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LeeAnn Flynn Hall, Clerk of Court

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

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

Docket Number: [REDACTED]

[REDACTED]

OPINION AND ORDER

On August 27, 2015, this Court issued orders directing [REDACTED]

[REDACTED]

[REDACTED] certain [REDACTED]. The Court's authorization is set to expire at 5:00 p.m. Eastern Time on November 28, 2015, the day before amendments in the USA FREEDOM Act take effect that prohibit the Foreign Intelligence Surveillance Court (FISC) from authorizing any further bulk collection of tangible things by the government. USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 103, 129 Stat. 268, 272; see also *id.* § 109(a), 129 Stat. at 276.

The Court took under advisement the government's request to continue to retain, search and analyze, for foreign intelligence purposes, [REDACTED] that are being produced under this Court's orders and have been produced pursuant to prior orders issued by the FISC. Primary Order at 13-14 *In Re Application of the FBI for an Order Requiring the Production of Tangible Things* [REDACTED]

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b1, b3 [50 USC 3024(i)] Docket No. b1, b3 [50 USC 3024(i)] (FISA Ct. Aug. 27, 2015) (Primary Order). On September 17, 2015, the Court appointed attorney Preston Burton to serve as amicus curiae in this matter pursuant to 50 U.S.C. § 1803(i)(2)(B), and directed him to address whether the government's request to retain and use the b1, b3 [50 USC 3024(i)] b was precluded by Section 103 of the USA FREEDOM Act or any other provision of that Act. Order Appointing an Amicus Curiae, Docket No. b1, b3 [50 USC 3024(i)] (FISA Ct. Sept. 17, 2015). Following briefing by the Amicus Curiae and the government pursuant to a Briefing Order entered on October 7, 2015, the Court held a hearing on November 20, 2015, in which the Amicus Curiae and the government participated.<sup>1</sup> At the Court's request, the government filed Attorney General-adopted minimization procedures on November 24, 2015, which the government proposes to apply beginning on November 29, 2015. Notice Regarding Procedures for the Retention and Use After November 28, 2015 of b1, b3 [50 USC 3024(i)] Previously Produced Pursuant to This Court's Orders, Docket No. b1, b3 [50 USC 3024(i)] (Nov. 24, 2015) (Notice).

The Court agrees with Amicus Curiae and the government that the USA FREEDOM Act does not prohibit the government from continuing to retain and use b1, b3 [50 USC 3024(i)] that have been acquired pursuant to orders of the FISC. Mem. of Law by Amicus Curiae Regarding Government's August 27, 2015, Application to Retain and Use Certain b1, b3 [50 USC 3024(i)] after November 28, 2015 at 9-10, Docket No. b1, b3 [50 USC 3024(i)] Oct. 30,

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<sup>1</sup> The Court wishes to thank Mr. Burton for his work in this matter. His written and oral presentations were extremely informative to the Court's consideration of the issues addressed herein. The Court is grateful for his willingness to serve in this capacity.

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2015); Response of the U.S. to the Mem. of Law by Amicus Curiae at 6, Docket No. [REDACTED] (Nov. 6, 2015). Section 103 of the USA FREEDOM Act, entitled “Prohibition on Bulk Collection of Tangible Things,” plainly prohibits any further bulk collection of tangible things pursuant to 50 U.S.C. § 1861 after November 28, 2015. To that end, Section 103 requires that all FISA business records applications brought after November 28 must include a “specific selection term to be used as the basis for the production of the tangible things sought.” Pub. L. No. 114-23 § 103, 129 Stat. at 272; *see also id.* §109, 129 Stat. at 276. “Specific selection term” is defined in pertinent part as “a term that specifically identifies a person, account, address, or personal device, or any other specific identifier,” and that “is used to limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking the tangible things.” *See id.* § 107, 129 Stat. at 274. “The ‘specific selection term’ required in each [FISA business records] application is the mechanism by which the Act prohibits the indiscriminate, bulk collection of any type of tangible thing under [50 U.S.C. §1861].” H.R. Rep. No. 114-109, pt. 1 at 19 (2015).

But while Section 103 clearly forecloses the issuance of additional bulk *collection* after November 28, 2015, it does not by its terms address the *retention or use* after that date of the [REDACTED] previously collected in bulk. Indeed, no provision of the USA FREEDOM Act requires the destruction of the [REDACTED] acquired by the government through November 28, or dictates any other particular disposition of these records.

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As this Court noted previously,<sup>2</sup> Congress passed the USA FREEDOM Act after extensive hearings and public debate, and with full knowledge of the government's bulk collection, retention, and use of business records pursuant to Section 1861. In Section 103 of the USA FREEDOM Act, Congress directed that further bulk collection end after November 28, 2015. Congress had every opportunity to direct a particular disposition of the bulk business records already in the government's possession on November 28, but it chose not to do so. Instead, Congress furnished a legal framework for analyzing the government's request to retain and use the b1, b3 [50 USC 3024(i)]

The USA FREEDOM Act retains the preexisting requirement of Section 1861 that each FISA business records application include "an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination" of the tangible things to be produced in response to the order. *See* 50 U.S.C. 1861(b)(2)(B), which, effective November 29, will be renumbered as Section 1861(b)(2)(D). Subsection (g), in turn, provides that

the term "minimization procedures" means -

(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

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<sup>2</sup> *See* Opinion and Order at 11, Docket Nos. b1, b3 [50 USC 3024(i)] FISA Ct. Jun. 29, 2015).

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(B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 1801(e)(1) of this title, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; and

(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.

50 U.S.C. 1861(g)(2).

The foregoing definition of "minimization procedures" - which was not altered by the USA FREEDOM Act<sup>3</sup> - provides the standards for evaluating the manner in which the government proposes to retain and handle information acquired pursuant to FISA business records orders. The question is whether the minimization procedures that the government proposes to apply to the b1, b3 [50 USC 3024(i)] in its possession on November 29, 2015, satisfy the requirements of this definition. The Court concludes that they do.

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<sup>3</sup> The USA FREEDOM Act made several minimization-related changes to Section 1861. For instance, Section 1861 now provides that, before granting a business records application, the Court must expressly find that the minimization procedures put forth by the government "meet the definition of minimization procedures under subsection (g)." See Pub. L. No. 114-23 §104(a)(1), 129 Stat. at 272. This change is not substantive, however, as such a finding was previously implicit in the broader finding required by Section 1861(c)(1) - i.e., "that the application meets the requirements of subsections (a) and (b)." As noted in the text above, among the requirements of subsection (b) was - and still is - the requirement that the application include an enumeration of Attorney General-adopted minimization procedures that meet the definition set forth in subsection (g). A new "rule of construction" has been added to clarify the Court's authority "to impose additional, particularized minimization procedures with regard to the production, retention, or dissemination" of certain information regarding United States persons, "including ... procedure related to the destruction of information within a reasonable time period." See *id.* §104(a)(2), 129 Stat. at 272.

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b1, b3 [50 USC 3024(i)]

[REDACTED]

[REDACTED] Based on this additional information, the Court is satisfied that the government has a continuing need to retain and use the [REDACTED]

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b1, b3 [50 USC 3024(i)] [REDACTED] it has acquired pursuant to FISC orders.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

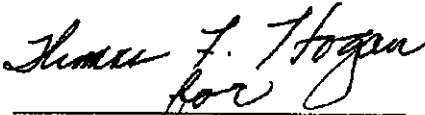
In view of the government's continuing need to retain and use the b1, b3 [50 USC 3024(i)] [REDACTED] obtained pursuant to FISC orders, and the government's history of properly implementing the relevant minimization procedures, the Court finds that the proposed minimization procedures satisfy the requirements of 50 U.S.C. 1861(g), and approves the government's request to continue to retain, search and analyze, for foreign intelligence purposes, the b1, b3 [50 USC 3024(i)] [REDACTED]

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pursuant to FISC orders, subject to the minimization procedures that the government filed on November 24, 2015.

SO ORDERED, this 24<sup>th</sup> day of November, 2015, in Docket No. b1, b3 [50]



**MICHAEL W. MOSMAN**  
Judge, United States Foreign  
Intelligence Surveillance Court

b6 Security Clerk,  
FISC, hereby certifies that this document is a  
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