

NSA FAILED TO FULLY INFORM FISC EVEN AFTER IT STARTED FACT-CHECKING ITSELF

On Friday, I described how, for four years after the FISA Court ruled that NSA couldn't keep otherwise unlawfully collected information from a single traditional FISA order, the NSA continued to do just that with data from 702 orders.

Hogan was [] surprised to learn NSA was doing the same thing – and had been! – with Section 702 data that had otherwise been purged, which the NSA confessed to Hogan in July of last year. That is, having stopped the practice with a single traditional FISA order, they kept doing it with programmatic 702 data.

In light of the May 2011 [redacted], the Court was very surprised to learn from the July 13, 2015 Notice that the NSA had not been deleting from [redacted] Section 702 records placed on the NSA's Master Purge List ("MPL").

[snip]

As the Court explained to the government at the October 8 Hearing, it expects the government to comply with its heightened duty of candor in ex parte proceedings at all times. Candor is fundamental to this Court's effective operation in considering ex parte submissions from the government, particularly in matters involving large and complex operations such as the

implementation of Section 702.

That's pathetic, given the history of material misstatements to FISC.

All the more so given that it happened after NSA implemented an effort to make sure it started telling FISC the truth (the date is redacted, but it probably happened sometime between October 2011 and March 2013).

As laid out in a 2013 reissue of a 2012 NSA IG report (this report starts at PDF 55; Charlie Savage liberated this via FOIA), NSA implemented a fact-checking process on its own FISC submissions. (See PDF 101)

~~(U//FOUO)~~ Procedures to Improve Representations to the FISC

~~(U//FOUO)~~ In an operation as diverse as NSA, where a multitude of legacy systems are involved in processing and compliance under a given authority, it is understandable that variations might exist in systems and manual procedures involved in the application of authority under FAA §702. These variations have the potential to create compliance concerns when standards are mandated for all users of an authority. [redacted] NSA expanded its use of Verification of Accuracy (VoA) procedures to NSA's FAA 702 Minimization Procedures and Affidavits. NSA's VoA procedures are to be applied to written representations that describe NSA's acquisition, processing, retention, analysis, and dissemination and form the basis of a legal opinion, a FISC Order, or an Executive Branch decision or authority. The purpose of a VoA review is to increase confidence that the representations made to external entities are accurate and based on a shared understanding among operational, technical, legal, policy, and compliance officials. The VoA procedures require all factual statements within the declarations to be verified. Subject documents must be reviewed by authorizing individuals identified by senior leaders within the Directorates.

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~~(U//FOUO)~~ Additional training, maintenance of clear and updated guidance, and continued implementation of the VoA procedures will provide an increased level of confidence in obtaining a consistent understanding of Agency processes and in the accuracy of representations made regarding these processes to outside authorities (see Recommendations 7 and 11).

NSA is hiding when they first started fact-checking themselves, but it happened by March 2013. Which means the 2013 and 2014 702 recertification submissions were fact-checked. "The [Verification of Accuracy] procedures require all factual statements within the declarations to be verified." Yet neither told FISC that NSA continued to retain communications from selectors on the Master Purge List in a management database two and three years after the time (at that point) FISC had told NSA, in an order titled, "Opinion and Order Requiring Destruction of Information Obtained by Unauthorized Electronic Surveillance," it could not do so, not even with data unlawfully obtained on a single targeted

FISA order. It took another year before NSA confessed to FISC it was keeping 702 data that should have been purged.

Perhaps the continued discovery of three to four violations every time NSA submits its recertification process reflects the slow implementation of fact-checking. Or perhaps there are just too many databases in which willing NSA employees can stash information before it gets purged off all the other databases.

But if the VoA was supposed to “increase confidence” in what NSA says to courts and Congress, it’s not clear how continuing to miss things like ongoing retention of unlawfully collected information does that.

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