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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CAROLYN JEWEL, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	Case No. 3:08-cv-04373-JSW Case No. 3:13-cv-03287-JSW **GOVERNMENT DEFENDANTS' RESPONSE TO THE COURT'S ORDER RE: PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER** Date: March 10, 2014 Courtroom 11, 19th Floor The Honorable Jeffrey S. White
FIRST UNITARIAN CHURCH OF LOS ANGELES, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	

The Government Defendants respond to the Court's Order re: Plaintiffs' Motion for a Temporary Restraining Order in the above-captioned actions as follows.

On February 25, 2014, the Government filed a motion before the Foreign Intelligence Surveillance Court ("FISC") asking the FISC to amend its orders governing the NSA's bulk collection of telephony metadata pursuant to Section 215 of the USA-PATRIOT Act, 50 U.S.C. § 1861, to permit the retention (off-line) of call-detail records beyond five years after their initial collection. Exh. 1 at 1. The Government made this request for the limited purpose of allowing it to comply with its common-law preservation obligations in several civil actions, including *First Unitarian v. NSA*, 3:13-cv-03287-JSW, that challenge the legality of the FISC-authorized Section 215 program. *Id.* at 1, 5, 7. The motion was filed on the public record and Plaintiffs' counsel in the above-captioned actions became aware of it (as indicated in communications with Government counsel) no later than February 26, 2014.[1]

On March 7, 2014, the FISC denied the Government's Motion. Exh. 2. The FISC noted that under its orders authorizing the NSA's collection of telephony metadata under Section 215, the Government must comply with minimization requirements that include a requirement that call-detail records collected under the FISC's orders be destroyed within five years of their acquisition. Exh. 2 at 2. Although recognizing the general obligation of civil litigants to preserve records that could potentially serve as evidence in a case, the FISC held that the statutory minimization requirements imposed by Section 215, 50 U.S.C. § 1861(g)(2), which are

[1] In particular, on February 26, after reviewing the Government's motion before the FISC, Plaintiffs contacted the Government Defendants' counsel questioning why the *Jewel* (and *Shubert*) cases were not mentioned among the cases noted in the Government's motion. In response Government counsel advised that *Jewel* and *Shubert* were not listed among the cases referenced in the Government's motion before the FISC because the question of preservation of evidence had already been litigated in those cases and this Court had issued separate preservation orders that govern in those actions. *See* Pls.' TRO Mot., Cohn Decl. Exh. E. Those orders followed the Government's submission of a classified *ex parte* declaration that described in detail the specific preservation steps the Government was taking. The orders direct the parties in *Jewel* and *Shubert*, *inter alia*, to halt "business practices" and "processes" that involve the destruction of "materials reasonably anticipated to be subject to discovery in th[ose] action[s]" "to the extent practicable for the pendency of [the] order[s]." Unlike the cases challenging the legality of the Section 215 program, the claims in the *Jewel* and *Shubert* complaints challenge intelligence activities conducted without court approval.

intended to prevent the retention or dissemination of U.S. person information except as necessary to obtain, produce, or disseminate foreign intelligence information, supersede the Government's common-law preservation obligations, at least on the record before it. Exh. 2 at 3-7. The FISC reasoned that the purpose for which the Government sought to retain the data beyond five years was not related to obtaining, producing, or disseminating foreign intelligence information, and therefore that, at least on the record before it, could not find that an exception to Section 215's minimization requirements was permissible. Exh. 2 at 7-8.

Therefore, in light of the FISC's March 7 order, the Government currently remains subject to orders of the FISC—the Article II Court established by Congress with authority to issue orders pursuant to FISA and to impose specific minimization requirements—which orders require the destruction of call-details records collected by the NSA pursuant to Section 215 that are more than five years old.

In light of the obligations created by those orders, on March 7, 2014, upon receipt of the FISC's decision, the Government filed a notice in *First Unitarian* and other cases challenging the legality of the Section 215 telephony metadata program of the Government's intention, as of the morning of Tuesday, March 11, 2014, to comply with applicable FISC orders requiring the destruction of call-detail records at this time, absent a court order to the contrary. Exh. 3. The Government respectfully continues to believe that, absent a court order to the contrary. it must follow this course in order to discharge its obligations under the FISC's orders.

Dated: March 10, 2014

Respectfully Submitted,

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EXHIBIT 1

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

Docket Number: BR 14-01

MOTION FOR SECOND AMENDMENT TO PRIMARY ORDER

The United States of America, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978 (the "Act"), Title 50, United States Code (U.S.C.), § 1861, as amended, for an amendment to the Primary Order issued in the above-captioned docket number. Specifically, the Government requests that Section (3)E of the Court's Primary Order be amended to authorize the preservation and/or storage of certain call detail records or "telephony metadata" (hereinafter "BR metadata") beyond five years (60 months) after its initial collection under strict conditions and for the limited purpose of allowing the Government to comply with its preservation obligations, described below, arising as a result of the filing of several civil lawsuits challenging the legality of the National Security Agency (NSA) Section 215 bulk telephony metadata collection program.

As detailed below, several plaintiffs have filed civil lawsuits in several United States District Courts challenging, among other things, the legality of the Government's receipt of BR metadata from certain telecommunications service providers in response to production orders issued by this Court under Section 215. While the Court's Primary

Order requires destruction of the BR metadata no later than five years (60 months) after its initial collection, such destruction could be inconsistent with the Government's preservation obligations in connection with civil litigation pending against it. Accordingly, to avoid the destruction of the BR metadata, the Government seeks an amendment to the Court's Primary Order that would allow the NSA to preserve and/or store the BR metadata for non-analytic purposes until relieved of its preservation obligations, or until further order of this Court under the conditions described below.

1. Upon consideration of the Application by the United States, on January 3, 2014, the Honorable Thomas F. Hogan of this Court issued orders in the above-captioned docket number requiring the production to the NSA of certain BR metadata created by certain specified telecommunications providers. That authority expires on March 28, 2014, at 5:00 p.m. Eastern Time. On February 5, 2014, this Court issued an order granting the Government's motion for amendment to the Primary Order to modify certain applicable minimization procedures.[1] The application in docket number BR 14-01, including all exhibits and the resulting orders, as well as the Government's motion and the Court's February 5, 2014 Order, are incorporated herein by reference.

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1. The minimization procedures were modified to requirethe Government, by motion, to first obtain the Court's approval to use specific selection terms to query the BR metadata for purposes of obtaining foreign intelligence information, except in cases of emergency, and to restrict queries of the BR metadata to return only that metadata within two "hops" of anapproved seed.

2. The Primary Order in the above-captioned docket number, as amended, requires NSA to strictly adhere to the enumerated minimization procedures. Among the minimization procedures is subparagraph (3)E, which requires that "BR metadata be destroyed no later than five years (60 months) after its initial collection." The Court's February 5, 2014 Order granting the Government's motion to amend the Primary Order does not relieve the NSA of this destruction requirement.

3. The Government moves this Court for an amendment to the Primary Order in docket number BR 14-01, as amended, that would allow the NSA to preserve and/or store the BR metadata for non-analytic purposes until relieved of its preservation obligations or until further order of this Court under the conditions described below.

I. Background Concerning Pending Civil Litigation

4. Over the course of the last several months certain plaintiffs have filed civil actions against various government agencies and officials challenging the legality of the NSA bulk telephony metadata collection program as authorized by the Court under Section 215. The following matters, currently pending either before a United States District Court, or United States Court of Appeals, are among those in which a challenge to the lawfulness of the Section 215 program have been raised:

(i) *American Civil Liberties Union, et al., v. James R. Clapper, et al,* No. 13-cv-3994 (WHP) (S.D.N.Y.), action challenging the legality of the NSA bulk telephony metadata collection program and seeking, among other things, an injunction permanently

enjoining the collection under the program of telephony metadata pertaining to Plaintiffs' communications, and requiring the Government to purge all of Plaintiffs' call detail records heretofore acquired. Following dismissal of the Complaint and denial of Plaintiffs' motion for preliminary injunction in the District Court, Plaintiffs have filed an appeal to the United States Court of Appeals for the Second Circuit;

(ii) *Klayman, et al., v. Obama, et al.*, Nos. 13-cv-851, 13-cv-881, 14-cv-092 (RJL) (D.D.C.), actions challenging the legality of the NSA bulk telephony metadata collection program and seeking, among other things, an injunction during the pendency of the proceedings barring the Government from collecting metadata pertaining to Plaintiffs' calls, the destruction of all call detail records of Plaintiffs' calls previously acquired, and a prohibition on the querying of the collected telephony metadata using any telephone number or other identifier associated with Plaintiffs. Following the granting (with a stay of the order pending appeal) of Plaintiffs' motion for preliminary injunction in Docket Number 13-cv-851, the Government filed an appeal to the United States Court of Appeals for the District of Columbia Circuit;

(iii) *Smith v. Obama, et al.*, No. 13-cv-00257 (D. Idaho), action challenging the legality of the NSA bulk telephony metadata collection program, and seeking, among other things, to permanently enjoin the Government from continuing to acquire BR metadata of Plaintiff's calls, and the purging of all BR metadata of Plaintiff's calls heretofore acquired;

(iv) *First Unitarian Church of Los Angles, et al., v. National Security Agency, et al.*, No. 3:13-cv-3287 (JSW) (N.D.Cal.), action challenging the legality of the NSA bulk telephony metadata collection program and seeking similar injunctive relief;

(v) *Paul, et al., v. Obama, et al.*, No. 14-cv-0262 (RJL) (D.D.C.) putative class action for declaratory and injunctive relief against the NSA bulk telephony metadata collection program and seeking similar injunctive relief. According to the Complaint, plaintiffs apparently anticipate attempting to ascertain the exact size and identities of the putative class and its members through the Government's acquired BR metadata (although the BR metadata does not contain 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); and

(vi) *Perez, et al., v. Clapper, et al.*, No. 3:14-cv-0050-KC (W.D. Tx.), *pro se* "*Bivens* action" challenging the legality of the NSA bulk telephony metadata collection program and seeking monetary damages of $1.[2]

II. The Government's Preservation Obligations

5. When litigation is pending against a party (or reasonably anticipated), that party has a duty to preserve--that is, to identify, locate, and maintain--relevant information that may be evidence in the case. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d

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[2] The Government can neither confirm nor deny whether it has specifically acquired and/or queried and/or obtained query results of BR metadata pertaining to plaintiffs.

776, 779 (2d Cir. 1999). The duty to preserve typically arises from the common-law duty to avoid spoliation of relevant evidence for use at trial; the inherent power of the courts; and court rules governing the imposition of sanctions. *See, e.g., Silvestri v. General Motors*, 271 F.3d 583, 590-91 (4th Cir. 2001) (applying the "federal common law of spoliation"). "Relevant" in this context means relevant for purposes of discovery, *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004), including information that relates to the claims or defenses of any party, as well as information that is reasonably calculated to lead to the discovery of admissible evidence. *West*, 167 F.3d at 779; *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003). A party may be exposed to a range of sanctions not only for violating a preservation order,[3] but also for failing to produce relevant evidence when ordered to do so because it destroyed information that it had a duty to preserve. *See, e.g., Residential Funding Corp. v. DeGeorge Financial Corp.*,306 F.3d 99, 106-07 (2d Cir. 2002); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 288 (S.D.N.Y. 2009); *Danis v. USN Communications, Inc.*, 2000 WL 1694325, *1 (N.D. Ill. Oct. 20, 2000) ("fundamental to the duty of production of information is the threshold duty to preserve documents and other information that may be relevant in a case"). *Accord Pipes v. United Parcel Serv., Inc.*, 2009 WL 2214990, *1 n.3 (W.D. La. July 22, 2009).

[3] To date, no District Court or Court of Appeals has entered a specific preservation order in any of the civil lawsuits referenced in paragraph 4 above, but a party's duty to preserve arises apart from any specific court order.

6. When preservation of information is required, the duty to preserve supersedes statutory or regulatory requirements or records-management policies that would otherwise result in the destruction of the information. *See, e.g., Zubulake v. UBS Warburg LLC, 229* F.R.D. 422, 431 (S.D.N.Y. 2004) (a litigant "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure preservation of relevant documents"). The duty to preserve discoverable information persists throughout the litigation; the responsible party must ensure that all potentially relevant evidence is retained. *Id.* at 432-33; *see also Richard Green (Fine Paintings),* 262 F.R.D. at 289; *R.F.M.A.S., Inc. v. So,* 2010 WL 3322639, *6 (S.D.N.Y. Aug. 11, 2010).

7. Based upon the issues raised by Plaintiffs in the above-referenced lawsuits and the Government's potential defenses to those claims, the United States must ensure that all potentially relevant evidence is retained which includes the BR metadata obtained in bulk from certain telecommunications service providers pursuant to this Court's production orders. To meet this obligation, the Government seeks an order that would allow the NSA to retain the BR metadata for non-analytic purposes until relieved of its preservation obligations or until further order of this Court under the conditions described below. Based upon the claims raised and the relief sought, a more limited retention of the BR metadata is not possible as there is no way for the Government to know in advance and then segregate and retain only that BR metadata specifically relevant to the identified lawsuits.

III. The Conditions Under Which the BR Metadata will be Retained

8. All BR metadata retained beyond the five-year period specified in Section (3)E of the Court's Primary Order will be preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts for any purpose, including to conduct RAS-approved contact chaining queries of the BR metadata for the purpose of obtaining foreign intelligence information, and subject to the following additional conditions:

(i) NSA technical personnel may access BR metadata only for the purpose of ensuring continued compliance with the Government's preservation obligations to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata.

(ii) Should any further accesses to the BR metadata be required for civil litigation purposes, such accesses will occur only following prior written notice specifically describing the nature of and reason for the access, and the approval of this Court.

IV. Conclusion

9. In light of the above, the Government respectfully submits that it is reasonable to extend the retention period for the BR metadata for this very limited purpose. Congress did not intend FISA or the minimization procedures adopted pursuant to section 1801(h) to abrogate the rights afforded to defendants in criminal proceedings.[4] For example, in discussing section 1806, Congress stated,

> [a]t the outset, the committee recognizes that nothing in these subsections abrogates the rights afforded a criminal defendant under *Brady v. Maryland*, and the Jencks Act. These legal principles inhere in any such proceeding and are wholly consistent with the procedures detailed here. Furthermore, nothing contained in this section is intended to alter the traditional principle that the Government cannot use material at trial against a criminal defendant, and then withhold from him such material at trial.

H.R. Rep. No. 95-1283, 95th Cong., 2d Sess, pt. 1 at 89 (1978); S. Rep. No. 95-604, 95th Cong. 2d Sess., pt. 1, at 55-56 (1978). Although the legislative history discussed above focuses on the use of evidence against a person in criminal proceedings, the Government respectfully submits that the preservation of evidence in civil proceedings is likewise consistent with FISA.

By this motion, the Government does not seek to modify any other provision of the January 3, 2014 Primary Order, as amended by the Court's February 5, 2014 Order.

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[4] By extension, this should also apply to section 1861(g) which, with respect to retention is entirely consistent with section 1801(h).

WHEREFORE, the United States of America, through the undersigned attorneys, moves for an amendment to the Primary Order in docket number BR 14-01 as set forth above.

Respectfully submitted,

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Acting Assistant Attorney General
National Security Division

Stuart F. Delery
Assistant Attorney General
Civil Division

U.S. Department of Justice

APPROVAL

I find that the foregoing Motion for Amendment to Primary Order satisfies the criteria and requirements set forth in the Foreign Intelligence Surveillance Act of 1978, as amended, and hereby approve its filing with the United States Foreign Intelligence Surveillance Court.

_____
Date

Eric H. Holder, Jr.
Attorney General of the United States

2/25/14
Date

James M. Cole
Deputy Attorney General of the United States

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

Docket Number: BR 14-01

SECOND AMENDMENT TO PRIMARY ORDER

This matter having come before the Court upon the motion of the United States seeking an second amendment to this Court's Primary Order in the above-captioned docket number, which requires the production to the National Security Agency (NSA) of certain call detail records or "telephony metadata" (hereinafter, "BR metadata") pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA or the Act), Title 50, United States Code (U.S.C.), § 1861, as amended, and relying upon and incorporating the verified application, declaration, and orders issued in the above-captioned docket number, with full consideration having been given to the matters set forth therein, as well as the matters set forth in the Government's motion, and it appearing to the Court that the Government's motion should be granted,

IT IS HEREBY ORDERED that the Government's Motion for Second Amendment to Primary Order is GRANTED, and

IT IS FURTHER ORDERED that subparagraph (3)E of the Court's Primary Order in the above-captioned docket number is amended to authorize the Government to retain BR metadata off-line beyond five years (60 months) after its initial collection for the purpose of the Government meeting its preservation obligations in civil lawsuits, subject to the following conditions:

(i) all BR metadata retained beyond five-years (60 months) shall be preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts for any purpose, including to conduct RAS-approved contact chaining queries of the BR metadata for the purpose of obtaining foreign intelligence information;

(ii) NSA technical personnel shall access BR metadata retained beyond five-years (60 months) only for the purpose of ensuring continued compliance with the Government's preservation obligations to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata; and

(iii) should any further accesses to the BR metadata retained beyond five-years (60 months) be required for civil litigation purposes, such accesses shall occur only following prior written notice specifically describing the nature of and reason for the access, and the approval of this Court.

The Court finds that, as so amended, the minimization procedures contained in the Primary Order issued in docket number BR 14-01 are consistent with the definition of "minimization procedures" as set forth by 50 U.S.C. § 1861(g)(2).

IT IS FURTHER ORDERED that all other provisions of the Court's Primary Order issued in docket number BR 14-01 shall remain in effect.

Signed _____ Eastern Time
Date Time

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

EXHIBIT 2

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

Docket Number: BR 14-01

OPINION AND ORDER

This matter is before the United States Foreign Intelligence Surveillance Court ("FISC" or "Court") on the motion of the government for a second amendment to the Primary Order issued on January 3, 2014, in the above-captioned docket ("January 3 Primary Order" or "Jan. 3 Primary Order"), which was submitted on February 25, 2014 ("Motion"). In the January 3 Primary Order, the Court approved the government's application pursuant to Section 501 of the Foreign Intelligence Surveillance Act of 1978 ("FISA" or "the Act"), codified at 50 U.S.C. § 1861, as amended (also known as Section 215 of the USA PATRIOT Act),[1] for orders requiring the production to the National Security Agency ("NSA"), on an ongoing basis, of all

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[1] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("USA PATRIOT Act"), amended by the "USA PATRIOT Improvement Reauthorization Act of 2005," Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006); "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006," Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006); and Section 215 expiration extended by the "Department of Defense Appropriations Act, 2010," Pub. L. No. 111-118 (Dec. 19, 2009); "USA PATRIOT - Extension of Sunsets," Pub. L. No. 111-141 (Feb. 27, 2010); "FISA Sunsets Extension Act of 2011," Pub. L. No. 112-3 (Feb. 25, 2011); and the "PATRIOT Sunsets Extension Act of 2011," Pub. L. No. 112-14, 125 Stat. 216 (May 26, 2011).

call detail records or "telephony metadata" from certain telecommunications carriers ("BR metadata"). The January 3 Primary Order approved and adopted a detailed set of minimization procedures restricting the NSA's retention and use of the BR metadata, including a requirement that telephony metadata produced in response to the Court's orders be destroyed within five years. The government seeks to modify this destruction requirement in order to permit the government to retain telephony metadata beyond the five years subject to further restrictions on the NSA's accessing and use of the metadata. The motion asserts that such relief is needed because destruction of the metadata "could be inconsistent with the Government's preservation obligations in connection with civil litigation pending against it." Motion at 2. For the reasons set forth below, the Motion is DENIED without prejudice.

The January 3 Primary Order provides that "[w]ith respect to the information that NSA receives as a result of this Order, [2] NSA shall strictly adhere to the minimization procedures [set forth in the Primary Order]." Jan. 3 Primary Order at 4. Those procedures include the requirement that "BR metadata shall be destroyed no later than five years (60 months) after its initial collection." Id. at 14. The government seeks an amendment to the Court's order that would allow the NSA "to preserve and/or store the BR metadata for non-analytic purposes until relieved of its preservation obligations," subject to certain access restrictions. Motion at 3, 8.

This Court is cognizant of the general obligation of civil litigants to preserve records that could potentially serve as evidence. Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) ("obligation to preserve evidence arises when the party has notice that the evidence is relevant to

[2] The Court understands the government to be requesting changes to the minimization procedures that the NSA applies to the telephony metadata acquired under this order and all previous orders issued by the FISC for the production of such metadata.

litigation - most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation"); see also Gerlich v. U.S. Dep't of Justice, 711 F.3d 161, 171 (D.C. Cir. 2013) (duty to preserve is triggered by a reasonably foreseeable Department investigation, which was "not merely foreseeable but likely"). The government contends that its duty to preserve the BR metadata "supersedes statutory or regulatory requirements or records-management policies that would otherwise result in the destruction of the information." Motion at 7. From that premise, it would follow that FISA's minimization requirements would yield to a duty to preserve, regardless of what the statute states. The Court rejects this premise.

The government cites three cases in support of its position: R.F.M.A.S., Inc. v. So, 271 F.R.D. 13 (S.D.N.Y. 2010), Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284 (S.D.N.Y. 2009), and Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004). Although the destruction of electronic records was an issue in all three cases, see R.F.M.A.S. at 40; Green at 287-88; Zubulake at 434, none of these cases involved a conflict between a litigant's duty to preserve electronic records and a statute or regulation that required their destruction. They merely demonstrate that, when triggered, a civil litigant's duty to preserve relevant evidence includes electronic records and that duty trumps a corporate document destruction policy. The Court has not found any case law supporting the government's broad assertion that its duty to preserve supersedes statutory or regulatory requirements.

Moreover, as the government acknowledges, see Motion at 6 (citing Silvestri v. Gen. Motors, 271 F.3d 583, 590-91 (4th Cir. 2001)), the general obligation to preserve records that

may be relevant to the civil matters cited by the government is a matter of federal common law. As such, it may be displaced by statute whenever Congress speaks directly to the issue. See, e.g., Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011). Here, with respect to the retention of records produced under Section 1861, Congress has sought to protect the privacy interests of United States persons by requiring the government to apply minimization procedures that restrict the retention of United States person information. See 50 U.S.C. § 1861(g)(2) (definition of "minimization procedures" set out below). As specifically provided for by Congress, the procedures in question are embodied in FISC orders that the government is obliged to follow. See Id. § 1861(c)(1). In sharp contrast with the document retention policies of corporations, the restrictions on retention of United States person information embodied in FISA minimization procedures are the means by which Congress has chosen to protect the privacy interests of United States persons when they are impacted by certain forms of intelligence gathering.

The government's contention that FISA's minimization requirements are superseded by the common-law duty to preserve evidence is simply unpersuasive. The procedures proposed by the government accordingly must stand or fall based on whether they comport with FISA. Specifically, Section 1861(g)(2) defines "minimization procedures" as follows:

> (A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
>
> (B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 1801(e)(1) of this title, shall

> not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; and
>
> (C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.

50 U.S.C. § 1861(g)(2).

The government's proposed amendment of the minimization procedures would allow the NSA to retain call detail records that were acquired more than five years ago and that would otherwise be destroyed. Given the scope of the production under the Court's orders, the number of records is likely voluminous and they undoubtably contain United States person information, including information concerning United States persons who are not the subject of an FBI investigation to protect against international terrorism or clandestine intelligence activities. See In Re Production of Tangible Things From [redacted], No. BR 08-13 at 11-12 (FISA Ct. Mar. 2, 2009).[3] Further, under the amended procedures proposed by the government, such records would be retained indefinitely while the six civil matters currently pending in various courts are litigated.[4] The government's proposed amendment would, therefore, significantly increase the

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[3] Available at: http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf.

[4] The six pending matters identified by the government are: American Civil Liberties Union v. Clapper, No. 13-cv-3994 (WHP) (S.D.N.Y.), appeal docketed, No. 14-42 (2d Cir. Jan. 2, 2014); Klayman v. Obama, Nos. 13-cv-851, 13-cv-881, 14-cv-092 (RJL) (D.D.C.), appeals docketed, No. 14-5004 (D.C. Cir. Jan. 3, 2014), No. 14-5005 (D.C. Cir. Jan. 3, 2014), No. 14-5016 (D.C. Cir. Jan. 10, 2014), No. 14-5017 (D.C. Cir. Jan. 10, 2014); Smith v. Obama, No. 13-cv-00257 (D. Idaho); First Unitarian Church v. National Security Agency, No. 3:13-cv-2387 (JSW) (N.D.Cal.); Paul v. Obama, No. 14-cv-0262 (RJL) (D.D.C.); and Perez v. Clapper, No. 3:14-cv-0050-KC (W.D. Tx.). Motion at 3-5.

amount of nonpublicly available information concerning United States persons being retained by the government under the minimization procedures.

Extending the period of retention for these voluminous records increases the risk that information about United States persons may be improperly used or disseminated. The government seeks to mitigate this risk by imposing certain access restrictions on the data being retained. Specifically, the government proposes to: (1) store the information in a format that precludes any access or use by NSA intelligence analysts for any purpose; (2) permit NSA technical personnel to access the BR metadata, but only for the purpose of ensuring continued preservation and/or storage, as well as the integrity of, the BR metadata; and (3) require this Court's approval before allowing "any further accesses" to the BR metadata for civil litigation purposes. Motion at 8.

As noted above, in order to approve the proposed modifications to the minimization procedures, the Court must find that they "are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1861(g)(2)(A). For the following reasons, the Court concludes that it cannot make this finding based on the government's motion.

The sole purpose of the production of call detail records under the Court's January 3, 2014 Primary Order is to obtain foreign intelligence information in support of individual authorized investigations to protect against international terrorism and concerning various international organizations. In Re Application of the Fed. Bureau of Investigation for an Order

Requiring the Production of Tangible Things From [redacted], No. BR 13-109 (FISA Ct. Aug. 29, 2013) (Amended Memorandum Opinion at 4).[5] In order to accomplish this objective, the government acquires call detail records in bulk in order to create a historical repository of metadata that enables the NSA to find or identify known and unknown operatives, some of whom may be in the United States or in communication with United States persons. Id. at 21. Thus, the "technique" employed by the government by necessity captures a large volume of information, i.e., metadata, of or concerning United States persons.

Examining the government's proposed amendment in light of the purpose and technique of the government's program, it is clear the proposed retention of the BR metadata beyond five years is unrelated to the government's need to obtain, produce, and disseminate foreign intelligence information. This conclusion in compelled because the BR metadata loses its foreign intelligence value after five years. See The Administration's Use of FISA Authorities: Hearing before the H. Comm. on the Judiciary, 113th Cong. 16 (Jul. 17, 2013) http://www.fas.org/irp/congress/2013_hr/fisa.pdf (statement of John C. Inglis, NSA) ("Typically in our holdings, under BR FISA, the information is mandatorily destroyed at 5 years. For most of the rest of our collection, 5 years is the reference frame. We found that over time at about the 5-year point, it loses its relevance simply in terms of its temporal nature."). Further, the amendment is sought "for the limited purpose of allowing the Government to comply with its [purported] preservation obligations," and any possibility of obtaining, producing, or disseminating foreign intelligence information from the BR metadata being retained is foreclosed

[5]Available at http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

by the requirement that the data be stored in a format "that precludes any access or use by NSA intelligence analysts for any purpose." Motion at 1, 8.

Therefore, unlike most cases where this Court examines the adequacy of minimization procedures, the amendment proposed by the government provides no occasion to balance United States person privacy interests against foreign intelligence needs.[6] Rather, the countervailing interest asserted by the government is the purported litigation interests of the civil plaintiffs in having these records preserved.[7] Even if it is assumed that the Court, in assessing whether the proposed minimization procedures satisfy Section 1861(g)(2), should afford some weight to the civil litigants' purported interests in preserving the BR metadata, those interests, at least on the current record, are unsubstantiated.

To date, no District Court or Circuit Court of Appeals has entered a preservation order applicable to the BR metadata in question in any of the civil matters cited in the motion. Motion at 6 n.3. Further, there is no indication that any of the plaintiffs have sought discovery of this

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[6] Nor does the government assert any law enforcement interest in retaining the information as evidence of a crime. See 50 U.S.C. § 1861(g)(2)(C).

[7] The government suggests that FISA's legislative history supports the retention requested. Motion at 9 (citing H.R. Rep. No. 95-1283, 95th Cong., 2d Sess, pt.1 at 89 (1978); S. Rep. No. 95-604, 95th Cong. 2d Sess., pt.1 at 55-56 (1978)) (the preservation of evidence in civil proceedings is consistent with FISA because "Congress did not intend FISA or the minimization procedures adopted pursuant to section 1801(h) [respecting electronic surveillance] to abrogate the rights afforded to defendants in criminal proceedings."). But the legislative history cited does not concern minimization at all. Rather, it pertains to the provisions of FISA at 50 U.S.C. § 1806 that govern district court review of the lawfulness of FISA surveillances in the context of adversarial proceedings in which the government seeks to introduce the fruits of electronic surveillance. FISA has no comparable provisions for use of information acquired under Section 1861. And obviously, the government's motion has nothing to do with the rights of criminal defendants. The cited legislative history sheds no light on what is before the Court, i.e., the nexus of minimization requirements and the retention of information for purposes of civil litigation.

information or made any effort to have it preserved, despite it being a matter of public record that BR metadata is routinely destroyed after five years. See, e.g., In Re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things From [redacted], No. BR 06-05 Primary Order at 8 (FISA Ct. Aug. 18, 2006) declassified on Sept. 10, 2013[8] ("[t]he metadata collected under this Order may be kept online ... for five years, at which time it shall be destroyed."); In Re Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things From [redacted], No. BR 13-109 Primary Order at 2, 14 (FISA Ct. July 19, 2013) declassified on Sept. 17, 2013 ("[T]he minimization procedures [including the destruction requirement in subsection 3(E)] ... are similar to the minimization procedures approved and adopted as binding by the order of this Court in Docket Number BR 13-80 and its predecessors"). In fact, with one possible exception, the substantive relief sought by the plaintiffs would require the destruction of BR metadata, not its retention.[9] Motion at 3-5.

For its part, the government makes no attempt to explain why it believes the records that are subject to destruction are relevant to the civil cases. The government merely notes that "'[r]elevant' in this context means relevant for purposes of discovery, ... including information that relates to the claims or defenses of any party, as well as information that is reasonably calculated to lead to the discovery of admissible evidence." Motion at 6. Similarly, the government asserts that "[b]ased on the issues raised by Plaintiffs," the information must be

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[8] Available at: http://www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf.

[9] The one possible exception identified in the motion is that the pro se plaintiffs in Perez v. Clapper are challenging the legality of the NSA bulk telephony metadata collection program in a "Bivens action" seeking monetary damages of $1. Motion at 5.

retained, but it fails to identify what those issues are and how the records might shed light on them.[10] Id. at 7. Finally, the motion asserts, without any explanation, that "[b]ased on the claims raised and the relief sought, a more limited retention of the BR metadata is not possible as there is no way for the Government to know in advance and then segregate and retain only that BR metadata specifically relevant to the identified lawsuits." Id. Of course, questions of relevance are ultimately matters for the courts entertaining the civil litigation to resolve. But the government now requests this Court to afford substantial weight to the purported interests of the civil litigants in retaining the BR metadata relative to the primary interests of the United States persons whose information the government seeks to retain. The government's motion provides scant basis for doing so.

The government's motion seems to be motivated to a significant degree by its fear that the judges presiding over the six pending civil matters may sanction the government at some point in the future for destroying BR metadata that is more than five years old. Id. at 6. Yet the cases cited by the government show that, in order for the government to be sanctioned for spoilation of evidence, the plaintiffs must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support

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[10]The motion identifies one possible issue: "[a]ccording to the Complaint, plaintiffs [in Paul v. Obama] apparently anticipate attempting to ascertain the exact size and identities of the putative class and its members through the Government's acquired BR Metadata ...." Motion at 5. But the government then suggests that the metadata will not be helpful in this regard since it "does not contain the substantive contents of any communication,... or the name, address or financial information of a subscriber or customer." Id.

that claim or defense. Green, 262 F.R.D. at 289; Zubulake, 229 F.R.D. at 430. On the current record, such an outcome appears far-fetched, as the plaintiffs appear not to have made any attempt to have the BR metadata retained, despite being on notice that the government has a statutorily-mandated obligation to destroy the information that is embodied in prior orders of this Court. Further, it would appear that the government could significantly reduce its exposure by simply notifying the plaintiffs and the district courts of the pending destruction. United States v. Ochoa, 88 Fed. App'x 40, 42, 2004 WL 304183 (C.A.5 (Tex.)) (disposal of evidence was done pursuant to a routine policy, and plaintiff was informed of steps she would need to take to retrieve the evidence prior to its disposal but declined to do so).

To sum up, the amended procedures would further infringe on the privacy interests of United States persons whose telephone records were acquired in vast numbers and retained by the government for five years to aid in national security investigations. The great majority of these individuals have never been the subject of investigation by the Federal Bureau of Investigation to protect against international terrorism or clandestine intelligence activities. The government seeks to retain these records, not for national security reasons, but because some of them may be relevant in civil litigation in which the destruction of those very same records is being requested. However, the civil plaintiffs potentially interested in preserving the BR metadata have expressed no desire to acquire the records, even though they have notice that this Court's orders require destruction after five years and that production of the records commenced in 2006.

On this record, the Court cannot find that the amended minimization procedures proposed by the government "are reasonably designed in light of the purpose and technique of an order for

the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1861(g)(2)(A). While the proposed procedures would include enhanced retention on access to, and use of, BR metadata after five years, see Motion at 8, the demonstrated need for preservation does not warrant retention after five years, even with such limitations.[11]

This Court is reluctant to take any action that could impede the proper adjudication of the identified civil suits, and understands why the government would proceed with caution in connection with records potentially relevant to those matters. However, as explained above, the Court cannot make the finding required to grant the motion based upon the record before it. Accordingly, the government's motion is DENIED, without prejudice to the government bringing another motion providing additional facts or legal analysis, or seeking a modified amendment to the existing minimization procedures.

SO ORDERED, this 7th day of March, 2014, in Docket Number BR 14-01.

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

[11] By minimizing retention, Congress intended that "information acquired, which is not necessary for obtaining[,] producing or disseminating foreign intelligence information, be destroyed where feasible." In Re Sealed Case, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (citing H.R. Rep. No. 95-1283, pt. 1, at 56 (1978)).

EXHIBIT 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FIRST UNITARIAN CHURCH OF LOS ANGELES, *et al.*, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	Case No. 3:13-cv-03287-JSW **GOVERNMENT DEFENDANTS' NOTICE REGARDING ORDER OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT**

The Government Defendants hereby provide notice regarding an order issued by the Foreign Intelligence Surveillance Court (FISC) today. On February 25, 2014, the United States filed a motion with the FISC for leave to retain call-detail records collected under the National Security Agency (NSA) bulk telephony metadata program beyond the five-year deadline by which FISC orders require the records to be destroyed. *See* Exh. 1, attached hereto. The United States filed that motion in order to ensure compliance with any preservation obligations the Government may have in this and other civil actions respecting those records. Today, the FISC

issued an order denying that motion. *See* Exh. 2, attached hereto. Consistent with that order, as of the morning of Tuesday, March 11, 2014, absent a contrary court order, the United States will commence complying with applicable FISC orders requiring the destruction of call-detail records at this time.

Dated: March 7, 2014

Respectfully submitted,

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