



U.S. Department of Justice

National Security Division

Washington, D.C. 20530

EMAIL: savage@nytimes.com

NSD FOIA/PA #16-148

June 15, 2017

Mr. Charlie Savage
The New York Times
1627 I Street, N.W.
Washington, D.C. 20006

Charlie:
Dear ~~Mr. Savage~~:

This is an interim response to your Freedom of Information Act (FOIA) request dated May 10, 2016, for "previously unreleased documents from the Foreign Intelligence Surveillance Court docket for the case that resulted in Judge John Bates' October 3, 2011, and November 30, 2011, rulings, both of which were declassified and made public in August 2013 but with their docket number and case name redacted." Your request was received on May 10, 2016.

In response to your request, we conducted a search of the National Security Division Office of Intelligence (NSD/OI), and we have located responsive records. We have processed four documents for today's response under the FOIA. We are withholding the records in part pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

(1) which permits the withholding of information properly classified pursuant to Executive Order No. 13526;

(3) which permits the withholding of information specifically exempted from disclosure by statute, including but not limited to Section 102(d)(3) of the National Security Act of 1947;

(6) which permits the withholding of information when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."; and

(7)(C) which permits the withholding of records or information compiled for law enforcement purposes the release of which could "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

For your information, Congress excluded three discrete categories of law enforcement information and national security records from the requirements of the FOIA. See 5 U.S.C. §552(c). This response is limited to those records that are subject to the requirements of the

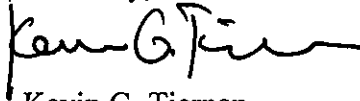
FOIA. This is standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Although this request is now the subject of litigation, we are including the following information on FOIA mediation and administrative appeals.

You may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, or at ogis@nara.gov, or 202-741-5770, or toll free at 1-877-684-6448, or facsimile at 202-741-5769. Or you may contact our Public Liaison at 202-233-0756.

If you are not satisfied with this response, you may administratively appeal by writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 11050, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA portal by creating an account at: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or transmitted electronically within 90 days of the date of my response to your request. If you submit an appeal by mail, both the letter and envelope should be clearly marked, "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin G. Tiernan", written over a horizontal line.

Kevin G. Tiernan
Records and FOIA

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

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

2011 OCT -5 PM 12:22

LEEANN FLYNN HALL
CLERK OF COURT

**MOTION FOR SECONDARY ORDERS TO CERTAIN
ELECTRONIC COMMUNICATIONS SERVICE PROVIDERS (S)**

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, respectfully moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended (the Act), to issue secondary orders to certain electronic communication service providers concerning DNI/AG 702(g) Certifications

~~(S//OC/NF)~~

1. On October 3, 2011, this Court issued a Memorandum Opinion and Order concerning the following matters: (1) the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications

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Classified by: Lisa O. Monaco, Assistant Attorney
General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 5 October 2036

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which was filed on April 20, 2011; [REDACTED]

[REDACTED]

[REDACTED] ~~(S//OC/NF)~~

2. The Court's Order granted in part and denied in part the Government's request for the Court to approve DNI/AG 702(g) Certification [REDACTED]

[REDACTED] See Order at 2. In particular, the Court found that the certifications contained all of the required elements. See *id.* at 2-3. The Court further found that with respect to one aspect of the proposed collection – the “upstream collection” of Internet transactions containing multiple communications (MCTs) – NSA's minimization procedures, as the government proposes to apply them to MCTs as to which the “active user” is not known to be a tasked selector, do not meet the requirements of the Act with respect to retention. See *id.* at 3. The Court further found that NSA's targeting and minimization procedures, as the government proposes to apply them to MCTs as to which the “active user” is not known to be a tasked selector, are inconsistent with the requirements of the

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Fourth Amendment. See id. Accordingly, the Court ordered, pursuant to 50 U.S.C. § 1881a(i)(3)(B), that the government shall, at its election: (a) not later than 30 days from October 3, 2011, correct the deficiencies identified by the Court; or (b) cease the implementation of the Certifications insofar as they permit the acquisition of MCTs as to which the "active user" is not known to be a tasked selector. See id. at 3-4.

~~(S//OC/NF)~~

3. The Government respectfully requests that the Court issue secondary orders reflecting the above, as described in the Court's Memorandum Opinion and Order of October 3, 2011, to the electronic communications service providers who provide the Government with information, facilities, or assistance necessary to accomplish the acquisition of telephone communications and the "upstream" collection of Internet communications. [REDACTED]

[REDACTED]

[REDACTED] ~~(S//OC/NF)~~

Respectfully submitted,
b(6), b(7)(C)

National Security Division
United States Department of Justice

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

U.S. FC
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2011 NOV -4 PM 2:47
LEEANN FLYNN HALL
CLERK OF COURT

MOTION TO EXTEND TIME

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, respectfully requests the Court to extend the time, to and including November 22, 2011, in which to file a memorandum in response to the Court's Briefing Order of October 13, 2011 (hereinafter, "Briefing Order"). The Briefing Order directed the Government to submit a memorandum by November 10, 2011, addressing several issues related to subsection 1809(a) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA), 50 U.S.C. § 1809(a), as it applies to certain collections by the National Security Agency approved by this Court. ~~(S//OC/NF)~~

The Government continues to work diligently to respond to the issues raised by the Court. However, due to the complex factual and legal questions raised in the Briefing Order, as well as the ongoing matter concerning the above-captioned

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~~Classified by: Lisa O. Monaco, Assistant Attorney
General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 4 November 2036~~

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certifications, the Government believes that a brief extension of time would be of great benefit in preparing a complete and accurate response to the Court's Briefing Order.

~~(S//OC/NF)~~

Accordingly, the Government requests leave to provide the Court with a complete response to the Briefing Order by November 22, 2011. (U)

Respectfully submitted,

b(6), b(7)(C)

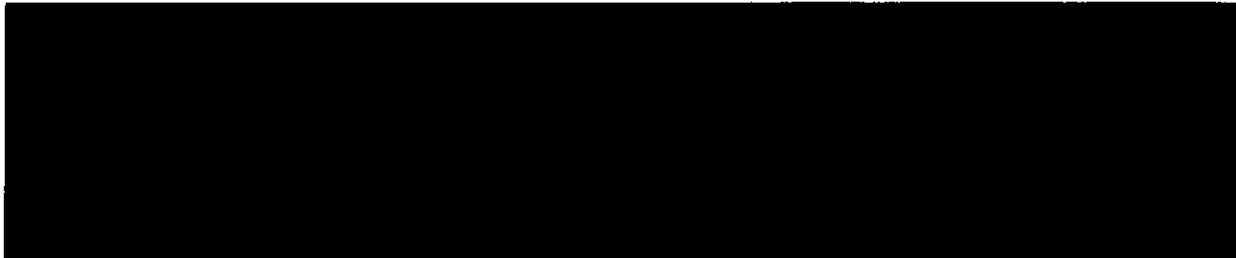


National Security Division
United States Department of Justice

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

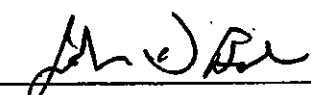


ORDER

Upon consideration of the government's motion for an extension of time, and the entire record herein, it is by this Court hereby



ORDERED, that the government shall have until November 22, 2011, to file its memorandum in response to this Court's Briefing Order of October 13, 2011.

Signed 11-07-2011 P05:29 Eastern Time
Date Time



JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

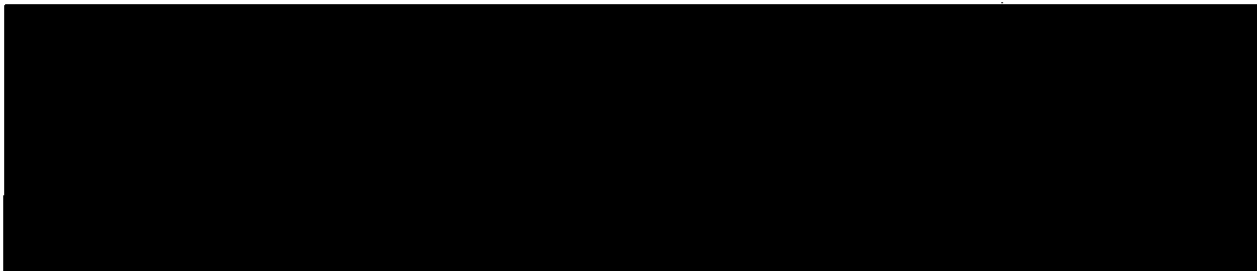
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1.  Deputy Clerk,
FISC, certify that this document
is a true and correct copy of
the original 

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in Docket Number captioned above

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

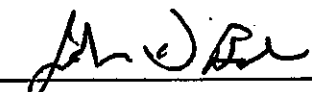


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Signed 11-07-2011 PO5:29 Eastern Time
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JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

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1.  Deputy Clerk,
FISC, certify that this document
is a true and correct copy of
the original 

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**FISC QUESTIONS RE: AMENDED 2011 SECTION 702 CERTIFICATIONS
NOV. 7, 2011**

1. The government previously indicated to the Court that it lacked the capacity to conduct some of the activities that are now required by the amended NSA minimization procedures. Please confirm that the NSA is fully complying with those procedures.
2. The Court's Memorandum Opinion defined "active user" to be "the individual using the electronic communications account/address/identifier to interact with his/her Internet service provider." See Oct. 3, 2011 Memorandum Opinion at 35 n. 34 (emphasis added). However, the amended minimization procedures state that NSA will identify and segregate through technical means MCTs where "the active user of the transaction (i.e., the electronic communications account/address/identifier used to send or receive the Internet transaction to or from a service provider) is reasonably believed to be located in the United States; or the location of the active user is unknown." See Section 3(b)(5)(a). Please confirm that NSA's "technical means" for identification and segregation will focus on the location of the individual using the account.
3. Section 3(b)(5)(a)(1)(a) prohibits NSA from using a segregated Internet transaction "for foreign intelligence purposes" unless it has been determined that the transaction does not contain any wholly domestic communications. It is the Court's understanding that segregated Internet transactions may be used only for the purpose of determining whether any communication within the transaction is wholly domestic. Is this understanding correct? If not, please fully describe any other uses.
4. What circumstances will trigger review by a specially-trained NSA analyst to determine whether a particular Internet transaction contains a discrete wholly domestic communication? It is the Court's understanding that such review occurs only when a segregated Internet transaction is responsive to a query designed to elicit foreign intelligence information. Is this understanding correct?
5. Please confirm that any transactions reviewed under Section 3(b)(5)(b)(1) will be destroyed if the analyst determines that the transaction contains a wholly domestic communication.
6. Section 3(b)(5)(b)(2)(c) indicates that NSA analysts will document certain determinations "if technically possible or reasonably feasible." Please explain under what circumstances documentation would be considered technically possible but not reasonably feasible.
7. Section 3(c)(2) states, in the context of destruction of raw data: "[t]he internet transactions that may be retained include those that were acquired because of limitations on NSA's ability to filter communications." Please explain the meaning of this statement?
8. Please explain whether, and if so under what circumstances, NSA will share unminimized communications acquired through its upstream collection under Section 6(c) (sharing with CIA

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and FBI) or under Section 8 of the procedures.

9. Section 3(b)(5)(b)(4) of the amended NSA minimization procedures allows NSA to use metadata extracted from Internet transactions without first determining whether the metadata was extracted from a wholly domestic communication or a non-target communication. Please fully describe what constitutes "metadata" within the meaning of this provision.

10. It is the Court's understanding that metadata extracted in accordance with Section 3(b)(5)(b)(4) may otherwise be retained, used, and disseminated in accordance with the other provisions of the amended NSA minimization procedures. Is this understanding correct?

a. For example, is metadata that has been extracted from Internet transactions pursuant to Section 3(b)(5)(b)(4) subject to the two-year retention limit set forth in Section 3(c) of the amended NSA minimization procedures? If not, how long is such metadata retained? If such metadata (including metadata extracted from discrete, non-target communications) is retained for longer than two years, how is Section 3(b)(5)(b)(4) consistent with the requirements of 50 U.S.C. § 1801(h)(1)?

b. Is metadata consisting of U.S. person information disseminated only if such information constitutes foreign intelligence information or is necessary to understand foreign intelligence information or assess its importance? If not, how is Section 3(b)(5)(b)(4) consistent with the requirements of 50 U.S.C. § 1801(h)(1)-(2)?

11. Under Section 3(b)(5)(b)(4), NSA will not extract or use metadata from segregated Internet transactions. Will this limitation impair NSA's ability to determine when the users of targeted facilities have entered the United States?

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