

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

Docket Number: BR 14-01

OPINION AND ORDER

This matter is before the United States Foreign Intelligence Surveillance Court (“FISC” or “Court”) on the government’s Notice of Entry of Temporary Restraining Order Against the United States and Motion for Temporary Relief from Subparagraph (3)(E) of Primary Order, filed on March 11, 2014 (“March 11 Notice and Motion”). For reasons explained herein, the government’s request for temporary relief is granted, subject to a modification to the conditions proposed by the government.

The Primary Order in the above-captioned docket (“Primary Order”) was issued on January 3, 2014, and amended pursuant to a prior government motion on February 5, 2014. As part of the minimization procedures adopted pursuant to 50 U.S.C. § 1861(c)(1), (g), the Primary Order requires the National Security Agency (NSA) to destroy call detail records or telephony metadata (hereinafter “BR metadata”) produced to NSA by certain telecommunications carriers no later than five years after its initial production. See Primary Order subparagraph (3)(E) at 14.

On February 25, 2014, the government submitted a motion for a second amendment to the Primary Order in the above-captioned docket (“February 25 Motion”). The February 25 Motion sought to amend the minimization procedures in the Primary Order to retain BR metadata

for longer than five years in furtherance of its potential obligation to retain evidence possibly relevant to pending civil litigation, subject to further restrictions on access and use. February 25 Motion at 3-8.

On March 7, 2014, the Court issued an Opinion and Order that denied the February 25 Motion without prejudice (“March 7 Opinion and Order”). The Court rejected the government’s premise that the common law obligation to preserve evidence that is potentially relevant to civil litigation superseded requirements to destroy information under provisions of FISC orders that were adopted pursuant to 50 U.S.C. § 1861(c)(1), (g). March 7 Opinion and Order at 3-4. The Court accordingly analyzed the government’s proposed amendments under those statutory minimization requirements. The Court found that, on the record then before it, the government’s proposal did not satisfy those requirements. Id. at 4-12. The Court concluded that any interests the civil plaintiffs might assert in preserving all of the BR metadata was “unsubstantiated” on that record. Id. at 8. The Court further observed that

no District Court or Circuit Court of Appeals has entered a preservation order applicable to the BR metadata in question in any of the civil matters cited in the motion. Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved, despite it being a matter of public record that BR metadata is routinely destroyed after five years.

Id. at 8-9 (citations omitted). Further, while acknowledging that “questions of relevance are ultimately matters for the courts entertaining the civil litigation to resolve,” id. at 10, the Court was unpersuaded by the government’s assertion that the entire, voluminous set of BR metadata needed to be preserved for the civil litigation, particularly in view of the fact that the plaintiffs in

the civil matters, as described by the government, generally sought destruction of the BR metadata. Id. at 9-10.

As noted above, the Court denied the February 25 Motion without prejudice, stating that the government may bring “another motion providing additional facts or legal analysis, or seeking a modified amendment to the existing minimization procedures.” Id. at 12.

The March 11 Notice and Motion provides such additional facts.¹ On March 7, 2014, subsequent to the issuance of the March 7 Opinion and Order, the government began to notify the plaintiffs in the civil matters identified in the February 25 Motion, as well as the courts in which those matters are pending, of the March 7 Opinion and Order and of the government’s intention “to commence complying with the applicable destruction requirements” on March 11, 2014. March 11 Notice and Motion at 5.² One of those civil matters is First Unitarian Church v. National Security Agency, No. 3:13-cv-2387 (JSW) (N.D. Cal.). On March 10, 2014, the plaintiffs in that matter, and those in a related case also pending before the District Court for the Northern District of California – Jewel v. National Security Agency, No. C 08-04373-JSW (N.D. Cal.) – sought temporary restraining orders from that District Court against the destruction of any

¹ On March 10, 2014, a Motion of Plaintiffs in Jewel v. NSA and in First Unitarian Church v. NSA for Leave to Correct the Record, together with a supporting declaration, was submitted in the above-captioned docket. (The motion is available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-motion-140311.pdf> and the declaration is available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-declaration-140311.pdf>.) Those movants seek to add to the record additional information addressing the need to preserve at least some BR metadata in connection with pending civil matters. The Court will rule on this motion separately.

² This Court’s March 7 Opinion and Order noted that the government could notify the plaintiffs and the district courts of the pending destruction of BR metadata. March 7 Opinion and Order at 11.

BR metadata. March 11 Notice and Motion at 5 and Exhibits A and B thereto. The District Court issued a temporary restraining order (“March 11 TRO”) in both matters on the same date. March 11 Notice and Motion at 6 and Exhibit C thereto. The March 11 TRO prohibits the Government defendants “from destroying any potential evidence relevant to the claims at issue ..., including but not limited to ... any telephone metadata or ‘call detail’ records,” pending further order of that District Court. March 11 Notice and Motion at 6 and March 11 TRO at 2. The March 11 TRO also established a schedule for further consideration of these preservation issues, with briefing by the government and the plaintiffs to be completed by March 18, 2014, and a hearing set for March 19, 2014. March 11 Notice and Motion at 6 and March 11 TRO at 2.

These intervening developments fundamentally alter premises on which the March 7, 2014 Opinion and Order was based.³ It is now apparent that some civil plaintiffs actively seek to preserve the BR metadata as potentially relevant to their claims. What is more, by issuing the March 11 TRO, the District Court has directly prohibited NSA from doing what the FISC has ordered it to do – namely, destroy BR metadata no later than five years from when it was initially produced. These conflicting directives from federal courts put the government in an untenable position and are likely to lead to uncertainty and confusion among all concerned about the status of BR metadata that was acquired more than five years ago.

³ There appears to be a dispute between the government and the plaintiffs in Jewel and First Unitarian Church about whether prior preservation orders issued by the District Court for the Northern District of California encompass call detail records produced to the NSA pursuant to FISC orders under 50 U.S.C. § 1861. See, e.g., Exhibit A to the March 11 Notice and Motion (Jewel v. National Security Agency, No. C 08-04373-JSW (N.D. Cal.), Plaintiffs’ Notice of Ex Parte Motion and Ex Parte Motion for a Temporary Restraining Order to Prevent the Government from Destroying Evidence, filed on March 10, 2014, at 2-3 and Exhibit E thereto (exchange of emails between counsel for the government and the plaintiffs)). That dispute is a matter for the District Court to resolve.

The March 11 TRO also demonstrates that the District Court for the Northern District of California intends to hear more from the parties in Jewel and First Unitarian Church regarding preservation of BR metadata for purposes of that litigation. See March 11 TRO at 1 (“A temporary restraining order is necessary and appropriate in order to allow the Court to decide whether the evidence should be preserved with the benefit of full briefing and participation by all parties.”). As already noted, it is appropriate for that District Court, rather than the FISC, to determine what BR metadata is relevant to that litigation.

For the foregoing reasons, the government’s motion for temporary relief from the five-year destruction rule is granted. In one respect, however, the Court modifies the government’s proposed “conditions” for such relief. See March 11 Notice and Motion at 7-8.

One of the conditions proposed by the government states: “Should any further accesses to the BR metadata be required for civil litigation purposes, such accesses will occur only following prior written notice specifically describing the nature of and reason for the access, and the approval of the Court.” Id. at 8 (emphasis added). The Court declines to adopt the underscored language requiring prior FISC approval. It appears unnecessary, and probably ill-advised, to put the FISC in the position of approving or disapproving actions the government, as a civil litigant, proposes to take, e.g., to respond to specific discovery requests or to particular inquiries made by the court before which a civil matter is pending. While accessing or using the BR metadata for civil litigation purposes can implicate the privacy interests of United States persons, the other interests and considerations likely to be implicated – such as fairness to the civil plaintiffs, relevance of the information sought, and burden placed on the government – are tangential at best

to the purposes of minimization under Section 1861. They are, however, proper considerations for the court before which the civil litigation is pending.⁴

Accordingly, it is HEREBY ORDERED that the government's motion for temporary relief from the five-year destruction requirement is GRANTED AS FOLLOWS:

(1) Pending resolution of the preservation issues raised by the plaintiffs in *Jewel* and *First Unitarian Church* before the United States District Court for the Northern District of California, BR metadata otherwise required to be destroyed under the five-year limitation on retention specified in subparagraph (3)(E) of the Primary Order issued in the above-captioned docket, as amended, may be preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts for any purpose, including to conduct contact chaining queries of the BR metadata approved under the applicable "reasonable, articulable suspicion" standard⁵ for the purpose of obtaining foreign intelligence information, and subject to the following additional conditions:

(a) 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

⁴ In contrast, having the government merely provide the FISC with written notice of such accesses to the BR metadata does not present the same concerns and may be helpful in keeping the FISC informed of developments that are relevant to its role in determining and enforcing compliance with the minimization procedures, see 50 U.S.C. § 1803(h), and in assessing the continued adequacy of those procedures in the event of a future application to continue bulk production of BR metadata under Section 1861.

⁵ See No. BR 14-01, Order Granting the Government's Motion to Amend the Court's Primary Order Dated January 3, 2014, at 3-9 (FISA Ct. Feb. 5, 2014) (available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-order.pdf>).

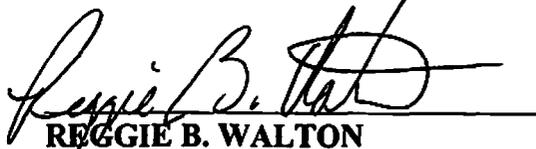
obligations to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata; and

(b) 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.

(2) The government shall promptly notify the FISC of any additional material developments in civil litigation pertaining to the BR metadata, including upon resolution of the temporary restraining order proceedings in the Northern District of California.

(3) All other provisions of the Primary Order in the above-captioned docket, as amended on February 5, 2014, shall remain in effect.

SO ORDERED, this th day of March, 2014, in Docket Number BR 14-01.


REGGIE B. WALTON
Presiding Judge, United States Foreign
Intelligence Surveillance Court