



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 19, 2011

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for your September 21, 2011 letter to the Attorney General concerning the government's authority to obtain records under section 215 of the USA PATRIOT Act. We are sending an identical response to Senator Mark Udall, who joined in your letter.

As you know, section 215 allows the federal government to apply to the Foreign Intelligence Surveillance Court ("FISA Court") for a court order directing the production of any tangible things for an authorized investigation to protect against international terrorism or clandestine intelligence activities. In order to issue an order, the FISA Court must determine that there are reasonable grounds to believe that: (1) the tangible things sought are relevant to an authorized national security investigation, other than a threat assessment; (2) the investigation is being conducted under Guidelines approved by the Attorney General under Executive Order 12333; and (3) if a U.S. person is the subject of the investigation, the investigation is not being conducted solely on the basis of First Amendment protected activities. In addition, by law, the FISA Court may only require the production of records that can be obtained with a grand jury subpoena or any other court order directing the production of records or tangible things. *See* 50 U.S.C. § 1861(c)(2)(D).

The government has made public that some orders issued by the FISA Court under section 215 have been used to support important and highly sensitive intelligence collection operations, on which members of Congress have been fully and repeatedly briefed. During the last Congress (in December 2009), and in the current Congress (February 2011), the Department of Justice and the Intelligence Community provided a document to the House and Senate intelligence committees to be made available to all members of the House and Senate describing the classified uses of section 215 in detail. The Intelligence and Judiciary Committees have been briefed on these operations multiple times and have had access to copies of the classified FISA Court orders and opinions relevant to the use of section 215 in those matters. In addition, the Department of Justice has provided Congress with classified and unclassified annual and semi-annual written reports on section 215 use, and, over the years, has provided extensive briefings

and testimony on the way this statute has been implemented pursuant to lawful FISA Court orders. Most recently, in connection with the reauthorization of the PATRIOT Act, the Attorney General, the Director of the FBI, and relevant heads of Intelligence Community agencies have all testified or briefed members of Congress on the operation of section 215, in addition to multiple congressional hearings at which other senior Department of Justice and Intelligence Community officials testified and briefed the issue over the past year. Armed with this information, the Congress, on a bipartisan basis and by large majorities, has repeatedly reauthorized section 215. In May 2011, the Senate approved the legislation to reauthorize the statute and two other provisions of the USA PATRIOT Act by a vote of 72-23 and the House voted in favor of the legislation by 250-153.

Against this backdrop, we do not believe the Executive Branch is operating pursuant to “secret law” or “secret opinions of the Department of Justice.” Rather, the Intelligence Community is conducting court-authorized intelligence activities pursuant to a public statute, with the knowledge and oversight of Congress and the Intelligence Committees of both Houses. There is also extensive oversight by the Executive Branch, including the Department of Justice and relevant agency General Counsels and Inspectors General, as well as annual and semi-annual reports to Congress as required by law.

To be sure, the FISA Court opinions and orders relevant to the use of section 215 and many other intelligence collection authorities are classified. This is necessary because public disclosure of the activities they discuss would harm national security and impede the effectiveness of the intelligence tools that Congress has authorized. This is true of many other intelligence activities that our government throughout its history has carried out in a classified manner in the interest of national security. Since it is not possible to disclose these activities to the public, Congress established the Senate and House intelligence committees to ensure that Congress is able to perform its proper oversight role on behalf of the American people.

We appreciate and share your interest in an informed public debate on how the government interprets and uses its intelligence collection authorities. However, the Intelligence Community has determined that public disclosure of the classified uses of section 215 would expose sensitive sources and methods to our adversaries and therefore harm national security. As you know, the Attorney General and a senior member of the Intelligence Community testified in June 2011 in a closed hearing before the Senate Select Committee on Intelligence concerning the classified uses of section 215. Their classified testimony addressed in detail the operations carried out under the statute, their legal basis, their importance to national security, and the reasons why neither the operations nor their detailed legal basis can be disclosed publicly. As they explained, the Executive Branch has done everything it can to ensure that the people’s elected representatives are fully informed of the intelligence collection operations at issue and how they function.

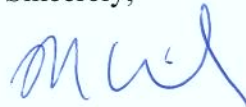
The Honorable Ron Wyden
Page Three

Finally, with regard to the analogy between section 215 and grand jury subpoenas, as noted above, section 215 expressly provides that the court “may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things.” 50 U.S.C. §1861(c)(2)(D). Grand jury subpoenas do not require the approval of a court but rather may be obtained with the approval of a single prosecutor and may request a wide variety of records; the government is not required to make any showing of relevance to a court before issuing such a subpoena. The records obtained pursuant to a grand jury subpoena may concern the lawful activities of U.S. citizens if those records are relevant to an investigation. A motion to quash a grand jury subpoena will be denied unless there is “no reasonable possibility” that the category of information the government seeks will produce information relevant to the general subject of the grand jury’s investigation. In contrast, as discussed above, records collected under Section 215 require approval of an Article III judge sitting on the FISA Court, and the government must make an affirmative showing to that Court that the records are relevant to an authorized national security investigation. Particularly in light of the statutory requirement that a section 215 order may only obtain records that could be obtained via a grand jury subpoena (or court order), we continue to believe that the analogy between section 215 and a grand jury subpoena is apt. This is not to say, of course, that the factual context in which section 215 may be used for classified intelligence collection operations is the same as it is for ordinary criminal matters.

In sum, given the constraints as to what can be discussed in an unclassified setting, we believe that we have been as forthcoming as possible in our discussions of section 215.

Thank you for the opportunity to present our views, and please do not hesitate to contact this office if we can be of further assistance regarding this or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General