

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

Under Seal

Docket No. BR 14-01

ORDER

On January 22, 2014, [REDACTED]

[REDACTED] ("Petitioner") filed a
Petition pursuant to 50 U.S.C. § 1861(f)(2)(A) and Rule 33 of the Foreign Intelligence
Surveillance Court ("FISC" or "the Court") Rules of Procedure "to vacate, modify, or
reaffirm" the Secondary Order issued to Petitioner on January 3, 2014, in the above-
captioned docket ("Petition"). Following the Government's submission of a Response
to the Petition, the Court issued an Opinion and Order on March 20, 2014, denying the
Petition insofar as it requested that the production order be vacated or modified
("March 20, 2014 Opinion and Order").

The Foreign Intelligence Surveillance Act ("FISA") requires that all petitions challenging production orders issued under Section 1861 "be filed under seal." 50 U.S.C. § 1861(f)(5). Accordingly, the Court has placed the Petition and related Court records (e.g., the Government's Response to the Petition, the Court's January 23, 2014 Scheduling Order, its March 20, 2014 Opinion and Order, and the instant Order) under seal.

In its March 20, 2014 Opinion and Order, this Court noted that since last summer, "the Government has declassified and made public substantial details regarding the NSA telephony metadata program" to which the Petition and challenged Secondary Order relate, and that "substantial portions of this Court's January 3 Primary Order and all predecessor orders have been publicly released." Mar. 20, 2014 Op. and Order at 31.

"In light of those disclosures and the ongoing public debate regarding this program," the Court directed the Government and Petitioner

to submit memoranda (or a joint memorandum) stating their views with respect to whether this Court can or should unseal the Petition, the Government's Response, and this Opinion and Order, and whether appropriately redacted versions of these documents should be published pursuant to FISC Rule 62(a).

Id. On April 10, 2014, the parties each made a submission responsive to this directive.

See Apr. 10, 2014 Memorandum submitted by Petitioner ("Petitioner's Memorandum");

Apr. 10, 2014 Letter from Assistant Attorney General John P. Carlin to Hon. Reggie B. Walton Re: Redactions of Petition, Response to Petition, and Opinion and Order in Docket Number BR 14-01 ("Government's Memorandum").

Neither party's submission expressly addresses a legal question raised by the Court in the March 20 Opinion and Order – i.e., whether "this Court can or should unseal the Petition." The submissions make clear, however, that both parties believe that some version of the Petition, the Government's Response, and the March 20, 2014 Opinion and Order should be made public.¹ Hence, the parties necessarily share the view that the Court has authority to unseal a properly declassified version of the Opinion and Order and that it should exercise that authority. This Court agrees.

The sealing requirement in Section 1861(f)(5) applies to the filing of a petition and by its terms, therefore, binds the petitioner, not the Court. Hence, the Court concludes that it has the discretion to unseal a petition and related Court records under appropriate circumstances. See In Re Motion for Release of Court Records, 526 F. Supp.

¹ The government contends that certain information in these Court records (most notably, Petitioner's identity as the recipient of the challenged production order) is classified and should remain redacted in versions of the documents that are released to the public. See Gov't Mem. at 1. Petitioner, on the other hand, "request[s] no redactions should the Court decide to unseal and publish the specified documents." Pet. Mem. at 5. Petitioner states that its position "is based entirely on an assessment of [its] own equities" and not on "the potential national security effects of publication," which it "is in no position to evaluate." Id.

2d 484, 486 (FISA Ct. 2007) (“[T]he FISC is an inferior federal court established by Congress under Article III, and like all such courts was vested with certain inherent powers upon its creation,” including “supervisory power over its own records and files.” (quoting Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 598 (1978)) (footnotes omitted)).

The purpose of the statutory sealing requirement appears to be the protection of classified national security or other sensitive information that has been placed in the hands of private entities such as Petitioner through the issuance and service of production orders under Section 1861. As noted above, the Government has declassified and made public many of the facts and circumstances concerning the telephony metadata program that is the subject of the Secondary Order challenged by Petitioner. The government has further concluded that “significant portions of the pleadings and the [March 20, 2014] Opinion and Order” may be declassified and “made public.” Gov’t Mem. at 1. The Government has provided the Court and Petitioner with proposed declassified versions of the Petition, the Government’s Response, and the March 20, 2014 Opinion and Order. See id. Under these circumstances, keeping such unclassified information under seal would not serve the purpose of the statutory sealing requirement. Accordingly, the Court is satisfied that it would be appropriate to unseal

properly redacted versions of the Petition, the Government's Response, the January 23, 2014 Scheduling Order, the March 20, 2014 Opinion and Order, and the instant Order, once the redactions have been finalized. The undersigned intends to request that the unsealed, redacted versions of these documents be published pursuant to FISC Rule 62(a).

In anticipation of such unsealing and publication, the Court hereby orders as follows:

1. The Government is directed to submit a memorandum addressing the following questions concerning its proposed redactions:

A. What is the basis for the Government's conclusion that Petitioner's identity as the recipient of the challenged production order [REDACTED] constitute classified national security information?

B. With regard to specific redactions:

- (1.) What is the basis for redacting the words, [REDACTED] in the first line of footnote 3, on page 5 of the March 20, 2014 Opinion and Order?
- (2.) The redaction in line 3 on page 6 of March 20, 2014 Opinion and Order is inconsistent with the proposed redaction of the same sentence in the Government's Response. What is the basis for this inconsistency?

- (3.) What is the basis for redacting [REDACTED] in lines 3-4 of page 8 of the March 20, 2014 Opinion and Order?
- (4.) What is the basis for redacting the definition of "telephony metadata" in footnote 7 on page 11 of the March 20, 2014 Opinion and Order?
- The Court notes that the definition of "telephony metadata" is unredacted in the declassified versions of the January 23 Primary Order and other Primary Orders in this matter that have been publicly released.

2. The Government is directed to conduct a declassification review of the January 23, 2014 Scheduling Order and the instant Order and to submit proposed declassified versions thereof.

3. The Court has identified a non-substantive typographical error in the March 20, 2014 Opinion and Order. In line 6 on page 20, the word "there" should not appear between the words "whether" and "any." The parties are directed to inform the Court in writing if either objects to the correction of this error in any version of the March 20, 2014 Opinion and Order that is ultimately unsealed and made public. No response on this point is required absent any objection.

The submissions required by this Order are to be made as promptly as is

practicable but in no event later than 5 p.m. on April 21, 2014.

SO ORDERED, this 11th day of April, 2014, in Docket No. BR 14-01.



ROSEMARY M. COLLYER

Judge, United States Foreign
Intelligence Surveillance Court