

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 10/29/2003

To: All Field Offices

Attn: ADIC;
SAC;
CDC
CI/CT Supervisors
AD Pistole;
DADs;
Section Chiefs
AD Szady;
DADs;
Section Chiefs

Counterterrorism

Counterintelligence

foipa# 1073946

From: General Counsel
National Security Law Unit, Room 7975

Contact: [Redacted] [Redacted]

Approved By: Caproni Valerie E [Redacted] b6
b7C

Drafted By: [Redacted] b2

Case ID #: 66F-HQ-A1431182

Title: BUSINESS RECORDS ORDERS UNDER 50 U.S.C. § 1861

Synopsis: Provides guidance on the preparation, approval, and service of Business Record Orders, implementing 15 U.S.C. §1861 of the Foreign Intelligence Surveillance Act (FISA), as amended by the 2001 USA Patriot Act.

Reference: 66F-HQ-A1431182

Enclosure(s): Model Business Records Order Form and Instruction Sheet

Details: Public Law 107-56, the USA Patriot Act, contained several significant provisions with respect to expanding the scope of investigative techniques available in national security investigations. One of the provisions was the expansion of the scope of business records that may be obtained from an order issued by the FISA Court (FISC).

1. Introduction to Procuring Business Records

Prior to 1998, there was no provision in FISA nor any other statutory provision that authorized the FBI to obtain business records for a national security investigation other than the telephone, financial, and credit information available

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

through national security letters. In 1998, FISA was amended to authorize an application to the FISC to procure certain limited types of business records, namely, those of a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility. Further, the amendment provided that the applicant must establish "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power," in addition to the requirement that the information is "sought for" a foreign intelligence or international terrorism investigation.

The 2001 Patriot Act expanded the scope of business records that are available pursuant to a FISC order. Currently, we can obtain "any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person [USP] is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." Further, the Patriot Act eliminated the requirement for a business record order that the person to whom the documents pertain is a foreign power or agent of a foreign power, just as it eliminated similar criteria for national security letters and pen registers. Thus, the requirements for a FISC business record order are very similar to those for a FISC pen register order. Basically, the records must be sought for an investigation authorized under the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). Consistent with that requirement, the investigation must be to obtain foreign intelligence information not concerning a USP or to protect against international terrorism or clandestine intelligence activities. The investigation, if of a USP, cannot be solely based upon First Amendment activities.

The business records statute, 50 U.S.C. §1861, also provides that upon submission to the FISC of an application certifying that the request fits within the parameters of the statute, the FISC shall issue an ex parte order approving the release of the records if the court finds that the application meets the requirements of the statute. The ex parte order may not disclose that it was issued for purposes of an authorized investigation. Moreover, the person upon whom the order is served may not disclose to any other person, other than those persons necessary to produce the tangible things, that the FBI has sought or obtained the records.

At the present time, a business record request can only be sought for a full field investigation, inasmuch as the statute

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

requires that the request pertain to an "authorized investigation," not an inquiry. However, DOJ policy may be revised in the near future to allow the use of a FISC business records order in a preliminary investigation. If a new policy is adopted concerning the availability of a FISC business records order, this guidance will be appropriately amended. In the meantime, agents are advised that they can only obtain a FISC business record order in a full field investigation.

The business records request is not limited to the records of the target of a full investigation. The request must simply be sought for a full investigation. Thus, if the business records relating to one person are relevant to the full investigation of another person, those records can be obtained by a FISC order despite the fact that there is no open investigation of the person to whom the subject of the business records pertain.

One further caveat needs to be noted. While the statute, on its face, does not limit the nature of the business records we can seek, there is a legal question as to whether tax records and educational records, which are the subject of separate statutes, are obtainable under the business record provision of the law. Thus, please submit such requests knowing that court orders may not be obtained as readily as with other types of requests.¹ Further, in light of the constitutional implications of requests for records from libraries, please note that such requests will be subject to strict scrutiny to assure that they fully comply with the Constitution and all applicable statutes.

2) Process of Obtaining Business Records

The first step in the process of obtaining business records is to complete the Business Records Form, attached herein to this EC. The form requests information required under the law as well as information needed for administrative purposes.

¹As may be apparent, certain bank records and toll billing records are obtainable through NSLs so those records should not be sought by business records requests, although records from financial institutions and telecommunications companies that are not within the parameters of NSLs may be sought. Credit reports, on the other hand, are completely outside the scope of the business records statute, since statutory provision already exists to obtain them in all intelligence cases, either by an NSL (in IT cases, per 15 U.S.C. §1681v) or by court order (in IT and CI cases, per 15 U.S.C. §1681u(c)).

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

A. General Information

The form requires that the party requesting the business records identify the target of the full investigation for which the records are sought, the file number, and the date the full investigation was opened. Note that because the business record request may soon be available in preliminary investigations, the provisions that reference a full investigation also include the caveat that a preliminary investigation may soon be included. Note also that the target of the investigation does not have to be the subject of the request.

Other administrative provisions relate to the identity of the field of origin, the case agent, and the headquarters SSA. Information is also requested concerning the status of the target of the investigation, and, if the subject of the request is different from the target of the investigation, the status of the subject.

B. Basis of Request for Tangible Things

Thereafter, the form provides for the requesting party to give a description of the business records or other tangible objects that are sought, why the requesting party believes the records are in the possession of the custodian to whom the request is directed, and whether the originals of the records are sought or whether copies will suffice. Note that if you request copies, the order served upon the custodian will mandate that he/she maintain the originals of the records for two years unless notified by the FBI that earlier destruction is permissible.

In order to justify the request, the requesting party must then describe the investigation for which the business records are sought and the manner in which it is expected that the records will provide foreign intelligence information of value to the investigation.

C. Service of the Order

The requesting party must provide the name, address, title, and telephone number of the custodian of records upon whom to serve the order.

D. Field Office Approval

The Business Records Form must be approved by the SSA, CDC, and SAC (or program ASAC) at the field level.

E. Cover EC to Headquarters

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

The Business Record Form should be transmitted to headquarters via a cover EC to NSLB requesting that it prepare the application and proposed FISC order and present the package to the FISC. A copy of the Business Record Form should also be sent to the substantive headquarters unit and to the FISA unit.

3. NSLB Preparation of Application and Order

NSLB will review the business records request and, assuming it meets the requirements of the law, will prepare an application and proposed order² to be transmitted to the FISC. We expect that such an application and proposed order can be prepared within a few days of NSLB's receipt of the business records request form.

Approval authority for the application is housed at headquarters. On October 10, 2003, the authority to approve the application was delegated by the Director to the Deputy Director, the Executive Assistant Director for Counterterrorism/Counterintelligence, the Assistant Director and all Deputy Assistant Directors of the Counterterrorism, Counterintelligence, and Cyber Divisions, the General Counsel, the Deputy General Counsel for National Security Affairs, and the Senior Counsel for National Security Affairs. It is expected that, unless availability becomes a problem, the application will be signed by attorneys within the General Counsel's office.³

Once the application and proposed order have been prepared, they will be presented to the FISC by an attorney

²At this point, it has not yet been determined whether there will be a single order issued by the FISC, equivalent to the secondary order(s) associated with FISA electronic surveillance process, with the business as the recipient, or whether there will also be a primary order issued by the FISC. But such issues are of no consequence to the field.

³Since this will mark the first time that the business record procedure has been used, it was determined that approval authority should remain at headquarters in the initial stages. Once a routine practice has been established and any problems or issues have been resolved, consideration will be given to delegating the approval authority to the field. However, the practical effects of such delegation may be minimal, inasmuch as the application must be made to the FISC and attorneys from OGC and/or OIPR, of necessity, will need to shepherd the paperwork through the process, regardless of who signs the application.

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

either from OGC or from OIPR. Unless there is reason to do otherwise, the application and proposed order will be presented at the FISC's regularly scheduled Friday hearings.

Upon signature by the FISC judge, a conformed copy of the order (a copy with an official marking by the FISC Clerk attesting that it is a true and correct copy of the original document) will be forwarded to the FISA Unit at headquarters. Thereafter, FISA Unit will email a copy of the conformed copy of the order to the appropriate field office for service and to the case agent (i.e., the point of contact on the order). The case agent and field office should receive the email within several days of the signing of the order.⁴

CONCLUSION

Any questions about the business records process should be addressed to Office of General Counsel, Assistant General Counsel [redacted] at [redacted]

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⁴We expect that the process currently used with regard to FISC orders will also apply in the future to business records orders. That is, per suggested Court procedures (although practice often differs), the FISA Unit should receive the conformed copy of FISC orders within a day or two of their signing. Once received by the FISA Unit, the Unit scans the orders and emails them to the appropriate office within 24 hours. While recipients of FISC orders to date generally have not required the original of the signed document, it is possible that the recipient of the business record order, likely an entity that never heard of the FISC, much less a FISC order, will require the original of the signed order. In that event, arrangements will need to be made with the FISA Unit to procure the original of the order. Further, if it is necessary for the office serving the business record order to receive the document sooner than set forth above, i.e., if there is a need for a "walkaway" copy, arrangements will need to be made with the Clerk of the FISC well ahead of the signing.

To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 10/29/2003

Set Lead 1: (Adm)

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Distribute to all supervisory personnel involved in the investigation of counterintelligence and counterterrorism cases.

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Reference: 66F-HQ-A1431182-serial 3

Enclosure: Revised Model Business Records Order Form and Instruction Sheet

Details: On October 29, 2003, the General Counsel issued guidance on the preparation, approval, and service of business record orders under 15 U.S.C. §1861. At that time, the policy of the Department of Justice (DOJ) was to restrict the use of business record orders to full investigations. That policy has now been amended and business record orders may be sought in preliminary inquiries, as they have been titled under prior DOJ policy, and preliminary investigations, as such inquiries will now be denoted under the new DOJ policy.

Because of this change, the enclosed Business Records Form also needed to be amended to reflect the fact that the form

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To: All Field Offices From: General Counsel
Re: 66F-HQ-A1431182, 11/05/2003

could be used to seek an order in a preliminary inquiry or preliminary investigation as well as full investigation.

All other aspects of the guidance remain accurate.

Any questions about the business records process should be addressed to Office of General Counsel, Assistant General Counsel [redacted] at [redacted]

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