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



MEMORANDUM OPINION

This matter is before the Foreign Intelligence Surveillance Court (“FISC” or “Court”) on the Government’s Ex Parte Submission of Amendment to DNI/AG 702(g) [REDACTED] [REDACTED] and Ex Parte Submission of Amended Minimization Procedures (“Amended Minimization Procedures” or “the procedures”). Through this filing (which was submitted on [REDACTED] 2012, and hereinafter will be referred to as the [REDACTED] Submission”), the government seeks approval of Amended Minimization Procedures for the National Security Agency (“NSA”) to permit the sharing of certain unminimized communications [REDACTED]

[REDACTED] The government seeks to share these communications in order to coordinate the intelligence efforts of the United States (“US”) [REDACTED]



For the reasons stated below, the Court concludes that the government has met the statutory

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requirements for this amendment, and the request for approval is therefore granted.

I. BACKGROUND

A. [REDACTED] and Amendments

The government originally filed DNI/AG 702(g) [REDACTED] [REDACTED] with the Court on [REDACTED] 2011.¹ It is one [REDACTED] certifications that have been submitted by the government pursuant to Section 702. See [REDACTED]

[REDACTED] It governs the acquisition of foreign intelligence information [REDACTED]

[REDACTED] through the targeting of non-United States persons reasonably believed to be located outside the United States. See [REDACTED]

On October 3, 2011, the Court issued a Memorandum Opinion and Order (“October 3 Opinion”) concluding that one aspect of the collection proposed under [REDACTED] (i.e., NSA’s “upstream collection” of Internet transactions containing multiple communications or

¹ The [REDACTED] 2011 filing included the “Government’s Ex Parte Submission of [REDACTED] and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving [REDACTED] and Amended Certifications” for DNI/AG 702(g) [REDACTED]. It also included amendments to all prior certifications proposing that information collected under such certifications be handled subject to the same revised NSA and Central Intelligence Agency (“CIA”) minimization procedures that had been submitted for use in connection with [REDACTED]. See [REDACTED]

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MCTs) was, in some respects, deficient on statutory and constitutional grounds.² Thereafter, on [REDACTED] 2011, the government submitted amended NSA minimization procedures designed to correct these deficiencies. See Government's Ex Parte Submission of Amendment to DNI/AG 702(g) [REDACTED] and Ex Parte Submission of Amended Minimization Procedures. On November 30, 2011, the Court issued a Memorandum Opinion and Order ("November 30 Opinion") holding that the government had, through the amended NSA minimization procedures, adequately cured the deficiencies, and that [REDACTED] [REDACTED] satisfied the applicable statutory and constitutional requirements.³

As noted above, the Amendment to [REDACTED] included in the [REDACTED] Submission reflects changes that are intended to permit the sharing of certain unminimized communications [REDACTED]. It is executed by the Attorney General and the Director of National Intelligence ("DNI") pursuant to Section 702, and includes a supporting affidavit by the Director of the National Security Agency ("DIRNSA Affidavit") and an amended set of minimization procedures for use by NSA.

II. REVIEW OF AMENDED CERTIFICATIONS

The government executed and submitted the [REDACTED] including the Amended Minimization Procedures, pursuant to 50 U.S.C. § 1881a(i)(1)(C), which

² The Court concluded that then-proposed [REDACTED] and, implicitly, all prior Section 702 certifications, were similarly deficient.

³ The Court noted, however, that one component of the deficiencies identified in the October 3 opinion remained unresolved. Specifically, the government had not yet formally amended the NSA minimization procedures applicable to information collected under prior Section 702 certifications. This remains true.

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provides that:

The Attorney General and the Director of National Intelligence may amend a certification submitted in accordance with subsection (g) or the targeting and minimization procedures adopted in accordance with subsections (d) and (e) as necessary at any time, including if the Court is conducting or has completed review of such certification or such procedures, and shall submit the amended certification or amended procedures to the Court not later than 7 days after amending such certification or such procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures.

The [REDACTED] and procedures took effect on [REDACTED] 2012, see [REDACTED] [REDACTED] and the government submitted the amendment within the time allowed by the statute. The Attorney General and the Director of National Intelligence properly authorized the use of the Amended Minimization Procedures pending the Court's review. See id. [REDACTED]

Under the judicial review provisions that are incorporated by reference into Section 1881a(i)(C), the Court must review the certifications, as amended, to determine whether they contain all required elements. The Court concluded in its October 3 Opinion that [REDACTED] [REDACTED] as originally submitted, contained all of the required elements, see October 3 Opinion at 11-12; the Court also concluded in its November 30 Opinion that [REDACTED] contained all of the required elements, see November 30 Opinion at 4. Like the original and [REDACTED] the amendment now before the Court was executed under oath by the Attorney General and the Director of National Intelligence, as required by 50 U.S.C. § 1881a(g)(1)(A). See [REDACTED] Pursuant to Section

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1881a(g)(2)(A)(ii), the amendment includes the attestation of the Attorney General and the Director of National Intelligence that the Amended Minimization Procedures meet the statutory definition of minimization procedures and have been submitted to the FISC for approval. See

██████████. The amendment states that “[a]ll other aspects” of the certifications, as originally submitted, “remain unaltered and are incorporated herein.” See

██████████ Accordingly, the Court finds that ██████████ as now amended, contains all of the required elements.

III. REVIEW OF AMENDED NSA MINIMIZATION PROCEDURES

The Court must also review the Amended Minimization Procedures included as part of the ██████████ Submission to determine whether they satisfy FISA’s statutory definition of minimization procedures⁴ and are consistent with the requirements of the Fourth Amendment. See 50 U.S.C. §§ 1881a(i)(2)(C), (i)(3)(A). For the reasons set forth below, the Court concludes that the Amended Minimization Procedures satisfy these requirements.

A. NSA’s Framework for Sharing Unminimized Communications ██████████

The Amended Minimization Procedures provide for the sharing of certain unminimized communications obtained ██████████

⁴ FISA’s definition of minimization procedures requires, in pertinent part, “specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular [surveillance or physical search], to minimize the acquisition and 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.” 50 U.S.C. §§ 1801(h)(1) & 1821(4)(A).

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[REDACTED] from Internet Service Providers (“ISPs”).⁵ See Amended Minimization Procedures,

[REDACTED] The procedures only provide for the sharing of unminimized communications acquired from electronic communications accounts/addresses/identifiers (“selectors”) assessed to be relevant [REDACTED]

[REDACTED]⁶ See id. [REDACTED] Pursuant to the Amended Minimization Procedures, NSA will provide unminimized data [REDACTED]

[REDACTED] in consultation with the Attorney General and the DNI, in advance of the sharing. See id. [REDACTED]

[REDACTED] The Amended Minimization Procedures provide for general NSA oversight of [REDACTED] access, use, retention and dissemination of unminimized communications, some elements of which are discussed below. See id. [REDACTED]

In support of its request for approval of the Amended Minimization Procedures, NSA

[REDACTED]

⁵ Because these communications are acquired directly from ISPs and not through the “upstream collection” of Internet transactions, they do not present the problems discussed in the Court’s October 3 Opinion.

⁶ [REDACTED]

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B. Acquisition

In [REDACTED] Submission, the government represents that the Amended Minimization Procedures contain provisions governing acquisition of information that are identical to those in the NSA minimization procedures previously approved by this Court. See [REDACTED]

[REDACTED]

[REDACTED] no changes regarding acquisition were necessary. *Id.* The Court's review of the provisions of the Amended Minimization Procedures related to acquisition confirms that they are identical to those submitted by the government on October 31, 2011, and approved by the Court in its November 30 Opinion. Accordingly, the Court finds that the

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Amended Minimization Procedures satisfy the statutory definitions in 50 USC. §§ 1801(h)(1) & 1821(4)(A) with regard to acquisition.

C. Retention and Dissemination

The Amended Minimization Procedures allow NSA to provide unminimized data to

[REDACTED] See Amended Minimization Procedures [REDACTED]

[REDACTED] The procedures allow the data to be retained beyond this date if the Director of NSA determines, in writing with the concurrence of the FBI and CIA on an annual basis, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Any such extensions must be promptly reported to the National Security Division ("NSD") of the Department of Justice ("DOJ"), which must, in turn, promptly notify this Court. Id.

[REDACTED]

⁷ The procedures contemplate that NSA may stop sharing [REDACTED] before that time if the DNI or the Attorney General, in consultation with the Director of NSA and the CIA and the FBI, as appropriate, determines that the continued provision of unminimized data [REDACTED] no longer consistent with the needs of the US to obtain, produce, and disseminate foreign intelligence information [REDACTED]

[REDACTED] The procedures also allow for the DNI or the Attorney General to restrict, suspend, or terminate the provision of unminimized data [REDACTED]

[REDACTED]

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In addition to the aforementioned restrictions related to retention and dissemination, the Amended Minimization Procedures include other provisions establishing NSA's general oversight of, and accountability [REDACTED]

required to report promptly to NSA any instance of non-compliance with the procedures, and NSA must, in turn, promptly notify ODNI and DOJ. See Amended Minimization Procedures

[REDACTED] The procedures also require NSA to provide a report to this Court no later than [REDACTED] [REDACTED] indicating the number of selectors for which unminimized data was provided; a statistical description of requested and approved disseminations of US person information; and a description of [REDACTED] improperly handled unminimized data. See id. [REDACTED]

[REDACTED] Finally, NSA, ODNI and DOJ will have "all access reasonably necessary to conduct oversight" [REDACTED] See id. [REDACTED]

As noted above, the government seeks to share the unminimized communications obtained pursuant to [REDACTED]



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The Court finds that the Amended Minimization Procedures satisfy the statutory definition of minimization procedures in 50 USC §§ 1801(h)(1) & 1821(4)(A) with regard to retention and dissemination. As noted above, the collection that the government seeks to share [REDACTED] targets non-US persons reasonably believed to be located outside of the US, which at the outset substantially narrows the volume of nonpublicly available information concerning unconsenting US persons [REDACTED]. Further, the provisions of the Amended Minimization Procedures [REDACTED] are narrowly-tailored to provide only for the sharing of unminimized communications acquired from those selectors assessed to be relevant [REDACTED].



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Taking into account the government's need to protect US interests [REDACTED]



[REDACTED] and the extent to which the Amended Minimization Procedures have been carefully crafted to support that objective while protecting US person information, the Court concludes that the procedures are reasonably designed, in light of the purpose and technique of the particular surveillance or physical search, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting US persons consistent with the need of the US to obtain, produce, and disseminate foreign intelligence information, as required by 50 USC. §§ 1801(h)(1) & 1821(4)(A).

D. The Minimization Procedures Are Consistent With the Fourth Amendment.

The final question before the Court is whether the Amended Minimization Procedures are consistent with the Fourth Amendment. See 50 U.S.C. § 1881a(i)(3)(A)-(B). The Fourth Amendment provides:

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Court has assumed in prior Section 702 Dockets that, at least in some circumstances, account holders have a reasonable expectation of privacy in electronic communications and, hence, that the acquisition of such communications can result in a “search” or “seizure” within the meaning of the Fourth Amendment. See, e.g., Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 33. Indeed, the government has acknowledged in prior Section 702 matters that the acquisition of communications from facilities used by US persons located outside the US “must be in conformity with the Fourth Amendment.” [REDACTED]

2010 Memorandum of Law at 8.

a. The Warrant Requirement

The Court has previously concluded that the acquisition of foreign intelligence information pursuant to Section 702 falls within the “foreign intelligence exception” to the warrant requirement of the Fourth Amendment. See e.g., Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 35-36. The collection at issue here is directed at [REDACTED], and it is conducted for the purpose of national security – a purpose going “well beyond any garden-variety law enforcement objective.” See id. (quoting In re Directives, Docket No. 08-01, Opinion at 16 (FISA Ct. Rev. Aug. 22, 2008) (hereinafter “In re Directives”)).¹⁰ Further, it remains true

¹⁰ A redacted, de-classified version of the opinion in In re Directives is published at 551 F.3d 1004. The citations herein are to the unredacted, classified version of the opinion.

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that the collection is undertaken in circumstances in which there is a “high degree of probability that requiring a warrant would hinder the government’s ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake.” Id. at 36 (quoting In re Directives at 18). Accordingly, the government is not required to obtain a warrant before conducting the acquisitions under NSA’s minimization procedures.

b. Reasonableness

As the government recognizes, the central Fourth Amendment question is whether the Amended Minimization Procedures are reasonable under the Fourth Amendment.

See [REDACTED] As the Foreign Intelligence Surveillance Court of Review (“Court of Review”) has explained, a court assessing reasonableness in this context must consider “the nature of the government intrusion and how the government intrusion is implemented. The more important the government’s interest, the greater the intrusion that may be constitutionally tolerated.” In re Directives at 19-20 (citations omitted), quoted in Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 37. The court must therefore

balance the interests at stake. If the protections that are in place for individual privacy interests are sufficient in light of the government interest at stake, the constitutional scales will tilt in favor of upholding the government’s actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

Id. at 20 (citations omitted), quoted in Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 37.

In conducting this balancing, the Court must consider the “totality of the circumstances.” Id. at 19. This Court has recognized that the government’s national security interest in conducting

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acquisitions pursuant to Section 702 “is of the highest order of magnitude.” Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 37 (quoting In re Directives at 20).

In addition, the Court’s prior approvals of NSA’s targeting and minimization procedures rested, in part, on its conclusion that the procedures “reasonably confine acquisitions to targets who are non-U.S. persons outside the United States,” who thus “are not protected by the Fourth Amendment.” Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 37. The Court’s approvals also relied upon the understanding that acquisitions obtained from ISPs under the procedures “will intrude on interests protected by the Fourth Amendment only to the extent that (1) despite the operation of the targeting procedures, U.S. persons, or persons actually in the United States, are mistakenly targeted; or (2) U.S. persons, or persons located in the United States, are parties to communications to or from tasked selectors.” Id. at 38.¹¹

In arguing that the Amended Minimization Procedures satisfy the Fourth Amendment, the government stresses that the sharing of unminimized information [REDACTED] will enhance the intelligence efforts [REDACTED]. See [REDACTED]

[REDACTED]

¹¹ [REDACTED]

[REDACTED]

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Therefore, the

government has articulated a compelling national security need that is also cabined in terms of mission, geographical scope, and duration.

In evaluating the totality of the circumstances, the Court must consider not only the government's interests, but also the individual privacy interests that are affected by the government's actions. See In re Directives at 19-20. Here, the government acquires the full content of internet communications. A person's "papers" are among the four items that are specifically listed in the Fourth Amendment as subject to protection against unreasonable search and seizure. United States v. Jones, 132 S. Ct. 945, 949-950 (2012). Whether they are transmitted by letter, telephone or e-mail, a person's private communications are akin to personal papers. Indeed, the Supreme Court has held that the parties to telephone communications and the senders and recipients of written communications generally have a reasonable expectation of privacy in the contents of those communications. See Katz v. United States, 389 U.S. 347, 352 (1967); United States v. United States Dist. Ct. (Keith), 407 U.S. 297, 313 (1972); United States

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v. Jacobsen, 466 U.S. 109, 114 (1984). The intrusion resulting from the interception of the contents of electronic communications is, generally speaking, no less substantial.¹²

Here, the Court finds that both the provisions of the Amended Minimization Procedures

[REDACTED]
[REDACTED] serve to protect individual privacy interests to the extent necessary given the very substantial national security need. The government's amendment [REDACTED]

[REDACTED] also provides a number of safeguards for that data. First, as discussed above, the data will be provided [REDACTED] for a limited period of time consistent with [REDACTED]

[REDACTED] threats. Second, as also noted above, there is a time restriction on the retention [REDACTED]

The government's Amended Minimization Procedures also contain a number of protections regarding the use and dissemination of information. As discussed above, this includes a provision for limiting access to the data to trained and tested analysts, see id. [REDACTED], who are located at approved facilities, see id. [REDACTED]. Querying the data is limited to "selection terms reasonably likely to return foreign intelligence information concerning [REDACTED] [REDACTED] and use of any US person identifiers for querying must be approved by [REDACTED]"

¹² Of course, not every interception by the government of a personal communication results in a "search" or "seizure" within the meaning of the Fourth Amendment. Whether a particular intrusion constitutes a search or seizure depends on the specific facts and circumstances involved.

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NSA. Id. §8(c)(2)c. Records will be kept of all US person identifiers used as selection terms. Id. As is also discussed above, with regard to disseminations of information derived from the unminimized data as it concerns US persons, [REDACTED] not disseminate such information without prior written approval from NSA, except in situations involving imminent threat to life.¹³ See id. [REDACTED] NSA will not approve any dissemination that it would not itself be authorized to make. Id. Finally, the Amended Minimization Procedures require NSA to: maintain records of data provided [REDACTED]; develop and implement analyst training regarding minimization; [REDACTED] compliance with the procedures, to include monitoring and oversight; maintain records [REDACTED]; make determinations about detaskings, disseminations, and destruction pursuant to the amended procedures; and, notify DOJ and ODNI of any compliance incidents. See id. [REDACTED]

The Court of Review and this Court have recognized that the procedures governing retention, use, and dissemination bear on the reasonableness under the Fourth Amendment of a program for collecting foreign intelligence information. See In re Directives at 29-30; Docket No. 702(i)-08-01, Sept. 4, 2008 Mem. Op. at 40-41. As explained in the discussion of NSA's Amended Minimization Procedures above, significant protections have been put in place [REDACTED]

[REDACTED] Based on all of these factors and considering the totality of the circumstances, the Court finds that the government's proposed application of NSA's

¹³ [REDACTED]

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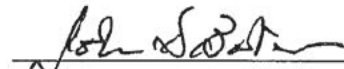
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Amended Minimization Procedures, together with the FBI and CIA minimization procedures and the targeting procedures previously approved by the Court for [REDACTED] are consistent with the requirements of the Fourth Amendment.

IV. CONCLUSION

For the foregoing reasons, the Court finds, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that, as amended on [REDACTED] 2012, [REDACTED] all the elements required by 50 U.S.C. § 1881a(g), and that the minimization procedures and targeting procedures approved for use in connection with [REDACTED] are consistent with the requirements of 50 U.S.C. §1881a(d)-(e) and with the Fourth Amendment. An order approving [REDACTED] and the use of the procedures is being entered contemporaneously herewith.

ENTERED this [REDACTED] 2012.



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

[REDACTED] Chief Deputy
Clerk, FISC, certify that this document
is a true and correct copy of the
original [REDACTED]
[REDACTED] exempt
under b(6)

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



ORDER

For the reasons stated in the Memorandum Opinion issued contemporaneously herewith, and in reliance upon the entire record in this matter, the Court finds that, pursuant to 50 U.S.C. § 1881a(i)(3)(A), [redacted] as amended on [redacted] 2012, [redacted] all the elements required by 50 U.S.C. § 1881a(g), and that the minimization procedures and targeting procedures approved for use in connection with [redacted] are consistent with the requirements of 50 U.S.C. §1881a(d)-(e) and with the Fourth Amendment.

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that the [redacted] and the use of such procedures are approved.

ENTERED this [redacted] 2012, at 5:46 pm Eastern Time.



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

[redacted] exempt under b(6), Chief Deputy
Clerk, FISC, certify that this document
is a true and correct copy of the
original [redacted] exempt
under
[redacted] b(6)

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