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United States Foreign Intelligence Surveillance Court.

In re PROCEEDINGS REQUIRED BY § 702(i) OF the FISA AMENDMENTS ACT OF 2008.

Misc No. 08–01. | Aug. 27, 2008.

Opinion

ORDER

MARY A. McLAUGHLIN, Judge.

***1** IT IS HEREBY ORDERED that the Motion of the American Civil Liberties Union for Leave to Participate in Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008 is DENIED, for the reasons set forth in the Memorandum Opinion issued on this date.

MEMORANDUM OPINION[1]

This matter comes before the Court on the "Motion for Leave to Participate in Proceedings Required by § 702(i) of the FISA Amendments Act of 2008," filed by the American Civil Liberties Union ("ACLU") on July 10, 2008 ("ACLU motion"). In accordance with a scheduling order issued on July 17, 2008, the Government filed its "Opposition to the American Civil Liberties Union's Motion for Leave to Participate in Proceedings Required by § 702(i) of the FISA Amendments Act of 2008" on July 29, 2008. The ACLU filed a "Reply Memorandum in Support of Motion for Leave to Participate in Proceedings Required by § 702(i) of the FISA Amendments Act of 2008" on August 5, 2008. For the reasons described below, the Court denies the ACLU's motion.

BACKGROUND

Section 702 of the Foreign Intelligence Surveillance Act

In its motion, the ACLU seeks information about, and the opportunity to participate in, judicial proceedings required under Section 702(i) of the Foreign Intelligence Surveillance Act ("FISA"), as most recently amended by the FISA Amendments Act of 2008 ("FAA"), Pub L. No. 110–261, 122 Stat. 2436.Section 702 of FISA (codified at 50 U.S.C. § 1881a) specifies circumstances under which the Government can authorize the targeting of non-United States persons reasonably believed to be outside the United States, to acquire foreign intelligence information. The FAA imposes several limitations upon and requirements for the exercise of this authority.

Among other requirements, the FAA provides that "[t]he Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to—(A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States."50 U.S.C. § 1881a(d)(1).

The FAA further provides that the Attorney General, again in consultation with the Director of National Intelligence, "shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h) or 1821(4) ... as appropriate, for acquisitions authorized under subsection (a)."*Id.* § 1881a(e)(1).

Finally, the Attorney General and the Director of National Intelligence are required to submit to the Foreign Intelligence Surveillance Court ("FISC") a written certification. Among other things, this certification must attest (1) that there are procedures in place that are reasonably designed to ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States, and to prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; (2) that the minimization procedures to be used with respect to such an acquisition meet the definition of minimization procedures under section 1801(h) or 1821(4) of FISA, as appropriate; and (3) that both the targeting and the minimization procedures either have been approved, have been submitted for approval, or will be submitted with the certification for approval by the F1SC. *Id.* § 1881a(g)(2)(A)(i)-(ii).

Judicial Review under Section 702(i)

***2** The FAA provides that the FISC shall have jurisdiction to review the certification, the targeting procedures and the minimization procedures. *Id.* § 1881a(i)(1)(A). As the ACLU notes in its motion, however, the Court's role here is "narrowly circumscribed." ACLU Mot. at 5. With respect to the certification, the FISC is merely to "determine whether the certification contains all the required elements."*Id.* § 1881a(i)(2)(A). The Court is to review the targeting procedures to "assess whether the procedures are reasonably designed to—(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States."*Id.* § 1881a(i)(2)(B). As for the minimization procedures, the Court must "assess whether such procedures meet the definition of minimization procedures under section 1801(h) or section 1821(4) of this title, as appropriate."*Id.* § 1881a(i)(2)(C).

The FAA further provides that the FISC shall enter an order approving the certification. and the use, or continued use, of the targeting and minimization procedures if the Court finds that the certification contains all the required elements, and that the targeting and minimization procedures are consistent with the requirements of Sections 1881a(d)(1) and 1881a(e)(1) and "with the Fourth Amendment to the Constitution of the United States."*Id.* § 1881a(i)(3)(A). Should the Court conclude that it cannot make these findings, the Court shall either order the Government to correct any deficiency identified by the Court or cease or not begin implementation of the authorization for which the certification was submitted. *Id.* § 1881a(i)(3)(B).

The ACLU's Motion

In its motion, the ACLU requests:

> (1) that it be notified of the caption and briefing schedule for any proceedings under Section 702(i) in which this Court will consider legal questions relating to the scope, meaning and constitutionality of the FAA;
>
> (2) that, in connection with such proceedings, the Court require the Government to file public versions of its legal briefs, with only those redactions necessary to protect information that is properly classified;
>
> (3) that, in connection with such proceedings, the ACLU be granted leave to file a legal brief addressing the constitutionality of the FAA and to participate in oral argument before the Court; and
>
> (4) that any legal opinions issued by the Court at the conclusion of such proceedings be made available to the public, with only those redactions necessary to protect information that is properly classified.

ACLU Mot. at 2. The relief sought by the ACLU can be viewed as falling into two categories, which to a certain degree overlap: (1) a request for the release of records (i.e., any legal briefs filed by the Government and legal opinions issued by the Court in proceedings) similar to that which was considered by this court last year in *In re Motion for Release of Court Records,* 526 F.Supp.2d 484 (Foreign Intel. Surv. Ct.2007); and (2) a more general request to participate in the Court's review under § 702(i) (i.e., to be granted leave to file a legal brief and to participate in oral argument). The ACLU's request to be notified of the caption and briefing schedule of particular proceedings under § 702(i) is a bit of a hybrid; it is in effect a request for release of records, made in order to facilitate the ACLU's participation in the matter.

1. ***The ACLU's Request for the Release of Records***

***3** The ACLU's request is similar to a request it made on August 9, 2007. At that time, the ACLU filed a motion with the FISC seeking the release of what it identified as court orders and Government pleadings regarding a surveillance program conducted by the National Security Agency. The court denied the motion, finding (1) that the common law provided no public right of access to the requested records; and (2) that the First Amendment provided no public right of access to the requested records. *In re Motion for Release of Court Records.* 526 F.Supp.2d at 490–497, The court further declined to exercise any "residual discretion," should it exist, to release any portions of the records at issue.*Id.* at 497.

Although the records sought by the ACLU in the present motion are different from those it requested in 2007, this Court finds no reason to reach a different conclusion. These records also are to be maintained under the comprehensive statutory scheme described by Judge Bates in *In re Motion for Release of Court Records* as "designed to protect FISC records from routine public disclosure" and found to supercede any common law right of access.*Id.* at 491.

Nor is there a First Amendment right of access to the records, Application of the "experience and logic" tests adopted by the Supreme Court for assessing the existence of a qualified First Amendment right of access in *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (*Press–Enterprise II*) confirms that there is no such right of access to these documents.[2]First, the "experience" test is not satisfied because neither the "place" nor the "process" has "historically been open to the press and general public."*Id.* at 8. The FISC has no tradition of openness, either with respect to its proceedings, its orders, or to Government briefings filed with the FISC. *See In re Motion for Release of Court Records,* 526 F.Supp.2d at 492. Moreover, the specific process at issue here, proceedings under Section 702(i) of the FAA, is brand-new, and therefore cannot be said to have such a tradition.

Under *Press–Enterprise II,* the failure to satisfy the "experience" test alone defeats a claim for a First Amendment right of access. 478 U.S. at 9. *See also In Re Motion for Release of Court Records,* 526 F.Supp.2d at 493. But should the "logic" test even apply in this case, it is not satisfied because public access to these documents will not play a significant positive role in the functioning of the FISA process. The Government asserts that its certification, targeting procedures, and minimization procedures will provide the details of its sources and methods for collecting foreign intelligence information under the FAA and therefore will be classified. Gov't. Opp'n at 8. The ACLU responds that it is not seeking access to "properly classified information," ACLU Reply at 1, but contends that the Court should determine whether the Government's procedures are "properly" classified. *Id.* at 7.

***4** Assuming, *arguendo,* that the Court does have the authority to undertake this type of inquiry, the "logic" test would still not be satisfied. Absent the Government's wholesale abuse of classification authority, which there is no reason to presume here, any disclosure resulting from such a review can be expected to be limited and incremental in nature. The fact that at most, only partial access to the documents could be provided undercuts the ACLU's ability to satisfy the "logic" test. As with the records at issue in *In re Motion for Release of Court Records,*"[t]he benefits from a partial release of declassified portions of the requested materials would be diminished, insofar as release with redactions may confuse or obscure, rather than illuminate, the decisions in question."526 F.Supp.2d at 495. Moreover, such a review could result in the release of information that should have remained classified.

Although it is possible to identify some benefits which might flow from public access to Government briefs and FISC orders related to Section 702(i) proceedings, the "logic" test is not satisfied because any such benefits would be outweighed by the risks to national security created by the potential exposure of the Government's targeting and minimization procedures. In short, the proceedings in Section 702(i) seem to be of the type "that would be totally frustrated if conducted openly."*Press–Enterprise II.* 478 U.S. at 8–9.

In the alternative, the ACLU contends that the Court should exercise its discretion to grant the relief it requests because the FAA has "sweeping implications for the rights of U.S. citizens and residents," ACLU Reply at 7, and the Section 702(i) proceedings "should be adversarial and as informed and transparent as possible," ACLU Mot. at 9. Assuming that such discretion resides with the Court, it declines to exercise that authority here. Providing the ACLU with access to the materials provided to the FISC in connection with the Section 702(i) review, and with the Court's assessment of the Government submissions, would create risks to national security that far outweigh any potential benefit to be gained by providing the ACLU with access to the requested records.[3]

2. ***The ACLU's Request to Participate in Section 702(i) Proceedings before the FISC***

The ACLU also seeks leave, in connection with proceedings under Section 702(i), to file a legal brief addressing the constitutionality of the FAA, and to participate in oral argument before the Court. The Court denies this request as well. First, the ACLU has no right to such participation. The FAA does not provide for such participation by a party other than the Government. Second, assuming that the Court has the discretion to allow such participation, it declines to do so. For the reasons described below, the ACLU's participation is unlikely to provide meaningful assistance to the Court.

First, the FAA itself does not provide for participation by a party other than the Government in the Court's review of the Government's certification and procedures. In fact, it provides that only the Government may file a petition with the Foreign Intelligence Surveillance Court of Review for review of the Court's order resulting from its review of the certification and procedures. 50 U.S.C. § 1881a(i)(4)(A). By contrast, Section 702(h) explicitly provides for the participation of parties other than the Government, in that electronic communication service providers can bring a challenge in the FISC to directives issued to them under the FAA. *Id.* § 1881a(h)(4). The FAA also expressly gives these providers a right to

appeal. *Id.* § 1881a(h)(6).

***5** In addition, even before the enactment of the FAA, Congress provided for the participation of parties other than the Government in the limited context of providing a right of challenge in the FISC to those receiving orders for the production of tangible things pursuant to 50 U.S.C. § 1861. *Id.* § 1861(f)(2). The lack of analogous provisions for proceedings under Section 702(i) strongly suggests that Congress did not contemplate the Court's review of the certification and procedures to be anything other than an ex parte proceeding.

Second, as described above, the Court's review under Section 702(i) is limited to three specific components: the certification, the targeting procedures and the minimization procedures. The Court's review of the certification is limited to determining whether the certification contains all of the elements required by the statute. As to the targeting procedures adopted by the Government, the Court must review the procedures to "assess whether the procedures are reasonably designed to—(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States."50 U.S.C. § 1881a(i)(2)(B). As to the minimization procedures, the Court must "assess whether such procedures meet the definition of minimization procedures under section 1801(h) or section 1821(4) of this title, as appropriate."*Id.* § 1881a(i)(2)(C). Finally, the Court must decide whether the targeting and minimization procedures are consistent with the Fourth Amendment. *Id.* § 1881a(i)(3)(A).

As described above, the Government states that its targeting and minimization procedures will be classified because they provide the details of its sources and methods for collecting foreign intelligence information. The ACLU, therefore, will not have access to either set of procedures. Without such access, it cannot provide meaningful input to the Court on the compliance of those procedures with the FAA or the Fourth Amendment.

The ACLU suggests that judicial review under Section 702(i) will necessarily include review of the constitutionality of the FAA, and the ACLU's input would be helpful in such a constitutional analysis. Such a generalized constitutional review, however, is not contemplated under Section 702(i). The Court is required to consider whether the targeting and minimization procedures adopted by the Government meet the requirements of the statute and whether those procedures are consistent with the Fourth Amendment. The Court is not required, in the course of this Section 702(i) review, to reach beyond the Government's procedures and conduct a facial review of the constitutionality of the statute. Accordingly, the ACLU's participation in Section 702(i) proceedings will not assist the Court.

CONCLUSION

***6** For all the reasons set forth above, the motion of the ACLU for leave to participate in proceedings required by § 702(i) of the FISA Amendments Act of 2008 is denied. A separate order has been issued.

Footnotes

1 The Government's filing in this case was unclassified; this opinion does not go beyond the factual assertions that were contained in the Government's filing.

2 "First, because a tradition of accessibility implies the favorable judgment of experiences, we have considered whether the place and process have historically been open to the press and general public."*Press–Enterprise II,* 478 U.S. at 8 (citations and internal quotation marks omitted)."Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question."*Id.*"If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches."*Id.* at 9.

3 Even in a context where a criminal defendant's Sixth Amendment rights are at issue, FISA provides that materials may be disclosed to the aggrieved person "only where such disclosure is *necessary* to make an accurate determination of the legality of the surveillance."50 U.S.C. § 1806(f) (emphasis added). As Section 702(i) does not include a similar mechanism for disclosing materials when deemed necessary to the Court's review, the Court will decline to disclose such materials in this case, when it believes that disclosure is not only unnecessary to the Court's determination but also unlikely to be useful, for the reasons discussed below.