

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

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
NOV 09 2015 11:00 AM
LEEANN FLYNN HALL
CLERK OF COURT

(U) IN RE APPLICATION OF THE FEDERAL
BUREAU OF INVESTIGATION FOR AN
ORDER REQUIRING THE PRODUCTION
OF TANGIBLE THINGS

Docket Number BR 15-99

(U) **REPLY MEMORANDUM OF AMICUS CURIAE TO THE UNITED STATES
RESPONSE TO OCTOBER 29, 2015 MEMORANDUM OF LAW**

(U) Undersigned, as *Amicus Curiae*, respectfully submits this reply to the government's November 6, 2015, Response to undersigned's October 29, 2015, Memorandum of Law. Amicus and the government agree that the USA FREEDOM Act of 2015 (USFA) does not categorically preclude the retention and use of the previously produced bulk call detail records after November 28, 2015. Gov. Response at 1. The government also agrees that the Act permits the Court to impose particularized minimization procedures regarding such use and retention, including procedures addressing the destruction of such material. *Id* at 2. One of the provisions of the Act which goes into effect on November 28, 2015, requires the government to "adopt minimization procedures that require the prompt destruction of all call detail records produced under the order that the Government determines are not foreign intelligence information." USFA § 101(b)((3)(F)(vii)(I) (to be codified at 50 U.S.C. §1861(c)(F)(2)). But the Court was given immediate authority to impose additional minimization procedures related to the destruction of information within a reasonable time period. USFA § 104. Accord Gov. Response at 7.

(U) The government urges the Court to endorse the procedures it proposed in its Application. *Id.* at 7-8. But its Response fails to articulate specific procedures regarding how it intends to

destroy the telephony metadata archive it has created and accumulated for nearly a decade. See Gov't Response at 11. It also fails to provide the Court with a clear answer as to whether and how collections that should have already been destroyed actually were destroyed.

(U) As to the Government's response to suggested inquiries regarding its litigation preservation obligations, Amicus agrees that the ultimate resolution of those issues is for the parties in the two pending cases and the courts currently addressing that litigation—the Northern District of California and the Ninth Circuit. See Gov. Response at 16. But the preservation orders issued in those cases collide with the minimization procedures for the call detail records program in this Docket. Amicus simply suggested some inquiries the Court may wish to consider in deciding whether to continue this Court's deference to those preservation orders as part of the applicable minimization procedures. See Op. and Order, *In re Application of FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR. 14-01 (March 12, 2014).

(U) Specifically, Amicus stated:

- Why has the government been unable to reach some stipulation with the plaintiffs to preserve only the evidence necessary for plaintiffs to meet their standing burden? Consider whether it is appropriate for the government to retain billions of irrelevant call detail records involving millions of people based on, what undersigned understands from counsel involved in that litigation, the government's stubborn procedural challenges to standing – a situation that the government has fostered by declining to identify the particular telecommunications provider in question and/or stipulate that the plaintiff is a customer of a relevant provider.

Amicus Br. at 27. The government does not answer those questions. Instead the government reinvents the questions as suggesting:

that the Government disclose national security information concerning the identity of providers, information subject to a pending state secrets assertion, is inappropriate, and the suggestion by amicus that the government stipulate to Article III standing in those cases is unfounded as a matter of law. Finally, the suggestion that preservation of bulk call detail records can be limited solely to the plaintiffs in multiple pending putative class actions is entirely unworkable.

Government Response at 16-17. Amicus's proposed inquiries were not quite the calamities the government conjures to avoid answering the questions. They were simply inquiries fostered by this Court's own observations that the preservation requirements conflict with minimization procedures designed to protect privacy rights of millions of uninvolved U.S. persons and to appropriately balance those privacy interests with the government's foreign intelligence justification for obtaining the information in the first place. See Op. and Order at 2, 6, 1-12, *In re Application of FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR. 14-01 (March 7, 2014) (denying government motion to amend minimization procedures for litigation preservation).

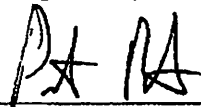
~~(TS//SI//OC/NF)~~ The Court can consider the government's litigation tactics and whether it is largely responsible for the duration of the preservation orders in the California cases in deciding whether to permit it in *this* Docket, not the other cases, to continue to retain millions of records. The government's unwillingness to address its various litigation positions, some of which appear to have contributed to the prolonged hold, speaks volumes. For example, its resort to incanting the state secrets privilege seems rather energetic given the robust public discussion of this program, including the [REDACTED]

[REDACTED]

[REDACTED] The government also states, without more, that limiting the records it

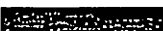
holds to those belonging to plaintiffs is "entirely unworkable." The Court may fairly probe whether that conclusory declaration is sufficient or meaningful. It would perhaps be expensive and time-consuming to segregate the data or otherwise pare the archive but that is a choice the government may be required to make in deciding whether to continue to burrow in on its standing and procedural challenges.

Respectfully submitted,



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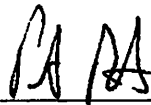
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(U) **CERTIFICATE OF SERVICE**

(U) I hereby certify that on the 9th day of November, 2015, I filed a true and correct copy of the foregoing Reply Memorandum with the Clerk of Court who will transmit a true copy via appropriate secure means to:

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