UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE PRODUCTION OF TANGIBLE THINGS FROM : [redacted] : Docket No.: BR 08-13

SUPPLEMENTAL OPINION

This Supplemental Opinion memorializes the Court's reasons for concluding that the records to be produced pursuant to the orders issued in the above-referenced docket number are properly subject to production pursuant to 50 U.S.C.A. § 1861 (West 2003 & Supp. 2008), notwithstanding the provisions of 18 U.S.C.A. §§ 2702-2703 (West 2000 & Supp. 2008), amended by Public Law 110-401, § 501(b)(2) (2008).

As requested in the application, the Court is ordering production of telephone "call detail records or 'telephony metadata,'" which "includes comprehensive communications routing information, including but not limited to session identifying information . . ., trunk identifier, telephone calling card numbers, and time and duration of [the] calls," but "does not include the substantive content of any communication." Application at 9; Primary Order at 2. Similar productions have been ordered by judges of the Foreign Intelligence Surveillance Court ("FISC"). See Application at 17. However, this is the first application in which the government has identified the provisions of 18 U.S.C.A. §§ 2702-2703 as potentially relevant to whether such orders could properly be issued under 50 U.S.C.A. § 1861. See Application at 6-8.

Pursuant to section 1861, the government may apply to the FISC "for an order requiring the production of any tangible things (including books, records, papers, documents, and other items)." 50 U.S.C.A. § 1861(a)(1) (emphasis added). The FISC is authorized to issue the order, "as requested, or as modified," upon a finding that the application meets the requirements of that section. Id. at § 1861(c)(1). Under the rules of statutory construction, the use of the word "any" in a statute naturally connotes "an expansive meaning," extending to all members of a common set, unless Congress employed "language limiting [its] breadth." United States v. Gonzales, 520 U.S. 1, 5 (1997); accord Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, 836 (2008)

("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind.").[1]

However, section 2702, by its terms, describes an apparently exhaustive set of circumstances under which a telephone service provider may provide to the government non-content records pertaining to a customer or subscriber. See § 2702(a)(3) (except as provided in § 2702(c), a provider "shall not knowingly divulge a record or other [non-content] information pertaining to a subscriber or customer . . . to any governmental entity"). In complementary fashion, section 2703 describes an apparently exhaustive set of means by which the government may compel a provider to produce such records. See § 2703(c)(1) ("A governmental entity may require a provider . . . to disclose a record or other [non-content] information pertaining to a subscriber . . . or customer . . . only when the governmental entity" proceeds in one of the ways described in § 2703(c)(1)(A)-(E)) (emphasis added). Production of records pursuant to a FISC order under section 1861 is not expressly contemplated by either section 2702(c) or section 2703(c)(1)(A)-(E).

If the above-described statutory provisions are to be reconciled, they cannot all be given their full, literal effect. If section 1861 can be used to compel production of call detail records, then the prohibitions of section 2702 and 2703 must be understood to have an implicit exception for production in response to a section 1861 order. On the other hand, if sections 2702 and 2703 are understood to prohibit the use of section 1861 to compel production of call detail records, then the expansive description of tangible things obtainable under section 1861(a)(1) must be construed to exclude such records.

The apparent tension between these provisions stems from amendments enacted by Congress in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Public Law 107-56, October 26, 2001, 115 Stat. 272. Prior to the USA PATRIOT Act, only limited types of records, not

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[1] The only express limitation on the type of tangible thing that can be subject to a section 1861 order is that the tangible thing "can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things." Id. at § 1861(c)(2)(D). Call detail records satisfy this requirement, since they may be obtained by (among other means) a "court order for disclosure" under 18 U.S.C.A. § 2703(d). Section 2703(d) permits the government to obtain a court order for release of non-content records, or even in some cases of the contents of a communication, upon a demonstration of relevance to a criminal investigation.

including call detail records, were subject to production pursuant to FISC orders.[2] Section 215 of the USA PATRIOT Act replaced this prior language with the broad description of "any tangible thing" now codified at section 1861(a)(1). At the same time, the USA PATRIOT Act amended sections 2702 and 2703 in ways that seemingly re-affirmed that communications service providers could divulge records to the government only in specified circumstances,[3] without expressly referencing FISC orders issued under section 1861.

The government argues that section 1861(a)(3) supports its contention that section 1861(a)(1) encompasses the records sought in this case. Under section 1861(a)(3), which Congress enacted in 2006,[4] applications to the FISC for production of several categories of sensitive records, including "tax return records" and "educational records," may be made only by the Director, the Deputy Director or the Executive Assistant Director for National Security of the Federal Bureau of Investigation ("FBI"). 18 U.S.C.A. § 1861(a)(3). The disclosure of tax return records[5] and educational records[6] is specifically regulated by other federal statutes, which do not by their own terms contemplate production pursuant to a section 1861 order. Nonetheless, Congress clearly intended that such records could be obtained under a section 1861 order, as demonstrated by their inclusion in section 1861(a)(3). But, since the records of telephone service providers are not mentioned in section 1861(a)(3), this line of reasoning is not directly on point. However, it does at least demonstrate that Congress may have intended the sweeping description of tangible items obtainable under section 1861 to encompass the records of telephone service providers, even though the specific provisions of sections 2702 and 2703 were not amended in order to make that intent unmistakably clear.

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[2] See 50 U.S.C.A. § 1862(a) (West 2000) (applying to records of transportation carriers, storage facilities, vehicle rental facilities, and public accommodation facilities).

[3] Specifically, the USA PATRIOT Act inserted the prohibition on disclosure to governmental entities now codified at 18 U.S.C.A. § 2702(a)(3), and exceptions to this prohibition now codified at 18 U.S.C.A. § 2702(c). See USA PATRIOT Act § 212(a)(1)(B)(iii) & (E). The USA PATRIOT Act also amended the text of 18 U.S.C.A. § 2703(c)(1) to state that the government may require the disclosure of such records only in circumstances specified therein. See USA PATRIOT Act § 212(b)(1)(C)(i).

[4] See Public Law 109-177 § 106(a)(2) (2006).

[5] See 26 U.S.C.A. § 6103(a) (West Supp. 2008), amended by Public Law 110-328 § 3(b)(1) (2008).

[6] See 20 U.S.C.A. § 1232g(b) (West 2000 & Supp. 2008).

The Court finds more instructive a separate provision of the USA PATRIOT Act, which also pertains to governmental access to non-content records from communications service providers. Section 505(a) of the USA PATRIOT Act amended provisions, codified at 18 U.S.C.A. § 2709 (West 2000 & Supp. 2008), enabling the FBI, without prior judicial review, to compel a telephone service provider to produce "subscriber information and toll billing records information." 18 U.S.C.A. § 2709(a).[7] Most pertinently, section 505(a)(3)(B) of the USA PATRIOT Act lowered the predicate required for obtaining such information to a certification submitted by designated FBI officials asserting its relevance to an authorized foreign intelligence investigation.[8]

Indisputably, section 2709 provides a means for the government to obtain non-content information in a manner consistent with the text of sections 2702-2703.[9] Yet section 2709 merely requires an FBI official to provide a certification of relevance. In comparison, section 1861 requires the government to provide to the FISC a "statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant" to a foreign intelligence investigation,[10] and the FISC to determine that the application satisfies this

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[7] This process involves service of a type of administrative subpoena, commonly known as a "national security letter." David S. Kris & J. Douglas Wilson, National Security Investigations and Prosecutions § 19:2 (2007).

[8] Specifically, a designated FBI official must certify that the information or records sought are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 18 U.S.C.A. § 2709(b)(1)-(2) (West Supp. 2008). Prior to the USA PATRIOT Act, the required predicate for obtaining "local and long distance toll billing records of a person or entity" was "specific and articulable facts giving reason to believe that the person or entity . . . is a foreign power or an agent of a foreign power." See 18 U.S.C.A. § 2709(b)(1)(B) (West 2000).

[9] Section 2703(c)(2) permits the government to use "an administrative subpoena" to obtain certain categories of non-content information from a provider, and section 2709 concerns use of an administrative subpoena. See note 7 supra.

[10] 50 U.S.C.A. § 1861(b)(2)(A). More precisely, the investigation must be "an authorized investigation (other than a threat assessment) . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities," id., "provided that such investigation of a United States

(continued...)

requirement, see 50 U.S.C.A. § 1861(c)(1), before records are ordered produced. It would have been anomalous for Congress, in enacting the USA PATRIOT Act, to have deemed the FBI's application of a "relevance" standard, without prior judicial review, sufficient to obtain records subject to sections 2702-2703, but to have deemed the FISC's application of a closely similar "relevance" standard insufficient for the same purpose. This anomaly is avoided by interpreting sections 2702-2703 as implicitly permitting the production of records pursuant to a FISC order issued under section 1861.

It is the Court's responsibility to attempt to interpret a statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal quotations and citations omitted). For the foregoing reasons, the Court is persuaded that this objective is better served by the interpretation that the records sought in this case are obtainable pursuant to a section 1861 order.

However, to the extent that any ambiguity may remain, it should be noted that the legislative history of the USA PATRIOT Act is consistent with this expansive interpretation of section 1861(a)(1). See 147 Cong. Rec. 20,703 (2001) (statement of Sen. Feingold) (section 215 of USA PATRIOT Act "permits the Government . . . to compel the production of records from any business regarding any person if that information is sought in connection with an investigation of terrorism or espionage;" "all business records can be compelled, including those containing sensitive personal information, such as medical records from hospitals or doctors, or educational records, or records of what books somebody has taken out from the library") (emphasis added). In this regard, it is significant that Senator Feingold introduced an amendment to limit the scope of section 1861 orders to records "not protected by any Federal or State law governing access to the records for intelligence or law enforcement purposes," but this limitation was not adopted. See 147 Cong. Rec. 19,530 (2001).

ENTERED this 12th day of December, 2008, regarding Docket No. BR 08-13.

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

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[10](...continued)
person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." Id. § 1861(a)(1). The application must also include minimization procedures in conformance with statutory requirements, which must also be reviewed by the FISC. Id. § 1861(b)(2)(B), (c)(1), & (g).

[redacted]

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE PRODUCTION OF TANGIBLE THINGS FROM [redacted]

Docket Number: BR 08-13

ORDER REGARDING PRELIMINARY NOTICE OF COMPLIANCE INCIDENT DATED JANUARY 15, 2009

On December 11, 2008, the Court authorized the government to acquire the tangible things sought by the government in its application in Docket BR 08-13. The Court specifically ordered, however, that

> access to the archived data shall occur only when NSA has identified a known telephone identifier for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone identifier is associated with [redacted]; provided, however, that a telephone identifier believed to be used by a U.S. person shall not be regarded as associated with [redacted]

[redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution. Docket BR 08-13, Primary Order at 8.

On January 15, 2009, the Department of Justice notified the Court in writing that the government has been querying the business records acquired pursuant to Docket BR 08-13 in a manner that appears to the Court to be directly contrary to the above-quoted Order and directly contrary to the sworn attestations of several Executive Branch officials. See e.g., id., Application at 10-11, & 20-21; Declaration at 8; Exhibit B (NSA 120-Day Report) at 9 & 11-12. Given the massive production authorized by this Order,[1] coupled with the limited information provided thus far by the government, the Court

HEREBY ORDERS the government to file a written brief with appropriate supporting documentation, no later than 10:00 a.m., Tuesday, February 17, 2009, the purpose of which is to help the Court assess whether the Orders issued in this docket should be modified or rescinded; whether other remedial steps should be directed; and whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violation of its Orders, either through its contempt powers or by referral to appropriate investigative offices.

In addition to any other information the government wishes to provide, the brief shall

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[1]As the government noted in its application, "[i]f authorized, the requested order will result in the production of call detail records pertaining to [redacted] telephone communications, including call detail records pertaining to communications of U.S. persons located within the United States who are not the subject of any FBI investigation." Id., Application at 12.

specifically address the following issues:[2]

1. Prior to January 15, 2009, who, within the Executive Branch, knew that the "alert list" that was being used to query the Business Record database included telephone identifiers that had not been individually reviewed and determined to meet the reasonable and articulable suspicion standard? Identify each such individual by name, title, and specify when each individual learned this fact.

2. How long has the unauthorized querying been conducted?

3. How did the unauthorized querying come to light? Fully describe the circumstances surrounding the revelations.

4. The application signed by the Director of the Federal Bureau of Investigation, the Deputy Assistant Attorney General for National Security, United States Department of Justice ("DOJ"), and the Deputy Attorney General of the United States as well as the Declaration of [redacted], a Deputy Program Manager at the National Security Agency ("NSA"), represents that during the pendency of this order, the NSA Inspector General, the NSA General Counsel, and the NSA Signals Intelligence Directorate Oversight and Compliance Office each will conduct reviews of this program. Docket BR 08-13, Application at 27, Declaration at 11. The Court's Order directed such review. Id.,

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[2]The government reports in its Forty-five Day Report in Docket BR 08-13, filed on January 26, 2009, that it expects to report to the Court by February 2, 2009, "the actions it has taken to rectify this compliance incident." To the extent that report addresses the following questions, the government need not repeat the answers in response to this Order. Instead, the government may refer the Court to the appropriate page or pages of the February 2nd report.

Primary Order at 12. Why did none of these entities that were ordered to conduct oversight over this program identify the problem earlier? Fully describe the manner in which each entity has exercised its oversight responsibilities pursuant to the Primary Order in this docket as well as pursuant to similar predecessor Orders authorizing the bulk production of telephone metadata.

5. The preliminary notice from DOJ states that the alert list includes telephone identifiers that have been tasked for collection in accordance with NSA's SIGINT authority. What standard is applied for tasking telephone identifiers under NSA's SIGINT authority? Does NSA, pursuant to its SIGINT authority, task telephone identifiers associated with United States persons? If so, does NSA limit such identifiers to those that were not selected solely upon the basis of First Amendment protected activities?

6. In what form does the government retain and disseminate information derived from queries run against the business records data archive?

7. If ordered to do so, how would the government identify and purge information derived from queries run against the business records data archive using telephone identifiers that were not assessed in advance to meet the reasonable and articulable suspicion standard?

The Court is exceptionally concerned about what appears to be a flagrant violation of its Order in this matter and, while the Court will not direct that specific officials of the Executive

Branch provide sworn declarations in response to this Order, the Court expects that the declarants will be officials of sufficient stature that they have the authority to speak on behalf of the Executive Branch.

IT IS SO ORDERED, this 28th day of January 2009.

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

~~TOP SECRET//COMINT//NOFORN//MR~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE PRODUCTION OF TANGIBLE THINGS FROM [redacted]

Docket Number: BR 08-13

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO THE COURT'S ORDER DATED JANAURY 28, 2009 (U)

The United States of America, by and through the undersigned Department of Justice attorneys, respectfully submits this memorandum and supporting Declaration of Lt. General Keith B. Alexander, U.S. Army, Director, National Security Agency (NSA), attached hereto at Tab 1 ("Alexander Declaration"), in response to the Court's Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009 ("January 28 Order"). ~~(TS)~~

The Government acknowledges that NSA's descriptions to the Court of the alert list process described in the Alexander Declaration were inaccurate and that the

~~TOP SECRET//COMINT//NOFORN//MR~~

[redacted]

Business Records Order did not provide the Government with authority to employ the alert list in the manner in which it did. ~~(TS//SI//NF)~~

For the reasons set forth below, however, the Court should not rescind or modify its Order in docket number BR 08-13. The Government has already taken significant steps to remedy the alert list compliance incident and has commenced a broader review of its handling of the metadata collected in this matter. In addition, the Government is taking additional steps to implement a more robust oversight regime. Finally, the Government respectfully submits that the Court need not take any further remedial action, including through the use of its contempt powers or by a referral to the appropriate investigative offices.[1] ~~(TS//SI//NF)~~

BACKGROUND (U)

I. Events Preceding the Court's January 28 Order ~~(S)~~

In docket number BR 06-05, the Government sought, and the Court authorized NSA, pursuant to the Foreign Intelligence Surveillance Act's (FISA) tangible things provision, 50 U.S.C. § 1861 et seq., to collect in bulk and on an ongoing basis certain call

[1] The January 28 Order directed the Government to file a brief to help the Court assess how to respond to this matter and to address seven specific issues. This memorandum discusses the need for further Court action based, in part, on the facts in the Alexander Declaration, which contains detailed responses to each of the Court's specific questions. See Alexander Decl. at 24-39. ~~(S)~~

detail records or "telephony metadata," so that NSA could analyze the metadata using contact chainin[redacted] tools.[2] ~~(TS//SI//NF)~~

FISA's tangible things provision authorizes the Director of the Federal Bureau of Investigation (FBI) or his designee to apply to this Court

> for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution.

50 U.S.C. § 1861(a)(1). FISA's tangible things provision directs the Court to enter an ex parte order requiring the production of tangible things and directing that the tangible things produced in response to such an order be treated in accordance with minimization procedures adopted by the Attorney General pursuant to section 1861(g), if the judge finds that the Government's application meets the requirements of 50 U.S.C. § 1861(a) & (b). See 50 U.S.C. § 1861(c)(1). (U)

In docket number BR 06-05 and each subsequent authorization, including docket number BR 08-13, this Court found that the Government's application met the requirements of 50 U.S.C. § 1861(a) & (b) and entered an order directing that the BR metadata to be produced—call detail records or telephony metadata—be treated in

[2] The Government will refer herein to call detail records collected pursuant to the Court's authorizations in this matter as "BR metadata." ~~(TS)~~

accordance with the minimization procedures adopted by the Attorney General.

Among these minimization procedures was the following:

> Any search or analysis of the data archive shall occur only after a particular known telephone number has been associated with [redacted]. [3] More specifically, access to the archived data shall occur only when NSA has identified a known telephone number for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted] organization; provided, however, that a telephone number believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution.

Order, docket number BR 06-05, at 5 (emphasis added); see also Memo. of Law in Supp. of Application for Certain Tangible Things for Investigations to Protect Against International Terrorism, docket number BR 06-05, Ex. C, at 20 (describing the above requirement as one of several minimization procedures to be applied to the collected metadata).[4] ~~(TS//SI//NF)~~

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[3] Authorizations after this matter was initiated in May 2006 expanded the telephone identifiers that NSA could query to those identifiers associated with [redacted] see generally docket number BR 06-05 (motion to amend granted in August 2006), and later the [redacted], see generally docket number BR 07-10 (motion to amend granted in June 2007). The Court's authorization in docket number BR 08-13 approved querying related to [redacted] Primary Order, docket number BR 08-13, at 8. ~~(TS//SI//NF)~~

[4] In addition, the Court's Order in docket number BR 06-05 and each subsequent authorization, including docket number BR 08-13, required that "[a]lthough the data collected under this Order will necessarily be broad, the use of that information for analysis shall be strictly tailored to identifying terrorist communications and shall occur solely according to the

On December 11, 2008, the Court granted the most recent reauthorization of the BR metadata collection. For purposes of querying the BR metadata, as in prior Orders in this matter, the Court required the Government to comply with the same standard of reasonable, articulable suspicion set forth above. Primary Order, docket number BR 08-13, at 8-9.[5] ~~(TS//SI//NF)~~

On January 9, 2009, representatives from the Department of Justice's National Security Division (NSD) attended a briefing at NSA concerning the telephony metadata collection.[6] At the briefing, NSD and NSA representatives discussed several matters, including the alert list. See Alexander Decl. at 17, 27-28. Following the briefing and on the same day, NSD sent NSA an e-mail message asking NSA to confirm NSD's understanding of how the alert list operated as described at the briefing. Following additional investigation and the collection of additional information, NSA replied on

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procedures described in the application, including the minimization procedures designed to protect U.S. person information." See, e.g., Order, docket number BR 06-05, at 6 ¶ D. ~~(TS//SI//NF)~~

[5] In this memorandum the Government will refer to this standard as the "RAS standard" and telephone identifiers that satisfy the standard as "RAS-approved." ~~(S)~~

[6] The names of the Department of Justice representatives who attended the briefing are included in the Alexander Declaration at page 28. The date of this meeting, January 9, 2009, was the date on which these individuals first learned (later confirmed) that the alert list compared non-RAS-approved identifiers to the incoming BR metadata. Other than these individuals (and other NSD personnel with whom these individuals discussed this matter between January 9 and January 15, 2009), and those NSA personnel otherwise identified in the Alexander Declaration, NSD has no record of any other executive branch personnel who knew that the alert list included non-RAS-approved identifiers prior to January 15, 2009. ~~(TS//SI//NF)~~

January 14, 2009, confirming much of NSD's understanding and providing some additional information. See id. at 27. ~~(TS//SI//NF)~~

Following additional discussions between NSD and NSA, a preliminary notice of compliance incident was filed with the Court on January 15, 2009. See id. at 27-28. The letter reported that the alert list contained counterterrorism-associated telephone identifiers tasked for collection pursuant to NSA's signals intelligence (SIGINT) authorities under Executive Order 12333, and therefore included telephone identifiers that were not RAS-approved, as well as some that were.[7] Thereafter, as previously reported in a supplemental notice of compliance incident filed with the Court on February 3, 2009, NSA unsuccessfully attempted to complete a software fix to the alert list process so that it comported with the above requirement in docket number BR 08-13.

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[7] The preliminary notice of compliance incident filed on January 15, 2009, stated in pertinent part:

> NSA informed the NSD that NSA places on the alert list counterterrorism associated telephone identifiers that have been tasked for collection pursuant to NSA's signals intelligence (SIGINT) authorities under Executive Order 12333. Because the alert list consists of SIGINT-tasked telephone identifiers, it contains telephone identifiers as to which NSA has not yet determined that a reasonable and articulable suspicion exists that they are associated with [redacted] nd [redacted] ted [redacted] As information collected pursuant the Court's Orders in this matter flows into an NSA database, NSA automatically compares this information with its alert list in order to identify U.S. telephone identifiers that have been in contact with a number on the alert list. Based on results of this comparison NSA then determines in what body of data contact chaining is authorized.

Jan. 15, 2009, Preliminary Notice of Compliance Incident, docket number 08-13, at 2. ~~(TS//SI//NF)~~

See id. at 20. NSA shut down the alert list process entirely on January 24, 2009, and the process remains shut down as of the date of this filing.[8] See id. ~~(TS//SI//NF)~~

II. NSA's Use of the Alert List Process to Query Telephony Metadata ~~(TS)~~

When the Court initially authorized the collection of telephony metadata in docket number BR 06-05 on May 24, 2006, neither the Court's Orders nor the Government's application (including the attachments) discussed an alert list process. Rather, a description of the alert list process first appeared in the NSA report accompanying the renewal application in BR 06-08, filed with the Court on August 18,

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[8] The supplemental notice of compliance incident filed on February 3, 2009, stated in pertinent part:

> On January 23, 2009, NSA provided the NSD with information regarding the steps it had taken to modify the alert list process in order to ensure that only "RAS-approved" telephone identifiers run against the data collected pursuant to the Court's Orders in this matter (the "BR data") would generate automated alerts to analysts. Specifically, NSA informed the NSD that as of January 16, 2009, it had modified the alert list process so that "hits" in the BR data based on non-RAS-approved signals intelligence (SIGINT) tasked telephone identifiers would be automatically deleted so that only hits in the BR data based on RAS-approved telephone identifiers would result in an automated alert being sent to analysts. NSA also indicated that it was in the process of constructing a new alert list consisting of only RAS-approved telephone identifiers.
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> On January 24, 2009, NSA informed the NSD that it had loaded to the business record alert system a different list of telephone identifiers than intended. NSA reports that, due to uncertainty as to whether all of the telephone identifiers satisfied all the criteria in the business records order, the alert list process was shut down entirely on January 24, 2009.

Feb. 3, 2009, Supplemental Notice of Compliance ~~Incident~~, docket number 08-13, at 1-2. ~~(TS//SI//NF)~~

2006.[9] The reports filed with the Court incorrectly stated that the alert list did not include telephone identifiers that were not RAS-approved. In fact, the majority of telephone identifiers on the list were not RAS-approved. See Alexander Decl. at 4, 7-8. ~~(TS//SI//NF)~~

A. Creation of the Alert List for BR Metadata in May 2006 ~~(TS)~~

Before the Court issued its Order in BR 06-05, NSA had developed an alert list process to assist NSA in prioritizing its review of the telephony metadata it received. See id. at 8. The alert list contained telephone identifiers NSA was targeting for SIGINT collection and domestic identifiers that, as a result of analytical tradecraft, were deemed relevant to the Government's counterterrorism activity. See id. at 9. The alert list process notified NSA analysts if there was a contact between either (i) a foreign telephone identifier of counterterrorism interest on the alert list and any domestic telephone identifier in the incoming telephony metadata, or (ii) any domestic telephone identifier on the alert list related to a foreign counterterrorism target and any foreign telephone identifier in the incoming telephony metadata. See id. ~~(TS//SI//NF)~~

According to NSA's review of its records and discussions with relevant NSA personnel, on May 25, 2006, NSA's Signals Intelligence Directorate (SID) asked for NSA Office of General Counsel's (OGC) concurrence on draft procedures for implementing

[9] Similarly, the applications and declarations in subsequent renewals did not discuss the alert list although the reports attached to the applications and reports filed separately from renewal applications discussed the process. ~~(TS)~~

the Court's Order in docket number BR 06-05. See id. at 12. The procedures generally described how identifiers on the alert list would be compared against incoming BR metadata and provided that a supervisor would be notified if there was a match between an identifier on the alert list and an identifier in the incoming data. See id. at 12-13 and Ex. B thereto ("BR Procedures") at 1-2. Moreover, a close reading of the BR Procedures indicated that the alert list contained both RAS-approved and non-RAS-approved telephone identifiers.[10] See Alexander Decl. at 12-13; BR Procedures at 1. NSA OGC concurred in the use of the BR Procedures, emphasizing that analysts could not access the archived BR metadata for purposes of conducting contact chaining [redacted] unless the RAS standard had been satisfied. See Alexander Decl. at 13-14 and Ex. A and Ex. B thereto. ~~(TS//SI//NF)~~

On May 26, 2006, the chief of NSA-Washington's counterterrorism organization in SID directed that the alert list be rebuilt to include only identifiers assigned to "bins" or "zip codes"[11] that NSA used to identify [redacted]

[10] For example, after describing the notification a supervisor (i.e., Shift Coordinator and, later, Homeland Mission Coordinator) would receive if a foreign telephone identifier generated an alert based on the alert list process, the BR Procedures provided that the "Shift Coordinator will examine the foreign number and determine if that particular telephone number has been previously associated w[redacted] based on the standard articulated by the Court." BR Procedures at 1. ~~(TS//SI//NF)~~

[redacted]

[redacted] the only targets of the Court's Order in docket number BR 06-05. See Alexander Decl. at 14-15. Pursuant to this overall direction, personnel in NSA's counterterrorism organization actually built two lists to manage the alert process. The first list — known as the "alert list" — included all identifiers (foreign and domestic) that were of interest to counterterrorism analysts who were charged with tracking [redacted] This list was used to compare the incoming BR metadata NSA was obtaining pursuant to the Court's Order and NSA's other sources of SIGINT collection to alert the counterterrorism organization if there was a match between a telephone identifier on the list and an identifier in the incoming metadata. See id. at 15. The alert list consisted of two partitions—one of RAS-approved identifiers that could result in automated chaining in the BR metadata and a second of non-RAS approved identifiers that could not be used to initiate automated chaining in the BR metadata. See id. The second list—known as the "station table"—was a historical listing of all telephone identifiers that had undergone a RAS determination, including the results of the determination. See id. at 15, 22. NSA used the "station table" to ensure that only RAS-approved "seed" identifiers were used to conduct chaining [redacted] in the BR metadata archive. See id. at 15. In short, the system was designed to compare both SIGINT and BR metadata against the identifiers on the alert list but only to permit

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A chart of the alert list process as it operated from May 2006 to January 2009 is attached to the Alexander Declaration as Ex. C. ~~(S)~~

alerts generated from RAS-approved telephone identifiers to be used to conduct contact chaining [redacted] of the BR metadata. As a result, the majority of telephone identifiers compared against the incoming BR metadata in the rebuilt alert list were not RAS-approved. See id. at 4, 7-8. For example, as of January 15, 2009, the date of NSD's first notice to the Court regarding this issue, only 1,935 of the 17,835 identifiers on the alert list were RAS-approved. See id. at 8. ~~(TS//SI//NF)~~

Based upon NSA's recent review, neither NSA SID nor NSA OGC identified the inclusion of non-RAS-approved identifiers on the alert list as an issue requiring extensive analysis. See id. at 11. Moreover, NSA personnel, including the OGC attorney who reviewed the BR Procedures, appear to have viewed the alert process as merely a means of identifying a particular identifier on the alert list that might warrant further scrutiny, including a determination of whether the RAS standard had been satisfied and therefore whether contact chaining [redacted] could take place in the BR metadata archive using that particular identifier.[12] See id. at 11-12. In fact, NSA designed the alert list process to result in automated chaining of the BR metadata only if the initial alert was based on a RAS-approved telephone identifier. See id. at 14. If an

[12] As discussed in the Alexander Declaration, in the context of NSA's SIGINT activities the term "archived data" normally refers to data stored in NSA's analytical repositories and excludes the many processing steps NSA undertakes to make the raw collections useful to analysts. Accordingly, NSA analytically distinguished the initial alert process from the subsequent process of performing contact chaining [redacted] (i.e., "queries") of the "archived data," assessing that the Court's Order in docket number BR 06-05 only governed the latter. See Alexander Decl. at 3-4, 10-15. ~~(TS//SI//NF)~~

alert was based on a non-RAS-approved identifier, no automated chaining would occur in the BR metadata archive although automated chaining could occur in other NSA archives that did not require a RAS determination (e.g., non-FISA telephony collection). See id. ~~(TS//SI//NF)~~

B. Description of the Alert List Process Beginning in August 2006 ~~(TS)~~

The first description of the alert list process appeared in the NSA report accompanying the Government's renewal application filed with the Court on August 18, 2006. The report stated in relevant part:

> ~~(TS//SI//NF)~~ NSA has compiled through its continuous counter-terrorism analysis, a list of telephone numbers that constitute an "alert list" of telephone numbers used by members of [redacted] This alert list serves as a body of telephone numbers employed to query the data, as is described more fully below.
>
> ~~(TS//SI//NF)~~ Domestic numbers and foreign numbers are treated differently with respect to the criteria for including them on the alert list. With respect to foreign telephone numbers, NSA receives information indicating a tie to [redacted] Principal among these are: [redacted] Each of the foreign telephone numbers that comes to the attention of NSA as possibly related to [redacted] is evaluated to determine whether the information about it provided to NSA satisfies the reasonable articulable suspicion standard. If so, the foreign telephone number is placed on the alert list; if not, it is not placed on the alert list.
>
> ~~(TS//SI//NF)~~ The process set out above applies also to newly discovered domestic telephone numbers considered for addition to the

> alert list, with the additional requirement that NSA's Office of General Counsel reviews these numbers and affirms that the telephone number is not the focus of the analysis based solely on activities that are protected by the First Amendment. . . .
>
> . . . .
>
> ~~(TS//SI//NF)~~ As of the last day of the reporting period addressed herein, NSA had included a total of 3980 telephone numbers on the alert list, which includes foreign numbers and domestic numbers, after concluding that each of the foreign telephone numbers satisfied the standard set forth in the Court's May 24, 2006 [Order], and each of the domestic telephone numbers was either a FISC approved number or in direct contact with a foreign seed that met those criteria.
>
> ~~(TS//SI//NF)~~ To summarize the alert system: every day new contacts are automatically revealed with the 3980 telephone numbers contained on the alert list described above, which themselves are present on the alert list either because they satisfied the reasonable articulable suspicion standard, or because they are domestic numbers that were either a FISC approved number or in direct contact with a number that did so. These automated queries identify any new telephone contacts between the numbers on the alert list and any other number, except that domestic numbers do not alert on domestic-to-domestic contacts.

NSA Report to the FISC (Aug. 18, 2006), docket number BR 06-05 (Ex. B to the Government's application in docket number BR 06-08), at 12-15 ("August 2006 Report").[13] The description above was included in similar form in all subsequent reports to the Court, including the report filed in December 2008. ~~(TS//SI//NF)~~

[13] The August 2006 report also discussed two categories of domestic telephone numbers that were added to the alert list prior to the date the Order took effect. One category consisted of telephone numbers for which the Court had authorized collection and were therefore deemed approved for metadata querying without the approval of an NSA official. The second category consisted of domestic numbers added to the alert list after direct contact with a known foreign [redacted] seed number. The domestic numbers were not used as seeds themselves and contact chaining was limited to two hops (instead of the three hops authorized by the Court). See August 2006 Report, at 12-13; Alexander Decl. at Z n.1. NSA subsequently removed the numbers in the second category from the alert list. ~~(TS//SI//NF)~~

According to NSA's review of its records and discussions with relevant NSA personnel, the NSA OGC attorney who prepared the initial draft of the report included an inaccurate description of the alert list process due to a mistak[redacted]lert [redacted] Upon completing the draft, the attorney circulated the draft to other OGC attorneys and operational personnel and requested that others review it for accuracy. See id. The inaccurate description, however, was not corrected before the report was finalized and filed with the Court on August 18, 2006. The same description remained in subsequent reports to the Court, including the report filed in docket number BR 08-13.[14] ~~(TS//SI//NF)~~

[14] At the meeting on January 9, 2009, NSD and NSA also identified that the reports filed with the Court have incorrectly stated the number of identifiers on the alert list. Each report included the number of telephone identifiers purportedly on the alert list. See, e.g., NSA 120-Day Report to the FISC (Dec. 11, 2008), docket number BR 08-08 (Ex. B to the Government's application in docket number BR 08-13), at 11 ("As of November 2, 2008, the last day of the reporting period herein, NSA had included a total of 27,090 telephone identifiers on the alert list . . . ."). In fact, NSA reports that these numbers did not reflect the total number of identifiers on the alert list; they actually represented the total number of identifiers included on the "station table" (NSA's historical record of RAS determinations) as currently RAS-approved (i.e., approved for contact chaining[redacted]. See Alexander Decl. at 8 n.3. ~~(TS//SI//NF)~~

DISCUSSION (U)

I. THE COURT'S ORDERS SHOULD NOT BE RESCINDED AND NEED NOT BE MODIFIED ~~(TS)~~

In the January 28 Order, the Court directed the Government to submit a written brief designed to, among other things, assist the Court in assessing whether the Primary Order in docket number BR 08-13 should be modified or rescinded.[15] January 28 Order at 2. ~~(S)~~

So long as a court retains jurisdiction over a case, then, in the absence of a prohibition by statute or rule, the court retains inherent authority to "reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." Melancon v. Texaco, Inc., 659 F.3d 551, 553 (5th Cir. 1981). The choice of remedies rests in a court's sound discretion, see Kingsley v. United States, 968 F.2d 109, 113 (1st Cir. 1992) (citations omitted) (considering the alternative remedies for breach of a plea agreement), but in exercising that discretion a court may consider the full consequences that a particular remedy may bring about, see Alrefae v. Chertoff, 471 F.3d 353, 360 (2d Cir. 2006) (citations omitted) (instructing that on remand to consider petitioner's motion to rescind order of removal, immigration judge may consider "totality of the circumstances"). Consonant with these principles, prior decisions of this Court reflect a strong preference for resolving incidents of non-compliance through the creation of

[15] The authorization granted by the Primary Order issued by the Court in docket number BR 08-13 expires on March 6, 2009 at 5:00 p.m. Eastern Time. ~~(TS//SI//NF)~~

additional procedures and safeguards to guide the Government in its ongoing collection efforts, rather than by imposing the extraordinary and final remedy of rescission. See, e.g., [redacted], Primary Order, docket numbe[redacted]at 11-12 (requiring, in response to an incident of non-compliance, NSA to file with the Court every thirty days a report discussing, among other things, queries made since the last report to the Court and NSA's application of the relevant standard); see also [redacted] docket numbers [redacted] (prohibiting the querying of data using "seed" accounts validated using particular information). ~~(TS//SI//NF)~~

The Court's Orders in this matter did not authorize the alert list process as implemented to include a comparison of non-RAS-approved identifiers against incoming BR metadata. However, in light of the significant steps that the Government has already taken to remedy the alert list compliance incident and its effects, the significant oversight modifications the Government is in the process of implementing, and the value of the telephony metadata collection to the Government's national security mission, the Government respectfully submits that the Court should not rescind or modify the authority granted in docket number BR 08-13. ~~(TS)~~

A. **Remedial Steps Already Undertaken by the Government Are Designed to Ensure Future Compliance with the Court's Orders and to Mitigate Effects of Past Non-Compliance** ~~(S)~~

Since the Government first reported this matter to the Court, NSA has taken several corrective measures related to the alert process, including immediate steps to sequester and shut off its analysts' access to any alerts that were generated from comparing incoming BR metadata against non-RAS-approved identifiers. See Alexander Decl. at 19-20. NSA also immediately began to re-engineer the entire alert process to ensure that only RAS-approved telephone identifiers are compared against incoming BR metadata. See id. Most importantly, NSA shut off the alert list process on January 24, 2009, when its redesign efforts failed, and the process will remain shut down until the Government can ensure that the process will operate within the terms of the Court's Orders. See id. at 20. ~~(TS//SI//NF)~~

NSA has also conducted a review of all 275 reports NSA has disseminated since May 2006 as a result of contact chaining [redacted] of NSA's archive of BR metadata.[16] See id. at 36. Thirty-one of these reports resulted from the automated alert process. See id. at 36 n.17. NSA did not identify any report that resulted from the use of a non-RAS-approved "seed" identifier.[17] See id. at 36-37. Additionally, NSA

[16] A single report may tip more than one telephone identifier as being related to the seed identifier. As a result, the 275 reports have tipped a total of 2,549 telephone identifiers since May 24, 2006. See Alexander Decl. at 36 n.17. ~~(TS//SI//NF)~~

[17] NSA has identified one report where the number on the alert list was not RAS-approved when the alert was generated but, after receiving the alert, a supervisor determined

determined that in all instances where a U.S. identifier served as the initial seed identifier for a report (22 of the 275 reports), the initial U.S. seed identifier was either already the subject of FISC-approved surveillance under the FISA or had been reviewed by NSA's OGC to ensure that the RAS determination was not based solely on a U.S. person's first amendment-protected activities. See id. at 37. ~~(TS//SI//NF)~~

Unlike reports generated from the BR metadata, which NSA disseminated outside NSA, the alerts generated from a comparison of the BR metadata to the alert list were only distributed to NSA SIGINT personnel responsible for counterterrorism activity.[18] See id. at 38. Since this compliance incident surfaced, NSA identified and eliminated analyst access to all alerts that were generated from the comparison of non-RAS approved identifiers against the incoming BR metadata and has limited access to the BR alert system to only software developers assigned to NSA's Homeland Security Analysis Center (HSAC), and the Technical Director for the HSAC. See id. at 38-39. ~~(TS//SI//NF)~~

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that the identifier, in fact, satisfied the RAS standard. After this determination, NSA used the identifier as a seed for chaining in the BR FISA data archive. Information was developed that led to a report to the FBI that tipped 11 new telephone identifiers. See Alexander Decl. at 37 n.18. ~~(TS//SI//NF)~~

[18] Initially, if an identifier on the alert list generated an alert that the identifier had been in contact with an identifier in the United States, the alert system masked (i.e., concealed from the analyst's view) the domestic identifier. Later, in January 2008, the SIGINT Directorate allowed the alerts to be sent to analysts without masking the domestic identifier. NSA made this change in an effort to improve the ability of SIGINT analysts, on the basis of their target knowledge, to prioritize their work more efficiently. See Alexander Decl. at 38. ~~(TS//SI//NF)~~

In addition to the steps NSA has taken with respect to the alert list issues, NSA has also implemented measures to review NSA's handling of the BR metadata generally. For example, the Director of NSA has ordered end-to-end system engineering and process reviews (technical and operational) of NSA's handling of BR metadata. See id. at 21. The results of this review will be made available to the Court. See id. at 21 n.13. In response to this Order, NSA also has undertaken the following:

- a review of domestic identifiers on the "station table" in order to confirm that RAS determinations complied with the Court's Orders; and
- an audit of all queries made of the BR metadata repository since November 1, 2008, to determine if any of the queries during that period were made using non-RAS-approved identifiers.[19]

See id. at 22-23. ~~(TS//SI//NF)~~

To better ensure that NSA operational personnel understand the Court-ordered procedures and requirements for accessing the BR metadata, NSA's SIGINT Oversight & Compliance Office also initiated an effort to redesign training for operational personnel who require access to BR metadata. This effort will include competency testing prior to access to the data. See id. at 23. In the interim, NSA management personnel, with support from NSA OGC and the SIGINT Oversight and Compliance Office, delivered

[19] Although NSA's review is still ongoing, NSA's review to date has revealed no instances of improper querying of the BR metadata, aside from those previously reported to the Court in a notice of compliance incident filed on January 26, 2009, in which it was reported that between approximately December 10, 2008, and January 23, 2009, two analysts conducted 280 queries using non-RAS-approved identifiers. See Alexander Decl. at 22-23. As discussed below, NSA is implementing software changes to the query tools used by analysts so that only RAS-approved identifiers may be used to query the BR FISA data repository. See id. at 22-23. ~~(TS)~~

in-person briefings for all NSA personnel who have access to the BR metadata data archive to remind them of the requirements and their responsibilities regarding the proper handling of BR metadata. See id. In addition, all NSA personnel with access to the BR metadata have also received a written reminder of their responsibilities. See id. ~~(TS//SI//NF)~~

Finally, NSA is implementing two changes to the tools used by analysts to access the BR metadata. First, NSA is changing the system that analysts use to conduct contact chaining of the BR metadata so that the system will not be able to accept any non-RAS-approved identifier as the seed identifier for contact chaining. See id. at 24. Second, NSA is implementing software changes to its system that will limit to three the number of "hops" permitted from a RAS-approved seed identifier. See id. ~~(TS//SI//NF)~~

B. Additional Oversight Mechanisms the Government Will Implement ~~(S)~~

The operation of the alert list process in a manner not authorized by the Court and contrary to the manner in which it was described to the Court is a significant compliance matter. While the process has been remedied in the ways described above, the Government has concluded that additional oversight mechanisms are appropriate to ensure future compliance with the Primary Order in docket number BR 08-13 and any future orders renewing the authority granted therein. Accordingly, the Government will implement the following oversight mechanisms in addition to those contained in the Court's Orders:

- NSA's OGC will consult with NSD on all significant legal opinions that relate to the interpretation, scope and/or implementation of the authorization granted by the Court in its Primary Order in docket number BR 08-13, prior Orders issued by the Court, or any future order renewing that authorization. When operationally practicable, such consultation shall occur in advance; otherwise NSD will be notified as soon as practicable;
- NSA's OGC will promptly provide NSD with copies of the mandatory procedures (and all replacements, supplements or revisions thereto in effect now or adopted in the future) the Director of NSA is required to maintain to strictly control access to and use of the data acquired pursuant to orders issued by the Court in this matter;
- NSA's OGC will promptly provide NSD with copies of all formal briefing and/or training materials (including all revisions thereto) currently in use or prepared and used in the future to brief/train NSA personnel concerning the authorization granted by orders issued by the Court in this matter;
- At least once before any future orders renewing the authorization granted in docket number BR 08-13 expire, a meeting for the purpose of assessing compliance with this Court's orders will be held with representatives from NSA's OGC, NSD, and appropriate individuals from NSA's Signals Intelligence Directorate. The results of this meeting will be reduced to writing and submitted to the Court as part of any application to renew or reinstate this authority;
- At least once during the authorization period of all future orders, NSD will meet with NSA's Office of Inspector General (OIG) to discuss their respective oversight responsibilities and assess NSA's compliance with the Court's orders in this matter;
- Prior to implementation, all proposed automated query processes will be reviewed and approved by NSA's OGC and NSD.

~~(TS//SI//NF)~~

While no oversight regime is perfect, the Government submits that this more robust oversight regime will significantly reduce the likelihood of such compliance incidents occurring in the future. ~~(TS)~~

C. **The Value of the BR Metadata to the Government's National Security Mission ~~(TS)~~**

The BR metadata plays a critical role in the Government's ability to find and identify members and agents of [redacted]. As discussed in declarations previously filed with the Court in this matter, operatives of [redacted] use the international telephone system to communicate with one another between numerous countries all over the world, including to and from the United States. Access to the accumulated pool of BR metadata is vital to NSA's counterterrorism intelligence mission because it enables NSA to discover the communications of these terrorist operatives. See Alexander Decl. at 39-42. While terrorist operatives often take intentional steps to disguise and obscure their communications and their identities using a variety of tactics, by employing its contact chaining [redacted] against the accumulated pool of metadata NSA can discover valuable information about the adversary. See id. Specifically, using contact chaining [redacted] NSA may be able to discover previously unknown telephone identifiers used by a known terrorist operative, to discover previously unknown terrorist operatives, to identify hubs or common contacts between targets of interest who were previously thought to be unconnected, and potentially to discover individuals willing to become U.S. Government assets. See, e.g., Decl. of Lt. Gen. Keith B. Alexander, docket number BR 06-05, Ex. A at ¶ 9; Decl. of [redacted] docket

number BR 08-13, Ex. A at ¶¶ 9-11.[20] Such discoveries are not possible when targeting solely known terrorist telephone identifiers. See Alexander Decl. at 39-40. Demonstrating the value of the BR metadata to the U.S. Intelligence Community, the NSA has disseminated 275 reports and tipped over 2,500 telephone identifiers to the FBI and CIA for further investigative action since the inception of this collection in docket number BR 06-05. See id. at 42. This reporting has provided the FBI with leads and linkages on individuals in the U.S. with connections to terrorism that it may have otherwise not identified. See id. ~~(TS//SI//NF)~~

In summary, the unquestionable foreign intelligence value of this collection, the substantial steps NSA has already taken to ensure the BR metadata is only accessed in compliance with the Court's Orders, and the Government's enhanced oversight regime provide the Court with a substantial basis not to rescind or modify the authorization for this collection program. ~~(TS)~~

III. THE COURT NEED NOT TAKE ADDITIONAL ACTION REGARDING MISREPRESENTATIONS THROUGH ITS CONTEMPT POWERS OR BY REFERRAL TO APPROPRIATE INVESTIGATIVE OFFICES ~~(TS)~~

The January 28 Order asks "whether the Court should take action regarding persons responsible for any misrepresentation to the Court or violation of its Orders,

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[20] Other advantages of contact chaining include [redacted]. See Alexander Decl. at 41; Decl. of [redacted] docket number BR 08-13, Ex. A at ¶ 10. ~~(TS//SI//NF)~~

either through its contempt powers or by referral to the appropriate investigative offices." January 28 Order at 2. The Government respectfully submits that such actions are not required. Contempt is not an appropriate remedy on these facts, and no referral is required, because NSA already has self-reported this matter to the proper investigative offices. ~~(TS//SI//NF)~~

Whether contempt is civil or criminal in nature turns on the "character and purpose" of the sanction involved. See Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 (1994) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911)). Criminal contempt is punitive in nature and is designed to vindicate the authority of the court. See Bagwell, 512 U.S. at 828 (internal quotations and citations omitted). It is imposed retrospectively for a "completed act of disobedience," and has no coercive effect because the contemnor cannot avoid or mitigate the sanction through later compliance. Id. at 828-29 (citations omitted).[21] Because NSA has stopped the alert list process and corrected the Agency's unintentional misstatements to the Court, any possible contempt sanction here would be in the nature of criminal contempt. ~~(TS//SI//NF)~~

[21] By contrast, civil contempt is "remedial, and for the benefit of the complainant." Gompers, 221 U.S. at 441. It "is ordinarily used to compel compliance with an order of the court," Cobell v. Norton, 334 F.3d 1128, 1145 (D.C. Cir. 2003), and may also be designed "to compensate the complainant for losses sustained." United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947) (citations omitted). (U)

A finding of criminal contempt "requires both a contemptuous act and a wrongful state of mind." Cobell, 334 F.3d at 1147 (citations omitted). The violation of the order must be willful: "a volitional act by one who knows or should reasonably be aware that his conduct is wrongful." United States v. Greyhound Corp., 508 F.2d 529, 531-32 (7th Cir. 1974), quoted in In re Holloway, 995 F.2d 1080, 1082 (D.C. Cir. 1993) (emphasis in original). For example, a criminal contempt conviction under 18 U.S.C. § 401 requires, among other things, proof of a willful violation of a court order; i.e., where the defendant "acts with deliberate or reckless disregard of the obligations created by a court order." United States v. Rapone, 131 F.3d 188, 195 (D.C. Cir. 1997) (citations omitted).[22] (U)

Here, there are no facts to support the necessary finding that persons at NSA willfully violated the Court's Orders or intentionally sought to deceive the Court. To the contrary, NSA operational personnel implemented the alert list based on the concurrence of its OGC to a set of procedures that contemplated comparing the alert list, including non-RAS-approved telephone identifiers, against a flow of new BR metadata. See Alexander Decl. at 12-14. The concurrence of NSA's OGC was based on NSA's understanding that, by using the term "archived data," the Court's Order in

[22] A person charged with contempt committed out of court is entitled to the usual protections of criminal law, such as the presumption of innocence and the right to a jury trial. Bagwell, 512 U.S. at 827-28. For criminal contempt to apply, a willful violation of an order must be proved beyond a reasonable doubt. See id. Contempt occurring in the presence of the Court, however, is not subject to all such protections. See id. at 827 n.2. (U)

docket number BR 06-05 only required the RAS standard to be applied to the contact chaining [redacted] conducted by accessing NSA's analytic repository of BR metadata. See id. at 10-14. This advice was given for the purpose of advising NSA operators on how to comply with the Court's Orders when using an alert list. Its goal plainly was not to deliberately or recklessly disregard those Orders; and in heeding this advice, NSA operators were not themselves seeking to deliberately or recklessly disregard the Court's Orders. Indeed, the NSA attorney who reviewed the procedures added language to the procedures to emphasize the Court's requirement that the RAS standard must be satisfied prior to conducting any chaining [redacted] of NSA's analytic repository of BR metadata. See id. at 13-14. ~~(TS//SI//NF)~~

NSA OGC's concurrence on the procedures the SIGINT Directorate developed for processing BR metadata also established the framework for numerous subsequent decisions and actions, including the drafting and reviewing of NSA's reports to the Court. NSA personnel reasonably believed, based on NSA OGC's concurrence with the BR Procedures, that the queries subject to the Court's Order were only contact chaining [redacted] of the aggregated pool of BR metadata. Against this backdrop, NSA operational personnel reasonably believed that, until contact chaining of the aggregated pool of BR metadata was conducted, the alert list process was not subject to the RAS requirement contained in the Court's Order. This, in turn, led to the misunderstanding between the NSA attorney who prepared the initial draft of NSA's

first BR report to the Court and the individual in the SIGINT Directorate who served as the report's primary reviewer, so that ultimately the report contained an incorrect description of the alert list process. See id. at 16-18.[23] In other words, there was no deliberate effort to provide inaccurate or misleading information to the Court, nor did any NSA employee deliberately circumvent the RAS requirement contained in the Court's Orders. Based on this confluence of events, all parties involved in the drafting of the report believed the description of the alert list to be accurate. ~~(TS//SI//NF)~~

In addition, the Government has already taken steps to notify the appropriate investigative officials regarding this matter. Specifically, FBI's OGC was informed of this matter on January 23, 2009; the Director of National Intelligence was informed of this matter on January 30, 2009, and received additional information about the incident on two other occasions; and the Undersecretary of Defense for Intelligence was informed of this matter on February 10, 2009. See id. at 28-29. NSA has also notified its Inspector General of this matter. See id. at 28. Finally, NSA is in the process of formally reporting this matter to the Assistant Secretary of Defense for Intelligence Oversight and subsequently the President's Intelligence Oversight Board. See id. at 28-29. (S)

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[23] As described above, the alert list actually consisted of two partitions—one of RAS-approved identifiers that could result in automated chaining in the BR metadata and a second of non-RAS approved identifiers that could not be used to initiate automated chaining in the BR metadata. See Alexander Decl. at 15. ~~(TS//SI//NF)~~

CONCLUSION (U)

For the reasons provided above, while the Government acknowledges that its descriptions of the alert list process to the Court were inaccurate and that the Court's Orders in this matter did not authorize the alert list process as implemented, the Court should not rescind or modify its Order in docket number BR 08-13 or take any further remedial action. ~~(TS//SI//NF)~~

Respectfully submitted,

Matthew G. Olsen
Acting Assistant Attorney General

[redacted]
Office of Intelligence

National Security Division
United States Department of Justice

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

(TS) In Re Production of Tangible Things from [redacted]	Docket No.: BR 08-13

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, UNITED STATES ARMY, DIRECTOR OF THE NATIONAL SECURITY AGENCY

(U) I, Lieutenant General Keith B. Alexander, depose and state as follows:

(U) I am the Director of the National Security Agency ("NSA" or "Agency"), an intelligence agency within the Department of Defense ("DoD"), and have served in this position since 2005. I currently hold the rank of Lieutenant General in the United States Army and, concurrent with my current assignment as Director of the National Security Agency, I also serve as the Chief of the Central Security Service and as the Commander of the Joint Functional Component Command for Network Warfare. Prior to my current assignment, I have held other senior supervisory positions as an officer of the United States military, to include service as the Deputy Chief of Staff (DCS, G-2), Headquarters, Department of the Army; Commander of the US Army's Intelligence and Security Command; and the Director of Intelligence, United States Central Command.

[redacted]

(S) As the Director of the National Security Agency, I am responsible for directing and overseeing all aspects of NSA's cryptologic mission, which consists of three functions: to engage in signals intelligence ("SIGINT") activities for the US Government, to include support to the Government's computer network attack activities; to conduct activities concerning the security of US national security telecommunications and information systems; and to conduct operations security training for the US Government. Some of the information NSA acquires as part of its SIGINT mission is collected pursuant to Orders issued under the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA").

(U) The statements herein are based upon my personal knowledge, information provided to me by my subordinates in the course of my official duties, advice of counsel, and conclusions reached in accordance therewith.

I. (U) Purpose:

~~(S//SI//NF)~~ This declaration responds to the Court's Order of 28 January 2009 ("BR Compliance Order"), which directed the Government to provide the Foreign Intelligence Surveillance Court ("FISC" or "Court") with information "to help the Court assess whether the Orders issued in this docket should be modified or rescinded; whether other remedial steps should be directed; and whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violations of its Orders, either through its contempt powers or by referral to appropriate investigative offices."

~~(S//NF)~~ To this end, this declaration describes the compliance matter that gave rise to the BR Compliance Order; NSA's analysis of the underlying activity; the root causes of the compliance problem; the corrective actions NSA has taken and plans to take to avoid a reoccurrence of the incident; answers to the seven (7) specific questions the Court has asked regarding the incident; and a description of the importance of this collection to the national security of the United States.

II. (U) Incident:

A. (U) Summary

~~(TS//SI//NF)~~ Pursuant to a series of Orders issued by the Court since May 2006, NSA has been receiving telephony metadata from telecommunications providers. NSA refers to the Orders collectively as the "Business Records Order" or "BR FISA." With each iteration of the Business Records Order, the Court has included language which says "access to the *archived data* shall occur only when NSA has identified a known telephone identifier for which . . . there are facts giving rise to a reasonable articulable suspicion that the telephone identifier is associated with [redacted] *See, e.g.,* Docket BR 08-13, Primary Order, 12 December 2008, *emphasis added.* For reasons described in more detail in the Section III.A. of this declaration, NSA personnel understood the term "archived data" to refer to NSA's analytic repository of BR FISA metadata and implemented the Business Records Order accordingly.

~~(TS//SI//NF)~~ While NSA did not authorize contact chaining [redacted] to occur in the Agency's analytic repository of BR FISA material unless NSA had determined that the "seed" telephone identifier for the chaining [redacted] satisfied the reasonable articulable suspicion ("RAS") standard specified in the Order, in its reports to the Court regarding NSA's implementation of the Business Records Order, the Agency incorrectly described an intermediate step called the alert process that NSA applied to the incoming stream of BR FISA metadata. The alert process would notify counterterrorism (CT) analysts if a comparison of the incoming metadata NSA was receiving from the Business Records Order and other sources of SIGINT collection revealed a match with telephone identifiers that were on an alert list of identifiers that were already of interest to CT personnel.

~~(TS//SI//NF)~~ In its reports to the Court, NSA stated the alert list only contained telephone identifiers that satisfied the RAS standard. In reality, the majority of identifiers on the alert list were CT identifiers that had not been assessed for RAS. If one of these non-RAS approved identifiers generated an alert, a CT analyst was notified so that NSA could make a RAS determination. If the Agency determined the identifier satisfied the RAS standard, only then would the identifier be approved as a seed for contact chaining [redacted] in the Agency's BR FISA analytic repository (*i.e.*, the "archived data"). If the contact chaining [redacted] produced information of foreign intelligence value, an NSA analyst would issue a report. In other words, none of NSA's BR FISA reports were based on non-RAS approved identifiers across the period in question – May 2006 through January 2009.

~~(S//SI)~~ I wish to emphasize that neither I nor the Agency is attempting to downplay the significance of NSA's erroneous description of the alert process to the Court. In retrospect, the Business Records Order did not provide NSA with specific authority to employ the alert list in the manner in which it did. The Agency's failure to describe the alert process accurately to the Court unintentionally precluded the Court from determining for itself whether NSA was correctly implementing the Court's Orders. Although I do not believe that any NSA employee intended to provide inaccurate or misleading information to the Court, I fully appreciate the severity of this error.

B. (U) Details

~~(TS//SI//NF)~~ Docket BR 08-13 is the FISC's most recent renewal of authority first granted to the Government in May 2006 to receive access to business records in the form of telephone call detail records. *See* Docket BR 06-05, 24 May 2006. NSA developed the automated alert process to notify NSA analysts of contact between a foreign telephone identifier of counterterrorism interest and any domestic telephone identifier; or any contact between a domestic telephone identifier, related to a foreign counterterrorism target, and any foreign telephone identifier. In its first BR FISA report to the Court in August 2006, the Agency described the automated alert process as follows:

> ~~(TS//SI//NF)~~ NSA has compiled through its continuous counter-terrorism analysis, a list of telephone numbers that constitute an "alert list" of telephone numbers used by members of [redacted]. This alert list serves as a body of telephone numbers employed to query the data, as is described more fully below.
>
> ~~(TS//SI//NF)~~ Domestic numbers and foreign numbers are treated differently with respect to the criteria for including them on the alert list.

With respect to foreign telephone numbers, NSA receives information indicating a tie to [redacted] from a variety of sources. Principal among these are: [redacted] Each of the foreign telephone numbers that comes to the attention of NSA as possibly related to [redacted] is evaluated to determine whether the information about it provided to NSA satisfies the reasonable articulable suspicion standard. If so, the foreign telephone number is placed on the alert list; if not, it is not placed on the alert list.

~~(TS//SI//NF)~~ The process set out above applies also to newly discovered domestic telephone numbers considered for addition to the alert list, with the additional requirement that NSA's Office of General Counsel reviews these numbers and affirms that the telephone number is not the focus of the analysis based solely on activities that are protected by the First Amendment. There are, however, two categories of domestic telephone numbers that were added to the NSA alert list [redacted] and the basis for their addition is slightly different.

~~(TS//SI//NF)~~ The first category consists of [redacted] domestic numbers that are currently the subject of FISC authorized electronic surveillance based on the FISC's finding of probable cause to believe that they are used by agents of [redacted] Since these numbers were already reviewed and authorized by the Court for electronic surveillance purposes, they were deemed approved for meta data querying without the approval of an NSA official.

~~(TS//SI//NF)~~ The second category consists of [redacted] domestic numbers each of which was added to the NSA alert list after coming to NSA's attention [redacted] and subsequent NSA analysis produced a sufficient level of suspicion that NSA generated an intelligence report about the telephone number to the FBI and the CIA [redacted]

~~(TS//SI//NF)~~ However, in order to avoid any appearance of circumventing the procedures, NSA will change its software to build the chains from the original foreign number and remove the [redacted] domestic numbers described above from the alert list. While the software is being developed, which will take approximately 45 days, NSA will continue to run the domestic numbers on the alert list as described.[1]

~~(TS//SI//NF)~~ As of the last day of the reporting period addressed herein, NSA had included a total of 3980 telephone numbers on the alert list, which includes foreign numbers and domestic numbers, after concluding that each of the foreign telephone numbers satisfied the standard set forth in the Court's May 24, 2006, and each of the domestic telephone numbers was either a FISC approved number or in direct contact with a foreign seed that met those criteria.

~~(TS//SI//NF)~~ To summarize the alert system: every day new contacts are automatically revealed with the 3980 telephone numbers contained on the alert list described above, which themselves are present on the alert list either because they satisfied the reasonable articulable suspicion standard, or because they are domestic numbers that were either a FISC approved number or in direct contact with a number that did so. These automated queries identify any new telephone contacts between the numbers on the alert list and any other number, except that domestic numbers do not alert on domestic-to-domestic contacts.

~~(TS//SI//NF)~~ During this reporting period, a combination of the alert system and queries resulting from leads described below in paragraph two led to analysis that resulted in the discovery of 138 new numbers that were tipped as leads to the FBI and the CIA as suspicious telephone numbers.

See Docket BR 06-05, NSA Report to the FISC, August 18, 2006, at 12-16 (footnote omitted). Subsequent NSA reports to the Court contained similar representations as to the functioning of the alert list process. *See, e.g.*, Docket BR 08-08, NSA 120-Day Report to the FISC, December 11, 2008, at 8-12.

~~(TS//SI//NF)~~ In short, the reports filed with the Court incorrectly stated that the telephone identifiers on the alert list satisfied the RAS standard. In fact, the majority of telephone identifiers included on the alert list had not been RAS approved, although the

[redacted]

identifiers were associated with the same class of terrorism targets covered by the Business Records Order.[2] Specifically, of the 17,835 telephone identifiers that were on the alert list on 15 January 2009 (the day DoJ reported this compliance incident to the Court), only 1,935 were RAS approved.[3]

III. (U) NSA's Analysis:

~~(TS//SI//NF)~~ [redacted] (The term "metadata" refers to information about a communication, such as routing information, date/time of the communication, *etc.*, but does not encompass the actual contents of a communication.) As explained in greater detail in Section VII of this declaration, analysis of communications metadata can yield important foreign intelligence information, [redacted]

[2] ~~(TS//SI//NF)~~ The initial BR FISA only covered [redacted]

[3] ~~(TS//SI//NF)~~ The reports filed with the Court in this matter also incorrectly stated the number of identifiers on the alert list. Each report included the number of telephone identifiers purportedly on the alert list. *See, e.g.*, Docket BR 06-08, NSA 120-Day Report to the FISC, August 18, 2006, at 15 ("As of the last day of the reporting period addressed herein, NSA has included a total of 3980 telephone numbers on the alert list . . . ."); Docket BR 08-13, NSA 120-Day Report to the FISC, December 11, 2008, at 11 ("As of November 2, 2008, the last day of the reporting period herein, NSA had included a total of 27,090 telephone identifiers on the alert list . . . ."). In fact, these numbers reported to the Court did not reflect the number of identifiers on the alert list; they actually represented the total number of identifiers included on the "station table" (discussed below at page15) as "RAS approved," *i.e.*, approved for contact chaining.

~~(TS//SI//NF)~~ [redacted], NSA put on the alert list telephone identifiers from two different sources that were of interest to counterterrorism personnel. The first source consisted of telephony identifiers against which the Agency was conducting SIGINT collection for counterterrorism reasons and the second source consisted of domestic telephony identifiers which, as a result of analytic tradecraft, were also deemed relevant to the Government's counterterrorism activity. The key goal of this alert process was to notify NSA analysts if there was a contact between a foreign telephone identifier of counterterrorism interest and any domestic telephone identifier; or contact between any domestic telephone identifier, related to a foreign counterterrorism target, and any foreign telephone identifier. At the time, NSA considered this type of contact to be an important potential piece of foreign intelligence since such contact could be indicative of an impending terrorist attack against the US homeland.[4]

A. (TS) The Alert List Process

~~(TS//SI//NF)~~ When the Court issued the first Business Records Order in May 2006, the [redacted] The first source was the "Address Database" which was a master target database of foreign and domestic telephone identifiers that were of current foreign intelligence interest to counterterrorism personnel.

[4] ~~(TS//SI//NF)~~ Neither the Agency nor the rest of the US Intelligence Community has changed this view regarding the importance of identifying this type of contact between counterterrorism targets and persons inside the United States. In fact, the 9/11 Commission Report alluded to the failure to share information regarding a facility associated with an al Qaeda safehouse in Yemen and contact with one of the 9/11 hijackers (al Mihdhar) in San Diego, California, as an important reason the Intelligence Community did not detect al Qaeda's planning for the 9/11 attack. *See*, "The 9/11 Commission Report," at 269-272.

The second source was [redacted] which was and continues to be a database NSA uses as a selection management system to manage and task identifiers for SIGINT collection.

~~(TS//SI//NF)~~ The Business Records Order states that "access to the archived data shall occur only when NSA has identified a known telephone identifier for which . . . there are facts giving rise to a reasonable articulable suspicion that the telephone identifier is associated with [redacted] Docket BR 08-13, Primary Order, 12 December 2008. The term "archived data" is of critical importance to understanding the rebuilt alert process NSA implemented after the Court issued the first Business Records Order in May 2006.

~~(TS//SI//NF)~~ As normally used by NSA in the context of the Agency's SIGINT activities, the term "archived data" refers to data stored in NSA's analytical repositories and excludes the many processing steps the Agency employs to make the raw collection useful to individual intelligence analysts.[5] Based on internal NSA correspondence and from discussions with NSA personnel familiar with the way NSA processes SIGINT collection, I have concluded this understanding of the term "archived data" meant that the NSA personnel who designed the BR FISA alert list process believed that the requirement to satisfy the RAS standard was only triggered when access was sought to NSA's stored (*i.e.*, "archived" in NSA parlance) repository of BR FISA data.

[5] ~~(TS//SI//NF)~~ For example, a small team of "data integrity analysts" ensures that the initial material NSA receives as a result of the Business Records Order is properly formatted and does not contain extraneous material that the Agency does not need or want before such material is made available to intelligence analysts.

~~(TS//SI//NF)~~ In fact, when the initial draft procedures for implementing the Business Records Order were created, it does not appear that either the SIGINT Directorate or the Office of General Counsel identified the use of non-RAS approved identifiers on the alert list as an issue that required in-depth analysis. NSA personnel, including the NSA attorney who reviewed the SIGINT Directorate's implementation procedures for the Business Records Order, appear to have viewed the alert system as merely pointing to a particular identifier on the alert list that required determination of *whether* the RAS standard had been satisfied before permitting contact chaining and/or pattern analysis in the archived BR FISA data. Accordingly, the Office of General Counsel approved the procedures but stressed that the RAS standard set out in the Business Records Order had to be satisfied before any access to the archived data could occur.[6]

~~(TS//SI//NF)~~ As a result, personnel in the SIGINT Directorate who understood how the automated alert process worked, based on their own understanding of the term "archived data" and the advice of NSA's Office of General Counsel, did not believe that NSA was required to limit the BR FISA alert list to only RAS approved telephone identifiers, [redacted]

[6] ~~(TS//SI//NF)~~ This result is not surprising since, regardless of whether the identifiers on the alert list were RAS approved, NSA was lawfully authorized to collect the conversations and metadata associated with the non-RAS approved identifiers tasked for NSA SIGINT collection activities under Executive Order 12333 and included on the alert list. The alert process was intended as a way for analysts to prioritize their work. The alerts did not provide analysts with permission to conduct contact chaining [redacted] of the BR FISA metadata. Instead, any contact chaining [redacted] of the BR FISA data also required a determination that the seed number for such chaining [redacted] had satisfied the RAS standard.

[redacted] Rather, they believed the limitation in the Court's order applied only where data had been aggregated over time, and where the authority and ability existed to conduct multi-hop analysis across the entire data archive. (See Section VII for a description of the benefits of aggregating data for later analysis.)

~~(TS//SI//NF)~~ NSA's review of this matter has confirmed that, even prior to the issuance of the Business Records Order, members of the SIGINT Directorate engaged in discussions with representatives of NSA's Office of General Counsel to determine how the Agency would process the telephony metadata NSA expected to receive pursuant to the Court's Order. Then, on 25 May 2006 immediately after issuance of the first Business Records Order, representatives of NSA's Signals Intelligence Directorate asked NSA's Office of General Counsel to concur on a draft set of procedures the SIGINT Directorate had developed to implement the Business Records Order. These draft procedures stated:

> The [redacted] ALERT processing system will provide a selective notification to the NSA CT AAD Shift Coordinator that a FISA Business Record transaction has been received. This notification will contain only the foreign telephone number and collection bin category. This notification will only occur when the foreign number in the transaction matches the foreign telephone number residing in that collection bin. This notification will include no domestic numbers and occurs prior to any chaining whatsoever.

There was no express statement that the alert list contained both RAS and non-RAS approved identifiers but it was clear that identifiers in the alert system would be

[redacted]

compared against incoming BR FISA data. It was also clear that, if there was a match between an identifier on the alert list and an identifier in the incoming data, a Shift Coordinator in the SIGINT Directorate's counterterrorism office would be notified.[8]

~~(TS//SI//NF)~~ Later on 25 May 2006, [redacted] of the Office of General Counsel concurred on the use of the draft procedures after adding language to the procedures emphasizing that analysts could not access the archived BR FISA data in NSA's BR FISA data repository unless the RAS standard had been satisfied. [redacted] coordinated her review of the procedures with one of her colleagues in the Office of General Counsel, [redacted] Specifically, as initially drafted, the procedures stated in pertinent part:

> The CT AAD Shift Coordinator will examine the foreign number and determine if that particular telephone number has been previously associated with [redacted] based on the standard articulated by the Court.

[redacted] revised this bullet to read:

> The CT AAD Shift Coordinator will examine the foreign number and determine if that particular telephone number has been previously associated with [redacted] based on the standard articulated by the Court. Reasonable articulable suspicion must be based on a totality of the circumstances and can be met by any number of factual scenarios. However, if a seed number is of interest only because of its direct contact with one other number, that other number must be known by some identifiable standard (probably or possibly) to be used by [redacted]. If you are unsure of whether the standard is met, please contact OGC.

[8] ~~(TS//SI//NF)~~ Since preparation of the original procedures, the Agency now refers to each "Shift Coordinator" as a "Homeland Mission Coordinator" or "HMC."

[redacted] also added a footnote to the procedures to read, "As articulated in the FISC Order, 'access to the archived data will occur only when the NSA has identified a known telephone number for which, based on the practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted] Section 5A."

~~(TS//SI//NF)~~ The SIGINT Directorate began using the process described in the procedures not long after receiving OGC's approval. A copy of the procedures approved by NSA's Office of General Counsel and the approval of NSA's Office of General Counsel are attached as Exhibits A and B, respectively.

~~(TS//SI//NF)~~ As a result, the Agency ultimately designed the alert process to result in automated call chaining of the BR FISA data repository if the initial alert was based on a RAS approved identifier. If an alert was based on a non-RAS approved identifier, no automated chaining would occur in the BR FISA material but automated chaining could occur in NSA's repositories of information that had been acquired under circumstances where the RAS requirement did not apply, such as telephony collection that was not regulated by the FISA.

~~(TS//SI//NF)~~ Specifically, on 26 May 2006, [redacted] who was serving as the chief of NSA-Washington's counterterrorism organization in NSA's Signals Intelligence Directorate, directed that the alert list be rebuilt to ensure that the

alert list would only include identifiers assigned to "bins" or "zip codes"[9] that NSA used to label an identifier as being associated with [redacted] since these were the only classes of targets covered by the initial Business Records Order. Pursuant to this overall direction, personnel in the counterterrorism organization actually built two lists to manage the alert process. The first list – known as the alert list - included all identifiers that were of interest to counterterrorism analysts who were charged with tracking a [redacted] to include both foreign and domestic telephony identifiers. This list was used to compare the incoming telephony metadata NSA was obtaining from the Business Records Order and NSA's other sources of SIGINT collection to alert the counterterrorism organization if there was a match between a telephone identifier on the list and an identifier in the incoming metadata. This list had two partitions. The first partition consisted of RAS approved identifiers which could result in automated chaining of the BR FISA data repository. The second partition consisted of non-RAS approved identifiers which could not be used to initiate automated chaining of the archived BR FISA material. The second list – known as the "station table" - served as a historical listing of all telephone identifiers that have undergone a RAS determination, to include the results of the determination. This list was used to ensure that only RAS approved "seed" identifiers would be used to conduct chaining or pattern analysis of NSA's data repository for BR FISA material. For the Court's

[redacted]

convenience, a pictorial description of the BR FISA alert process as the process operated from May 2006 until January 2009 is attached as Exhibit C.

B. ~~(TS)~~ Incorrect Description of Alert List in Reports to the FISC

~~(TS//SI//NF)~~ Reviews of NSA records and discussions with relevant NSA personnel have revealed that [redacted] a managing attorney in NSA's Office of General Counsel, prepared the initial draft of the first BR FISA report. [redacted] appears to have included the inaccurate description of the BR FISA alert process due to a mistaken belief that the alert process for the Business Records Order

[redacted]

~~(TS//SI//NF)~~ After completing his initial draft of the BR FISA report, in an email prepared on Saturday, 12 August 2006, [redacted] wrote:

> Attached is the Draft of the Report to the Court. This is NOT ready to go until it is reviewed again... I have done my best to be complete and thorough, but ... make sure everything I have siad (*sic*) is absolutely true.

[redacted]

See Exhibit D. Despite the direction that the draft BR FISA report be thoroughly reviewed by other attorneys and NSA operational personnel for accuracy, the inaccurate description of the alert list that was contained in the initial draft of the report was not corrected before the report was finalized. In addition, the inaccurate description was not corrected in subsequent reports to the Court, either, until the inaccurate description was identified by representatives from the Department of Justice ("DoJ") during a briefing and roundtable discussion regarding NSA's handling of BR FISA material on 9 January 2009. Once DoJ confirmed that the Agency's actual alert list process in the BR FISA was inconsistent with the past descriptions NSA had provided to the Court of the alert list process, DoJ filed a notice on 15 January 2009 identifying this problem to the Court.

~~(TS//SI//NF)~~ As alluded to above, the inaccurate description of the BR FISA alert list initially appears to have occurred due to a mistaken belief that the alert list for the BR FISA material

This error was compounded by the fact that, as noted previously, the SIGINT Directorate had actually constructed the alert list with two partitions. Moreover, given that the Office of General Counsel prepared the initial draft of the report and had previously approved the procedures the SIGINT Directorate drafted for processing the BR FISA material, [redacted] as the primary reviewer of the draft report for the SIGINT Directorate, thought the Office of General Counsel's description of the automated alert process for BR FISA material, although omitting a discussion of one of the partitions, was legally correct since no contact chaining was

authorized to take place against the BR FISA archive unless the seed identifier for the chaining had undergone RAS approval.

~~(S//SI)~~ Therefore, it appears there was never a complete understanding among the key personnel who reviewed the report for the SIGINT Directorate and the Office of General Counsel regarding what each individual meant by the terminology used in the report. Once this initial misunderstanding occurred, the alert list description was never corrected since neither the SIGINT Directorate nor the Office of General Counsel realized there was a misunderstanding. As a result, NSA never revisited the description of the alert list that was included in the original report to the Court. Thus, the inaccurate description was also included in the subsequent reports to the Court.

~~(TS//SI//NF)~~ The initial Business Records Order was the subject of significant attention from NSA's Signals Intelligence Directorate, Office of General Counsel, and Office of Inspector General in an effort to ensure the Agency implemented the Order correctly. *See, e.g.,* NSA Office of Inspector General Report, "Assessment of Management Controls for Implementing the FISC Order: Telephony Business Records," dated 5 September 2006 (attached as Exhibit E).[11] Nevertheless, it appears clear in hindsight from discussions with the relevant personnel as well as reviews of NSA's internal records that the focus was almost always on whether analysts were contact chaining the Agency's repository of BR FISA data in compliance with the RAS standard

[11] ~~(TS//SI//NF)~~ Note that some of the Exhibits included with this declaration, such as Exhibit E, contain the control marking [redacted] or [redacted] NSA has de-compartmented these materials solely for the Court's consideration of the BR FISA compliance incident that DoJ reported to the Court on 15 January 2009.

specified in the Order. Similarly, subsequent internal NSA oversight of NSA's use of BR FISA material also appears to have focused on ensuring that:

- Homeland Mission Coordinators were applying the RAS standard correctly;
- Proper access control and labeling procedures were in place to ensure BR FISA material was controlled appropriately;
- The Agency was receiving and archiving the correct BR FISA telephony metadata;
- The Agency's dissemination of BR FISA reports containing US telephone identifiers were handled consistently with the terms of the Business Records Order and NSA reporting policies; and
- A process was put in place to conduct some auditing of the queries of the BR FISA *data repository*.

~~(TS//SI//NF)~~ Furthermore, from a technical standpoint, there was no single person who had a complete technical understanding of the BR FISA system architecture. This probably also contributed to the inaccurate description of the alert list that NSA included in its BR FISA reports to the Court.

IV. (U) Corrective Actions:

A. ~~(TS)~~ The Alert List

~~(TS//SI//NF)~~ Since DoJ reported this compliance matter to the Court on 15 January 2009, NSA has taken a number of corrective measures, to include immediate

steps to sequester, and shut off analyst access to, any alerts that were generated from comparing incoming BR FISA material against non-RAS approved identifiers. NSA also immediately began to re-engineer the entire alert process to ensure that material acquired pursuant to the Court's Business Records Order is only compared against identifiers that have been determined to satisfy the RAS standard since this was the description of the process that the Agency had provided to the Court. After an initial effort to fix the problem resulted in an unintended configuration of the revised automated alert process, NSA shut down the automated alert process entirely on 24 January 2009. (This configuration error resulted in DoJ filing a Supplemental Notice of Compliance Incident with the Court on 3 February 2009.) The automated alert process for BR FISA data will remain shut down until the Agency can ensure that all the intended changes to the automated BR FISA alert process will operate as intended and in a manner that match the descriptions NSA has provide to the Court. As appropriate, NSA plans to keep DoJ and the Court informed concerning the progress of this effort.

~~(TS//SI//NF)~~ In short, this redesign of the alert process will ensure that it is implemented in a manner that comports with the Court's Orders. NSA currently contemplates that there will actually be two, physically separate, alert lists. One list will consist solely of RAS approved identifiers and only this list will be used as a comparison point against the incoming BR FISA material. The second list will consist of a mix of RAS and non-RAS approved identifiers but will not be compared against the BR FISA data. In other words, BR FISA data will not be compared against non-RAS approved identifiers.

B. (U) Other Measures Being Taken to Better Ensure Compliance With the Court's Orders

~~(TS//SI//NF)~~ In addition to the immediate measures the Agency took to address the compliance incident, I directed that the Agency complete ongoing end-to-end system engineering and process reviews (technical and operational) of NSA's handling of BR FISA material to ensure that the material is handled in strict compliance with the terms of the Business Records Order and the Agency's descriptions to the Court.[12] Detailed below are components of this end-to-end review and other steps being taken by NSA to ensure compliance with the Court's Orders.[13]

~~(TS//SI//NF)~~ For example, as part of the review that I have ordered, the Agency is examining the "Transaction Portal" analysts use to conduct one (1) hop chaining on RAS approved telephone identifiers for the purpose of validating network contacts, identified through previous, properly authorized contact chaining, for reporting on terrorist contacts with domestic telephone identifiers. The existing query mechanism for the Transaction Portal limits each query to a single "hop." In order that the results do not exceed the three (3) hop limit imposed by the Business Records Order the identifier entered by an analyst must either be RAS approved or must be within two (2) hops of the RAS approved identifier. Results from the query are returned to the analyst as a list of all individual call records associated with the identifier for the query. In theory, an analyst

[12] ~~(S)~~ NSA's SIGINT Director has directed similar reviews for some of the other sensitive activities NSA undertakes pursuant to its SIGINT authorities, to include certain activities that are regulated by the FISA, such as NSA's analysis of data received pursuant to the [redacted] If the Agency identifies any compliance issues related to activities undertaken pursuant to FISC authorization, NSA will bring such issues to the attention of DoJ and the Court.

[13] ~~(TS//SI//NF)~~ The results of this end-to-end review will be made available to DoJ and, upon request, to the FISC.

could conduct a series of one-hop queries to effectively conduct a multi-hop chain of the BR FISA data. The Agency is investigating whether software safeguards can be developed to enforce the three hop limit imposed by the Business Records Order.

~~(TS//SI//NF)~~ NSA initiated a review of the domestic identifiers on the "station table" that NSA uses as its historical record of RAS approval decisions on approved telephone identifiers so that NSA will be certain the Agency is in compliance with all aspects of the Business Records Order, to include the Agency's previous representations to the Court. As NSA's historical listing of all telephone identifiers that have undergone a RAS determination, the station table includes the results of each determination (*i.e.*, RAS approved or not RAS approved).

~~(TS//SI//NF)~~ Similar to the reviews of the Transaction Portal and the station table, NSA is examining other aspects of the Agency's technical architecture, to ensure that NSA's technical infrastructure has not allowed, and will not allow, non-approved selectors to be used as seeds for contact chaining of the BR FISA data. NSA will report to DoJ and the Court if this examination of the technical infrastructure reveals any incidents of improper querying of the BR FISA data repository.

~~(TS//SI//NF)~~ Although the Agency and DoJ have conducted previous audits of queries made against the BR FISA data, in response to the BR Compliance Order as well as in light of recent instances of improper querying that were the subject of separate notices to the Court, the Agency initiated an audit of all queries made of the BR FISA data repository since 1 November 2008 to determine if any of the queries during this

timeframe were made on the basis of non-RAS approved identifiers. While this review is still ongoing, to date this review has revealed no instances of improper querying of the BR FISA data repository, aside from improper queries made by two (2) analysts who were the subject of a previous compliance notice to the Court. From the time these two analysts were granted access to the BR FISA data repository on 11 and 12 December 2008 until the time NSA terminated their access in January 2009, these two analysts were responsible for 280 improper queries.

~~(TS//SI//NF)~~ Also, in response to some earlier instances of improper analyst queries of the BR FISA data repository that were recently discovered and reported to the Court, the Agency scheduled and delivered in-person briefings for all NSA personnel who have access to the BR FISA data archive to remind them of the requirements and their responsibilities regarding the proper handling of BR FISA material. NSA management personnel delivered these briefings with direct support from the Office of General Counsel and NSA's SIGINT Oversight & Compliance Office. In addition to the in-person briefings, all personnel with access to the BR FISA data archive have also received a written reminder of their responsibilities. As a follow-on effort, NSA's SIGINT Oversight & Compliance Office also initiated an effort to re-design the Agency's training for NSA operational personnel who require access to BR FISA material. The new training will include competency testing. If an analyst cannot achieve a passing grade on the test, he or she will not receive access to the BR FISA data repository.

~~(TS//SI//NF)~~ In an effort to eliminate the type of querying mistakes of the archived data that were the subject of other, separate compliance notices to the Court,

see, e.g., DoJ Rule 10(c) Notices, filed 21 January 2009 and 26 January 2009, NSA is implementing changes to the system that analysts use to conduct contact chaining of the BR FISA repository so that the system will not be able to accept any non-RAS approved identifier as the seed identifier for call chaining analysis. Only a limited number of NSA personnel will possess privileges that would allow the new safety feature to be bypassed temporarily. NSA anticipates that the feature would only be bypassed for time sensitive queries where an NSA Homeland Mission Coordinator has determined that the seed identifier satisfies the RAS standard but operational priorities cannot wait for the formal update of the list of RAS approved identifiers to take effect within the system. Additionally, NSA is implementing software changes to the system that will limit the number of chained hops to only three from any BR FISA RAS approved selector.

VI. (U) Answers to Court's Specific Questions:

~~(TS//SI//NF)~~ ***Question 1****: Prior to January 15, 2009, who, within the Executive Branch, knew that the "alert list" that was being used to query the Business Record database included telephone identifiers that had not been individually reviewed and determined to meet the reasonable and articulable suspicion standard? Identify each such individual by name, title, and specify when each individual learned this fact.*

~~(TS//SI//NF)~~ **Answer 1**: As explained in the Agency's answer to Question 3, below, after DoJ identified this matter as a potential issue during DoJ's visit to NSA on 9 January 2009, numerous NSA and DoJ personnel were briefed about the problem. Accordingly, the identities of the some of the key personnel informed of the compliance

issue on or after 9 January 2009 are discussed in the answer to Question 3. The NSA personnel who, prior to 9 January 2009, knew, or may have known, that the alert list contained both RAS and non-RAS approved identifiers and were run against the incoming BR FISA data are as follows:

Name	Title	Date of Knowledge	Distro for Reports
	Program Mgr CT Special Projects, SID	May 2006	Yes
	Deputy Program Mgr, CT Special Projects, SID	May 2006	Yes
	Deputy Program Mgr, CT Special Projects, A&P, SID	May 2006	Yes
	NSA/OGC Attorney	May 2006	Yes
	NSA/OGC Attorney	May 2006	Yes
	[redacted]	May 2006	No
	Computer Scientist SIGINT Dev'ment Strategy & Governance	May 2006	No
	Tech Director HSAC, SID	May 2006	No
	Deputy Chief HSAC, SID	January 2009	No
	Computer Scientist HSAC, SID	May 2006	No
	Tech Support	May 2006	No

Mission Systems
Mgmt, HSAC, SID

As ordered by the Court, the listing identifies the relevant personnel by their name, the title of the person's position with the Agency at the time they learned, or may have learned, that non-RAS identifiers were being run against the incoming BR FISA data, and the estimated date this information did or may have come to their attention. [redacted], whose name is denoted by an asterisk (*), has retired from Government service. Please note that the listing also indicates whether a person on the list was also on distribution for NSA's reports to the Court that contained the inaccurate description of the alert list. This does not mean that an individual who was on distribution for the reports was actually familiar with the contents of the reports.

~~(TS//SI//NF)~~ In addition to the individuals identified above, there were at least three (3) individuals [redacted] included as named addressees on her email concurrence to SIGINT Directorate's BR FISA implementation procedures on 25 May 2006. These individuals – [redacted] (NSA/OGC), [redacted] (NSA/OGC), and [redacted] (SID Data Acquisition) – are not included in the listing since they appear to have received the email for information purposes only and, based on conversations with each, do not appear to have been familiar with the implementation procedures that were attached to the email.

~~(TS//SI//NF)~~ It should also be noted there are an indeterminate number of other NSA personnel who knew or may have known the alert list contained both RAS and non-RAS selectors, but these personnel were not formally briefed on how the alert process

worked and were not responsible for its operation. Instead, they received alerts for the purpose of assessing RAS. Based on information available to me, I conclude it is unlikely that this category of personnel knew how the Agency had described the alert process to the Court.

~~(TS//SI//NF)~~ ***Question 2****: How long has the unauthorized querying been conducted?*

~~(TS//SI//NF)~~ **Answer 2**: The comparison of the incoming BR FISA material against the identifiers listed on the alert list began almost as soon as the first Business Records Order was issued by the Court on 24 May 2006.

~~*(TS//SI//NF)*~~ ***Question 3****: How did the unauthorized querying come to light? Fully describe the circumstances surrounding the revelations.*

~~(TS//SI//NF)~~ **Answer 3**: On 9 January 2009, representatives from the Department of Justice met with representatives from NSA in order to receive a briefing on NSA's handling of BR FISA material and then participated in a roundtable discussion of the BR FISA process.[14] During this briefing and follow-on discussion, DoJ representatives asked about the alert process. Upon receiving a description of the alert process from a representative of NSA's SIGINT Directorate, DoJ expressed concern that NSA may not have accurately described the alert list in its previous reports to the Court. After confirming its initial concern via an email response from NSA on 14 January 2009 to questions posed via email on 9 January 2009, DoJ filed a notice with the Court on

[14] ~~(TS//SI//NF)~~ NSA records indicate DoJ personnel attended at least eight BR FISA oversight sessions prior to the session on 9 January 2009 when the error was discovered but there is no indication that the use of non-RAS approved identifiers on the alert list was ever raised or discussed at these prior sessions.

15 January 2009 regarding this compliance matter. The following individuals participated in the briefing and discussion on 9 January 2009:

NSA Attendees

[redacted]

DoJ Attendees

(S) I understand that DoJ informed the FBI's Office of General Counsel of this compliance incident on 23 January 2009. In addition, on 30 January 2009, I personally mentioned to the new Director of National Intelligence ("DNI"), Dennis Blair, that NSA was investigating this compliance matter. The DNI received additional information about the compliance incident on 4 February 2009, from the DNI General Counsel, Benjamin Powell, and on 12 February 2009 I provided further information to the DNI regarding the incident. Internally, NSA notified its Inspector General of this compliance matter sometime after DoJ notified the Court on 15 January 2009. In accordance with Department of Defense requirements, NSA is in the process of formally reporting this compliance matter to the Assistant Secretary of Defense for Intelligence Oversight as part of NSA's current Quarterly Intelligence Oversight Report. In the manner specified by Department of Defense and DNI regulations, the Quarterly Report will also be provided to the President's Intelligence Oversight Board ("IOB"). I expect the notification to the

IOB will occur, concurrent with, or shortly after the filing of this declaration with the Court. In addition to preparing the formal notification required by the Defense Department's procedures, on 10 February 2009 I provided detailed information about this compliance matter to the Undersecretary of Defense for Intelligence, James Clapper.

~~(TS//SI//NF)~~ ~~Question 4~~: *The application signed by the Director of the Federal Bureau of Investigation, the Deputy Assistant Attorney General for National Security, United States Department of Justice ("DOJ"), and the Deputy Attorney General of the United States as well as the declaration of* [redacted] *a Deputy Program Manager at the National Security Agency ("NSA"), represents that during the pendency of this order, the NSA Inspector General, the NSA General Counsel, and the NSA Signals Intelligence Directorate Oversight and Compliance Office each will conduct reviews of this program. Docket BR 08-13, Application at 27, Declaration at 11. The Court's Order directed such review. Id., Primary Order at 12. Why did none of these entities that were ordered to conduct oversight over this program identify the problem earlier? Fully describe the manner in which each entity has exercised its oversight responsibilities pursuant to the Primary Order in this docket as well as pursuant to similar predecessor Orders authorizing the bulk production of telephone metadata.*

~~(TS//SI//NF)~~ ~~Answer 4~~: As described earlier in this declaration, the oversight activities of NSA's Office of General Counsel, Office of Inspector General, and SIGINT Directorate Oversight & Compliance Office generally focused on how RAS determinations were made; the ingestion of BR FISA data; and ultimately on the querying of BR FISA data once it had been stored in the data repository NSA maintains

for BR FISA data. From May 2006 until January 2008, there were monthly, in-person "due diligence" meetings of oversight and operational personnel to monitor NSA's implementation of a number of sensitive NSA SIGINT activities, to include NSA's activities under the Business Records Order.[15] Although each office exercised regular oversight of the program, the initial error in the description of the alert list was not caught by either the Office of General Counsel nor the SIGINT Directorate's Oversight & Compliance Office.

~~(TS//SI//NF)~~ Agency records indicate that, in April 2006, when the Business Records Order was being proposed, NSA's Office of Inspector General ("OIG") suggested to SID personnel that the alert process be spelled out in any prospective Order for clarity but this suggestion was not adopted. Later in 2006 when OIG conducted a study regarding the adequacy of the management controls NSA adopted for handling BR FISA material, OIG focused on queries of the archived data since the SIGINT Directorate had indicated to OIG through internal correspondence that the telephone identifiers on the alert list were RAS approved. OIG's interest in the alert list came from OIG's understanding that the alert list was used to cue automatic queries of the specific analytic database where the BR FISA material was stored by the Agency. At least one employee of the SIGINT Directorate thought that OIG had been briefed about how the alert process worked. Regardless of the accuracy of this employee's recollection, like other NSA offices OIG also believed that the "archived data" referred to in the order was the analytic repository where NSA stored the BR FISA material.

[15] ~~(S//SI)~~ The Agency canceled the due diligence meetings in January 2008 since NSA management determined that monthly, in-person meetings were no longer necessary.

~~(TS//SI//NF)~~ OIG continued to monitor NSA's implementation of the Business Records Order throughout the relevant timeframe (2006-2009) by reviewing specific BR FISA compliance incidents; following up with the relevant NSA organization regarding the status of recommendations OIG made in a Special Study report on the BR FISA dated 5 September 2006; and attending the due diligence meetings NSA held until January 2008 regarding the status of a number of sensitive NSA SIGINT activities, to include the BR FISA activity. With respect to OIG's monitoring of the SIGINT Directorate's progress in implementing recommendations from OIG's September 2006 Special Study, OIG asked for and evaluated the SIGINT Directorate's progress responding to OIG's recommendations.

~~(TS//SI//NF)~~ Since the issuance of the first Business Records Order in May 2006, the BR FISA activity has received oversight attention from all three NSA organizations charged by the Court with conducting oversight. For example, in addition to OIG's oversight activities mentioned above, beginning in August 2008 the SIGINT Directorate, with support from the Office of General Counsel, has conducted regular spot checks of analyst queries of the BR FISA data repository. The Office of General Counsel has also had regular interaction with SIGINT and oversight personnel involved in BR FISA issues in order to provide legal advice concerning access to BR FISA data. The Office of General Counsel has also conducted training for personnel who require access to BR FISA material; participated in due diligence meetings; and prepared materials for the renewal of the Business Records Order. All of these activities allowed the Office of General Counsel to monitor the Agency's implementation of the Business Records Order.

~~(TS//SI//NF)~~ As a further illustration of the attention the Agency paid to the BR FISA Order, attached to this declaration are, respectively, copies of the Court-ordered review of NSA's BR FISA implementation, dated 10 July 2006, which was conducted jointly by OIG and the Office of General Counsel (Exhibit F); the SIGINT Oversight & Compliance Office's BR FISA Audit Plan from 11 July 2006 (Exhibit G); OIG's September 2006 Special Study of the BR FISA(previously identified as Exhibit E); and the implementation procedures for the Business Records Order that were reviewed and approved by NSA's Office of General Counsel (previously identified as Exhibit B).

~~(TS//SI//NF) In~~ addition, it is important to note that NSA personnel were always forthcoming with internal and external personnel, such as those from the Department of Justice, who conducted oversight of the Agency's activities under the Business Records Order. I have found no indications that any personnel who were knowledgeable of how NSA processed BR FISA material ever tried to withhold information from oversight personnel or that they ever deliberately provided inaccurate information to the Court.

~~(TS//SI//NF)~~ ***Question 5****: The preliminary notice from DOJ states that the alert list includes telephone identifiers that have been tasked for collection in accordance with NSA's SIGINT authority. What standard is applied for tasking telephone identifiers under NSA's SIGINT authority? Does NSA, pursuant to its SIGINT authority, task telephone identifiers associated with United States persons? If so, does NSA limit such identifiers to those that were not selected solely upon the basis of First Amendment protected activities?*

~~(TS//SI//NF)~~ ~~Answer 5~~: *SIGINT Tasking Standard*: Although the alert list included telephone identifiers of counterterrorism targets that had not been assessed against the RAS standard or had been affirmatively determined by NSA personnel not to meet the RAS standard, such identifiers were not tasked in a vacuum. Whether or not an identifier is assessed against the RAS standard, NSA personnel may not task an identifier for any sort of collection or analytic activity pursuant to NSA's general SIGINT authorities under Executive Order 12333 unless, in their professional analytical judgment, the proposed collection or analytic activity involving the identifier is likely to produce information of foreign intelligence value. In addition, NSA's counterterrorism organization conducted reviews of the alert list two (2) times per year to ensure that the categories (zip codes) used to identify whether telephone identifiers on the alert list remained associated with [redacted] or one of the other target sets covered by the Business Records Order. Also, on occasion the SIGINT Directorate changed an identifier's status from RAS approved to non-RAS approved on the basis of new information available to the Agency.

(U) *US Person Tasking*: NSA possesses some authority to task telephone identifiers associated with US persons for SIGINT collection. For example, with the US person's consent, NSA may collect foreign communications to, from, or about the US person. In most cases, however, NSA's authority to task a telephone number associated with a US person is regulated by the FISA. For the Court's convenience, a more detailed description of the Agency's SIGINT authorities follows, particularly with respect to the collection and dissemination of information to, from, or about US persons.

~~(TS//SI//NF)~~ NSA's general SIGINT authorities are provided by Executive Order 12333, as amended (to include the predecessors to the current Executive Order); National Security Council Intelligence Directive No. 6; Department of Defense Directive 5100.20; and other policy direction. In particular, Section 1.7(c) of Executive Order 12333 specifically authorizes NSA to "Collect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information for foreign intelligence and counterintelligence purposes to support national and departmental missions." However, when executing its SIGINT mission, NSA is only authorized to collect, retain or disseminate information concerning United States persons in accordance with procedures approved by the Attorney General.[16] The current Attorney General approved procedures that NSA follows are contained in Department of Defense Regulation 5240.1-R, and a classified annex to the regulation governing NSA's electronic surveillance activities.

(U) Moreover, some, but not all, of NSA's SIGINT activities are also regulated by the Foreign Intelligence Surveillance Act. For example, since the amendment of the FISA in the summer of 2008, if NSA wishes to direct SIGINT activities against a US person located outside the United States, any SIGINT collection activity against the US person generally would require issuance of an order by the FISC. For SIGINT activities executed pursuant to an order of the FISC, NSA is required to comply with the terms of

[16](U) The FISA and Executive Order 12333 both contain definitions of the term "United States person" which generally include a citizen of the United States; a permanent resident alien; an unincorporated association substantially composed of US citizens or permanent resident aliens; or a corporation that is incorporated in the US, except for a corporation directed and controlled by a foreign government(s).

the order and Court-approved minimization procedures that satisfy the requirements of 50 U.S.C. § 1801(h).

(U) *First Amendment Considerations*: For the following reasons, targeting a US person solely on the basis of protected First Amendment activities would be inconsistent with restrictions applicable to NSA's SIGINT activities. As part of their annual intelligence oversight training, NSA personnel are required to re-familiarize themselves with these restrictions, particularly the provisions that govern and restrict NSA's handling of information of or concerning US persons. Irrespective of whether specific SIGINT activities are undertaken under the general SIGINT authority provided to NSA by Executive Order 12333 or whether such activity is also regulated by the FISA, NSA, like other elements of the US Intelligence Community, must conduct its activities "with full consideration of the rights of United States persons." *See* Section 1.1(a) of Executive Order 12333, as amended. The Executive Order further provides that US intelligence elements must "protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law." *Id.* at Section 1.1(b).

(U) Consistent with the Executive Order's requirement that each intelligence agency develop Attorney General approved procedures that "protect constitutional and other legal rights" (EO 12333 at Section 2.4), DoD Regulation 5240.1-R prohibits DoD intelligence components, including NSA, from collecting or disseminating information concerning US persons' "domestic activities" which are defined as "activities that take place in the domestic United States that do not involve a significant connection to a

foreign power, organization, or person." *See, e.g.,* Section C2.2.3 of DoD Regulation 5240.1-R. In light of this language, targeting a US person solely on the basis of protected First Amendment activities would be inappropriate.

~~(TS//SI//NF)~~ ***Question 6****: In what form does the government retain and disseminate information derived from queries run against the business records data archive?*

~~(TS//SI//NF)~~ **Answer 6**: Through 29 July 2008, NSA archived the reports the Agency disseminated from its analysis of data in the BR FISA data repository in a special program-specific limited access data repository [redacted] as well as on a restricted access group of Lotus Notes servers. Reporting was transitioned to traditional NSA "I-Series" format on 29 July 2008. I-Series reports are retained in NSA's limited access sensitive reporting data repository [redacted] Copies of the I-Series reports are also kept in [redacted] to allow them to be searched with special software tools. In addition, the I-Series reports are stored on ESECS, the Extended Enterprise Corporate Server. Access to these reports in ESECS is appropriately restricted. As directed by the Business Records Order, information in the BR FISA data archive is retained five (5) years.

~~(TS//SI//NF)~~ In response to Question 6, the Agency has also conducted a review of all 275 reports of domestic contacts NSA has disseminated as a result of contact chaining [redacted] of the NSA's archive of BR FISA material.[17] NSA has

[17] ~~(TS//SI//NF)~~ Note that a single report may tip more than one telephone identifier as being related to the seed identifier. As a result, the 275 reports have tipped a total of 2,549 telephone identifiers since 24 May 2006. Also note that, of the 275 reports that were disseminated, 31 resulted from the automated alert process.

identified no report that resulted from the use of a non-RAS approved identifier as the initial seed identifier for chaining through the BR FISA material.[18] Of the 275 reports that were generated, 22 reports were based on a US identifier serving as the initial seed identifier. For each of these reports, the initial US seed identifier was either already the subject of FISC-approved surveillance based on the FISC's finding of probable cause to believe that they are used by agents of [redacted] or the initial US seed identifier had been reviewed by NSA's Office of General Counsel as part of a RAS determination to ensure that the RAS determination was not based solely on a US person's protected First Amendment activities. Almost invariably, the RAS determinations that the Office of General Counsel reviewed were based on direct contact between the telephone identifier and another identifier already known to be associated with one of the terrorist organizations or entities listed in the Business Records Order.

~~(TS//SI//NF)~~ For the Court's convenience, a copy of the type of report that NSA was issuing prior to 9 January 2009 is attached to this declaration as Exhibit H so the Court can see how the material was reported and to whom. Also attached as Exhibit I is an example of an alert generated by the automated alert system, prior to the Agency's decision on 23 January 2009 to shut down the BR FISA alerts. (The decision was actually effected in the early morning hours of 24 January 2009).

[18] ~~(TS//SI//NF)~~ The Agency has identified one (1) report where the number on the alert list was not RAS approved when the alert was generated but, after receiving the alert, a Homeland Mission Coordinator determined that the identifier, in fact, satisfied the RAS standard. After this determination, the Agency subsequently used the identifier as a seed for chaining in the BR FISA data archive. Ultimately, information was developed that led to a report to the FBI that tipped 11 new telephone identifiers.

~~(TS//SI//NF)~~ Unlike reports, which NSA disseminated outside NSA, the alerts were only disseminated inside NSA to SIGINT personnel responsible for counterterrorism activity. Initially, if an identifier on the alert list generated an alert that the identifier had been in contact with an identifier in the United States, the alert system masked (*i.e.*, concealed) the domestic identifier. Later, in January 2008, the SIGINT Directorate allowed the alerts to be sent to analysts without masking the domestic identifier. NSA made this change in an effort to improve the ability of SIGINT analysts, on the basis of their target knowledge, to prioritize their work more efficiently.

~~(TS//SI//NF)~~ ***Question 7****: If ordered to do so, how would the government identify and purge information derived from queries run against the business records data archive using telephone identifiers that were not assessed in advance to meet the reasonable and articulable suspicion standard?*

(TS//~~SI~~//NF) **Answer 7**: NSA has not authorized its personnel to use non-RAS approved identifiers to conduct chaining or pattern analysis of NSA's analytic repository of BR FISA material. On those occasions where improper querying of this data archive has been discovered, the Agency has taken steps to purge data and correct whatever deficiencies that led to the querying mistakes.

(TS//~~SI~~//NF) With respect to the alert process, after this compliance matter surfaced, NSA identified and eliminated analyst access to all alerts that were generated from the comparison of non-RAS approved identifiers against the incoming BR FISA material. The only individuals who retain continued access to this class of alerts are the

Technical Director for NSA's Homeland Security Analysis Center ("HSAC") and two system developers assigned to HSAC. From a technical standpoint, NSA believes it could purge copies of any alerts that were generated from comparisons of the incoming BR FISA information against non-RAS approved identifiers on the alert list. However, the Agency, in consultation with DoJ, would need to determine whether such action would conflict with a data preservation Order the Agency has received in an ongoing litigation matter.

VII. (~~TS//SI//NF~~) Value of the BR FISA Metadata

(~~TS//SI//NF~~) As discussed in prior declarations in this matter, including my declaration in docket number BR 06-05, access to the telephony metadata collected in this matter is vital to NSA's counterterrorism intelligence mission. It is not possible to target collection solely on known terrorist telephone identifiers and at the same time use the advantages of metadata analysis to discover the enemy because operatives of [redacted] (collectively, the "Foreign Powers") take affirmative and intentional steps to disguise and obscure their communications and their identities. They do this using a variety of tactics, including, regularly changing telephone numbers, [redacted] The only effective means by which NSA analysts are able continuously to keep track of the Foreign Powers, and all operatives of the Foreign

Powers making use of such tactics, is to obtain and maintain telephony metadata that will permit these tactics to be uncovered.

~~(TS//SI//NF)~~ Because it is impossible to determine in advance which particular piece of metadata will turn out to identify a terrorist, collecting metadata is vital for success. To be able to exploit metadata fully, the data must be collected in bulk. Analysts know that the terrorists' telephone calls are located somewhere in the billions of data bits; what they cannot know ahead of time is exactly where. The ability to accumulate metadata substantially increases NSA's ability to detect and identify members of the Foreign Powers. Specifically, the NSA performs queries on the metadata: contact-chaining [redacted]

~~(TS//SI//NF)~~ When the NSA performs a contact-chaining query on a terrorist-associated telephone identifier computer algorithms will identify all the contacts made by that identifier and will automatically identify the further contacts made by that first tier of contacts. In addition, the same process is used to identify a third tier of contacts, which includes all identifiers in contact with the second tier of contacts. The collected metadata thus holds contact information that can be immediately accessed as new terrorist-associated telephone identifiers are identified. Multi-tiered contact analysis is useful for telephony, because unlike e-mail, which involves the heavy use of spam, a telephonic device does not lend itself to simultaneous contact with large numbers of individuals.

~~(TS//SI//NF)~~ One advantage of the metadata collected in this matter is that it is historical in nature, reflecting contact activity from the past that cannot be captured in the present or prospectively. In addition, metadata may also be very timely and well suited for alerting against suspect activity. To the extent that historical connections are

important to understanding a newly-identified target, metadata may contain links that are absolutely unique, pointing to potential targets that otherwise would be missed. [redacted]

[redacted]

Other advantages of contact chaining include [redacted]

[redacted]

~~(TS//SI// NF)~~ [redacted]

[redacted]

[redacted]

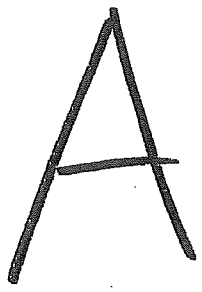
~~(TS//SI//NF)~~ The foregoing discussion is not hypothetical. As noted previously, since inception of the first Business Records Order, NSA has provided 275 reports to the FBI. These reports have tipped a total of 2,549 telephone identifiers as being in contact with identifiers associated with [redacted] and affiliated terrorist organizations. Upon receipt of the reporting from NSA, the FBI has sent investigative leads to relevant FBI Field Offices for investigative action. FBI representatives have indicated to NSA as recently as 9 February 2009 that the telephone contact reporting has provided leads and linkages to individuals in the U.S. with potential terrorism ties who may not have otherwise been known to or identified by the FBI. For example, attached as Exhibit J is feedback from the FBI on the report that NSA has included as Exhibit H.

(U) I declare under penalty of perjury that the facts set forth above are true and correct.

VR

KEITH B. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

Executed this 13TH day of February, 2009



From: [redacted] (CIV-NSA) D21
Sent: Thursday, May 25, 2006 6:07 PM
To: [redacted] (CIV-NSA) S2I5; [redacted] (CIV-NSA)D21; [redacted] (CIV-NSA) D21; DL AADSC
Cc: [redacted] (CIV-NSA) [redacted] (CIV-NSA) [redacted]; [redacted] (CIV-NSA) [redacted] (CIV-NSA) D21; [redacted] (CIV-NSA) D21
Subject: (U) OGC Changes to RE: (U) Proposed Interim Procedures.

Classification: ~~TOP SECRET//COMINT//NOFORN//MR~~

Shift Supervisors,

OGC has added clarification language to the procedures [redacted] sent earlier today. Please use the modified document.

[redacted]

If you would like to discuss further tomorrow, please contact [redacted] (I'm on leave).

[redacted]

[redacted]
Attorney
Office of General Counsel
963-3121(s)/[redacted]
Ops2B, 2B8134, Suite 6250

-----Original Message-----
From: [redacted] (CIV-NSA) S2I5
Sent: Thursday, May 25, 2006 2:13 PM
To: [redacted] (CIV-NSA) D21; [redacted] (CIV-NSA)D21; [redacted] (CIV-NSA) D21
Cc: [redacted] (CIV-NSA) [redacted] (CIV-NSA) [redacted]; [redacted] (CIV-NSA) S
Subject: (U) Proposed Interim Procedures.

Classification: ~~TOP SECRET//COMINT//NOFORN//MR~~

OGC, please review and provide comments.

Thanks,

[redacted]
<<...>>

[redacted]
Counter Terrorism Primary Production Center
963-0491, Room 2B3116
[redacted]
[redacted]
Suite 6276

Classification: ~~TOP SECRET//COMINT//NOFORN//MR~~

B

~~(C)~~ Interim procedures to ensure CT AAD is in compliance with FISC Business Records Order:

1. ~~(TS//SI//NF)~~ All foreign telephone numbers analyzed against the FISA Business Records acquired under Docket Number: BR 06-05 approved on 24 May 2006 will adhere to the following:
   - The [redacted] ALERT processing system will provide a selective notification to the NSA CT AAD Shift Coordinator that a FISA Business Record transaction has been received. This notification will contain only the foreign telephone number and collection bin category. This notification will only occur when the foreign number in the transaction matches the foreign telephone number residing in that collection bin. This notification will include no domestic numbers and occurs prior to any chaining whatsoever.
   - The CT AAD Shift Coordinator will examine the foreign number and determine if that particular telephone number has been previously associated with [redacted] based on the standard articulated by the Court[1]. Reasonable articulable suspicion must be based on a totality of the circumstances and can be met by any number of factual scenarios. However, if a seed number is of interest only because of its direct contact with one other number, that other number must be known by some identifiable standard (probably or possibly) to be used by [redacted] organization. If you are unsure of whether the standard is met, please contact OGC.
   - Once the CT AAD Shift Coordinator has made a positive determination the number will be processed for chaining [redacted] against the FISA Business Records acquire under Docket Number: BR 06-05.

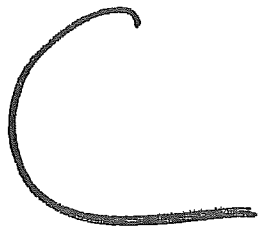
2. ~~(TS//SI//NF)~~ All domestic and most foreign collection bins which had been processing [redacted] have been suspended. The exception is active FISC FISA approved telephone numbers.
3. ~~(TS//SI//NF)~~ CT AAD will rebuild these collection bins starting with the selective notifications sent to the NSA CT AAD Shift Coordinator that a FISA Business Record transaction has been received. (as describe above)
4. The CT AAD Shift must independently review each number gleaned from all published reports. For example NSA and CIA reporting

[1] As articulated in the FISC Order, "access to the archived data will occur only when the NSA has identified a known telephone number for which, based on the practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted] Section 5A.

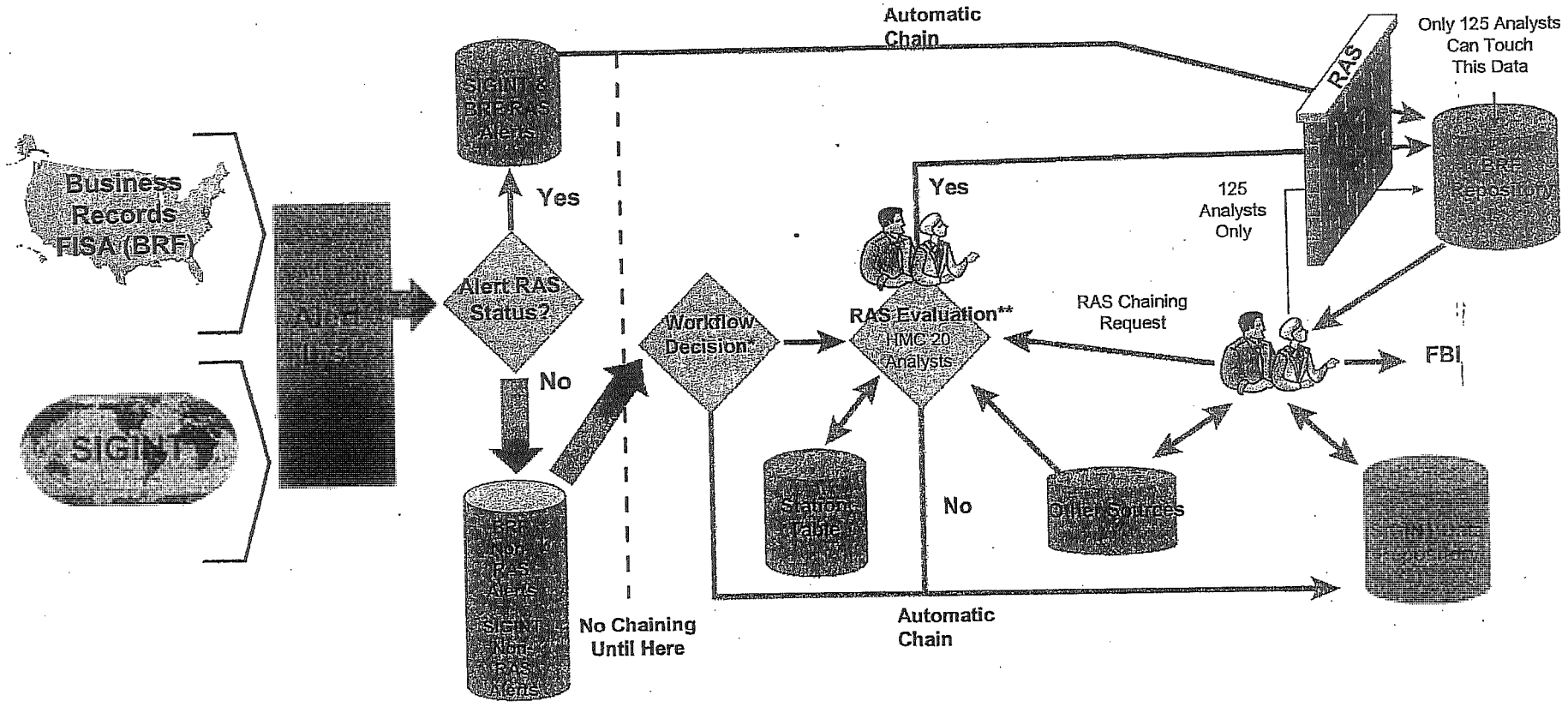
~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20070108~~
Declassify On: 20310403

5. ~~(TS//SI//NF)~~ Simultaneously, the CT AAD will conduct a review of the approximate 12,000 [redacted] number which currently resided in these bins
6. ~~(TS//SI//NF)~~ These interim steps will allow all alerting processes to continue with the added measure necessary to comply with FISA Business Record order, Docket Number: BR 06-05.

FN 1: ~~(TS//SI//NF)~~ As articulated in the FISC Order, "access to the archived data shall occur only when NSA has identified a known telephone number for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted]" (BR Order, Docket BR 06-05, Section 5(A)).



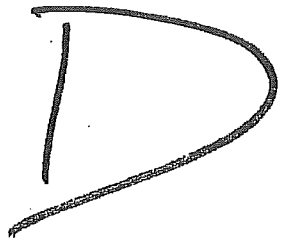
Former Process (May 06 – Jan 09)



* Workflow decision based on available Homeland Mission Coordinators (HMC) and volume of alerts.

** RAS decision by HMC, who evaluates all available intelligence and open source data to determine if the combined information indicates the suspect phone selector is a terrorist selector as defined by the Court.

Derived From: NSA/CSSM 1-52
Dated: 20070108
Declassify On: 20320108



From: [redacted](CIV-NSA)D21
Sent: Saturday, August 12, 2006 12:03 PM
To: [redacted](CIV-NSA) D21; [redacted](CIV-NSA) [redacted](CIV-NSA) S2; [redacted](CIV-NSA)D21; [redacted](CIV-NSA)D21
Cc: [redacted](CIV-NSA) D21; [redacted](CIV-NSA) D21; [redacted](CIV-NSA) D21
Subject: (U) Report to Court on Business Record Activity
Importance: High

Classification: ~~TOP SECRET//COMINT//ORCON/NOFORN//20291123~~

Hi all-

Here is where we stand on the metadata [redacted]

[redacted] expire on Friday.

All of the draft docs are in the shared directory, under OPSPROGRAM FISA/BUSINESS RECORDS/BR FISA AUG 06 RENEWAL, except there is a separate folder entitled REPORTS TO COURT in wich the BR report is located.

We have sent to DoJ draft copies of the application for renewal, the declaraton (which [redacted]s going to complete, rather than the DIRNSA (unless DoJ squawks)), and the Orders. We should hear from them early in the week about any needed revisions, and they want to provide to the judge on Thursday am. I am hoping [redacted] can be in charge of changes to it, and [redacted] can supervise and/or assist her.

Attached is the Draft of the Report to the Court. This is NOT ready to go until it is reviewed again by [redacted] I have done my best to be complete and thorough, but [redacted] needs to make sure everything I have siad is absolutely true, and you guys need to make sure it makes sense and will satisfy the Court. You MUST feel free to edit as you think appropriate; dont stick to what I have said if there is a better way to say it.

Someone needs to format the thing too, make sure spacing, numbering, etc are all good [redacted] and we need to get this into DOJ's hands as quickly as we are able.

[redacted]

Thanks for all your help and have a great week. [redacted]

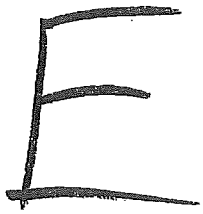
[redacted]
Associate General Counsel
(Operations)
963-3121

~~Derived From: NSA/CSSM 1-52~~

~~Dated: 20041123~~

~~Declassify On: 20291123~~

~~Classification: TOP SECRET//COMINT//ORCON/NOFORN//20291123~~



National Security Agency/Central Security Service

Further dissemination of this report outside the Office of the Inspector General, NSA is *PROHIBITED* without the approval of the Inspector General.

Inspector General Report

~~(TS//SI//NF)~~ REPORT ON THE ASSESSMENT OF MANAGEMENT CONTROLS FOR IMPLEMENTING THE FOREIGN INTELLIGENCE SURVEILLANCE COURT ORDER: TELEPHONY BUSINESS RECORDS

ST-06-0018
5 SEPTEMBER 2006

~~DERIVED FROM: NSA/CSSM 1-52~~
~~DATED: 20041123~~
~~DECLASSIFY ON: MR~~

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OFFICE OF THE INSPECTOR GENERAL
NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE

5 September 2006
IG-10693-06

TO: DISTRIBUTION

SUBJECT: ~~(TS//SI//NF)~~ Report on the Assessment of Management Controls for Implementing the Foreign Intelligence Surveillance Court (FISC) Order: Telephony Business Records (ST-06-0018)—ACTION MEMORANDUM

1. ~~(TS//SI//NF)~~ This report summarizes the results of our assessment of Management Controls for Implementing the FISC Order: Telephony Business Records. The report incorporates management's response to the draft report.

2. ~~(U//FOUO)~~ As required by NSA/CSS Policy 1-60, *NSA/CSS Office of the Inspector General*, actions on OIG audit recommendations are subject to monitoring and followup until completion. Consequently, we ask that you provide a written status report concerning each planned corrective action categorized as "OPEN." The status report should provide sufficient information to show that corrective actions have been completed. If a planned action will not be completed by the original target completion date, please state the reason for the delay and give a revised target completion date. Status reports should be sent to [redacted] Assistant Inspector General, at OPS 2B, Suite 6247, within 15 calendar days after each target completion date.

3. ~~(U//FOUO)~~ We appreciate the courtesy and cooperation extended to the auditors throughout the review. If you need clarification or additional information, please contact [redacted] Assistant Inspector General, on 963-2988 or via e-mail at [redacted]

Brian R. McAndrew
BRIAN R. MCANDREW
Acting Inspector General

Derived From: NSA/CSSM 1-52
Dated: 20041123
Declassify On: MR

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GC
AGC(O)

~~(TS//SI//NF)~~ ASSESSMENT OF MANAGEMENT CONTROLS FOR IMPLEMENTING THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (FISC) ORDER: TELEPHONY BUSINESS RECORDS

~~(TS//SI//[redacted]//OC,NF)~~ **Background:** The Order of the FISC issued 24 May 2006 in *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from* [Telecommunications Providers] *Relating to* [redacted] *in the United States and Abroad*, No. BR-06-05 (the Order) states that "[t]he Inspector General and the General Counsel shall submit a report to the Director of NSA (DIRNSA) 45 days after the initiation of activity [permitted by the Order] assessing the adequacy of management controls for the processing and dissemination of U.S. person information. DIRNSA shall provide the findings of that report to the Attorney General." The Office of the Inspector General (OIG), with the Office of the General Counsel's (OGC) concurrence, issued the aforementioned report on 10 July 2006 in a memorandum with the subject *FISA Court Order: Telephony Business Records (ST-06-0018)*. Subsequently, DIRNSA sent the memorandum to the Attorney General. This report provides the details of our assessment of management controls that was reported to DIRNSA and makes formal recommendations to Agency management.

FINDING

~~(TS//SI//[redacted]//OC,NF)~~ The management controls designed by the Agency to govern the processing, dissemination, data security, and oversight of telephony metadata and U.S. person information obtained under the Order are adequate and in several aspects exceed the terms of the Order. Due to the risk associated with the collection and processing of telephony metadata involving U.S. person information, three additional controls should be put in place. Specifically, Agency management should:

(1) design procedures to provide a higher level of assurance that non-compliant data will not be collected and, if inadvertently collected, will be swiftly expunged and not made available for analysis.

(2) separate the authority to approve metadata queries from the capability to conduct queries of metadata under the Order.

(3) conduct periodic reconciliation of approved telephone numbers with the logs of queried numbers to verify that only authorized queries have been made under the Order.

(U) Criteria

~~(TS//SI/[redacted]~~/OC,NF) **The Order.** The Order authorizes NSA to collect and retain telephony metadata to protect against international terrorism and to process and disseminate this data regarding [redacted] in the United States. To protect U.S. privacy rights, the Order states specific terms and restrictions regarding the collection, processing, retention,[1] dissemination, data security, and oversight of telephony metadata and U.S. person information obtained under the Order. To ensure compliance with these terms and restrictions, the Order also mandates Agency management to implement a series of procedures to control the access to and use of the archived data collected pursuant to the Order. These control procedures are clearly stated in the Order. Appendix B includes a summary of the key terms of the Order and the related mandated control procedures.

(U) **Standards of Internal Control.** Internal control, or management control, comprises the plans, methods, and procedures used to meet missions, goals, and objectives. It provides reasonable assurance that an entity is effective and efficient in its operations, reliable in its reporting, and compliant with applicable laws and regulations. The General Accounting Office's *Standards for Internal Control in the Federal Government*, November 1999 (the Standards), presents the standards that define the minimum level of quality acceptable for management control in government. NSA/CSS Policy 7-3, *Internal Control Program*, advises that evaluations of internal control should consider the requirements outlined by the Standards. The OIG uses the Standards as the basis against which management control is evaluated.

~~(TS//SI//NF)~~ Documented Procedures are Needed to Govern the Collection of Telephony Metadata

~~(TS//SI//NF)~~ Control procedures for collecting telephony metadata under the Order were not formally designed and are not clearly documented. As a result, management controls do not provide reasonable assurance that NSA will comply with the following terms of the Order:

[1] ~~(TS//SI)~~ We did not assess the controls over retention at this time as the Order allows data to be retained for five years.

NSA may obtain telephony metadata, which includes comprehensive communications, routing information, including but not limited to session identifying information, trunk identifier, and time and duration of a call. Telephony metadata does not include the substantive content of any communications, or the name, address, or financial information of a subscriber or customer.

~~(TS//SI//NF)~~ As required by the Order, OGC plans to examine periodically a sample of call detail records to ensure NSA is receiving only data authorized by the court. (This is the only control procedure related to collection that is mandated by the Order.) Although this will detect unauthorized data that has been loaded into the archived database, there should also be controls in place to prevent unauthorized data from being loaded into the database. In addition, good internal control practices require that documentation of internal control appear in management directives, administrative policies, or operating manuals. At a minimum, procedures should be established to:

- monitor incoming data on a regular basis,
- upon discovery of unauthorized data, suppress unauthorized data from analysts' view, and
- eliminate unauthorized data from the incoming data stream.

~~(TS//SI//[redacted]/NF)~~ With these proposed control procedures in place, the risk that Agency personnel will mistakenly collect types of data that are not authorized under the Order will be minimized. Although the primary and secondary orders prohibit the providers from passing specific types of data to NSA, mistakes are possible. For example, in responding to our request for information, Agency management discovered that NSA was obtaining two types of data that may have been in violation of the Order: a 16-digit credit card number and name/partial name in the record of Operator-assisted calls. (It should be noted that the name/partial name was not the name of the subscriber from the provider's records; rather, a telephone operator entered name at the time of an Operator-assisted call.)

~~(TS//SI//[redacted]/NF)~~ In the case of the credit card number, OGC advised that, in its opinion, collecting this data is not what the Court sought to prohibit in the Order; but recommended that it still be suppressed on the incoming data flow if not needed for contact chaining purposes. In the case of the name or partial name, OGC advised that, while not what it believed the Court was concerned about when it issued the Order, collecting this information was not in keeping with the Order's specific terms and that it should also be suppressed from the incoming data flow. OGC indicated that it will report these issues to the Court when it seeks renewal of the authorization. Agency management noted that these data types were

blocked from the analysts' view. Management also stated that it will take immediate steps to suppress the data from the incoming data flow. These steps should be completed by July 31, 2006.

Recommendation 1
~~(TS//SI)~~ Design and document procedures to provide a higher level of assurance that non-compliant data will not be collected and, if inadvertently collected, will be swiftly expunged and not made available for analysis. **(ACTION: Chief, [redacted])**

(U) Management Response

CONCUR. ~~(TS//SI//[redacted]//NF)~~ Management concurred with the finding and recommendation and has already partially implemented the recommended procedures to block the questionable data from the providers' incoming dataflow. A final system upgrade to block the questionable data from one remaining provider is scheduled for 8 September 2006. Testing is currently ongoing.

Status: **OPEN**
Target Completion Date: **8 September 2006**

(U) OIG Comment

(U) Planned action meets the intent of the recommendation.

~~(TS//SI//NF)~~ Additional Controls are Needed to Govern the Processing of Telephony Metadata

~~(TS//SI//NF)~~ Agency management designed, and in some ways exceeded, the series of control procedures over the processing of telephony metadata that were mandated by the Order; however, there are currently no means to prevent an individual who is authorized access the telephony metadata from querying, either by error or intent, a telephone number that is not compliant with the Order. Therefore, additional controls are needed to reduce the risk of unauthorized processing.

~~(TS//SI//[redacted]//OC,NF)~~ Processing refers to the querying, search, and analysis of telephony metadata. To protect the privacy of U.S. persons, the Order restricts the telephone numbers that may be queried:

Based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted]

A telephone number believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution.

~~(TS//SI//NF)~~ Agency management designed the series of control procedures over the processing of telephony metadata that were mandated by the Order. In a short amount of time, Agency management modified existing systems and designed new processes to:

- document justifications for querying a particular telephone number,
- obtain and document OGC and other authorized approvals to query a particular telephone number, and
- maintain automatic audit logs of all queries of the telephony metadata.

~~(TS//SI//NF)~~ These controls are adequate to provide reasonable assurance that justifications are sound, approvals are given and documented, and that there is a record of all queries made. Agency management even exceeded the intent of the Order by fully documenting the newly developed processes in Standard Operating Procedures and by developing enhanced logging capability that will, once completed, generate additional reports that are more usable for audit purposes.

~~(TS//SI//NF)~~ Two additional control procedures are needed to provide reasonable assurance that only telephone numbers that meet the terms of the Order are queried.

~~(TS//SI//NF)~~ The authority to approve metadata queries should be segregated from the capability to conduct metadata queries.

~~(TS//SI//NF)~~ The Chief and Deputy Chief of the Advanced Analysis Division (AAD) and five Shift Coordinators[2] each have both the authority to approve the querying of telephone numbers under the Order and the capability to conduct queries. The Standards of

[2] ~~(TS//SI//NF)~~ The Order grants approval authority to seven individuals: the SID Program Manager for CT Special Projects, the Chief and Deputy Chief of the AAD, and four Shift Coordinators in AAD. In practice, Agency management transferred the authority of the SID Program Manager for CT Special Projects to one additional Shift Coordinator. Approval authority therefore remains limited to seven individuals as intended by the Order.

Internal Control in the Federal Government require that key duties and responsibilities be divided among different people to reduce the risk of error or fraud. In particular, responsibilities for authorizing transactions should be separate from processing and recording them. This lack of segregation of duties increases the risk that Shift Coordinators and the Chief and Deputy Chief of AAD will approve and query, either by error or intent, telephone numbers that do not meet the terms of the Order.

Recommendation 2

~~(TS//SI)~~ Separate the authority to approve metadata queries from the capability to conduct queries of metadata under the Order.

(ACTION: Chief, Advanced Analysis Division)

(U) Management Response

CONCUR. ~~(TS//SI//[redacted]//NF)~~ Management concurred with the finding but stated that it could not implement the recommendation because of constraints in manpower and analytic expertise. As an alternative, management recommended that SID Oversight & Compliance (O&C) routinely review the audit logs of the Chief and Deputy Chief of the Advanced Analysis Division and Shift Coordinators to verify that their queries comply with the Order. This alternative would be developed in conjunction with actions taken to address Recommendation 3 and is contingent on the approval of a pending request to SID management to detail two computer programmers to the team. Management is also negotiating with O&C to accept the responsibility for conducting the recommended reconciliations.

Status: **OPEN**
Target Completion Date: **28 February 2007**

(U) OIG Comment

~~(TS//SI//[redacted]//NF)~~ Although not ideal, management's alternative recommendation to monitor audit logs to detect errors will, at a minimum, mitigate the risk of querying telephone numbers that do not meet the terms of the Order. Therefore, given the existing manpower constraints, management's suggested alternative recommendation meets the intent of the recommendation.

~~(TS//SI//NF)~~ *Audit logs should be routinely reconciled to the records of telephone numbers approved for querying.*

~~(TS//SI//NF)~~ Management controls are not in place to verify that those telephone numbers approved for querying pursuant to the Order are the only numbers queried. Although audit logs document all queries of the archived metadata as mandated by the Order, the logs are not currently generated in a usable format, and Agency management does not routinely use those logs to audit the telephone numbers queried. The Standards of Internal Control in the Federal Government recommends ongoing reconciliations to "make management aware of inaccuracies or exceptions that could indicate internal control problems." The lack of routine reconciliation procedures increases the risk that errors will go undetected.

Recommendation 3

~~(TS//SI)~~ Conduct periodic reconciliation of approved telephone numbers with the logs of queried numbers to verify that only authorized queries have been made under the Order.

(ACTION: SID Special Program Manager for CT Special Projects)

(U) Management Response

CONCUR. ~~(TS//SI//[redacted]NF)~~ Management concurred with the finding and recommendation and presented a plan to develop the necessary tools and procedures to implement the recommendation. However, management stated that completion of the planned actions is contingent on the approval of a pending request to SID management to detail two computer programmers to the team. Management is also negotiating with O&C to accept the responsibility for conducting the recommended reconciliations.

Status: **OPEN**
Target Completion Date: **28 February 2007**

(U) OIG Comment

(U) Planned action meets the intent of the recommendation. However, should SID management not grant the request for additional computer programmers or O&C not accept responsibility for conducting the reconciliations, management must promptly inform the OIG and present an alternative plan.

Observation

(TS//SI//NF) At the time of our review, there was no policy in place to periodically review telephone numbers approved for querying under the Order to ensure that the telephone numbers still met the criteria of the Order. Although the Order is silent on the length of time a telephone number may be queried once approved, due diligence requires that Agency management issue a policy decision on this matter and develop procedures to execute the decision.

~~(TS//SI//NF)~~ Management Controls Governing the Dissemination of U.S. Person Information are Adequate

~~(TS//SI//NF)~~ Agency management implemented the series of control procedures governing the dissemination of U.S. person information mandated by the Order. O&C designs and implements controls to ensure USSID SP0018 compliance across the Agency, to include obtaining the approval of the Chief of Information Sharing Services and maintaining records of dissemination approvals, as required by the Order. No additional procedures are needed to meet the intent of the Order. Furthermore, these procedures are adequate to provide reasonable assurance that the following terms of the Order are met:

> Dissemination of U.S. person information shall follow the standard NSA minimization procedures found in the Attorney General-approved guidelines (USSID 18).

~~(TS//SI//NF)~~ Management Controls Governing Data Security are Adequate

~~(TS//SI//NF)~~ Agency management implemented the series of control procedures governing the data security of U.S. person information as mandated by the Order, such as the use of user IDs and passwords. Agency management exceeded the terms of the Order by maintaining additional control procedures that provide an even higher level of assurance that access to telephony metadata will be limited to authorized analysts. Most of these controls had been in place prior to and aside from the issuance of the Order. Only the requirement that OGC periodically monitor individuals with access to the archive was designed in response to the Order. Combined, these procedures are adequate to provide reasonable assurance that Agency management complies with the following terms of the Order:

> DIRNSA shall establish mandatory procedures strictly to control access to and use of the archived metadata collected pursuant to this Order.

~~(TS//SI//NF)~~ Additionally, O&C plans to reconcile the list of approved analysts with a list of authorized users to ensure only approved analysts have access to the metadata.

~~(TS//SI//NF)~~ Management Controls Governing the Oversight of Activities Conducted Pursuant to the Order are Adequate

~~(TS//SI//NF)~~ As mandated by the Order, Agency management designed plans to provide general oversight of activities conducted pursuant to the Order. The Order states that,

> The NSA Inspector General, the NSA General Counsel, and the Signals Intelligence Directorate Oversight and Compliance Office shall periodically review this program.

~~(TS//SI/[redacted]/OC,NF)~~ Specifically, Agency management designed the following plans that are adequate to ensure compliance with the Order.

- ~~(TS//SI//NF) The~~ OGC will report on the operations of the program for each renewal of the Order.
- ~~(TS//SI//NF) O~~&C plans to conduct periodic audits of the queries.
- ~~(TS//SI//NF)~~ OIG planned to audit telephony metadata [redacted] Upon issuance of the Order, the audit was put on hold to complete the court-ordered report. OIG will modify the audit plan to include the new requirements of the Order. Once sufficient operations have occurred under the Order to allow for a full range of compliance and/or substantive testing, the audit will proceed.

(U) Conclusion

~~(TS//SI//NF)~~ The activities conducted under the Order are extremely sensitive given the risk of encountering U.S. person information. The Agency must take this responsibility seriously and show good faith in its execution. Much of the foundation for a strong control system is set up by the Order itself, in the form of mandated control procedures. In many ways, Agency management has made the controls even stronger. Our recommendations will address control weaknesses not covered by the Order or Agency management and will meet Federal standards for internal control. Once the noted weaknesses are addressed, and additional controls are implemented, the management control system will provide reasonable assurance that the terms of the Order will not be violated.

APPENDIX A

(U) About the Audit

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(U) ABOUT THE AUDIT

(U) Objectives

~~(TS//SI)~~ The overall objective of this review was to determine whether management controls will provide reasonable assurance that Agency management complies with the terms of the Order. Specific objectives were to:

- verify that Agency management has designed the control procedures mandated by the Order.
- assess the adequacy of all management controls in accordance with the *Standards of Internal Control in the Federal Government*.

(U) Scope and Methodology

~~(U//FOUO)~~ The audit was conducted from May 24, 2006 to July 8, 2006.

~~(U//FOUO)~~ We interviewed Agency personnel and reviewed documentation to satisfy the review objectives.

~~(TS//SI)~~ We did not conduct a full range of compliance and/or substantive testing that would allow us to draw conclusions on the efficacy of management controls. Our assessment was limited to the overall adequacy of management controls, as directed by the Order.

~~(TS//SI)~~ As footnoted, we did not assess controls related to the retention of telephony metadata pursuant to the Order. As the Order authorizes NSA to retain data for up to five years, such controls would not be applicable at this time.

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Appendix B

~~(U//FOUO)~~ Telephony Business Records FISC Order - Mandated Terms and Control Procedures

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(U) Business Records FISC Order

(U) Mandated Terms and Control Procedures

(TS//SI//NF)

Control Area	Terms of the Order	Responsible Entity	Control Procedures
Collection of Metadata	NSA may obtain telephony metadata, which includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, communications device identifier, etc.), trunk identifier, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 USC 2510(8) or the name, address, or financial information of a subscriber or customer (pg. 2, para 2).	OGC	At least twice every 90 days, OGC shall conduct random spot checks, consisting of an examination of a sample of call detail records obtained, to ensure that NSA is receiving only data as authorized by the Court and not receiving the substantive content of the communications (pg. 10, para (4)J).

~~(TS//SI//NF)~~

Control Area	Terms of the Order	Responsible Entity	Control Procedures
Processing (Search & Analysis, or Querying of Archived Metadata)	Although data collected under this order will be broad, the use of that information for analysis shall be strictly tailored to identifying terrorist communications and shall occur solely according to the procedures described in the application (pg. 6, para (4)D). Any search or analysis of the data archive shall occur only after a particular known telephone number has been associated with [redacted] (pg. 5, para (4)A). ▪ Based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted] (pg. 5, para (4)A); ▪ A telephone number believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution (pg. 5, para (4)A). DIRNSA shall establish mandatory procedures strictly to control access to and use of the archived data collected pursuant to this Order (pg. 5, para (4)A).	OGC PM, Chief or D/Chief of AAD, Shift Coordinators PM; Chief & D/Chief of AAD, & Shift Coordinators AAD Analysts [redacted] and Technical Support OGC OGC	OGC shall review and approve proposed queries of archived metadata based on seed account numbers reasonably believed to be used by U.S. persons (pg. 6, para (4)C). Queries of archived data must be approved by one of seven persons: SID PM for CT Special Projects, the Chief or Deputy Chief, Counterterrorism Advanced Analysis Division, or one of the four specially authorized CT Advanced Analysis Shift Coordinators in the Analysis and Production Directorate of SID (pg. 7, para (4)D). SID PM for CT Special Projects; Chief and Deputy Chief, CT Advanced Analysis Division, and CT Advanced Analysis Shift Coordinators shall establish appropriate management controls (e.g., records of all tasking decisions, audit and review procedures) for access to the archived data (pg. 8, para (4)G). *Maintain a record of justifications because* at least every ninety days, the Department of Justice shall review a sample of NSA's justifications for querying the archived data (pg. 8, para (4)E). When the metadata archive is accessed, the user's login, IP address, date and time, and retrieval request shall be automatically logged for auditing capability (pg. 6, para (4)C). OGC will monitor the functioning of this automatic logging capability (pg. 6, para (4)C). Analysts shall be briefed by OGC concerning the authorization granted by this Order and the limited circumstances in which queries to the archive are permitted, as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of the archived data (pg. 6, para (4)G).

~~(TS//SI//NF)~~

Control Area	Terms of the Order	Responsible Entity	Control Procedures
Dissemination of U.S. Person Information	Dissemination of U.S. person information shall follow the standard NSA minimization procedures found in the Attorney General-approved guidelines (USSID 18) (pgs. 6-7, para (4)D) & pg. 8, para (4)G).	Chief of Information Sharing Services in SID	Prior to the dissemination of any U.S. person identifying information, the Chief of Information Sharing Services in SID must determine that the information identifying the U.S. person is in fact related to Counterterrorism information and that it is necessary to understand the Counterterrorism information or assess its importance (pg. 7, para (4)D). A record shall be made of every such determination (pg. 7, para (4)D).
Metadata Retention	Metadata collected under this Order may be kept online (that is, accessible for queries by cleared analysts) for five years, at which time it shall be destroyed (pg. 8, para (4)F).	[redacted] and Technical Support	None
Data Security	(TS//SI//NF) DIRNSA shall establish mandatory procedures strictly to control access to and use of the archived data collected pursuant to this Order (pg. 5, para (4)A).	[redacted] and Technical Support OGC	The metadata shall be stored and processed on a secure private network that NSA exclusively will operate (pg. 5, para (4)B). Access to the metadata archive shall be accomplished through a software interface that will limit access to this data to authorized analysts controlled by user name and password (pg. 5, para (4)C). OGC shall monitor the designation of individuals with access to the archive (pgs. 5-6, para (4)C).
Oversight	The IG, GC, and the SID Oversight and Compliance Office shall periodically review this program (pg. 8, para (4)H).	IG, GC, and SID Oversight and Compliance Office DIRNSA	The IG and GC shall submit a report to DIRNSA 45 days after the initiation of the activity assessing the adequacy of the management controls for the processing and dissemination of U.S. person information (pg. 8, para (4)H). DIRNSA shall provide the findings of that report to the Attorney General (pg. 9, para (4)H).

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Appendix C

~~(U//FOUO)~~ Full Text of Management Comments

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PROGRAM MEMORANDUM

PM-031-06 Reissued
29 Aug 2006

To: Office of the Inspector General [redacted]

Cc: Office of [redacted]
Counterterrorism Production Center [redacted]
Chief, SID Oversight and Compliance [redacted]
SSG1 [redacted]

SUBJECT: ~~(TS//SI//NF)~~ PMO Response to IG-10681-06, Subject Draft Report on the Assessment of Management Controls for implementing the FISA Court Order: Telephony Business Records (ST-06-0018)

1. ~~(U//FOUO)~~ The SIGINT Directorate Program Office appreciates and welcomes the Inspector General Office's review of program operations as required by the subject court order. The Program Office offers the following response.

2. ~~(TS//SI//NF)~~ This report presents three findings/recommendations. Finding one pertains to procedures to provide a higher level of assurance that non-compliant data will not be collected and, if inadvertently collected, will be swiftly expunged and not made available for analysis. Finding two pertains to the goal to separate the authority to approve metadata queries from the capability to conduct queries. Finding three pertains to the requirement to conduct periodic reconciliation of approved telephone numbers with the logs of queried numbers to verify that only authorized queries have been made.

3. ~~(TS//SI//[redacted]/NF)~~ With respect to Finding One, the Program Office acknowledges that the item is factually correct and concurs with the assessment with comment. It should be noted that internal management controls, known as software rules that are part of the [redacted] database, do prevent the data in question from ever being loaded into the operational contact chaining databases. Still, the data in question did exist in the dataflow and should be suppressed on the provider-end as the OIG recommends.

a. ~~(TS//SI//[redacted]/NF)~~ Corrective Actions: Although already partially implemented among the providers, the final system upgrade necessary to block the data in question from one provider on the incoming dataflow is scheduled to be in place by 8 September 2006. Testing continues at this time.

4. ~~(TS//SI//NF)~~ Finding Two recommends two additional controls. With respect to the first, "The authority to approve metadata queries should be segregated from the capability to conduct metadata queries", the Program Office agrees the assessment has merit, but cannot implement the required corrective actions. In theory, the OIG recommendation is sound and conforms fully to the standards of internal control in the Federal Government. In practical terms, it is not something that can be easily implemented given the

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~~Dated: 20041123~~
~~Declassify On: 20301115~~

risk/benefit tradeoff and real world constraints. Manpower ceilings and available analytic expertise are the two most significant limiting factors.

5. ~~(TS//SI//NF)~~ The Advanced Analysis Division (S2I5) is comprised of personnel of varying grades and experience levels. Given the requirements of the court order, the Shift Coordinators are required to be the most experienced intelligence analysts, have the most training and consequently hold the most senior grade levels. They therefore are given the authority to approve data queries, and because of their status can also execute queries. Removing this dimension of their authorities would severely limit the versatility of the most experienced operations personnel. Also, as their title implies, they are also the most senior personnel present during each operational shift and in effect control the ops tempo on the operations floor. Replicating that senior structure to accommodate the OIG recommendation is not possible given current manning authorizations and ops tempo.

a. ~~(TS//SI//NF)~~ However, there are checks and balances already in place to help mitigate the risks cited. For example, the Shift Coordinators routinely approve queries into the database based on selectors meeting a reasonable articulable suspicion standard IAW with NSA OGC written guidelines and verbal briefings. Any queries initiated from probable U.S. selectors must be individually approved by the OGC. In this way, the risk of error or fraud associated with the requirements of the court order is acceptably mitigated within available manning and analytic talent constraints.

b. ~~(TS//SI//NF)~~ Corrective Actions: Corrective actions cannot be implemented without significantly increasing manning levels of senior, highly skilled analysts. In our view, the benefit gained will not justify the manpower increase required. However, it may be possible to implement additional checks and audits on the query approval process. As recommended in the response to Finding Three below, Oversight and Compliance could, if they accept an expanded role, use (yet to be developed) new automated software tools to regularly review the audit logs of all shift coordinators. With software changes to the audit logs it would be possible to easily compare numbers approved and their accompanying justifications against numbers chained. In this way, it would be possible to review the shift coordinator's actions against the standards established by the court. The Program Office recommends that this corrective action be pursued as part of the long term goal discussed below.

6. ~~(TS//SI//NF)~~ Finding Three reads "conduct periodic reconciliation of approved telephone numbers with the logs of queried numbers to verify that only authorized queries have been made under the order". The Program Office agrees with this assessment. However, competing priorities for the software programming talent necessary to implement improvements to the audit logs, as well as to perform the programming necessary to create automated reconciliation reports, require that this issue be addressed as a long term goal.

a. ~~(TS//SI//NF)~~ If SID management approves a pending Program Office request to detail two computer programmers to the team for six-to-nine month rotations, suitable procedures and software tools could be implemented. Also, the Program Office has approached the office of Oversight and Compliance about accepting the responsibility of conducting the recommended audits. That negotiation is ongoing.

b. ~~(TS//SI//NF)~~ Corrective Action: Acceptable tools and procedures can be developed within six months if the required manpower is allocated. Assuming the Program team's request is granted, this initiative can be completed by 28 February 2007. The corrective action will include:

1. ~~(U//FOUO)~~ Improvements to the audit logs to make them more user friendly

2. ~~(U//FOUO)~~ Reports that provide a useable audit trail from requester, to approver, to any resulting reports. These reports will be used to automatically identify any discrepancies in the query process (i.e. queries made, but not approved).

3. ~~(U//FOUO)~~ Complete the negotiations with SID Oversight & Compliance

7. ~~(U//FOUO)~~ Please contact me if you have additional questions.

[redacted]

29 Aug 06

SID Program Manager
CT Special Programs

IT'S EVERYBODY'S BUSINESS –

TO REPORT SUSPECTED INSTANCES OF FRAUD,
WASTE, AND MISMANAGEMENT, CALL OR VISIT
THE NSA/CSS IG DUTY OFFICER
ON 963-5023s/[redacted]
IN OPS2A/ROOM 2A0930

IF YOU WISH TO CONTACT THE OIG BY MAIL,
ADDRESS CORRESPONDENCE TO:

DEPARTMENT OF DEFENSE
NATIONAL SECURITY AGENCY/
CENTRAL SECURITY SERVICE
ATT: INSPECTOR GENERAL
9800 SAVAGE ROAD, STE 6247
FT. MEADE, MD 20755-6247

F

OFFICE OF THE INSPECTOR GENERAL
NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE

10 July 2006
IG-10667-06

TO: DIRECTOR, NSA

SUBJECT: ~~(TS//SI//NF)~~ FISA Court Order: Telephony Business Records (ST-06-0018)

1. ~~(TS//SI//NF)~~ **Background and Objective.** The Order of the Foreign Intelligence Surveillance Court issued 24 May 2006 in *In Re Application of the FBI etc.*, No. BR-06-05 (Telephony Business Records) states that "[t]he Inspector General and the General Counsel shall submit a report to the Director of NSA 45 days after the initiation of the activity [permitted by the Order] assessing the adequacy of the management controls for the processing and dissemination of U.S. person information." This is that report. The Order further states that "[t]he Director of NSA shall provide the findings of that report to the Attorney General." Order at 8-9. The Order sets no deadline for transmission of the findings to the Attorney General.

2. ~~(TS//SI//NF)~~ **Finding.** The management controls designed by the Agency to govern the processing, dissemination, security, and oversight of telephony metadata and U.S. person information obtained under the Order are adequate and in several aspects exceed the terms of the Order. However, due to the risk associated with the collection and processing of telephony metadata involving U.S. person information, three additional controls should be put in place. Specifically, Agency management should (1) design procedures to provide a higher level of assurance that non-compliant data will not be collected and, if inadvertently collected, will be swiftly expunged and not made available for analysis; (2) separate the authority to approve metadata queries from the capability to conduct queries of metadata under the Order; and (3) conduct periodic reconciliation of approved telephone numbers to the logs of queried numbers to verify that only authorized queries have been made under the Order.

~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20041123~~
~~Declassify On: MR~~

3. (~~TS//SI~~) **Further Review.** The Inspector General will make formal recommendations to the Director, NSA/CSS, in a separate report regarding the design and implementation of the additional controls.

4. (U//~~FOUO~~) We appreciate the courtesy and cooperation extended throughout our review to the auditors from the Office of the Inspector General and the attorneys from the Office of the General Counsel who consulted with them. If you need clarification or additional information please contact [redacted] on 963-1421(s) or via e-mail at [redacted]

JOEL F. BRENNER
Inspector General

(U//~~FOUO~~) I endorse the conclusion that the management controls for the processing and dissemination of U.S. person information are adequate.

ROBERT L. DEITZ
General Counsel

DISTRIBUTION:

SIGINT Director
SID Program Manager for CT Special Projects
Chief, S2
Chief, S2I
Chief, S2I5
Chief, S3
Chief, S33
OGC
SID O&C

G

FM: SID Oversight & Compliance

Date: 11 July 2006

Subject: Final Responses to the OIG – Request for Information - Business Records Order (U)

SID Oversight and Compliance

1. **~~(TS//SI//NF)~~ Written plans for periodically reviewing this program.**

~~(TS//SI//NF)~~ SID Oversight and Compliance will:

- In coordination with Program Office, conduct weekly reviews of list of analysts authorized to access Business Records data and ensure that only approved analysts have access. Oversight & Compliance will inform NSA's Office of General Counsel (OGC)of the results of the reviews and provide copies if needed to OGC.
- Perform periodic super audits of queries.
- Work with the Program Office to ensure that the data remains appropriately labeled, stored and segregated according to the terms of the court order.

2. **~~(TS//SI//NF)~~ Written procedures in addition to USSID SP0018 to ensure compliance with standard NSA minimization procedures for the dissemination of U.S. person information.**

~~(TS//SI//NF)~~ SID Oversight and Compliance has a documented SOP which outlines the process to ensure compliance with standard NSA minimization procedures:

- During normal duty hours, every report from this order containing U.S. or 2nd Party identities is reviewed by SID Oversight and Compliance prior to dissemination.
- SID Oversight & Compliance (SV) reviews the products (Tippers) and creates a "one-time dissemination" authorization memorandum for signature of the Chief or Deputy Chief of Information Sharing Services.
- The NSOC SOO approves dissemination authorizations after hours.
- S2I/Counterterrorism Production Center provides SV with a copy of any report that is approved by NSOC/SOO for dissemination.
- Oversight and Compliance then issues a memorandum for the record stipulating that the U.S. or 2nd Party identities contained in that report were authorized for dissemination by the NSOC/SOO.

~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20041123~~
Declassify On: 20301129

~~TOP SECRET//COMINT//NOFORN//MR~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE PRODUCTION OF TANGIBLE THINGS

[redacted]

Docket Number: BR 08-13

NOTICE OF COMPLIANCE INCIDENTS (U)

The United States of America, pursuant to Rule 10(c) of the Foreign Intelligence Surveillance Court Rules of Procedure, advises the Court of the circumstances surrounding two compliance matters in docket number BR 08-13 and prior dockets in this matter. In support of this notice, the Government submits the attached Supplemental Declaration of Lt. General Keith B. Alexander, U.S. Army, Director of the National Security Agency (NSA) ("Supplemental Alexander Declaration"). ~~(TS)~~

In response to the Court's Order of January 28, 2009, the Director of NSA ordered end-to-end system engineering and process reviews (technical and operational) of NSA's handling of the call detail records collected pursuant to the Court's authorizations in this matter ("BR metadata"). See Declaration of Lt. General Keith B.

Alexander, U.S. Army, Director, National Security Agency, filed February 17, 2009, at 21 ("Alexander Declaration"). The Director also ordered an audit of all queries made of the BR metadata repository since November 1, 2008, to determine if any of the queries during that period were made using telephone identifiers for which NSA had not determined that a reasonable, articulable suspicion exists that they are associated with [redacted] and [redacted]ons, as required by the Court's Primary Orders.[1] Id. at 22-23. These reviews identified the following two matters where NSA did not handle the BR metadata in the manner authorized by the Court.[2] ~~(TS//SI//NF)~~

Queries Using [redacted] On February 19, 2009, NSA notified the National Security Division (NSD) and the Office of the Director of National Intelligence that one of its analytical tools (known as [redacted]) may have been used to query the BR metadata and that such queries may have used non-RAS-approved telephone identifiers. Supp. Alexander Decl. at 5. According to the Supplemental Alexander Declaration, [redacted] determined if a record of a telephone identifier was present in NSA databases and, if so, provided analysts with certain information regarding the calling activity associated with that identifier. Id. at 3, 5-6. It did not provide analysts with the telephone identifiers that were in contact with the telephone identifier that

[1] In this notice, the Government will refer to this standard as the "RAS standard" and telephone identifiers that satisfy the standard as "RAS-approved." ~~(S)~~

[2] NSD orally notified Court advisors of these two matters on February 20, 2009. ~~(S)~~

served as a basis for the query. Id. at 3, 6. Although [redacted] could operate as a stand-alone tool, it more often operated automatically in support of other analytic tools, namely [redacted] which is described more fully in the Supplemental Alexander Declaration. Id. at 3, 5-7. Since the Court's initial Order in May 2006, [redacted] would search the BR metadata and other NSA databases. Id. at 2-3, 5-6. ~~(TS//SI//NF)~~

According to the Supplemental Alexander Declaration, on February 18, 2009, NSA disabled portions of two analytic tools, including [redacted] that most often invoked [redacted] query mechanism. Id. at 7. On February 19, 2009, NSA confirmed that [redacted] was querying the BR metadata without requiring RAS-approval of the telephone identifiers used as query terms. Id. at 5. NSA then began to eliminate [redacted] access to the BR metadata. Id. at 3. On February 20, 2009, NSA restricted access to the BR metadata to permit only manual queries based on RAS-approved telephone identifiers and to prevent any automated processes from accessing the BR metadata. Id. at 7, 9. NSA also blocked access to the historical files that were generated from automated [redacted] queries. Id. at 7. Before re-instituting automated processes that would access the BR metadata, NSA and NSD will determine that any proposed automated process will access the BR metadata in a manner that complies with the Court's Orders. Id. at 9-10. ~~(TS//SI//NF)~~

Improper Analyst Queries Since November 1, 2008. On February 20, 2009, NSA notified NSD that NSA's audit of queries since November 1, 2008 had identified three analysts who conducted chaining in the BR metadata using fourteen telephone identifiers that had not been RAS-approved before the queries. According to the Supplemental Alexander Declaration:

- One analyst conducted contact chaining queries on four non-RAS-approved telephone identifiers on November 5, 2008;
- A second analyst conducted one contact chaining query on one non-RAS-approved telephone identifier on November 18, 2008; and
- A third analyst conducted contact chaining queries on three non- RAS-approved telephone identifiers on December 31, 2008; one non-RAS approved identifier on January 5, 2009; three non-RAS approved identifiers on January 15, 2009; and two non-RAS approved identifiers on January 22, 2009.

Id. at 8. None of the telephone identifiers used as seeds was associated with a U.S. person or telephone identifier, and none of the improper queries resulted in intelligence reporting. Id. at 8-9. According to the Supplemental Alexander Declaration, at the time of the improper queries, the three analysts were conducting queries of telephone metadata other than the BR metadata, and each appears to have been unaware that they were conducting queries of the BR metadata. Id. at 9. ~~(TS//SI//NF)~~

As stated in the Alexander Declaration, NSA began designing a software fix to prevent the querying of the BR metadata with telephone identifiers that had not been RAS-approved. Alexander Decl. at 23-24. On February 20, 2009, NSA installed that software fix; as a result, no non-RAS-approved telephone identifier may be used to query the BR metadata. Supp. Alexander Decl. at 9. ~~(TS//SI//NF)~~

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* * *

The Government acknowledges that in the above matters it did not handle the BR metadata in the manner authorized by the Court. These matters were identified as a result of the several oversight and investigative obligations that the Government voluntarily undertook as a result of the Court's Order of January 28, 2009. The Government also has implemented certain additional restrictions on the access to the BR metadata that are designed to prevent the recurrence of improper access to the BR metadata. Accordingly, the Government respectfully submits that the Court need not take any further remedial action. ~~(TS//SI//NF)~~

Respectfully submitted,

Acting Section Chief, Oversight

[redacted]
Office of Intelligence

National Security Division
United States Department of Justice

Attachment

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

(TS) In Re Production of Tangible Things [redacted]	)	Docket No.: BR 08-13

SUPPLEMENTAL DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, UNITED STATES ARMY, DIRECTOR OF THE NATIONAL SECURITY AGENCY

(U) I, Lieutenant General Keith B. Alexander, depose and state as follows:

(U) I am the Director of the National Security Agency ("NSA" or "Agency"), an intelligence agency within the Department of Defense ("DoD"), and have served in this position since 2005. I currently hold the rank of Lieutenant General in the United States Army and, concurrent with my current assignment as Director of the National Security Agency, I also serve as the Chief of the Central Security Service and as the Commander of the Joint Functional Component Command for Network Warfare.

(U) The statements herein are based upon my personal knowledge, information provided to me by my subordinates in the course of my official duties, advice of counsel, and conclusions reached in accordance therewith.

Derived From: ~~NSA/CSSM 1-52~~
Dated: ~~20070108~~
Declassify On: MR

I. (U) Purpose:

~~(TS//SI//NF)~~ Pursuant to a series of Orders issued by the Court since May 2006, NSA has been receiving telephony metadata from telecommunications providers. NSA refers to the Orders collectively as the "Business Records Order" or "BR FISA." Among other things, the Business Records Order requires NSA to determine that there is a reasonable articulable suspicion ("RAS") to believe that a telephone identifier that NSA wishes to use as a "seed" for accessing the BR FISA data is associated wi[redacted] This supplemental declaration describes two compliance matters that NSA has discovered while implementing the corrective actions the Government described to the Court in the brief and declaration filed with the Court on 17 February 2009 regarding a compliance matter that the Department of Justice ("DoJ") first brought to the Court's attention on 15 January 2009. *See, respectively,* Memorandum of the United States in Response to Court's Order Dated January 28, 2009, ("DoJ Memo") *and* Declaration of Keith B. Alexander ("Alexander Declaration"), Docket BR 08-13.

II. (U) Incidents:

A. (U) Summary

~~(TS//SI//NF)~~ During an end-to-end review of NSA's technical infrastructure that I ordered in response to the compliance incident that DoJ reported to the Court on 15 January 2009, NSA personnel determined on 18 February 2009 that an NSA analytical tool known as [redacted] was querying both E.O. 12333 and the Business Records

data and that such queries would not have been limited to RAS approved telephone identifiers. As explained further below, [redacted] was automatically invoked to support certain types of analytical research. Specifically, to help analysts identify a phone number of interest. If an analyst conducted research supported by [redacted] the analyst would receive a generic notification that NSA's signals intelligence ("SIGINT") databases contained one or more references to the telephone identifier in which the analyst was interested; a count of how many times the identifier was present in SIGINT databases; the dates of the first and last call events associated with the identifier; a count of how many other unique telephone identifiers had direct contact with the identifier that was the subject of the analyst's research; the total number of calls made to or from the telephone identifier that was the subject of the analyst's research; the ratio of the count of total calls to the count of unique contacts; and the amount of time it took to process the analyst's query. [redacted] did not return to the analyst the actual telephone identifier(s) that were in contact with the telephone identifier that was the subject of the analyst's research and the analyst did not receive a listing of the individual NSA databases that were queried by [redacted]

~~(TS//SI//NF)~~ After identifying that [redacted] was allowing non-RAS approved telephone identifiers to be used to conduct queries of the BR FISA metadata to generate the statistical information that [redacted] returned to individual analysts, NSA personnel immediately began to eliminate [redacted] ability to access the BR FISA data. As of 20 February 2009, no automated analytic process or analytical tool can access the telephony metadata NSA receives pursuant to the Business Records Order. Moreover, the system's change of 20 Feburary 2009 also prevents manual queries of the BRFISA

metadata unless NSA has determined that the telephone identifier that is being used to query the data has satisfied the RAS standard.

~~(TS//SI//NF) In~~ addition to the problem NSA identified regarding _____ during a 100% audit of individual analyst queries of the BR FISA metadata, NSA personnel discovered that three analysts inadvertently accessed the Business Records data using fourteen different non-RAS approved selectors between 1 November 2008 and 23 January 2009. None of the improper queries resulted in any intelligence reporting and none of the identifiers were associated with a U.S. telephone identifier or U.S. person. The technical change NSA implemented on 20 February 2009 to correct the problem of automated BR FISA queries also included another software change that prevents manual queries against non-RAS approved identifiers. Thus, the 20 February 2009 system upgrades should prevent recurrences of the improper analyst queries that are also discussed in detail below.

B. (U) Details

~~(S) Incident 1:~~ _____

~~(TS//SI//NF) As~~ part of the response to the compliance problem described to the Court in my 17 February 2009 declaration, I ordered an examination "to ensure that NSA's technical infrastructure has not allowed, and will not allow, non-approved selectors to be used as seeds for contact chaining _____ of the BR FISA data." Alexander Declaration at 22. I also stated that NSA would "report to DoJ and the

Court if this examination of the technical infrastructure reveals any incidents of improper querying of the BR FISA data repository." *Id.*

~~(TS//SI//NF)~~ On 18 February 2009, NSA technical personnel notified NSA's Office of General Counsel that, as part of the review of NSA's technical infrastructure that I ordered, they discovered that the use of [redacted] may have resulted in queries of NSA's BR FISA data and that such queries would not have been limited to the use of RAS approved telephone identifiers. On 19 February 2009, NSA personnel confirmed that this was, in fact, the case. NSA informally notified DoJ and the Office of the Director of National Intelligence of this problem later that same day.

~~(S//SI)~~ As I stated above, NSA uses [redacted] to support analytical research regarding telephone identifiers that are of intelligence interest to NSA's SIGINT personnel. [redacted] determines if a telephone identifier is present in NSA data repositories and also reports the level of calling activity associated with any particular telephone identifier. Although [redacted] can be used as a stand-alone tool, it is used more often as a background process in support of other NSA analytical tools.

[redacted]

The results of the queries (the number of unique contacts found for each expanded telephone identifier; the total number of calls made to or from the telephone identifier that served as the basis for the query; the ratio of total calls to unique calls; the date of the first call event recorded; the date of the last call event; and the amount of time it took to process the query) would be displayed to the analyst

Although no longer can access the BR FISA data, greatly assists analysts to choose selectively the best identifiers for further target development. As I stated above, does not return the telephone identifier(s) that were in contact with the telephone identifier that was the subject of the analyst's research.

~~(TS//SI//NF)~~ NSA has determined that the Agency had configured to include the BR FISA data repository as one of the sources of SIGINT data that queried since the issuance of the first Business Records Order in May 2006.

This configuration remained in place until NSA identified this problem on 18 February 2009. As noted previously, [redacted] did not tell individual analysts which SIGINT databases [redacted] was querying nor did the tool provide analysts with the actual telephone numbers that had been in direct contact with the identifiers that served as the basis for [redacted] queries. In other words, if an analyst wanted to construct a chain [redacted] of the contacts associated with an identifier that had been the subject of a [redacted] query, the analyst was required to query the appropriate data repositories directly. For BR FISA data, this meant that only an analyst approved for access to BR FISA material could conduct such a query.

~~(TS//SI//NF)~~ Upon identification of this problem, NSA took immediate corrective actions. First, on the evening of 18 February 2009, NSA's Signals Intelligence Directorate disabled portions of two analytical tools used most often to invoke [redacted] automatic query mechanism. Second, on the morning of 19 February 2009, NSA shut down [redacted] itself. Third, after conducting further examination of the problem, on the morning of 20 February 2009, the Signals Intelligence Directorate installed a technical safeguard called Emphatic Access Restriction, which is the equivalent of a firewall that prevents any automated process or subroutine from accessing the BR FISA data.[2] Fourth, on the evening of Friday, 20 February 2009, NSA blocked access to the historical files that were generated from automated [redacted] queries.

[2] ~~(TS//SI//NF)~~ This technical safeguard had been under development since mid-January 2009, following the initial discovery of compliance issues associated with the Business Records Order. The safeguard also prevents analysts from performing manual chaining on numbers that have not been marked as RAS approved.

~~(S)~~ **Incident 2: Improper Analyst Queries**

(~~TS//SI//NF~~) Among the other corrective actions described to the Court in the Government's filing on 17 February 2009, NSA also initiated an audit of all queries made of the BR FISA data between 1 November 2008 and 23 January 2009. *See* Alexander Declaration at 22-23. As part of this audit, NSA has identified additional instances of improper analyst queries of the BR FISA data. None of the improper queries resulted in any intelligence reporting and none of the identifiers were associated with a U.S. telephone number or person.

~~(TS//SI//NF)~~ Prior to 15 January 2009, audits of BR FISA queries were implemented as spot checks of analyst queries or would be limited to a single day's worth of queries. After one of these spot checks identified improper queries conducted by two analysts, the Agency decided to conduct a more comprehensive audit of all analysts queries of the BR FISA metadata conducted between 1 November 2008 to 23 January 2009. *See* Alexander Declaration at 22-23. When NSA oversight personnel completed the first round of this comprehensive audit, they discovered that three analysts were responsible for fourteen instances of improper querying of the BR FISA data. The fourteen seed identifiers did not meet RAS approval prior to the analysts' queries. The first analyst conducted one query on one non-RAS approved seed identifier on 18 November 2008. The second analyst chained on four different non-RAS approved seeds on 5 November 2008. The third analyst chained on three different non-RAS approved seeds on 31 December 2008; one non-RAS approved identifier on 5 January 2009; three different non-RAS approved identifiers on 15 January 2009; and two different non-RAS approved identifiers on 22 January 2009. None of the improper

queries resulted in any intelligence reporting and none of the identifiers were associated with a U.S. telephone identifier or U.S. person.

~~(TS//SI//NF)~~ Each of the analysts responsible for these improper queries did not realize they were conducting queries in the BR FISA data. This conclusion is based on an audit of other queries they were conducting at the same time as well as questioning of the analysts by NSA's Oversight and Compliance Office. Each analyst thought they were conducting queries of other repositories of telephony metadata that are not subject to the requirements of the Business Records Order.[3] On 20 February 2009, software changes were made to ensure analysts could only access the BR data using this new version of the chaining tool.

~~(TS//SI//NF)~~ As the Government reported in its filing of 17 February 2009, NSA decided to design new software to prevent the querying of any telephone identifier within the BR FISA data unless the identifier has been RAS-approved. See Alexander Declaration at 23-24. On 20 February 2009, the software change NSA made to prevent automated tools from access the BR FISA metadata also prevents any non-RAS approved selector from being used as a seed for manual querying of the BR FISA data.

III. (U) Conclusion:

~~(TS//SI//NF)~~ NSA's implementation of Emphatic Access Restriction should prevent recurrences of both types of compliance incidents that are the subject of this supplemental declaration to the Court. NSA's BR FISA data repository is currently only able to accept manual queries based on a RAS-approved telephone identifier. Prior to

[3] ~~(TS//SI//NF)~~ At the time of the improper queries, each of these analysts were using dual screen computer equipment that provided the analysts with simultaneous access to BR FISA data and metadata that is not subject to the Business Records Order.

reinstituting any automated process that would provide any sort of access to, or comparison against, the BR FISA data, NSA's Office of General Counsel and the Department of Justice will review and approve the process.

~~(TS//SI//NF)~~ Notwithstanding implementation of Emphatic Access Restriction, NSA continues to examine its technical infrastructure to ensure that queries of BR FISA metadata are restricted to the use of RAS approved telephone identifiers. I expect that any further problems NSA personnel may identify with the infrastructure will be historical in nature. However, as indicated in my previous declaration to the Court, NSA will report any further problems Agency personnel may identify (whether current or historical) to both DoJ and the Court.

(U) I declare under penalty of perjury that the facts set forth above are true and correct.

KEITH B. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

Executed this 25 TH day of February, 2009

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE PRODUCTION OF TANGIBLE THINGS FROM [redacted]	Docket Number: BR 08-13

ORDER

On December 12, 2008, the Foreign Intelligence Surveillance Court ("FISC" or "Court") re-authorized the government to acquire the tangible things sought by the government in its application in the above-captioned docket ("BR 08-13"). Specifically, the Court ordered [redacted] to produce, on an ongoing daily basis for the duration of the order, an electronic copy of all call detail records or "telephony metadata" created by [redacted] BR 08-13, Primary Order at 4. The Court found reasonable grounds to believe that the tangible things sought are relevant to authorized investigations being conducted by the Federal Bureau of Investigation ("FBI") to protect against international terrorism, which investigations are not being conducted solely upon the basis of First Amendment protected activities, as required by 50 U.S.C. §§1861(b)(2)(A) and (c)(1). Id. at 3. In making this finding, the Court relied on the

assertion of the National Security Agency ("NSA") that having access to the call detail records "is vital to NSA's counterterrorism intelligence mission" because "[t]he only effective means by which NSA analysts are able continuously to keep track o[redacted] and all affiliates of one of the aforementioned entities [who are taking steps to disguise and obscure their communications and identities], is to obtain and maintain an archive of metadata that will permit these tactics to be uncovered." BR 08-13, Application Exhibit A, Declaration of [redacted] Signals Intelligence Directorate Deputy Program Manager [redacted] NSA, filed Dec. 11, 2008 ([redacted] Declaration") at 5. NSA also averred that

> [t]o be able to exploit metadata fully, the data must be collected in bulk.... The ability to accumulate a metadata archive and set it aside for carefully controlled searches and analysis will substantially increase NSA's ability to detect and identify members of [redacted]
>
> Id. at 5-6.

Because the collection would result in NSA collecting call detail records pertaining to [redacted] of telephone communications, including call detail records pertaining to communications of United States ("U.S.") persons located within the U.S. who are not the subject of any FBI investigation and whose metadata could not otherwise be legally captured in bulk, the government proposed stringent minimization procedures that strictly controlled the

acquisition, accessing, dissemination, and retention of these records by the NSA and the FBI.[1] BR 08-13, Application at 12, 19-28. The Court's Primary Order directed the government to strictly adhere to these procedures, as required by 50 U.S.C. 1861(c)(1). Id. at 4-12. Among other things, the Court ordered that:

> access to the archived data shall occur only when NSA has identified a known telephone identifier for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone identifier is associated with [redacted] provided, however, that a telephone identifier believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution.

Id. at 8 (emphasis added).

In response to a Preliminary Notice of Compliance Incident dated January 15, 2009, this Court ordered further briefing on the non-compliance incident to help the Court assess whether its Orders should be modified or rescinded; whether other remedial steps should be directed; and whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violations of its Orders. Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, issued Jan. 28, 2009, at 2. The government timely filed its Memorandum in Response to the Court's Order on February 17, 2009. Memorandum of the United States In Response to the Court's Order Dated January 28, 2009 ("Feb. 17, 2009

[1]The Court notes that the procedures set forth in the government's application and the Declaration are described in the government's application as "minimization procedures." BR 08-13, Application at 20.

Memorandum").

A. NSA's Unauthorized Use of the Alert List

The government reported in the Feb. 17, 2009 Memorandum that, prior to the Court's initial authorization on May 24, 2006 (BR 06-05), the NSA had developed an "alert list process" to assist the NSA in prioritizing its review of the telephony metadata it received. Feb. 17, 2009 Memorandum at 8. Following the Court's initial authorization, the NSA revised this alert list process so that it compared the telephone identifiers on the alert list against incoming FISC-authorized Business Record metadata ("BR metadata") and SIGINT collection from other sources, and notified NSA's counterterrorism organization if there was a match between an identifier on the alert list and an identifier in the incoming data. Feb. 17, 2009 Memorandum at 9-10. The revised NSA process limited any further analysis of such identifiers using the BR metadata to those telephone identifiers determined to have met the "reasonable articulable suspicion" standard (hereafter "RAS-approved identifiers") set forth above. Id. at 10-11. However, because the alert list included all identifiers (foreign and domestic) that were of interest to counterterrorism analysts who were charged with tracking [redacted], most of the telephone identifiers compared against the incoming BR metadata were not RAS-approved.[2] Feb. 17, 2009 Memorandum at 10-11. Thus, since the earliest days of the FISC-authorized collection of call-detail records by the NSA, the

[2]As an example, the government reports that as of January 15, 2009, only 1,935 of the 17,835 identifiers on the alert list were RAS-approved. Feb.17, 2009 Memorandum at 11.

NSA has on a daily basis, accessed the BR metadata for purposes of comparing thousands of non-RAS approved telephone identifiers on its alert list against the BR metadata in order to identify any matches. Such access was prohibited by the governing minimization procedures under each of the relevant Court orders, as the government concedes in its submission. Feb. 17, 2009 Memorandum at 16.

The government's submission suggests that its non-compliance with the Court's orders resulted from a belief by some personnel within the NSA that some of the Court's restrictions on access to the BR metadata applied only to "archived data," i.e., data residing within certain databases at the NSA. Feb. 17, 2009 Memorandum, Tab 1, Declaration of Lieutenant General Keith B. Alexander, United States Army, Director of the NSA ("Feb. 17, 2009 Alexander Declaration") at 10-11. That interpretation of the Court's Orders strains credulity. It is difficult to imagine why the Court would intend the applicability of the RAS requirement - a critical component of the procedures proposed by the government and adopted by the Court - to turn on whether or not the data being accessed has been "archived" by the NSA in a particular database at the time of the access. Indeed, to the extent that the NSA makes the decision about where to store incoming BR metadata and when the archiving occurs, such an illogical interpretation of the Court's Orders renders compliance with the RAS requirement merely optional.

The NSA also suggests that the NSA OGC's approval of procedures allowing the use of non-RAS-approved identifiers on the alert list to query BR metadata not yet in the NSA's "archive" was not surprising, since the procedures were similar to those used in connection with

other NSA SIGINT collection activities. Feb 17, 2009 Alexander Declaration at 11, n.6. If this is the case, then the root of the non-compliance is not a terminological misunderstanding, but the NSA's decision to treat the accessing of all call detail records produced by [redacted] no differently than other collections under separate NSA authorities, to which the Court-approved minimization procedures do not apply.

B. Misrepresentations to the Court

The government has compounded its non-compliance with the Court's orders by repeatedly submitting inaccurate descriptions of the alert list process to the FISC. Due to the volume of U.S. person data being collected pursuant to the Court's orders, the FISC's orders have all required that any renewal application include a report on the implementation of the Court's prior orders, including a description of the manner in which the NSA applied the minimization procedures set forth therein. See, e.g., BR 08-13, Primary Order at 12.

In its report to the FISC accompanying its first renewal application that was filed on August 18, 2006, the government described the alert list process as follows:

> NSA has compiled through its continuous counter-terrorism analysis, a list of telephone numbers that constitutes an "alert list" of telephone numbers used by members of [redacted] This alert list serves as a body of telephone numbers employed to query the data....
>
> [...] Each of the foreign telephone numbers that comes to the attention of the NSA as possibly related to [redacted] is evaluated to determine whether the information about it provided to NSA satisfies the reasonable articulable suspicion standard. If so, the foreign telephone number is placed on the alert list; if not, it is not placed on the alert list.

The process set out above applies also to newly discovered domestic

telephone numbers considered for addition to the alert list, with the additional requirement that NSA's Office of General Counsel reviews these numbers and affirms that the telephone number is not the focus of the analysis based solely on activities that are protected by the First Amendment....

....

As of the last day of the reporting period addressed herein, NSA had included a total of 3980 telephone numbers on the alert list, which includes foreign numbers and domestic numbers, after concluding that each of the foreign telephone numbers satisfied the [RAS standard], and each of the domestic telephone numbers was ether a FISC approved number or in direct contact with a foreign seed that met those criteria.[3]

To summarize the alert system: every day new contacts are automatically revealed with the 3980 telephone numbers contained on the alert list described above, which themselves are present on the alert list either because they satisfied the reasonable articulable suspicion standard, or because they are domestic numbers that were either a FISC approved number or in direct contact with a number that did so. These automated queries identify any new telephone contacts between the numbers on the alert list and any other number, except that domestic numbers do not alert on domestic-to-domestic contacts.

NSA Report to the Foreign Intelligence Surveillance Court, Docket no. BR 06-05, filed Aug. 18, 2006 at 12-15 (emphasis added). This description was included in similar form in all subsequent reports to the Court, including the report submitted to this Court on December 11, 2008. Feb. 17, 2009 Memorandum at 13.

The NSA attributes these material misrepresentations to the failure of those familiar with

[3]The report further explained that identifiers within the second category of domestic numbers were not used as "seeds." NSA Report to the Foreign Intelligence Surveillance Court, Docket no. BR 06-05, filed Aug. 18, 2006 at 14. Moreover, rather than conducting daily queries of the RAS-approved foreign telephone identifier that originally contacted the domestic number, the domestic numbers were included in the alert list as "merely a quicker and more efficient way of achieving the same result...." Id. at 14 n.6. In November 2006, the NSA reported that it ceased this activity on August 18, 2006. Feb. 17, 2009 Alexander Declaration at 7 n.1.

the program to correct inaccuracies in a draft of the report prepared in August 2006 by a managing attorney in the NSA's Office of General Counsel, despite his request that recipients of the draft "make sure everything I have siad (sic) is absolutely true."[4] Feb. 17, 2009 Alexander Declaration at 16-17; see also id. at Exhibit D. Further, the NSA reports:

> it appears there was never a complete understanding among the key personnel who reviewed the report for the SIGINT Directorate and the Office of General Counsel regarding what each individual meant by the terminology used in the report. Once this initial misunderstanding occurred, the alert list description was never corrected since neither the SIGINT Directorate nor the Office of General Counsel realized there was a misunderstanding. As a result, NSA never revisited the description of the alert list that was included in the original report to the Court.

Feb. 17, 2009 Alexander Declaration at 18. Finally, the NSA reports that "from a technical standpoint, there was no single person who had a complete technical understanding of the BR FISA system architecture. This probably also contributed to the inaccurate description of the alert list that NSA included in its BR FISA reports to the Court." Id. at 19.

Regardless of what factors contributed to making these misrepresentations, the Court finds that the government's failure to ensure that responsible officials adequately understood the NSA's alert list process, and to accurately report its implementation to the Court, has prevented,

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[4]The Court notes that at a hearing held on August 18, 2006, concerning the government's first renewal application (BR 06-08), the NSA's affiant testified as follows:

THE COURT: All right. Now additionally, you have cause to be – well at least I received it yesterday – the first report following the May 24 order, which is a 90-day report, [redacted] and some 18 pages and I've reviewed that and you affirm that that's the best report or true and accurate to the best of your knowledge and belief.

[redacted] I do, sir.

Transcript of Proceedings before the Hon. Malcolm J. Howard, U.S. FISC Judge, Docket No. BR 06-08, Aug. 18, 2006, at 12.

for more than two years, both the government and the FISC from taking steps to remedy daily violations of the minimization procedures set forth in FISC orders and designed to protect call detail records pertaining to telephone communications of U.S. persons located within the United States who are not the subject of any FBI investigation and whose call detail information could not otherwise have been legally captured in bulk.

C. Other Non-Compliance Matters

Unfortunately, the universe of compliance matters that have arisen under the Court's Orders for this business records collection extends beyond the events described above. On October 17, 2008, the government reported to the FISC that, after the FISC authorized the NSA to increase the number of analysts authorized to access the BR metadata to 85, the NSA trained those newly authorized analysts on Court-ordered procedures. Sixty-Day Report for Filing in Docket Number BR 08-08, filed Oct. 17, 2008 at 7. Despite this training, however, the NSA subsequently determined that 31 NSA analysts had queried the BR metadata during a five day period in April 2008 "without being aware they were doing so." Id. (emphasis added). As a result, the NSA analysts used 2,373 foreign telephone identifiers to query the BR metadata without first determining that the reasonable articulable suspicion standard had been satisfied. Id.

Upon discovering this problem, the NSA undertook a number of remedial measures, including suspending the 31 analysts' access pending additional training, and modifying the NSA's tool for accessing the data so that analysts were required specifically to enable access to

the BR metadata and acknowledge such access. Id. at 8. Despite taking these corrective steps, on December 11, 2008, the government informed the FISC that one analyst had failed to install the modified access tool and, as a result, inadvertently queried the data using five identifiers for which NSA had not determined that the reasonable articulable suspicion standard was satisfied. Preliminary Notice of Compliance Incident, Docket no. BR 08-08, filed Dec. 11, 2008 at 2; see also Notice of Compliance Incident Involving Docket Number BR 08-08, filed Jan. 22, 2009. Then, on January 26, 2009, the government informed the Court that, from approximately December 10, 2008, to January 23, 2009, two NSA analysts had used 280 foreign telephone identifiers to query the BR metadata without determining that the Court's reasonable articulable suspicion standard had been satisfied. Notice of Compliance Incident, Docket No. BR 08-13, filed January 26, 2009 at 2. It appears that these queries were conducted despite full implementation of the above-referenced software modifications to the BR metadata access tool, as well as the NSA's additional training of its analysts.[5] And, as noted below with regard to the NSA's routine use of the tool from May 2006 until February 18, 2009, the NSA continues to uncover examples of systemic noncompliance.

In summary, since January 15, 2009, it has finally come to light that the FISC's authorizations of this vast collection program have been premised on a flawed depiction of how

[5]On October 17, 2008, the government reported that all but four analysts who no longer required access to the BR metadata had completed the additional training and were provided access to the data. Sixty-Day Report for Filing in Docket Number BR 08-08, filed Oct. 17, 2008 at 8 n.6.

the NSA uses BR metadata. This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systemically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.

D. Reassessment of BR Metadata Authorization

In light of the foregoing, the Court returns to fundamental principles underlying its authorizations. In order to compel the production of tangible things to the government, the Court must find that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment. 50 U.S.C. § 1861.

The government's applications have all acknowledged that, of the of call detail records NSA receives per day (currently over per day), the vast majority of individual records that are being sought pertain neither t[redacted]. See, e.g., BR 08-13, Application at 19-20. In other words,

nearly all of the call detail records collected pertain to communications of non-U.S. persons who are not the subject of an FBI investigation to obtain foreign intelligence information, are communications of U.S. persons who are not the subject of an FBI investigation to protect against international terrorism or clandestine intelligence activities, and are data that otherwise could not be legally captured in bulk by the government. Ordinarily, this alone would provide sufficient grounds for a FISC judge to deny the application.

Nevertheless, the FISC has authorized the bulk collection of call detail records in this case based upon: (1) the government's explanation, under oath, of how the collection of and access to such data are necessary to analytical methods that are vital to the national security of the United States; and (2) minimization procedures that carefully restrict access to the BR metadata and include specific oversight requirements. Given the Executive Branch's responsibility for and expertise in determining how best to protect our national security, and in light of the scale of this bulk collection program, the Court must rely heavily on the government to monitor this program to ensure that it continues to be justified, in the view of those responsible for our national security, and that it is being implemented in a manner that protects the privacy interests of U.S. persons as required by applicable minimization procedures. To approve such a program, the Court must have every confidence that the government is doing its utmost to ensure that those responsible for implementation fully comply with the Court's orders. The Court no longer has such confidence.

With regard to the value of the BR metadata program, the government points to the 275 reports that the NSA has provided to the FBI identifying 2,549 telephone identifiers associated with the targets. Feb. 17, 2009 Alexander Declaration at 42. The government's submission also cites three examples in which the FBI opened three new preliminary investigations of persons in the U.S. based on tips from the BR metadata program. Id., FBI Feedback on Report, Exhibit J. However, the mere commencement of a preliminary investigation, by itself, does not seem particularly significant. Of course, if such an investigation led to the identification of a previously unknown terrorist operative in the United States, the Court appreciates that it would be of immense value to the government. In any event, this program has been ongoing for nearly three years. The time has come for the government to describe to the Court how, based on the information collected and analyzed during that time, the value of the program to the nation's security justifies the continued collection and retention of massive quantities of U.S. person information.

Turning to the government's implementation of the Court-ordered minimization procedures and oversight regime, the Court takes note of the remedial measures being undertaken by the government as described in its recent filings. In particular, the Court welcomes the Director of the NSA's decision to order "end-to-end system engineering and process reviews (technical and operational) of NSA's handling" of BR metadata. Feb. 17, 2009 Alexander Declaration at 21. However, the Court is very disturbed to learn that this ongoing exercise has identified additional violations of the Court's orders, including the routine accessing of BR

metadata from May 2006 to February 18, 2009, through another NSA analytical tool known as [redacted] using telephone identifiers that had not been determined to meet the reasonable articulable suspicion standard. BR 08-13, Notice of Compliance Incident, filed Feb. 26, 2009 ("Feb. 26, 2009 Notice").

In its last submission, the government describes technical measures implemented on February 20, 2009, designed to prevent any recurrences of the particular forms of non-compliance uncovered to date. This "technical safeguard" is intended to prevent "any automated process or subroutine," such as [redacted] "from accessing the BR FISA data," and to prevent "analysts from performing manual chaining[6] on numbers that have not been marked as RAS approved." See Supplemental Declaration of Lieutenant General Keith B. Alexander, United States Army, Director of NSA, filed Feb. 26, 2009 ("Feb. 26, 2009 Alexander Declaration") at 7 & n.2. On the strength of these measures, the government submits that "the Court need not take any further remedial action." Feb. 26, 2009 Notice at 6. After considering these measures in the context of the historical record of non-compliance and in view of the Court's authority and responsibility to "determine [and] enforce compliance" with Court orders and Court-approved procedures, 50 U.S.C. § 1803(i), the Court has concluded that further action is, in fact, necessary.

The record before the Court strongly suggests that, from the inception of this FISA BR

[6] In context, "chaining" appears to refer to the form of querying the BR metadata known as "contact chaining." See [redacted] Declaration at 6.

program, the NSA's data accessing technologies and practices were never adequately designed to comply with the governing minimization procedures. From inception, the NSA employed two separate automated processes – the daily alert list and the [redacted] tool – that routinely involved queries based on telephone identifiers that were not RAS-approved. See supra pp. 4-6, 13-14. As for manual queries, the minimization procedures required analysts to use RAS-approved identifiers whenever they accessed BR metadata, yet thousands of violations resulted from the use of identifiers that had not been RAS-approved by analysts who were not even aware that they were accessing BR metadata. See supra pp. 9-10.

Moreover, it appears that the NSA – or at least those persons within the NSA with knowledge of the governing minimization procedures – are still in the process of determining how the NSA's own systems and personnel interact with the BR metadata. Under these circumstances, no one inside or outside of the NSA can represent with adequate certainty whether the NSA is complying with those procedures. In fact, the government acknowledges that, as of August 2006, "there was no single person who had a complete understanding of the BR FISA system architecture." Feb. 17, 2009 Alexander Declaration at 19. This situation evidently had not been remedied as of February 18, 2009, when "NSA personnel determined," only as a result of the "end-to-end review of NSA's technical infrastructure" ordered by the Director of the NSA on January 15, 2009, that the [redacted] tool accessed the BR metadata on the basis of telephone identifiers that had not been RAS-approved. Feb. 26, 2009 Alexander Declaration at 2-3.

This end-to-end review has not been completed. Id. at 10. Nonetheless, the government submits that the technical safeguards implemented on February 20, 2009 "should prevent recurrences" of the identified forms of non-compliance, id. at 9 (emphasis added), and "expect[s] that any further problems NSA personnel may identify with the infrastructure will be historical," rather than current, id. at 10 (emphasis added). However, until this end-to-end review has been completed, the Court sees little reason to believe that the most recent discovery of a systemic, ongoing violation – on February 18, 2009 – will be the last. Nor does the Court share the government's optimism that technical safeguards implemented to respond to one set of problems will fortuitously be effective against additional problems identified in the future.

Moreover, even with regard to the particular forms of non-compliance that have been identified, there is reason to question whether the newly implemented safeguards will be effective. For example, as discussed above, the NSA reported on October 17, 2008, that it had deployed software modifications that would require analysts to specifically enable access to BR metadata when performing manual queries, but these modifications did not prevent hundreds of additional violations by analysts who inadvertently accessed BR metadata through queries using telephone identifiers that had not been RAS-approved. See supra pp. 9-10; Feb. 26, 2009 Alexander Declaration at 4. The Court additionally notes that, in a matter before another judge of the FISC, [redacted] the mere existence of software solutions was not sufficient to ensure their efficacy:

- "NSA's representations to the Court in the August 27, 2008, hearing did not explicitly account for the possibility that system configuration errors (such as those discussed in the government's response to question 10 below) might render NSA's overcollection filters ineffective, which was the root cause for some of the non-compliance incidents." Government's Response to the Court's Order of January 16, 2009, answer no. 8 at 13.
- "Troubleshooting has since revealed that a software patch that might have prevented the [compliance incident] was not present on the recently deployed selection system." Id., answer no. 10 at 14.
- "NSA further determined [in January 2009] that the overcollection filter had not been functioning since this site was activated on July 30, 2008." Id.

In light of what appear to be systemic problems, this Court cannot accept the mere introduction of technological remedies as a demonstration that a problem is solved. More is required. Thus, notwithstanding the remedial measures undertaken by the government, the Court believes that more is needed to protect the privacy of U.S. person information acquired and retained pursuant to the FISC orders issued in this matter. However, given the government's repeated representations that the collection of the BR metadata is vital to national security, and in light of the Court's prior determinations that, if the program is conducted in compliance with appropriate minimization procedures, such collection conforms with 50 U.S.C. §1861, the Court concludes it would not be prudent to order that the government's acquisition of the BR metadata cease at this

time. However, except as authorized below, the Court will not permit the government to access the data collected until such time as the government is able to restore the Court's confidence that the government can and will comply with previously approved procedures for accessing such data.

Accordingly, it is HEREBY ORDERED:

1. The NSA may continue to acquire all call detail records of "telephony metadata" created by [redacted] in accordance with the orders entered in the above-captioned docket on December 12, 2008;

2. The government is hereby prohibited from accessing BR metadata acquired pursuant to FISC orders in the above-captioned docket and its predecessors for any purpose except as described herein. The data may be accessed for the purpose of ensuring data integrity and compliance with the Court's orders. Except as provided in paragraph 3, access to the BR metadata shall be limited to the team of NSA data integrity analysts described in footnote 5 of the [redacted] Declaration, and individuals directly involved in developing and testing any technological measures designed to enable the NSA to comply with previously approved procedures for accessing such data;

3. The government may request through a motion that the Court authorize querying of the BR metadata for purposes of obtaining foreign intelligence on a case-by-case basis. However, if the government determines that immediate access is necessary to protect against an imminent threat to human life, the government may access the BR metadata for such purpose. In

each such case falling under this latter category, the government shall notify the Court of the access, in writing, no later than 5:00 p.m., Eastern Time on the next business day after such access. Any submission to the Court under this paragraph shall, at a minimum, specify the telephone identifier for which access is sought or was granted, provide the factual basis for the NSA's determination that the reasonable articulable suspicion standard has been met with regard to that identifier, and, if the access has already taken place, a statement of the immediate threat necessitating such access;

4. Upon completion of the government's end-to-end system engineering and process reviews, the government shall file a report with the Court, that shall, at a minimum, include:

a. an affidavit by the Director of the FBI, and affidavits by any other official responsible for national security that the government deems appropriate, describing the value of the BR metadata to the national security of the United States and certifying that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, and that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment;

b. a description of the results of the NSA's end-to-end system engineering and process reviews, including any additional instances of non-compliance identified therefrom;

c. a full discussion of the steps taken to remedy any additional non-compliance as well as the incidents described herein, and an affidavit attesting that any technological remedies have been tested and demonstrated to be successful; and

d. the minimization and oversight procedures the government proposes to employ should the Court decide to authorize the government's resumption of regular access to the BR metadata.

IT IS SO ORDERED, this 2nd day of March, 2009.

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

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

~~TOP SECRET//COMINT//NOFORN,ORCON~~
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

March 5, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam and Messrs. Chairmen:

In accordance with the Attorney General's obligation, pursuant to Sections 1846 and 1862 of the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA"), 50 U.S.C. § 1801, *et. seq.*, to keep your committees fully informed concerning all uses of pen registers and trap and trace devices, and all requests for the production of tangible things, we are submitting herewith certain documents related to the government's use of such authorities. The documents contain redactions necessary to protect the national security of the United States, including the protection of sensitive sources and methods.

The enclosed documents are highly classified. Accordingly, while four copies are being provided for review by Members and appropriately cleared staff from each of the four Committees, all copies are being delivered to the Intelligence Committees for appropriate storage.

~~TOP SECRET//COMINT//NOFORN,ORCON~~
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member
Senate Committee on the Judiciary

The Honorable Christopher S. Bond
Vice Chairman
Senate Select Committee on Intelligence

The Honorable Lamar S. Smith
Ranking Minority Member
House Committee on the Judiciary

The Honorable Peter Hoekstra
Ranking Minority Member
House Permanent Select Committee on Intelligence

The Honorable Colleen Kollar-Kotelly
Presiding Judge
United States Foreign Intelligence Surveillance Court

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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 06-05

ORDER

An application having been made by the Director of the Federal Bureau of Investigation (FBI) for an order pursuant to the Foreign Intelligence Surveillance Act of 1978 (the Act), Title 50, United States Code (U.S.C.), § 1861, as amended, requiring the production to the National Security Agency (NSA) of the tangible things described below, and full consideration having been given to the matters set forth therein, the Court finds that:

[redacted]

1. The Director of the FBI is authorized to make an application for an order requiring the production of any tangible things for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism, provided that such investigation of a United States person is not conducted solely on the basis of activities protect by the First Amendment to the Constitution of the United States. [50 U.S.C. § 1861(c)(1)]

2. The tangible things to be produced are all call-detail records or "telephony metadata" created by [redacted] Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, communications device identifier, etc:), trunk identifier, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer.[1] [50 U.S.C. § 1861(c)(2)(A)]

[1] The Court understands that the vast majority of the call-detail records provided are expected to concern communications that are (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls.

3. There are reasonable grounds to believe that the tangible things sought are relevant to authorized investigations (other than threat assessments) being conducted by the FBI under guidelines approved by the Attorney General under Executive Order 12,333 to protect against international terrorism, which investigations are not being conducted solely upon the basis of activities protected by the First Amendment to the Constitution of the United States. [50 U.S.C. § 1861(c)(1)]

4. The tangible things sought could be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things. [50 U.S.C. § 1861(c)(2)(D)]

WHEREFORE, the Court finds that the application of the United States to obtain the tangible things, as described in the application, satisfies the requirements of the Act and, therefore,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the application is GRANTED, and it is

FURTHER ORDERED, as follows:

(1) To the extent practicable, the Custodians of Records of [redacted] shall produce to NSA an electronic copy upon service of the appropriate secondary order, and continue production on an ongoing daily basis thereafter for the duration of this order, unless otherwise ordered by the Court, of the following tangible things: all call-detail records or "telephony metadata" created by such companies as described above;

(2) NSA shall compensate [redacted] for reasonable expenses incurred in providing such tangible things;

(3) With respect to any information the FBI receives as a result of this Order (information that is passed or "tipped" to it by NSA[2]), the FBI shall follow as minimization procedures the procedures set forth in The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (October 31, 2003).

(4) With respect to the information that NSA receives as a result of this Order, NSA shall adhere to the following procedures:

[2] The Court understands that NSA expects that it will provide on average approximately two telephone numbers per day to the FBI.

A. The Director of NSA shall establish mandatory procedures strictly to control access to and use of the archived data collected pursuant to this Order. Any search or analysis of the data archive shall occur only after a particular known telephone number has been associated with [redacted] More specifically, access to the archived data shall occur only when NSA has identified a known telephone number for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [redacted]; provided, however, that a telephone number believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution.

B. The metadata shall be stored and processed on a secure private network that NSA exclusively will operate.

C. Access to the metadata archive shall be accomplished through a software interface that will limit access to this data to authorized analysts. NSA's OGC

shall monitor the designation of individuals with access to the archive. Access to the archive shall be controlled by user name and password. When the metadata archive is accessed, the user's login, IP address, date and time, and retrieval request shall be automatically logged for auditing capability. NSA's Office of General Counsel (OGC) shall monitor the functioning of this automatic logging capability. Analysts shall be briefed by NSA's OGC concerning the authorization granted by this Order and the limited circumstances in which queries to the archive are permitted, as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of the archived data. In addition, NSA's OGC shall review and approve proposed queries of archived metadata based on seed accounts numbers reasonably believed to be used by U.S. persons.

D. Although the data collected under this Order will necessarily be broad, the use of that information for analysis shall be strictly tailored to identifying terrorist communications and shall occur solely according to the procedures described in the application, including the minimization procedures designed to protect U.S. person information. Specifically, dissemination of U.S. person information shall follow the standard NSA minimization procedures found in the

Attorney General-approved guidelines (U.S. Signals Intelligence Directive 18). Before information identifying a U.S. person may be disseminated outside of NSA, a judgment must be made that the identity of the U.S. person is necessary to understand the foreign intelligence information or to assess its importance. Prior to the dissemination of any U.S. person identifying information, the Chief of Information Sharing Services in the Signals Intelligence Directorate must determine that the information identifying the U.S. person is in fact related to counterterrorism information and that it is necessary to understand the counterterrorism information or assess its importance. A record shall be made of every such determination.

E. Internal management control shall be maintained by requiring that queries of the archived data be approved by one of seven persons: the Signals Intelligence Directorate Program Manager for Counterterrorism Special Projects, the Chief or Deputy Chief, Counterterrorism Advanced Analysis Division; or one of the four specially authorized Counterterrorism Advanced Analysis Shift Coordinators in the Analysis and Production Directorate of the Signals Intelligence Directorate.

In addition, at least every ninety days, the Department of Justice shall review a sample of NSA's justifications for querying the archived data.

F. The metadata collected under this Order may be kept online (that is, accessible for queries by cleared analysts) for five years, at which time it shall be destroyed.

G. The Signals Intelligence Directorate Program Manager for Counterterrorism Special Projects; Chief and Deputy Chief, Counterterrorism Advanced Analysis Division; and Counterterrorism Advanced Analysis Shift Coordinators shall establish appropriate management controls (e.g., records of all tasking decisions, audit and review procedures) for access to the archived data and shall use the Attorney General-approved guidelines (USSID 18) to minimize the information reported concerning U.S. persons.

H. The NSA Inspector General, the NSA General Counsel, and the Signals Intelligence Directorate Oversight and Compliance Office shall periodically review this program. The Inspector General and the General Counsel shall submit a report to the Director of NSA 45 days after the initiation of the activity assessing the adequacy of the management controls for the processing and

dissemination of U.S. person information. The Director of NSA shall provide the findings of that report to the Attorney General.

I. Any application to renew or reinstate the authority granted herein shall include a report describing (i) the queries that have been made since this Order was granted; (ii) the manner in which NSA applied the procedures set forth in subparagraph A above, and (iii) any proposed changes in the way in which the call-detail records would be received from the carriers.

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J. At least twice every 90 days, NSA's OGC shall conduct random spot checks, consisting of an examination of a sample of call-detail records obtained, to ensure that NSA is receiving only data as authorized by the Court and not receiving the substantive content of communications.

Signed 05-24-06P12:19 Eastern Time
Date Time

This authorization regarding a [redacted] in the United States and Abroad expires on the 18 day of August, 2006, at 5:00 p.m., Eastern Time.

MALCOLM J. HOWARD
Judge, United States Foreign
Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

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

DOCKET NO. BR 09-06

ORDER

On May 29, 2009, this Court issued a Supplemental Order [redacted] that addressed several issues. Among other things, the May 29 Supplemental Order noted the government's recent disclosure that the unminimized results of authorized queries o[redacted] metadata collected by the National Security Agency (NSA) pursuant to the Court's order in [redacted] and prior FISC orders [redacted] had been shared with NSA analysts other than the limited number of analysts authorized to access such metadata. May 29 Supplemental Order at 1-2. Such sharing had not previously been disclosed to the Court. Id. at 2. The May 29 Supplemental Order also noted the government's disclosure of an inaccuracy regarding the number of [redacted] reports described in paragraph 14 of the declaration attached as Exhibit A to the application in [redacted]

The Court directed the government to submit, within 20 days, a declaration correcting the inaccuracy regarding the number of reports and to provide a complete and "updated description of NSA's dissemination practices." May 29 Supplemental Order at 3-4. [redacted]

[redacted]

[redacted]

On June 18, 2009, the United States submitted the Government's Response to the Court's Supplemental Order Entered on May 29, 2009, [redacted]

[redacted]

Unfortunately, the government's responses to the Court's May 29 Supplemental Order also raise two additional compliance issues, [redacted] but also its orders in the [redacted] bulk business records collection, which was last renewed by the Court in Docket No. BR 09-06.

[redacted]

[redacted]

Second, the government referred in its June 18 submissions to a dissemination-related problem that was first brought to the Court's attention in a "preliminary notice of compliance incident filed with the Court on June 16, 2009." June 18 [redacted] Declaration at 3 n.1. In the June 16 notice – and in a separate notice filed contemporaneously in Docket No. BR 09-06 – the government informed the Court that the unminimized results of some queries of metadata [redacted] had been "uploaded [by NSA] into a database to which other intelligence agencies . . . had access." [redacted] Preliminary Notice of Compliance Incident filed June 16, 2009, in Docket No. BR 09-06 at 2. Providing such access, the government explained, may have resulted in the dissemination of U.S. person information in violation of USSID 18 and the more restrictive restrictions on dissemination proposed by the government and adopted by the Court in its current and prior orders in both of the above-captioned matters. [redacted]

[redacted]; Preliminary Notice of Compliance Incident filed June 16, 2009, in Docket No. BR 09-06 at 2. [redacted] The government asserts that NSA terminated access by outside agencies to the database at issue on June 12, 2009, and that it is still investigating the matter. Preliminary Notice of Compliance Incident filed June 16, 2009, in Docket No. BR 09-06 at 2; [redacted]

[redacted] The Court is also seriously concerned regarding NSA's placement of

unminimized metadata [redacted] into databases accessible by outside agencies, which, as the government has acknowledged, violates not only the Court's orders, but also NSA's minimization and dissemination procedures set forth in USSID 18.

Accordingly, it is hereby ORDERED that:

1. [redacted]

2. With regard to [redacted] BR 09-06, the government shall, by 5:00 p.m. each Friday, commencing on July 3, 2009,[2] file with the Court a report listing each instance during the seven-day period ending the previous Friday in which NSA has shared, in any form, information obtained or derived from the [redacted] BR metadata collections with anyone outside NSA. For each such instance, the government shall specify the date on which the information was shared, the recipient of the information, and the form in which the information was communicated (e.g., written report, email, oral communication, etc.). For each such instance in which U.S. person information has been shared, the Chief of Information Sharing of NSA's Signals Intelligence Directorate shall certify that such official determined, prior to dissemination, the information to be related to counterterrorism information and necessary to understand the counterterrorism information or to assess its importance;

3. With regard to [redacted] BR 09-06, the government shall

[2] If Friday is a holiday, the report shall be submitted on the next business day.

include, in its submissions regarding the results of the end-to-end reviews, a full explanation of why the government has permitted the dissemination outside NSA of U.S. person information without regard to whether such dissemination complied with the clear and acknowledged requirements for sharing U.S. person information derived from the metadata collected pursuant to the Court's orders.

IT IS SO ORDERED this 22nd day of June, 2009.

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

[redacted]

~~TOP SECRET//COMINT//NOFORN~~

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

2009 AUG 17 PM 4:15

CLERK OF COURT

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

Docket Number: BR 09-09

REPORT OF THE UNITED STATES (U)

The United States of America, by and through the undersigned Department of Justice attorneys, respectfully submits this report and supporting documents in response to the Court's Primary Order dated July 9, 2009, and similar predecessor Orders. ~~(TS//SI//NF)~~

The National Security Agency (NSA) has completed an end-to-end review of its handling of call detail records produced pursuant to the Orders. The review began earlier this year after the discovery that NSA had not handled the records in the manner authorized by the Court, and it

~~TOP SECRET//COMINT//NOFORN~~

Classified by: David S. Kris, Assistant Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 17 August 2034

has identified several serious instances of non-compliance. Although NSA successfully implemented many of the Orders' requirements, in several instances it treated records collected pursuant to the Orders in the manner it treats information collected under other NSA collections, without the necessary regard for the unique nature and requirements of this Court-ordered collection. ~~(TS//SI//NF)~~

NSA has since remedied these instances of non-compliance, primarily through a series of technological fixes and improved training. It has implemented the new oversight procedures set forth in the Orders and self-imposed by NSA, and proposes to implement additional procedures in the event that the Court authorizes NSA to query the records using telephone identifiers that NSA has determined meet the reasonable, articulable suspicion standard. This report, the supporting declarations of the Directors of NSA (Exhibits A and B) and Federal Bureau of Investigation (FBI) (Exhibit C), and the attached NSA report (Exhibit D) (the "End-to-End Report") aim to provide the Court with assurance that NSA has addressed and corrected the instances of non-compliance and is taking the additional steps described herein to monitor and ensure compliance with the Court's Orders going forward. The documents describe the results of NSA's end-to-end review, the remedies for instances of non-compliance, the testing of technological remedies, and additional procedures employed and proposed to be employed. They also explain how valuable the collection and analysis of the records is to the national security. Based on these findings and actions, the Government anticipates that it will request in the Application seeking renewal of docket number BR 09-09 authority that NSA, including certain NSA analysts who obtain appropriate approval, be permitted to resume non-automated querying of the call detail records using selectors approved by NSA. ~~(TS//SI//NF)~~

I. BACKGROUND (U)

In docket number BR 06-05 and each subsequent authorization, including docket number BR 09-09, the Government sought, and the Court authorized NSA, pursuant to the Foreign Intelligence Surveillance Act's (FISA) tangible things provision, 50 U.S.C. § 1861 et seq., to collect in bulk and on an ongoing basis certain call detail records or "telephony metadata."[1] The Government will refer herein to call detail records collected pursuant to the Court's authorizations in this matter as "BR metadata." NSA analyzes the BR metadata, using contact chaining [redacted] to find and identify known and unknown members or agents of [redacted] ~~(TS//SI//NF)~~

The Orders direct the Government to treat the BR metadata in accordance with minimization procedures adopted by the Attorney General. Among these minimization procedures in docket number BR 06-05 was the following:

> Any search or analysis of the data archive shall occur only after a particular known telephone number has been associated with [redacted]. More specifically, access to the archived data shall occur only when NSA has identified a known telephone number for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a

[1] "Call detail records," or "telephony metadata," include comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) numbers, International Mobile station Equipment Identity (IMEI) numbers, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. A "trunk" is a communication line between two switching systems. *Newton's Telecom Dictionary* 951 (24th ed. 2008). Metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer. ~~(TS)~~

[2] The Primary Order in docket number BR 06-05 authorized NSA to query the BR metadata using telephone identifiers associated with [redacted]. Later authorizations expanded the telephone identifiers that NSA could use for queries to those associated with [redacted], see docket number BR 06-05 (motion to amend granted in August 2006), and, later, the [redacted], see docket number BR 07-10 (motion to amend granted in June 2007). The Court's authorization in docket number BR 09-09 approved querying related to [redacted]. See Primary Order, docket number BR 09-09, at 5-7. ~~(TS//SI//NF)~~

> reasonable, articulable suspicion that the telephone number is associated with [redacted] provided, however, that a telephone number believed to be used by a U.S. person shall not be regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the Constitution.

Order, docket number BR 06-05, at 5 (emphasis added). For purposes of querying the BR metadata, all subsequent Orders in this matter required the Government to comply with the same standard of reasonable, articulable suspicion.[3] See, e.g., Primary Order, docket number BR 09-09, at 5-7. As authorized by the Orders in docket numbers BR 06-05 through BR 08-13, NSA determined which telephone identifiers met the RAS standard and, therefore, could be used to query the BR metadata. In addition, the Orders contained minimization procedures that governed other aspects of the use, retention, and dissemination of BR metadata. ~~(TS//SI//NF)~~

Beginning in mid-January 2009, the Government notified the Court of instances of non-compliance with the Court-ordered minimization procedures in this matter. The first written notice, filed on January 15, 2009, reported that, through an automated "alert list" process, NSA had conducted automated queries of the BR metadata using non-RAS-approved telephone identifiers. NSA shut down this automated alert list process entirely on January 24, 2009, and the process remains shut down. ~~(TS//SI//NF)~~

By Order dated January 28, 2009, the Court ordered the Government to file a written brief concerning the alert list process. In response to this Order, the Director of NSA ordered that NSA complete an end-to-end system engineering and process review of its handling of the BR metadata. On February 26, 2009, after it filed its brief, the Government provided written notice to the Court of additional non-compliance incidents. These incidents were identified as a

[3] In this memorandum the Government will refer to this standard as the "RAS standard" and telephone identifiers that satisfy the standard as "RAS-approved." ~~(S)~~

result of the end-to-end review and, like the alert list process, also concerned queries of the BR metadata using telephone identifiers that were not RAS-approved at the time of the queries. ~~(TS//SI//NF)~~

On March 2, 2009, the Court issued an Order that required NSA to seek Court approval to query the BR metadata on a case-by-case basis, except where necessary to protect against an imminent threat to human life. The Court further ordered that:

> Upon completion of the government's end-to-end system engineering and process reviews, the government shall file a report with the Court, that shall, at a minimum, include:
>
> a. an affidavit by the Director of the FBI, and affidavits by any other official responsible for national security that the government deems appropriate, describing the value of the BR metadata to the national security of the United States and certifying that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, and that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment;
>
> b. a description of the results of the NSA's end-to-end system engineering and process reviews, including any additional instances of non-compliance identified therefrom;
>
> c. a full discussion of the steps taken to remedy any additional non-compliance as well as the incidents described herein, and an affidavit attesting that any technological remedies have been tested and demonstrated to be successful; and
>
> d. the minimization and oversight procedures the government proposes to employ should the Court decide to authorize the government's resumption of regular access to the BR metadata.

The Court's Primary Orders in docket numbers BR 09-01, BR 09-06, and BR 09-09 contain these same reporting requirements. ~~(TS//SI//NF)~~

Subsequent Orders have required that the Government's report include additional information regarding certain instances of non-compliance and/or other matters. These further reporting requirements are summarized in the Primary Order in docket number BR 09-09:

- a full explanation of why the government has permitted dissemination outside NSA of U.S. person information in violation of the Court's Orders in this matter;
- a full explanation of the extent to which NSA has acquired call detail records of foreign-to-foreign communications from [redacted] pursuant to orders of the FISC, and whether the NSA's storage, handling, and dissemination of information in those records, or derived therefrom, complied with the Court's orders; and
- either (i) a certification that any overproduced information, as described in footnote 11 of the government's application [i.e., credit card information], has been destroyed, and that any such information acquired pursuant to this Order is being destroyed upon recognition; or (ii) a full explanation as to why it is not possible or otherwise feasible to destroy such information.

~~(TS//SI//NF)~~

II. VALUE TO THE NATIONAL SECURITY (U)

Analysis of the BR metadata addresses a critical, threshold issue for the Government's efforts to detect and prevent terrorist acts affecting the national security of the United States: identifying the terrorists and their associates. Ex. B at 4-5, 15; Ex. C at 4, 19. The [redacted] analysis of the BR metadata – contact chaining [redacted] – share this purpose. Contact chaining analysis identifies which telephone identifiers have been in contact with a telephone identifier reasonably suspected to be associated with a terrorist. Ex. B at 5-7. [redacted] ~~(TS//SI//NF)~~

Because the BR metadata is a collection of historical telephony metadata, NSA analysts are able to look back in time to identify not only recent contacts and patterns, but those in the

past. Id. at 6. By the time the Government associates a telephone identifier with a terrorist, the terrorist who was using it may have moved on to a new one. The historical nature of the BR metadata, however, allows for the identification of past contacts [redacted]. It, therefore, increases the likelihood of identifying previously unknown associates and telephone identifiers. Id. at 6. ~~(TS//SI//NF)~~

The BR metadata provides information on the activities of terrorists and their associates that is not available from other sources of telephony metadata. Collections pursuant to Title I of FISA, for example, do not provide NSA with information sufficient to perform multi-tiered contact chaining [redacted]. Id. at 8. NSA's signals intelligence (SIGINT) collection, because it focuses strictly on the foreign end of communications, provides only limited information to identify possible terrorist connections emanating from within the United States. Id. For telephone calls, signaling information includes the number being called (which is necessary to complete the call) and often does not include the number from which the call is made. Id. at 8-9. Calls originating inside the United States and collected overseas, therefore, often do not identify the caller's telephone number. Id. Without this information, NSA analysts cannot identify U.S. telephone numbers or, more generally, even determine that calls originated inside the United States. Id. ~~(TS//SI//NF)~~

The BR metadata helps fill these foreign intelligence gaps. Unlike information NSA acquires during its traditional SIGINT operations outside the United States, the BR metadata identifies the telephone identifiers of the person placing a telephone call from within the United States. Id. at 9. It also identifies the U.S. telephone identifiers of persons receiving a call from a foreign terrorist. NSA thus is able to provide the FBI with information about contacts between a

U.S. telephone identifier and a foreign terrorist, thereby alerting it to possible terrorist-related activity within the United States. Id. at 9-10. ~~(TS//SI//NF)~~

According to NSA, not having this information can have grave consequences. As an illustration, prior to the September 11, 2001, attacks, NSA intercepted and transcribed seven calls made by hijacker Khalid al-Mihdhar, then living in San Diego, California, to a telephone identifier associated with an al Qaeda safe house in Yemen. Id. NSA intercepted these calls through its overseas SIGINT collection and, as noted above for telephone calls originating within the United States, the calling party identifier was not included in the signaling information. Id. Because they lacked the U.S. telephone identifier and had nothing in the content of the calls to suggest that al-Mihdhar was inside the United States, NSA analysts mistakenly concluded that al-Mihdhar remained overseas when, in fact, he was in San Diego. Id. The BR metadata, by contrast, would have included the missing information and might have permitted NSA analysts to place al-Mihdhar within the United States prior to the attacks and tip that information to the FBI.[4] Id. ~~(TS//SI//NF)~~

NSA acts on and otherwise makes use of the results of its BR metadata queries. Id. at 3. Where appropriate, it provides those results to other U.S. Government and foreign government agencies. From May 2006 (when the Court issued the first Orders in this matter) through May 2009, NSA disseminated 277 reports containing approximately 2,900 telephone identifiers that NSA had identified through its analysis of the BR metadata. Id. at 12. ~~(TS//SI//NF)~~

The tips or leads the FBI receives are among the most important because they can act as an early warning of possible domestic terrorist activity. Ex. C at 6-7. As noted above, the BR

[4] The 9/11 Commission Report alluded to the failure to share information regarding a facility associated with an al Qaeda safehouse in Yemen and contact with one of the 9/11 hijackers (al Mihdhar) in San Diego, California, as an important reason the Intelligence Community did not detect al Qaeda's planning for the 9/11 attack. See "The 9/11 Commission Report," at 269-272. (U)

metadata is unique in that it can provide more complete information about domestic telephone identifiers in contact with terrorist associates. The earlier FBI obtains information about a threat—in this case, information about a domestic contact—the more likely it will be able to protect against the threat. Id. at 6. Without BR metadata tips, the FBI might never learn about domestic contacts; with these tips, it learns about them promptly. Id. ~~(TS//SI//NF)~~

The FBI has opened predicated international terrorism investigations based, at least in part, on BR metadata tips, including twenty-seven full investigations between May 2006 and the end of 2008. Id. at 7-9. In those cases, BR metadata provided predication for opening the investigation.[5] Id. at 7. Examples are set forth in the accompanying Declaration of the FBI Director. Id. at 9-19. In other cases, BR metadata provided additional information regarding an existing investigation and advanced that investigation. Id. at 5-6. In any such case, the BR metadata was a valuable source of foreign intelligence for the FBI, assisting it in uncovering the operations of [redacted] and in thwarting terrorist activities targeting the United States, its citizens, and its interests abroad.[6] Id. at 19. ~~(TS//SI//NF)~~

III. RESULTS OF THE END-TO-END REVIEW (U)

The results of the NSA's end-to-end review are discussed in detail in the Director of NSA's Declaration (Exhibit A) and the End-to-End Report (Exhibit D). Generally, the end-to-end review focused on two major components of implementation of the BR FISA Orders—system-level technical engineering and execution within the analytical framework. The end-to-

[5] In these twenty-seven full investigations opened based on BR metadata tips, the FBI has issued forty-six intelligence information reports to U.S. government agencies and thirty-one intelligence information reports to foreign government partners. Ex. C at 9. ~~(TS//SI//NF)~~

[6] Based on the value of the BR metadata, the FBI Director has certified that the BR metadata is relevant to authorized investigations (other than threat assessments) to obtain foreign intelligence information to protect against international terrorism. See Ex. C at 19. ~~(TS//SI//NF)~~

end review revealed that there was no single cause of the identified instances of non-compliance and that there were a number of successful oversight, management, and technology processes that operated appropriately. Nonetheless, the end-to-end review uncovered additional instances of non-compliance, all of which were brought to the Court's attention shortly after their discovery during the end-to-end review.[7] The NSA concluded that these instances of non-compliance stemmed from or were exacerbated by a primary focus on analyst use of the data, the complexity of the overall BR FISA system, and a lack of shared understanding among the key stakeholders as to the full scope of the BR FISA system and the implementation of the BR FISA Orders. Each specific instance of non-compliance identified as part of the end-to-end review is briefly discussed below. The remedies for the instances of non-compliance are discussed in the following section. ~~(TS//SI//NF)~~

A. Domestic Identifiers Designated as RAS-Approved Without Review by NSA OGC ~~(TS)~~

The end-to-end review revealed that historically a significant number of domestic identifiers were added to the Station Table as RAS-approved without first undergoing the required review by NSA OGC. This happened in two distinct ways. First, identifiers reported to the Intelligence Community as having a connection with one of the Court-approved terrorist organizations before and after the BR FISA Orders were, until December 15, 2008, added to the Station Table as RAS-approved without NSA OGC review.[8] Second, NSA discovered that

[7] As a result of the end-to-end review, NSA also discovered several areas that presented a potential for non-compliance or a vulnerability in management and/or oversight controls. While these areas were not deemed compliance matters and therefore are not discussed in detail herein, the issues and the steps NSA has taken to address them are discussed in the End-to-End Report in sections II.B.1, II.B.4, and II.B.5. ~~(TS)~~

[8] This matter was identified as a potential instance of non-compliance on page 4 of Exhibit C to the Application in docket number BR 09-01 filed on March 4, 2009, and is discussed in section of II.A.4 of the End-to-End Report and on page 12 of Exhibit A. ~~(S)~~

historically errors were made when implementing the BR FISA Orders and consequently some domestic identifiers were initially RAS-approved without the required review by NSA OGC.[9]

~~(TS//SI//NF)~~

B. Data Integrity Analysts' Identification and Use of Non-User Specific Identifiers ~~(S)~~

NSA discovered during the end-to-end review that Data Integrity Analysts were, as part of their authorized access to the BR metadata, identifying identifiers not associated with specific users [redacted] and sharing those identifiers with analysts through out the NSA not authorized to access the BR metadata.[10]

~~(TS//SI//NF)~~

C. Use of Non-RAS-Approved Correlated Identifiers to Query the BR Metadata ~~(TS//SI//NF)~~

The end-to-end review revealed that management practices and NSA tools permitted analysts to query the BR metadata using a non-RAS-approved identifier if that identifier was correlated to a RAS-approved identifier.[11] [redacted] While historically NSA tools permitted queries of non-RAS-approved identifiers based on [redacted]

[9] This matter was the subject of a preliminary notice of compliance incident filed on June 29, 2009, and is discussed in section of II.B.7 of the End-to-End Report and on pages 12-13 of Exhibit A. ~~(S)~~

[10] This matter was the subject of a preliminary notice of compliance incident filed on May 8, 2009, and is discussed in section of II.B.2 of the End-to-End Report and on pages 18-20 of Exhibit A. ~~(S)~~

[11] This matter was the subject of a preliminary notice of compliance incident filed on June 15, 2009, and is discussed in section of II.B.3 of the End-to-End Report and on pages 13-15 of Exhibit A. ~~(S)~~

[redacted]

D. Improper Dissemination of the Results of BR FISA Queries ~~(TS//SI//NF)~~

As a result of the end-to-end review, it was revealed that NSA's historic, general practice as to the dissemination of U.S. person identifying information derived from BR FISA information was to apply United States Signals Intelligence Directive 18 (USSID 18) and not the more restrictive dissemination provisions of the Court's Orders.[12] In addition, NSA also uncovered two specific instances of non-compliance concerning the dissemination of BR FISA query results. First, NSA discovered that unminimized query results were available to Central Intelligence Agency (CIA), FBI, and National Counterterrorism Center (NCTC) analysts via an NSA database.[13] Second, NSA discovered that on one occasion unminimized U.S. person identifying information was improperly [redacted].[14] ~~(TS//SI//NF)~~

E. [redacted] ~~(TS//SI//NF)~~

[redacted] is the software tool interface used by analysts to manually query the BR metadata chain summaries. In connection with the end-to-end review, NSA developed a new version of [redacted] - that limits the number of hops permitted

[12] This practice was the subject of a preliminary notice of potential compliance incident filed on June 26, 2009, and specifically mentioned in the Court's Primary Order in docket number BR 09-09. This practice is mentioned in section II.B.9 of the End-to-End Report and discussed more fully on pages 36-38 of Exhibit A. ~~(S)~~

[13] This matter was the subject of a preliminary notice of compliance incident filed on June 16, 2009, and is discussed in section of II.B.8 of the End-to-End Report. A fuller explanation of this practice is set forth at pages 29-36 of Exhibit A. ~~(S)~~

[14] This matter was the subject of a preliminary notice of compliance incident filed on June 29, 2009, and is discussed in section of II.B.9 of the End-to-End Report. ~~(S)~~

from a RAS-approved telephone identifier to three, in accordance with the Court's Orders. During testing of the beta version of [redacted], NSA determined that, despite the hop restriction, a feature called [redacted] could be invoked to provide an analyst with the number of unique contacts for a third-hop identifier, a type of information that would otherwise only be revealed by a fourth hop.[15] Prior versions of [redacted] also included the [redacted] feature. ~~(TS//SI//NF)~~

IV. STEPS TAKEN TO REMEDY INSTANCES OF NON-COMPLIANCE (U)

In addition to those instances of non-compliance noted above, Exhibit A and the End-to-End Report address three instances of noncompliance noted in the Court's March 2 Order—the Telephony Activity Detection Process,[16] [redacted][17] and certain inappropriate queries by NSA analysts.[18] All of these instances of non-compliance have been remedied, and the NSA Director has attested as to the testing and functionality of the technological remedies employed by NSA. Ex. A. at 28. For purposes of discussing the remedies implemented by NSA it is helpful to divide the instances of noncompliance into two broad categories: (1) unauthorized queries via automated processes and tools; and (2) operator errors within the BR FISA analytic framework.[19] ~~(TS//SI//NF)~~

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[15] This matter was the subject of a preliminary notice of compliance incident filed on August 4, 2009, and is discussed on pages 15-17 of Exhibit A. ~~(S)~~

[16] This issue is discussed in section of II.A.1 of the End-to-End Report and on pages 5-7 of Exhibit A. ~~(S)~~

[17] This issue is discussed in section of II.A.2 of the End-to-End Report and on pages 7-9 of Exhibit A. ~~(S)~~

[18] This issue is discussed in section of II.A.3 of the End-to-End Report and on page 9 of Exhibit A. ~~(S)~~

[19] The NSA's identification and use of non-user specific identifiers is not addressed below, as that formerly non-compliant practice was specifically authorized by the Court in docket number BR 09-09. See Primary Order, docket number BR 09-09, at 12. ~~(TS)~~

A. Unauthorized Queries Via Automated Processes and Tools ~~(U//FOUO)~~

NSA has remedied the Telephony Activity Detection Process and [redacted] incidents by eliminating their ability to access the BR metadata. Ex. A. at 6-8. Specifically, NSA shut down the flow of incoming BR metadata into the Telephony Activity Detection Process on January 24, 2009. Id. at 6. Accordingly, the Telephony Activity Detection Process could no longer query the incoming BR metadata with the non-RAS-approved identifiers on the alert list. On February 20, 2009, NSA prevented the Telephony Activity Detection Process, [redacted] or any other automated processes and tools from accessing the BR metadata in its [redacted] database by removing all previously used Public Key Structure (PKI) system-level certificates that gave processes and tools access to the BR metadata.[20] Id. at 8-9. By removing these PKI system-level certificates NSA revoked all automated processes and tools' access to the BR metadata in [redacted] and, therefore, rendered the automated query processes and tools inoperable. Id. The end-to-end review concluded that apart from the Telephony Activity Detection Process's querying of incoming BR metadata, no other automated processes and tools queried BR metadata outside of [redacted] Accordingly, the removal of the PKI system-level certificates ensures that no automated processes or tools are now permitted to query the BR metadata. ~~(TS//SI//NF)~~

The Emphatic Access Restriction (EAR), discussed below, provides further protection against automated processes and tools from querying the BR metadata inappropriately. Specifically, even if [redacted] or some other tool were permitted to access the BR metadata, EAR would prevent it from doing so with anything but a RAS-approved identifier. EAR will continue to serve this function even if the Court grants NSA's request to resume querying based on its own RAS-approval authority. See id. at 28-29. ~~(TS//SI//NF)~~

[20] A PKI system-level certificate is essentially a "ticket" used by the system to recognize and authenticate that the automated capability has the authority to access the database. See Ex. A at 8. ~~(TS//SI//NF)~~

B. Operator Errors with the BR FISA Analytic Framework ~~(TS)~~

Several instances of non-compliance resulted from analysts' actions that were inconsistent with the Court's Orders rather than the functioning of a specific technological process or tool. Although some human error is inevitable in any activity, NSA has addressed each of the identified areas prone to human error with a combination of improved oversight and training, regular reports to the Court, and technological remedies. ~~(TS)~~

1. Queries with Non-RAS-Approved Identifiers ~~(S)~~

As noted in the Court's March 2 Order and uncovered during the end-to-end review, analysts used non-RAS-approved identifiers to query the BR metadata. See III.C. supra; Ex. D at II.A.3. NSA eliminated the potential for this type of analyst error from being repeated by implementation of the EAR on February 20, 2009. See Ex. A at 9, 15. ~~(TS//SI//NF)~~

The EAR is a software restrictive measure that prohibits queries to the BR metadata in [redacted] using non-RAS-approved seeds. Before a given query to the BR metadata is executed, the EAR in effect checks the RAS status of the seed for the query against the Station Table. If the seed for a given query is RAS-approved, the EAR permits the query to be run. If the seed for a given query is not RAS-approved, the EAR will not permit the query to be executed.[21] In this way, NSA has provided a technological remedy to the potential for analysts entering non-RAS-approved identifiers as query seeds, and this remedy will continue to apply should the Court permit NSA to resume non-automated querying of the BR metadata. Ex. A at 9-10. ~~(TS//SI//NF)~~

[21] The EAR does not offer the same protection to the BR metadata outside of [redacted] in the [redacted] NSA's audit of queries to the [redacted] revealed that no inappropriate queries were run by analysts against the BR metadata contained in it. In the future NSA intends to migrate the functionality of the [redacted] into [redacted] or its successor, to bring all BR metadata under the protection of the EAR. Ex. A at 9 n.5; Ex. D. at 9, 23. ~~(TS)~~

2. Queries More Than Three Hops From RAS-Approved Identifier ~~(S)~~

As noted above, the beta version of [redacted] and prior versions contained the [redacted] feature that gave analysts contacts information that normally is available only on an unauthorized fourth hop from a RAS-approved identifier. NSA corrected [redacted] to disable the [redacted] feature for last-hop identifiers. As of July 31, 2009, analysts can access the BR metadata contact chain summary repository only through use of [redacted]. All prior versions of [redacted] have been locked out from access to the BR metadata contact chain summary repository. Ex. A at 16-17. ~~(TS//SI//NF)~~

3. Improper Designation of Identifiers as RAS-Approved ~~(S)~~

As uncovered during the end-to-end review, historically NSA had included on the Station Table as RAS-approved identifiers reasonably believed to be used by U.S. persons without those identifiers being reviewed by NSA OGC. See III.A. supra. The first step to remedying this non-compliance was to change the identifiers that should have been reviewed by NSA OGC from "RAS-approved" to "not-RAS-approved." NSA did this for the identifiers designated as RAS-approved based on being reported to the Intelligence Community in early February 2009. Ex. A. at 12. NSA reports that the few identifiers improperly RAS-approved in 2006 were all identified and disapproved or properly approved in 2006 shortly after they were identified. Id. at 13. Continued training and oversight mechanisms employed by NSA are designed to ensure that these incidents will not be repeated. ~~(TS//SI//NF)~~

4. Improper Disseminations of U.S. Person Information ~~(S)~~

As uncovered during the end-to-end review, NSA disseminated BR metadata-derived U.S. person information in a manner not consistent with the Court's Orders. See III.D. supra. The mechanism that resulted in the inappropriate dissemination [redacted] was shut down in

advance of the end-to-end review, and, therefore, required no remediation. Moreover, NSA confirmed that [redacted] purged the inappropriately disseminated information from its systems and did not further disseminate it before doing so. Ex. D at 18. NSA disabled external access to the database that was the other mechanism for inappropriate disseminations on June 12, 2009. Ex. A at 33. NSA's review concluded that approximately one-third of the 250 analysts with permission to access the database between August 2005 and January 2009 actually accessed it. Id. at 34. NSA further determined that approximately forty-seven analysts queried the database in the course of their counterterrorism responsibilities and accessed directories containing the results of BR metadata queries, including un-minimized U.S. person-related information. Id. Finally, a review of NSA reports containing BR metadata with U.S. person identities indicated a significant number of dissemination were approved by an official permitted to approve such determinations pursuant to USSID 18, but not the Court's Orders, and without the appropriate determination required by the Court's Orders. Id. at 38-39.[22] ~~(TS//SI//NF)~~

As noted in section VI below, additional training and oversight, as well as the weekly reports to the Court on disseminations, should prevent similar instances of noncompliance.[23] Moreover, as noted in Exhibit A and the End-to-End Report, these and other non-compliant dissemination practices were the product of an incomplete understanding of the dissemination

[22] In docket number BR 09-09, the Court approved additional individuals to approve disseminations to include the Chief, Information Sharing Services, the Senior Operations Officer, the Signals Intelligence Directorate (SID) Director, the Deputy Director of NSA, and the Director of NSA. ~~(TS//SI//NF)~~

[23] In addition to the above practices, NSA's litigation support team conducts prudential searches in response to requests from Department of Justice or Department of Defense personnel in connection with criminal or detainee proceedings. The team does not perform queries of the BR metadata. See Ex. A at 36 n.19. The Government respectfully submits that NSA's sharing of U.S. person identifying information in this manner does not require a dissemination determination and need not be accounted for in NSA's weekly dissemination report. ~~(TS//SI//NF)~~

requirements set forth in the Court's Order, and as a result of the end-to-end review NSA personnel are now well aware of the Court-ordered dissemination requirements. ~~(TS//SI//NF)~~

V. OTHER MATTERS (U)

A. Storage, Handling and Dissemination of Foreign-to-Foreign Records ~~(TS)~~

NSA has acquired records of foreign-to-foreign communications from [redacted] With the possible exception of certain foreign-to-foreign records produced by [redacted] NSA has stored, handled and disseminated foreign-to-foreign records produced pursuant to the Orders in accordance with the terms of the Orders. See Ex. A at 39-44 [redacted] 44-46 [redacted], and 46-47 [redacted] ~~(TS//SI//NF)~~

[redacted]

[redacted]

[redacted]

NSA advised that for the first time, in May 2009, [redacted] stated it produced foreign-to-foreign records [redacted] pursuant to the Orders. [redacted] stopped its production of this set of foreign-to-foreign records on May 29, 2009, after service of the Secondary Order in BR 09-06, which carves out foreign-to-foreign records from the description of records to be produced. Id. at 42-43. ~~(TS//SI//NF)~~

[redacted] Furthermore, because the records are records of foreign-to-foreign communications, almost all of them do not concern the communications of U.S. persons. To the extent any of the records concern the communications of U.S. persons, such communications would be afforded the same protections as any other U.S. person communication [redacted] authorities. Id. at 43. ~~(TS//SI//NF)~~

[redacted]

[redacted]

B. Storage and Handling of Credit Card Information ~~(TS)~~

In the months after the issuance of Orders in docket number BR 06-05, a small percentage of records produced by [redacted] and [redacted] contained credit card numbers in one of the fields when a caller used a credit card to pay for the call. See Ex. B, docket number BR 06-08, at 6-8. At NSA's request, [redacted] and [redacted] removed credit card numbers from this field in the records they provided to NSA starting on July 10, 2006, and October 11, 2006, respectively. Ex. B, docket number BR 06-12, at 5-7. Since that time, NSA spot checks have confirmed that [redacted] and [redacted] continue to remove credit card numbers from the relevant field. Ex. A. at 48. Also since that time, NSA spot checks have identified only one record containing a credit card number. Id. That record, identified in a March 2008 spot check, contained a credit card number in a field different from the field filtered by [redacted] and [redacted]. Id. ~~(TS//SI//NF)~~

According to NSA, it is not feasible for NSA to destroy the records received before October 2006 and the one identified in March 2008 that contain credit card numbers. At this time, the records are stored in one of three locations: back-up tapes, [redacted] storage of raw records, and the [redacted][25] Destroying records stored in any of these

[25] Although NSA used the records that contain credit card numbers to make chain summaries (which in turn are stored in the chain summary database), the credit card numbers did not become part of the chain summaries and, therefore, are not stored in the chain summary database. Id. at 48 n.26. ~~(TS//SI//NF)~~

three locations requires significant personnel, time, and system resources that are not justified given the operational need for certain information and the measures to secure the records. Id. at 48-50. ~~(TS//SI//NF)~~

NSA has an operational need for the non-credit card information contained in the records. To destroy records in the [redacted] that contain credit card numbers, NSA would have to destroy a swath of records in addition to those few containing credit card numbers. Id. at 49. In the event of a catastrophic failure, NSA would rebuild the contact chaining database with records now stored on tapes. If NSA were to destroy those records that contain credit card information, either in the [redacted] or on tapes, it would lack information that is necessary for operations and that otherwise it is authorized to retain under the Orders. Id. at 48-49. ~~(TS//SI//NF)~~

Balanced against this significant operational loss is the reasonable measures currently taken by NSA to secure the records. Records contained on back-up tapes and in [redacted] raw records are not available to analysts for queries. In the [redacted], NSA masks the credit card numbers when the records are retrieved in response to an analyst query. Id. at 48-50. Masking ensures that analysts do not have access to the credit card numbers, and analysts cannot unmask the information. Id. at 48 n.26. In the future, when NSA reconstitutes the [redacted] within another system, see Ex. D at 9, the fields containing credit card information will not be included in the data transfer and will be purged. Ex. A. at 49. ~~(TS//SI//NF)~~

VI. PROCEDURES DESIGNED TO MAINTAIN ONGOING COMPLIANCE WITH THE ORDERS (U)

Beginning in docket number BR 08-13, the Government has implemented and the Court has imposed several requirements that will help ensure compliance with the Orders. Each of

these requirements is set forth in the Primary Order in docket number BR 09-09. In general, they require regular communications between NSA and the Department of Justice's National Security Division (NSD) on significant legal interpretations, compliance with the Orders, and oversight responsibilities. Primary Order, docket number BR 09-09, at 13-14. Also, by requiring the sharing of NSA's procedures for controlling access and use of the BR metadata and for training with the National Security Division, the Order gives NSD greater insight into NSA's implementation of its authorities. Id. at 8, 13. ~~(TS//SI//NF)~~

Other requirements and self-imposed "fixes," including technological fixes, specifically address the problem of unauthorized queries of the BR metadata. As noted above, NSA technological fixes prevent any automated querying of the BR metadata and any querying with non-RAS-approved identifiers. NSA also has implemented a new user interface [redacted] – that will limit the number of query hops to three, as authorized by the Orders. Ex. A at 27. Apart from these technological fixes, NSA has recently created the new position of Director of Compliance, who reports directly to the Director and Deputy Director of NSA and has full-time responsibility in this area. Id. at 28. ~~(TS//SI//NF)~~

The Order's requirements serve as an important backstop for these technological fixes. In the event that NSA seeks to implement an automated query process in the future, it must obtain the approval of both NSD and the Court. Primary Order, docket number BR 09-09, at 14. The Orders also now require that all persons accessing the data, including technical personnel, be briefed on the authorizations and restrictions in Orders regarding the BR metadata. Id. at 10. This broader training requirement is designed to prevent, among other things, the creation of processes to access the BR metadata by persons lacking a necessary understanding of the restrictions. In the event that even these safeguards fail, more explicit requirements for logging

access to the BR metadata are designed to identify the source of the non-compliance. See id. at 9-10. ~~(TS//SI//NF)~~

These requirements also provide the Court with additional information regarding NSA's implementation of the Orders. Specifically, any renewal Application must include the report on the meeting between NSA and NSD regarding compliance with the Orders. Id. at 13-14. In addition, NSA must file a report every week describing any dissemination of BR metadata and certifying whether NSA followed the Order's requirements for dissemination. Id. at 10-11. The dissemination report and the training requirement for persons receiving results of BR metadata queries also address NSA's prior non-compliance with the Order's dissemination requirements. In addition, following renewal of the authorities in Docket Number BR 09-09 and any subsequent renewal, an attorney from NSD will meet with appropriate NSA personnel to brief such personnel on the requirements of the Court's authorization. ~~(TS//SI//NF)~~

Last, in the Application that the Government intends to file for the renewal of docket number BR 09-09, it will seek authority to resume querying the BR metadata using telephone identifiers that NSA has determined meet the RAS standard. Although NSA's violations of the Orders did not concern its application of the RAS standard, the standard is the cornerstone minimization procedure that ensures the overall reasonableness of the production. It is appropriate, therefore, that in connection with the request for authority to make RAS determinations the Government proposes two additional minimization and oversight procedures concerning RAS determinations and queries. First, NSA plans to review its RAS determinations at regular intervals. Specifically, NSA will review a RAS determination at certain intervals: at least once every one hundred eighty days for U.S. telephone identifiers or any identifier believed to be used by a U.S. person; and at least every year for all other telephone identifiers. Ex. A at

25. Second, where such information is available, NSA will make analysts conducting queries aware of the time period for which a telephone identifier has been associated with [redacted] organizations, in order that the analysis and minimization of the information retrieved from the queries may be informed by that fact. Id. at 26. ~~(TS//SI//NF)~~

The Application will also include two oversight requirements similar to those included in the Order in docket number BR 08-13 and prior Orders. Specifically, twice during the ninety day period of authorization, NSD will review NSA's queries of the BR metadata, including a review of a sample of the justifications for RAS approval. Moreover, NSA will report to the Court twice during the ninety day period of authorization regarding, among other things, its queries of the BR metadata. The Court will maintain the authority to approve automated query processes upon request from the Government, once DOJ and NSA are comfortable requesting such authority from the Court. ~~(TS//SI//NF)~~

CONCLUSION (U)

The Government recognizes that no oversight regime will eliminate all risk of non-compliance. The above requirements, fixes, and proposed procedures, however, address the identified and systemic instances of non-compliance with the Orders and seek to protect against vulnerabilities with the implementation of future authorities. The Government respectfully submits that together these steps provide a solid foundation to monitor and promote continued future compliance. The Government will continue to monitor, evaluate and report to the Court on the effectiveness of the oversight and compliance regime discussed herein. ~~(TS//SI//NF)~~

Respectfully submitted,

David S. Kris
Assistant Attorney General for National Security

By: [redacted]

Office of Intelligence
National Security Division
United States Department of Justice

~~TOP SECRET//COMINT//NOFORN~~

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 09-09

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, UNITED STATES ARMY, DIRECTOR OF THE NATIONAL SECURITY AGENCY

(U) BACKGROUND

(U) I, Lieutenant General Keith B. Alexander, depose and state as follows:

(U) I am the Director of the National Security Agency ("NSA" or "Agency"), an intelligence agency within the Department of Defense ("DoD"), and have served in this position since 2005. I currently hold the rank of Lieutenant General in the United States

Army and, concurrent with my current assignment as Director of the National Security Agency, I also serve as the Chief of the Central Security Service and as the Commander of the Joint Functional Component Command for Network Warfare. Prior to my current assignment, I have held other senior supervisory positions as an officer of the United States military, to include service as the Deputy Chief of Staff (DCS, G-2), Headquarters, Department of the Army; Commander of the U.S. Army's Intelligence and Security Command; and the Director of Intelligence, United States Central Command.

(U) As the Director of the National Security Agency, I am responsible for directing and overseeing all aspects of NSA's cryptologic mission, which consists of three functions: to engage in signals intelligence ("SIGINT") activities for the U.S. government, to include support to the government's computer network attack activities; to conduct activities concerning the security of U.S. national security telecommunications and information systems; and to conduct operations security training for the U.S. government. Some of the information NSA acquires as part of its SIGINT mission is collected pursuant to Orders issued under the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA").

(U) PURPOSE AND SUMMARY

~~(TS//SI//NF)~~ This Declaration responds to the Court's Order of 2 March 2009 in docket number BR 08-13 and its subsequent orders in docket numbers BR 09-01, BR 09-06, and BR 09-09 concerning NSA's incidents of non-compliance in implementing a 24 May 2006 Order of the Court pursuant to 50 U.S.C. § 1861 (Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations), as well as subsequent renewals of the 24 May 2006 Order. NSA refers to the program in

which such records are acquired and analyzed as the "Business Records FISA Order" or as the "BR FISA."

~~(TS//SI//NF)~~ The Orders in docket numbers BR 08-13, BR 09-01, BR 09-06, and BR 09-09 direct that the government file with the Court, upon completion of NSA's end-to-end system engineering and process reviews of its handling of the BR FISA metadata, a report that includes, among other things: (1) a description of the results of NSA's end-to-end review, to include any additional instances of non-compliance identified therefrom; (2) a full discussion of the steps taken to remedy any additional non-compliance as well as those incidents described in the Court's 2 March 2009 Order in docket number BR 08-13, and an affidavit attesting that any technological remedies have been tested and demonstrated to be successful; and (3) the additional minimization and oversight procedures the government proposes to employ should the Court decide to authorize the government's resumption of regular access[1] to the BR metadata. *See, e.g.*, Primary Order, docket number BR 09-06, at 15-16. This Declaration responds to each of these requirements. Each of the matters discussed in this Declaration, with the exception of the [redacted]" matter, is discussed in greater depth in NSA's Report dated 25 June 2009 entitled "Implemention of the Foreign Intelligence

[1] ~~(TS//SI//NF)~~ The term "regular access" refers to NSA's proposed resumption of previously authorized access to the BR FISA metadata, to include automated alerting and querying of the metadata, as well as the authority to establish whether a telephony selector meets the Reasonable Articulable Suspicion ("RAS") standard for analysis. I understand that in seeking renewal of the authority granted by the Court in Docket Number BR 09-09, the government will not be seeking the resumption of "regular access" to the BR FISA metadata. Rather, the government intends to seek authority: (a) for certain designated NSA officials to approve access to the BR metadata for purposes of obtaining foreign intelligence information through contact chaining [redacted] using telephone identifiers that those officials have determined meet the RAS standard; and (b) for NSA analysts who have received appropriate training on the BR FISA metadata ("BR-cleared analysts") to be able to access the BR metadata to perform queries. Resumption of automated alerting and/or querying of the BR metadata will be sought via subsequent submissions and commence only with the approval of the Court.

Surveillance Court Authorized Business Records FISA Order – NSA Review" (hereafter "End-to-End Report"), which is attached hereto.

~~(TS//SI//NF)~~ In summary, NSA's end-to-end review compared all aspects of its handling of the BR FISA metadata with the requirements of the Orders in docket number BR 09-06 and prior docket numbers. This review identified several new issues, in addition to the issues previously reported to the Court, that are of concern to NSA. This Declaration addresses issues, including those that required some form of technical remedy or "fix," which fall into four general categories: the use of automation to assist analytic efforts in a manner not authorized; improper analyst queries of the BR metadata repository; improper access to or handling of the BR metadata; and lack of a shared understanding of the BR program. With the exception of the [redacted] issue, each of the issues addressed herein is discussed in more detail in the End-to-End Report.

~~(TS//SI//NF)~~ The Court's Primary Order in docket number BR 09-09 requires that "the government's submission regarding the results of the [BR FISA] end-to-end review" include: (1) "a full explanation of why the government has permitted dissemination outside NSA of U.S. person information in violation of the Court's Orders in this matter;" (2) "a full explanation of the extent to which NSA has acquired call detail records of foreign-to-foreign communications from [redacted] pursuant to orders of the FISC, and whether the NSA's storage, handling, and dissemination of information in those records, or derived therefrom, complied with the Court's orders;" and (3) "either (i) a certification that any overproduced information, as described in footnote 10 of the government's application, has been destroyed, and that any such information acquired pursuant to this Order is being destroyed upon recognition; or (ii) a full explanation as to

why it is not possible or otherwise feasible to destroy such information." Primary Order, docket number BR 09-09, at 16-17. This Declaration also responds to each of these requirements.

~~(TS//SI//NF)~~ The statements made in this Declaration are based upon: my personal knowledge; information provided to me by my subordinates in the course of my official duties -- in particular as a result of the end-to-end systems engineering and process reviews conducted at NSA since the filing of my declarations in this matter on 17 and 26 February 2009 in docket number BR 08-13; the advice of counsel; and conclusions reached in accordance with all of the above.

I. (U) END-TO-END REVIEW

A. (U) RESULTS, REMEDIES, AND TESTING

1. ~~(U//FOUO)~~ Use of Automation in a Manner Not Authorized

~~(TS//SI//NF)~~ **The Telephony Activity Detection (Alerting) Process**

~~(TS//SI//NF)~~ As previously reported in my declaration filed on 17 February 2009, until 24 January 2009, NSA employed an activity detection ("*alert*") process, which used an *"alert list"* consisting of counterterrorism telephony identifiers[2] to provide automated notification to signals intelligence analysts if one of their assigned foreign counterterrorism targets was in contact with a telephone identifier in the United States, or if one of their domestic targets associated with foreign counterterrorism was in contact with a foreign telephone identifier. NSA's process compared the telephony identifiers on

[2] ~~(TS//SI//NF)~~ In the context of this Declaration, the term "identifier" means a telephone number, as that term is commonly understood and used, as well as other unique identifiers associated with a particular user or telecommunications device for purposes of billing and/or routing communications, such as International Mobile Subscriber Identity (IMSI) numbers, International Mobile station Equipment Identity (IMEI) numbers, and calling card numbers.

the alert list against incoming BR FISA telephony metadata as well as against telephony metadata that NSA acquired pursuant to its Executive Order (EO) 12333 SIGINT authorities. Reports filed with the Court incorrectly stated that NSA had determined that all of the telephone identifiers it placed on the alert list were supported by facts giving rise to a reasonable, articulable suspicion (RAS) that the telephone identifier was associated with one of the targeted Foreign Powers as required by the Court's Orders, *i.e.*, RAS approved. In fact, the majority of telephone identifiers included on the alert list had not been RAS approved, although the identifiers were associated with the Foreign Powers covered by the Business Records FISA Order.

~~(TS//SI//NF)~~ The Telephony Activity Detection Process was turned off at 1:45 a.m. on Saturday, 24 January 2009. On Monday, 26 January 2009, the Telephony Activity Detection Process was restarted, but without the use of metadata obtained pursuant to the Business Records FISA Order. In other words, at present, NSA compares telephony metadata obtained pursuant to its EO 12333 SIGINT authorities against a list of telephone identifiers that are of interest to NSA's counterterrorism personnel. No BR FISA metadata is being used as an input in the Telephony Activity Detection Process.[3]

~~(TS//SI//NF)~~ The shutdown of the Telephony Activity Detection Process was done by technical experts assigned to NSA's Technology Directorate (TD) and witnessed by representatives from NSA's Signal's Intelligence Directorate (SID). A subsequent

[redacted]

demonstration to SID Oversight and Compliance on 27 January 2009, following resumption of the Telephony Activity Detection Process using telephony metadata obtained pursuant to NSA's EO 12333 SIGINT authorities, confirmed that the system was not processing any BR FISA metadata. Tests conducted at that time demonstrated that no results of "BRF" (Business Records FISA) type were contained in the system, and no internal system processes for alerting on BR FISA metadata were running on the system. A sample of alert email notifications was examined and only EO 12333 alerts were being produced. Since that time, periodic reviews conducted by NSA's Homeland Security Analysis Center (HSAC) Technical Director (at least twice per month) have confirmed that the Telephony Activity Detection Process system has continued to produce only EO 12333 alerts.

~~(U//FOUO)~~ The [redacted] Mechanism

~~(TS//SI//NF)~~ As previously reported in my declaration filed on 26 February 2009, NSA analysts working counterterrorism targets had access to a tool known as [redacted]" to assist them in determining if a telephony identifier of interest was present in NSA's EO 12333 SIGINT collection or BR FISA metadata repositories and, if so, what the level of calling activity was for that identifier. Although this tool could be used in a stand-alone manner, it was more frequently invoked by other analytic tools. On 19 February 2009, NSA confirmed that the [redacted] tool enabled analysts to query the BR FISA metadata, as well as metadata obtained from EO 12333 SIGINT collection, using telephone identifiers that had not been determined to meet the RAS standard.

~~(TS//SI//NF)~~ NSA had previously disabled certain tools designed to perform searches against BR FISA metadata in [redacted] one of the data repositories used to

store BR FISA metadata, on 6 February 2009. To prevent additional instances of non-compliance in the access to the data within the [redacted] BR FISA contact chaining repository by automated tools/processes, including [redacted] on 20 February 2009, NSA removed all existing system level Public Key Infrastructure (PKI) certificates that afforded these tools/processes access to the BR FISA metadata in [redacted].[4] A PKI system-level certificate is essentially a "ticket" used by the system to recognize and authenticate that the automated capability has the authority to access the database. As a result of the removal of system level certificates, all automated query capabilities against the [redacted] BR FISA contact chaining repository were rendered inoperable. Removal of the system level certificates was done by [redacted] technical personnel. A subsequent inspection conducted by both [redacted] technical personnel and SID's Oversight and Compliance verified that the certificates were no longer on the list of authorized BR FISA users. HSAC analysts then subsequently verified that the automated processes no longer worked following removal of the certificates.

~~(TS//SI//NF)~~ Subsequent inspection of the system logs, to include an audit of activity from 1 March – 1 June 2009, conducted by SID Oversight & Compliance, confirmed that the system level certificates were no longer able to access the BR FISA metadata in [redacted] These system logs, which document any person or process submitting queries to the [redacted] BR FISA contact chaining repository, indicated that only manual queries by individual BR-cleared analysts were performed. These logs were then used by SID Oversight & Compliance to audit each analyst's queries of the BR

[4] (S) [redacted], discussed below, exists outside of [redacted] and, therefore, was not affected by this remedy.

FISA metadata. Continued periodic review of these logs will confirm that no automated processes are gaining access to the BR FISA metadata in [redacted] until such time that a tested and Court-approved capability is brought into operation.

2. ~~(TS//SI//NF)~~ Improper Queries of the BR Metadata Repository

~~(U//FOUO)~~ Improper Analyst Queries

~~(TS//SI//NF)~~ My declaration filed on 26 February 2009 identified and discussed queries using non-RAS approved identifiers of the BR FISA metadata by analysts who did not realize their queries were reaching into the BR FISA metadata. NSA implemented a software modification (the "Emphatic Access Restriction" or "EAR") that allows chaining on only those identifiers that have been determined to satsify the RAS standard. The EAR is designed to eliminate the possibility of this problem recurring.

~~(TS//SI//NF)~~ As previously reported to the Court, three NSA analysts inadvertently performed chaining within the BR FISA metadata using non-RAS approved identifiers. To ensure compliance with the Business Record FISA Order's requirement that NSA personnel use only RAS-approved identifiers to query the BR FISA metadata, NSA made system level changes to the BR FISA [redacted] repository (Action 1) that is used by analysts to perform contact chaining [redacted] This software restrictive measure, the EAR, ensures queries are employed using only RAS-approved identifiers as seeds and prohibits queries made with non-RAS-approved identifiers as seeds against the [redacted] BR FISA contact chaining repository.[5]

[5] ~~(S)~~ [redacted], discussed below, exists outside of [redacted] and, therefore, queries to it are not vetted by the EAR.

~~(TS//SI//NF)~~ [redacted] was the software tool interface used by analysts to manually query the BR FISA chain summaries in [redacted] at the time the EAR was implemented. The EAR is written into the [redacted] middleware.[6] As a BR-cleared analyst logs into [redacted], the Authentication Service determines if the user is approved for access to the BR FISA metadata. However, before the middleware will execute the query, the EAR requires that it access a [redacted] database that contains the disposition of RAS-approved identifiers. [redacted] now obtains from HSAC, on an approximately hourly basis, the most up-to-date Station Table with the current list of RAS-approved identifiers. (The Station Table serves as NSA's definitive list of identifiers that have undergone RAS determinations.) Upon obtaining the RAS-approval status of the query "seed," the EAR determines whether to allow the middleware to conduct the query or prohibit it. Additional "hop" queries will be permitted by EAR as long as the lineage of an identifier resolves back to a RAS-approved "seed." As discussed further below, NSA began to implement [redacted] in late July 2009, which, as an additional middleware software restrictive measure, will limit the number of hops permitted from a "seed" to three, in accordance with the Court's Orders. As of 31 July 2009, access to the [redacted] BR FISA contact chaining repository can only be achieved through use of [redacted] (discussed below). All prior versions of [redacted] have been locked out from access to this data.

[6] (U) Middleware is a general term for any programming that serves to "glue together" or mediate between two separate and usually already existing programs. A common application of middleware is to allow programs written for access to a particular database to access other databases.

~~(TS//SI//NF)~~ To further mitigate the possibility of additional instances of non-compliant querying of the BR FISA material, NSA created a software interface (Action 2) that requires authorized analysts affirmatively to invoke an option (or "opt in") for access. This "opt in" measure was designed prior to the end-to-end review to ensure that analysts know when they have accessed the [redacted] BR FISA metadata repository. As an additional remedy (Action 3) and to ensure queries against the BR FISA metadata are evaluated against the most current list of RAS-approved identifiers, NSA now ensures that [redacted], the system that is used for contact chaining [redacted] against the BR FISA repository, is updated on an hourly basis with the most current list of RAS-approved identifiers from the Station Table.

~~(TS//SI//NF)~~ The software measures described in Actions 1 and 2 above were tested by [redacted] technical personnel at the component level via unit tests, a methodology used to verify that individual units of source code are working properly. Each affected software component was modified as necessary, and then specific tests were conducted to ensure the proper operation of that software component. For Action 1, the test methodology for the EAR software consisted of standard component testing. The tests included attempts to query with both approved and non-approved identifiers. Queries against approved identifiers ran successfully, while queries against non-approved identifiers failed. As the deployment of the EAR was done with urgency to remedy this compliance issue, initial testing was conducted over a period of two days. For this reason, the full test suite was re-run the week following the EAR's implementation to re-verify test results. The testing was judged to be complete and no "bugs" or deficiencies were found. For Action 2, the test included attempts to use the approved user interface

(which operated correctly) and the prohibited user interfaces (which failed). Action 3 was tested by verifying receipt of the expected update file on an hourly basis, comparing the file sizes of the file-sent and file-received, and automated production of an e-mail verifying that the status changes had been applied to the operational system. Following testing, the system was demonstrated to show correct operation to TD leadership, members of the HSAC, SID Oversight & Compliance, and NSA's Office of General Counsel (OGC). Subsequent inspection of system logs, to include an audit of activity from 1 March – 1 June 2009, conducted by SID Oversight & Compliance, provided additional verification that the system was operating correctly.

~~(TS//SI//NF) U.S. Identifiers Designated as RAS-Approved without OGC Review~~

~~(TS//SI//NF) Be~~tween 24 May 2006 and 2 February 2009, NSA Homeland Mission Coordinators (HMCs) or their predecessors concluded that approximately 3,000 domestic telephone identifiers reported to Intelligence Community agencies satisfied the RAS standard and could be used as seed identifiers. However, at the time these domestic telephone identifiers were designated as RAS-approved, NSA's OGC had not reviewed and approved their use as "seeds" as required by the Court's Orders. NSA remedied this compliance incident by re-designating all such telephone identifiers as non RAS-approved for use as seed identifiers in early February 2009. NSA verified that although some of the 3,000 domestic identifiers generated alerts as a result of the Telephony Activity Detection Process discussed above, none of those alerts resulted in reports to Intelligence Community agencies.[7]

[7] ~~(TS//SI//NF)~~ The alerts generated by the Telephony Activity Detection Process did not then and does not now, feed the NSA counterterrorism target knowledge database described in Part I.A.3 below.

~~(TS//SI//NF)~~ Another historic incident of non-compliance, uncovered during the end-to-end review, relates to errors made in the process of implementing the initial BR FISA Orders in 2006, when a few domestic telephone identifiers were designated as RAS-approved and chained without OGC approval due to analyst errors. For example, a process error occurred when an analyst inadvertently selected an incorrect option which put the domestic telephone identifier into a large list of foreign identifiers which did not require OGC approval as part of the RAS approval process. The HMC failed to notice the domestic identifier in the large list of foreign identifiers at the time, and once the RAS justification was approved, the domestic telephone identifier was chained without having first gone through an NSA OGC First Amendment review as required by the BR FISA Orders. NSA estimates that this type of analyst error occurred only a few times. Each time an error of this type was identified through NSA's quality control regime, senior HMCs provided additional guidance and training to analysts, as appropriate, and the incorrectly approved identifier was changed to non-RAS approved and then re-submitted for proper approval and OGC review.

~~(TS//SI//NF)~~ Use of Correlated Identifiers to Query the BR FISA Metadata

~~(TS//SI//NF)~~ The end-to-end review uncovered the fact that NSA's practice of using correlated identifiers to query the BR FISA metadata had not been fully described to, nor approved by, the Court. An identifier is considered correlated with other identifiers when each identifier is shown to identify the same communicant(s). [redacted]

[redacted]

~~(TS//SI//NF)~~ NSA analysts authorized to query the BR FISA metadata routinely [redacted] to query the BR FISA metadata without a separate RAS determination on each correlated identifier. In other words, if there was a successful RAS determination made on any one of the identifiers in th[redacted] correlation[redacted], and all of the correlated identifiers[redacted], were considered RAS-approved for purposes of the query because they were all associated with the[redacted]. NSA obtained[redacted] correlations from a variety of sources to include Intelligence Community reporting, but the tool that the analysts authorized to query the BR FISA metadata primarily used to make correlations is called[redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted] - a database that holds correlations [redacted] between identifiers of interest, to include results from [redacted] - was the primary means by which [redacted] correlated identifiers were used to query the BR FISA metadata. On 6 February 2009, prior to the implementation of the EAR, [redacted] access to BR FISA metadata was disabled, preventing [redacted] from providing automated correlation results to BR FISA-authorized analysts. In addition, the implementation of the EAR on 20 February 2009 ended the practice of treating [redacted] correlations as RAS-approved in manual queries conducted within [redacted] since the EAR requires each identifier to be individually RAS-approved prior to it being used to query the BR FISA metadata. NSA ceased the practice of treating [redacted] correlations as RAS-approved within the [redacted] in conjunction with the March 2009 Court Order.

[redacted]

~~(TS//SI//NF)~~ [redacted] **Display Feature Provided Information Concerning Contacts of Third-Hop Identifiers**

~~(TS//SI//NF)~~ As discussed above [redacted] is the software tool interface used by analysts to manually query the BR FISA chain summaries in [redacted]. The latest version of [redacted] as noted above, limits the number of "hops"

permitted from a "seed" to three, in accordance with the Court's Orders. During testing of the beta version of [redacted] and its hop restriction, NSA determined that, despite the hop restriction, a feature called [redacted] could be invoked to provide an analyst with the number of unique contacts for a third-hop identifier, a type of information that would otherwise only be revealed by a fourth hop.[9] This feature did not return to the analyst any information on the contacts of the last selector in a contact chain other than their total number of unique contacts. After consultation with NSA OGC, the [redacted] feature in the beta version of [redacted] was disabled for last-hop identifiers.[10] This corrected version of [redacted] was deployed to select users beginning on 23 July 2009.

~~(TS//SI//NF)~~ The [redacted] feature was not exclusive to the beta version of [redacted] prior versions of [redacted], since its first delivery beginning in late 2001/early 2002, provided analysts the [redacted] feature. In prior versions of [redacted], Look Ahead was generally the same: if an analyst activated [redacted] in his or her preferences his or her BR FISA contact chaining query results would include the number of unique contacts for each returned identifier, including for identifiers in the third hop from the RAS-approved seed.

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[9] ~~(S)~~ NSA discovered this issue subsequent to finalization of the end to end report. DoJ, National Security Division (NSD) personnel were notified of the [redacted] feature on 29 July 2009, and orally notified Court Advisors on 30 July 2009. The Court was formally notified of this matter with a notice filed on 4 August 2009 in accordance with Rule 10(c) of the FISC Rules of Procedure.

[10] [redacted]

~~(TS//SI//NF)~~ On 24 July 2009, HSAC instructed all persons authorized to query the BR FISA metadata not already using [redacted] to migrate to [redacted] as soon as possible and uninstall all previous versions of the [redacted] software. As of 31 July 2009, access to the [redacted] BR FISA contact chaining repository can only be achieved through use of [redacted] All prior versions of [redacted] have been locked out from access to this data. Following the lock out of all prior [redacted] versions, the system was demonstrated to show correct operation to TD leadership, the Chief HSAC, and members of SID's Oversight & Compliance. Should the Court authorize additional analysts to query the BR FISA metadata, NSA will ensure that they only do so with [redacted] or its successor that likewise does not permit [redacted] to display the number of unique contacts for a third-hop identifier in the BR FISA metadata.

~~(TS//SI//NF)~~ NSA identified two common practices used by BR metadata analysts that mitigated [redacted] potential for non-compliance. First, although NSA analysts were permitted three hops in the BR FISA metadata from a RAS-approved seed, in practice NSA analysts infrequently chained out beyond the second hop. Second, [redacted] users frequently disabled [redacted] because its use resulted in slower queries. To the extent that [redacted] was used with BR FISA metadata, NSA has concluded, based on discussions with [redacted] users, that the information returned by [redacted] would not have been disseminated. Instead, [redacted] ad information was used by NSA personnel for target development purposes. The number of unique contacts of a third-hop identifier assisted analysts in determining whether the third-hop identifier was one of genuine interest or not, such as a [redacted] identifier that might be added to a defeat list.

3. ~~(U//FOUO)~~ Improper Access to or Handling of the BR FISA Metadata

~~(TS//SI//NF)~~ Data Integrity Analysts' Use of BR FISA Metadata

~~(TS//SI//NF)~~ As part of their Court-authorized function of ensuring BR FISA metadata is properly formatted for analysis, Data Integrity Analysts seek to identify numbers in the BR FISA metadata that are not associated with specific users, *e.g.*, "high volume identifiers." [redacted]. NSA determined during the end-to-end review that the Data Integrity Analysts' practice of populating non-user specific numbers in NSA databases had not been described to the Court.

~~(TS//SI//NF)~~ For example, NSA maintains a database, [redacted] which is widely used by analysts and designed to hold identifiers, to include the types of non-user specific numbers referenced above, that, based on an analytic judgment, should not be tasked to the SIGINT system. In an effort to help minimize the risk of making incorrect associations between telephony identifiers and targets, the Data Integrity Analysts provided [redacted] included in the BR metadata to [redacted] A small number of [redacted] BR metadata numbers were stored in a file that was accessible by the BR FISA-enabled [redacted], a federated query tool that allowed approximately 200 analysts to obtain as much information as possible about a particular identifier of interest. Both [redacted] and the BR FISA-enabled [redacted] allowed analysts outside of those authorized by the Court to access the non-user specific number lists.

~~(TS//SI//NF)~~ In January 2004, [redacted] engineers developed a "defeat list" process to identify and remove non-user specific numbers that are deemed to be of little analytic value and that strain the system's capacity and decrease its performance. In building defeat lists, NSA identified non-user specific numbers in data acquired pursuant to the BR FISA Order as well as in data acquired pursuant to EO 12333. Since August 2008, [redacted] had also been sending all identifiers on the defeat list to the [redacted]

~~(TS//SI//NF)~~ While the positive impacts that result in making these numbers available to analysts outside of those authorized by the Court seem to be in keeping with the spirit of reducing unnecessary telephony collection and minimizing the risk of making incorrect associations between telephony identifiers and targets, upon identifying this as an area of concern NSA took several remedial actions to end these practices. As of 2 May 2009, NSA quarantined the BR-derived identifiers on [redacted] On 12 May 2009, NSA shut off access to the file containing the small number of BR-derived [redacted] identifiers by the BR FISA-enabled [redacted] tool. On 11 May 2009, [redacted] removed eight BR FISA identifiers from its SIGINT-only defeat list.

~~(TS//SI//NF)~~ To verify the technical measures taken were successful, from 1-2 May 2009, technical personnel segregated and deactivated BR FISA-derived data in [redacted] previously entered by the Data Integrity Analysts. The [redacted] database is hosted in a [redacted] database. Each record contains a STATUS field that is either set to "ACTIVE" or "DELETE." If the STATUS field is set

to "ACTIVE," then the selector is a valid phone number and is being used for a purpose of which NSA is not interested; however, the record is available for query by analysts and follow-on systems. If the STATUS field is set to "DELETE," then the record is unavailable to analysts or other systems. In order to segregate and deactivate the BR FISA-derived records, the decision was made to change the STATUS field from "ACTIVE" to "DELETE," which means that the number is unavailable to NSA analysts or other systems. Due to the volume of entries, a program was written and executed to change the status.

~~(TS//SI//NF)~~ After testing the program on a small sampling of data and the test results were found to be accurate, the program was executed. Technical personnel monitored initial execution and performed a series of tests to validate the results. At the completion of program execution, Technical Personnel again performed those tests to validate the results. The validation testing was performed three times and results were consistent.

~~(TS//SI//NF)~~ The Primary Order in docket number BR 09-09, dated 9 July 2009, now permits NSA to use certain non-user specific numbers and [redacted] identifiers for purposes of metadata reduction and management.

~~(TS//SI//NF)~~ **~~Handling of BR FISA Metadata~~**

~~(TS//SI//NF)~~ The end-to-end review uncovered that NSA's data protection measures were not constructed exactly as the Court Order sets out. Specifically, while the Order requires processing of the data to be carried out on "select" machines using "encrypted communications," the protections NSA affords the data, though different, are quite effective. NSA provides strong and robust physical and security access controls,

but there are not specifically designated machines on which the technical personnel are required to work nor are the communications encrypted. To accurately reflect NSA's data protection measures, NSA worked with the Department of Justice (DoJ) to revise the orders proposed to and ultimately adopted by the Court in docket number BR 09-06.

~~(TS//SI//NF)~~ Data Integrity Analysts sometimes pulled samples of BR metadata onto a non-audited group/shared directory to carry out authorized activities. While the Data Integrity Analysts are authorized to access the data, they are not authorized to move it from the auditable repository into a shared directory where analysts, BR-cleared and otherwise, could have viewed the data. This shared folder was in essence a work space in which the Data Integrity Analysts could perform their authorized activities. There is, however, no reason to believe that analysts, BR-cleared or otherwise, accessed the BR metadata through the shared directory: only a small group of non-cleared analysts had access to the files on this server and it would have been outside the scope of their duties to access the BR metadata samples on the group/shared directory. It is also unlikely that any of the cleared analysts would have accessed this data. As an extra safeguard, NSA has implemented additional access controls that provide appropriate storage areas for the samples of BR FISA metadata used by Data Integrity Analysts for technical purposes.

~~(TS//SI//NF)~~ System Developer Access to BR FISA Metadata while Testing New Tools

~~(TS//SI//NF)~~ During the review NSA discovered that a group of software developers designing a next generation metadata analysis graphical user interface (GUI), [redacted] ([redacted] is the replacement for [redacted] and uses the same authentication/authorization mechanism as [redacted]), had queried the BR FISA metadata 20 times while running tests between September 2008 and February 2009.

This access occurred due to the dual responsibilities of the individuals involved. The developers on [redacted] also have maintenance responsibilities of the operational system, [redacted], where their access to BR FISA is warranted on a continual basis. While the actions were in keeping with the Court Orders in place at the time of the queries, under the current Court Order the developers will require OGC approval prior to engaging in their development and testing activities.

~~(TS//SI//NF)~~ When this issue surfaced, NSA implemented a software change on 19 March 2009 to prevent the [redacted] GUI from accessing BR FISA metadata regardless of the user's access level or the RAS status of the identifier.[11] This change was tested by [redacted] developers and [redacted] technical personnel via a demonstration that the [redacted] could not be used against BR FISA metadata even when a BR FISA-cleared user attempted to do so. NSA also implemented an oversight process whereby all BR FISA-authorized technical personnel who have both maintenance and development responsibilities have their accesses to BR FISA metadata revoked when involved in new systems development, except when granted by NSA's OGC on a case-by-case basis. This process will ensure no inadvertent access to the data until such time as these technical personnel receive OGC authorization to access BR FISA metadata to test technological measures designed to enable compliance with the Court Order. SID Oversight & Compliance is notified each time anyone's permission to access the BR FISA metadata is changed and tracks these changes for compliance purposes.

[11] ~~(TS//SI//NF)~~ As of 20 February, EAR would have prevented any query made through the [redacted] GUI that included a non-RAS-approved identifier.

~~(TS//SI//NF)~~ External Access to Unminimized BR FISA Metadata Query Results

~~(TS//SI//NF)~~ During the end-to-end review, NSA's Review Team learned that analysts from the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and National Counterterrorism Center (NCTC) had access to unminimized BR FISA query results via an NSA counterterrorism target knowledge database. This matter is discussed in more detail below in Section II.

4. ~~(TS//SI//NF)~~ Lack of a Shared Understanding of the BR Program

~~(S//NF)~~ [redacted] Not Audited Prior to January 2009

~~(TS//SI//NF)~~ The end-to-end review surfaced an issue concerning proper auditing of the [redacted]. In addition to the [redacted] BR FISA chaining summary repository in which contact summaries are stored and where the bulk of metadata analysis takes place, a separate database, the [redacted], stores particular fields from each record (as opposed to summaries of those records). This database is used regularly by the Data Integrity Analysts but is also accessible by other analysts authorized to query the BR FISA metadata. When a report is to be issued based on analysis conducted in the repository of contact summaries, analysts often verify what they intend to report by accessing the records in this second data repository. The end-to-end review uncovered the fact that this second database had not been audited. In response, NSA modified the database to enhance its auditability and NSA has audited every query made in the database since February 2009 and found no indication of improper queries.[12]

[12] ~~(TS//SI//NF)~~ Although the [redacted] suffered a system crash in September 2008, NSA was ultimately able to recover sufficient data to permit NSA Oversight & Compliance personnel to conduct sample audits of queries since the Order's inception. These sample audits revealed no unauthorized access to nor improper queries against the BR FISA metadata.

~~(TS//SI//NF)~~ **Provider Asserts That Foreign-to-Foreign Metadata Was Provided Pursuant to Business Records Court Order**

~~(TS//SI//NF)~~ The end-to-end review team learned that [redacted] This matter is discussed in more detail below in Section III.

B. (U) MINIMIZATION AND OVERSIGHT PROCEDURES

~~(TS//SI//NF) In~~ addition to the steps taken to remedy the specific issues identified above, NSA plans to institute additional oversight and compliance processes designed to ensure that NSA will comply with any order authorizing NSA to resume regular access to the BR FISA metadata.

~~(TS//SI//NF)~~ Several additional procedures already have been incorporated into the Court's Primary Order in docket number BR 09-09. The Primary Order now imposes additional access controls for technical personnel. In the past, NSA had logged queries to the BR metadata by analysts and briefed only those analysts on the authorization granted by the Orders. Now, the Orders require NSA to log access to the BR FISA metadata by technical personnel as well as by analysts, and to brief technical personnel, as well as analysts, on the authorization granted by the Orders. *See* Primary Order, docket number BR 09-09, at 9-10. These tightened controls should provide greater accountability for any decision to access the BR FISA metadata and will educate all personnel, particularly those who set up the tools and processes for accessing the BR FISA metadata, about the rules governing access and use. Additionally, the Primary Order now incorporates mechanisms to better ensure that the results of queries to the BR FISA metadata are

treated in accordance with the Court's Orders. Specifically, NSA is now providing weekly dissemination reports to the Court and analysts not cleared to query the metadata are not permitted access to query results before they receive appropriate training. *See id.* at 10-12.

~~(TS//SI//NF)~~ The current Primary Order also incorporates the additional oversight procedures first proposed by the government in its application in docket number BR 09-01. *See id.* at 8, 13-14. In general, those additional oversight procedures require greater coordination between various NSA components and DoJ's National Security Division concerning implementation and interpretation of the Orders. They also require that the Court approve the implementation of any automated process involved in the querying of the BR FISA metadata. These additional procedures are designed to eliminate the risk of incorrect legal interpretations, to ensure timely notice to DoJ and the Court of material issues, and to ensure that any automated query process has been tested and demonstrated to be compliant with the Orders, and approved by the Court, before implementation.

~~(TS//SI//NF)~~ NSA will also propose several new minimization and oversight procedures in the application seeking the renewal of docket number BR 09-09. The application will request authority for NSA to resume approving telephone identifiers for contact chaining [redacted] First, the application will propose that NSA re-visit its RAS determinations at certain intervals: at least once every one hundred and eighty days for U.S. telephone identifiers or any identifier believed to be used by a U.S. person; and at least every year for all other telephone identifiers. This new re-validation procedure is designed to ensure that for as long as NSA queries the BR FISA metadata

with RAS-approved telephone identifiers, those identifiers will continue to meet the RAS standard. Second, the application will propose an express requirement that, where NSA has affirmative information that a RAS-approved telephone identifier was, but may not presently be, or is, but was not formerly, associated with a Foreign Power, analysis and minimization of results of queries using that identifier be informed by that fact. This requirement is designed to focus NSA's analysis on the period for which the RAS-approved telephone identifier is associated with a Foreign Power.

~~(TS//SI//NF)~~ NSA has recently reviewed and revalidated the oversight documentation governing the BR FISA. This documentation consists of a set of Standard Operating Procedures (SOPs). These SOPs address: access to BR FISA metadata; BR FISA audit procedures; compliance notifications; DoJ and NSA OGC spot checks; and the respective roles of various NSA personnel involved in oversight and compliance activities.

~~(TS//SI//NF)~~ More recently, NSA's Associate Directorate of Education and Training (ADET) has redesigned the BR FISA training package to ensure common and expert level proficiency in the rules and procedures governing appropriate handling of the BR FISA metadata. ADET, together with NSA OGC and the SID Oversight & Compliance organization, has developed and is in the process of implementing a series of on-line training modules, complete with competency testing, specifically addressing activities conducted with respect to the BR FISA Order. Moreover, an oral competency test is currently being administered to each Homeland Mission Coordinator at the completion of the training they are currently receiving to ensure they understand the restrictions governing access to the BR FISA metadata.

~~(TS//SI//NF)~~ Should the Court approve the application seeking the renewal of docket number BR 09-09 and grant NSA authority to resume approving telephone identifiers for contact chaining [redacted] NSA will update its SOPs and training package for the BR FISA to account for the change in authority and the new procedures associated with that change.

~~(TS//SI//NF)~~ NSA has implemented and intends to implement additional software restrictions and changes to the BR metadata system architecture. As discussed above, NSA implemented a software change, [redacted] n July 2009 to restrict analyst queries to the number of hops authorized by the Orders.[13] Furthermore, NSA is revamping its baseline system architecture, to include formal system engineering of all aspects governing the interaction of analysts and processes. Using principles of system engineering, configuration management, and access control, NSA has explored a future implementation of the BR FISA program to be used should the Court authorize NSA to resume regular access to the BR FISA metadata. This architecture has the potential to offer more effective management of the system as a whole, and a team of employees will collaborate to manage the entire system. The single approach, providing visibility into the overall structure of the system to the entire team, together with the technology solutions discussed above, will help prevent an isolated decision to connect a tool or process to the BR FISA database.

~~(TS//SI//NF)~~ In addition, requirements from the Court Order will be formally translated by NSA into system requirements prior to any changes to the system

[13] ~~(S)~~ NSA OGC granted approval for developers to access BR FISA metadata for the specific purpose of testing and demonstrating [redacted]

architecture, which should prevent problems such as the misunderstanding among different personnel as to how the Telephony Activity Detection Process functioned. Finally, NSA has recently created the new position of Director of Compliance, reporting directly to me and the Deputy Director of NSA. The Director of Compliance has full-time responsibility in this area. The Director of Compliance will be responsible for continuous modernization and enforcement of our mission compliance strategies and activities to ensure their relevance and effectiveness. At the same time, this new position will serve as an ongoing reminder of the importance of compliance work, and provide greater visibility and transparency in this essential area.

~~(TS//SI//NF)~~ The Court entrusted NSA with extraordinary authority, and with it came the highest responsibility for compliance and protection of privacy rights. In several instances, NSA implemented its authority in a manner inconsistent with the Orders, and some of these inconsistencies were not recognized for more than two and a half years. These are matters I take very seriously, and the changes NSA has made and will make as a result of the end-to-end review, with regard to both analyst access and the handling of data, are intended to address them directly and to provide an environment for successful implementation and management of the program should the Court decide to authorize NSA's resumption of regular access to the BR metadata. The technological remedies discussed herein have remedied the identified instances of noncompliance and should significantly improve future compliance with the Court's Orders. I attest that each of these remedies has been tested and demonstrated to be successful insofar as each functions as intended. Although no corrective measures are infallible, I believe that this more robust regime and the technological remedies NSA has instituted, particularly the

implementation of the EAR, represent significant steps to reduce the possibility of any future compliance issues and to ensure that mechanisms are in place to detect and respond quickly if a compliance incident were to occur.

II. ~~(TS//SI//NF)~~ PRE-JUNE 2009 BR FISA DISSEMINATION PRACTICES

~~(TS//SI//NF)~~ In a 16 June 2009 notice to the Court, the government reported that NSA had provided personnel from CIA, FBI, and NCTC access to a database that contained, among other things, some unminimized results of BR FISA metadata queries. NSA did not make all, or even most, BR FISA query results available via this database. Instead, NSA placed only certain BR FISA query results in the database, generally in response to specific requests for information received from specially-cleared personnel from NSA, CIA, FBI, or NCTC.

~~(TS//SI//NF)~~ In response to this compliance incident, the Court issued an order on 22 June 2009 which directed NSA to provide the Court with "a full explanation of why the government has permitted the dissemination outside NSA of U.S. person information without regard to whether such dissemination complied with the clear and acknowledged requirements for sharing U.S. person information ... pursuant to the Court's orders" in the BR docket. This section responds to the Court's Order for a full explanation of how this compliance incident occurred. It also describes actions NSA has taken to investigate and remediate the problem.

~~(S//NF)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

[14] ~~(TS)~~ The BR FISA end to end report stated that approximately 200 external analysts were permitted access to the database; further investigation revealed that the number is actually closer to approximately 250.

~~(TS//SI//NF)~~ [redacted]

~~(TS//SI//NF)~~ [redacted]

~~(S//NF)~~ [redacted]

~~(TS//SI//NF)~~ The Court's 2006 BR FISA Order authorized NSA to acquire the [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

[15] ~~(U//FOUO)~~ In contrast, USSID 18 permits NSA to disseminate outside of NSA information identifying U.S. persons if the U.S. person information is necessary to understand *foreign intelligence* or assess its importance. USSID 18 also permits the Deputy Chief of Information Sharing Services, among others, to approve disseminations of U.S. person identifying information.

[redacted]

(U) Discovery and Response to the Problem

~~(TS//SI//NF)~~ In June 2009, during the course of NSA's end-to-end review of the Agency's implementation of the BR Order, NSA identified as a compliance matter the use of the database to make unminimized BR and [redacted] query results available to FBI, CIA, and NCTC. NSA personnel also determined that, despite the disabling of the hyperlink button in July 2008, external analysts could have continued accessing the database if they retained the Uniform Resource Locator (URL) address for the database. After this problem was identified on 11 June 2009, NSA immediately began terminating individual external customer account access to the target knowledge database. NSA completed this action by 12 June 2009.

~~(TS//SI//NF)~~ To determine why this compliance issue occurred, NSA spoke with the senior analysts and oversight personnel who were aware of the Court-ordered minimization requirements and of how the database was used. These conversations revealed NSA personnel generally followed the minimization requirements when the Agency issued formal reports based on queries of the metadata acquired pursuant to the Court's BR FISA Orders. However, even though the applicability of the minimization requirements to the shared database is clear in hindsight, until the issue was discovered during NSA's end-to-end review [redacted] the new dissemination procedures required by the Court's Orders.

~~(TS//SI//NF)~~ Since identification of this matter, NSA has attempted to determine the actual extent of access to the database and/or use of the BR [redacted] metadata. As part of that effort, the Agency has conducted a detailed audit of log-in activity of external analysts from each of the participating organizations.[16] The audit revealed that no external analysts accessed the database after January 2009. Prior to that, [redacted] approximately 250 analysts had permission to access the database but only about one-third actually did so. Of that number, only approximately 47 external analysts did more than log in and change their passwords. These approximately 47 external analysts appear to have queried the database in the course of their counterterrorism responsibilities and they accessed directories that contained the results of [redacted] BR queries, including unminimized U.S. person-related information. The BR [redacted] derived U.S. person information consisted of unmasked telephone numbers or email addresses that were returned in response to RAS-approved queries made of the underlying metadata.

~~(TS//SI//NF)~~ In addition to the audits, NSA also asked CIA, FBI, and NCTC to describe how their personnel made use of their access to the database.[17] The NCTC employees with access to the database reported that they did not make use of any unminimized BR [redacted] query results in any NCTC analytic products. Only two FBI analysts accessed this database while researching counterterrorism leads. Several other

[redacted]

[17] ~~(S)~~ The response from each agency covered the entire period of time that their respective personnel had access to the database.

FBI analysts believe they may have accessed the database while working closely with a team of FBI analysts [FBI Team 10] who were detailed to NSA and working under NSA's control.[18] The FBI reported that none of the external FBI analysts published or disseminated anything as a result of their access to the database and FBI believes that it is "highly unlikely that any FBI-published analytical products or investigative reports ever contained this data" from the database. CIA reported that some of its personnel who were approved for access to the compartmented counterterrorism program used information in the database for lead purposes, to include as a basis for initiating counterterrorism discussions between CIA and FBI personnel. However, CIA's review indicated that any information contained in the database, to include [redacted] BR metadata chaining results, "was used very rarely in finished intelligence products produced by CIA analysts for senior policymakers." Instead, information obtained from CIA's access to the database was usually used "in conjunction with reporting from other intelligence sources."

~~(TS//SI//NF)~~ [redacted]

[redacted]

~~(S//SI//NF)~~ NSA has corrected the problem in this specific instance by terminating all external access to the database in question. Beyond that, the Agency recognizes that the underlying issue is the need to identify all areas of activity that are subject to these Court Orders and/or other legal restrictions and conditions, in order to ensure compliance. This requires several elements, including an accurate end-to-end picture of how data is handled -- by technical (*e.g.,* systems administrators) and operational personnel alike -- from collection through dissemination; ongoing oversight, training, and compliance efforts; and system testing procedures that give assurance that data is actually being handled as required. NSA has instituted measures in all these areas, as described in detail in the report on the Agency's end-to-end review. In addition, as discussed above, NSA has created the new position of Director of Compliance to ensure that NSA has a comprehensive and effective compliance program and maintain heightened attention in this particular area. NSA continues to work to discover and correct any outstanding issues and avoid any recurrence.

(U) **Dissemination of U.S. Person Identifying Information**

~~(TS//SI//NF)~~ When an NSA analyst determines that information identifying a U.S. person needs to be included in a report, a designated NSA approving official must authorize the release.[19] The Information Sharing Services office is generally the

[19] ~~(TS//SI//NF)~~ The designated approving official does not make a determination to release U.S. person information requested by DoJ or DoD personnel in connection with prudential searches, such as those

responsible entity for approving such releases. Within the context of EO 12333 collected information, the release authority includes the Chief and Deputy Chief, Information Sharing Services, SID Director and Deputy Director, Senior Operations Officer (SOO),[20] DIRNSA, and Deputy DIRNSA. In the EO 12333 context, the approving authority must determine that the information is related to a foreign intelligence purpose, and that the U.S. person information is necessary to understand or assess the value of the information.

[redacted]

NSA followed USSID 18 procedures for the dissemination of U.S. person identities and did not appropriately implement the additional requirements identified in the Court orders for a determination that the information is related to counterterrorism information. Furthermore, NSA did not implement appropriate procedures reflecting the fact that individuals other than the Chief, Information Sharing Services were not specifically authorized to grant the release of U.S. person information. Although NSA now understands the fact that only a limited set of individuals are authorized to approve these releases under the Court's authorization, it seemed only appropriate at the time to allow her Deputy or those acting in her capacity to be delegated with this authority as well.

~~(TS//SI//NF)~~ On 18 June 2009, NSA advised the Office of Information Sharing Services that the chief of that office was the only NSA official authorized to approve the

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conducted for criminal or detainee proceedings. In the case of such requests, NSA's Litigation Support Team conducts specific prudential searches of NSA holdings but these prudential searches do not include or result in queries of the BR FISA metadata.

[20] ~~(S)~~ The SOO is the Senior Operations Officer, in charge of the National Security Operations Center, NSA's 24/7 operations center. The SOO acts in place of the DIRNSA, when the DIRNSA is unavailable. The Court's Order dated 29 May 2009 recognized that the SOO may approve disseminations for after-hours requests.

dissemination of any U.S. person identity derived from BR FISA metadata and that the chief must make the required findings and document those findings prior to any such dissemination. Moreover, on 9 July 2009, in docket number BR 09-09, the Court increased the numbers of individuals permitted to approve disseminations to include the Chief, Information Sharing Services, the SOO, the SID Director, the Deputy Director of NSA, and the Director of NSA.

(U) **Review of Prior Disseminations**

(~~TS//SI//NF~~) On 29 July 2009, members of DoJ/NSD's Office of Intelligence Oversight Section completed a review of all BR FISA disseminations containing U.S. person identities in order to determine who approved the disseminations and what determinations were made, if any, by the approving official.

(~~TS//SI//NF~~) The NSD review identified 280 disseminations of reports containing BR FISA-derived U.S. person identities. Of the 280 disseminations, 92 were approved by the Chief of Information Sharing Services, 170 were approved by the Deputy Chief of Information Sharing Services, 15 were approved by a SOO, one was approved by an acting Chief of Information Services, and two were approved by an acting Deputy Chief of Information Sharing Services. The disseminations authorized by persons other than the Chief of Information Sharing Services did not occur during any particular time frame. Rather, they were distributed throughout the lifespan of the collection.

(~~TS//SI//NF~~) Of the 280 disseminations of reports containing BR FISA-derived U.S. person identities, 74 were made in 2006, 101 were made in 2007, 95 were made in 2008, and ten were made in 2009. The waiver forms authorizing each of the disseminations in 2006 and 2007, 175 in total, contained no particularized finding relating to the purpose of the dissemination. Beginning in July 2008, however, the

authorizing waivers contained a general finding that the U.S. person identity was foreign intelligence or necessary to understand foreign intelligence. Of the 95 disseminations approved in 2008, 82 contained no finding and 13 contained the foreign intelligence finding. Beginning in January 2009, the authorizing waiver contained specific counterterrorism findings as required by the Court's orders. Eight of the ten waivers issued in 2009 contained this finding. The last two disseminations in 2009, one in May and one in June, however, had only the more general foreign intelligence finding in the waivers.

~~(TS//SI//NF)~~ NSA also reviewed its records of all reports issued that may have included BR FISA-derived information, including the records of reports written by analysts not specifically authorized to query the BR FISA metadata.[21] NSA did not discover any additional reports that were issued by non-BR cleared analysts.

III. ~~(TS//SI//NF)~~ NSA'S COLLECTION OF FOREIGN-TO-FOREIGN CALL DETAIL RECORDS PURSUANT TO THE BR FISA ORDERS

~~(S)~~ [redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

[21] ~~(TS//SI//NF)~~ To identify the total number of reports produced and disseminated that contained BR-derived information, the NSA reviewed all analyst reporting records, including the records of reports written by non-BR-cleared analysts. When drafting reports, all NSA analysts, including both BR-cleared analysts and non-BR-cleared analysts, are trained to include in any reporting record the sources of the information contained in a report. The NSA's review included an examination of these records, including the fields of each record that might include references to BR-derived source information. The NSA then audited the reports that referenced BR-derived information as a source, and excluded those that referenced BR sources but in fact that did not contain BR-derived information. Through this methodology the NSA was able to determine that 280 were reports were produced and disseminated. Admittedly, this methodology would not account for reports issued with BR-derived data that mistakenly failed to reference BR sources.

[redacted]

~~(TS//SI//NF)~~ [redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

(~~TS//SI//NF~~) [redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ In May 2009, during a discussion between NSA and [redacted] regarding the production of metadata, a [redacted] representative stated that [redacted] produced the records [redacted] pursuant to the BR FISA Orders. This was the first indication that NSA had ever received from [redacted] of its contrary understanding. At the May 28, 2009, hearing in docket number BR 09-06, the government informed the Court of [redacted] To address the issue, based on the government's proposal, the Court issued a Secondary Order to [redacted] in docket number BR 09-06 that expressly excluded foreign-to-foreign call detail records from the scope of

records to be produced. On May 29, 2009, upon service of the Secondary Order in docket number BR 09-06, [redacted] ceased providing foreign-to-foreign records [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

almost all of them concern the communications of non-U.S. persons located outside the United States. If NSA were to find that any of the records concerned U.S. persons, their dissemination would be governed by the terms of USSID 18 which are the procedures established pursuant to EO 12333, as amended.

~~(TS//SI//NF)~~ [redacted]

[redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

[redacted]

(TS//SI//NF) [redacted]

[redacted]

(S) [redacted]

(TS//SI//NF)

[redacted]

~~(TS//SI//NF)~~ [redacted]

[redacted]

[redacted]

[redacted]

IV. ~~(TS)~~ NSA'S TREATMENT OF CREDIT CARD DATA CONTAINED IN BR FISA METADATA

~~(TS//SI//NF)~~ As first noted in a report to the Court in docket number BR 06-08, and noted in footnote 10 in the Application in docket number BR 09-09, a small percentage of records received from [redacted] contained credit card numbers in one of the fields when a caller used a credit card to pay for the call. Exhibit B, docket number BR 06-08, at 6-8. At NSA's request, [redacted] removed credit card numbers from this field in the records it provided NSA starting on 10 July 2006, and 11 October 2006, respectively. Exhibit B, docket number BR 06-12, at 5-7. Since that time, NSA spot checks have confirmed that [redacted] continue to remove

credit card numbers from the relevant field. Also since that time, NSA spot checks have identified only one record containing a credit card number. That record contained a credit card number in a field different from the field filtered by [redacted] NSA identified this record during a spot check in approximately March 2008.

~~(TS//SI//NF)~~ The records containing credit card numbers received before [redacted] began filtering (*i.e.*, records received in October 2006 and before) are stored on back-up tapes.[26] Records contained on back-up tapes are not available to analysts for queries and are not readily available to technical personnel. To destroy the individual records that are on back-up tapes would be an extreme resource and system intensive endeavor and therefore not feasible. It would require reloading the records from the tapes onto servers authorized to process BR metadata, uncompressing the records, converting them to a readable format, identifying those with a field containing a credit card number, and then deleting the records. Then NSA would have to test to confirm that only the records with credit card numbers were deleted, back-up the records again to tape storage and delete them from BR metadata servers. As the back-up tapes are necessary to rebuild the contact chaining database in the event of a catastrophic failure, to destroy the tapes prematurely would put at risk NSA's ability to recover information important for operations and still allowed under the Court Order. In the event of the need to restore the [redacted] BR FISA contact chaining repository, as the credit card numbers contained in those records do not become part of the chain summaries, analysts would still not have

[26] ~~(TS//SI//NF)~~ These records also are stored in th[redacted] discussed further below, where they were masked to analysts, and in the raw call detail record repositories, where they were accessible only to technical personnel. *See* Exhibit B, docket number BR 06-12, at 5-7, and Exhibit B, docket number BR 09-09, at 9-10. Analysts are not allowed to have the credit card number unmasked. Although these records were used to make chain summaries and stored in the chain summary database, the credit card numbers contained in the records did not become part of the chain summaries.

access to this information. Based on the above information and that the back-up tapes will be destroyed upon reaching the end of their authorized retention period, NSA considers this information on the back-up tapes secured from user access until their required date of destruction.

~~(TS//SI//NF)~~ The above records containing credit card information are also stored in the [redacted] It is not feasible to delete individual records based on the technical architecture of the [redacted] without deleting all data from the beginning of the BR FISA orders up to October 2006. The loss of such data would be so operationally detrimental that deletion is not feasible. As described in Exhibit B to the Application in BR 09-09, NSA's current solution to ensure NSA analysts do not have access to this credit card information is masking the data upon retrieval. As NSA reconstitutes the [redacted] to systems under a supported architecture, the fields containing credit card information will not be included in the data transfer and will be purged.

~~(TS//SI//NF)~~ The one record with a credit card number identified by NSA since October 2006 exists only in [redacted] storage of raw call detail records, known as the [redacted] and on back-up tapes. As noted above, back-up tapes are not available to analysts. Likewise, the [redacted] is not accessible to analysts for queries. This record is not stored in the [redacted] database and was not used to build a chain summary because it was an incomplete record. In order to delete this single record from the [redacted] upon first isolating the appropriate file, NSA would have to uncompress the data from the provider's proprietary format, convert the data into a readable format, and move the data to a server that hosts the Data Integrity Analysts'

tools to isolate and delete the one record. Removing data on back-up tapes is a difficult process as described above. Based on the above information and that the back-up tapes will be destroyed upon reaching the end of their authorized retention period, NSA considers this information on the [redacted] and the back-up tapes secured from user access until their required date of destruction.

~~(TS//SI//NF)~~ In summary, I certify that the overproduced credit card information has been destroyed or secured as noted above, and that the records containing overproduced credit card information still retained by NSA cannot be accessed by an analyst, but as noted above will be destroyed no later than when the records reach the end of their authorized retention period.

V. (U) Conclusion:

~~(TS//SI//NF)~~ The instances of non-compliance that have been identified in NSA's implementation of the Court's orders in the BR docket stemmed from a basic lack of shared understanding among the key NSA mission, technical, legal and oversight stakeholders concerning the full scope of the BR FISA program. With the remedial steps described above, NSA has taken significant steps to reduce the possibility of future compliance issues. Further, in moving forward, lessons learned as a result of NSA's review of BR FISA practices will be institutionalized, and we will remain constantly vigilant in ensuring that we are in strict compliance with the Court's orders. Although no corrective measures are infallible, NSA has taken significant steps to reduce the possibility of any future compliance issues and to ensure that the mechanisms are in place to detect and respond quickly if a compliance incident were to occur. Therefore, I am

hopeful the Court will again grant NSA regular access to the BR FISA metadata, which I believe is invaluable in helping the Nation detect and thwart potential terrorist threats.

(U) I declare under penalty of perjury that the facts set forth above are true and correct.

KEITH B. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

Executed this 17TH day of August, 2009

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 09-09

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, UNITED STATES ARMY, DIRECTOR OF THE NATIONAL SECURITY AGENCY

(U) I, Lieutenant General Keith B. Alexander, depose and state as follows:

(U) I am the Director of the National Security Agency ("NSA" or "Agency"), an intelligence agency within the Department of Defense ("DoD"), and have served in this position since 2005. I currently hold the rank of Lieutenant General in the United States Army and, concurrent with my current assignment as Director of the National Security

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Agency, I also serve as the Chief of the Central Security Service and as the Commander of the Joint Functional Component Command for Network Warfare. Prior to my current assignment, I have held other senior supervisory positions as an officer of the United States military, to include service as the Deputy Chief of Staff (DCS, G-2), Headquarters, Department of the Army; Commander of the U.S. Army's Intelligence and Security Command; and the Director of Intelligence, United States Central Command.

(U) As the Director of the National Security Agency, I am responsible for directing and overseeing all aspects of NSA's cryptologic mission, which consists of three functions: to engage in signals intelligence ("SIGINT") activities for the U.S. Government, to include support to the Government's computer network attack activities; to conduct activities concerning the security of U.S. national security telecommunications and information systems; and to conduct operations security training for the U.S. Government. Some of the information NSA acquires as part of its SIGINT mission is collected pursuant to Orders issued under the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA").

(U) The statements herein are based upon my personal knowledge, information provided to me by my subordinates in the course of my official duties, advice of counsel, and conclusions reached in accordance therewith.

(U) I. Introduction

~~(TS//SI//NF)~~ Pursuant to a series of Orders issued by the Foreign Intelligence Surveillance Court ("FISC" or "Court") beginning in May 2006, NSA has been receiving

and analyzing certain call detail records or telephony metadata[1] from [redacted] telecommunications providers. NSA refers to the Orders collectively as the "Business Records Order" or "BR FISA." The telephony metadata NSA receives via the BR FISA has enabled it in the past to discover [redacted] and unknown persons in the United States and abroad affiliated with [redacted] and unknown persons in the United States and abroad affiliated with [redacted] and their communications, and act upon and disseminate such information to support the efforts of the United States Government, including the Federal Bureau of Investigation (FBI), to detect and prevent terrorist acts against the United States and U.S. interests. Continued receipt of the telephony metadata is advantageous to NSA's ability to continue its efforts to discover such terrorist organizations and their communications, in order to assist the FBI in detecting, investigating and preventing terrorist acts against the United States. Accordingly, this declaration is intended to provide the Court with my assessment of the value that the BR FISA metadata provides to the NSA and the FBI with respect to the Government's national security responsibilities for the detection, investigation, and prevention of terrorist activities by [redacted]

[1] ~~(S)~~ "Call detail records," or "telephony metadata," include comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) numbers, International Mobile station Equipment Identity (IMEI) numbers, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. A "trunk" is a communication line between two switching systems. *Newton's Telecom Dictionary* 951 (24th ed. 2008). Telephony metadata does not include the substantive content of any communication or the name, address, or financial information of a subscriber or customer.

[redacted] (collectively, the "Foreign Powers").

~~(TS)~~ II. Value of BR FISA Metadata

~~(TS//SI//NF)~~ The BR FISA provides access to bulk call detail records which primarily include records of telephone calls that either have one end in the United States or are purely domestic. This collection of information is not available to NSA through its other authorized foreign intelligence information collections.[2] This data has value to NSA analysts tasked with identifying potential threats to the U.S. homeland and U.S. interests abroad by enhancing their ability to identify, prioritize, and track terrorist operatives and their support networks both in the U.S. and abroad. By applying the Court-ordered "reasonable, articulable suspicion" or "RAS" standard to telephone identifiers[3] used to query the BR FISA metadata, NSA analysts are able to: (i) detect domestic identifiers calling foreign identifiers associated with one of the Foreign Powers and discover who the foreign identifiers are in contact with; (ii) detect foreign identifiers associated with a Foreign Power calling into the United States and discover which

[2] ~~(TS//SI//NF)~~ For example, NSA obtains foreign intelligence information from its collection of overseas communications (SIGINT collection) authorized by Executive Order (EO) 12333, traditional Court-authorized electronic surveillance pursuant to Titles I and III of FISA, Pen Register and Trap and Trace surveillance authorized pursuant to Title IV of FISA, and, more recently, the targeting of non-United States persons reasonably believed to be located overseas pursuant to Section 702 of the FISA Amendments Act of 2008 (FAA). None of these authorities would allow NSA to replicate, or appropriately analyze, the call detail records it receives pursuant to the BR FISA.

[3] ~~(TS//SI//NF)~~ In the context of this Declaration, the term "identifier" means a telephone number, as that term is commonly understood and used, as well as other unique identifiers associated with a particular user or telecommunications device for purposes of billing and/or routing communications, such as International Mobile Subscriber Identity (IMSI) numbers, International Mobile station Equipment Identity (IMEI) numbers, and calling card numbers.

domestic identifiers are in contact with the foreign identifiers; and (iii) detect possible terrorist-related communications occurring between communicants located inside the United States.

~~(TS//SI//NF)~~ Although NSA possesses a number of sources of information that can each be used to provide separate and independent indications of potential terrorist activity against the United States and its interests abroad, the best analysis occurs when NSA analysts can consider the information obtained from each of those sources together to compile and disseminate to the FBI as complete a picture as possible of a potential terrorist threat. Although BR FISA metadata is not the sole source available to NSA counterterrorism personnel, it provides a key component of the information NSA analysts rely upon to execute this threat identification and characterization role.

~~(S)~~ **A. The Value of BR FISA Metadata: Contact-Chaining** [redacted]

~~(TS//SI//NF)~~ The primary advantage of metadata analysis as applied to telephony metadata is that it enables the Government to analyze past connections and patterns of communication. The ability to accumulate metadata substantially increases NSA's ability to detect and identify persons affiliated with the Foreign Powers. Specifically, the NSA performs [redacted] queries on the metadata: contact-chaining [redacted]

~~(TS//SI//NF)~~ When the NSA performs a contact-chaining query on a terrorist-associated telephone identifier, [redacted] identify the further contacts made by that first tier of contacts. In addition, the same process can be used to identify additional tiers of

contacts, out to a maximum of three "hops" from the original identifier, as authorized by the Business Records Order. The collected metadata thus holds contact information that can be immediately accessed as new terrorist-associated telephone identifiers are identified. Multi-tiered contact chaining identifies not only the terrorist's direct associates but also indirect associates, and, therefore provides a more complete picture of those who associate with terrorists and/or are engaged in terrorist activities.

~~(TS//SI//NF)~~ One advantage of the metadata collected in this matter is that it is historical in nature, reflecting contact activity from the past that cannot be captured in the present or prospectively. To the extent that historical connections are important to understanding a newly-identified target, metadata may contain links that are unique, pointing to potential targets that may otherwise be missed. [redacted]

~~(TS//SINF)~~ In sum, the BR FISA metadata analysis enriches the NSA analysts' understanding of the communications tradecraft of terrorist operatives who may be preparing to conduct attacks against the U.S. Terrorist operatives often take affirmative and intentional steps to disguise and obscure their communications. They do this by using a variety of tactics,

~~(TS)~~ B. Filling the Gaps: BR FISA Metadata in the Context of Other Collections

~~(TS//SI//NF)~~ The BR FISA metadata complements information NSA collects via other means and is a valuable, if not the only, means available to NSA for linking possible terrorist-related telephone communications that occur between communicants based solely inside the U.S. NSA analysts use the combination of telephony metadata and communications content collected pursuant to EO 12333 and/or Court-authorized electronic surveillance in concert with BR FISA metadata to develop an accurate characterization of individual/network activity; potentially derive the intent of the individual(s) or network; and learn of new terrorist networks or cells working inside the U.S. NSA's access to the BR FISA metadata improves the likelihood of the Government being able to detect terrorist cell contacts within the U.S.

~~(TS//SI//NF)~~ NSA's traditional SIGINT collection, which focuses strictly on the foreign end of communications, provides limited signals-related information available to aid analysts in identifying possible terrorist connections emanating from or within the U.S. Collection authorized by Section 702 of the FAA is limited to the targeting of non-United States persons located overseas and does not provide NSA with information sufficient to support contact chaining [redacted] Traditional Court-authorized electronic surveillance does not make available the full extent of metadata resident with the service providers and provided through the BR FISA. With the metadata provided by BR FISA, NSA has the information necessary to perform call chaining [redacted] This analysis enables NSA to obtain a fuller understanding of the target and provide FBI with a more complete picture of possible terrorist-related activity occurring inside the U.S.

~~(TS//SI//NF)~~ The value of the BR FISA is not hypothetical. Additional detail available in call data records (CDRs) allows NSA to recognize that a communicant is based in the U.S., a detail often absent in traditional SIGINT collection. Unlike traditional SIGINT collection, BR FISA CDRs include the calling party number in a call that originates from the United States. From telecommunications provider's perspective, only the called number is necessary to complete a call. The originating, or calling, number is not required and, as unnecessary data, is often removed or manipulated by the U.S. telecommunications provider before leaving the U.S en route to an overseas provider. If the calling party information is present, it can be used by other telecommunication providers to understand macro traffic statistics and identify important business opportunities. For this reason, U.S.-origin calls collected overseas often lack a valid U.S. calling party number, making it difficult or impossible to identify that a particular call originated in the U.S.

~~(TS//SI//NF)~~ In illustration, prior to the attacks of 9/11, NSA intercepted via its overseas SIGINT collection and transcribed seven (7) calls made by hijacker Khalid al-Mihdhar, then living in San Diego, California, to a telephone identifier associated with an al Qaeda safe house in Yemen. However, the NSA SIGINT intercept was collected through an access point overseas and the calling party identifier was not available because it had not been transmitted with the call. Lacking this U.S. phone identifier and having nothing in the content of the calls to suggest that al-Mihdhar was actually inside the United States, NSA analysts concluded that al-Mihdhar remained overseas when, in fact, he was in San Diego. The BR FISA metadata addresses the information gap that existed at the time of the al-Mihdhar case. It potentially allows NSA to note these types

of suspicious contacts and, when appropriate, to tip them to the FBI for follow-on analysis or action.

~~(TS//SI//NF)~~ Once an identifier has been detected, NSA can use BR FISA metadata along with other data sources to quickly identify the larger network and possible co-conspirators both inside and outside the U.S. for further investigation by the FBI with the goal of preventing future attacks. One recent example of BR FISA's contribution to characterizing a network of interest was the investigation referred to within NSA and FBI as [redacted]

~~(TS//SI//NF)~~ NSA's involvement with [redacted] began in January 2009. NSA analysts were following a foreign-based e-mail identifier associated with an al Qaeda facilitation cell in Yemen, an activity of significance due to U.S. Government concern with Yemen's potential to serve as an al Qaeda safe haven. This particular e-mail identifier was tasked under FAA authorities while numerous other network identifiers were monitored through EO 12333 authorities. [redacted] Upon verification, NSA [redacted] as permitted by the Court-approved minimization procedures for NSA's FAA collection, informed the FBI of the U.S. location of the identifiers. Upon receipt of

[redacted]

the NSA information, the FBI initiated a full field investigation and sought its own FISA coverage on the newly-discovered domestic links.

~~(TS//SI//NF)~~ NSA used the BR FISA metadata to aid the FBI investigation by adding critical insight into the network's functions and intent. Analysis of the BR FISA metadata demonstrated foreign contacts within the suspected network stretching from Kansas City to New York, the United Arab Emirates, Yemen and Denmark. While BR FISA did not discover the person of interest in Kansas City, the telephony metadata was able to confirm suspicions that the FBI already had about him. It confirmed the target's outbound contacts with other members of the network and provided a better understanding of the network. This characterization would not have happened without leveraging both the BR FISA metadata and the FAA access in conjunction with FBI's investigation.

~~(TS//SI//NF)~~ As the [redacted] example illustrates, BR FISA metadata is an important resource for investigating threat leads obtained from other SIGINT collection or partner agencies. This is especially true for the NSA-FBI partnership. The BR FISA metadata enables NSA analysts to evaluate potential threats that it receives from or reports to the FBI in a more complete manner than if this data source was unavailable. Even the absence of terrorist-related contacts in the BR FISA metadata can be valuable, because such "negative reporting" helps to assess the credibility of a prospective threat.

~~(TS//SI//NF)~~ A final benefit of the way in which BR FISA metadata complements other counterterrorist-related collection sources is by serving as a significant enabler for NSA intelligence analysis. It assists NSA in applying limited linguistic resources

available to the counterterrorism problem against links that have the highest probability of connection to terrorist targets. Put another way, analysis of the BR FISA metadata can help NSA prioritize for content analysis communications which it acquires under other authorities. While [redacted] assists in identifying terrorist communications of interest, content exploitation is required to achieve a full understanding and characterization of the associations between the telephony identifiers and users. Additionally, content is critical to deriving intent of the individuals and associated networks. BR FISA metadata is an important piece for steering and applying content analysis so the U.S. Government can gain the best possible understanding of terrorist target actions and intentions.

(U) C. Statistics/Additional Examples

~~(TS//SI//NF)~~ The foregoing discussion is not hypothetical. As noted on page seven of NSA's end-to-end report on the Agency's implementation of the Business Records Order, between inception of the first Business Records Order in May 2006, and May 2009, NSA issued 277[5] BR FISA-based reports to FBI and, if appropriate, to other NSA customers. These reports tipped to the FBI roughly 2,900 identifiers that were noted to be in contact with identifiers associated with [redacted]

[5] ~~(TS//SI//NF)~~ The number of reports included in my Declaration of 13 February 2009 was 275. This was based upon information gathered on 6 February 2009. Further review has taken into account the fact that an additional report was issued after 6 February, but before 13 February. Some of these reports had been cancelled for various reasons and some of the cancelled reports were reissued with corrections. Therefore, the correct number of unique reports as of the 13 February 2009 declaration should have been 274. My Declaration also stated that there were 2,549 selectors tipped in these reports. The actual number of selectors tipped in the 274 reports is 2,888.

~~(TS//SI//NF)~~ A recent illustration of the use of the BR FISA metadata can be found in the evaluation of telephony contacts associated with [redacted] an [redacted] associate and primary suspect [redacted]

[redacted]

~~(TS//SI//NF)~~ In an even more recent example, on 2 June 2009 NSA received a request for information from the FBI pertaining to leads associated with [redacted]

[redacted]

[redacted]

NSA conducted initial research on the identifiers provided by the FBI in EO 12333 metadata and subsequently sought approval from the FISC to query the identifiers against the BR FISA metadata. [redacted]

[redacted] Without the BR FISA metadata, a significant number of those leads would have remained undiscovered and NSA's ability to evaluate [redacted] U.S. contacts would have been degraded.

(U) IV. Conclusion

~~(TS//SI//NF)~~ In conclusion, while all metadata analysis is essential in the fight against terrorism, the BR FISA metadata provides NSA with additional information readily available through the providers, but which would be otherwise unavailable to NSA. The BR FISA metadata complements and enriches NSA analysts' understanding of the target and provides the capability to detect domestic identifiers calling foreign terrorist identifiers abroad; foreign terrorist-associated targets calling into the United States; and possible terrorist-related communications occurring between communicants solely in the U.S. That the BR FISA metadata is generating what may be perceived as little foreign intelligence in comparison with the volume of the data collected does not discount its value to NSA's analysis of potential terrorist threats to the U.S. and to NSA's ability to provide security for the nation. NSA's access to the BR FISA metadata addresses a key gap in the Intelligence Community's ability to connect foreign and domestic threat-related information and tip this information for appropriate follow-up investigation.

(U) I declare under penalty of perjury that the facts set forth above are true and correct.

VR

KEITH B. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

Executed this 3rd day of August, 2009

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 No.: BR 09-09

AFFIDAVIT OF ROBERT S. MUELLER, III

I, Robert S. Mueller, III, hereby affirm the following:

(U) I am the Director of the Federal Bureau of Investigation (FBI), United States Department of Justice (DOJ), a component of an Executive Department of the United

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~~Declassify On: 20340810~~

States Government (USG). I am responsible for, among other things, the national security operations of the FBI, including the FBI's Counterterrorism Division (CTD).

(U) The matters stated herein are based upon my personal knowledge, my review and consideration of documents and information available to me in my official capacity, information furnished by the National Security Agency (NSA) and information furnished by Special Agents and other employees of the FBI.

(U) Purpose of the Affidavit

~~(S//NF)~~ This affidavit is submitted in response to the Court's Orders dated March 2, March 5, May 29, and July 9, 2009 (Orders). It describes the FBI's assessment of the value of the Business Records FISA (BR FISA) metadata to FBI national security investigations and, more broadly, to the national security of the United States.

(U) Relevance to Authorized Investigations

~~(S//NF)~~ [redacted] and unknown persons in the United States and abroad affiliated with [redacted] [redacted] are the subject of numerous FBI predicated investigations being conducted under guidelines approved by the Attorney General pursuant to Executive Order 12333, as amended. As of August 10, 2009, the FBI had approximately [redacted] open predicated investigations[1] targeting [redacted]

[1] (U) Predicated investigations are either full investigations or preliminary investigations. A full investigation may be initiated if there is an articulable factual basis for the investigation that reasonably indicates, *inter alia*, that a threat to the national security has or may have occurred, is or may be occurring, or will or may occur and the investigation may obtain information relating to the activity or the involvement or role of an individual, group, or organization in such activity. A preliminary investigation may be initiated on the basis of information or an allegation

[redacted]. As of August 10, 2009, the FBI was conducting approximately [redacted] predicated investigations of individuals believed to be associated with [redacted] under guidelines the Attorney General has approved pursuant to Executive Order 12333, as amended.

~~(TS/SI//NF)~~ The National Security Agency (NSA) has issued and is expected to continue to issue to the FBI BR FISA metadata "tippers" regarding telephone numbers that are associated with [redacted] that are targets of FBI investigations. The tippers provide information regarding contacts between these foreign telephone numbers and domestic telephone numbers. NSA identifies the assessed users of the foreign telephone numbers, the dates of contact between the foreign telephone numbers and the domestic telephone numbers, and any additional information, e.g., foreign telephone number's country of origin, domestic telephone number's city and state, etc., that NSA may have regarding the telephone numbers.

~~(S//SI)~~ FBI Processing of BR FISA Metadata Reports

~~(S//NF)~~ FBI employees from the Counterterrorism Division's (CTD) Communications Analysis Unit (CAU) are detailed full-time to the NSA's Homeland

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indicating, *inter alia*, that a threat to the national security has or may have occurred, is or may be occurring, or will or may occur and the investigation may obtain information relating to the activity or the involvement or role of an individual, group, or organization in such activity.

Security Analysis Center (HSAC). These detailees, known as "Team 10," consist of a Supervisory Special Agent and several Intelligence Analysts. Team 10's chief responsibility is to identify and initially process domestic information contained in reports disseminated to the FBI from HSAC.[2] Upon receiving an HSAC report, Team 10 queries FBI databases to determine whether the FBI already has information about any of the domestic facilities contained in the report. Team 10 then transmits the NSA information together with additional analysis based on any information already known to the FBI to the appropriate FBI field offices. Team 10 also recommends subsequent investigation to the field office.

~~(S//SI)~~ Value of BR FISA Metadata to FBI Investigations

~~(TS//SI//NF)~~ The FBI derives value from the BR FISA metadata primarily in two ways. First, BR FISA metadata provides information that assists the FBI in detecting, preventing, and protecting against terrorist threats to the national security of the United States by providing the predication to open investigations, advance pending investigations, and revitalize stalled investigations. Second, metadata obtained via the BR FISA can provide warning signals that alert the FBI to individuals who are inside the United States and are linked to persons who pose a threat to the national security.

~~(S//SI)~~ I. BR FISA Metadata as Additional Information

~~(S//SI)~~ The FBI is authorized, *inter alia*, to collect intelligence and to conduct investigations to detect, obtain information about, and prevent and protect against

[2] ~~(S//NF)~~ HSAC reports include BR FISA metadata "tippers."

terrorist threats to national security. The more information the FBI has regarding such threats to the national security, the more likely it will be able to prevent and protect against those threats. The BR FISA metadata program is a source of information that the FBI uses in its mission to detect, prevent, and protect against terrorist threats to national security. The oft-used metaphor is that the FBI is responsible for "connecting the dots" to form a picture of the threats to national security. BR FISA metadata provides additional "dots" that the FBI uses to ascertain the nature and extent of domestic threats to the national security.

~~(S//SI)~~ In certain circumstances, the FBI may already have an investigative interest in a particular domestic telephone number prior to receipt of a BR FISA metadata tipper containing that domestic telephone number. Nevertheless, the tipper may be valuable if it provides new information regarding the domestic telephone number that revitalizes the investigation or otherwise allows the FBI to focus its resources more efficiently and effectively.

~~(S//SI)~~ The FBI has received BR FISA metadata tippers containing information not previously known to the FBI about domestic telephone numbers utilized by targets of pending preliminary investigations. The information from the BR FISA metadata tippers has provided articulable factual bases to believe that the subjects posed a threat to the national security such that the preliminary investigations could be converted to full investigations, which, in turn, led the FBI to focus resources on those targets.[3] The FBI has also re-opened previously closed investigations based on information contained in

[3] (U) Because there is greater predication for a full investigation (an articulable factual basis to believe the subject poses a threat to the national security) than for a preliminary investigation (information or allegation that the subject is or may be a threat to the national security), the FBI tends to focus more resources on full investigations than preliminary investigations.

BR FISA metadata tippers. In those instances, the FBI had previously exhausted all leads and concluded that no further investigation was warranted. The new information from the BR FISA metadata tippers was significant enough to warrant the re-opening of the investigations.

~~(S//NF)~~ Provided below are two examples of investigations [redacted] that were re-opened because of new information provided by a BR FISA metadata tipper.

~~(S//SI)~~ II. BR FISA Metadata Analysis as an "Early Warning System"

~~(S//SI)~~ The earlier the FBI obtains information about a threat to national security, the more likely it will be able to prevent and protect against those threats. The BR FISA metadata program sometimes provides information earlier than the FBI's other investigative methods and techniques. To use the oft-used metaphor, BR FISA metadata sometimes provides "dots" that the FBI may not otherwise have uncovered until much later in its investigation. In those instances, the BR FISA metadata program acts as an "early warning system" of potential threats against national security.

~~(S//SI)~~ In certain circumstances, the FBI may receive a BR FISA metadata tipper containing information regarding a domestic telephone number that the FBI inevitably would have discovered via other investigative techniques. Nevertheless, that tipper is valuable because it provides information earlier than the FBI would otherwise have obtained it. Earlier receipt of the information may advance the investigation and could contribute to the FBI preventing or protecting against a threat to national security that, absent the BR FISA metadata tipper, the FBI could not.

~~(S//SI)~~ The FBI has also received BR FISA metadata tippers regarding domestic telephone numbers in which the FBI had little or no prior investigative interest at the time the tipper was received. In those instances, the FBI opened either a preliminary or a full investigation of the user of the domestic telephone number. Here again, although the FBI may have inevitably developed an investigative interest in these domestic telephone numbers, it is impossible to say when that would have occurred or whether it would have occurred too late to prevent or protect against a terrorist attack.

~~(S//SI)~~ Provided below are two examples of preliminary investigations [redacted] that were commenced based upon BR FISA metadata tippers. In both cases, the investigations were eventually converted to full investigations based on information developed by the FBI, thus demonstrating the value of the BR FISA metadata information.

(U) III. Statistical Information Pertaining to Full Investigations

~~(TS//SI//NF)~~ One method of quantifying the value of the BR FISA metadata to the FBI's efforts to protect the nation's security is the number of predicated full investigations that the FBI has opened or supported using BR FISA metadata provided by the NSA.[4] Full investigations opened based on BR FISA metadata tippers illustrate the value of the BR FISA metadata in assisting the FBI to identify previously unknown connections between persons in the United States and [redacted]. Similarly,

[4] ~~(S//NF)~~ Full investigations are typically more significant and fruitful than preliminary investigations. I will, therefore, limit the information discussed in this affidavit to full investigations that were predicated, in whole or part, or assisted by BR FISA metadata.

the number of preliminary investigations converted to full investigations illustrates the importance of the BR FISA metadata in assisting the FBI to develop suspected connections between persons in the United States and [redacted].

~~(S//NF)~~ Below is a chart containing statistical information pertaining to investigations that were opened as full investigations or converted from preliminary investigations to full investigations based, at least in part, on information from BR FISA metadata since the Court first authorized the BR FISA order in 2006 through 2008. These statistics show that the BR FISA metadata's contribution to FBI investigations is not insignificant. This chart includes (1) the total number of full investigations that are predicated, at least in part, on BR FISA metadata;[5] (2) the number of Intelligence Information Reports (IIRs) issued to foreign partners from these full investigations; and (3) the number of IIRs issued to other U.S. government agencies from these full investigations.

[5] ~~(S//NF)~~ The FBI's statistics include investigations that were (1) opened as full investigations based, at least in part, on BR FISA metadata, and (2) preliminary investigations that were converted to full investigations based, at least in part, on BR FISA metadata. These statistics are limited to investigations that are connected directly to BR FISA metadata tippers. BR FISA metadata tippers have also indirectly contributed to the predication for other investigations. For example, information obtained during the full investigation of [redacted] discussed below, led the FBI to open preliminary investigations of others suspected of engaging in similar activities. This affidavit is limited to investigations based directly, at least in part, on BR FISA metadata.

Year	Full Investigations Opened/Preliminary Investigations Converted to Full Investigations	Intelligence Information Reports (IIRs) Issued to Foreign Partners	IIRs issued to Other U.S. Government Agencies
2006	3	1	3
2007	9	6	8
2008	15	24[6]	35
Total	27	31	46

(S//SI) During the 27 full investigations that were based, at least in part, on BR FISA metadata tippers, the FBI has found and identified known and unknown members or agents of [redacted], and those in communication with them. The information NSA has tipped to the FBI has also permitted FBI to acquire additional information about such individuals and their activities, including criminal activities in support of international terrorism.

(U) IV. Specific Examples of Noteworthy Full Investigations

(S//SI) To illustrate the value of the BR FISA metadata program to the FBI, four (4) full investigations that were predicated, at least in part, on BR FISA metadata tippers are summarized below.

[6] (S//NF) Because certain IIRs were issued to multiple countries, the FBI issued a total of 51 IIRs to foreign partners.

~~(S)~~ A. [redacted]

~~(S)~~ On or about [redacted] the FBI opened a preliminary investigation of [redacted] a U.S. person, based on an anonymous letter alleging that he and eight others had ties to the Muslim extremist organization [redacted] After pursuing all available leads, the FBI closed the preliminary investigation on [redacted], because it had not developed any evidence tending to show that [redacted] was, in fact, affiliated with [redacted]

~~(TS//SI//OC//NF)~~ On or about [redacted], the FBI received an intelligence report from the NSA that included information and contact chaining analysis conducted on data obtained through the BR FISA order ("metadata report"). The metadata report established a [redacted] connection between a [redacted] telephone known to be used by [redacted] a [redacted]-based extremist with ties to [redacted] and [redacted] an unlisted [redacted] telephone number.[7] The FBI's [redacted] Division opened a preliminary investigation of the unknown user of the [redacted] telephone number based upon the information contained in the metadata report and information contained in FBI's databases that telephone number [redacted] was linked to [redacted] other pending FBI investigations.[8]

[7] ~~(S//NF)~~ The metadata tipper established that [redacted] telephone was in contact with another [redacted] telephone. That second [redacted] cellular telephone was in contact with [redacted].

[8] ~~(S)~~ Most notably, prior to [redacted] opening of the preliminary investigation, in an investigation conducted by the [redacted] Division, the FBI had obtained via a national security letter (NSL) telephone records for [redacted], the target of the investigation, who was suspected of [redacted]. According to the telephone records, [redacted] telephone number had contact with [redacted]

~~(TS//SI//REL TO USA, AUS, CAN, GBR, NZL)~~ On or about [redacted], during [redacted] preliminary investigation, the FBI received information from the NSA indicating that someone named [redacted] using the [redacted] telephone number [redacted] had stated that [redacted]. At the time, [redacted] was linked to the [redacted]

~~(S)~~ On or about [redacted] was identified by the FBI as a user of telephone number [redacted][10] Based on that identification, the fact that [redacted] was formerly the subject of a [redacted] preliminary investigation, and the phonetic similarity between [redacted] first name [redacted] and the name [redacted] the [redacted] Division converted the preliminary investigation of the unknown user of [redacted] into a full investigation of [redacted]

~~(TS//SI)~~ During the full investigation, the FBI obtained authorization from this Court to conduct electronic surveillance of [redacted] Court-authorized electronic surveillance of [redacted] revealed that [redacted] and [redacted] routinely discussed [redacted] Also through this investigation, the FBI has identified other individuals in the United States who are believed to be involved in [redacted]

[redacted]

[10] ~~(S)~~ [redacted] provided [redacted] as his telephone number in a [redacted] he filed with the [redacted]. In addition, [redacted]

for [redacted] full investigations have been opened as a result of information obtained through the [redacted] investigation. The FBI has also identified certain methods and means that these individuals use to [redacted], including the suspected use of [redacted]

~~(S//OC/NF)~~ The FBI is working with the Department of Justice, National Security Division, and the United States Attorney's Office, [redacted] to indict [redacted] on criminal charges that include, but are not limited to, [redacted]

~~(S)~~ B. [redacted]

~~(S)~~ On or about [redacted], the FBI opened a full investigation of [redacted] based on information indicating that [redacted] made terrorist threats and were connected to [redacted] On or about [redacted] the FBI closed this investigation (the [redacted] investigation) after pursuing all available leads because the U.S. Attorney's Office, [redacted], was reluctant to proceed unless additional evidence could be obtained.

~~(TS//OC/NF)~~ On or about [redacted] the FBI received a BR FISA metadata report from the NSA that included information and contact chaining analysis

indicating that [redacted] and [redacted] had each been in contact with several cellular telephone numbers in [redacted] that were believed to be used by [redacted][11] The [redacted] cellular telephone numbers were, in turn, in contact with [redacted] telephone numbers believed to be associated with [redacted] which are owned by [redacted][12] In addition, the BR FISA metadata report stated that a [redacted] telephone number, reportedly registered to [redacted] had also been in contact with two of the aforementioned [redacted] telephone numbers.

~~(S//NF)~~ Based upon the information obtained in the [redacted] investigation, information obtained from another investigation that had been conducted from [redacted],[14] and on the information provided by the BR FISA metadata report, the FBI re-opened the full terrorism investigation of [redacted] on [redacted]

~~(S//OC//NF)~~ Since re-opening the investigation in [redacted], the FBI has received reports from various sources, [redacted] are connected to and [redacted] to [redacted]

[11] ~~(S//NF)~~ According to NSA reporting, [redacted] was believed to be [redacted] and [redacted] was believed to be a [redacted] and [redacted]

[12] ~~(S)~~ The FBI subsequently confirmed via an NSL that [redacted] and [redacted] were the subscribers of two of the [redacted] telephone numbers.

[13] ~~(S)~~ According to U.S. Intelligence Community reporting, [redacted] that is responsible for directing and supporting [redacted].

[14] ~~(S)~~ In [redacted], the FBI re-opened the full investigation of [redacted] based on an anonymous letter alleging that they supported [redacted]. The FBI uncovered no new additional evidence, and closed the investigation again in [redacted]

~~(S)~~ The FBI continues to investigate [redacted] suspected [redacted] for [redacted] The FBI recently obtained renewed FISC authority to conduct electronic surveillance and physical searches of [redacted] telephone and e-mail accounts, as well as [redacted] telephone and e-mail accounts, as agents of [redacted] The FBI's investigation of [redacted] is ongoing.

~~(S)~~ C. [redacted]

~~(TS//SI//OC//NF)~~ On or about [redacted], the FBI received a BR FISA metadata report from the NSA that included information and contact chaining analysis indicating that associates of [redacted][15] [redacted] living in the [redacted], had been in contact with several U.S. [redacted] telephone numbers.[16] According to the NSA's BR FISA metadata report, two of the foreign telephone numbers that were in contact with [redacted] one [redacted] cellular number and one [redacted] cellular number, were also in contact with U.S. telephone number [redacted] An Internet search of [redacted] by the FBI revealed [redacted] as the apparent subscriber of the telephone number. Furthermore, toll billing records obtained via NSL's in [redacted] by the FBI in connection with other FBI investigations revealed that [redacted] had been in contact with telephone numbers associated with four other pending counterterrorism investigations. That information, in conjunction with the information obtained from the

[15] ~~(TS//SI//OC//NF)~~ According to the NSA, [redacted] is the leader of a mainly [redacted] Islamic extremists called [redacted] and maintains ties to more radical members of [redacted] an organization designated by the Interagency Intelligence Committee on Terrorism (IICT) as a tier 1 support entity to [redacted]

[16] ~~(S//NF)~~ The FBI had received previous reports regarding [redacted] and his activities from both the [redacted].

BR FISA metadata program, formed the basis for the FBI's decision to open a preliminary investigation of [redacted]. The preliminary investigation was opened on [redacted].

~~(S//OC//NF)~~ During the preliminary investigation, the FBI learned that [redacted] is a [redacted] board member of [redacted]. According to [redacted]. On or about [redacted] reported to the FBI that [redacted] had been designated by [redacted] as a point-of-contact for [redacted] a senior member of [redacted] and that [redacted] has donated funds to [redacted]. Based on this additional information, on [redacted], the FBI converted the preliminary investigation of [redacted] to a full investigation.

~~(S//NF)~~ The FBI has obtained information about several financial transactions that suggests [redacted] is providing material support to a foreign terrorist organization. On [redacted] [redacted] sent [redacted] to [redacted] in [redacted]. According to the CIA, [redacted] was a member of [redacted] as well as the [redacted]. In addition, [redacted] sent [redacted] to [redacted] in [redacted] on [redacted]. The CIA has reported that [redacted] is believed to be a member of [redacted]. Finally, [redacted] sent [redacted] to [redacted]

[redacted], in [redacted] on [redacted]. According to the CIA, [redacted] is a former senior member of [redacted]

~~(S//NF)~~ Although these known money transfers to [redacted] and [redacted] are not particularly large, they do show connections between [redacted] and members and former members of [redacted]. These connections are troubling in light of significant account activity that occurred on [redacted]. On that date, [redacted] made deposits to his checking account of [redacted] and [redacted] including [redacted] in foreign currency. [redacted] also transferred [redacted] to a [redacted] bank named [redacted] This transfer is suspicious because it is larger than [redacted] typical transactions.[18]

~~(S//NF)~~ The FBI continues to investigate [redacted] and has begun to receive and analyze responses to eleven national security letters that were served during [redacted] The FBI is also investigating the [redacted] bank account that received [redacted] from [redacted]

~~(S)~~ D. [redacted]

~~(TS//SI//OC//NF)~~ On or about [redacted], the FBI received a BR FISA metadata report from the NSA that included information and contact chaining analysis

[17] ~~(S//NF)~~ The CIA reported in March 2009 that [redacted]

[18] [redacted]

indicating that a [redacted] cellular telephone number used by several extremists associated with the [redacted] had been in contact with several U.S. telephone numbers, including [redacted] cellular number [redacted] The FBI's database contained information from another investigation indicating that the subscriber of the [redacted] telephone number was [redacted] Based on the information contained in the BR FISA metadata report, the [redacted] Division was instructed by FBI HQ to conduct a threat assessment of the user of the [redacted] ostensibly [redacted]

~~(S//NF//OC)~~ The [redacted] Division subsequently received information from a [redacted] that [redacted] had been killed on or about [redacted] Based on the BR FISA metadata, the information identifying the subscriber of the [redacted] telephone number, and [redacted] the FBI's [redacted] Division opened a full investigation of [redacted] to investigate [redacted] alleged association with [redacted] Although [redacted] had been reported killed, the FBI elected to investigate, *inter alia*, whether the report of [redacted] death was accurate and whether others traveled overseas and took part in terrorist training with him in [redacted]

(U) Conclusion

~~(TS//SI)~~ The facts set forth above demonstrate that the BR FISA metadata has historically proved to be a valuable source of intelligence to the FBI. Its historic value leads me to conclude that the BR FISA metadata will continue to be a valuable source of

intelligence that is relevant to numerous FBI-authorized international terrorism investigations. Accordingly, I hereby certify that the BR FISA metadata is relevant to an authorized investigation (other than a threat assessment) to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, and that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

(U) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 2009.

ROBERT S. MUELLER, III
Director
Federal Bureau of Investigation

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

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

Docket Number: BR 09-15

SUPPLEMENTAL OPINION AND ORDER

On October 30, 2009, the Court authorized the acquisition by the National Security Agency ("NSA") of the tangible things sought in the government's application in the above-captioned docket ("BR metadata"). This supplemental opinion and order reiterates the manner in which query results may be shared within the NSA, as informed by the testimony provided by government, and elaborates on the reporting requirement imposed in the Court's order of October 30.

Sharing of BR Metadata Query Results Within the NSA

The Court's order permits NSA analysts who are authorized to query the BR metadata to share the results of authorized queries among themselves and with other NSA personnel, "provided that all NSA personnel receiving such query results in any form (except for information properly disseminated outside NSA) shall first receive appropriate and adequate training and guidance regarding the rules and restrictions governing the use, storage, and dissemination of such information." Primary Order at 15, Docket No. BR 09-15 (October 30, 2009) ("October 30 Order"). The order further provides: "[a]ll persons authorized for access to the BR metadata and other NSA personnel who are authorized to receive query results shall receive appropriate and adequate training by NSA's [Office of General Counsel] concerning the authorization granted by this Order, the limited circumstances in which the BR metadata may be accessed, and/or other procedures and restrictions regarding the retrieval, storage, and dissemination of the metadata." Id. at 13. The Court's prior order in this matter contained identical provisions. Primary Order at 12, 14-15, Docket No. BR 09-13 (September 3, 2009) ("September 3 Order").

In September, 2009, the Court received oral notification that NSA analysts had, on two occasions, shared the results of queries of the BR metadata with NSA analysts involved in the [redacted] investigation who had not received "appropriate and adequate training and guidance" as required under the September 3 Order. Order Regarding Further Compliance Incidents at 2-3, Docket No. BR 09-13 (September 25, 2009). On September 25, 2009, the Court ordered representatives of the NSA and the National Security Division ("NSD") of the

Department of Justice to appear for a hearing in order to inform the Court more fully of the scope and circumstances of the incidents, and to allow the Court to assess whether the Court's order should be modified or rescinded and whether other remedial steps should be imposed. Id at 4.

At the hearing, which was conducted on September 28, 2009, the government confirmed that NSA analysts authorized to query the BR metadata had sent query results to NSA personnel who had not received the training and guidance required by the Court's September 3 Order. Transcript at 6-7, Docket No. BR 09-13. Specifically, the government reported that the NSA had created an e-mail distribution list (the NSA representative referred to this list as an "alias") for the 189 NSA analysts who were working on the "[redacted]" threat, only 53 of whom had received the required training and guidance. Id. at 6-7, 12-13. On September 17th, an NSA analyst authorized to query the BR metadata sent an e-mail to the [redacted] alias that included a "general analytic summary" of the results of a query of the BR metadata. Id. at 7. After a recipient brought the e-mail to the attention of the NSA's Oversight and Compliance Office and Office of General Counsel, the Oversight and Compliance Office issued guidance on September 21st, "reemphasizing the point, no dissemination of query results in any form." Id. at 14. The NSA's Counter-terrorism organization sent a similar reminder on the morning of September 22nd, however, that afternoon, a second NSA analyst who was authorized to query the BR metadata sent a situation report to the [redacted] alias that contained information derived from a query of the BR metadata. Id. at 15.

The government testified at the hearing that the NSA has taken steps to ensure that any sharing of the results of queries of the BR metadata within the NSA is fully consistent with the

Court's orders. First, the NSA has issued guidance interpreting "query results in any form," to mean any information of any kind derived from the BR metadata. Id. at 16. Second, NSA aliases for sharing information that could include BR metadata query results, will be limited to NSA personnel who have received the necessary training and guidance to receive those query results. Id. at 21-22. The Court hereby affirms that the NSA may share BR metadata query results in this manner consistent with the Court's October 30 Order. The only exception to this practice is under circumstances in which the Court has expressly authorized a deviation.[1]

Report on Queries Described in Footnote 6 of the Court's October 30 Order

According to the government, one advantage of the BR metadata repository is that it is historical in nature, reflecting contact activity from the past that cannot be captured in the present or prospectively. Declaration of [redacted]at 7, Docket No. BR 09-15. At the government's request, the Court's September 3 Order and October 30 Order both acknowledge that the government may query the BR metadata for historical purposes, using a telephone identifier that is not currently associated with one of the targeted foreign powers, but that was for a period of time in the past.[2]

[1] For example, pursuant to paragraph (3)J of the Court's order, NSA personnel authorized to query the BR metadata may use and share the identity of high-volume telephone identifiers and other types of identifiers not associated with specific users for purposes of metadata reduction and management, without regard to whether the recipient has received the training and guidance required for access to BR metadata query results.

[2] Both orders contain the following footnote: "The Court understands that from time to time the information available to designated approving officials will indicate that a telephone identifier was, but may not presently be, or is, but was not formerly, associated with [redacted] In such a circumstance, so long as the designated approving official can determine that the reasonable, articulable suspicion standard can be met for a particular period of time with respect to the telephone identifier, NSA may query the BR metadata using that telephone identifier. However, analysts conducting queries using such telephone identifiers must be made aware of the time period for (continued...)

Nevertheless, the NSA's querying of the BR metadata using telephone identifiers that do not currently satisfy the "reasonable articulable suspicion" standard has been a source of concern for the Court. Given that telephone providers regularly re-assign telephone identifiers, and in light of the fact that the NSA acquires approximately [redacted] call detail records per day, the vast majority of which are irrelevant to the Federal Bureau of Investigation's ("FBI") investigations and concern communications of United States persons in the United States, it would appear likely that such a query could produce results that include metadata from United States persons not under investigation by the FBI. In order to allay these concerns, the Court's September 3 Order mandated that any application to renew or reinstate the authority granted therein must include a report describing, among other things, how the NSA has conducted [these types of queries] and minimized any information obtained or derived therefrom. September 3Order at 18.

The government's report submitted as Exhibit B to its Application in Docket Number 09-15, stated:

> From time to time, NSA may have information indicating that a particular identifier was used by an individual associated w[redacted] only for a particular timeframe. In these circumstances, NSA would seek and grant as appropriate, RAS approval, with the understanding that contact chaining would be conducted in a manner that covered a limited timeframe that has been identified.

(...continued) which the telephone identifier has been associated with [redacted] in order that the analysis and minimization of the information retrieved from their queries may be informed by that fact." September 3 Order at 9, n. 5; October 30 Order at 9, n. 6.

The report then provided one example of how the NSA had conducted such a query. NSA Report to the Foreign Intelligence Surveillance Court (BR 09-13) at 15-16.

This report was not sufficiently detailed to allay the Court's concerns, and the Court therefore continues to be concerned about the likelihood that these queries could reveal communications of United States person users of the telephone identifier who are not the subject of FBI investigations. As a result, the Court's October 30 Order contains the same reporting requirements as the September 3 Order. October 30 Order at 18-19. However, to assist the government in providing a report that satisfies its needs, the Court HEREBY ORDERS that any report submitted by the government pursuant to paragraph (3)S of the Court's October 30 Order shall include the following information with regard to how the NSA has conducted queries of the BR metadata using telephone identifiers determined to satisfy the reasonable articulable suspicion standard at some time in the past, but that do not currently meet the standard, and how the NSA minimized any information obtained or derived therefrom:

1. The total number of such queries run during the reporting period and what percentage those queries constitute of the total number of queries run.
2. Would the status of a telephone identifier that was approved for querying under these circumstances be changed on the Station Table to non-RAS approved once a single query using that identifier has been run? If not, does the NSA have an automated process to limit queries of that telephone identifier to the specified time frame? If not, how will an NSA analyst know that any query of that telephone identifier must be limited to the time period for which the reasonable articulable suspicion existed?

3. Are NSA analysts permitted to conduct more than one query using any telephone identifier determined to have met the reasonable articulable suspicion standard under circumstances described above, and if so, for what purpose? If query results from the first query indicated that the telephone identifier's association with the foreign power terminated earlier than the date the NSA believed the identifier no longer met the reasonable articulable suspicion, would the timeframe restriction be adjusted for any subsequent query?

4. If this type of query is run, and the NSA analyst who ran the query determines that the query results include records of communications that were made after the telephone identifier was re-assigned to a United States person who is not associated with the foreign power, must the analyst delete or otherwise mask such records prior to sharing the query results with NSA analysts authorized to receive query results pursuant to paragraph (3)I of the Court's order?

ENTERED this 5th day of November, 2009.

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

[redacted]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC

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~~UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE~~

September 3, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Madam and Messrs. Chairmen:

To keep your committees fully informed of matters pertaining to your oversight responsibilities pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA"), 50 U.S.C. 1801, *et. seq.*, we are submitting herewith several documents for your information. The content of these documents were described, in pertinent part, in briefings provided to the House and Senate Intelligence and Judiciary Committees in March, April, and August 2009. The enclosed documents contain redactions necessary to protect the national security of the United States, including the protection of sensitive sources and methods.

The enclosed documents are highly classified. Accordingly, while four copies are being provided for review by Members and appropriately-cleared staff from each of the four Committees, the copy for the Senate Committee on the Judiciary is being delivered to the Senate Select Committee on Intelligence for appropriate storage. The House Committee on the Judiciary's documents will be delivered to the House Security Office for appropriate storage.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Sessions
Ranking Minority Member
Senate Committee on the Judiciary

The Honorable Christopher S. Bond
Vice Chairman
Senate Select Committee on Intelligence

The Honorable Lamar S. Smith
Ranking Minority Member
House Committee on the Judiciary

The Honorable Peter Hoekstra
Ranking Minority Member
House Permanent Select Committee on Intelligence

The Honorable John D. Bates
Presiding Judge
United States Foreign Intelligence Surveillance 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 FROM [redacted]

[redacted] (TS)

Docket Number: BR: 09-13

PRIMARY ORDER

A verified application having been made by the Director of the Federal Bureau of Investigation (FBI) for an order pursuant to the Foreign Intelligence Surveillance Act of 1978 (the Act), Title 50, United States Code (U.S.C.), § 1861, as amended, requiring the production to the National Security Agency (NSA) of the tangible things described below, and full consideration

Derived from: Pleadings in the above-captioned docket
Declassify on: 1 September 2034

having been given to the matters set forth therein, the Court finds as follows:

1. There are reasonable grounds to believe that the tangible things sought are relevant to authorized investigations (other than threat assessments) being conducted by the FBI under guidelines approved by the Attorney General under Executive Order 12333 to protect against international terrorism, which investigations are not being conducted solely upon the basis of activities protected by the First Amendment to the Constitution of the United States. [50 U.S.C. § 1861(c)(1)]

2. The tangible things sought could be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things. [50 U.S.C. § 1861(c)(2)(D)]

3. The application includes an enumeration of the minimization procedures the government proposes to follow with regard to the tangible things sought. Such procedures are similar to the minimization procedures approved and adopted as binding by the order of this Court in Docket Number BR 09-09 and its predecessors. [50 U.S.C. § 1861(c)(1)]

Accordingly, the Court finds that the application of the United States to obtain the tangible things, as described below,

satisfies the requirements of the Act and, therefore,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the application is GRANTED, and it is

FURTHER ORDERED, as follows:

(1)A. [redacted] shall produce to NSA upon service of the appropriate secondary order, and continue production on an ongoing daily basis thereafter for the duration of this order, unless otherwise ordered by the Court, an electronic copy of the following tangible things: all call detail records or "telephony metadata"[1] created by [redacted] In addition, the Custodian of Records of [redacted] shall produce to NSA upon service of the appropriate Secondary Order an electronic copy of the same tangible things created by [redacted] for the period from 5:11 p.m. on July 9, 2009, to the date of this Order, to the extent those records still exist.

[1] For purposes of this Order "telephony metadata" includes comprehensive communications routing information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer.

B. The Custodian of Records of [redacted] shall produce to NSA upon service of the appropriate secondary order, and continue production on an ongoing daily basis thereafter for the duration of this order, unless otherwise ordered by the Court, an electronic copy of the following tangible things: all call detail records or "telephony metadata" created by [redacted] for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls. [redacted]

(2) With respect to any information the FBI receives as a result of this Order (information that is passed or "tipped" to it by NSA), the FBI shall follow as minimization procedures the procedures set forth in The Attorney General's Guidelines for Domestic FBI Operations (September 29, 2008).

(3) With respect to the information that NSA receives as a result of this Order, NSA shall strictly adhere to the following minimization procedures:

A. The government is hereby prohibited from accessing business record metadata acquired pursuant to this Court's orders in the above-captioned docket and its predecessors ("BR metadata") for any purpose except as described herein. Notwithstanding the requirements set forth below, Executive Branch personnel may be permitted access to the BR metadata and information derived therefrom in order to facilitate their lawful oversight functions, which include, but are not limited to, those set forth below.

B. The BR metadata may be accessed for the purposes of ensuring data integrity and developing and testing any technological measures designed to enable the NSA to comply with the Court's orders. Access to the BR metadata for such purposes shall be limited to the NSA Collection Managers, Data Integrity Analysts, and System Administrators described in paragraph 16 of the Declaration of [redacted], Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate, the National Security Agency, filed as Exhibit A to the Application in the above-captioned docket ([redacted] Declaration"). Additional individuals directly involved in developing and testing technologies to be used with the BR metadata may be granted access to the BR metadata, provided such access is approved by NSA's Office of General Counsel (OGC) on a

case-by-case basis. Except as provided in paragraph (3)J, persons who query the BR metadata pursuant to this paragraph may only share the results of any such query with other specially-cleared NSA technical personnel. Queries performed by the persons described in this paragraph shall not be subject to the approval process and standard set forth in paragraph (3)C below. To the extent NSA personnel make copies of the BR metadata for purposes of ensuring data integrity or developing and testing technological measures, such copies shall be destroyed upon the completion of their work.

C. Subject to the restrictions and procedures below, the BR metadata may be accessed for purposes of obtaining foreign intelligence information through contact chaining [redacted] ("queries") using telephone identifiers,[2] as described in the [redacted] Declaration at paragraphs 8-13.

(i) Except as provided in subparagraph (ii) below, all telephone identifiers to be used for queries shall be approved by one of the following designated approving

[redacted]

officials: the Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate; the Chief or Deputy Chief, Homeland Security Analysis Center; or one of the twenty specially-authorized Homeland Mission Coordinators in the Analysis and Production Directorate of the Signals Intelligence Directorate. Such approval shall be given only after the designated approving official has determined that based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone identifier to be queried is associated with [redacted]

[3] For purposes of this Order, the term [redacted] includes the following [redacted]

[redacted][4]

provided, however, that NSA's OGC shall first determine that any telephone identifier reasonably believed to be used by a United States (U.S.) person is not regarded as associated with [redacted] solely on the basis of activities that are protected by the First Amendment to the

[redacted]

[4] For purposes of this Order, the term [redacted] refers to those [redacted] organizations involved in international terrorism (namely [redacted] If intelligence reveals the existence of other terrorist organizations associated with the [redacted] the Government shall seek the Court's approval before regarding them as falling within [redacted]

Constitution.[5]

(ii) Telephone identifiers that are currently the subject of electronic surveillance authorized by the Foreign Intelligence Surveillance Court (FISC) based on the FISC's finding of probable cause to believe that they are used by agents of [redacted], including those used by U.S. persons, may be deemed approved for querying for the period of FISC-authorized electronic surveillance without review and approval by a designated approving official. The preceding sentence shall not apply to telephone identifiers under surveillance pursuant to any

[5] The Court understands that from time to time the information available to designated approving officials will indicate that a telephone identifier was, but may not presently be, or is, but was not formerly, associated with [redacted] In such a circumstance, so long as the designated approving official can determine that the reasonable, articulable suspicion standard can be met for a particular period of time with respect the telephone identifier, NSA may query the BR metadata using that telephone identifier. However, analysts conducting queries using such telephone identifiers must be made aware of the time period for which the telephone identifier has been associated with [redacted], in order that the analysis and minimization of the information retrieved from their queries may be informed by that fact.

certification of the Director of National Intelligence and the Attorney General pursuant to Section 702 of FISA, as added by the FISA Amendments Act of 2008, or pursuant to an Order of the FISC issued under Section 703 or Section 704 of FISA, as added by the FISA Amendments Act of 2008.

(iii) A determination by a designated approving official that a telephone identifier is associated with [redacted] shall be effective for: one hundred eighty days for U.S. telephone identifiers and for any identifiers believed to be used by a U.S. person; one year for all other telephone identifiers.[6]

[redacted]

D. The Director of the NSA shall continue to maintain mandatory procedures to strictly control access to and use of the BR metadata, in accordance with this Court's orders. NSA's OGC shall continue to promptly provide NSD with copies of these mandatory procedures (and all replacements, supplements or revisions thereto in effect now or adopted in the future). The Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate; Chief and Deputy Chief, Homeland Security Analysis Center; and the Homeland Mission Coordinators shall maintain appropriate management controls (e.g., records of all tasking decisions, audit and review procedures) for access to the metadata.

E. The NSA shall obtain the BR metadata from [redacted] via [redacted], and shall store and process the BR metadata on a secure internal network that NSA exclusively will operate.

F. Any processing by technical personnel of the BR metadata acquired pursuant to this order shall be conducted through the NSA's secure internal network, which shall be accessible only to authorized personnel, using accounts authorized by a user authentication service, based on user login and password.

G. Access to the metadata shall be controlled by user name and password. NSA's Oversight and Compliance Office shall

monitor the designation of individuals with access to the BR metadata. When the BR metadata is accessed through queries under paragraphs (3)B or (3)C above, a software interface shall limit access to the BR metadata to authorized personnel, and the user's login, Internet Protocol (IP) address, date and time, and retrieval request shall be automatically logged for auditing capability.[7] When the BR metadata is accessed through any other means under paragraph (3)B above, the user's login, date and time shall be automatically logged for auditing capability. NSA's Office of Oversight and Compliance shall monitor the functioning of this automatic logging capability. All persons authorized for access to the BR metadata and other NSA personnel who are authorized to receive query results shall receive appropriate and adequate briefings by NSA's OGC concerning the authorization granted by this Order, the limited circumstances in which the BR metadata may be accessed, and/or other procedures and restrictions regarding the retrieval, storage, and dissemination of the metadata.

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[7] In addition, the Court understands from the Declaration of Lieutenant General Keith B. Alexander, Director of NSA (Ex. A to the Report of the United States filed in docket number BR 09-09 on August 17, 2009) that NSA has made a number of technical modifications that will prohibit analysts: a) from inadvertently accessing the BR metadata in [redacted]; b) from querying the BR metadata in [redacted] with non-RAS-approved identifiers; and c) from going beyond three "hops" from an identifier used to query the BR metadata in [redacted]

H. NSA shall treat information from queries of the BR metadata in accordance with USSID 18 and shall apply USSID 18 to minimize information concerning U.S. persons obtained from the records produced pursuant to the authorities granted herein. Additionally, before the NSA disseminates any U.S. person identifying information, the Chief of Information Sharing Services in the Signals Intelligence Directorate, the Senior Operations Officer at NSA's National Security Operations Center, the Signals Intelligence Directorate Director, the Deputy Director of the NSA, or the Director of the NSA must determine that the information identifying the U.S. person is in fact related to counterterrorism information and that it is necessary to understand the counterterrorism information or assess its importance. Notwithstanding the above requirements, NSA may share information derived from the BR metadata, including U.S. person identifying information, with Executive Branch personnel in order to enable them to determine whether the information contains exculpatory or impeachment information or is otherwise discoverable in legal proceedings. By 5:00 p.m. each Friday following the authorization requested herein, the government shall file a report listing each instance during the seven-day period ending the previous Friday in which NSA has shared, in any form, information obtained or derived from the BR metadata

with anyone outside NSA. For each such instance, the government shall specify the date on which the information was shared, the recipient of the information, and the form in which the information was communicated (e.g., written report, e-mail, oral communication, etc.). For each such instance in which U.S. person information has been shared, except those involving Executive Branch personnel seeking to identify discoverable information, the Chief of Information Sharing Services in the Signals Intelligence Directorate shall certify that one of the authorized officials identified above determined, prior to dissemination, that the information was related to counterterrorism information and necessary to understand the counterterrorism information or to assess its importance. This paragraph's reporting requirement is not intended to apply to instances in which BR metadata and information derived therefrom is shared with Executive Branch personnel in order to facilitate their lawful oversight functions.

I. Personnel authorized to query the BR metadata in paragraph (3)C above may use and share the results of authorized queries of the BR metadata among themselves and with NSA personnel, including those who are not authorized to access the BR metadata pursuant to paragraph (3)C, provided that all NSA personnel receiving such query results in any form (except for

information properly disseminated outside NSA) shall first receive appropriate and adequate training and guidance regarding the rules and restrictions governing the use, storage, and dissemination of such information. NSA's Oversight and Compliance Office shall monitor the designation of individuals who have received the training and guidance necessary to receive the results of queries of the BR metadata.

J. Authorized personnel also may use and share the identity of high-volume telephone identifiers and other types of identifiers not associated with specific users [redacted] that they discover or have discovered as a result of access authorized under paragraphs (3)B and (3)C or as a result of technical personnel access under prior docket numbers in this matter, among themselves and with other NSA personnel, including those who are not authorized to access the BR metadata, for purposes of metadata reduction and management. The training requirements set forth in paragraph (3)I above for NSA personnel receiving query results shall not apply to personnel receiving such identifiers, which may have

been identified through queries, so long as they are received solely for purposes of metadata reduction and management.

K. The BR metadata collected under this Court's Orders may be kept online (that is, accessible for queries) for five years from the date of acquisition, at which time it shall be destroyed.

L. At least twice before the expiration of the authorities granted herein, NSA's OGC shall conduct a random spot check, consisting of an examination of a sample of call detail records obtained, to ensure that NSA is receiving only data as authorized by the Court and not receiving the substantive content of communications.

M. At least twice before the expiration of the authorities granted herein, the Department of Justice's National Security Division (NSD) will review NSA's access to the BR metadata under paragraph (3)C above. Such reviews shall include a sample of the justifications designated approving officials relied upon to approve telephone identifiers for querying the BR metadata, and a review of the queries conducted.

N. NSA's OGC shall consult with NSD on all significant legal opinions that relate to the interpretation, scope, and/or implementation of the authorizations granted by the Court in this matter. When operationally practicable, such consultation

shall occur in advance; otherwise, NSD shall be notified as soon as practicable.

O. NSA's OGC shall promptly provide NSD with copies of all formal briefing and/or training materials (including all revisions thereto) currently in use or prepared and used in the future to brief/train NSA personnel concerning the authorizations granted by this Order.

P. At least once before the expiration of the authorities granted herein, a meeting for the purpose of assessing compliance with this Court's orders in this matter shall be held with representatives from NSA's OGC, NSD, and appropriate individuals from NSA's Signals Intelligence Directorate. The results of this meeting shall be reduced to writing and submitted to the Court as part of any application to renew or reinstate the authorities granted herein.

Q. At least once before the expiration of the authorities granted herein, NSD shall meet with NSA's Office of Inspector General (OIG) to discuss their respective oversight responsibilities and assess NSA's compliance with the Court's orders in this matter.

R. Prior to implementation, all proposed automated query processes shall be reviewed and approved by NSA's OGC, NSD, and

the Court.[8]

S. Any application to renew or reinstate the authority granted herein shall include a report describing: (i) the queries made since the end of the reporting period of the last report filed with the Court; (ii) the manner in which NSA applied the procedures set forth in paragraph (3)C above; and (iii) any proposed changes in the way in which the call detail records would be received from the carriers and any significant changes to the systems NSA uses to receive, store, process, and disseminate BR metadata. In particular, the report shall describe how NSA has conducted queries described in footnote 5 of this order and minimized any information obtained or derived therefrom.

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[8] The Court understands that NSA may begin testing of certain automated processes (or capabilities associated with such processes) within the next sixty days.

This authorization regarding [redacted] and unknown persons in the United States and abroad affiliated with [redacted] and unknown persons in the United States and abroad affiliated with [redacted] expires on 30th day of October 2009, at 5:00 p.m., Eastern Time.

Signed 09-03-2009 P03:33 Eastern Time
Date Time

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

Business Records FISA
NSA Review

25 June 2009

Prepared by: Business Records FISA Team
Lead, [redacted]

~~(TS//SI//NF)~~ Implementation of the Foreign Intelligence Surveillance Court Authorized Business Records FISA – NSA Review
25 June 2009

I. (U) Executive Summary

~~(TS//SI//NF)~~ The Business Records FISA Compliance Review Team of the National Security Agency (NSA), in response to instructions from the Director of NSA (DIRNSA) and as set out in DIRNSA's Declaration of 13 February 2009 to the Foreign Intelligence Surveillance Court (FISC), conducted a comprehensive systems engineering and process review of the instrumentation and implementation of the Business Records (BR) FISA authorization. This review was focused along the two major components where compliance issues had been reported -- system-level technical engineering and execution within the analytic workforce.

~~(TS//SI//NF)~~ The review entailed 8 major system or process components of the BR FISA metadata workflow, 248 sub-components, and 93 requirements and resulted in 9 new areas of concern based on past practices as described herein. NSA has taken steps, described herein, to remedy the problems identified, and to ensure to the extent possible they will not recur. NSA has also developed plans for both the current and future architecture to provide more rigorous and efficient protection, control and monitoring of the BR FISA metadata. Implementation of the envisioned changes in architectural design and oversight procedures briefly described in this report will help mitigate vulnerabilities and correct the problems identified through the course of the end-to-end review.

~~(C//REL TO USA, FVEY)~~ The end-to-end review revealed that there was no single cause of the problems that occurred and, in fact, there were a number of successful oversight, management and technology processes in place that operated as designed. The problems NSA experienced stemmed from a basic lack of shared understanding among the key mission, technology, legal and oversight stakeholders of the full scope of the program to include its implementation and end-to-end design. The complexity of the overall configuration, due in part to the intricacy of the system and the differing rules associated with NSA's various authorizations, was also a contributing factor as was the fact that NSA oversight was primarily focused on analyst access to and use of the metadata.

~~(TS//SI//NF)~~ This report, which assumes a basic knowledge of NSA's structure and some familiarity with the FISC documents and DIRNSA declarations associated with the BR FISA program, addresses previously identified and newly uncovered areas of concern, as well as the corrective actions already taken, and those on-going or planned, to address these issues. It details the scope of the end-to-end review, the methodology employed and the results. It also describes the minimization and oversight procedures NSA proposes to employ should the FISC decide to approve NSA's resumption of previously authorized access to the BR FISA metadata, to include automated alerting and querying of the metadata, as well as the authority to establish whether a telephony selector meets the Reasonable Articulable Suspicion ("RAS") standard for analysis (i.e., regular authorized access). Additionally, the report outlines the checks, balances and safeguards

engineered into the system; points to the need to clarify existing language in some cases; and describes enhanced training for the workforce that is designed to prevent future instances of non-compliance. Finally, the report includes a summary of a proposed technical architecture which will further protect BR FISA metadata.

~~(TS//SI//NF)~~ In conducting the end-to-end review, NSA established a diverse team of technical, legal and mission experts to examine jointly the key functional areas of system engineering, mission operations and oversight. The NSA team created an architectural diagram of the end-to-end data and workflow and examined each major system component and sub-component to ensure a complete understanding of how the data was handled. In addition, NSA compiled all BR FISA-related requirements and evaluated each system and process component against those requirements to identify areas of concern or vulnerability.

~~(U//FOUO)~~ In moving forward, NSA will not only address the specific technical and process issues identified in this report, but will also implement changes in its program management construct to increase transparency and awareness among accountable parties and establish an enduring view of the full scope of the program.

~~(U//FOUO)~~ NSA may produce additional supplements to this report to the extent necessary to respond to additional items that may be of interest to the court.

II. ~~(U//FOUO)~~ Results of Detailed Analysis on Identified Areas of Concern

A. ~~(U//FOUO)~~ Previously Reported Compliance Issues

1. ~~(U//FOUO)~~ Telephony Activity Detection (Alerting) Process

(U) Description

~~(TS//SI//NF)~~ As previously described to the Court,[1] NSA implemented an activity detection (alerting) process[2] in a manner that was not authorized by the Court's Order, and then inaccurately described that process in its initial and each subsequent report to the Court. NSA stated that only RAS-approved selectors were included on the Activity Detection List when, in fact, the list included those RAS-approved and non-RAS-approved selectors[3] which were also tasked for content collection by counterterrorism analysts tracking [redacted] and associated terrorist organizations or, subsequent to

[1] ~~(U//FOUO)~~ See DIRNSA Declaration dated 13 February 2009, at Sections III.A. and III.B.

[2] ~~(U//FOUO)~~ NSA now refers to the Alert Process and the Alert List as the Activity Detection Process and the Activity Detection List to more accurately describe their functions.

[3] ~~(TS//SI//NF)~~ In mid-January 2009, there were 1,935 RAS-approved and 15,900 non-RAS-approved selectors on the Activity Detection List. At that time, the Station Table (the reference database of all RAS evaluations) had approximately 27,000 selectors identified as RAS-approved and 63,000 selectors identified as non-RAS-approved.

the modifications of the BR FISA Court Order on 8 August 2006 and again on 14 June 2007, [redacted][4]

~~(TS//SI//NF)~~ The Activity Detection List that was used prior to 24 January 2009 to alert analysts to a selector of potential interest was a list independent of the Station Table, the historic reference database of all RAS evaluations. The Activity Detection List was compared against the incoming BR FISA data to assist analysts in prioritizing their work. Some of the selectors on the Activity Detection List had been RAS evaluated, and their status would have been reflected on the Station Table. Others had never been evaluated for RAS and would not have appeared in the Station Table. In this latter case, they were treated as non-RAS-approved on the alert list which meant that contact chaining did not take place in the complete body of archived data until and unless the particular selector had satisfied the RAS standard.

~~(TS//SI//NF)~~ NSA's description of this process to the Court reflected a similar process already in place for the [redacted] program, but NSA's implementation of the two processes was actually different. Further, as described to the Court, the NSA personnel who designed the BR FISA Activity Detection List process believed that the requirement to satisfy the RAS standard was only triggered when access was sought to NSA's stored (i.e., "archived" in NSA parlance) repository of BR FISA metadata. The inaccurate characterization was identified in the course of a meeting between NSA and representatives from the National Security Division (NSD) of the Department of Justice (DoJ) on 9 January 2009. During discussions, DoJ identified what was ultimately determined to be an incident of non-compliance with the Order. After additional inquiry, NSD/DoJ officially reported the incident to the FISC on 15 January 2009.

~~(TS//SI//NF)~~ Between 20 and 24 January 2009, the RAS-approved portion of the Station Table was mistakenly implemented as the Activity Detection List in an attempt to address the original problems identified with the alerting process. At that time there were approximately 27,000 selectors on this list, approximately 600 of which were designated as RAS-approved without having undergone NSA Office of General Counsel (OGC) review as described in Section II.A.4.

(U) Remedial Steps

~~(TS//SI//NF)~~ NSA completely shut down the Activity Detection Process against the BR FISA metadata on 24 January 2009 as a corrective measure.

2. ~~(U//FOUO)~~ The [redacted] Mechanism

[4] ~~(TS//SI//NF)~~ As of 8 August 2006, queries of the BR metadata for telephone identifiers reasonably believed to be associated [redacted] were permitted by the Court. As of 14 June 2007, the authorization expanded again to include queries of the BR metadata for telephone identifiers reasonably believed to be associated with [redacted] associated terrorist organizations to include [redacted]

(U) Description

~~(TS//SI//NF)~~ As previously reported to the Court,[5] from May 2006 to 18 February 2009, NSA intelligence analysts who were working counterterrorism targets had access to a tool known as [redacted] which was used to assist them in determining whether or not a telephone identifier of interest was present in NSA's metadata repositories and, if so, what the level of calling activity was for that selector. Between these dates, [redacted] in turn, accessed the data present in the BR FISA metadata repository to assist in responding to these questions. [redacted] is not a tool used for contact chaining or [redacted]. Rather, for each query of a specific telephony selector, the [redacted] tool returns the number of unique contacts, the number of calls made, the dates of the first and last call events recorded in NSA's data repositories and the amount of time it took to process the query. It does not return the actual telephone identifiers in contact with the selector that serves as the basis for the analyst's query. Though [redacted] can be used as a stand-alone tool, it is more commonly invoked by other tools such as [redacted]

~~(TS//SI//NF)~~ On 19 February 2009, NSA confirmed that [redacted] performed queries against the BR FISA metadata repository using non-RAS-approved selectors. It was also confirmed that analysts who were not BR FISA-authorized inadvertently accessed BR FISA metadata without realizing it as a result of accessing [redacted]. The results returned from this tool did not identify to the user whether their results came from BR FISA or from metadata collected pursuant to NSA's authority to collect signals intelligence information under Executive Order (EO) 12333, but rather combined them into a consolidated summary.

(U) Remedial Steps:

~~(TS//SI//NF)~~ On 20 February 2009, NSA removed the specific system-level certificate (cryptologic authentication for software akin to a ticket used to confirm the bearer is entitled to enter) that had allowed the BR FISA-enabled [redacted] to access the BR FISA metadata chain repository.[6] Out of an abundance of caution, NSA also made software changes on 6 March 2009 which removed analysts' ability to manually invoke [redacted] against BR FISA metadata. While [redacted] could still automatically be

[5] ~~(U//FOUO)~~ See DIRNSA Supplemental Declaration dated 25 February 2009 at Section II.A. & B.

[6] ~~(TS//SI//NF)~~ The removal of the system-level certificate cut off all access to the BR FISA metadata chain repository by any automated process or subroutine. [redacted]

invoked via the Automated Chaining Analysis Tool (ACAT),[7] as stated, the revocation of the system level certificate prevented [redacted] from accessing the BR FISA metadata chain repository.

3. ~~(U//FOUO)~~ Improper Analyst Queries

(U) Description

~~(TS//SI//NF)~~ Among the compliance issues previously reported to the Court[8] was NSA's discovery that between 1 November 2008 and 23 January 2009, three analysts inadvertently performed chaining within the [redacted] BR FISA metadata repository using 14 different telephone identifiers that did not meet RAS approval prior to the query. The analysts did not realize they were querying the BR FISA metadata and none of the identifiers was associated with a U.S. telephone number or person. Based on an audit of other queries the analysts were conducting at the same time, it appears each analyst thought he or she was conducting queries of other repositories of telephony metadata that are not subject to the requirements of the Business Records Order.

(U) Remedial Steps

~~(TS//SI//NF)~~ NSA implemented the Emphatic Access Restriction (EAR) to ensure that contact chaining [redacted] in the [redacted] BR FISA repository is restricted to only those seeds that have been RAS-approved [redacted] support personnel have conducted tests to ensure the EAR is functioning properly by monitoring manual query input and output, evaluating individual and connected functions, as well as examining log files to ensure the results of manual queries, now with the EAR in place, produce the desired results. Earlier NSA had also introduced a safeguard requiring the analysts to acknowledge that they were about to access the BR FISA metadata [redacted] to further reduce the potential for additional instances of non-compliance. More formal and rigorous training also emphasizes the need for caution when invoking their BR FISA authority. NSA is in the process of finalizing the testing of a software modification which will restrict the analysts to chaining no more than three hops from a RAS-approved selector within [redacted] BR FISA metadata repository.

~~(TS//SI//NF)~~ Internal audits of the activities of NSA personnel authorized to query the data under the 5 March 2009 order since 17 March 2009, when the Court approved the first batch of BR FISA metadata selectors as meeting the RAS standard, have shown no further compliance issues.

4. ~~(TS//SI//NF)~~ U.S. Identifiers Designated as RAS-Approved without OGC Review

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[7] ~~(U//FOUO)~~ The relationship between the tools [redacted] ACAT can be found in the Appendix, Glossary of Terms.

[8] ~~(U//FOUO)~~ See DIRNSA Supplemental Declaration dated 25 February 2009 at Section II.B.

(U) Description

~~(TS//SI//NF)~~ Between 24 May 2006 and 2 February 2009, NSA designated approximately 3,000 U.S. selectors as RAS-approved on the Station Table without undergoing the required OGC approval. This set of numbers was derived from two time periods: 1 January 2005 to 23 May 2006 and 24 May 2006 to mid-December 2008.

~~(TS//SI//NF)~~ Approximately 600 U.S. selectors that had been tipped to FBI and CIA between 1 January 2005 and 23 May 2006 as having ties to known, or probable, terrorist entities were added to the Station Table after the BR FISA Order was issued in an effort to "jumpstart" the BR FISA operations. These 600 U.S. selectors did not undergo OGC review.

~~(TS//SI//NF)~~ Between 24 May 2006 and 6 May 2009, NSA issued 277[9] BR FISA-based reports, all of which were based on contact chaining of RAS-approved selectors. Included in these reports were tips to customers (FBI, CIA, NCTC, and/or ODNI) of U.S. telephone numbers which had been in contact with a RAS-approved selector associated with [redacted] or were within three hops of a RAS-approved selector. For those reports issued between 24 May 2006 and mid-December 2008, NSA took the additional step of designating as RAS-approved in the Station Table the subset of these domestic selectors that were tipped as having ties to known, or probable, terrorist entities. However, these selectors did not undergo the required OGC review. For this entire period (24 May 2006 to 15 December 2008), the total number of U.S. selectors added to the station table as RAS-approved, but without the OGC review, was approximately 2,400.[10]

~~(TS//SI//NF)~~ At the time the RAS-approved portion of the Station Table was mistakenly implemented as the Activity Detection List in mid-January 2009, as described in Section

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[9] ~~(TS//SI//NF)~~ The number of reports included in the DIRNSA Declaration of 13 February 2009 was 275. This was based upon information gathered on 6 February. Further review has taken into account the fact that an additional report was issued after 6 February, but before 13 February. Some of these reports had been cancelled for various reasons and some of the cancelled reports were reissued with corrections. Therefore, the correct number of unique reports as of the 13 February 2009 declaration should have been 274. Since then, additional reports have been issued for a current total of 277 (as of 6 May 2009). The Declaration also stated that there were 2,549 selectors tipped in these reports. The actual number of selectors tipped in the 274 reports is 2,883.

[10] ~~(TS//SI//NF)~~ Approximately 1000 of these selectors from the post-23 May 2006 era were reported to customers as having only an indirect connection to known or probable terrorist selectors. It was not NSA policy to include this category of numbers in the Station Table as "RAS-approved." However, an error was made during a bulk upload to the Station Table of tipped numbers on 9 December 2008 and these numbers were inadvertently included. They were present on the Station Table as RAS-approved until the entire set of 2,400 U.S. selectors were changed to "not RAS-approved" on 15 December 2008 (six days later). An audit of the Alert system, the [redacted] system and the Transaction Database showed that no chaining in the BR FISA metadata was performed on these numbers during this period.

II.A.1., approximately 600[11] of the U.S. selectors from the Table had not undergone the required OGC review. Forty-six of these approximately 600 selectors generated alerts as a result of the actions described in Section II.A.1; however, none of the resulting analysis based on these alerts yielded information that was subsequently tipped to customers.

~~(TS//SI//NF)~~ Designating these U.S. identifiers as RAS-approved without the required OGC review grew out of a related practice that NSA applied briefly to its development of the Telephony Activity Detection List in 2006. Specifically, in its first periodic report to the Court as directed in the initial May 2006 Order, NSA stated that U.S. identifiers that had been reported to FBI and CIA prior to 24 May 2006 because of their direct contact with international terrorism selectors had also been added to the alert list, even though they had not been qualified as seed identifiers and had not been reviewed by OGC. While the initial report explained to the Court the NSA rationale for the belief that these identifiers did not need to go through the full approval process to be included on the alert list, the November 2006 90-day report also stated that the practice had ceased as of 18 August 2006. Although the use of this process to add identifiers to the Alert List did cease on that date, NSA failed to discontinue the process of adding selectors to the Station Table.

(U) Remedial Steps

~~(TS//SI//NF)~~ In early February 2009, all selectors that the OGC had not reviewed were changed to *non*-RAS-approved on the Station Table.

B. (U) Newly Identified Areas of Concern

1. ~~(S//NF)~~ [redacted] Not Audited Prior to January 2009

(U) Description

~~(TS//SI//NF)~~ January 2009 discussions between Oversight and Compliance (O&C) and the BR FISA-authorized analysts revealed that the [redacted], NSA's repository for individual BR FISA metadata one-hop chains, had not been audited, prompting further investigation as part of the end-to-end review. Prior to that time, NSA O&C was not aware of its existence in the technical architecture and therefore did not audit the database.

(U) Remedial Steps

~~(TS//SI//NF)~~ Between May 2006 and January 2009 [redacted] logging capability recorded all queries via the analyst graphical user interface

[11] ~~(TS//SI//NF)~~ These were the approximately 600 from the pre-FISA era; the others had been changed to "not RAS-approved" in mid-December 2008. The failure to remove these approximately 600 numbers was an oversight. The 600 selectors were changed to "non-RAS-approved" on the Station Table in early February 2009.

to the data within the [redacted] to include the user's login, Internet Protocol (IP) address, date and time, and retrieval request -- all fields required by the Order. Analysts use the [redacted] to verify the specific call event details between two individuals -- details such as which selector initiated each call, when the call was initiated and how long the call lasted. However, sometimes to verify the call details of a communication event the analyst uses the selector that was the first or second hop result as the retrieval request. Because of this, the selector that was the RAS-approved seed is not always evident in the [redacted]. In January 2009, NSA took steps to augment the information recorded in the [redacted] system log to include the RAS-approved seed that the user was asserting to be within two hops of the selector being queried. O&C began auditing queries to the database in February 2009. Since this enhanced auditing capability was added, O&C has audited the BR FISA-authorized intelligence analysts' queries and found no evidence of improper queries. Although the [redacted] suffered a system crash in September 2008, NSA was ultimately able to recover sufficient data to permit O&C to conduct sample audits of queries since the Order's inception. These sample audits revealed no unauthorized analysts conducted queries against the BR FISA metadata and no authorized analysts conducted improper queries of the metadata.

~~(TS//SI//NF)~~ As the [redacted] is outside the [redacted] architecture, it is currently not protected by the EAR. NSA will migrate [redacted] system functionality into the corporate architecture to provide greater accountability and to help ensure compliance with the Court Order and any future requirements. Reconstituting this database within the corporate architecture will ensure that it is established and supported on systems that use corporate authentication/authorization services, use system security and configuration management practices, are certified and accredited with approval to operate on an active System Security Plan (SSP),[12] and above all employ software measures that minimize compliance risks.

2. ~~(TS//SI//NF)~~ Data Integrity Analysts' Use of BR FISA Metadata

(U) Description

~~(TS//SI//NF)~~ As part of their Court-authorized function of ensuring BR metadata is properly formatted for analysis, data integrity analysts seek to identify numbers in the BR metadata that are [redacted] Once the data integrity analysts had identified such [redacted] selectors in the BR FISA data, they

[12] ~~(U//FOUO)~~ An SSP is a formal document describing the implemented protection measures for the secure operation of a computer system.

would not only take steps to prevent the selectors becoming part of the analysis in the BR FISA context, but would also note them as [redacted] selectors in other NSA systems in order to similarly prevent them from being included in analysis conducted outside the BR FISA context. NSA determined that the data integrity analysts' practice of populating [redacted] numbers in NSA databases outside the BR FISA databases had not been described to the Court.

~~(TS//SI//NF)~~ For example, NSA maintains a database, [redacted] which is widely used by analysts and designed to hold identifiers, to include the types of [redacted] numbers referenced above, that, based on an analytic judgment, should not be tasked to the SIGINT system. In an effort to help minimize the risk of making incorrect associations between telephony identifiers and targets, the data integrity analysts provided the BR metadata [redacted] A small number of [redacted] BR metadata business numbers were stored in a file that was accessible by the BR FISA-enabled [redacted] a federated query tool that allowed approximately 200 analysts to obtain as much information as possible about a particular selector of interest. Both [redacted] and the BR FISA-enabled [redacted] allowed analysts outside of those authorized by the Court to access the [redacted] number lists. The end-to-end review has not identified any other systems that have been fed using [redacted] numbers uncovered by the data integrity analysts from the BR FISA metadata.

~~(TS//SI//NF)~~ Similarly, in January 2004 [redacted] developed a 'defeat list' process to identify and remove [redacted] selectors deemed to be of little analytic value and that [redacted] In building defeat lists, NSA identified [redacted] selectors in data acquired pursuant to the BR FISA Order as well as in data acquired pursuant to EO 12333. When candidate [redacted] selectors contained in the BR FISA metadata were found to have a [redacted] obtained approval from the data integrity analysts to allow those selectors, which come from BR FISA metadata, to be added to the defeat list. This resulted in all references to those selectors being removed from all of [redacted] chain databases, to include the database containing and processing data acquired pursuant to EO 12333. Since August 2008, [redacted] had also been sending all selectors on the defeat list to the [redacted] A notice was filed with the FISC on these issues on 8 May 2009.

(U) Remedial Steps

~~(TS//SI//NF)~~ On 1 May 2009, NSA determined that the data integrity analysts' practice of populating [redacted] numbers in [redacted] and using BR FISA-enabled [redacted] to access this database was an area of concern. NSA immediately began quarantining the BR-derived identifiers in [redacted], completing the action by 2 May 2009. Access to the file containing the small number of BR-derived [redacted]

identifiers by the BR FISA-enabled [redacted] was shut off on 12 May 2009, when files created by the data integrity analysts were moved to a protected work file system.

~~(TS//SI//NF)~~ NSA determined that only eight selectors from the BR FISA metadata have ever been added to the [redacted] list. Starting in November 2008 [redacted] began to maintain separate defeat lists for BR FISA [redacted], and on 11 May 2009 [redacted] removed the eight BR FISA selectors from its [redacted] defeat list. The BR FISA defeat list will no longer be shared with [redacted] until this issue is resolved.

~~(TS//SI//NF)~~ As the positive impacts that result in making these numbers available to analysts outside of those authorized by the Court seem to be in keeping with the spirit of reducing unnecessary telephony collection and minimizing the risk of making incorrect associations between telephony identifiers and targets, NSA will work with DoJ to seek Court approval to continue such practices.[13]

3. ~~(TS//SI//NF)~~ Use of Correlated Selectors to Query the BR FISA Metadata

(U) Description

~~(TS//SI//NF)~~ The end-to-end review revealed the fact that NSA's practice of using correlated selectors to query the BR FISA metadata had not been fully described to the Court. A communications address, or selector, is considered correlated with other communications addresses when each additional address is shown to identify the same communicant(s) as the original address [redacted]

~~(TS//SI//NF)~~ NSA analysts authorized to query the BR FISA metadata routinely used [redacted] to query the BR FISA metadata without a separate RAS determination on each correlated selector. In other words, if there was a successful RAS determination made on any one of the selectors in

[13] ~~(TS//SI//NF)~~ [redacted]

[14] ~~(U//FOUO)~~ See Appendix 1, Glossary of Terms, for expansion and definition of [redacted]

the correlation, all were considered RAS-approved for purposes of the query because they were all associated with the same account [redacted]

~~(TS//SI//NF)~~ Although NSA obtained [redacted] correlations from a variety of sources to include Intelligence Community reporting, the tool that the analysts authorized to query the BR FISA metadata primarily used to obtain the correlations is called [redacted] A description of how [redacted] is used to correlate [redacted] was included in the government's 18 August 2008 filing to the FISA Court. While NSA previously described to the FISC the practice of using correlated selectors as seeds, the FISC never addressed whether [redacted] correlated selectors met the RAS standard when any one of the correlated selectors met the RAS standard. A notice was filed with the FISC on this issue on 15 June 2009.

(U) Remedial Steps

~~(TS//SI//NF)~~ The [redacted] - a database that holds correlations between selectors of interest, to include results from [redacted] was the primary means by which correlated selectors were used to query the BR FISA metadata. On 6 February 2009, prior to the implementation of the EAR, [redacted] access to BR FISA metadata was disabled, preventing [redacted] from providing automated correlation results to BR FISA-authorized analysts. In addition, the implementation of the EAR on 20 February ended the practice of treating [redacted] correlations as RAS-approved in manual queries conducted within [redacted], since the EAR requires each selector to be individually RAS-approved prior to it being used to query the BR FISA data. NSA ceased the practice of treating [redacted] correlations as RAS-approved within the [redacted] in conjunction with the March 2009 Court Order.

4. ~~(TS//SI//NF)~~ Handling BR FISA Metadata

(U) Description

~~(TS//SI//NF)~~ The results of the Homeland Security Analysis Center (HSAC) analysts' BR FISA metadata contact chaining queries have been routinely made available to the broader population of NSA analysts working [redacted] This sharing helps ensure that analysts with specific foreign target expertise can apply the full scope of their knowledge to the BR FISA-generated information to identify all possible terrorist connections quickly and characterize them within the context of the target's known activities. With only 20 HSAC analysts approved to query the bulk BR FISA metadata and more than one thousand analysts working various aspects of the counterterrorism mission enterprise-wide, fewer than two percent of counterterrorism

analysts currently have the authority to access the BR FISA metadata. Thus, the collective experience of the BR FISA-authorized analysts represents a small fraction of NSA's overall expertise on counterterrorism targets. CT target analysts beyond the small number currently authorized to query the BR FISA metadata are responsible for analyzing the data in the context of SIGINT information and writing reports; this practice continued under the structure imposed by the March Court Orders. NSA believed such internal sharing of the results of its analysis (as distinct from the bulk metadata itself) was consistent with the Court's Orders, but had not included a description of it to the Court in its periodic reports prior to May 2009 [redacted]

~~(TS//SI//NF)~~ In addition, the Court Orders prior to 2 March 2009 state that "any processing by technical personnel of the BR metadata acquired pursuant to this Order shall be conducted through the NSA's private network, which shall be accessible only via select machines and only to cleared technical personnel, using secured encrypted communications." The end-to-end review revealed that the way in which NSA protects the data is not precisely as stated in the Court Order; however we believe NSA's implementation *is* consistent with the intent of preventing unauthorized users from accessing the data. For example, there are not specifically designated or "select" machines from which technical personnel access and process the data on NSA's private, secure network. The internal NSA communications paths on its classified networks are not encrypted, but are subject to strong physical and security access controls[15] which provide the necessary protections.

~~(TS//SI//NF)~~ The end-to-end review also revealed that data integrity analysts, in order to conduct their authorized duties, pull samples of raw BR metadata into their private directories on the NSA network, which they access via username and password, to analyze the metadata in order to develop new parsing rules or prepare samples for spot checks. The private directories offered them a workspace to analyze the metadata using tools and applications that they could not invoke in the [redacted] While these private directories could be interpreted to be an additional data repository to the two [redacted] already described to the Court, the BR FISA data is not accumulated as in a true database repository. The data integrity analysts are authorized to access the data, and any importation to their own systems was deleted when no longer needed.

~~(TS//SI//NF)~~ Additionally, the review uncovered that data integrity analysts, in conducting their authorized duties, copied data into two shared directories created for

[15] ~~(TS//SI//NF)~~ The NSA complex is a Sensitive Compartmented Information Facility (SCIF) that is an accredited installation, incorporating strong physical and security access control measures (barriers, locks, alarm systems, armed guards), to which only authorized personnel are granted access. Within NSA, only approved users of NSANET can gain access to the network through login and password. Once on the network, the user can only access the BR FISA metadata if additional access controls specifically allow such access. Access to particular data sets is granted based on need-to-know and is verified via Public Key Infrastructure (PKI).

restricted information with a controlled user set. These shared directories also offered access to similar tools and applications as mentioned above. NSA learned that roughly 170 personnel who at one time had been cleared for sensitive metadata programs had access to files on this server. Approximately 15% of these personnel were system administrators or data integrity analysts; the remainder included intelligence analysts, managers and engineers. While it was possible for the files to be accessed by any of these personnel, it is unlikely that anyone other than data integrity analysts would have done so since it would have been outside the scope of their duties.

(U) Remedial Steps

~~(TS//SI//NF)~~ A notice was filed with the FISC on the matter of sharing results of queries within NSA as it relates to the BR FISA Order on 12 June 2009. While NSA believes the ability of BR FISA-authorized analysts to share unminimized query results with the broader population of NSA analysts working [redacted] is critical to the success of its counterterrorism efforts, effective 18 June 2009 NSA began the process of limiting access to unminimized BR FISA metadata query results to only authorized analysts. [redacted] the Court explicitly authorized the continuation of internal sharing of the results of authorized queries with NSA analysts other than the limited number authorized to access the bulk metadata, provided all analysts receiving such results receive appropriate and adequate training. The government anticipates seeking [redacted] in the BR FISA context.

~~(TS//SI//NF)~~ Regarding the handling of metadata by technical personnel, NSA implemented additional access controls using UNIX group access control which assured that only the data integrity analysts were in the "group" which could access this data, and is providing appropriate protected storage areas for the data integrity analysts' work files. With regard to the manner in which NSA secures the BR FISA metadata, NSA will work with DoJ to more accurately reflect in any future application to the Court the current method of providing protection. Instead of accessing the data via select machines using secured encrypted communications, NSA provides protection through the use of the secure network; use of NSA's identity and authorization access control service; and other NSA corporate standard data protection services.

5. ~~(TS//SI//NF)~~ System Developer Access to BR FISA Metadata while Testing New Tools

(U) Description

~~(TS//SI//NF)~~ In its review of all tools and interfaces that allowed access to BR FISA metadata, NSA determined that developers assigned to work [redacted] a next generation metadata analysis graphical user interface (GUI) which is the replacement for [redacted] had queried BR FISA metadata chaining summaries 20 times during the course of their testing between 26 September 2008 and 11 February 2009. This access occurred due to the dual responsibilities of the

individuals involved. The developers of [redacted] also have maintenance responsibilities for the operational system, [redacted] where their access to BR FISA is warranted on a continual basis. While the actions were in keeping with the Court Orders that were in place at the time of the queries, access to the BR metadata was unintentional and unknown to the developers at the time.

(U) Remedial Steps

~~(TS//SI//NF)~~ When this issue surfaced, NSA implemented a software change on 19 March 2009 to prevent the [redacted] GUI from accessing BR FISA metadata regardless of the user's access level or the RAS status of the selector. NSA also implemented an oversight process whereby all BR FISA-authorized technical personnel who have both maintenance and development responsibilities have their accesses to BR FISA metadata revoked when involved in new systems development. This process will ensure no inadvertent access to the data until such time as these technical personnel receive OGC authorization to access BR FISA metadata to test technological measures designed to enable compliance with the Court Order. The NSA O&C is notified each time anyone's permission to access the BR FISA metadata is changed and tracks these changes for compliance purposes.

6. ~~(TS//SI//NF)~~ Provider Asserts That Foreign-to- Foreign Metadata Was Provided Pursuant to Business Records Court Order

(U) Description

~~(TS//SI//NF)~~ [redacted] NSA's mission element which obtains the BR FISA metadata from the providers, reported during the end-to-end review that [redacted] raised a question concerning whether certain foreign-to-foreign metadata it provides to NSA is subject to the terms of the BR FISA Order [redacted] This foreign-to-foreign metadata started coming into NSA in January 2007.

(U) Remedial Steps

~~(TS//SI//NF)~~ When the provider began providing NSA with foreign-to-foreign metadata in January 2007, [redacted] The Court is now aware of this issue, and the Court's 29 May Order specifically excludes from its scope the aforementioned foreign-to-foreign metadata. The provider ceased providing this metadata on the same day as the Order was signed. NSA is coordinating with the provider and the NSD/DoJ to resolve this matter.

7. ~~(TS//SI//NF)~~ Unintentional Omission of OGC Review of U.S. Identifiers

(U) Description

~~(TS//SI//NF)~~ It was recently discovered that during the June through October 2006 timeframe, in the process of implementing the initial BR FISA Orders, a few domestic numbers were designated as RAS approved and chained without OGC approval due to compound analyst errors. These errors occurred when analysts inadvertently selected the incorrect option in a GUI. The correct option would have designated the domestic identifier as needing OGC approval. The incorrect option put the domestic selector into a large list of foreign selectors which did not need OGC approval as part of the RAS approval process. In those cases where the Homeland Mission Coordinator (HMC) failed to notice the domestic number in the large list of foreign selectors and the RAS justification was approved, the number was chained. NSA continues to investigate this matter, but, based on available records, NSA's initial estimate is this occurred fewer than ten times. NSA will provide additional information as appropriate. A notice was filed with the FISC on this issue on 29 June 2009.

(U) Remedial Steps

~~(TS//SI//NF)~~ Each time an error was identified through quality control, senior HMCs provided additional guidance and training, as appropriate. Continued training and management oversight, in particular when new analysts arrived, helped ensure such errors were not repeated.

8. ~~(TS//SI//NF)~~ External Access to Unminimized BR FISA Metadata Query Results

(U) Description

~~(TS//SI//NF)~~ In examining NSA's practice of sharing BR FISA metadata query results internally with other NSA analysts working authorized [redacted], NSA learned of CIA, FBI, and NCTC analyst access to unminimized BR FISA metadata-derived query results and target knowledge information via an NSA counterterrorism database. This matter, just recently identified, was a collaboration practice that was in place prior to the inception of the BR FISA Court Order. Over time, approximately 200 analysts at CIA, FBI, and NCTC had been granted access to this target knowledge base. When the BR program was brought under the jurisdiction of the FISA Court, this practice was not modified to conform with the Order's requirements for the dissemination of BR FISA metadata-derived query results outside of NSA. A notice was filed with the FISC on this matter on 16 June 2009.

(U) Remedial Steps

~~(TS//SI//NF)~~ While NSA disabled the hyperlink button used by the external analysts to access this target knowledge database in the Summer 2008 timeframe, NSA learned that the external analysts could have still accessed the data if they retained the URL address.

Upon identifying this as an area of concern on 11 June 2009, NSA began terminating external customer account access to the target knowledge database, completing the action by 12 June 2009. NSA is continuing to investigate this matter; audits are now underway to determine the extent to which the query results may have been accessed. Once completed, NSA will provide a full explanation of this practice.

9. ~~(TS//SI//NF)~~ Dissemination of BR FISA Information

(U) Description

~~(TS//SI//NF)~~ When an NSA analyst determines that information identifying a U.S. person is critical to include in a metadata report, he or she is required to obtain dissemination authorization from the designated NSA approving office in accordance with the Court's Order. Specifically, the order requires that prior to disseminating any U.S. person information outside of the NSA, the Chief of Information Sharing Services must determine that the information is related to counterterrorism information and is necessary to understand the information or to assess its importance. In fact, the Chief of Information Sharing Services, when unavailable, has in the past delegated this authority, typically to the Deputy Chief. Additionally, after hours or in an emergency situation, this authority has also been delegated to NSA's Senior Operations Officer (SOO) in its National Security Operations Center (NSOC).

~~(TS//SI//NF)~~ The practice of sharing BR FISA metadata analytic results also applied to [redacted] process which was established to facilitate sharing of sensitive metadata among NSA's [redacted] Queries, called Requests for Information (RFIs), submitted to the [redacted] were disseminated to all the partners for response. Only those RFIs that the [redacted] determined were answerable by NSA were forwarded to the HSAC. HSAC queries in response to the RFIs were only performed against valid RAS-approved selectors. The [redacted] standard operating procedure was to minimize HSAC's results and then merge them with the results of [redacted] with any sourcing information sanitized. Of the 12 RFIs sent to HSAC from the [redacted] etween 2007 and 2008, HSAC affirmatively responded to only four. The [redacted] in turn, provided the results of one[16] of these RFIs, in a sanitized format, back to the [redacted] requestor. While the query results were sanitized to remove information regarding the collection source, it was recently discovered that two U.S. telephony identifiers derived from BR FISA metadata analysis results were inadvertently shared, without being minimized by NSA, with the [redacted][7] As it was not [redacted] practice to disseminate unminimized U.S. person information, obtaining dissemination authorization from the designated NSA approving office was not part of their process.

(U) Remedial Steps

[16] ~~(U//FOUO)~~ The RFI response *is not* a subset of the 277 reports discussed earlier in Section II.A.4.
[redacted]

~~(TS//SI//NF)~~ NSA is currently conducting a review of any BR FISA metadata-derived reports that contained U.S. person identifying information to determine consistency with the Court's Order. Once this is completed, the results will be provided.

[redacted]

III. ~~(U//FOUO)~~ NSA's End-to-end BR FISA Review

A. (U) Scope

~~(TS//SI//NF)~~ NSA established a team of experts to conduct a thorough end-to-end systems engineering and process review of the BR FISA metadata workflow. The team reviewed 93 requirements extracted from the March 2009 BR FISA Court Order, Application and Declaration; dataflow diagrams; and system documentation (to include systems engineering and security plans) to ensure a complete understanding of how the requirements were being met prior to 2 March 2009, how well they are currently being met, and what changes may be needed to ensure compliance. The team then used these requirements as a basis to examine six key aspects (systems architecture, analyst workflow, management control, compliance auditing, oversight, and training) of NSA's handling of BR FISA metadata, and to establish a comprehensive plan to ensure that all requirements are addressed and properly implemented.

~~(TS//SI//NF)~~ Another critical step in preparing to conduct the end-to-end review was to identify and map how all the system components fit together. Lack of such end-to-end awareness contributed to the problems initially reported to the FISC.[18] The systems/processes reviewed were:

1. [redacted]
2. [redacted], NSA's corporate file transfer/distribution system
3. [redacted], NSA's corporate contact chaining system
4. [redacted], NSA's repository for individual BR FISA metadata one-hop chains
5. the Telephony Activity Detection (Alerting) Process
6. the Reasonable Articulable Suspicion (RAS) Approval Process
7. the BR FISA Analytic Tools and Processes
8. the BR FISA Analyst Decision and Reporting Process.

[18] ~~(U//FOUO)~~ See Declaration of the Director of the National Security Agency (DIRNSA) dated 13 February 2009.

~~(TS//SI//NF)~~ The interaction of these systems and processes can be summarized as follows (see Figures 1 and 2): [redacted] Both of these databases are accessible to BR FISA-authorized intelligence analysts. These analysts also use the following processes: the *Activity Detection (Alerting) Process*, the *RAS Approval Process*, the *BR FISA Analytic Tools/Processes*, and the *BR FISA Analyst Decision/Reporting Process* to identify, query, analyze and ultimately disseminate information derived from the metadata. These eight components, part of a large and complex system, are further described in Section III.C. and pictured in Figures 1-10. Figure 1 provides a top-level view of the overall architectural system, Figure 2 highlights the eight components, while Figures 3-10 highlight each of the individual components in greater detail. Each component is reflected with corresponding colors in the diagrams.

~~(TS//SI//NF)~~ In concert with this systems engineering end-to-end review, NSA conducted a thorough review of its analytic processes, management controls, auditing mechanisms, oversight and training for the BR FISA metadata handling. This included a thorough examination of each activity, tool and analytic process to assure that it operated in compliance with the Court Order. The review led to several additional audits to ensure that no compliance incidents had occurred and to examine whether or not the individuals who worked with the BR FISA metadata fully understood the applicable authority and limitations. Documentation and training were also updated. Each part of the review compared the component or process being reviewed with the relevant requirement from the list extracted from the Court documents.

~~(TS//SI//NF)~~ NSA's systems engineering and workflow reviews surveyed the processes and tools as they existed before any remedies were implemented. This retrospective evaluation enabled NSA to develop the near-term corrective measures necessary for current Court-approved operations and potential resumption of regular access to the BR FISA metadata should it be authorized by the Court. It also informed plans for incorporating the BR FISA flow into the NSA future architecture more effectively.

B. (U) Methodology:

~~(TS//SI//NF)~~ NSA employed a repeatable and well-documented process in conducting its end-to-end review. NSA derived technical requirements from the legal requirements governing BR FISA metadata handling. As noted, NSA simultaneously began to develop an end-to-end systems engineering diagram of the systems and databases that support BR processing and storage. NSA also developed and conducted Initial Privacy Assessments (IPAs) which include a standard set of questions used to determine, among other things, whether the system or process under review interacts with data that could contain information about U.S. persons. The outcome of the IPA determines whether a more in-

depth Privacy Impact Assessment (PIA)[19] is required to fully explore the extent of interaction and whether any privacy compliance concerns exist. An IPA was conducted for any system or process identified as potentially part of the BR FISA metadata end-to-end data flow. For those systems confirmed to be in contact with BR FISA metadata via the IPA, a PIA was performed. The results of the IPAs and PIAs were then compared against the Court-derived requirements to determine the level to which each requirement was satisfied. For any system or process for which there was concern, NSA is developing well-documented, fully-tested corrective solutions should the Court decide to allow NSA to resume its regular access.

C. (U) Results:

1. ~~(U//FOUO)~~ [redacted]

~~(TS//SI//NF)~~ [redacted] receives BR FISA metadata from [redacted] in bulk. Upon receipt, [redacted] sorts and labels the data according to data source and type, and determines the necessary routing path that is to be used for the different data types. [redacted] does not derive, process or create new data from this data set.

~~(TS//SI//NF)~~ Except for the provider issue identified in Section II.B.6, NSA identified no other significant issues in [redacted] receipt or handling of the BR FISA metadata [redacted]

2. ~~(U//FOUO)~~ [redacted]

~~(TS//SI//NF)~~ [redacted] NSA's corporate file forwarding service, provides for distribution of the BR FISA metadata from the collection source to the analytic repositories. It accepts files from sources and transports those files to the end destinations identified in the filename given to the file by the source system.

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[19] ~~(C//REL TO USA, FVEY)~~ The IPA/PIA framework provided a way for the Agency to assess compliance risk. This framework was not used to supersede any Court-derived requirements. Both the IPA and PIA templates were based on Department of Defense (DoD), DoJ or Homeland Security Privacy Assessment frameworks and then adjusted for the SIGINT environment. While IPAs and PIAs are not required for the Intelligence Community, they provided a sound methodology for the systems engineering end-to-end review.

~~(TS//SI//NF)~~ [redacted] is configured to allow dataflows and system accesses by technical personnel to be monitored and logged. The [redacted] system has security controls that are documented across multiple SSPs. [redacted] employs security access controls, such as PKI, to verify users and their system level access and likewise employs file transfer controls[20] to verify file transfer access, file source and file destination. The [redacted] system also employs a stringent configuration management methodology such that software changes cannot be implemented without the required testing and approval.

3. ~~(U//FOUO)~~ [redacted]

~~(TS//SI//NF)~~ [redacted] NSA's corporate contact chaining system, accepts metadata from multiple sources. It accepts the BR FISA metadata files from [redacted] stores the raw metadata in a separate realm, performs data quality, preparation and sorting functions; and then summarizes contacts represented in the processed data. [redacted] stores the resulting contact chains and provides analysts with access to these contact chains.

~~(TS//SI//NF)~~ The [redacted] portion of the end-to-end review demonstrated that the system is now providing the necessary protection of the BR FISA metadata while it is in the [redacted] domain given the added protection provided by the implementation of the EAR and the removal of the system level certificates. [redacted] has always employed other access controls, system security and configuration management practices for ensuring appropriate protection of the BR FISA metadata residing in its database and accessed by authorized analysts. They include, but are not limited to, a fully certified and accredited system under a System Security Plan and effective use of corporate authentication and authorization service.

~~(TS//SI//NF)~~ As stated earlier, NSA installed the EAR on 20 February 2009 in response to a compliance issue previously reported to the Court.[21] Prior to the EAR, NSA was relying on analytic due diligence to query [redacted] with only RAS-approved selectors. The EAR, via internal software system controls, now ensures that manual contact chaining is restricted to only those seeds that have been RAS-approved by the Court by preventing a non-RAS-approved selector from being used as a seed for conducting call chaining [redacted] of the BR FISA metadata in the [redacted] repository. In addition, NSA removed the system level certificate that had been used by automated tools to access the BR FISA metadata. In so doing, NSA disabled all automated querying of the BR FISA metadata. Access to the BR FISA metadata chaining information in [redacted] is strictly controlled via individual user access authentication/permission and this access is logged in accordance with the current BR FISA Court Order.

[redacted]

[21] ~~(U//FOUO)~~ See DIRNSA Supplemental Declaration dated 25 February 2009.

~~(TS//SI//NF)~~ The implementation of the EAR had an unintentional adverse impact on the technical support mission of NSA's BR FISA-authorized data integrity analysts. Prior to the addition of the EAR, these analysts frequently queried [redacted] Contact Chaining Database for the limited purpose of verifying their parsing rules (a method for separating data into standardized data fields). Analysts composed these rules for [redacted] BR FISA metadata to determine whether the system output represented accurate connections between communicants. In so doing, the data integrity analysts queried [redacted] using both RAS and non-RAS-approved selectors, as they were authorized to do. This type of querying is especially important when a new data format is received from one of the providers. Once the EAR was put in place, these analysts could only query the database using a RAS-approved selector. This diminishes their ability to test and evaluate their parsing rules. NSA is finalizing testing of a technical solution to create an EAR-bypass capability solely for the data integrity team. The existing impaired ability of the data integrity analysts is assessed as a system performance vulnerability, as it could result in improperly formatted data.

~~(TS//SI//NF)~~ While the EAR restricts the ability to query the [redacted] Contact Chaining Database to only RAS-approved seeds, there is no similar technical restriction to prevent a BR FISA-authorized analyst from chaining beyond the Court-mandated three hops from a RAS-approved selector. NSA is finalizing testing of a software modification to provide this contact-chaining hop restriction. In the meantime, training and management oversight ensure that contact chaining is executed in accordance with the Court Order.

~~(TS//SI//NF)~~ The end-to-end review also identified the fact that [redacted] incorporated a defeat list including BR FISA-derived selectors to manage data ingest volumes more effectively. The inclusion of BR FISA-derived selectors on this list is described more fully in Section II.B.2.

4. ~~(U//FOUO)~~ [redacted]

~~(TS//SI//NF)~~ [redacted] is used by authorized BR FISA analysts to view detailed data about specific calling events. As the [redacted] Contact Chaining Database only contains summaries of one-hop chains (i.e., selector 1 was in contact with selector 2 - N times within a specific timeframe), [redacted]

~~(TS//SI//NF)~~ The end-to-end review revealed an area of concern resulting from the fact that queries within the [redacted] had not been audited, as described in Section II.B.1. As previously noted, subsequent audits showed no indication of unauthorized access to the [redacted] metadata or of any improper querying of the [redacted]

~~(TS//SI//NF)~~ The review also identified other system weaknesses. First, insufficient documentation and configuration management (the ability to track versions) exist to ensure that no unauthorized or unintended changes can be made that would make the system non-compliant. Second, although it is attached to the [redacted] network, the [redacted] is not afforded the additional protection of [redacted] although access to the database is strictly controlled. Third, the [redacted] is not protected by the EAR, thus there are no technical measures in place to prevent a BR FISA-approved analyst from querying the metadata using a non-RAS-approved selector or one that is not within two hops of a RAS-approved selector. To prevent improper manual queries of metadata [redacted] using non-Court-approved selectors, NSA has provided enhanced training to authorized analysts and is conducting regular audits of queries. Additionally, analysts using [redacted] see a pop-up window reminding them to use only RAS-approved selectors for queries and limit their chaining to the Court-approved number of hops.

~~(TS//SI//NF)~~ NSA is preparing to incorporate the [redacted] into the NSA corporate architecture. This transition to the corporate engineering framework will maximize use of the latest technologies and proven configuration management to minimize any security and compliance risks. In the interim, NSA is addressing these vulnerabilities through improved training, competency testing and increased management oversight.

5. ~~(U//FOUO)~~ Telephony Activity Detection (Alerting) Process

~~(TS//SI//NF)~~ The Activity Detection (Alerting) Process identified when a selector on the Activity Detection List was in contact with an incoming number in a given day's BR metadata when that contact originated or terminated in the U.S. This notification, in turn, allowed analysts to prioritize their follow-on analysis. If the RAS standard was met on the selector, the system performed automated contact chaining in the BR FISA metadata archive to identify and track terrorist operatives and their support networks both in the U.S. and abroad. If not, a notification was made to NSA personnel so that they could determine whether to attempt to satisfy the RAS standard, which would then allow such contact chaining to take place manually.

~~(TS//SI//NF)~~ As noted in Section II.A.1., the Activity Detection List consisted of telephony selectors [redacted] that had been RAS evaluated as well as selectors that had never been RAS evaluated. The original Activity Detection List was built from two sources; one was called the "Address Database," which was a master target database of foreign and domestic telephone identifiers that were of current foreign intelligence interest to counterterrorism personnel. The second source was [redacted] which was and continues to be a database NSA uses as a selection management system to manage and task identifiers for SIGINT collection. One of the features of [redacted] is that it is enriched with correlations of telephony identifiers associated with numbers tasked to the SIGINT system. This enrichment is enabled by [redacted], which is a

database used to store correlations between selectors [redacted]

~~(TS//SI//NF)~~ The Telephony Activity Detection Process is not currently operational as the result of the compliance issue previously reported to the FISC[22] and as described in Section II.A.1 of this report. NSA shut down the Activity Detection Process entirely on 24 January 2009 as a corrective measure. (Of note, under the prior implementation before contact chaining could take place in the complete body of archived metadata and before any results of such analysis were disseminated, the alerting selector had to satisfy the RAS standard and be approved explicitly as having done so.) This process was thoroughly examined in the course of the end-to-end review and consequently a revised implementation, as described in Section V.A., has been proposed should the Court approve resumption of regular access.

6. ~~(TS//SI//NF)~~ RAS Approval Process

~~(TS//SI//NF)~~ The RAS Approval Process is the mechanism by which an analyst must be able to articulate some fact or set of facts that causes him or her to suspect in light of the totality of the circumstances that a particular number is associated with [redacted] before he or she may use a telephone number or electronic identifier as a seed to query the BR FISA metadata.

~~(TS//SI//NF)~~ The RAS Approval Process in place until 2 March 2009 (the date of the FISC Order) incorporated a combination of documented guidance and well-understood procedures as outlined in the OGC RAS Memo and the analytic office's RAS Working Aid. During the three years that DoJ has reviewed NSA RAS approvals, no spot check has revealed a faulty RAS approval decision.

7. ~~(TS//SI//NF)~~ BR FISA Analytic Tools and Processes

~~(TS//SI//NF)~~ The BR FISA Tools were designed to analyze the raw BR FISA metadata as well as the output of analytics such as [redacted] contact chaining. Analysts used these tools against the BR FISA metadata and chaining results to identify possible terrorist communications into, from and within the US.

~~(TS//SI//NF)~~ Two instances of concern related to the analytic tools and processes used by the BR FISA-authorized intelligence analysts were identified through the end-to-end review and are described in Sections II.A.2. and II.B.3. These tools and processes, which were designed to function against both the BR FISA metadata and other categories of telephony metadata that NSA acquires through SIGINT operations authorized under the general provisions of EO 12333, were used primarily by analysts within NSA's Office of Counterterrorism to identify possible terrorist connections into, from, and within the U.S., as well as foreign-to-foreign communications. Twelve of the 19 analytic tools examined

[22] ~~(U//FOUO)~~ See DIRNSA Declaration dated 13 February 2009

were developed under [redacted] systems architecture and are well-documented, configuration-controlled and audited. The other seven BR FISA analytic tools examined were developed in whole or in part by engineers working in the Counterterrorism Organization to meet constantly changing mission requirements, resulting in limited configuration and change management control. All seven of these tools were either monitored through existing O&C audits or were subjected to new audits and/or reviews as part of the end-to-end review. With the exception of [redacted] and GUI, none of these tools are currently able to access the BR FISA metadata.

~~(TS//SI//NF)~~ To mitigate risk in the future, NSA will transition the BR FISA analytic tools and processes to the corporate NSA enterprise architecture and will no longer develop tools within the Office of Counterterrorism. Complete end-to-end testing will be conducted for all tools against a standard set of BR FISA requirements to ensure they are fully compliant prior to resumption of automated operations if authorized by the Court.

8. ~~(U//FOUO)~~ Analyst Decision and Reporting Process

~~(TS//SI//NF)~~ The Analyst Decision and Reporting Process encompasses the target knowledge, guidelines and procedures that enable intelligence analysts to determine what information meets customer requirements. It also involves the evaluation and minimization procedures intelligence analysts employ when analyzing data and drafting and disseminating reports.

~~(TS//SI//NF)~~ Prior to the alert list shutdown on 24 January 2009, the BR FISA analyst decision and reporting work flow began when an HSAC analyst was notified of a match between a known selector of counterterrorism interest and an identifier in the ingested BR FISA metadata, when an analyst received an RFI from a customer, or when an analyst was continuing analysis on an existing target set. Aside from the activity detection list, the process remains the same today on selectors that are specifically approved in accordance with the Court's Orders. If NSA has reason to believe the information constitutes valid threat-related activity, NSA applies USSID 18 to minimize information concerning U.S. persons and then reports the information to the FBI, CIA, NCTC and ODNI, and other customers, as appropriate.

~~(TS//SI//NF)~~ NSA reviewed its analytic workflow to ensure the BR FISA metadata was appropriately handled, analyzed and disseminated. Three new areas of concern, discussed in Section II.B, were identified with the BR FISA Analysis Decision and Reporting Process in addition to that which was previously described to the Court[23] and discussed in Section II.A.

[23] ~~(U//FOUO)~~ See Supplemental DIRNSA Declaration dated 25 February 2009, at 8, Section 2 (Inappropriate analyst querying).

~~(TS//SI//NF)~~ As a by-product of the end-to-end review, NSA has updated the interim analytic BR FISA Standard Operating Procedures (SOP) to ensure compliance with the current Court Orders and is coordinating this document with DoJ as required by the Court. This SOP outlines step-by-step instructions for the authorized intelligence analysts in handling the BR FISA metadata; describes the procedures used to control access to the BR FISA metadata; provides the steps used to conduct weekly audits of the analysts' queries and tools; and details the methodology used to query the BR FISA metadata under newly established Imminent Threat Concept of Operations guidelines. NSA will continue to maintain the SOP and CONOP as "living documents" and update them as needed.

~~(TS//SI//NF)~~ NSA also continues to maintain and regularly update an 11-step comprehensive checklist that outlines both the Homeland Mission Coordinator and analyst responsibilities in the BR FISA metadata analysis and reporting process. The checklist is comprised of over 30 components that require analysts to answer a variety of questions, including whether the proposed report falls within the scope of BR FISA authorities and express OGC guidelines; whether NSA attempted to get additional information about the selector from the FBI and CIA integrees at NSA; and whether cellular identifiers were checked to determine if the user had roamed into another country. The checklist also reminds analysts to detail the information/intelligence source(s) that prompted the report's production.

~~(TS//SI//NF) In~~ addition, NSA has in place a combination of web pages and on-line aids dedicated to end-product reporting and dissemination guidance. These detailed working aids, together with required USSID 18 training for all BR FISA-approved intelligence analysts, require that any NSA BR FISA-based reporting that contains U.S. person information follow NSA's standard minimization procedures found in USSID 18 and the Court Order.

IV. ~~(U//FOUO)~~ NSA's Minimization and Oversight Procedures

~~(TS//SI//NF)~~ NSA has well-documented and long-standing minimization procedures for ensuring protection of U.S. persons' information in SIGINT analysis and reporting under all SIGINT authorities, to include the FISA Order. NSA's normal regime of compliance oversight for handling the BR FISA is a comprehensive, multi-pronged approach involving DoJ and NSA's OGC, O&C, Office of the Inspector General and SID. Currently, NSA is required to consult with DoJ on all significant legal opinions involving BR FISA metadata handling. DoJ meets with the appropriate NSA representatives at least once every renewal period to review the program. Prior to the 2 March Court Order that the FISC make all RAS determinations, DoJ also conducted "spot checks" to review a sampling of justifications (RAS determinations) for querying the metadata. NSA, in turn, provides internal oversight to the BR FISA program by a variety of oversight controls and compliance mechanisms to prevent, detect, correct and report incidents and violations of the procedures, to include technical, physical and managerial safeguards such as: examining samples of call-detail records to ensure NSA is receiving only compliant data; ensuring analysts are trained in the querying, dissemination and storage

restrictions for the metadata; monitoring analytic access to the metadata; auditing queries on a weekly basis by O&C; monitoring audit functionality; reviewing the BR FISA raw database repositories; and examining the list of RAS-approved selectors.

~~(TS//SI//NF)~~ In light of the compliance issues that surfaced specific to the handling of the BR FISA metadata, NSA reviewed its minimization procedures as well as its oversight procedures, to include auditing, documentation, and training, to identify areas for potential improvement. All were identified as areas for enhancement to ensure that personnel handling the BR FISA metadata are aware of and compliant with the Court Orders governing its use and dissemination.

A. (U) Minimization

~~(TS//SI//NF)~~ Every NSA intelligence analyst is required to complete training and pass a test on USSID 18 minimization procedures every two years as a pre-requisite for access to unminimized/unevaluated SIGINT data. Additionally, intelligence analysts must receive an OGC compliance briefing and on-the-job training (OJT) regarding their responsibilities for handling metadata containing U.S. person information prior to being granted access to the BR FISA metadata. They also have on-line access to detailed working aids including required minimization procedures. NSA will continue to emphasize the critical importance of applying USSID 18 and the Court Order requirements as they relate to the handling and dissemination of BR FISA.

B. (U) Oversight

1. ~~(U//FOUO)~~ Oversight Auditing Mechanisms

~~(TS//SI//NF)~~ NSA assessed requirements for auditing of systems, tools, processes and analyst queries to ensure the proper compliance procedures were in place. A total of 13 audits related to BR FISA metadata access and querying were conducted either as the result of standing requirements or in response to issues identified through the end-to-end review. Descriptions of resultant anomalies are captured in Section II.

~~(TS//SI//NF)~~ NSA audits samples of queries conducted by BR FISA-authorized intelligence analysts and data integrity analysts in the [redacted] on a weekly basis. As a result of a review of its oversight processes, O&C created a dedicated senior intelligence analyst position to enhance auditing of BR FISA metadata queries.

2. ~~(U//FOUO)~~ Oversight Documentation and Procedures

~~(TS//SI//NF)~~ Oversight documentation and procedures governing BR FISA metadata handling consists of a set of SOPs that have been reviewed and revalidated. They are as follows:

- **"Access":** This SOP outlines the procedures for gaining and maintaining access to the BR FISA metadata in a way that is compliant with the BR FISA Court Order.
- **"BR FISA Audit Procedures":** This document outlines the procedures used to audit BR FISA analyst queries [redacted].
- **"Compliance Notification":** This document addresses the procedures to be followed when compliance issues are noted.
- **"DoJ and OGC Spot Checks":** This SOP addresses the procedures to be followed for the required, regular DoJ and/or OGC spot checks.
- **"Oversight":** This document outlines the roles and responsibilities of the DoJ, the NSA Director, the OGC, O&C, the Inspector General, [redacted] and those Counterterrorism Organization analysts approved for BR FISA metadata access.

3. (U) Oversight Training

~~(TS//SI//NF)~~ NSA's Associate Directorate of Education and Training (ADET) had already been working with O&C and OGC to redesign the required training for accessing BR FISA metadata to better enforce appropriate handling of this data and to introduce competency testing as part of the O&C curriculum. The curriculum will be administered on-line to allow students 24/7 access to the course material.

~~(TS//SI//NF)~~ The redesigned BR FISA portion of the training package addresses the knowledge and procedural components of handling BR FISA data, and now requires the analyst to read the most current Court Order and the OGC instructions, and in the future will require them to view an OGC video briefing about the BR FISA program and complete the following six lesson tutorials:

1. "Overview of the Reasonable Articulable Suspicion standard," as covered in OGC instructions
2. "Summary of the RAS standard," to aid NSA analysts in preparing RAS justifications
3. "Association with [redacted] to identify how associations are established in order to qualify a target for RAS justification
4. "First Amendment Considerations," to identify limitations and considerations when targeting U.S. persons within BR FISA data
5. "Sources of information," to identify the supporting information used to justify the RAS determination
6. "The BR FISC Order," which explains the content of the BR FISA Orders

~~(TS//SI//NF)~~ A computer-based competency examination will be administered upon completion of this training and remediation will be provided for missed questions. Once an analyst has demonstrated the necessary knowledge by successfully passing the exam, he or she will complete formalized OJT before O&C grants access to the data.

~~(TS//SI//NF)~~ The OJT component has always been administered by an experienced HMC or senior analyst experienced in conducting OJT. This training specifically addresses how analysts are permitted to use the BR FISA metadata, reinforces the unique privacy concerns and handling requirements of this data, and demonstrates the various tools that can be used to query the BR FISA metadata. In addition, each HMC and authorized intelligence analyst is required to sign a user agreement, documenting that he or she has read and understands the obligations associated with handling the BR metadata.

~~(TS//SI//NF)~~ NSA has also begun to provide tailored briefings to all technical personnel that have been granted access to the BR FISA metadata. The tailored briefings outline the categories of data obtained under the BR FISA Court Order and the restrictions associated with the technical personnel's duties. For example, the briefings make it clear that the Collection Managers and System Administrators are not authorized to query the BR FISA metadata for foreign intelligence purposes. The briefing also outlines the correct offices to contact if the technical personnel see possible compliance issues in the course of their duties.

~~(TS//SI//NF)~~ As part of the BR FISA training redesign, complete training records will be maintained by ADET for each individual. The documentation will include the test score, answers to individual test questions, and performance feedback from the OJT component. This documentation will allow for tracking of access to the BR data on an individual basis.

V. ~~(U//FOUO)~~ NSA's Future Architecture

~~(TS//SI//NF)~~ Using principles of system engineering, configuration management and access control, NSA has considered the future implementation of the BR FISA program including the automated activity detection process to be used should the Court authorize NSA to resume regular access to the BR FISA metadata.

A. (~~U//FOUO~~) Future BR FISA Activity Detection (Alerting) Process

~~(TS//SI//NF)~~ NSA could resume automated activity detection in a fully compliant manner should the Court approve. NSA would maintain an Activity Detection (alert) List containing *only* RAS-approved selectors. Only the RAS-approved selectors on this "BR Identifier List" would be compared to the BR FISA metadata. With Court approval to resume automated querying, NSA will work with NSD/DoJ to ensure the BR Identifier List will be populated with only those selectors that the Court has authorized. Should the Court grant NSA RAS decision authority, NSA would begin to augment the BR Identifier List with additional identifiers that NSA approves as having satisfied the RAS standard, using the improved processes and training identified in this document.

B. (U) Future of Overarching Architecture

~~(TS//SI//NF)~~ In the future, should the Court authorize NSA to resume regular access to the BR FISA metadata, NSA will migrate the dataflow and life cycle management of the BR FISA metadata to its next generation system architecture which offers more effective and efficient management and control. This architecture is designed to be flexible enough to adapt to changes in the legal and oversight requirements, while conforming to applicable governing authorizations such as EO 12333 and BR FISA.

~~(U//FOUO)~~ In the future architecture, the end-to-end BR FISA dataflow will be referred to as a system "thread." As such, NSA would manage the entire capability via a "Thread Engineering Team" to guide the requirements development, systems integration, use-case development, testing/validation and planning for current and future enhancements. Thread engineers would meet with representatives from the OGC and O&C to define and validate requirements prior to development. System-wide configuration management would be implemented to log the expected software builds and patches. Such practices exist now, but there is no thread focused on the Business Records process.

~~(TS//SI//NF)~~ The proposed systems supporting BR FISA dataflow and life cycle within the next generation architecture encompass both technical- and personnel-based strategies to ensure that data is accessed, retained and purged in full compliance with authorities granted to NSA by the FISC. Moreover, the implementation of centralized processes and databases will ensure that all aspects of the dataflow will continue to be tracked and audited to further ensure that any non-compliance issues can be promptly identified and addressed. Plans for addressing key requirements for BR FISA metadata are as follows:

1. **~~(U//FOUO)~~ Security / Access Control**

~~(TS//SI//NF)~~ A new access control application will be applied to all databases and systems supporting the BR FISA workflow. This application will validate the credentials of users to govern what systems they are approved to access, and validate that their required training is current. PKI, which offers security measures for identification and authentication, as well as for access control, and audit capability will be used to manage users with access to the raw data or query results.

2. **~~(U//FOUO)~~ Data Standardization**

~~(TS//SI//NF)~~ A data standardization platform will date-stamp the incoming BR metadata and ensure its consistent and accurate structure. This will allow quick and accurate date-based purging once the Court-ordered time frame has been reached.

3. **~~(U//FOUO)~~ Databasing RAS Selectors**

~~(TS//SI//NF)~~ An updated and improved centralized target knowledge database for storing telephony and email selectors has been under development since October 2008. This database will enable more efficient storage and retrieval of key information about each BR FISA telephony identifier such as its RAS status and the justification and OGC

approval as appropriate, for those that have been RAS-approved. These features are scheduled for completion during the fourth quarter of FY09.

4. ~~(TS//SI)~~ **Analytical Processing and Call Chaining**

~~(TS//SI//NF)~~ An enhanced call chaining function and data processing capability will support large volumes of automated algorithms, handle growing ingest rates and deliver faster query responses. Additionally, the metadata will be stored using security tags, a measure which can be used to restrict the visibility of individual entries in the database to personnel with the appropriate access credentials.

5. ~~(U//FOUO)~~ **Auditing and Monitoring**

(~~U//FOUO~~) Enhanced auditing will provide a means to track a data user's activity patterns, the state of a user's operations, and the frequency and composition of queries. A formal metrics and monitoring system will also be used to monitor the status of the end-to-end processing and will alert management and operations personnel when processing anomalies are detected.

VI. (U) Conclusion

~~(TS//SF/NF)~~ As discussed above, NSA has thoroughly reviewed the technological systems, analytic workflows and processes associated with its implementation of the BR FISA Court Order, and has introduced corrective measures to address specific concerns and vulnerabilities. These new measures will ensure a balanced focus on technological solutions and management controls. The end-to-end review also revealed areas for improvement which have been documented and will continue to be addressed. Where changes were made impacting current manual operations, a combination of system evaluations, demonstrations and audits provided confidence that the technical fixes are actually configured and operating as intended.

~~(TS//SI//NF)~~ The remedial actions described in this report are subject to ongoing improvement and will support strict adherence to the Court Order. Although no corrective measure is infallible, NSA has taken significant steps designed to eliminate the possibility of any future compliance issues and to ensure that the mechanisms are in place to detect and respond quickly if one were to occur.

Figure 1: Overall BR FISA Process

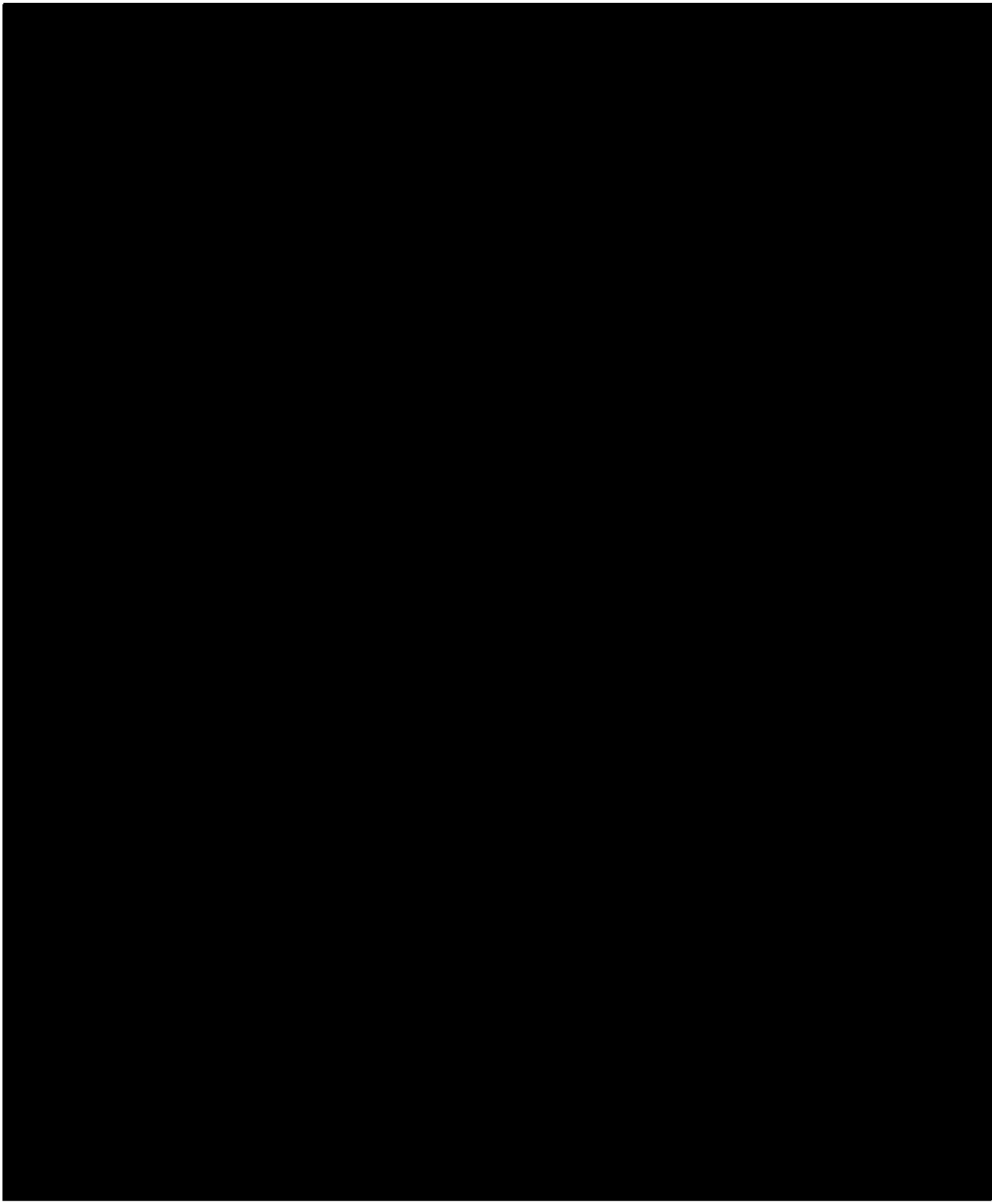


Figure 2: Components of BR FISA Process addressed in End-to-End Review

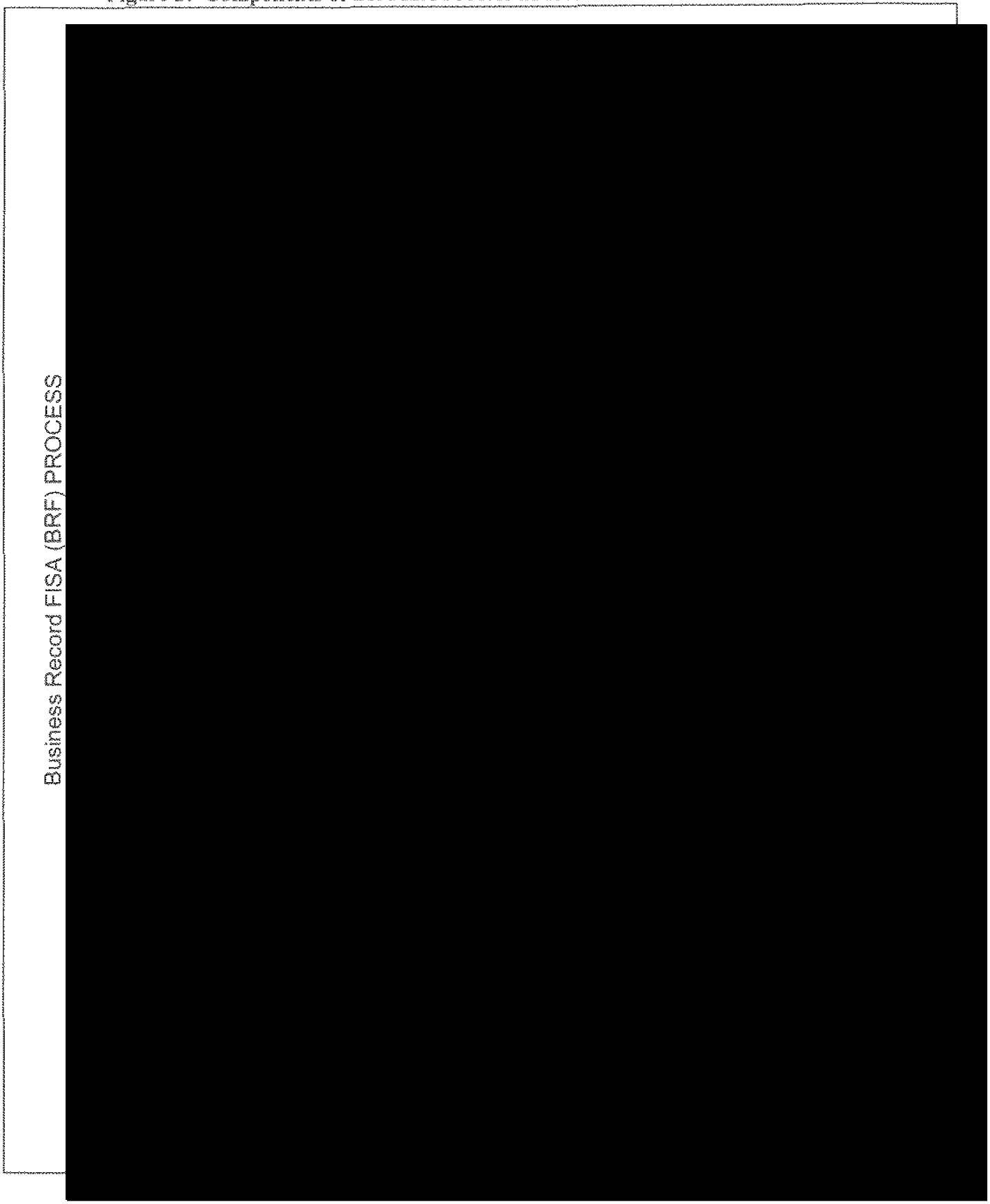


Figure 3: Component of BR FISA Process addressed in End-to-End Review

[redacted]

Figure 4: Component of BR FISA Process addressed in End-to-End Review

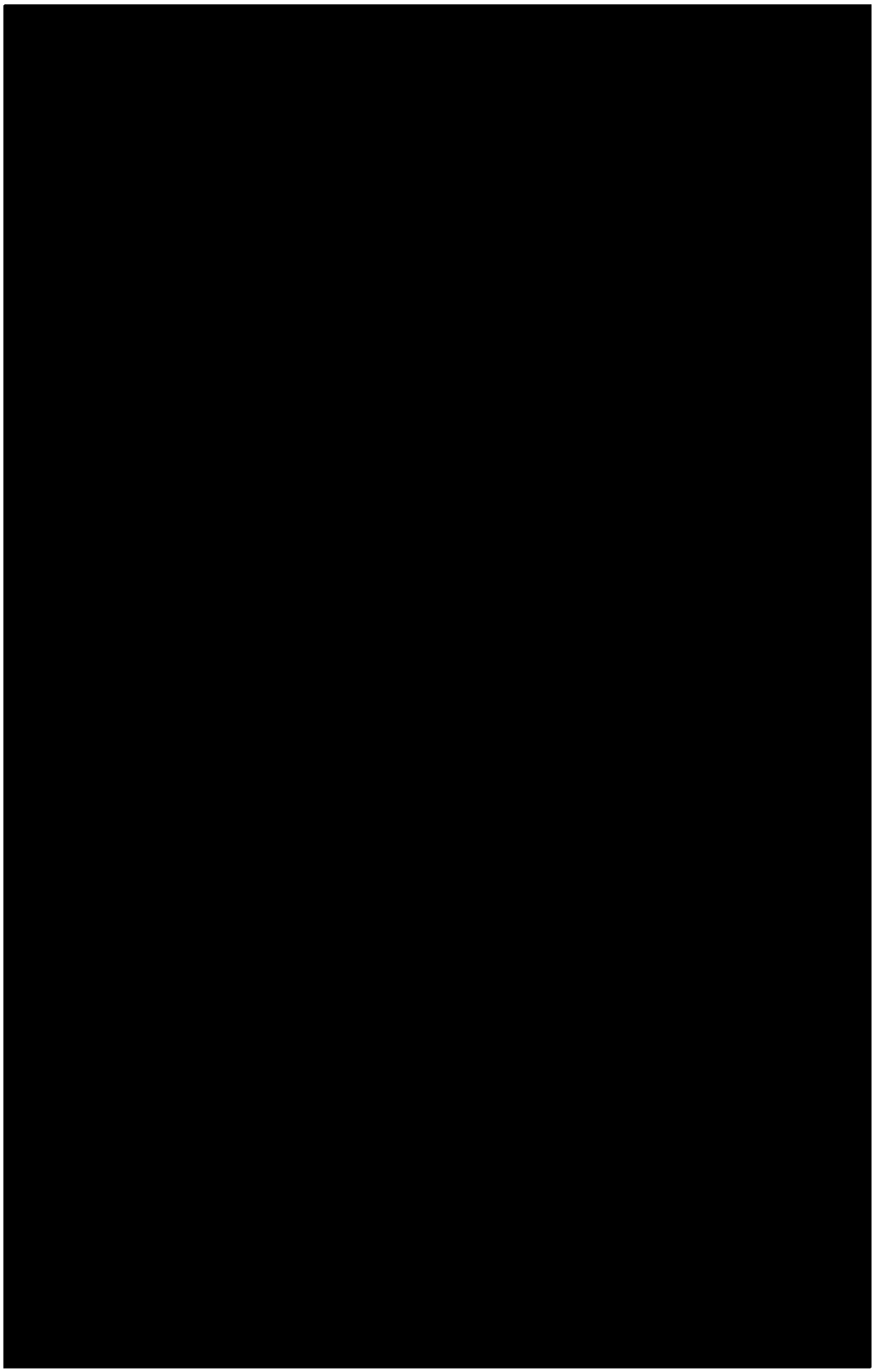


Figure 5: Component of BR FISA Process addressed in End-to-End Review

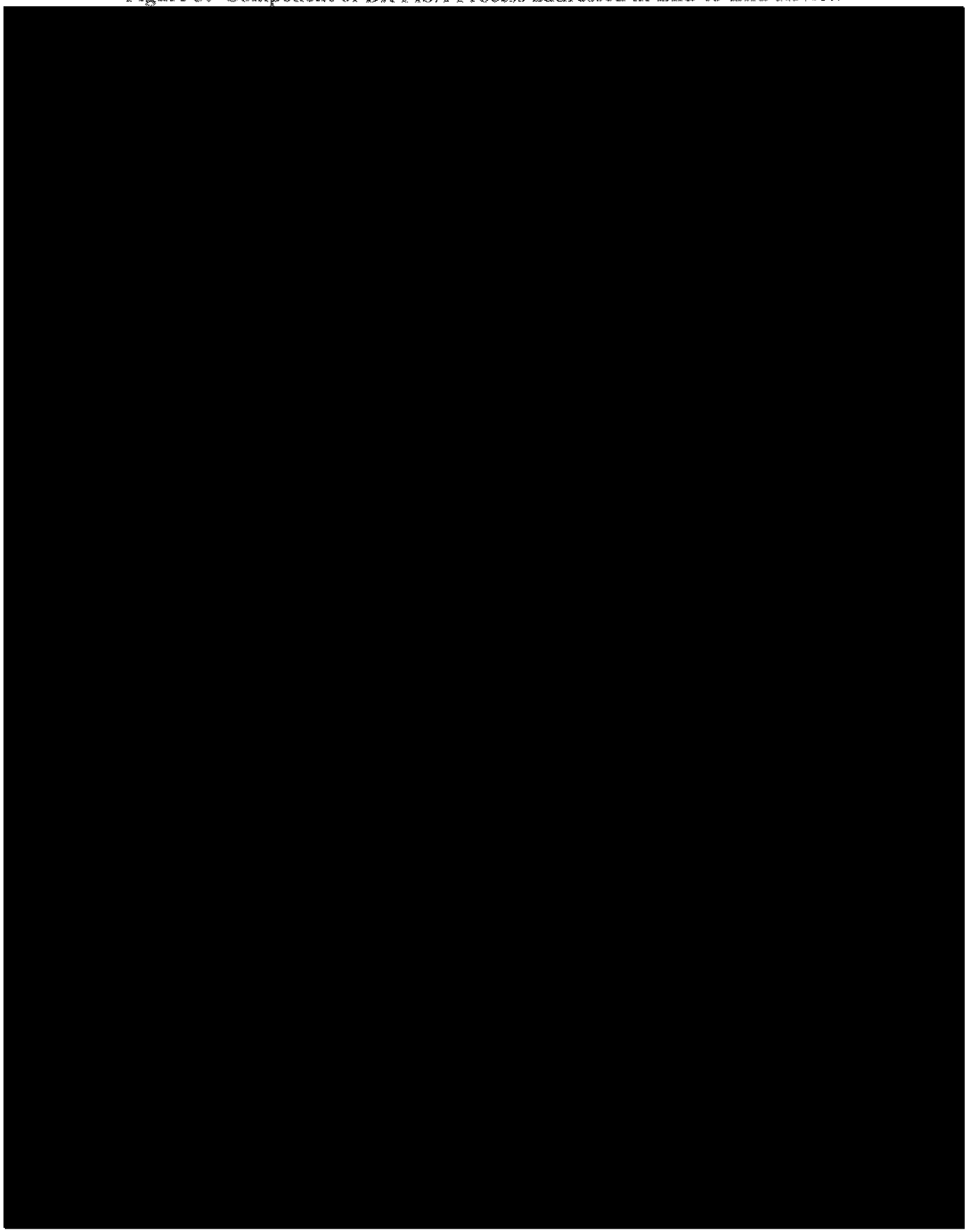


Figure 6: Component of BR FISA Process addressed in End-to-End Review

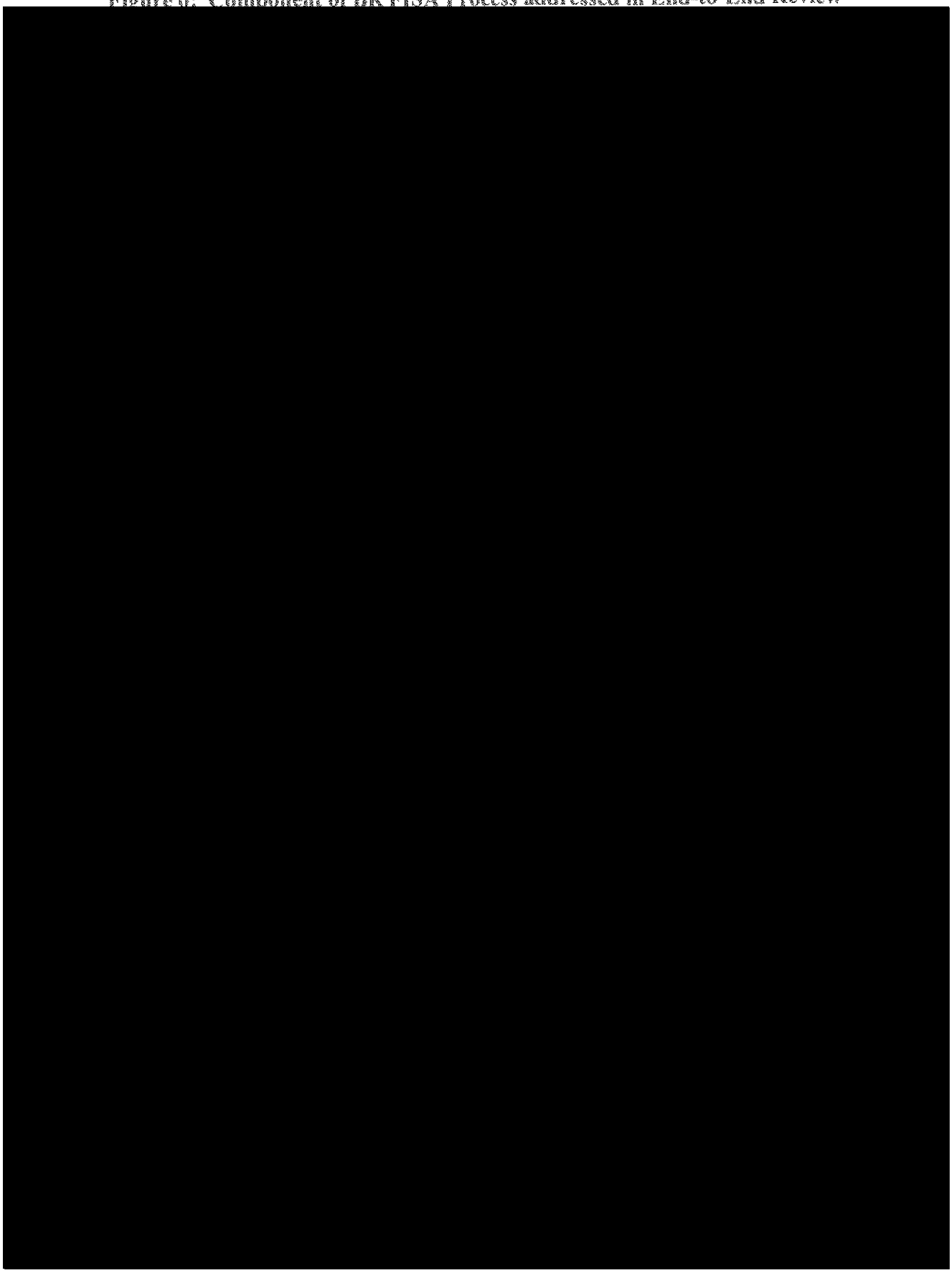


Figure 7: Component of BR FISA Process addressed in End-to-End Review
"Telephony Activity Detection Process"

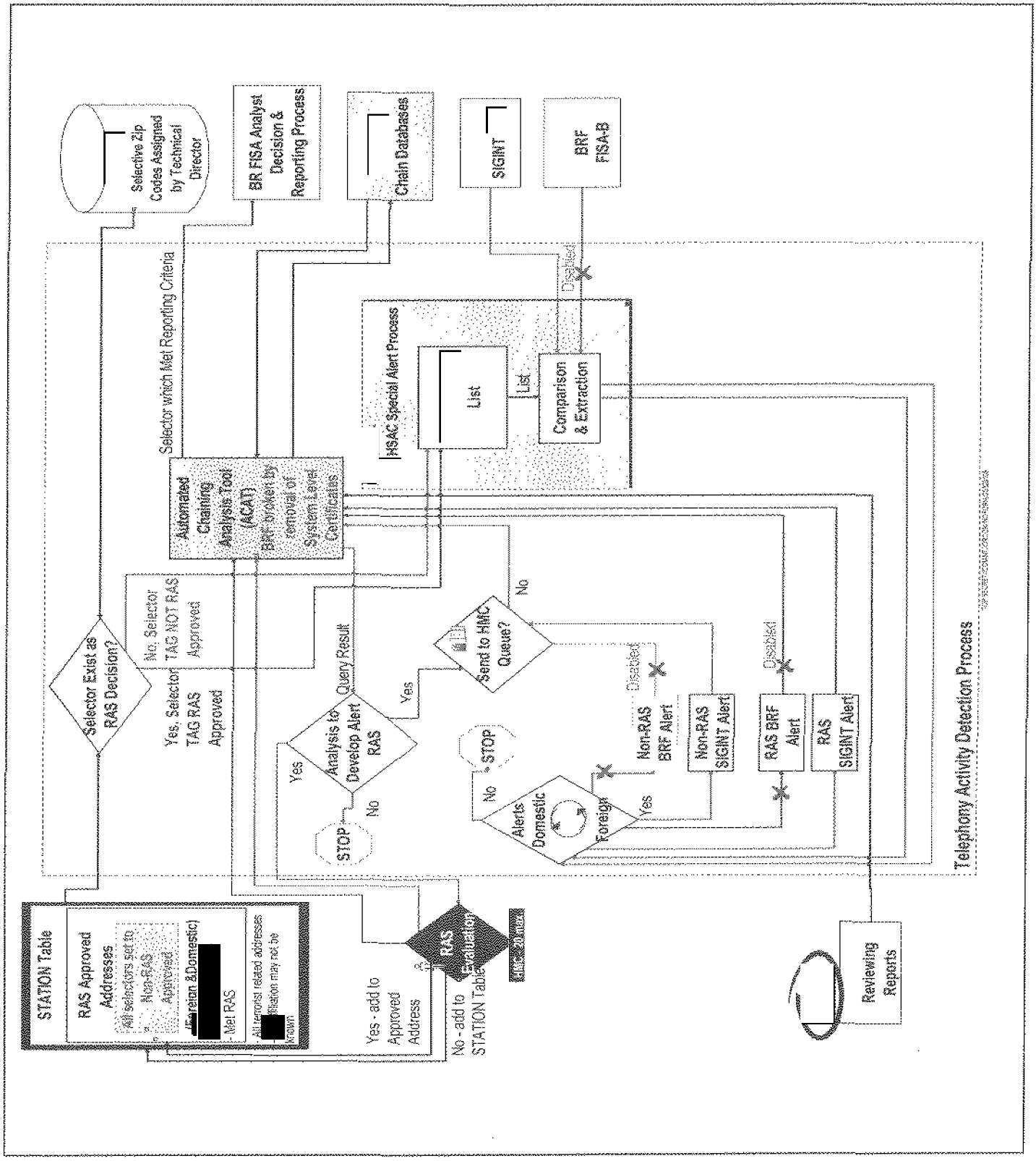


Figure 8: Component of BR FISA Process addressed in End-to-End Review
"RAS Approval Process"

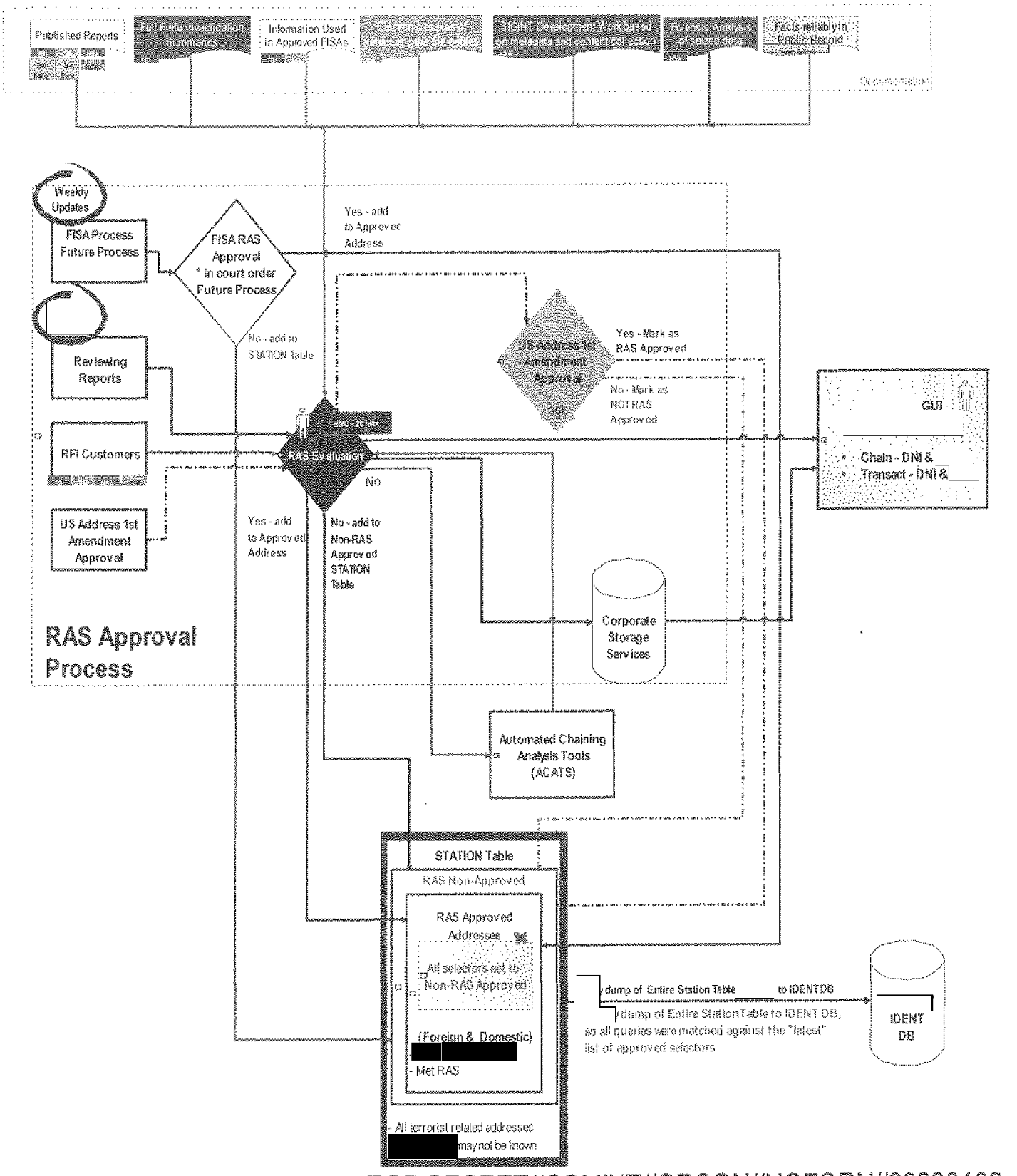


Figure 9: Component of BR FISA Process addressed in End-to-End Review "BR FISA Analytic Tools and Processes"

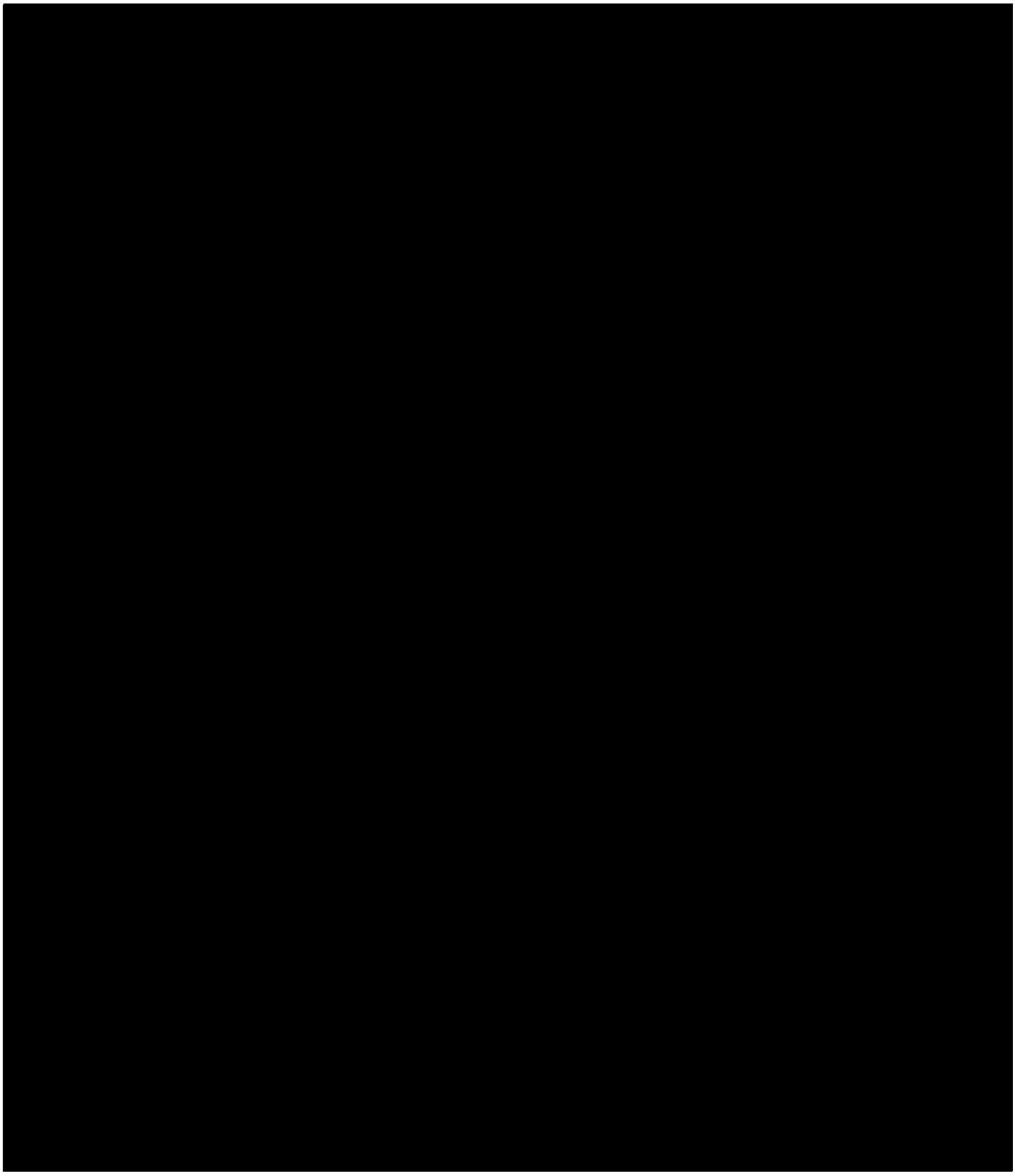
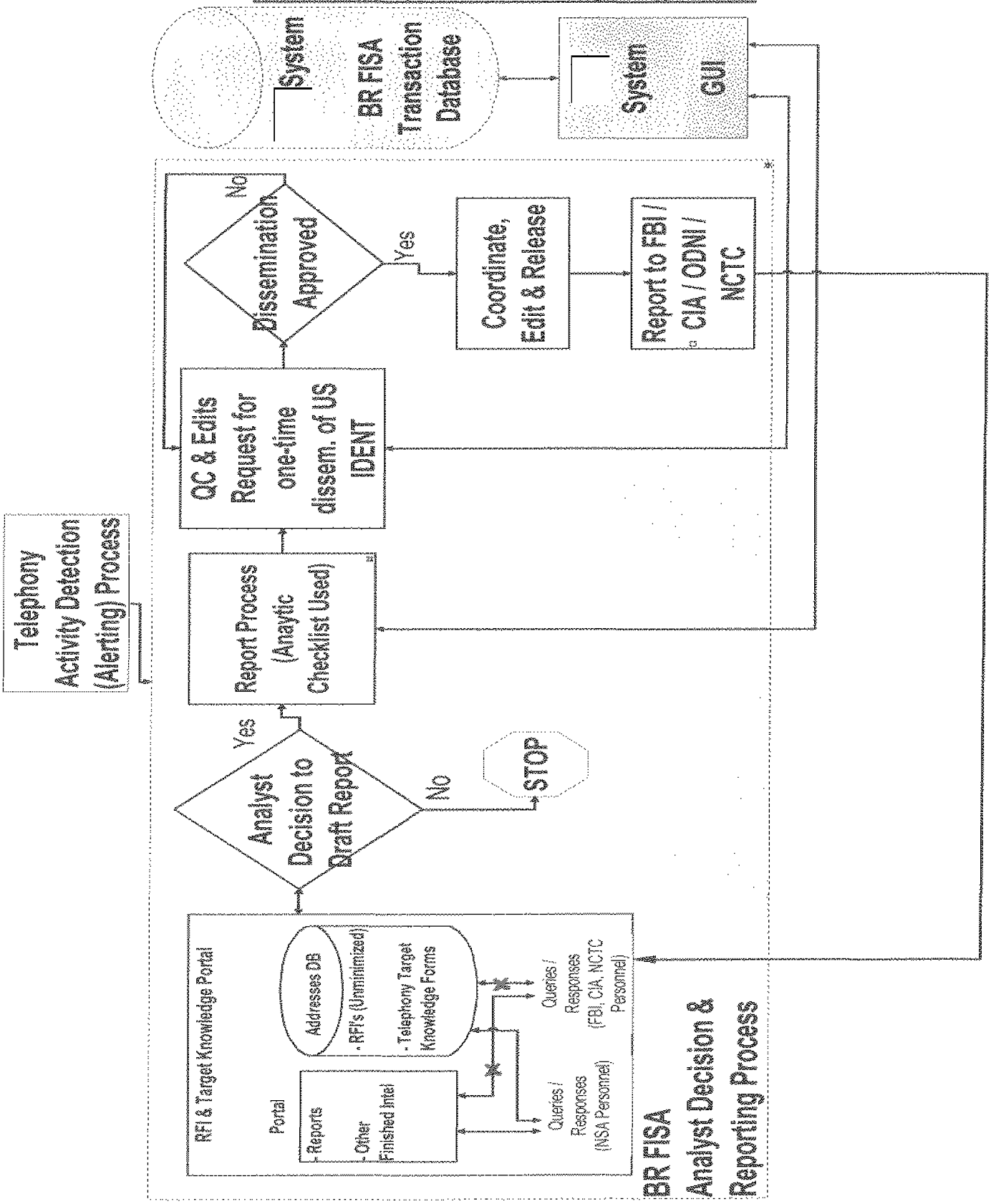


Figure 10: Component of BR FISA Process addressed in End-to-End Review
"BR FISA Analyst Decision and Reporting Process"



Appendix: Glossary of Terms

ACAT	*See Automated Chaining and Analysis Tool and GUI*
Activity Detection List	A list of foreign and domestic telephone selectors believed to be associated with terrorist targets. The Activity Detection List is independent of the Station Table. Formerly called the Alert List, this list is now more commonly referred to as the Activity Detection List in order to be more descriptive.
Alert List	*See Activity Detection List*
[redacted]	A database used to store correlations between selectors [redacted] It is one of the databases accessed by the [redacted] database.
Automated Chaining and Analysis Tool and GUI (ACAT)	ACAT provides automated chaining requests to [redacted] based on the occurrence of alerts [redacted] ad hoc query requests from BR FISA-authorized analysts [redacted]
Components	The core systems and processes identified as part of the BR FISA metadata workflow against which IPAs and PIAs were conducted.
Configuration Management	The process of tracking, controlling and documenting changes in software applications, including revision control and establishing baselines.
[redacted]	A database containing list of identifiers which, based on an analytic judgment, should not be tasked by the SIGINT system.
Defeat List	A list of selectors that are deemed of little analytic value for metadata analysis.
EAR	*See Emphatic Access Restriction*
[redacted]	
Emphatic Access Restriction (EAR)	A software restrictive measure written into the [redacted] middleware on 20

	February 2009 to prevent a non-RAS approved selector from being used for a chain query of the BR FISA metadata.
[redacted]	[redacted]
[redacted]	
Initial Privacy Assessment (IPA)	A review of a system or process which includes a standard set of questions used to determine, among other things, whether the system or process under review interacts with data that could contain information about U.S. persons.
IPA	*See Initial Privacy Assessment*
[redacted]	
	NSA's corporate file transfer/distribution system
	NSA's corporate contact chaining system.
	[redacted]
[redacted]	
Metadata	"Data about the data"; for example, information about a telephone call, to include the calling and called numbers, time of call, etc. Metadata does not include content.
[redacted]	The repository for individual BR FISA metadata call records for access by authorized Homeland Security Analysis Center (HSAC) and data integrity analysts

	to view detailed information about specific telephony calling events.
[redacted]	A selection management system used to manage and task selectors, such as telephone numbers, IMEIs, and IMSIs, to many different information collection systems worldwide.
Parsing Rules	A method for separating data into standardized data fields.
PIA	*See Privacy Impact Assessment*
PKI	*See Public Key Infrastructure*
Public Key Infrastructure (PKI)	An information assurance service that supports digital signatures and other public-key based security mechanisms, and offers security measures such as identification and authentication, access control and audit capability.
Privacy Impact Assessment (PIA)	An in-depth, standardized review of privacy concerns for a particular system or process
Requirements	The terms contained in the governing BR FISA metadata documents that must be satisfied as part the end-to-end workflow.
Sanitize	The process of disguising intelligence to protect sensitive collection sources, methods, capabilities or analytic procedures in order to disseminate to customers at a classification level they can use.
Seed	An initial selector used to generate a chain query.
Selector	An identifier, in BR FISA realm could be an IMEI, IMSI, or MSISDN, as well as a telephone number.
[redacted]	This tool is used by HMCs to conduct contact chaining against BR FISA metadata

	and provide the results to the team. HMCs only used RAS-approved selectors when using this tool. The team ultimately provided the results to NSA's
	The primary desktop graphical user interface (GUI) for access to data and services.
SOP	*See Standard Operating Procedure*
	NSA's mission element for access and exploitation o
SSP	*See System Security Plan*
Standard Operating Procedure (SOP)	Institutionalized documentation describing official processes and procedures.
Station Table	Historic reference of all telephony selectors that have been assessed for RAS – and their associated RAS determination (RAS Approved or Not RAS Approved) - since the BR FISA Order was first signed on 24 May 2006.
Sub-components	The logical and physical breakdowns of the BR FISA metadata workflow components that performed specific activities and/or functions.
	An analytic query tool used to seek out additional information on telephony selectors from and other knowledge bases and reporting repositories.
	A next generation metadata analysis graphical user interface (GUI) which is the replacement for
System Security Plan (SSP)	Formal document describing the implemented protection measures for the secure operation of a computer system.
Telephony Activity Detection (Alerting) Process	The process used to notify NSA analysts if there was a contact between a foreign telephone identifier associated with

	domestic telephone identifier.
[redacted]	The query tool which indicates whether a telephony selector is present in NSA data repositories, the total number of unique contacts, total number of calls, and "first heard" and "last heard" information for the selector.

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 09-13

ORDER REGARDING FURTHER COMPLIANCE INCIDENTS

On September 3, 2009, the Court authorized the acquisition by the National Security Agency ("NSA") of the tangible things sought in the government's application in the above-captioned docket ("BR metadata"). Like prior orders in this matter, the Court's September 3 Order adopted strict procedures to control the NSA's access to, use

and dissemination of the BR metadata. Among other things, the Court ordered the following:

> The Director of the NSA shall continue to maintain mandatory procedures to strictly control access to and use of the BR metadata, in accordance with this Court's orders. NSA's [Office of General Counsel] shall continue to promptly provide NSD with copies of these mandatory procedures (and all replacements, supplements or revisions thereto in effect now or adopted in the future). The Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate; Chief and Deputy Chief, Homeland Security Analysis Center; and the Homeland Mission Coordinators shall maintain appropriate management controls (e.g., records of all tasking decisions, audit and review procedures) for access to the metadata.

9/3/09 Order at 11. The Court further ordered that:

> All persons authorized for access to the BR metadata and other NSA personnel who are authorized to receive query results shall receive appropriate and adequate briefings by NSA's [Office of General Counsel] concerning the authorization granted by this Order, the limited circumstances in which the BR metadata may be accessed, and/or other procedures and restrictions regarding the retrieval, storage, and dissemination of the metadata.

Id. at 12. These provisions of the Court's order adopted requirements that the government proposed in its application as minimization procedures. Docket BR 09-13, Application at 21, 25.

On September 21, 2009, at approximately 5:10 p.m., an attorney with the National Security Division of the Department of Justice ("NSD") orally informed a member of the Court staff of a likely violation by the NSA of the foregoing provisions of the Court's

September 3, 2009 Order. The NSD attorney advised that an NSA analyst properly in possession of the results of a query of the BR metadata had forwarded such results by email to other NSA analysts involved in the [redacted]" investigation. According to the NSD attorney, at least some of those other analysts had not received "appropriate and adequate briefings by NSA's OGC" concerning the strict controls imposed by the Court on NSA's access to, use and dissemination of the BR metadata. The NSD attorney further advised that it did not appear that the query results in question had been shared outside NSA.

On September 23, 2009, at approximately 3:35 p.m., the same NSD attorney orally informed a member of the Court staff of another similar incident in which query results were shared by email with NSA employees who had not been trained on the handling of BR metadata in accordance with the Court's Order. The ensuing discussion between the NSD attorney and the Court staff suggested that NSA may have created a [redacted] distribution list comprised of the email addresses of some 189 NSA analysts, only 53 of whom have been so trained. The NSD attorney explained that he was not then in a position to assure the Court that the distribution list would be altered to include only properly trained NSA analysts.

The NSD attorney advised that NSD and NSA were investigating the foregoing incidents and expected to be in a position to submit a preliminary written notice to the

Court in short order. As of the entry of this Order, the Court has not yet received such a notice.

The Court is deeply troubled by the incidents described above, which have occurred only a few weeks following the completion of an "end to end review" by the government of NSA's procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court's orders going forward. Accordingly, the Court

HEREBY ORDERS that representatives of the NSA and NSD appear for a hearing on Monday, September 28, 2009, at 3:30 p.m., the purpose of which will be to inform the Court more fully of the scope and circumstances of the incidents discussed above, and to allow the Court assess whether the Orders issued in this docket should be modified or rescinded and whether other remedial steps should be imposed. The Court expects that the representatives of the NSA and NSD who appear at the hearing will include persons with detailed knowledge of the facts and circumstances surrounding the above-

described incidents and why remedial measures had not been implemented to ensure compliance with the Court's Orders that have been issued in this docket, as well as officials of stature sufficient to speak authoritatively on behalf of the Executive Branch.

IT IS SO ORDERED, this 25th day of September 2009.

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

[redacted]