

SEP 17 2015

LeeAnn Flynn Hall, Clerk of Court

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 15-99

ORDER APPOINTING AN AMICUS CURIAE

For the reasons set out below, the Court appoints Preston Burton to serve as amicus curiae in the above-captioned matter for the purpose of assisting the Court in considering the issue specified herein. This appointment is made pursuant to section 103(i)(2)(B) of the Foreign Intelligence Surveillance Act (“FISA”), codified at 50 U.S.C. § 1803(i)(2)(B), as most recently amended by the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268, 272 (2015). This Order also addresses certain administrative matters relating to the participation of the amicus.

Background

On August 27, 2015, this Court approved in part the government’s application in the above-captioned docket. The Court granted the government’s request for the issuance of orders pursuant to the FISA “business records” provision, 50 U.S.C. § 1861, authorizing the National Security Agency (“NSA”) to acquire, in bulk, and on an ongoing daily basis, certain call detail records or “telephony metadata.” Such acquisition is authorized until 11:59 p.m. Eastern Time on November 28, 2015, immediately after which section 103 of the USA FREEDOM Act prohibits any further bulk collection of tangible things pursuant to 50 U.S.C. § 1861. *See also* Pub. L. No. 114-23, § 109, 129 Stat. at 276.

The application also requested authority for the government, after November 28, 2015, to retain and use for certain technical and litigation-related purposes data acquired by NSA through the Court's orders in this docket and predecessor dockets ("BR metadata"). Specifically, the application requested authority for the government to retain BR metadata after November 28, 2015, in accordance with the Opinion and Order of this Court issued on March 12, 2014, in docket No. BR 14-01, concerning the retention of BR metadata for purposes of litigation, and subject to the restrictions stated therein. The application also requested authority, for a period ending on February 29, 2016, for appropriately trained and authorized NSA technical personnel to use BR metadata to verify the completeness and accuracy of call detail records produced under targeted (*i.e.*, "non-bulk") production orders issued by the Court after November 28, 2015. The Court has taken these requests under advisement. *See* Docket No. 15-99, Primary Order at 12-13 (Aug. 27, 2015).

Appointment of Amicus Curiae

By the terms of 50 U.S.C. § 1803(i)(2)(A), the Court "shall appoint" to serve as amicus curiae an individual who has been designated as eligible for such service under section 1803(i)(1) "to assist . . . in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate." Under section 1803(i)(1), the presiding judges of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review have until November 29, 2015, to jointly designate individuals to serve as amici under

section 1803(i)(1).¹ To date, no such designations have been made. Under present circumstances, therefore, the appointment of such an individual “is not appropriate” under section 1803(i)(2)(A), because, as of yet, there are no designated individuals who can serve.

Section 1803(i)(2)(B) provides that the Court “may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate.” Persons appointed under this provision need not have been designated under section 1803(i)(1). Pursuant to section 1803(i)(3)(B), however, they must “be persons who are determined to be eligible for access to classified information, if such access is necessary to participate in the matters in which they may be appointed.”

Here, the Court finds it appropriate to appoint Preston Burton as amicus curiae under section 1803(i)(2)(B). Mr. Burton is well qualified to assist the Court in considering the issue specified herein. The Security and Emergency Planning Staff (SEPS) of the Department of Justice has advised that he is eligible for access to classified information.

Accordingly, it is HEREBY ORDERED as follows:

(1) Preston Burton is appointed as amicus curiae (hereinafter “amicus”) in this matter pursuant to 50 U.S.C. § 1803(i)(2)(B);

(2) The amicus is directed to address whether the government’s above-described requests to retain and use BR metadata after November 28, 2015, are precluded by section 103 of the USA FREEDOM Act or any other provision of that Act. The Court anticipates setting a briefing schedule at a later date.

¹ 50 U.S.C. § 1803(i)(1) requires that such designations be made “not later than 180 days after” the date of enactment of the USA FREEDOM Act, which was June 2, 2015.

(3) Pursuant to 50 U.S.C. § 1803(i)(6)(A)(i), the Court has determined that the government's application (including exhibits and attachments) and the full, unredacted Primary Order in this docket are relevant to the duties of the amicus. By September 22, 2015, or after receiving confirmation from SEPS that the amicus has received the appropriate clearances and access approvals for such materials, whichever is later, the Clerk of the Court shall make these materials available to the amicus.

(4) With the guidance and assistance of SEPS, the amicus shall handle classified information in accordance with the Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (Feb. 21, 2013) ("Security Procedures") (copy attached as Exhibit A). For purposes of the Security Procedures, the amicus shall be regarded as court personnel.

(5) 50 U.S.C. § 1803(i)(6)(C) provides: "An amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States." The Court believes that, in this matter, the amicus's access to classified information pursuant to paragraphs (3) and (4) above is consistent with the national security of the United States. If, however, the government believes otherwise it shall provide written notice and explanation to the Court by September 21, 2015.

(6) The attorney for the government shall ensure that the Attorney General receives a copy of this Order pursuant to the notification requirement at 50 U.S.C. § 1803(i)(7).

Entered this 17th day of September, 2015, in Docket No. BR 15-99.

Thomas F. Hogan
for

MICHAEL W. MOSMAN
Judge, United States Foreign
Intelligence Surveillance Court

Exhibit A

Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court And the Foreign Intelligence Surveillance Court of Review

1. *Purpose.* The purpose of these procedures, as revised, is to meet the court security requirements of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, as amended ("the Act").¹ These security procedures apply to both the Foreign Intelligence Surveillance Court established under § 103(a) of the Act and the Foreign Intelligence Surveillance Court of Review established under § 103(b), and to all supporting personnel of said courts. Except for the judges of the two courts, the same facilities, personnel, and security procedures shall be used by both courts, subject to such exceptions as may be authorized by the Chief Justice. These procedures have been adopted in consultation with the Attorney General and the Director of National Intelligence as required by the Act and supersede the security procedures issued on May 18, 1979. The term "court" as used herein refers to both Courts.

2. *Quarters and Facilities.* The quarters and facilities of the court, including a hearing room, work chambers, and storage facilities for court records, shall be constructed and maintained in accordance with applicable construction standards pertaining to sensitive compartmented information facilities adopted by the Director of National Intelligence. The location of court facilities may be changed by the court from time to time in consultation with the Chief Justice, the Attorney General, and the Director of National Intelligence.

3. *Members of the Court.* Judges to be designated as members of the court pursuant to § 103 of the Act shall be subject, before designation, to an updated background investigation to be conducted by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information, insofar as they may be deemed applicable to the court. If a question of suitability to serve on the court is raised at any time after initial appointment, the matter is to be referred to the Chief Justice, who may elect to consult with the Attorney General and the Director of National Intelligence regarding the security significance of the matter before taking such action as the Chief Justice deems appropriate.

4. *Appointment of Personnel.* The court may have a Clerk of Court and such other legal, administrative or support personnel as it may require. The court may also arrange for the services of a court reporter, as it deems appropriate. Such personnel may have access to court

¹ Section 103(c) of the Act reads in pertinent part: "The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." See also § 302(e) (physical search proceedings); § 501(f)(4) (proceedings regarding the production of records or other tangible things); § 702(k)(1) (proceedings regarding certain acquisitions of foreign intelligence information).

records and proceedings, including sensitive compartmented information or other classified national security information contained therein, only as authorized by the court and only to the extent necessary to the performance of an official function. Personnel appointed by or designated for service to the court shall undergo appropriate background investigation by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information. All court personnel having access to sensitive compartmented information or other classified national security information shall sign appropriate security agreements. If a question concerning the security clearance of court personnel is raised subsequent to appointment, the matter shall be referred to the court, which may consult with the Attorney General and the Director of National Intelligence regarding its security significance before taking such action as it deems appropriate.

5. *Security Officer.* The court shall designate as security officer the Director, Security and Emergency Planning Staff, Department of Justice, or another individual who has demonstrated competence in providing security for classified national security information and sensitive compartmented information from among candidates submitted by the Attorney General and the Director of National Intelligence. One or more alternate security officers may be designated by the court as required. The security officer shall serve at the pleasure of the court and will not be subject to removal by the Executive Branch without the concurrence of the court. The security officer (and alternates) may be Executive Branch employees and may perform other duties in the Executive Branch, so long as such duties do not conflict with their responsibilities to the court. Additional personnel may be provided by the Department of Justice to perform incidental security and administrative functions for the court provided appropriate security clearances have been obtained.

The security officer shall be responsible to the court for document, physical, personnel, and communications security. Under the supervision of the court, the security officer shall take measures reasonably necessary to fulfill these responsibilities. The security officer shall arrange, at a minimum, for an annual security review of court quarters and facilities and shall submit a report to the court.

6. *Security Functions of the Clerk of Court.* The Clerk of Court, with the advice and concurrence of the security officer, shall establish and maintain a control and accountability system for all records of proceedings before the court that involve classified national security information, and any other records or documents the court may designate. The Clerk, in consultation with the security officer, shall further ensure that all court records are marked with appropriate security classifications in accordance with Executive Order 13526 and its successors, and procedures to be established by the court.

7. *Court Proceedings.* The court shall ensure that all court records (including notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch security standards for storing and handling

classified national security information. Records of the court shall not be removed from its premises except in accordance with the Act, applicable court rule, and these procedures. Insofar as the court may direct, the Clerk of the Court may, in coordination with the security officer, arrange for off-site storage of court records, provided that classified national security information contained therein is maintained according to the above-referenced security standards. Reports and exhibits submitted in support of applications to the court may be returned by the court to the applicant on a trust receipt basis.

Whenever a party other than the government makes a submission to the court that potentially contains classified national security information, the court shall promptly coordinate with the security officer to determine whether the submission contains classified national security information. The security officer shall, as directed by the court, consult with appropriate executive branch officials with regard to such a determination. The court may consider the submission while such a determination is pending, provided that the court safeguards the information in question as classified national security information in accordance with these procedures. The security officer shall, after consulting with the court, advise the parties of the results of the determination. If it is determined that the submission does contain classified national security information, the security officer shall ensure that it is marked with appropriate classification markings and the Clerk of Court shall ensure that it is handled in accordance with those markings under these procedures.

8. *Security Procedures for Section 102(a) and Section 302(a).* Certifications transmitted by the Attorney General to the court under seal pursuant to Section 102(a) or Section 302(a) of the Act shall be numbered in sequence by the Clerk of Court, who shall maintain a record of all certifications received by the designated number and date of receipt.

Certifications received by the court for retention only shall be filed under seal in separate storage compartments. They shall only be accessed jointly by a representative designated by the court and a representative of the Executive Branch designated by the Attorney General. They may be unsealed only in accordance with the provisions of the Act.

9. *Training.* Members of the court and court personnel shall be briefed on security measures appropriate to the functions of the court by designees of the Attorney General and the Director of National Intelligence.

10. *Term.* These procedures shall remain in effect until modified in writing by the Chief Justice after consultation with the Attorney General and the Director of National Intelligence.

Issued this 21st day of FEBRUARY, 2013, after consultation with the Attorney General of the United States and the Director of National Intelligence as required by the Foreign Intelligence Surveillance Act.



John G. Roberts, Jr.
Chief Justice of the United States

The Attorney General concurs in the procedures for safeguarding certifications filed under Section 102(a) or Section 302(a) of the Act, as set forth in paragraph 8.²



Eric H. Holder, Jr.
Attorney General of the United States

² Section 103(c) provides that the Chief Justice shall establish security procedures for the court in consultation with the Attorney General and the Director of National Intelligence. Sections 102(a)(3) and 302(a)(3) provide that certifications of the Attorney General issued in accordance with Section 102(a)(1) or Section 302(a)(1)(A) of the Act shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence.