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U.S. Department of Justice

National Security Division

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT

2011 MAY -2 AM 11:48

LEEANN FLYNN HALL
CLERK OF COURT

~~TOP SECRET//COMINT//NOFORN~~

Washington, D.C. 20530

May 2, 2011

The Honorable John D. Bates
United States Foreign Intelligence Surveillance Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Clarification of National Security Agency's Upstream Collection Pursuant to Section 702 of FISA ~~(S//SI//NF)~~

Dear Judge Bates:

On April 21, 2011, the National Security Agency (NSA) provided the National Security Division (NSD) and the Office of the Director of National Intelligence (ODNI) information clarifying the manner in which NSA acquires certain communications through its upstream collection platforms pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA). Although NSA, NSD, and ODNI are still reviewing this matter and assessing its import, we are providing preliminary notice at this time pursuant to Rule 13(a) of the Rules of Procedure for the Foreign Intelligence Surveillance Court, effective November 1, 2010, in order provide the Court with this additional clarifying information. We have worked closely in these efforts with NSA officials, who have assisted in drafting and reviewing this notice to the Court. ~~(TS//SI//NF)~~

As previously described to the Court, in conducting upstream collection using electronic communication accounts/addresses/identifiers (hereinafter "selectors") pursuant to Section 702, NSA acquires Internet communications that are to or from a tasked selector, or which contain a reference to a tasked selector. The term "Internet communications," as described by the Director of NSA in affidavits supporting DNI/AG 702(g) certifications, "is intended to include electronic communications that [redacted] See, e.g., DNI/AG 702(g) Certification [redacted] Affidavit of General Keith B. Alexander, Director, NSA, filed [redacted] 2010, ¶ 6. [redacted]

~~TOP SECRET//COMINT//NOFORN~~

Classified by: Tashina Gauhar, Deputy Assistant Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: May 2, 2036

OI Tracking No. 104876

[redacted] ~~(TS//SI//NF)~~

In past representations to the Court, the Government used as an example of upstream collection the acquisition of [redacted] that contained a selector that NA had tasked under Section 702, such that NSA acquired the [redacted] while it was being transmitted to or from a user of the non-tasked account.[1] [redacted] Based on recent discussions among NSA, NSD, and ODNI regarding one specified category of Internet communications acquired through upstream collection—"electronic communications [redacted]"—and in view of the complexity of this issue and the prior representations to the Court, the Government believes that further description of the scope of NSA's upstream collection is warranted. ~~(TS//SI//NF)~~

One type of "electronic communications [redacted][2] ~~(TS//SI//NF)~~

Depending on [redacted], the data transmitted [redacted] may also include [redacted]

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[1] [redacted] ~~(TS//SI//NF)~~

[2] [redacted] ~~(TS//SI//NF)~~

[redacted] including e-mail messages that are not to, from, or about a Section 702-targeted individual. For example, [redacted] The content of [redacted] would be acquired through NSA's Section 702 upstream collection if a tasked selector appeared anywhere [redacted] ~~(TS//SI//NF)~~

As this example demonstrates, an individual Internet communication can contain a single piece of information [redacted], or it could contain multiple pieces of information [redacted] ~~(TS//SI//NF)~~

Additionally, as described in the NSA's targeting procedures, "in those cases where NSA seeks to acquire communications about the target that are not to or from the target, NSA will employ either an Internet Protocol filter to ensure that the person from whom it seeks to obtain foreign intelligence information is located overseas, or [redacted]" See, e.g., DNI/AG 702(g) Certification [redacted] Exhibit A at 2. It is through these measures that NSA prevents the intentional acquisition of Internet communications that contain a reference to a targeted selector where the sender and all intended recipients are known at the time of acquisition to be located in the United States. See, e.g., In re DNI/AG Certification [redacted] No. 702(i)-08-01, Mem. Op. at 19 (USFISC Sept. 4, 2008). NSA, NSD, and ODNI are continuing to examine what affect, if any, the type of Internet communications collection discussed in this letter has on the efficacy of these measures. ~~(TS//SI//NF)~~

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NSA, NSD, and ODNI are continuing to review and assess this matter and will provide additional information to the Court as appropriate. We appreciate the Court's consideration of this matter and welcome additional opportunities to present further information to the Court. ~~(TS//SI//NF)~~

Respectfully submitted,

[redacted]

Office of Intelligence, NSD
U.S. Department of Justice