



APR 10 2009

MEMORANDUM FOR MAJORITY STAFF DIRECTOR, SENATE
SELECT COMMITTEE ON INTELLIGENCE

SUBJECT: (U) Congressional Notification - INFORMATION
MEMORANDUM

(~~TS//SI//NF~~) I am pleased to report to the Committee the significant progress made to date to resolve the Business Records (BR) matter, to provide additional information to the Committee on other matters that have been addressed previously to the Committee and to notify the Committee of one additional matter which was only recently identified. NSA is committed to work each matter to a resolution that is consistent with Foreign Intelligence Surveillance Court (FISC) orders and our obligation to conduct our operations with due regard to United States Persons' privacy. It is also NSA's commitment to make our efforts transparent to the Committee by providing updates of significant developments.

I. (~~TS//SI//NF~~) Compliance with the Foreign Intelligence Surveillance Court's Business Records and Pen Register/Trap and Trace Orders:

(~~TS//SI//NF~~) NSA notified the Committee on February 25, 2009 of a compliance issue with the implementation of the FISC authorized Business Records (BR) Order. The issue of non-compliance was originally identified by DoJ in mid-January and reported to the FISC. In his February 13 declaration to the Court, the Director of NSA committed to conducting end-to-end reviews of NSA's implementation of both the BR and Pen Register/Trap and Trace (PR/TT) Court Orders.

(~~TS//SI//NF~~) NSA has aggressively taken actions to correct the problems noted with BR FISA order compliance, avoid a reoccurrence, and ensure future compliance. A 60-day end-to-end system engineering and process review, a review of oversight and compliance training for all personnel who access both BR and PR/TT FISA metadata, and a redesign of the automated alert process for follow-on systems are being worked simultaneously. The end-to-end reviews involve a complex investigation of at least eight major system components and over 240 subcomponents, serving multiple functions and users. Our review of these systems and components has, to date, surfaced only the following issues noted in this update.

(U) Current operating capability/functionality

(~~TS//SI//NF~~) On February 20 NSA implemented a change in software that shut off all automated accessing of metadata acquired pursuant to both

BR and PR/TT FISC orders. NSA accepted that this would disrupt processes that had no identified compliance concerns, to include those supporting material acquired under the PR/TT FISA Court Order; however, NSA decided that halting automated access to the BR and PR/TT metadata to be the most prudent course of action.

1. (U//~~FOUO~~) BR Operations/Mitigation

(~~TS//SI//NF~~) Since the March 5, 2009 FISA Court order, the Court's approval has been required for each selector before it is tasked for BR FISA metadata analysis. On March 21 NSA resumed manual access to BR FISA metadata, allowing chaining [REDACTED] of FISA Court-approved selectors associated with [REDACTED] t [REDACTED] following multiple operational and technical reviews to ensure compliance. While no deficiencies in analyst training had been noted, NSA has taken the extra precaution of providing additional compliance training and testing to all analysts accessing the BR FISA metadata prior to being approved for access.

(~~TS//SI//NF~~) NSA has taken steps to minimize the impact of suspending the BR automated tipping (or alert) processes. A limited number of NSA analysts are now performing manual queries against 209 FISA Court-approved high-priority selectors daily and have adjusted collection tasking to ensure [REDACTED]

2. (U//~~FOUO~~) BR end-to-end review

(~~TS//SI//NF~~) NSA systems engineers have made substantial progress on the end-to-end review of the systems and analytic tools associated with BR FISA metadata. NSA engineers have reviewed more than 100 requirements documents, dataflow diagrams and system documentation records and are establishing a comprehensive plan to restore capabilities. In concert with the engineering review, NSA's Office of Oversight and Compliance has completed approximately half of the 15 necessary audits of the BR FISA metadata queries. So far these audits have revealed inappropriate queries by two analysts of foreign telephone selectors. These violations were reported to the FISC in the Director's 25 February 2009 Supplemental Declaration, which the Committee previously received. In addition, several of the audits have identified possible compliance issues that require further investigation.

3. (U//~~FOUO~~) Additional BR matters identified or undergoing review

- (~~TS//SI//NF~~) As a result of authorized analysis, and as previously reported to the Court, 275 reports containing 2,476 telephone numbers were disseminated to the FBI and CIA. While this dissemination was authorized, and the numbers were legitimately determined to be associated with international terrorism, they were also added prematurely to a list called the *Station Table*, a list

designed to store numbers determined by NSA to meet the reasonable articulable suspicion standard "RAS-approved". The problem identified is that these numbers did not undergo the formal NSA Office of General Counsel RAS-designation review as required by the Court prior to being added to the Station Table.

- ~~(TS//SI//NF)~~ NSA continues to review whether additional automated tools may have queried the business records metadata.
- ~~(TS//SI//NF)~~ NSA is reviewing its application of the 5-year data retention limitation provision of the FISC order.

4. ~~(U//FOUO)~~ Status of BR training

~~(TS//SI//NF)~~ NSA formed a team in early February to address both the immediate and long-term training required for analysts accessing metadata acquired through BR FISA and PR/TT FISA. The team initiated a redesign of the Agency's BR FISA training and has administered BR FISA oral competency tests. Training for PR/TT FISA will involve a new curriculum and competency exam and is projected to be available by June 1, 2009.

~~(TS//SI//NF)~~ NSA is also updating its BR FISA Standard Operating Procedures (SOP) document. An interim version of the new SOP details the processes and procedures governing access to BR FISA metadata. The interim SOP also describes the overall process to ensure consistency with the FISC order. The SOP will be revised as necessary as additional analytic tools are reinstated and automated processes are resumed following FISC approval.

5. ~~(U//FOUO)~~ Status of PR/TT Operations and Review

~~(TS//SI//NF)~~ NSA is also seeking DoJ approval to reactivate automated querying of the PR/TT metadata after conducting a system level review of the PR/TT alerting system to ensure compliance. Of note, no compliance issues were found in NSA's use of PR/TT metadata. NSA uses PR/TT metadata to chain across digital network selectors. However, as a result of the Court's order, DoJ approval is required to reactivate any of the automated PR/TT processes that NSA voluntarily shut down. NSA anticipates receiving approval to resume the automated PR/TT alerting process soon. In the interim, as with BR FISA, NSA has taken steps to minimize the impact of suspending the PR/TT automated tipping process by ensuring the highest priority selectors undergo manual chaining.

~~(TS//SI//NF)~~ On March 31, 2009 DoJ lawyers visited NSA in preparation for DoJ's first "spot check" of the PR/TT FISA process in compliance with the FISA Court's March 5, 2009 Order. NSA demonstrated the analytic tools used by analysts and provided a briefing on NSA's progress in conducting the end-to-end system engineering and process reviews. NSA also described how it administers oversight and compliance of the PR/TT metadata flows. DoJ identified no new issues during general discussion. DoJ

is scheduled to visit in late April for their first formal "spot check" on PR/TT FISA as well as a routine review of BR FISA.

(~~TS//SI//NF~~) The end-to-end review of the PR/TT systems and processes is underway and will be concluded upon completion of the BR FISA review.

II. (U//FOUO) [REDACTED] Overcollection

(~~S//SI//NF~~) This is to update the Committee on the matter of NSA's incidental acquisition of data during the course of FISA Amendments Act (FAA) authorized collection. For example, the selector [REDACTED]

[REDACTED] These incidents are described as [REDACTED] Overcollection ([REDACTED] O). The Committee previously received information on this matter on March 5, 2009, in the Semiannual Report of the Department of Justice Concerning Acquisitions Under Section 702 of the FISA Amendments Act of 2008, prepared by the Department of Justice, and covering the period from September 4, 2008 through November 30, 2008 and on March 17, 2009, in the Semiannual Assessment of Compliance With FISA Amendments Act Procedures and Guidelines, prepared by the Attorney General and the Director of National Intelligence, covering the same time frame. The reports also stated that [REDACTED] O had been reported to the Foreign Intelligence Surveillance Court (FISC).

(~~S//SI//NF~~) NSA supplements those reports by adding that [REDACTED] O was an issue considered by the Court during its review of the third FAA Certification that the Attorney General and the Director of National Intelligence have authorized, Certification [REDACTED] covering [REDACTED]

[REDACTED] which was filed with the Court on January 12, 2009. During the Court's consideration of that certification, the FISC asked for and received supplemental filings wherein NSA described the causes for and the efforts to mitigate against [REDACTED] O.

(U//FOUO) These mitigation efforts involve continuous process improvements to prevent and/or detect overcollection at the earliest possible point and the application of our targeting and minimization procedures regarding instances of overcollection, which include apprising ODNI and DOJ in a timely fashion whenever such incidents may occur in the future. NSA addressed the concerns expressed and the questions raised by the FISC concerning [REDACTED] O.

(~~S//SI//NF~~) On April 7, 2009, the FISC approved Certification [REDACTED] In accordance with the reporting requirements of the FISA Amendments Act, the government will provide the Committee copies of the Court's Opinion and

Order, as well as of the government's application and pleadings in the matter, to include the supplemental filings referenced above.

III. (U//~~FOUO~~) DIA Joint Intelligence Task Force - Combating Terrorism (JITF-CT) Access to Counterterrorism-related SIGINT Information

(U) This matter was first brought to the Committee's attention by way of oral notification on March 31, 2009 to Committee staff directors with an understanding that this written notification would follow.

(S//SI//NF) [REDACTED]

[REDACTED] NSA and DIA entered into a pilot program which allowed the DIA's Joint Intelligence Task Force - Combating Terrorism (JITF-CT) access to counterterrorism-related SIGINT information, including SIGINT collected pursuant to the Foreign Intelligence Surveillance Court's (FISC) [REDACTED]. Access to this FISA data was tightly controlled and was limited to JITF-CT analysts who had undergone training on the application of NSA minimization procedures to the FISA data and who were subject to NSA oversight of their activities. Moreover, these personnel were required to coordinate with NSA regarding dissemination of the information outside of JITF-CT.

(U//~~FOUO~~) At the time the pilot program was created, NSA determined that, once JITF-CT analysts were detailed to NSA they could be considered NSA "employees" pursuant to the FISC order for the purposes of their access to the FISA data. Under NSA's analysis, although not reporting to an NSA management chain, once detailed to NSA, they were nevertheless operating under NSA control (training, oversight, accountability) when accessing the FISA data.

(TS//SI//NF) In 2008, NSA's Oversight and Compliance office was conducting a review of database access to unminimized SIGINT. As a result, a database known as [REDACTED] was found to lack sufficient controls over analyst access to data. As a corrective measure, the database was reconfigured, "shutting it down" and bringing it back up under comprehensive controls. This was the database that JITF-CT analysts used to access the FISA data ([REDACTED] [REDACTED]) and these actions led to the loss of their access. The NSA Office of General Counsel then reconsidered the basis for its original concurrence on allowing JITF-CT analysts access to the FISA data.

(C//SI//NF) The NSA Office of General Counsel had questions concerning whether the circumstances of JITF-CT analysts "detail" supported the conclusion that they were NSA "employees" as originally determined. The facts and circumstances were reported to DoJ. Upon reviewing these facts, DoJ reported the matter to the FISC as a possible

compliance incident. NSA and DoJ continue to work to bring the matter to conclusion with the FISC. Until this matter is resolved, NSA will not reinstate JITF-CT access to this FISA data.

~~(S//SI//NF)~~ [REDACTED]
[REDACTED] there is no way to determine whether, in fact, JITF-CT analysts accessed it without authorization. However, even if such access occurred, the analysts were trained in routine minimization procedures and were required to coordinate with NSA regarding dissemination of information outside of JITF-CT; thus it is unlikely that United States Persons' identities were disseminated improperly.

IV. ~~(S//SI//NF)~~ Suspension of [REDACTED] to Unminimized SIGINT Collection

~~(S//SI//NF)~~ This is the first report to the Committee on this matter, which concerns a decision to suspend [REDACTED] access to an NSA system called X-KEYSCORE (XKS).

~~(S//SI//NF)~~ NSA allowed [REDACTED] access to a part of NSA's collection architecture relating to SIGINT collected under the authority of Executive Order 12333 and which NSA refers to as X-KEYSCORE (XKS). [REDACTED]
[REDACTED], this access is predicated on the principle that collaboration against counter-terrorism is essential to discover and pre-empt terrorist acts [REDACTED]

[REDACTED]
[REDACTED] On review of this access NSA is considering whether allowing this [REDACTED] access to unminimized SIGINT collection fully complies with NSA procedures. The review is considering whether additional automated and/or manual procedures should be in place with [REDACTED] prior to restoring their access to this stream of SIGINT.

(U) NSA is continuing to review the facts and circumstances concerning this matter. Should you have any questions, please contact me at [REDACTED]



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