3 [50 USC 3024(i)]



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b1, b3 [50 USC 3024(i)]



B. ~~(S//OC/NF)~~ The b1, b3 [50 USC 3024(i)] Continue to Have Significant Intelligence Value Even as they Age.

(S//OC/NF) The amicus curiae also suggests that the Court c b1, b3 [50 USC 3024(i)]



b1, b3 [50 USC 3024(i)] Amicus Mem. of Law at 15. As written, the minimization procedures satisfy all statutory requirements b1, b3 [50 USC 3024(i)]



~~(S//OC/NF)~~ b1, b3 [50 USC 3024(i)]



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b1, b3 [50 USC 3024(i)]

[REDACTED]

~~(S//OC/NF)~~ The Government reports to the Court in each renewal application the extent to which its reporting includes information obtained from b1, b3 [50 USC 3024(i)]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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b1, b3 [50 USC 3024(i)]



~~SECRET~~ ~~b1, b3~~ ~~//ORCON/NOFORN~~

~~SECRET//b1. [REDACTED] //ORCON/NOFORN~~

b1, b3 [50 USC 3024(i)]



~~SECRET//b1. [REDACTED] //ORCON/NOFORN~~

~~SECRET//b1, b3 [50 USC 3024(i)] //ORCON/NOFORN~~

b1, b3 [50 USC 3024(i)]

C. ~~(S//OC/NF)~~ The Proposed Minimization Procedures Have Already Created an Effective Process by Which Records Are Destroyed in a Timely Manner.

~~(S//OC/NF)~~ The amicus curiae further suggests that the Court inquire into ~~b1, b3 [50 USC 3024(i)]~~

plans for destroying records that reach the end of their retention period. Here, too, the Government agrees that the Court is authorized to impose particularized minimization procedures concerning the length of the Government's retention of the ~~b1, b3 [50 USC 3024(i)]~~

~~b1, b3 [50 USC 3024(i)]~~ But the amicus curiae is incorrect in stating that the USA

FREEDOM Act requires the "prompt destruction" of previously produced ~~b1, b3 [50 USC 3024(i)]~~

~~b1, b3 [50 USC 3024(i)]~~. See Amicus Mem. of Law at 15. Prompt destruction is a statutory requirement for the ~~b1, b3 [50 USC 3024(i)]~~. See 50

U.S.C. § 1861(c)(2)(F) (an order for ~~b1, b3 [50 USC 3024(i)]~~ must

direct the Government to "adopt minimization procedures that require the prompt

destruction of all call detail records produced under the order that the Government

determines are not foreign intelligence information[.]"). For all other types of

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

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~~SECRET~~ ~~b1, b3~~ ~~ORCON/NOFORN~~

retention is measured against a reasonableness standard. See USA FREEDOM Act, § 104(a)(2) (describing Court's authority to impose "additional, particularized procedures related to the destruction of information within a reasonable time period"). In this case, the particularized minimization procedures in place already create a reasonable process for identifying and destroying data in a timely way.

b1, b3 [50 USC 3024(i)]



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b1, b3 [50 USC 3024(i)]



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~~SECRET~~ ~~b1~~ ~~//ORCON/NOFORN~~

b1, b3 [50 USC 3024(i)]



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~~SECRET//b1 [REDACTED] //ORCON/NOFORN~~

b1, b3 {50 USC 3024(i)}



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b1, b3 [50 USC 3024(i)]



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b3 [50 USC 3024(i)]



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IV. (U) Conclusion

~~(S//OC/NF)~~ For the foregoing reasons, the USA FREEDOM Act does not preclude, and this Court may approve, the Government's retention and use of previously produced ~~b1, b3 [50 USC 3024(i)] [REDACTED]~~ for the purpose described in the Government's Application in ~~b1, b3 [50 USC 3024(i)] [REDACTED]~~ as further described above.

Respectfully submitted,

John P. Carlin
Assistant Attorney General



Stuart J. Evans
Deputy Assistant Attorney General

11/6/15

Date

b6


National Security Division
U.S. Department of Justice

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~~SECRET//b1 [REDACTED] /ORCON/NOFORN~~

(U) CERTIFICATE OF SERVICE

~~(S//OC/NF)~~ I hereby certify that on November 6, 2015, I filed a true and correct copy of the foregoing Response to the Memorandum of Law by Amicus Curiae, in Docket Number ~~b1, b3 [50]~~ [REDACTED], with the Clerk of Court who will transmit a true copy via appropriate secure means to:

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[REDACTED]

National Security Division
U.S. Department of Justice

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