UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

IN RE APPLICATION OF THE FEDERAL BUREAU OF INVESTIGATION FOR AN ORDER REQUIRING THE PRODUCTION OF TANGIBLE THINGS FROM [redacted]

Docket Number: BR 14-96

MEMORANDUM OPINION

The Court has today issued the Primary Order appended hereto granting the "Application of the Federal Bureau of Investigation for an Order Requiring the

Production of Tangible Things" ("Application" or "the instant Application"), which was submitted to the Court on June 19, 2014, by the Federal Bureau of Investigation ("FBI"). The Application requested the issuance of orders pursuant to 50 U.S.C. §1861, as amended (also known as Section 215 of the USA PATRIOT Act), requiring the ongoing daily production to the National Security Agency ("NSA") of certain telephone call detail records in bulk ("bulk telephony metadata").

On August 29, 2013, Judge Claire V. Eagan of this Court issued an Amended Memorandum Opinion in Docket Number BR 13-109, offering sound reasons for authorizing an application for orders requiring the production of bulk telephony metadata ("August 29 Opinion"). On September 17, 2013, following a declassification review by the Executive Branch, the Court published its redacted August 29 Opinion and the Primary Order issued in Docket Number BR 13-109. On October 11, 2013, Judge Mary A. McLaughlin of this Court granted the FBI's application to renew the authorities approved in Docket Number BR 13-109, issued a Memorandum adopting Judge Eagan's statutory and constitutional analyses, and provided additional analysis on whether the production of bulk telephony metadata violates the Fourth Amendment ("October 11 Opinion"). Both judges of this Court held that the compelled production of such records does not constitute a search under the Fourth Amendment. Judge

McLaughlin further found that the Supreme Court's decision in United v. Jones, __ U.S. __, 132 S. Ct. 945 (2012) neither mandates nor supports a different conclusion. Following a declassification review by the Executive Branch, the Court published the October 11 Opinion and the Primary Order issued in Docket Number BR 13-158 in redacted form a week later on October 18, 2013. Since the date of Judge McLaughlin's re-authorization of the bulk telephony metadata collection in Docket Number BR 13-158, the government has sought on three occasions renewed authority for this collection. The Court has approved those applications in Docket Numbers BR 14-01 (on January 3, 2014), BR 14-67 (on March 28, 2014), and the instant Application.

In approving the instant Application, I fully agree with and adopt the constitutional and statutory analyses contained in the August 29 Opinion and the October 11 Memorandum. In particular, with respect to the constitutional analysis, I concur with Judges Eagan and McLaughlin that under the controlling precedent of *Smith v. Maryland*, 442 U.S. 735 (1979), the production of call detail records in this matter does not constitute a search under the Fourth Amendment. With respect to the statutory requirements for the issuance of orders for the collection of bulk telephony metadata, I adopt the analysis put forth by Judge Eagan in her August 29 Opinion, and in particular, I note her discussion on the issue of relevance:

> The government must demonstrate "facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." 50 U.S.C. 1861(b)(2)(A). The fact that international terrorist operatives are using telephone communications, and that it is necessary to obtain the bulk collection of a telephone company's metadata to determine those connections between known and unknown international terrorist operatives as part of authorized investigations, is sufficient to meet the low statutory hurdle set out in Section 215 to obtain a production of records. Furthermore, it is important to remember that the relevance finding is only one part of a whole protective statutory scheme. Within the whole of this particular statutory scheme, the low relevance standard is counter-balanced by significant post-production minimization procedures that must accompany such an authorization and an available mechanism for an adversarial challenge in this Court by the record holder. [. . .] Without the minimization procedures set out in detail in this Court's Primary Order, for example, no Orders for production would issue from this Court. See Primary Ord. at 4-17. Taken together, the Section 215 provisions are designed to permit the government wide latitude to seek the information it needs to meet its national security responsibilities, but only in combination with specific procedures for the protection of U.S. person information that are tailored to the production and with an opportunity for the authorization to be challenged. The Application before this Court fits comfortably within this statutory framework.

August 29 Opinion at 22-23.

Since the issuance of the August 29 Opinion and October 11 Memorandum, there have been changes to the minimization procedures applied to the bulk telephony metadata collection. These were requested by the government and approved by this Court. Moreover, the legality of the bulk telephony metadata collection has been challenged in litigation throughout the country and considered by four U.S. District

Court judges. Lastly, on December 18, 2013, in an order entered in BR 13-158, Judge McLaughlin granted leave to the Center for National Security Studies ("the Center") to file an *amicus curiae* brief on why 50 U.S.C. §1861 does not authorize the collection of telephony metadata records in bulk. The Center filed its *amicus* brief on April 3, 2014, after the most recent authorization of this collection in Docket Number BR 14-67. Prior to making a decision to grant the instant Application, I considered each of these developments, which I briefly note below.

Changes to Minimization Procedures

Pursuant to 50 U.S.C. §1861(g), the bulk telephony metadata collected pursuant to orders granting the instant Application, as well as all predecessor applications, are subject to minimizations procedures. The statutory requirements for minimization procedures under 50 U.S.C. §1861(g) are discussed in the August 29 Opinion. August 29 Opinion at 11. On February 5, 2014, the Court granted the government's Motion for Amendment to Primary Order in Docket Number BR 14-01, which amended the minimization procedures required by the Primary Order in that case in two significant respects. First, the amended procedures preclude the government (except in emergency circumstances) from querying the bulk telephony metadata without first having

obtained, by motion, a determination from this Court that reasonable, articulable suspicion (RAS) exists to believe that the selection term (e.g., a telephone number) to be used for querying is associated with an international terrorist organization named in the Primary Order requiring the production of the bulk telephony metadata.[1] Second, the amended procedures require that queries of the bulk telephony metadata be limited so as to identify only that metadata found within two "hops" of an approved selection term.[2] The government has requested, and the Court has approved, the same limitations in orders accompanying the two subsequent applications for this collection filed with this Court (i.e., Docket Number BR 14-67 and the instant Application).

On February 25, 2014, the government filed a Motion for Second Amendment to Primary Order in Docket Number BR 14-01, through which it sought further to modify the minimization procedures ("February 25 Motion"). Specifically, the government sought relief from the requirement that it destroy bulk telephony metadata after five

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[1] Previously, the minimization procedures allowed for this RAS determination to be made by one of a limited set of high-ranking NSA personnel.

[2] The first "hop" would include metadata associated with the set of numbers directly in contact with the approved selection term, and the second "hop" would include metadata associated with the set of numbers directly in contact with the first "hop" numbers. Previously, the minimization procedures allowed the government to query the bulk telephony metadata to identify metadata within three "hops" of an approved selection term.

years, based on the government's common law preservation obligations in pending civil litigation. In seeking relief from the five-year destruction requirement, the government proposed a number of additional restrictions on access to and use of the data, all designed to ensure that collected metadata that was more than five years old could only be used for the relevant civil litigation purposes. Although this Court initially denied the February 25 Motion without prejudice, the Court granted a second motion for the same relief on March 12, 2014 ("March 12 Order and Opinion"), that the government sought in order to comply with a preservation order that had been issued by the U.S. District Court for the Northern District of California after this Court's denial of the February 25 Motion. The March 12 Order and Opinion required that the bulk telephony metadata otherwise required to be destroyed under the five year limitation on retention be preserved and/or stored "[p]ending resolution of the preservation issues raised . . . before the United States District Court for the Northern District of California[."] March 12 Opinion and Order at 6. The March 12 Order and Opinion prohibited NSA intelligence analysts from accessing or using such data for any purpose; permitted NSA personnel to access the data only for the purpose of ensuring continued compliance with the government's preservation obligations; and prohibited any further accesses of BR metadata for civil litigation purposes without prior written notice to this Court. *Id.*

at 6-7. Finally, the March 12 Opinion and Order required the government promptly to notify this Court of any additional material developments in civil litigation pertaining to the BR metadata, including the resolution of the preservation issues in the proceedings in the Northern District of California. *Id.* at 7. The preservation issues raised in the Northern District of California have not yet been resolved. As a result, the government has requested and the Court has approved the same exemption from the five year limitation on retention, subject to the same restrictions on access and use, in Docket Number BR 14-67 and the instant Application.

Prior to deciding whether to re-authorize the bulk telephony metadata collection through the appended Primary Order, I considered with care the stated changes to the minimization procedures. As described, the first set of changes approved in the February 5 Order provide enhanced protections for the bulk telephony metadata. While the March 12 Opinion and Order allows the government to retain bulk telephony metadata beyond five years, it allows the government to do so for the sole purpose of meeting preservation obligations in civil litigation pending against it.

U.S. District Court Cases

In recent months, the legality of the bulk telephony metadata collection has been challenged on both statutory and constitutional grounds in proceedings throughout the country, and four U.S. District Court judges have issued opinions on these challenges. *Smith v. Obama*, No. 2:13-CV-257-BLW, 2014 WL 2506421 (D. Idaho June 3, 2014); *A.C.L.U. v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013); and *U.S. v. Moalin*, No. 10cr4246 JM, 2013 WL 6079518 (S.D. Cal. November 18, 2013). In three of the four cases in which judges have issued opinions (i.e., all but the *Klayman* case), they have rejected plaintiffs' challenges to this collection. In particular, with respect to Fourth Amendment challenges raised by plaintiffs, the judges in *Smith, Clapper and Moalin* recognized that the Supreme Court's decision in *Smith v. Maryland* is controlling and does not support a finding that the bulk telephony metadata collection is a violation of the Fourth Amendment.

In *Klayman*, Judge Richard J. Leon of the U.S. District Court for the District of Columbia alone held that the plaintiffs were likely to succeed on their claim that the bulk telephony metadata collection was an unreasonable search under the Fourth Amendment. *Klayman*, 957 F. Supp. 2d at 41. Judge Leon ordered the government to

cease collection of any telephony metadata associated with [the plaintiffs'] personal Verizon accounts" and destroy any such metadata in its possession, but he stayed the order pending appeal. *Id.* at 43.

On January 22, 2014, a recipient of a production order in Docket Number BR 14-01 filed a Petition ("January 22 Petition") pursuant to 50 U.S.C. § 1861(f)(2)(A) and Rule 33 of the Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure, asking this Court "to vacate, modify, or reaffirm" the production order issued to it.[3] According to the Petitioner, the Petition arose "entirely from the effect on [the recipient] of Judge Leon's Memorandum [Opinion]," and specifically, that Judge's conclusion that the Supreme Court's decision in *Smith v. Maryland* is "inapplicable to the specific activities mandated by the [Section] 1861 order at issue in the *Klayman* litigation." January 22 Petition at 3-4. Pursuant to the requirements of 50 U.S.C. § 1861(f), Judge Rosemary M. Collyer of this Court issued an Opinion and Order on March 20, 2014 ("March 20 Opinion and Order"), finding that the Petition provided no basis for vacating or

[3] Following a declassification review by the Executive Branch, the Court published the January 22 Petition filed in Docket Number BR 14-01 in redacted form on April 25, 2014.

modifying the relevant production order issued in Docket Number BR 14-01.[4] In her March 20 Opinion and Order, Judge Collyer engaged in an extensive analysis of Judge Leon's opinion in *Klayman*, ultimately disagreeing with his conclusion that *Smith v. Maryland* is inapplicable to the collection of bulk telephony metadata.

In issuing the Primary Order appended hereto which re-authorizes the bulk telephony metadata collection, I have carefully examined the noted U.S. District Court opinions, and I agree with Judge Collyer's analysis and opinion of the *Klayman* holding.

Amicus Curiae Brief

On April 3, 2014, the Center for National Security Studies filed an *amicus curiae* brief explaining why it believes that 50 U.S.C. §1861 does not authorize the collection of bulk telephony metadata. The *amicus* brief made a number of thoughtful points, the merits of which I have analyzed. Notwithstanding the Center's arguments, I find the authority requested by the FBI through the instant Application meets the requirements of the statute, and that the collection of bulk telephony metadata may be authorized under the terms of the statute.

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[4] Following a declassification review by the Executive Branch, the Court published the March 20 Opinion and Order issued in Docket Number BR 14-01 in redacted form on April 25, 2014.

Conclusion

The unauthorized disclosure of the bulk telephony metadata collection more than a year ago led to many written and oral expressions of opinions about the legality of collecting telephony metadata. Congress is well aware that this Court has interpreted the provisions of 50 U.S.C. § 1861 to permit this particular collection, and diverse views about the collection have been expressed by individual members of Congress. In recent months, Congress has contemplated a number of changes to the Foreign Intelligence Surveillance Act, a few of which would specifically prohibit this collection. Congress could enact statutory changes that would prohibit this collection going forward, but under the existing statutory framework, I find that the requested authority for the collection of bulk telephony metadata should be granted. Courts must follow the law as it stands until the Congress or the Supreme Court changes it.

In light of the public interest in this particular collection and the government's declassification of related materials, including substantial portions of Judge Eagan's August 29 Opinion, Judge McLaughlin's October 11 Memorandum, and Judge Collyer's March 20 Opinion and Order, I request pursuant to FISC Rule 62 that this Memorandum Opinion and Accompanying Primary Order also be published, and I

direct such request to the Presiding Judge as required by the Rule.

ENTERED this 19th day of June, 2014.

JAMES B. ZAGEL
Judge, United States Foreign
Intelligence Surveillance Court

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