

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 FROM [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Docket Number: BR 09-13

ORDER REGARDING FURTHER COMPLIANCE INCIDENTS

On September 3, 2009, the Court authorized the acquisition by the National Security Agency ("NSA") of the tangible things sought in the government's application in the above-captioned docket ("BR metadata"). Like prior orders in this matter, the Court's September 3 Order adopted strict procedures to control the NSA's access to, use

and dissemination of the BR metadata. Among other things, the Court ordered the following:

The Director of the NSA shall continue to maintain mandatory procedures to strictly control access to and use of the BR metadata, in accordance with this Court's orders. NSA's [Office of General Counsel] shall continue to promptly provide NSD with copies of these mandatory procedures (and all replacements, supplements or revisions thereto in effect now or adopted in the future). The Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate; Chief and Deputy Chief, Homeland Security Analysis Center; and the Homeland Mission Coordinators shall maintain appropriate management controls (e.g., records of all tasking decisions, audit and review procedures) for access to the metadata.

9/3/09 Order at 11. The Court further ordered that:

All persons authorized for access to the BR metadata and other NSA personnel who are authorized to receive query results shall receive appropriate and adequate briefings by NSA's [Office of General Counsel] concerning the authorization granted by this Order, the limited circumstances in which the BR metadata may be accessed, and/or other procedures and restrictions regarding the retrieval, storage, and dissemination of the metadata.

Id. at 12. These provisions of the Court's order adopted requirements that the government proposed in its application as minimization procedures. Docket BR 09-13, Application at 21, 25.

On September 21, 2009, at approximately 5:10 p.m., an attorney with the National Security Division of the Department of Justice ("NSD") orally informed a member of the Court staff of a likely violation by the NSA of the foregoing provisions of the Court's

September 3, 2009 Order. The NSD attorney advised that an NSA analyst properly in possession of the results of a query of the BR metadata had forwarded such results by email to other NSA analysts involved in the [REDACTED] investigation.

According to the NSD attorney, at least some of those other analysts had not received "appropriate and adequate briefings by NSA's OGC" concerning the strict controls imposed by the Court on NSA's access to, use and dissemination of the BR metadata. The NSD attorney further advised that it did not appear that the query results in question had been shared outside NSA.

On September 23, 2009, at approximately 3:35 p.m., the same NSD attorney orally informed a member of the Court staff of another similar incident in which query results were shared by email with NSA employees who had not been trained on the handling of BR metadata in accordance with the Court's Order. The ensuing discussion between the NSD attorney and the Court staff suggested that NSA may have created a [REDACTED] [REDACTED] distribution list comprised of the email addresses of some 189 NSA analysts, only 53 of whom have been so trained. The NSD attorney explained that he was not then in a position to assure the Court that the distribution list would be altered to include only properly trained NSA analysts.

The NSD attorney advised that NSD and NSA were investigating the foregoing incidents and expected to be in a position to submit a preliminary written notice to the

Court in short order. As of the entry of this Order, the Court has not yet received such a notice.

The Court is deeply troubled by the incidents described above, which have occurred only a few weeks following the completion of an "end to end review" by the government of NSA's procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court's orders going forward. Accordingly, the Court

HEREBY ORDERS that representatives of the NSA and NSD appear for a hearing on Monday, September 28, 2009, at 3:30 p.m., the purpose of which will be to inform the Court more fully of the scope and circumstances of the incidents discussed above, and to allow the Court assess whether the Orders issued in this docket should be modified or rescinded and whether other remedial steps should be imposed. The Court expects that the representatives of the NSA and NSD who appear at the hearing will include persons with detailed knowledge of the facts and circumstances surrounding the above-

described incidents and why remedial measures had not been implemented to ensure compliance with the Court's Orders that have been issued in this docket, as well as officials of stature sufficient to speak authoritatively on behalf of the Executive Branch.

IT IS SO ORDERED, this 25th day of September 2009.



REGGIE B. WALTON

Judge, United States Foreign
Intelligence Surveillance Court