IN THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

In re: Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act	**No. 08-01**

PROVIDER'S UNCLASSIFIED MOTION UNDER FISC RULE 62 TO PUBLISH ADDITIONAL PORTIONS OF THE COURT'S DECISION

The provider who previously participated in this case[1] ("Provider") respectfully moves this court under FISC Rule 62(a) to publish additional portions of the Court's decision in this case in light of the recent declassification of information by the Director of National Intelligence ("DNI") on June 8, 2013. Provider requests the Court publish additional information including, but not limited to, the identity of Provider and its counsel and the arguments made in the briefs. Given the recent declassification of information related to the use of § 702 directives, as well as the DNI's statement linking § 702 Directives to recently leaked information about a program called "PRISM,"[2] it is no longer necessary for the name of Provider and its counsel that challenged the directives in this case to remain classified. To the contrary, the requested additional disclosures will serve the public interest in understanding judicial oversight over the PRISM program and

[1] The provider's name is being omitted as the inclusion of the name would disclose previously classified information. However, the undersigned counsel represents that this case is being brought by the provider previously involved in the suit.

[2] The DNI made reference to PRISM in his fact sheet attached as Exhibit D, and therefore the use of it in this motion is not classified information.

how at least one provider responded to the receipt of a directive and what challenges Provider made.

Such disclosure would also reduce the burden on Provider—which has been caused by the disclosure of information by a government contractor combined with the DNI's partial declassification of certain information—of responding to repeated inquiries from the press and otherwise about whether it voluntarily complied with the PRISM program. Additionally, lawsuits have already been filed against providers who have been identified as having responded to directives and/or participated in the PRISM program. *See, e.g., Klayman v. Holder*, No. 13-CV-00881-RJL (D.D.C. June 12, 2013). Releasing the Provider's identity would assist it in defending such a case if it has been/were to be filed against Provider. *See, e.g.,* 50 U.S.C. § 1885a(d) (stating "Any plaintiff or defendant in a civil action may submit any relevant … directive to the district court … for review and shall be permitted to participate in the briefing or argument…); 18 U.S.C. § 2703(e), 18 U.S.C. § 2707(e). As such, Provider respectfully requests that this Court issue an order under Rule 62 stating that it does not object to publication of additional parts of its opinion (and briefing) in this case, and requesting the Government revisit classification decisions in light of recent disclosures.

A. Facts

On Thursday, June 6, 2013, the Guardian newspaper published an article

describing a National Security Agency ("NSA") program which allegedly allowed intelligence officials to obtain access to certain data about users of Google, Facebook, Hotmail, Yahoo!, Apple, Skype, Paltalk, AOL, and YouTube. Ex. A, Glenn Greenwald & Ewen MacAskill, NSA Prism Program Taps in to User Data of Apple, Google and others, The Guardian (June 6, 2013);[3] Ex. B, Barton Gellman & Laura Poitras, U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program, The Washington Post (June 6, 2013).[4]

On June 9, 2013, DNI James R. Clapper released a statement responding to those articles and declassifying certain information about PRISM. Ex. C, DNI Statement on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, June 8, 2013.[5] In a fact sheet accompanying his statement, the DNI declassified the fact that PRISM is a "computer system used to facilitate the government's statutorily authorized collection of foreign intelligence information from electronic communications service providers under court supervision, as authorized by Section 702 of the Foreign Intelligence Surveillance

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[3] Available at http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data

[4] Available at http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

[5] DNI Statement on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, June 8, 2013 (available at http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/872-dni-statement-on-the-collection-of-intelligence-pursuant-to-section-702-of-the-foreign-intelligence-surveillance-act).

Act..." Ex. D, Director of Nat'l Intelligence, Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (June 8, 2013).[6] The DNI's statement and fact sheet make clear that the FISC (and by extension this court) supervised the PRISM program. *Id.* at 2. The government has also described certain success stories that identify specific providers as having had users whose communications were intercepted by the U.S. government pursuant to 2007 and 2008 laws. Ex. E, Matt Apuzzo & Adam Goldman, NYC Bomb Plot Details Settle Little in NSA Debate, AP Big Story (June 11, 2013).[7]

The public portions of the opinion in this case reveal it concerned a challenge to § 105B of the Protect America Act, which allowed the Government to issue directives to providers prior to February 18, 2008, when § 702 replaced § 105B and became effective. As the newspaper articles to which the DNI responded indicate, PRISM was alleged to be in effect prior to passage of § 702. *See,* Ex B, Gellman & Potrias at 1. As the court opinion states, "[b]eginning in 2007, the government issued directives to the petitioner commanding it to assist in warrantless surveillance of certain customers.... The government's efforts did not impress the petitioner, which refused to comply with the directives. On [redacted],

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[6] Available at http://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf

[7] Available at http://bigstory.ap.org/article/nyc-bomb-plot-details-settle-little-nsa-debate

the government moved to compel compliance."

B. **Argument**

This Court has jurisdiction over motions regarding handling of its own court files. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007) ("it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files.") Further, FISC Rule 62(a) specifically allows parties to request the Court to publish an opinion, and 62(b) allows the clerk to release other records with a court order, in accordance with established security procedures. FISC Rule 62(a) provides that "The Judge who authored an order, opinion, or other decision may *sua sponte* or **on motion by a party** request that it be published." (emphasis added). Provider was a party to this case, and thus the court may direct that the decision be published. Once the Court directs that a decision be publish it "**may**, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." *Id.* (emphasis added).

Provider is not aware of a case where a party has petitioned the Court to publish additional portions of the decision after its initial release. Nothing in Rule 62, however, appears to preclude the Court from issuing an order stating that it has

no objection to additional publication and requesting that the Government revisit its classification decisions. Indeed, the limited nature of this request sets this motion apart from the ACLU's motion in *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007), which asked this Court to order release on behalf of a non-party. Here, Provider makes a more limited request that this Court remove any objection it might have and direct the Government to reconsider its classification decisions.

The DNI's recent declassification of facts relating to the leaked information provide just cause for revisiting the classification decisions in this case and publishing additional information about the challenge, including the names of Provider and its counsel, and basis for its resistance. Executive Order 13,526, § 1.7 states that "in no case shall information … continue to be maintained as classified… in order to … prevent or delay the release of information that does not require protection in the interest of national security." Section 3.1 states "Information shall be declassified as soon as it no longer meets the standards for classification under this order."

The recent declassification of information related to PRISM supports revisiting the classification decision under E.O. 13,526, because there is no longer a compelling reason to maintain all of the redactions in this case, including names of Provider and its counsel. The DNI has confirmed that PRISM exists, that the

DNI uses § 702 directives to obtain information from providers, and the Government has disclosed to reporters specific success stories. Fact Sheet at 2, Ex. at 3. If the Government can declassify those details, there is no longer a compelling reason why it should not declassify the Provider's name in this case.

Further, Provider, like many electronic communications providers, is under public pressure to clarify whether it has had a role in PRISM. Courts have long recognized that the public has a right to access court records. *United States v. Mitchell,* 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Comm'ns, Inc.,* 435 U.S. 589 (1978) (The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state.") Indeed, even Executive Order 13,526 recognizes that "the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified." Provider intends to make that case to the Government here, where the public deserves to know which providers have fully engaged in the review process for directives under § 105B and § 702. Furthermore, release of Provider's name is essential to establishing that Provider's compliance with the directives served upon it was anything but voluntary for purposes of pending litigation.

While Executive Order 13,526 establishes procedures for challenging classification, the Department of Justice's filings in *In re Motion for Consent to*

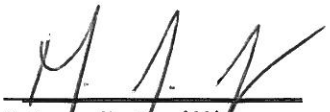
Disclosure of Court Records or in the Alternative a Determining of the Effect of the Court's Rules on Statutory Access Rights, No. Misc. 13-01 (Foreign Intel. Surv. Ct. June 12, 2013) ("*In re Motion for Consent*"), indicate that while it is the Executive Branch's responsibility to safeguard sensitive national security information, *see Dep't of Navy v. Egan*, 484 U.S. 518, 527-29 (1988), the Government believes that Provider must first petition this Court to ensure that the Court does not have an independent reason for redacting the information under Rule 62. But *In re Motion for Consent* is not binding on this Court. Moreover, intervening developments have altered any prior conclusions, reached nearly five years ago, about the need for classification.

Conclusion

Provider therefore respectfully requests this Court to issue an order stating: (1) that it does not object to the Government's release of additional portions of its opinion in this case and (2) directing the Government to revisit its classification decisions under Executive Order 13,526 to determine if classification remains appropriate in light of recent disclosures.[8]

[8] To the extent the government responds to this motion with a classified filing, Provider asks that this court allow it to file a short classified reply brief and establish a procedure for such filing by Provider.

Dated: June 13, 2013

Signature: 

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2013, I served copies of the foregoing motion on:

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pursuant to FISC Rule 8 and procedures established by the Security and Emergency Planning Staff, United States Department of Justice.

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