Exhibit B

U.S. Department of Justice
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October 15, 2014

The Honorable Michael W. Mosman
United States District Judge
United States Courthouse
1000 SW Third Avenue, Room 1615
Portland, OR 97204-2902

Re: *United States v. Reaz Khan*
Case No. 3:12-cr-659-MO

Dear Judge Mosman:

The purpose of this letter is to respond further to the Court's questions regarding the Government's Response to the Defendant's Motion to Compel Notice of Searches and Seizures and Purported Legal Authority for Searches and Seizures (see ECF Nos. 94 and 97), currently under submission before you.

I. SUMMARY

The government has previously provided statutorily required notice of the use of evidence obtained or derived under FISA Title I (electronic surveillance), FISA Title III (physical search), and FISA Title VII (specifically Section 702 acquisition). Defense counsel should feel free to challenge the acquisition and use of evidence under those three provisions. As further discussed below, however, the government has not provided any required statutory notice of the use of evidence obtained or derived from FISA pen register or trap and trace device authority or the use of any evidence obtained or derived under FISA/FAA Section 703. Therefore, the defense need not challenge the use of those sections of FISA in this case because such challenges would be moot. There is no similar required notice for the use of evidence obtained or derived from business records obtained from third parties pursuant to FISA orders issued under Section 215. Since the defendant would lack standing to challenge the admission of Section 215-obtained or -derived information there is no suppression remedy available.

II. NOTICE OF AUTHORITIES

On March 5, 2013, the government provided written notice that it intends to offer into evidence, or otherwise use or disclose in any proceedings in this case, information obtained or derived from electronic surveillance and physical search conducted pursuant to 50 U.S.C. §§ 1801-1812 (FISA Title I) and 1821-1829 (FISA Title III). (ECF No. 7.) Then, on April 3, 2014, the government provided written notice that it intends to offer into evidence, or otherwise

use or disclose in any proceedings in this case, information obtained or derived from acquisition of foreign intelligence information conducted pursuant to 50 U.S.C. § 1881a, which is Section 702 of the FISA Amendments Act of 2008. (ECF No. 59.)

With respect to FISA pen register or trap and trace device authority, Congress enacted criteria in 50 U.S.C. § 1845(c) to define the extent of the government's notice obligations. The government's notice obligations apply only if the government (1) "intends to enter into evidence or otherwise use or disclose" (2) "against an aggrieved person[1]" (3) in a "trial, hearing or other proceeding in or before any Court, department, officer, agency, regulatory body, or other authority of the United States" (4) any "information obtained or derived from" (5) "the use of a pen register or trap and trace device pursuant to" FISA. 50 U.S.C. § 1845(c). When all five criteria are met, the government will notify the defense and the Court (or other authority) in which the information is to be used or disclosed that the United States intends to use or disclose such information. The United States would have provided notice to the defense and this Court that the United States intended to use against him in this case information obtained or derived from a FISA pen register or trap and trace device if the statutory criteria for notice identified above were satisfied. No such notice has been provided to the defense because that is not the case. Thus, there is no reason for defendant to brief that issue.

Similar criteria define the extent of the government's notice obligations under Section 703. *See* 50 U.S.C. § 1881e(b) (providing that information acquired from an acquisition conducted under Section 703 shall be deemed to be information acquired from an electronic surveillance pursuant to Section 1806); 50 U.S.C. § 1806(c) (requiring notice only when the government intends to enter into evidence or otherwise use or disclose any information obtained or derived from electronic surveillance against an aggrieved person in a criminal case). The statutory criteria for such notice have not been satisfied here, and thus this statutory authority is irrelevant to the case as well.

With respect to the use of information obtained from Section 215 business records, FISA does not impose any notice obligation on the use of such information. In an analogous context, the Rules of Criminal Procedure do not require the government to notify the defense of the use of information obtained from grand jury subpoenas. Such records would be collected from third parties, so the defendant would lack standing to contest their admission. Nor is there any suppression remedy available even if the government had committed a statutory violation of Section 215 since the statute provides for none. To the extent that the defense chooses to challenge this provision of FISA, the government's response will be the same as that stated above, namely that the defendant lacks standing to challenge the admission of Section 215-obtained or -derived information and there is no suppression remedy available.

[1] An "aggrieved person" is defined in the FISA pen register and trap and trace device context to mean any person whose "telephone line was subject to the installation or use of a pen register or trap and trace device" or "communication instrument or device was subject to the use of a pen register or trap and trace device . . . to capture incoming electronic or other communications impulses." 50 U.S.C. § 1841(3).

However, with respect to the disclosure of particular information contained in FISA applications, orders, and other related materials presented to the FISC—such as the identity of a FISA target, the definition of an agent of a foreign power argued/used with respect to the target, the dates of collection relevant to the evidence, or whether emergency collection authority was sought or granted—that information falls outside the government's notice obligations under FISA.[2] Rather, sections 1806(f) and 1825(g) provide the only process by which a defendant may seek to discover, or a Court may order disclosure of, information contained in applications, orders, and other related materials provided to the FISC. Those sections provide that if the Attorney General files an affidavit that disclosure or an adversary hearing would harm the national security of the United States—as the government expects will occur in this case—the district court must review *in camera* and *ex parte* the application, order, and such other materials relating to the FISA collection as may be necessary to determine whether the collection of evidence to be used against the aggrieved person was lawfully authorized and conducted.

In making this determination, the district court may order disclosure to the defense only where such disclosure is necessary to make an accurate determination of the legality of the collection, or as required by due process. *See* 50 U.S.C. §§ 1806(f) and (g), 1825(g) and (h). These are the only statutory bases on which a district court may order disclosure of FISA materials or their content. They do not come into play until after the defendant files the appropriate motion and the district court considers the government's classified response and attachments *ex parte* and *in camera*. *See United States v. Daoud*, 755 F.3d 479, 482 (7th Cir. 2014) ("The statute requires the judge to review the FISA materials *ex parte* and *in camera* in *every* case, and on the basis of that review decide whether any of those materials must be disclosed to defense counsel."). Under the statute, judicial economy or preservation of court resources are not factors which a district court may consider when determining whether to order disclosure of these FISA materials.

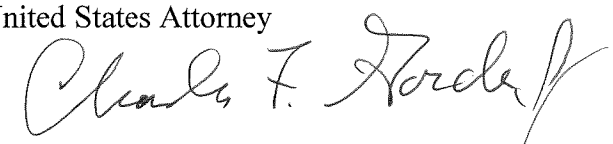
[2] As described in more detail in the government's earlier memorandum, see ECF No. 97, at 5-11, Congress deliberately enacted a narrow notice provision because of the need to protect sensitive national security information, including classified sources and methods. Notably, Congress did provide for broader notice of FISA surveillance in certain situations, but declined to do so in the notice sections applicable to this defendant. *Id.* at 7-8.

III. CONCLUSION

The recitations above provide the Court with additional reasons to deny the defendant's Motion to Compel Notice at this time as either moot or premature. Thank you for your attention to this matter.

Very truly yours,

S. AMANDA MARSHALL
United States Attorney



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cc: Amy M. Baggio, via email
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