

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
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FOREIGN INTELLIGENCE SURVEILLANCE COURT
LEEANN P. HALL
CLERK OF COURT
UNITED STATES
WASHINGTON, D. C.

IN RE APPLICATION OF THE
FEDERAL BUREAU OF INVESTIGATION
FOR AN ORDER REQUIRING THE
PRODUCTION OF TANGIBLE THINGS

Docket Number: BR 15-99

**RESPONSE OF THE UNITED STATES TO THE
MEMORANDUM OF LAW BY AMICUS CURIAE**

The United States of America submits this response to the Memorandum of Law by Amicus Curiae regarding the Government's request for authorization to retain and use after November 28, 2015, call detail records previously produced in bulk pursuant to this Court's orders. The Government's request has two limited purposes. First, authorization to access the bulk call detail records until February 29, 2016, to verify the completeness and accuracy of call detail records produced under the new targeted productions authorized by the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015). Second, authorization to preserve the bulk call detail records, consistent with the Opinion and Order of this Court issued on March 12, 2014, in docket number BR 14-01, until relieved of its obligation to preserve such records in pending civil litigation.

As described more fully below, the Government concurs with the conclusion of the amicus curiae that neither section 103 of the USA FREEDOM Act nor any other

provision of that Act, precludes the retention and use of the previously produced bulk call detail records after November 28, 2015. The Government further concurs with the conclusion of the amicus curiae that this Court is authorized under Title V of the Foreign Intelligence Surveillance Act (FISA), as amended by the USA FREEDOM Act, to impose particularized minimization procedures for the retention and use of the previously produced bulk call detail records, which the Court has done in previous orders requiring the production in bulk of call detail records. The Government respectfully submits that the procedures it has proposed are appropriate for the limited retention and use of bulk call detail records after November 28, 2015, and requests that the Court approve them.

I. Statement of Facts

The USA FREEDOM Act authorizes the Court to approve an application for the bulk production of call detail records pursuant to 50 U.S.C. § 1861 for a period ending 180 days after enactment of the USA FREEDOM Act, which is November 29, 2015. *Op. and Order*, docket number BR 15-75, at 11 (holding that in passing the USA FREEDOM Act, Congress “chose to allow a 180-day transitional period during which such collection could continue.”). See also *American Civil Liberties Union v. Clapper*, No. 14-42, slip op. at 21 (2nd Cir. Oct. 29, 2015)(“[t]he language of § 215 as amended by the Freedom Act indicates that Congress intended the telephone metadata program to continue during the transition period”). Beginning on November 29, 2015, the USA FREEDOM Act,

among other things, prohibits the bulk production of tangible things under Section 1861 and provides a new mechanism for the Government to obtain a targeted production of call detail records relating to authorized investigations to protect against international terrorism. USA FREEDOM Act, § 109(a) (“The amendments made by sections 101 through 103 shall take effect on the date that is 180 days after the date of the enactment of this Act.”).

In light of this legislation and the range of existing high priority counterterrorism efforts that the National Security Agency’s (NSA) bulk call detail records program supports, the Government sought authorization for the continued production of bulk call detail records until November 28, 2015, at 11:59 p.m. Eastern Time. This date was proposed in order to align the expiration of Court authorization with the end of the 180-day transition period authorized by the USA FREEDOM Act. On August 27, 2015, in docket number BR 15-99, the Honorable Michael W. Mosman of this Court approved the Government’s Application and issued orders requiring the production of the bulk call detail records to NSA. As requested by the Government, the Court’s authorization expires on November 28, 2015, at 11:59 p.m. Eastern Time.

The Government’s Application in docket number BR 15-99 stated that analytic access to the previously produced bulk call detail records would end on November 28, 2015. The Application, however, sought Court approval to retain and use after November 28, 2015, such records for the two limited purposes described above. In its

Primary Order in docket number BR 15-99, the Court stated that it was taking under advisement the requests to retain and use the bulk call detail records after November 28, 2015, and that it would address the requests in a subsequent order or orders. Primary Order, docket number BR 15-99, at 12-13. Accordingly, the Primary Order did not authorize retention and use of the bulk call detail records after November 28, 2015. On September 17, 2015, the Court issued an order appointing an amicus curiae, pursuant to 50 U.S.C. § 1803(i)(2)(B), “to address whether the government’s above-described requests to retain and use BR metadata [the previously produced bulk call detail records] after November 28, 2015, are precluded by section 103 of the USA FREEDOM Act or any other provision of that Act.” Order Appointing an Amicus Curiae, docket number BR 15-99, at 2-3.¹

II. Analysis of the USA FREEDOM Act

The text of the USA FREEDOM Act, according to the amicus curiae, “does not direct a particular fate for the government’s archive of telephony metadata. Instead, the Act provides that the Court shall decide issues concerning the use, retention,

¹ The Court’s order appointing the amicus curiae directed him to address whether the USA FREEDOM Act precludes the Government’s requests to retain and use bulk call detail records after November 28, 2015. Amicus curiae’s analysis of Section 104 of the USA FREEDOM Act could be interpreted as suggesting an opportunity for the Court to re-examine the minimization procedures applicable for other business records productions in this proceeding. Consistent with the Court’s order appointing amicus curiae, the Government has limited its response to the issue identified in that order.

dissemination, and eventual destruction of the tangible things collected under FISA business records statute as part of its oversight of the statutorily mandated minimization procedures.” Mem. of Law by Amicus Curiae Regarding Government’s August 27, 2015, Application to Retain and Use Certain Telephony Metadata after November 28, 2015, docket number BR 15-99 at 3 (Oct. 29, 2015) (Amicus Mem. of Law). The Government agrees with the amicus curiae that the USA FREEDOM Act does not prohibit the retention and use of previously produced call detail records. No provision of the USA FREEDOM Act requires any particular disposition, let alone immediate destruction, of records produced to the Government pursuant to a production order entered before the effective date of the USA FREEDOM Act. *Id.* at 12 (“No provision of the USFA. . . explicitly states how the government or this Court shall manage or use the data archive generated by years of collection”). The Government submits that, in the absence of a statutory requirement to dispose of previously produced information, the authorization to retain bulk call detail records upon the effective date of the USA FREEDOM Act is a matter to be decided by this Court. *See id.* at 3, 15 (USA FREEDOM Act confers issues regarding retention, use, dissemination and destruction of the legacy data to the Court).

Beginning on November 29, 2015, section 103 of the USA FREEDOM Act prohibits applications and orders for the bulk production of tangible things under Section 1861, *see, e.g.*, § 103(a) (requiring that each application under Section 1861 include “a specific selection term to be used as the basis for the production of tangible

things sought”), and section 101 provides for a new type of application for the targeted production of call detail records relating to authorized investigations to protect against international terrorism. USA FREEDOM Act, § 109(a). The amendments described in sections 101 through 103 of the USA FREEDOM Act are prospective in nature: they prohibit applications and orders for the production of tangible things in bulk made or issued after November 28, 2015. See, e.g., H.R. REP. NO. 114-109, at 17 (section 101 of the USA FREEDOM Act “establish[es] a new, narrowly tailored mechanism for the targeted collection of telephone metadata”) (emphasis added). No provision of the Act, including Sections 101 and 103, addresses the disposition of tangible things produced in bulk pursuant to applications made or orders issued before November 29, 2015.

The USA FREEDOM Act’s silence regarding tangible things produced in bulk before November 29, 2015, cannot reasonably be read to prohibit the continued retention and use of such bulk productions. The bulk production of call detail records to NSA was a matter of public record at the time Congress considered the USA FREEDOM Act. Had it intended to require the destruction of prior bulk productions, Congress would have made any prohibition on the continued use of these records clear in the USA FREEDOM Act. The USA FREEDOM Act, however, is silent regarding prior bulk productions. The USA FREEDOM Act’s silence regarding the disposition of prior bulk productions can be reasonably interpreted to mean only that Congress did not intend to mandate particular retention requirements for such productions. See Animal Legal Def. Fund. v. United

States Dept. of Agriculture, 789 F.3d 1206, 1217 (11th Cir. 2015) (“Where Congress knows how to say something but chooses not to, its silence is controlling.”) (quoting In re Haas, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other ground by In re Griffith, 206 F.3d 1389 (11th Cir. 2000)).

The Court has issued particularized minimization procedures for the retention and use of bulk call detail records in its first order approving the collection and in every order since then. The USA FREEDOM Act made the Court’s authority to issue such procedures even more express. Section 104(a)(1) of the USA FREEDOM Act requires that, before entering an order for the production of tangible things, the Court must find that the proposed minimization procedures meet the statutory definition of minimization procedures set forth in 50 U.S.C. § 1861(g). Section 104(a)(2) adds to 50 U.S.C. § 1861(g) a rule of construction:

Nothing in this subsection shall limit the authority of [the FISA Court] to impose additional, particularized minimization procedures with regard to the production, retention, or dissemination of nonpublicly available information concerning unconsenting United States persons, including the additional, particularized minimization procedures related to the destruction of information within a reasonable time period.

The Government agrees with the amicus curiae that this Court may direct the Government to follow particularized minimization procedures for the retention and use of bulk call detail records after November 28, 2015. See Amicus Mem. of Law at 15. The

Government requests that the procedures it proposed in its Application in docket number BR 15-99 be the procedures that the Court directs it to follow.

III. The Government's Retention and Use After November 28, 2015

The Government is proposing limiting its retention and use of bulk call detail records acquired on or before November 28, 2015, for two purposes. The Government fully recognizes the sensitivities that are associated with retention and use of bulk call detail records and thus has carefully circumscribed the purposes for which the bulk data may be used and has included significant physical and technical measures to protect against any misuse of this data.

A. The Bulk Telephony Metadata Archive is Secure.

As described in the Application in docket number BR 15-99 and prior docket numbers, NSA stores and processes the bulk call detail records in repositories within secure networks under NSA's control. Those repositories (servers, networked storage devices, and backup tapes in locked containers) are located in NSA's secure, access-controlled facilities at Fort George G. Meade, Maryland. As further described in those applications, NSA restricts access to the records to authorized personnel who have received appropriate and adequate training. Electronic access to the call detail records requires a user authentication credential. Physical access to the location where NSA

stores and processes the call detail records requires an approval by NSA management and must be conducted in teams of no less than two persons.

B. Access to the Bulk Telephony Metadata After November 28, 2015.

By November 28, 2015 at 11:59 p.m. Eastern Time, all access to the bulk call detail records (that is, access for any purpose) will cease, except as the Court may otherwise permit for technical and litigation preservation purposes. To ensure that there is no access after November 28, 2015, NSA will remove the access credentials of all persons previously approved to access the call detail records, and will update the system that manages and tracks Court-approved seed selection terms so that all such terms will be marked as "not approved" which will have the effect of blocking any query of the bulk call detail records conducted for the purpose of obtaining foreign intelligence information. Only if the Court approves technical access for 90 days will NSA authorize select technical personnel access to the data.

NSA technical personnel will access the bulk call detail records after November 28, 2015, until February 29, 2016, to verify the completeness and accuracy (i.e., data integrity) of the call detail records produced under the targeted production provisions of the USA FREEDOM Act. Verification will involve a comparison of the two sets of records (call detail records produced under the new targeted production and bulk call detail records). For example, NSA technical personnel will compare the number of call detail records produced for a specific selection term under the USA FREEDOM Act

provisions to the number of call detail records identified in response to a bulk query using the same specific selection term. This comparison will help provide assurance that the new architecture is working as intended in terms of the data the NSA should be receiving under the USA FREEDOM Act provisions.

NSA technical personnel also will examine the record fields in call detail records produced in a targeted production to ensure that they accurately correspond to the fields contained in the bulk call detail records. Such confirmation will assist NSA in ensuring that prohibited information, e.g., cell site location information or customer financial information, is not inadvertently produced. Similarly, in a targeted production of call detail records, the providers will be performing record “normalization” (that is, placing the records in known, standard formats). NSA technical personnel will evaluate whether record normalization by providers is in a format that will ensure proper processing by the Government. See 50 U.S.C. § 1861(c)(2)(F)(v).

Since enactment of the USA FREEDOM Act in June 2015, NSA and the providers have worked to create the infrastructure, processes and controls necessary to support the targeted production of call detail records. Much has been accomplished and NSA anticipates that by November 29, 2015, it and the providers will be ready to begin implementing orders for the targeted production of call detail records. Still, only by testing the infrastructure, processes, and controls with real requests authorized by orders issued by this Court after November 29, 2015 compelling provider assistance, and

comparing real productions against the bulk call detail records, can NSA be truly assured that the infrastructure, processes and controls necessary to support the targeted production of call detail records are operating as intended, and that targeted productions are complete and accurate.

C. Destruction of Bulk Telephony Metadata.

As soon as feasible after February 29, 2016, as it is relieved of its litigation preservation obligations, see below, NSA will begin the process of destroying the bulk call detail records. Destruction will include all bulk call details records and related call chain summaries. Copies of call detail records and information derived from them that are used by NSA technical personnel during the November 29, 2015, to February 29, 2016 period also will be destroyed, with the exception of summary reports that will assess the differences, if any, between call detail records previously produced in bulk and those produced pursuant to a targeted production. NSA anticipates it can complete destruction of the bulk call detail records and related chain summaries within one month of being relieved of its litigation preservation obligations. Information obtained or derived from call detail records which has been previously disseminated in accordance with approved minimization procedures will not be recalled or destroyed.² Also, select

² This practice does not differ from similar circumstances where, for example Court-authorized electronic surveillance and/or physical search authorities under Title I or III expire. While raw (unminimized) information is handled and destroyed in accordance with applicable

query results generated by pre-November 29, 2015, queries of the bulk records that formed the basis of a dissemination in accordance with approved minimization procedures will not be destroyed.

D. The Government's Continuing Preservation Obligations.

The Application also described that NSA remains under a continuing legal obligation to preserve bulk call detail records until civil litigation regarding the bulk production program is resolved or relevant courts relieve NSA of such obligations. Consistent with the Opinion and Order of this Court issued on March 12, 2014, in docket number BR 14-01, the Application stated that the bulk call detail records that are being preserved solely because of preservation obligations in pending litigation will not be used or accessed for any other purpose, and, as soon as possible, NSA will destroy the bulk call detail records upon expiration of its litigation preservation obligations.

The Government has described its litigation preservation obligations in several unclassified filings with this Court. On February 25, 2014, the Government moved for an amendment to the Primary Order in docket number BR 14-01 seeking authorization for the NSA to preserve and/or store the bulk call detail records beyond 60 months for non-analytic purposes arguing that such destruction could be inconsistent with its preservation obligations in connection with certain pending civil litigation. Motion for

minimization procedures, prior authorized disseminations and the material underpinning those disseminations are not recalled or otherwise destroyed.

Second Amendment to Primary Order, docket number BR 14-01 (February 25, 2014). By Opinion and Order dated March 7, 2014 the Court denied, without prejudice, the Government's motion. After the receipt of the Court's March 7, 2014 Opinion and Order, the Department of Justice notified the plaintiffs and district courts in the pending civil lawsuits that consistent with the Court's Opinion and Order, absent a contrary court order, the Government would commence complying with applicable record destruction requirements.

On March 10, 2014, plaintiffs in two matters (Jewel, et al., v. National Security Agency, et al. No. C 08-04373-JSW (N.D. Cal.), and First Unitarian Church of Los Angeles, et al., v. National Security Agency, et al. No. C 13-03287-JSW (N.D. Cal.)) moved in the United States District Court for the Northern District of California for temporary restraining orders (TROs) to prohibit destruction of the bulk call detail records, arguing that such data is evidence relevant to those lawsuits. On March 10, 2014, the district court issued TROs which prohibited the destruction of any potential evidence relevant to the claims at issue in those civil actions, "including but not limited to prohibiting the destruction of any telephone metadata or 'call detail' records, pending further order" of that district court. Notice of Entry of Temporary Restraining Order Against the United States and Motion for Temporary Relief from Subparagraph 3(E) of Primary Order, docket number BR 14-01 (March 11, 2014). Following issuance of the TROs, the Government again moved for relief from the Primary Order's destruction

requirement. This Court granted the Government's motion. Opinion and Order, docket number BR 14-01 (Mar. 12, 2014). In granting the requested relief, the Court noted, among other things, that "it is appropriate for [the district court for the Northern District of California], rather than the FISC, to determine what BR metadata is relevant to that litigation." Id. at 5.³

The Government subsequently received on March 21, 2014 an order in First Unitarian Church which required that the Government "preserve evidence that may be relevant" to the action. Notice of Order, docket number BR 14-01 (March 27, 2014). The Government has interpreted this broad language as requiring NSA, absent further relief from the district court, to preserve bulk call detail records beyond five years after its initial collection. See Notice of Order, docket number BR 14-01 (March 27, 2014).

Accordingly, consistent with the TROs issued in those civil cases, and the subsequent Opinion and Order of this Court issued on March 12, 2014, in docket number BR 14-01, NSA will preserve bulk call detail records to meet its litigation preservation obligations. Specifically, pending resolution of the preservation issues raised by plaintiffs in Jewel and First Unitarian Church, all call detail records retained beyond the

³ Moreover, in permitting the Government to retain data necessary to comply with its obligations as a civil litigant, the Court recognized that a contrary result would subject the Government to "conflicting directives from federal courts." March 12, 2014 Opinion and Order at 4. That, in turn, would "put the government in an untenable position and [would] likely lead to uncertainty and confusion among all concerned." Id.

five-year retention period of prior Court orders will be preserved and/or stored in a format that precludes any access or use for any purpose,⁴ provided that:

- (i) NSA technical personnel may access the BR metadata subject to this order only for the purpose of ensuring continued compliance with the government's preservation obligations to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata.
- (ii) Should any further accesses to the BR metadata be required for civil litigation purposes, such accesses shall occur only following prior written notice to the FISC specifically describing the nature of and reason for the access.

See Opinion and Order, docket number BR 14-01 (March 12, 2014). Additionally, the Government remains under a continuing obligation to promptly notify this Court of any additional material developments in the district court litigation. The Government has operated without incident pursuant to the Court's directive in this context for almost 20 months, successfully preserving and/or storing bulk call detail records beyond five years after initial collection in a format that has precluded prohibited access or use by NSA. The Government respectfully submits that NSA's track record of compliance provides assurance that it will

⁴ In particular, NSA will not access bulk call detail records retained beyond the five-year retention period to verify the completeness and accuracy of call detail records produced under the new provisions of the USA FREEDOM Act.

continue to secure the bulk call detail records until it destroys them as soon as practical upon expiration of its litigation preservation obligations.⁵

The suggestions by amicus curiae that this Court address (or perhaps even resolve) significant substantive questions at issue in underlying civil litigation, see Amicus Mem. of Law at 27, are exactly the kinds of inquiries the Court previously recognized were inappropriate for it to resolve. Opinion and Order, docket number BR 14-01 at 5 (“it is appropriate for [the district court for the Northern District of California], rather than the FISC, to determine what BR metadata is relevant to that litigation”). This Court should adopt the same view. In particular, the suggestion that the Government disclose national security information concerning the identity of providers, information subject to a pending state secrets privilege assertion, is inappropriate, and the suggestion by amicus that the government stipulate to Article III standing in those cases is unfounded as a matter of law. Finally, the suggestion that preservation of bulk call detail records can be limited solely to the plaintiffs in multiple pending

⁵ First Unitarian Church remains pending before the district court. The parties have fully briefed a motion to dismiss and a motion for partial summary judgment. The Government’s preservation obligations, therefore, are ongoing. The Government’s preservation obligations in Jewel are likewise ongoing. Much of the case remains pending in the district court, while one part of one claim is pending before the Ninth Circuit Court of Appeals pursuant to a Rule 54(b) appeal. Oral argument on the Government’s motion to dismiss that appeal was heard on October 28, 2015.

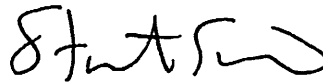
putative class actions is entirely unworkable. For the reasons more particularly set out above, until the Government is relieved of its preservation obligations, the data is secure.

IV. Conclusion

For the foregoing reasons, the USA FREEDOM Act does not preclude, and this Court may approve, the Government's retention and use of previously produced bulk call detail records for the limited purposes described in the Government's Application in BR 15-99, as further described above. The Government respectfully requests that the Court authorize such retention and use.

Respectfully submitted,

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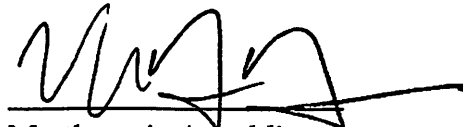
11/6/15

Date

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, I filed a true and correct copy of the foregoing Response to the Memorandum of Law by Amicus Curiae, in Docket Number BR 15-99, with the Clerk of Court who will transmit a true copy via appropriate means to:

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