

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	No. 12 CR 723
)	
v.)	Hon. Sharon Johnson Coleman
)	
ADEL DAOUD)	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S
MOTION FOR NOTICE OF FISA AMENDMENTS ACT
EVIDENCE PURSUANT TO §§ 1881(e)(a), 1806(c)**

The UNITED STATES OF AMERICA, by GARY S. SHAPIRO, United States Attorney for the Northern District of Illinois, respectfully submits this response to defendant Adel Daoud’s Motion for Notice of FISA Amendments Act Evidence Pursuant to §§ 1881(e)(a), 1806(c) (Doc. #42).

Section 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a, enacted as part of the FISA Amendments Act of 2008 (FAA), supplemented preexisting FISA authority by creating a new framework for authorizing certain types of surveillance targeting non-United States persons located outside the United States. *See Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1444 (2013).

Invoking section 106(c) of FISA, 50 U.S.C. § 1806(c), defendant demands notice whether the United States intends to use evidence obtained or derived from surveillance authorized by the FAA’s supplemental

authority—referred to here as a “Section 702 Order”—as opposed to a traditional FISA order.¹ Section 106(c) of FISA provides that the government, before using at trial “against an aggrieved person[] any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of [FISA],” must “notify the aggrieved person and the court . . . that the Government intends to so disclose or so use such information.” 50 U.S.C. § 1806(c); *see also* 50 U.S.C. § 1825(d) (same requirement for physical search).²

Though on its face section 106(c) does not require the government to disclose whether the information it intends to use was obtained under traditional FISA or instead under a Section 702 Order, the government here has gone beyond that minimum statutory requirement and has informed defendant that the information the government intends to use was acquired pursuant to a traditional FISA order issued under 50 U.S.C. §§ 1801-1812, as opposed to a Section 702 Order under 50 U.S.C. § 1881a (*see* Doc. #9). Thus,

¹ For clarity, this motion refers to an order issued under the preexisting FISA regime (50 U.S.C. §§ 1801-1812) as a “traditional FISA order” and an order issued under section 702 of FISA, 50 U.S.C. § 1881a, enacted as part of the FAA, as a “Section 702 Order.”

² Section 706 of FISA, which was part of the FAA, provides that “[i]nformation acquired from an acquisition conducted under section 702 [or section 703] shall be deemed to be information acquired from an electronic surveillance pursuant to title I for purposes of [50 U.S.C. § 1806].” 50 U.S.C. § 1881e.

the government has already fulfilled the defendant's request through the notice tendered in this case.

To the extent defendant seeks to know what information may or may not have been presented to the Foreign Intelligence Surveillance Court (FISC) to obtain FISA warrants and orders, section 106(c)'s notice requirement does not entitle him to that information. Rather, section 106(f) of FISA provides the only process by which a defendant may seek to discover applications, orders, and other related materials provided to the FISC.³ Section 106(f) also provides for an *ex parte, in camera* review by the Court of the classified materials submitted by the government in response to a defendant's motion to disclose FISA materials, to determine if such disclosures are necessary.⁴

³ See 50 U.S.C. § 1806(f) (describing the process that is followed when an aggrieved person files a motion "to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under the Act").

⁴ Section 106(f) permits the Court to order disclosure of FISA materials to the defendant only if the Court determines, after considering the Government's classified filing *ex parte* and *in camera*, that doing so is "necessary to make an accurate determination of the legality of the surveillance." Section 106(g) permits the Court to order disclosure of any FISA materials as required by due process. Those (and their parallel provisions for physical searches) are the only statutory bases on which the Court may order disclosure of FISA materials, and they do not come into play until after the defendant files the appropriate motion and the Court considers the government's classified response and attachments. Upon such review, no court has ever required the United States to disclose the information that was presented to the FISC to obtain a FISA warrant or order. *In re Grand Jury*

Section 106(f) serves as the exclusive means of addressing a defendant's attempt to discover applications and related information submitted to the FISC. "This [exclusivity] is necessary to prevent the carefully drawn procedures in [section 106(f)] from being bypassed by the inventive litigant using a new statute, rule or judicial construction." S. Rep. No. 95-701, 95th Cong., 2d Sess. 63, 1978 U.S.C.C.A.N. 3973; *see also United States v. Belfield*, 692 F.2d 141, 146-48 (D.C. Cir. 1982) (noting that Congress "was adamant" that the "carefully drawn procedures" of this section are not to be "bypassed by the inventive litigant using a new statute, rule or judicial construction").

Defendant has yet to file a motion under section 106(f); thus, to the extent he now seeks disclosure of information presented to the FISC, he runs afoul of FISA's plain directives. Using section 106(c) to seek information presented to the FISC—thereby sidestepping the possibility of *ex parte, in camera* review by this Court—constitutes precisely the sort of "inventive" tactic that Congress sought to forestall with section 106(f).

Defendant further maintains he is entitled to know at this stage of the case if information obtained through a Section 702 Order was used to obtain

Proceedings of the Special Apr. 2002 Grand Jury, 347 F.3d 197, 203 (7th Cir. 2003) (noting no court has ever ordered disclosure of FISA materials).

a traditional FISA order, citing *Clapper* (Doc. #42 at 13-15). But *Clapper* does not permit a defendant to bypass the exclusive provisions regulating disclosure of information found within a FISA application and order. Thus, defendant cannot obtain any additional information under section 106(c). Whether an application to the FISC or any of its contents should be disclosed to a defendant is a question this Court would assess based on a classified factual record and the government's *ex parte, in camera* filing that would be made in response to a motion under section 106(f).⁵

⁵ Subsequent to the entry of the Magistrate Judge's order in *United States v. Qazi*, (12-cr-60298; Southern District of Florida), which was attached as an exhibit to defendant's motion, the government filed a motion to reconsider and the Magistrate Judge has decided to address in the issue under the auspices of section 106(f).

Conclusion

Defendant's request for notice has already been answered by the government's prior filings. Any further request would be an attempt to compel disclosures beyond those required by the statute at this stage of the case and circumvent the framework Congress imposed in section 106(f) to govern disclosure of FISA information acquired by electronic surveillance. For these reasons, defendant's motion for should be denied.

Respectfully submitted,
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