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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

Maura Peterson, Clerk of Court

WASHINGTON, D.C.

IN RE CARTER W. PAGE,
A U.S. PERSON

Docket Numbers:
16-1182, 17-52, 17-375, 17-679

**ORDER RESPECTING THE LIMITED DISCLOSURE OF INFORMATION
IN THE CLASSIFIED APPENDIX TO THE REPORT ON MATTERS
RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS
ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS**

This matter is before the Court on the Government's Motion to Permit the Disclosure of Information Contained in the Classified Appendix to the Report on Matters Related to Intelligence Activities and Investigations Arising out of the 2016 Presidential Campaigns, filed in the above-captioned dockets on June 7, 2023 ("Motion"). The Court is granting the Motion as stated herein.

On June 25, 2020, the Court issued an Opinion and Order Regarding Use and Disclosure of Information entered in the above-captioned four dockets ("June 25, 2020 Order"), which explained why the results of electronic surveillance and physical search conducted under color of orders issued in those dockets^{*} were subject to the prohibitions against use or disclosure of the results of unauthorized surveillance and search set forth in 50 U.S.C. §§ 1809(a)(2) and 1827(a)(2). It is a criminal offense to "intentionally . . . (1) engage[] in electronic surveillance

^{*} Information acquired under color of the above-captioned dockets, in both minimized and un-minimized (*i.e.*, raw) form, is referred to as "Page FISA information."

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under color of law except as authorized by” identified statutory provisions, or “(2) disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized” by FISA or another “express statutory authorization.” 50 U.S.C. § 1809(a). It is similarly an offense to intentionally conduct a physical search under color of law within the United States to obtain foreign intelligence information, “except as authorized by statute,” or intentionally disclose or use information obtained by such a search, “knowing or having reason to know that the information was obtained through physical search not authorized by statute, for the purpose of obtaining intelligence information.” 50 U.S.C. § 1827(a). The applications in the above-captioned dockets involved “material errors and omissions” pertinent “to whether there was probable cause to believe that Page was an agent of a foreign power.” June 25, 2020 Order at 1. As a result of those deficiencies, the government admitted that “at least the third and fourth Page FISA applications lacked adequate factual support” and that “the restrictions on use or disclosure in Sections 1809 and 1827 apply at least to information acquired under color of the third and fourth dockets. . . .” *Id.* at 4 (internal quotation marks omitted). Because “the government declined to argue . . . that those provisions do not apply (or apply differently) to information obtained under the first two dockets,” the Court proceeded from the premise that Sections 1809(a)(2) and 1827(a)(2) apply to information acquired under color of all four dockets. *Id.*

The June 25, 2020 Order also recognized an exception to those prohibitions where use or disclosure of particular information “has been or can be demonstrated to be necessary to remedy or deter the types of harm at which §§ 1809 and 1827 are addressed,” such as when use or disclosure is “necessary to avoid similar instances of over-collection . . . or to remedy a prior

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over-collection.” *Id.* at 4, 20 (internal quotation marks omitted and alteration in original). Furthermore, “Sections 1809 and 1827 would be self-defeating if they were interpreted to prohibit use or disclosure of [information from unauthorized electronic surveillance or physical search], even when necessary to investigate and prosecute the very crimes they define.” *Id.* at 19. Pursuant to that exception, the Court permitted use or disclosure of Page FISA information in certain specified contexts, including “insofar as necessary to effective performance or disciplinary reviews of government personnel” and “insofar as necessary to investigate or prosecute potential crimes relating to the conduct of the Page or Crossfire Hurricane investigations.” *Id.* at 20-21. The latter context, the Court explained, was applicable (but not limited to) “use by, and disclosure by or to, personnel engaged in the review” of such investigations then being led by John H. Durham. *Id.* at 17, 21.

The completion of Mr. Durham’s work as Special Counsel has given rise to the government’s current request to disclose a limited amount of Page FISA information under circumstances not contemplated by the June 25, 2020 Order. Special Counsel Durham has prepared a final report titled *Report on Matters Related to Intelligence Activities and Investigations Arising out of the 2016 Presidential Campaigns* (“Report”). Motion at 1. The Report is unclassified and has been released to the public; however, there is a Classified Appendix to the Report, which contains a limited amount of Page FISA information. *Id.* at 1, 4. That information “is described in sections of the classified appendix addressing how the FBI assessed, explained, or excluded potentially relevant information from the Page FISA applications.” *Id.* at 4.

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Through the underlying Motion, the Government seeks to share the Classified Appendix with select Members of Congress and limited staff “who have oversight responsibility for FISA, the FBI, and the Department of Justice.” *Id.* at 8. Towards that end, the Government proposes to distribute the Classified Appendix, including its Page FISA information, to Members and limited staff of the House Permanent Select Committee on Intelligence, the U.S. Senate Select Committee on Intelligence, the House Judiciary Committee, the U.S. Senate Committee on the Judiciary, and to the Members of Congress identified in 50 U.S.C. § 3093(c)(2). *Id.* at 6. In the Government’s view, disclosure of the Page FISA information contained in the Classified Appendix may provide details about how the Government has exercised FISA authorities, and as a result, may “inform how Congress proceeds in attempting to prevent future unauthorized collections and violations of §§ 1809 and 1827.” *Id.* at 9. “Accordingly, it is incumbent upon the Government to provide a fulsome and accurate record of its investigations into the conduct of Government personnel [involved in the Page or Crossfire Hurricane investigation].” *Id.* at 9-10.

The Court’s previously recognized exception to the prohibitions found in 50 U.S.C. §§ 1809(a)(2) and 1827(a)(2), when necessary to remedy or deter the types of harm at which those sections are addressed, is very limited. “Neither the government nor the Court is free to depart from the plain meaning of §§ 1809(a)(2) and 1827(a)(2) simply to facilitate actions thought to be reasonable, or even laudable.” June 25, 2020 Order at 20. Here, the disclosure of the Report’s Classified Appendix, including its Page FISA information, to certain Congressional personnel engaged in ongoing oversight of the Government’s exercise of FISA authorities will provide the complete published results of Special Counsel Durham’s investigation, including with respect to the FBI’s FISA activities regarding Page. As such, the Court views disclosure in this narrow

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context as aligning with the purposes for use or disclosure of Page FISA information set out in the June 25, 2020 Order. *See* Order Regarding Further Disclosures of Information, Nos. 16-1182, 17-52, 17-375, 17-679, at 2 (FISA Ct. Nov. 23, 2020) (citing the June 25, 2020 Order and finding “disclosure of Page FISA information to the Senate Committee on the Judiciary, under the circumstances described by the government, to be consistent with the parameters for disclosure previously established by the Court”).

The government has marked one paragraph of the Motion as classified at the Secret level. The rest of the Motion is marked as Unclassified. This Order is marked in the same manner because it contains information only from the Unclassified paragraphs of the Motion.

Accordingly, IT IS HEREBY ORDERED THAT the Motion is GRANTED as follows: Notwithstanding the June 25, 2020 Order, the government may give access to the Page FISA information in the Classified Appendix to members and limited staff of the House Permanent Select Committee on Intelligence, the U.S. Senate Select Committee on Intelligence, the U.S. Senate Committee on the Judiciary, and the House Judiciary Committee, and to the members of Congress identified in 50 U.S.C. § 3093(c)(2), and

IT IS FURTHER ORDERED THAT, in all other respects, the June 25, 2020 Order remains in effect, including (i) the six-month reporting requirement on the retention, use, or disclosure of any Page FISA information and (ii) the prohibition on further use or disclosure of such information (except as permitted by this Order or the June 25, 2020 Order), and

IT IS FURTHER ORDERED THAT, by June 30, 2023, the government shall submit to the Court a copy of the Motion that is suitable for public release, including any redactions the

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government believes are necessary. If applicable, the submission shall also include a written explanation of why redactions are necessary.

ENTERED this 7th day of June, 2023.



ANTHONY J. TRENGA
Judge, United States Foreign
Intelligence Surveillance Court

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