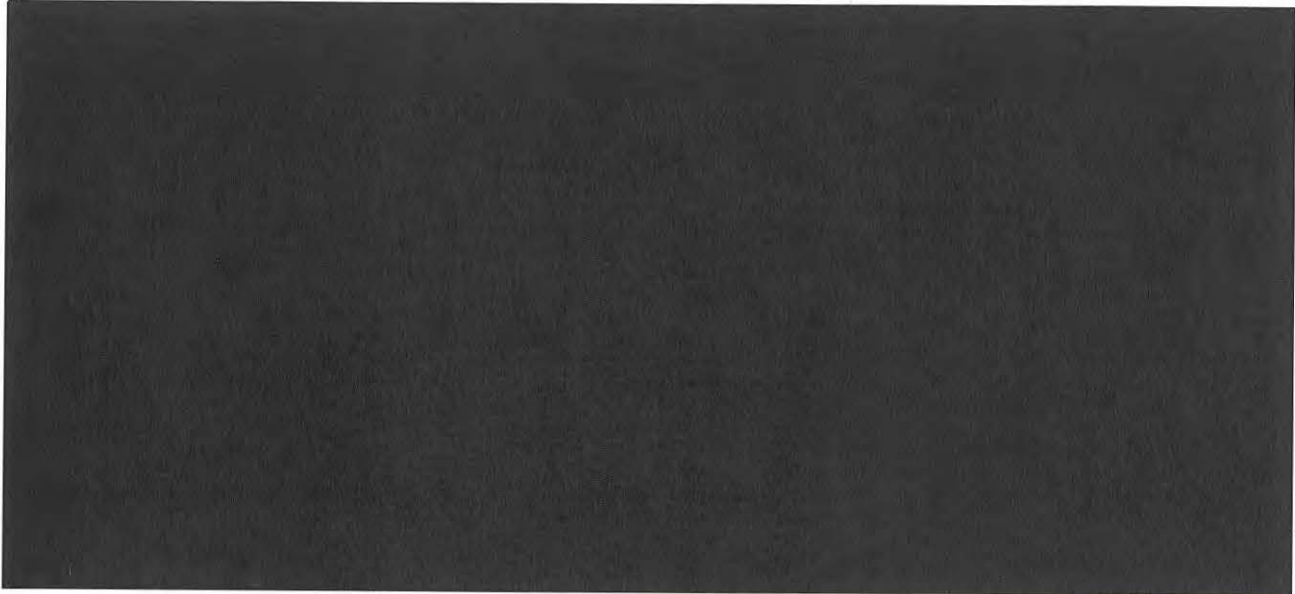


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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



(U) VERIFIED RESPONSE TO THE
COURT'S ORDER DATED NOVEMBER 6, 2015

~~(S//NF)~~ The Government submits this verified response to the Opinion and Order of the Foreign Intelligence Surveillance Court (FISC) issued on November 6, 2015 (hereinafter "Order"). The Order directs the Government to file a written submission by December 18, 2015, regarding the National Security Agency's (NSA) compliance plan with respect to certain categories of information specified in the Court's Order that are retained in two NSA systems - [REDACTED] and [REDACTED]. As detailed below, in order to ensure its compliance with NSA's Section 702 standard minimization procedures (SMPs) and 50 U.S.C. § 1809(a)(2), NSA will delete from [REDACTED] and

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~~Classified by: Chief, Oversight Section, OI, NSD, DOJ~~
~~Derived from: NSA/CSSM 1-52~~
~~Declassify on: 20401218~~

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██████████ all data collected as a result of unauthorized electronic surveillance as well as all other categories of information subject to purge pursuant to Section 702 procedures.

(U) **Background**

(S//NF) In a notice filed on July 13, 2015, the Government informed the Court that information acquired pursuant to the Foreign Intelligence Surveillance Act (FISA) that is subject to purge or age-off was being retained in two of NSA's mission management systems, ██████████ and ██████████. See "Update and Notice Regarding the NSA's purge process for FISA-acquired information in Mission Management Systems." On October 8, 2015, the Honorable Thomas F. Hogan held a hearing to discuss certain Section 702-compliance-related issues, including NSA's retention of data in ██████████ and ██████████ that is otherwise subject to purge or age off.¹ Following the hearing, on October 14, 2015, Judge Hogan issued an Order requiring the Government to explain in writing:

- (a) How it justifies under NSA's 702 SMPs the retention and use in ██████████ and ██████████ of information otherwise subject to purge; and
- (b) How it justifies under 50 U.S.C. § 1809(a)(2) the retention and use in ██████████ and ██████████ of information otherwise subject to purge.

See October 14 Order at 4. On October 21, 2015, the Government filed its Verified Response (hereinafter "October 21 Verified Response"), describing the ██████████

¹(S//SI//NF) ██████████
██████████

This helps ensure that NSA's taskings pursuant to Section 702 comply with the statutory prohibition against using Section 702 to target persons located inside the United States.

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and [REDACTED] systems, NSA's retention of data in [REDACTED] and [REDACTED], and proposed changes to how data will be retained in [REDACTED] and [REDACTED] to ensure all FISA-acquired data retained in those systems complies with both Section 1809 and NSA's Section 702 minimization procedures. After reviewing the Government's submission, the Court entered its Order of November 6, 2015, which directed the Government to report further information regarding NSA's retention of certain categories of information in [REDACTED] and [REDACTED]

(S//NF) As previously described to the Court, [REDACTED] [REDACTED] are retained in both [REDACTED] and [REDACTED] for collection avoidance purposes. Although the Court recognized that Section 5 of NSA's minimization procedures does not prohibit the NSA from keeping data in [REDACTED] and [REDACTED] that is derived from "domestic communications," as defined in NSA's minimization procedures, for the purpose of collection avoidance, Order at 71, it noted several categories of communications that may not be permitted to be retained under NSA's minimization procedures. Order at 71-72. The Court ordered the Government to report on how NSA plans to comply with its "targeting and minimization procedures with respect to these other categories of information" in these two systems, or, alternatively, "how the retention and use of these other categories of information in [REDACTED] and [REDACTED] comports with the NSA's targeting and minimization procedures." Order at 72 and 78. In addition, the Court concluded that it was unable to find, based on the current record, that all of the information the Government proposes to retain in [REDACTED] and [REDACTED] "falls entirely within the implicit exception to § 1809(a)(2)'s prohibition on disclosure and use." The below provides additional information regarding the Government's plan to purge or age-off information in [REDACTED] and [REDACTED] including the

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[REDACTED] information in these systems, in order to comply with the retention and use restrictions of NSA's Section 702 procedures and with Section 1809(a)(2).²

A. (U) FISA-Acquired Information Subject to Age-Off

~~(S//NF)~~ As indicated in the Government's October 21 Verified Response, NSA committed to age-off FISA-acquired information in [REDACTED] and [REDACTED] according to the time periods set forth in the relevant minimization procedures. NSA anticipates it will complete implementation and age-off all FISA-acquired information in [REDACTED] and [REDACTED] retained beyond the time periods set forth in the relevant minimization procedures by [REDACTED]. The age-off will remove all Section 702 data from [REDACTED] and [REDACTED] pursuant to the five and two-year retention time periods set forth in the Section 702 minimization procedures.³ Such

² ~~(S//SI//NF)~~ [REDACTED]

³ ~~(TS//SI//NF)~~ [REDACTED]

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data dates back to [REDACTED] and [REDACTED]. The Government will notify the Court when the age-off has been completed.

B. (U) FISA-Acquired Information Subject to Destruction Pursuant to 50 U.S.C. § 1809(a)(2)

(S//NF) The Court has previously recognized an exception to Section 1809(a)(2) that permits, in limited circumstances, the use and disclosure of information that would otherwise be prohibited.⁵ As noted by the Court in its November 6 Order, it was unable to find on the record before it that all information retained by NSA that otherwise would be subject to Section 1809(a)(2) fell within that exception. As a result, the Government has decided to delete all data subject to Section 1809(a)(2) from [REDACTED] and [REDACTED].⁶

(TS//SI//NF) Prospectively, if any FISA-acquired information in [REDACTED] or [REDACTED] is acquired via targeting that results in a Rule 13(b) compliance notice to

[REDACTED]

⁴ (S//NF) [REDACTED]

⁵ (S//NF) [REDACTED]

⁶ (S//NF) As described in the Government's October 21 Verified Response, the Government's ability to determine, on a case-by-case basis, whether FISA-acquired information subject to destruction pursuant to 50 U.S.C. § 1809(a)(2) currently in [REDACTED] and [REDACTED] meets the narrow, implicit exception to Section 1809(a)(2)'s prohibition on use and disclosure of unauthorized collection would necessitate significant resources.

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the Court,⁷ NSA will effectuate a purge of such information from [REDACTED] and [REDACTED]. Should NSA determine that FISA-acquired information subject to destruction pursuant to 50 U.S.C. § 1809(a)(2) fits within the narrow exception to Section 1809 described above, the Government will identify, in the relevant Quarterly Report, the data being retained and why such data is assessed to satisfy the above-noted exception.

C. ~~(S//NF)~~ Domestic Communications and Other Categories of Section 702-Acquired Information

a. (U) Domestic Communications

~~(S//NF)~~ As noted above, in its November 6 Order, the Court advised that it was “persuaded by the government’s argument that Section 5 of the NSA Minimization Procedures does not prohibit the NSA from keeping data in [REDACTED] and [REDACTED] that is derived from domestic communications placed on the NSA’s Master Purge List (MPL) for the purpose of collection avoidance.”⁸ Thus, unless the domestic communication is subject to destruction pursuant to 50 U.S.C. § 1809(a)(2) or otherwise subject to purge for other reasons, NSA will retain [REDACTED] in [REDACTED] and [REDACTED] from such communications subject to the restrictions described herein and in the Government’s October 21 Verified Response. Retention of [REDACTED] information in [REDACTED] including [REDACTED] information derived from domestic communications in [REDACTED] is relevant to the totality of circumstances

⁷ (U//FOUO) This would include tasking or detasking compliance incidents described in a Rule 13(b) letter or the Government’s Section 702 Quarterly Reports.

⁸ ~~(S//NF)~~ [REDACTED]

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that must support individual NSA tasking decisions. Thus, all [REDACTED] retained in query results is relevant to NSA's tasking decisions, and information derived from domestic communications retained in [REDACTED] will always have a potential collection avoidance benefit. With respect to [REDACTED] the Government acknowledges that there are circumstances in which [REDACTED] from individual domestic communications would provide limited or no foreseeable collection avoidance benefit. As described in the Government's October 21 Verified Response, however, the complexity and the volume [REDACTED] underlying records in [REDACTED] render it extremely difficult for NSA compliance personnel to parse out and delete domestic communications in [REDACTED] on a case-by-case basis.

b. ~~(S//NF)~~ Other Categories of FISA-Acquired Information Described in the Court's November 6, 2015 Order

~~(TS//SI//NF)~~ In the November 6 Order, the Court identified examples of categories of Section 702-acquired communications placed on NSA's MPL because of other destruction requirements in NSA's procedures that may not be permitted to be retained in [REDACTED] and [REDACTED]. The Court identified: (1) incidentally acquired communications of or concerning a United States person that are clearly not relevant to the authorized purpose of the acquisition or that do not contain evidence of a crime which may be disseminated under the minimization procedures; (2) attorney-client communications that do not contain foreign intelligence information or evidence of a crime; and (3) "any instances in which the NSA discovers that a United States person or person not reasonably believed to be outside the United States at the time of targeting has been intentionally targeted under Section 702"

~~(TS//SI//NF)~~ With respect to categories 1 and 2, NSA will remove from [REDACTED] and [REDACTED] information acquired or derived from such

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communications that have been identified and placed on the MPL. When communications are reviewed by NSA personnel in the ordinary course of their duties and recognized as required to be destroyed because the communication falls within categories 1 or 2, such information is removed from NSA's systems by either nominating that the information be added to NSA's MPL or through the use of a [REDACTED] that results in the information being added to the MPL. As a result, in either event, any associated [REDACTED] in [REDACTED] and [REDACTED] will subsequently be purged.⁹ With respect to category 3, the Government assesses that such acquisition would be subject to 50 U.S.C. § 1809(a)(2). Thus, as described above, such information will also be purged from [REDACTED] and [REDACTED]

D. (U) Timeline

~~(TS//SI//NF)~~ NSA is working to implement the changes in how it retains data in [REDACTED] and [REDACTED] in three phases. The first phase, which has already begun, will accomplish the age-off in both [REDACTED] and [REDACTED]. As noted above, NSA anticipates completion of the age-off by [REDACTED]

~~(TS//SI//NF)~~ Once the age-off is complete, NSA will implement those processes necessary to accomplish the above-described purges in [REDACTED] and [REDACTED] for relevant items identified in the future. The implementation of phase 2 will require modifications to NSA's current purge process to ensure all other FISA-acquired or

⁹ ~~(TS//SI//NF)~~ [REDACTED]

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derived information subject to purge is deleted. NSA anticipates the completion of this phase by [REDACTED]

~~(TS//SI//NF)~~ Finally, to accomplish the purge of the above-described categories of information currently in [REDACTED] and [REDACTED] NSA is assessing its ability to differentiate or parse between information that is required to be purged from information that it may retain (*i.e.*, domestic communications that fall within Section 5 of the NSA's Section 702 minimization procedures). Until NSA completes this process, data otherwise subject to destruction, including data subject to purge pursuant to 50 U.S.C. § 1809(a)(2), will remain in [REDACTED] and [REDACTED] and be used and accessed in the same manner it was prior to the July 2015 notice to the Court. As NSA's purge process has not historically differentiated objects subject to purge because they were domestic communications that fall within Section 5 of the NSA's Section 702 minimization procedures from all other objects subject to purge, there is not a simple way to separate and retain that information. As described in the Government's October 21 Verified Response, the retention of domestic communications in [REDACTED] and [REDACTED] will assist with the speed and accuracy of NSA's pre- and post-tasking checks. Therefore, NSA is exploring all avenues to identify and retain domestic communications in [REDACTED] and [REDACTED] including an analysis of all objects in [REDACTED] and [REDACTED] that are on NSA's MPL. NSA will provide more information regarding its assessment at the hearing with the Court on January 27, 2016. The outcome of the assessment will determine the manner in which NSA will accomplish the purging of the historic information remaining after the completion of the age-off and the timeline for completion of the purge.

~~(TS//SI//NF)~~ NSA has already begun implementation of the age-off process. NSA anticipates that implementing the age-off in [REDACTED] and [REDACTED] will

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result in the deletion of the information subject to 50 U.S.C. § 1809(a)(2) if that information falls outside the retention time periods at issue. NSA will then implement the purge process described in phase 2 to prevent new (*i.e.*, those identified after the implementation of this phase) items of concern to the Court from being retained in [REDACTED] and [REDACTED]. Portions of the work accomplished in this phase should assist with the implementation of phase 3. Implementation of phase 2 before phase 3 should also ensure that the process in phase 3 is only implemented once. Finally, the process in phase 3 will remove all remaining information in [REDACTED] and [REDACTED] subject to purge based on the description above.

E. (U) CONCLUSION

(~~S//NF~~) For all the above reasons, the Government respectfully submits that, when fully implemented, the proposed retention practices by NSA for data otherwise subject to destruction in [REDACTED] and [REDACTED] will ensure that NSA remains in compliance with Section 1809 and the Section 702 targeting and minimization procedures.

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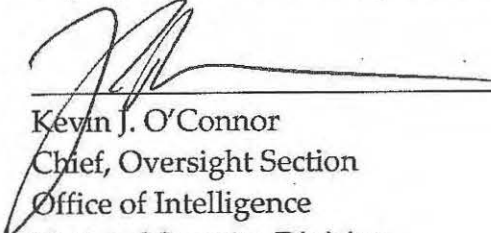
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Respectfully submitted,

Stuart J. Evans
Deputy Assistant Attorney General

By:



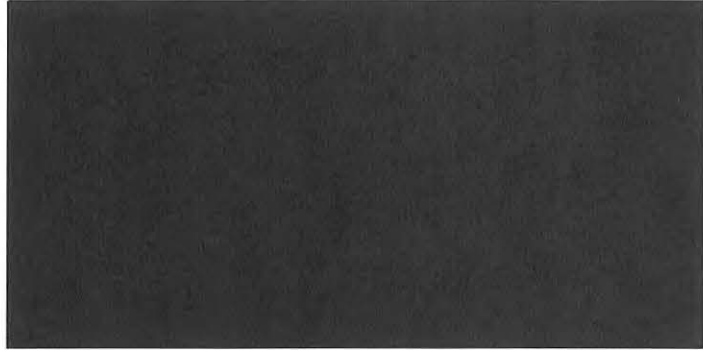
Kevin J. O'Connor
Chief, Oversight Section
Office of Intelligence
National Security Division
U.S. Department of Justice

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VERIFICATION

~~(TS//SI//NF)~~ I declare under penalty of perjury that the foregoing is true and correct. Executed pursuant to Title 28 United States Code, § 1746 on 18 December 2015.



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