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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL BUREAU OF INVESTIGATION FOR ORDERS REQUIRING THE PRODUCTION OF CALL DETAIL RECORDS

Docket Number: [redacted]

MEMORANDUM OPINION

On November 30, 2015, the Court issued a Primary Order granting the United States of America's (the "Government's") Verified Application for Orders Requiring the Production of Call Detail Records (the "Verified Application"), which sought to require that certain call detail records[1] relating to authorized investigations to protect against international terrorism be produced to the National Security Agency ("NSA") on an ongoing and daily basis pursuant to Section 501 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1861 (2015) ("FISA"). *See* Primary Order at 3; Verified App. at 1. The requested call detail records are believed to be in the possession of [redacted] (collectively referred to as the "Providers"). Verified App. at 2. For the reasons stated in the Primary Order, as well as those that follow, the Court has concluded that the Verified Application satisfies FISA's statutory requirements and supports the required judicial findings and directives. Although the Verified Application presented the first occasion for this Court to apply the standards set forth in Sections 101 and 103 of the Uniting and Strengthening

[1] Also referred to herein by the acronym "CDR."

America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. 114-23, 129 Stat. 268 (2015), the Court detected only one issue that potentially implicated Section 103(i) of FISA, which addresses the appointment of an amicus curiae, but that issue never materialized so no amicus curiae was required.

BACKGROUND

Section 501 of FISA, as previously amended by Section 215 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) ("USA PATRIOT Act"),[2] authorizes applications for orders requiring the production of tangible things -- commonly referred to as "business records" -- for investigations to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, so long as such investigations of United States persons are not conducted solely on the basis of activities protected by the First Amendment to the United States Constitution. 50 U.S.C. § 1861(a)(1). On June 2, 2015, Congress enacted the USA FREEDOM Act to amend Section 501 of FISA by, among other things, prohibiting the bulk collection of business records and "creat[ing] a new program for the targeted collection of telephone metadata . . . ." H.R. Rep. No. 114-109, at 2 (2015), *available at* http://www.congress.gov/congressional-report/114th-congress/house-report/109/1. To effectuate the ban on bulk

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[2] Although FISA has been amended numerous times since its inception, the Court makes particular reference to Section 215 of the USA PATRIOT Act because Section 501 of FISA, as codified at 50 U.S.C. § 1861, is "also known as Section 215 of the USA PATRIOT Act[.]" *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Am. Mem. Op. 2, No. BR 13-109 (F.I.S.C. 2013), *available at* http://www.fisc.uscourts.gov/public-filings/amended-memorandum-opinion-and-primary-order.

collection of business records, Section 103 of the USA FREEDOM Act requires that "a specific selection term . . . be used as the basis for the production of the tangible things sought." § 103, 129 Stat. at 272. In addition, Section 101 of the USA FREEDOM Act ensures the targeted collection of telephone metadata by establishing distinct requirements that apply to applications for, as well as orders authorizing, "the production on an ongoing basis of call detail records created before, on, or after the date of the application relating to an authorized investigation (other than a threat assessment) . . . to protect against international terrorism . . . ." §§ 101(a)(3), 101(b)(3), 129 Stat. at 269-270. Sections 101 and 103 of the USA FREEDOM Act became effective on November 29, 2015, *see* § 109(a), 129 Stat. at 276 (stating that "[t]he 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"), and the Court entertained the Government's Verified Application the following day on November 30, 2015. Accordingly, the Court's analysis of the Verified Application was conducted pursuant to Section 501 of FISA as amended by Sections 101 and 103 of the USA FREEDOM Act.

STATUTORY REQUIREMENTS

For applications like this one, in which the Government is seeking the ongoing daily production of call detail records relating to an authorized international terrorism investigation that is not a threat assessment, the amended FISA now states that a judge shall enter the ex parte order requested by the Government if the judge makes two findings. The first required finding is that the application meets the requirements of subsections (a) and (b) of Section 501. To satisfy the requirements of subsection (a) and (b) of Section 501, the Government's investigation must be conducted under guidelines approved by the Attorney General pursuant to Executive Order

12333 ("EO 12333") and shall not be conducted of a United States person solely on the basis of activities protected by the First Amendment. In addition, the application must:

- be made to a judge of the Foreign Intelligence Surveillance Court ("FISC");[3]
- include a specific selection term as the basis for the requested production of tangible things;
- contain a statement of facts showing that "there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term . . . are relevant to [an authorized investigation to protect against international terrorism that is conducted pursuant to EO 12333 guidelines approved by the Attorney General and not conducted of a U.S. person solely based on activities protected by the First Amendment]";
- contain a statement of facts showing that "there is a reasonable, articulable suspicion[4] that such specific selection term is associated with a foreign power engaged in international terrorism or activities in preparation therefor, or an agent of a foreign power engaged in international terrorism or activities in preparation therefor"; and
- enumerate "the minimization procedures adopted by the Attorney General . . . that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application."

50 U.S.C. § 1861(a), (b).

The second required judicial finding is that the minimization procedures submitted by the Government in accordance with Section 501(b)(2)(D) meet the definition of minimization

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[3] The FISA also permits the Government to make an application to "a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of [the FISC]." 50 U.S.C. § 1861(b)(1)(B).

[4] Colloquially referred to by the acronym "RAS."

procedures found in Section 501(g)(2). Section 501(g)(2) was not altered by the USA FREEDOM Act and is discussed in greater detail below.

If a judge makes these two findings, the amended FISA further requires that the ex parte order granting the Government's application shall do the following:

- describe the tangible things to be produced with sufficient particularity to permit them to be "fairly identified" and include each specific selection term that is to be used as the basis for the production;
- identify the date when the tangible things must be provided, allowing for a reasonable period of time to assemble the tangible things and make them available;
- provide "clear and conspicuous notice" of the nondisclosure principles and procedures described in Section 501(d) of FISA;
- only require the production of tangible things that can be obtained with a subpoena duces tecum issued by a federal court in aid of a grand jury investigation or any other federal court order directing the production of tangible things;
- not disclose that the order is issued for the purpose of an investigation described in Section 501(a) of FISA;
- authorize the daily production of call detail records for a period of up to 180 days;
- provide that the order may be extended upon an application made under Section 501(b) of FISA and the judicial finding under Section 501(c)(1);
- provide that the Government may require the "prompt" production of a first set of call detail records (referred to as the first "hop") using the specific selection term that satisfies the standard of Section 501(b)(2)(C)(ii), which requires a "reasonable, articulable suspicion that such specific selection term is associated with a foreign power engaged in international terrorism or activities in preparation therefor, or an agent of a foreign power engaged in international terrorism or activities in preparation therefor";
- provide that the Government may require the "prompt" production of a second set of call detail records (referred to as the second "hop") using

"session-identifying information" or a telephone calling card number identified by the specific selection term used to produce the first "hop";

- provide that produced records be in a form that will be useful to the Government;

- direct that the Providers "furnish the Government forthwith all information, facilities, or technical assistance necessary to accomplish the production in such a manner as will protect the secrecy of the production and produce a minimum of interference with the services that such person is providing to each subject of the production";

- 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"; and

- direct the Government to "destroy all call detail records produced under the order as prescribed by such procedures."

50 U.S.C. § 1861(c)(2).

ANALYSIS OF THE APPLICATION

A. The Government's Verified Application Meets the Requirements of Subsections (a) and (b) of Section 501

As already indicated, the first judicial inquiry under the new statutory framework is whether the application submitted by the Government meets the requirements of subsections (a) and (b) of Section 501 of FISA. 50 U.S.C. § 1861(c)(1). From the Court's perspective, the principal concerns of this inquiry are whether (1) the application includes the required specific selection term, (2) the application contains a statement of facts showing that there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term are relevant to an authorized international terrorism investigation, and (3) the application contains a statement of facts showing that there is a reasonable, articulable suspicion that such specific selection term is associated with a foreign power or an agent of a foreign power engaged in international terrorism or activities in preparation therefor. 50 U.S.C.

§ 1861(b)(2)(C)(i)-(ii), (c)(1). The following discussion addresses each of these principal concerns in turn, albeit the Court notes that, as previously found in the Primary Order issued on November 30, 2015, the Government's Verified Application otherwise complies with all other statutory requirements mandated in subsections (a) and (b) of Section 501. *See* Primary Order at 1-3.

1. The Government's Verified Application includes "specific selection terms" as required by FISA

Section 501 of FISA, as amended by the USA FREEDOM Act, now requires that each application for business records must include a "specific selection term" that will be used as the basis for the production of the records. 50 U.S.C. § 1861(b)(2)(A). FISA defines the phrase "specific selection term" differently depending on whether the Government seeks the ongoing daily production of call detail records related to an authorized international terrorism investigation, as is the case here, versus all other requests for tangible things. *Compare* 50 U.S.C. § 1861(k)(4)(A)(i) (defining the term in relation to all requests for the production of tangible things except requests for call detail records), *with* 50 U.S.C. § 1861(k)(4)(B) (defining the term in relation to requests for the production of call detail records). For requests for the ongoing daily production of call detail records related to an authorized international terrorism investigation, FISA defines the phrase "specific selection term" to mean "a term that specifically identifies an individual, account, or personal device." 50 U.S.C. § 1861(k)(4)(B). Because FISA does not further define the terms "individual, account, or personal device," those terms will be construed according to their ordinary meanings.[5] *See Smith v. United States*, 508 U.S. 223, 228

[5] The term "individual" is ordinarily understood to mean relating to, or existing, as one member or part of a larger group, the term "account" means an arrangement for regular dealings

(1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

The Government's Verified Application identifies [redacted] specific selection terms [redacted]. Verified App. at 2-3, Tab 1. Applying the ordinary meanings of "individual, account, or personal device," each of the [redacted] specific selection terms satisfy the statute. [redacted]

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or services with a business, and the term "personal device" means an object, machine or piece of equipment made for a special purpose. Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/individual, /account, /personal, /device (last visited Nov. 30, 2015). The Report of the United States House of Representatives Committee on the Judiciary that accompanied the USA FREEDOM Act states that "the term 'personal device' refers to a device that can reasonably be expected to be used by an individual or a group of individuals affiliated with one another" and cites as examples "a telephone used by an individual, family, or housemates, a telephone or computer provided by an employer to an employee or employees, a home computer or tablet shared by a family or housemates, and a Wi-Fi access point that is exclusively available to the inhabitants of a home, the employees of a business, or members of an organization." H.R. Rep. No. 114-109, pt. 1, at 20 (2015), *available at* 2015 WL 2151633. The Report goes on to state that such a device "would include a local area network server that is used by a business to provide e-mail to its employees" but would not include "devices that are made available for use by the general public or by multiple people not affiliated with one [an]other, such as a pay phone available to the public, a computer available to library patrons to access the Internet, or a Wi-Fi access point made available to all customers at an Internet café," or "devices that are used by companies to direct public communications, such as a router used by an Internet service provider to route e-mails sent by its customers, or a switch used by a telecommunications carrier to route calls made by its customers." *Id.* This characterization of the term "personal device" is generally consistent with the ordinary meaning of the phrase.

[redacted]

2. The Government's Verified Application includes the required statement of facts showing there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection terms are relevant to an authorized international terrorism investigation

Section 501(b)(2)(C)(i) of FISA requires that an application seeking the ongoing production of call detail records relating to an authorized international terrorism investigation contain "a statement of facts showing that . . . there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term required under [Section 501(b)(2)(A)] are relevant to such investigation." 50 U.S.C. § 1861(b)(2)(C)(i). The Government's Verified Application states that "[t]he FBI is conducting numerous predicated

6 [redacted]

investigations to protect against the international terrorism activities of [redacted] (the 'Foreign Power') under guidelines approved by the Attorney General pursuant to Executive Order 12333, as amended." Verified App. at 5, ¶ 3. The application then points to Paragraph 4 and Tab 1 for the statement of facts setting forth grounds to believe that the call detail records sought to be produced based on the specific selection terms are relevant to those investigations. *Id.* (stating that "[t]he facts set forth below and in Tab 1 to this application establish reasonable grounds to believe that the call detail records sought to be produced based on the specific selection terms listed above are relevant to an authorized investigation (other than a threat assessment) to protect against international terrorism").

In Paragraph 4, the Government asserts that foreign terrorist organizations, their agents, and individuals associated with them, [redacted] use the international telephone system [redacted] to communicate with one another all over the world and within the United States, and that "[i]ndividuals associated with the foreign terrorist organizations and their agents also place or receive domestic telephone calls [redacted] on their phones when they are in the United States." Verified App. at 6, ¶ 4. The Government therefore posits that both domestic calls and calls with one end in the United States, [redacted] "are analytically significant because they may identify individuals associated with the Foreign Power whose activities may include planning and facilitating attacks against the homeland." *Id.*

Tab 1 offers facts particular to each identified specific selection term. Verified App. at Tab 1, [redacted] specific selection terms involve [redacted] for which this Court has previously found a reasonable, articulable suspicion to

believe that the [redacted] is associated with [redacted] or one of its associated terrorist organizations, [redacted] the Court has previously found probable cause to believe that the individual using [redacted] is an agent of [redacted]. Verified App. at Tab 1, [redacted]. As far as specific selection terms [redacted] are concerned, the Government states that the first number is a [redacted]

[redacted]

[redacted]

Turning back to paragraph 4 of the application, the Government explains that using the specific selection terms as the seeds for the initial production of call detail records (the first "hop") will return call detail records, including all identifiers and their associated metadata, that identify a contact or connection with those specific selection terms. Verified App. at 6, ¶ 4. In other words, using the [redacted] numbers that have been identified as specific selection terms in this application will result in the production of call detail records that have a contact with, and/or connection to, those [redacted] numbers. Taking into consideration the facts that the Government is conducting numerous predicated investigations to protect against [redacted] under guidelines that have been approved by the Attorney General in accordance with Executive Order 12333, the specific selection terms involve [redacted] that are used by individuals who this Court has previously found probable cause to believe are agents [redacted] or who [redacted] are members [redacted] or are associated with [redacted] for which the Court has previously found a reasonable, articulable suspicion

to believe it is associated [redacted] and the call detail records to be produced based on the specific selection terms will identify a contact or connection with those specific selection terms, the Court has no reservation about concluding that the call detail records to be produced are relevant[8] to the Government's authorized investigations to protect against [redacted]

The Government further states that the second "hop" -- which the FISA contemplates will be based on "session-identifying information or a telephone calling card number identified by the specific selection term" used to produce the first "hop" call detail records[9] -- will return results that consist of all identifiers and their associated metadata that have a contact or connection with an identifier revealed by the first "hop."[10] Verified App. at 6, ¶ 4. The Government contends that:

> Obtaining the second 'hop' results enhances the Government's ability to find, detect and identify the Foreign Power, its agents, and those affiliated with them by greatly increasing the chances that previously unknown Foreign Power-associated identifiers (and operatives) may be uncovered. A RAS-approved specific selection

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[8] Like many terms discussed in this opinion, the term "relevant" is not defined in FISA. The ordinary meaning of the term "relevant" is "relating to a subject in an appropriate way." Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/relevant (last visited Nov. 30, 2015). When used in jurisprudence, relevancy is generally understood to mean "[a]pplicability to the issue joined." Black's Law Dictionary 1290 (6th ed. 1990). The Court concludes that the call detail records in the first "hop" are "relevant" under any such definition of the term as it is commonly understood.

[9] 50 U.S.C. § 1861(c)(2)(F)(iv).

[10] Before the USA FREEDOM Act was enacted, the Government received from certain telephone providers call detail records in bulk, i.e., without any nexus to particular telephone identifiers, but could query the bulk records only within two "hops" of a selection term for which the Court found a reasonable, articulable suspicion to believe that the selection term was related to a targeted foreign power. Although the USA Freedom Act ended the bulk collection of call detail records, it nonetheless preserved the Government's ability to query two "hops" from a Court-approved specific selection term.

> term, for example, may be in contact with a previously unknown telephone number. By allowing the Government to examine the contacts made by that previously unknown number, the second hop results may reveal a contact with other telephone identifiers already known to be associated with the Foreign Power, thus establishing that the previously-unknown identifier is itself likely associated with the Foreign Power or its agents. Thus, CDRs generated that include a second 'hop' reasonably could lead to the identification of telephone identifiers, and ultimately persons that could bear on or assist in the ultimate goal of the authorized investigation -- to prevent terrorist attacks on U.S. soil or against U.S. interests abroad.

Verified App. at 6-7, ¶ 4. This contention suggests that the call detail records produced by the second "hop" also will be relevant to the authorized investigations to protect against [redacted] international terrorism activities. The Court concludes, however, that no such relevance showing is required for the call detail records produced during the second "hop."

The fact that no relevance showing is required for call detail records produced during the second "hop" is evident from the plain language and structure of the statute. Section 501(c)(2)(F) of the amended FISA now states in relevant part that a judicial order granting an application for the ongoing production of call detail records for an authorized international terrorism investigation shall:

> (iii) [P]rovide that the Government may require the prompt production of a first set of call detail records using the specific selection term that satisfies the standard required under subsection (b)(2)(C)(ii);
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> (iv) [P]rovide that the Government may require the prompt production of a second set of call detail records using session-identifying information or a telephone calling card number identified by the specific selection term used to produce call detail records under clause (iii);

50 U.S.C. § 1861(c)(2)(F)(iii), (iv) (emphases added). Section 501(b)(2)(C)(i) requires that the application contain "a statement of facts showing that . . . there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term required under [Section 501(b)(2)(A)] are relevant to such investigation." 50 U.S.C. § 1861(b)(2)(C)(i)

(emphasis added). Because Section 501(b)(2)(C)(i) expressly limits this relevance determination to the call detail records that will be produced "based on the specific selection term," whereas Section 501(c)(2)(F)(iv) (i.e., the second "hop") distinguishes the production of the second set of call detail records as being based on "session-identifying information or a telephone calling card number identified by the specific selection term used to produce call detail records under clause (iii) [the first "hop"]," it is manifest that the relevance determination required in Section 501(b)(2)(C)(i) does not apply to the second "hop."

For whatever it is worth, the legislative history discussing the first "hop" and second "hop" call-detail-record-production processes bolsters the Court's conclusion by stating:

> The government may require the production of up to two "hops" – i.e., the call detail records associated with the initial seed telephone number and call detail records (CDRs) associated with the CDRs identified in an initial "hop." Subparagraph (F)(iii) provides that the government can obtain the first set of CDRs using the specific selection term approved by the FISC. In addition, the government can use the FISC-approved specific selection term to identify CDRs from metadata it already lawfully possesses. Together, the CDRs produced by the phone companies and those identified independently by the government constitute the first "hop." Under subparagraph (F)(iv), the government can then present session identifying information or calling card numbers (which are components of a CDR, as defined in section 107) identified in the first "hop" CDRs to phone companies to serve as the basis for companies to return the second "hop" of CDRs.

H.R. Rep. No. 114-109, at 17, *available at* http://www.congress.gov/ congressional-report/114th-congress/house-report/109/1 (emphases added). The legislative history therefore recognizes a statutory distinction between the "specific selection term" used to conduct the first "hop" versus the "session-identifying information" that is used to conduct the second "hop."

By limiting the relevance determination required in Section 501(b)(2)(C)(i) to the call detail records that will be produced "based on the specific selection term" -- which FISA provides in Section 501(c)(2)(F)(iii) will be the basis for the first "hop" production but not the

basis of Section 501(c)(2)(F)(iv)'s second "hop" production -- Section 501(b)(2)(C)(i) requires a judicial finding of relevance only for the call detail records that will be produced during the first "hop."

C. The Government's Verified Application contains the required statement of facts showing there is a reasonable, articulable suspicion that the specific selection term is associated with a foreign power engaged in international terrorism or activities in preparation therefor, or an agent of a foreign power engaged in international terrorism or activities in preparation therefor

In addition to the relevance determination, Section 501 of FISA as amended by the USA FREEDOM Act now requires the Court to make a finding that the application contains a statement of facts showing that there is a reasonable, articulable suspicion that the specific selection term is associated with a foreign power engaged in international terrorism or activities in preparation therefor, or an agent of a foreign power engaged in international terrorism or activities in preparation therefor. 50 U.S.C. § 1861(b)(2)(C)(ii). The Supreme Court has noted that "[t]he concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (internal quotation marks omitted). In the context of criminal cases, however, the Supreme Court has observed that reasonable suspicion "is a less demanding standard than probable cause." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

Section 501 of FISA defines "foreign power" and "agent of a foreign power" to "have the meanings provided those terms in [S]ection 101." 50 U.S.C. § 1861(k)(1). The relevant provisions of Section 101 of FISA define "foreign power" to mean "a group engaged in international terrorism or activities in preparation therefor," *id.* § 1801(a)(4), and "agent of a foreign power" to mean "any person other than a United States person, who . . . engages in

international terrorism or activities in preparation therefore [sic]," *id.* § 1801(b)(1)(C), "any person who . . . knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power," *id.* § 1801(b)(2)(C), or "any person who . . . knowingly aids or abets any person in the conduct of [international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power] or knowingly conspires with any person to engage in [such] activities," *id.* § 1801(b)(2)(E). Section 501 further defines "international terrorism" to mean the following:

> [A]ctivities that –
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> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
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> (2) appear to be intended –
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> (A) to intimidate or coerce a civilian population;
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> (B) to influence the policy of a government by intimidation or coercion; or
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> (C) to affect the conduct of a government by assassination or kidnapping; and
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> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Id. § 1801(c).

The Government's application relies on the same statements of fact found in paragraph 4 and Tab 1 to establish the required reasonable, articulable suspicion that the specific selection terms are associated with a foreign power engaged in international terrorism or activities in preparation therefor, or an agent of a foreign power engaged in international terrorism or activities in preparation therefor. Verified App. at 5, ¶ 3. Those statements of fact reflect [redacted]

[redacted] terrorist organization and individuals associated [redacted] might be engaged in activities that include planning and facilitating attacks against the United States. Verified App. at 6, ¶ 4. In addition, specific selection term [redacted] is a [redacted] number the Court previously found is associated [redacted] and is used by [redacted] who is an agent [redacted] *Id.* at Tab 1, [redacted] Likewise, specific selection term [redacted] is a [redacted] number the Court previously found there is a reasonable, articulable suspicion to believe is associated [redacted] and is being used by [redacted]

[redacted]

Specific selection term [redacted] is a [redacted] number the Court previously found a reasonable, articulable suspicion to believe is associated [redacted] and is used by [redacted] who the Court previously found probable cause to believe is an agent [redacted] *Id.* at Tab 1, [redacted] Finally, specific selection terms [redacted] are, respectively, [redacted] number, [redacted] and [redacted] number that [redacted] In totality, these statements of fact support a finding that there is a reasonable, articulable suspicion that the specific selection terms are associated [redacted] or agents thereof -- which the Court has on numerous occasions concluded is a foreign power engaged in international terrorism, as intimated in the facts asserted in Tab 1.

II. Whether the Minimization Procedures Meet the Definition of Minimization Procedures Under Subsection (g)

The second judicial finding required by Section 501 of FISA is a determination that the Government's minimization procedures submitted in accordance with Section 501(b)(1)(D) meet the definition of minimization procedures set forth in Section 501(g)(2). 50 U.S.C. § 1861(c)(1). Section 501(g)(2) was not amended by the USA FREEDOM Act and defines the term "minimization procedures" to mean:

> (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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> (B) procedures that require that nonpublicly available information, which is not foreign intelligence information as defined in section 101(e)(1) 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). After reviewing the minimization procedures, which were submitted as a separate document attached to the Government's Verified Application and titled "Minimization Procedures Used by the National Security Agency In Connection With the Production of Call Detail Records Pursuant to Section 501 of the Foreign Intelligence Surveillance Act, As Amended" (hereinafter referred to as "NSA's Minimization Procedures"), the Court finds that the procedures comply with FISA, including the definition of minimization procedures under Section 501(g)(2).

In addition to other provisos contained in the NSA's Minimization Procedures, Sections C and D address the dissemination and retention of call detail records. Section C of the NSA's Minimization Procedures complies with FISA Section 501(g)'s definitional requirements by stating that, except as otherwise provided, a dissemination based on call detail records of or concerning a U.S. person "will be written so as to focus solely on the activities of foreign entities and persons and their agents," NSA Minimization Procedures § C(1), "foreign intelligence information concerning U.S. persons must be disseminated in a manner [that] does not identify the U.S. person," *id.*, "[g]eneric or general terms or phrases must be substituted for the identity" of a U.S. person, *id.*, and disseminations may identity a U.S. person "only if" the U.S. person "has consented to the dissemination," *id.* § C(2)(a), the information is publicly available, *id.* § C(2)(b), the identity "is necessary to understand the foreign intelligence information or assess its importance," *id.* § C(2)(c), or the identity "is reasonably believed to contain evidence that a crime has been, is being, or is about to be committed, provided that dissemination is for law enforcement purposes," *id.* § C(2)(d). Section C also requires that one of several identified NSA officials determine that the identity of a U.S.-person "is foreign intelligence information related to international terrorism, or is necessary to understand foreign intelligence information related to international terrorism or assess its importance" before such U.S.-person information may be disseminated outside the NSA. *Id.* § C(3). Several of Section C's quoted provisions also satisfy FISA Section 501(g)(2)'s mandate that nonpublicly-available information shall not be disseminated in a way that identifies a U.S. person without his or her consent unless necessary to understand foreign intelligence information or assess its importance, 50 U.S.C. § 1861(g)(2)(B),

and the additional requirement to allow for the retention and dissemination of information that is evidence of a crime, *id.* § 1861(g)(2)(C).

Section D of the NSA's Minimization Procedures complies with the statutory requirement to minimize the retention of nonpublicly-available information about unconsenting U.S. persons by, in relevant part, stating that "NSA personnel will . . . promptly destroy any CDRs [that] are determined not to contain foreign intelligence information." *Id.* § D. Furthermore, "[a]ll call detail records . . . will be destroyed no later than five years (60 months) after their initial collection" except for call detail records that were the basis of an approved dissemination or retained to comply with litigation preservation obligations. *Id.* § D.

While the Court finds that, overall, the NSA's Minimization Procedures comply with the definition of minimization procedures found in Section 501(g)(2), there is a potential statutory conflict that, at first glance, appears to pose a legal conundrum. Although the definition of the term "minimization procedures" found in Section 501(g)(2) was not altered by the USA FREEDOM Act amendments, the USA FREEDOM Act added a new requirement in Section 501(c)(2)(F)(vii)(I) requiring that a judicial order authorizing the ongoing production of call detail records for an authorized international terrorism investigation "shall . . . 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." 50 U.S.C. § 1861(c)(2)(F)(vii)(I) (emphasis added). Section 501(c)(2)(F)(vii)(I)'s requirement calling for the "prompt destruction" of call detail records that the Government determines are not foreign intelligence information seemingly conflicts with the statutory mandate in Section 501(g)(2)(C) that the very same minimization procedures must

"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)(C) (emphasis added). It is possible that, in some situations, evidence of a crime might encompass call detail records that the Government has determined are not foreign intelligence information. In such circumstances, the amended FISA now appears to require that the minimization procedures direct both the prompt destruction and the retention of those same call detail records.

Upon closer inspection, though, the Court concludes that Sections 501(c)(2)(F)(vii)(I) and 501(g)(2)(C) are not, in fact, discordant. FISA does not define the term "prompt" so, here again, the Court applies the ordinary meaning of the term, which is "being ready and quick to act as occasion demands" or "performed readily or immediately." Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/prompt (last visited Nov. 30, 2015). Accordingly, Section 501(c)(2)(F)(vii)(I) does not command instant destruction but it does require that destruction be accomplished readily and quickly as occasion demands. In the case of call detail records that the Government ultimately determines are not foreign intelligence information but are evidence of a crime, occasion demands that provision for the retention and dissemination of such records must be made pursuant to Section 501(g)(2)(C). It therefore follows that, in the case of call detail records that the Government determines are not foreign intelligence information but do contain evidence of a crime, destruction of those records must occur readily and immediately after the retention and dissemination of those records for law enforcement purposes. It strikes the Court that the Government's proposed minimization

procedures marry the requirements of Sections 501(c)(2)(F)(vii)(I) with 501(g)(2)(C) in a sensible way by stating that:

> CDRs which do not contain foreign intelligence information related to international terrorism but are reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed may be disseminated (including United States person identities) to appropriate Federal law enforcement authorities, in accordance with 50 U.S.C. § 1861(h), Executive Order 12333, and, where applicable, the crimes reporting procedures set out in the August 1995 "Memorandum of Understanding: Reporting of Information Concerning Federal Crimes," or any successor document. Such CDRs may be retained by NSA for a reasonable period of time, not to exceed six months unless extended in writing by the Attorney General, to permit law enforcement agencies to determine whether access to original CDRs are required for law enforcement purposes.

NSA's Minimization Procedures § C(5). Under this approach, the Government will comply with Section 501(g)(2)(C) by retaining call detail records that it determines are not foreign intelligence information but are reasonably believed to contain evidence of a crime for "a reasonable period of time, not to exceed six months unless extended in writing by the Attorney General" and then will promptly destroy those records in compliance with Section 501(c)(2)(F)(vii)(I). *See* NSA's Minimization Procedures § D ("NSA personnel will exercise reasonable judgment in determining whether CDRs produced pursuant to the Order sought in this application contain foreign intelligence information, and will promptly destroy any CDRs which are determined not to contain foreign intelligence information.").

The Court is cognizant that reconciling any perceived conflict between Sections 501(c)(2)(F)(vii)(I) and 501(g)(2)(C) could be considered a "novel" interpretation of the law in the most rudimentary sense because this is the first time the Court has been called upon to

consider the interplay between these two provisions, one of which only recently became effective. Section 103(i) of FISA requires that the Court appoint an amicus curiae "to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the [C]ourt issues a finding that such appointment is not appropriate." 50 U.S.C. § 1803(i)(2)(A). As demonstrated, however, in the final analysis the supposed conflict between Sections 501(c)(2)(F)(vii)(I) and 501(g)(2)(C) never actualized. As a result, no statutory conflict emerged that required the Court to engage in an interpretation of the law -- versus the straightforward application of the statute -- such that FISA Section 103(i) was implicated.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Primary Order that was issued on November 30, 2015, the Court finds that the Government's Verified Application for Orders Requiring the Production of Call Detail Records meets the requirements of subsection (a) and (b) of Section 501 of FISA and the minimization procedures submitted in accordance with Section 501(b)(2)(D) meet the definition of minimization procedures adopted pursuant to Section 501(g).

ENTERED this 31st day of December, 2015.

Thomas F. Hogan

THOMAS F. HOGAN
Presiding Judge, United States Foreign
Intelligence Surveillance Court