



U.S. Department of Justice

National Security Division

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
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Washington, D.C. 20530

LEEANN FLYNN HALL
CLERK OF COURT

April 9, 2014

The Honorable Reggie B. Walton
Presiding Judge
United States Foreign Intelligence Surveillance Court
U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Rule 13(b) Notice, Docket Number BR 14-01 and Prior Related Dockets

Dear Judge Walton:

Through the Government's February 25, 2014 Motion for Second Amendment to Primary Order and subsequent March 11, 2014 Motion for Temporary Relief from Subparagraph (3)E of Primary Order,¹ the Government endeavored to reconcile its obligation to destroy certain call detail records or telephony metadata (BR metadata) after five years with obligations to preserve information relevant to issues raised in certain pending civil litigation. Despite the Government's best efforts to navigate those conflicting obligations, between March 5, 2014 and March 12, 2014, the date this Court issued an Opinion and Order granting the Government's motion for temporary relief, the Government retained (and continues to retain) certain BR metadata beyond the five-year retention period authorized by this Court solely for non-analytic purposes under strict conditions.² As a result of this Court's March 12, 2014 Opinion and Order, the Government's obligations do not conflict at this time. Consistent with that Opinion and Order, the Government continues to retain BR metadata under very strict access controls approved by the Court.

¹ Subparagraph (3)E of this Court's Primary Order entered in Docket Number BR 14-01 and prior related dockets requires that "BR metadata be destroyed no later than five years (60 months) after its initial collection."

² More specifically, the relevant BR metadata subject to destruction beginning March 5th was preserved and/or stored in a format that precluded any access or use by NSA intelligence analysts for any purpose. NSA technical personnel could access the relevant BR metadata only for the purpose of taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata.

On January 3, 2014, the Honorable Thomas F. Hogan of this Court issued orders in docket number BR 14-01 requiring the production to the NSA of BR metadata created by certain specified telecommunications providers. Subparagraph (3)E of the Primary Order required that “BR metadata be destroyed no later than five years (60 months) after its initial collection.”

Over the course of the last several months, certain plaintiffs have filed civil actions against various Government agencies and officials challenging the legality of, among other things, the Government’s collection of BR metadata pursuant to docket number BR 14-01 and prior related dockets. Those matters are currently pending before various United States District Courts or United States Courts of Appeals. Based upon the issues raised in those pending lawsuits, the Government assessed that it had a duty to preserve relevant information that may constitute evidence in those cases, which the Government assessed might include BR metadata previously acquired under this Court’s orders.

To ensure compliance with relevant preservation obligations and recognizing that certain BR metadata would be subject to destruction beginning on March 5, 2014, on February 25, 2014, the Government filed a motion with this Court seeking to amend the January 3, 2014, Primary Order to authorize the retention of BR metadata beyond five years. On March 7, 2014, this Court issued an Opinion and Order that denied the Government’s motion, without prejudice. During the Court’s consideration of the Government’s motion, the BR metadata subject to destruction beginning on March 5th was not destroyed, but rather, retained for non-analytic purposes under the strict conditions described above. Upon receipt of the Court’s March 7, 2014 Opinion and Order, the Government began notifying plaintiffs in the civil actions that it intended to commence complying with this Court’s destruction order on March 11, 2014. Plaintiffs in *First Unitarian Church of Los Angeles, et al., v. National Security Agency, et al.*, No. C 13-03287-JSW (N.D. Cal.) and *Jewel v. NSA*, No. C 08-04373-JSW (N.D. Cal.), sought temporary restraining orders from the United States District Court for the Northern District of California against the destruction of any BR metadata. On March 10, 2014, the district court issued a temporary restraining order in both matters. In response to the district court’s order, on March 11, 2014, the Government filed a motion for temporary relief from this Court’s destruction order. On March 12, 2014, this Court granted the Government’s motion and temporarily authorized the Government to retain BR metadata after the five-year limitation in subparagraph (3)E of the Primary Order in docket number BR 14-01 pending resolution of the preservation litigation in the Northern District of California, and, subject to very strict access controls and solely for the specific and limited purpose of meeting its preservation obligations.³

On March 5, 2014, certain of the BR metadata retained by NSA reached the five year limit for retention and, therefore, was subject to the Court’s destruction order. However, as a result of the steps the Government took to ensure compliance with relevant preservation obligations, the Government had suspended the destruction of this metadata while awaiting the Court’s ruling on the Government’s February 25, 2014, motion. Upon receipt of the March 7 Opinion and Order denying that motion, the Government prepared to commence compliance

³ As described in the government’s Notice, filed March 27, 2014, in docket number BR 14-01, the district court entered an order on March 21, 2014, in *First Unitarian Church of Los Angeles* concerning preservation issues which the Government has determined that, absent further relief from the district court, necessitates the preservation of BR metadata beyond five years (60 months) after its initial collection. The temporary restraining order in *Jewel*, remains in effect. At a hearing on March 19, 2014, the district court directed that the parties in *Jewel* complete their briefing on the question of the government’s compliance with the District Court’s prior preservation order by June 13, 2014.

with the Court's destruction order on March 11, 2014. On March 10, 2014, the United States District Court for the Northern District of California issued a temporary restraining order against that destruction. As a result, between March 5, 2014, and March 12, 2014, when this Court granted the Government's motion for temporary relief, the Government had retained (and continues to retain) certain BR metadata beyond the period authorized by the Court.

All BR metadata that has reached the five year limit for retention and is subject to destruction has been and will continue to be preserved, subject to the conditions and requirements stated in this Court's March 12, 2014, Opinion and Order, including being preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts to conduct RAS-approved contact chaining queries of the BR metadata for the purpose of obtaining foreign intelligence information or to access the BR metadata for any other purpose. NSA technical personnel will access BR metadata that is subject to destruction only for the purpose of taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata.

The Government will provide the Court with periodic updates regarding its retention of BR metadata beyond the five-year period specified in subparagraph (3)E of the Primary Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tashina Gauhar", written in a cursive style.

Tashina Gauhar
Deputy Assistant Attorney General