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DATE: 03-23-2012
CLASSIFIED BY 65179 DMH/STP/MJS
REASON: 1.4 (C)
DECLASSIFY ON: 03-23-2037

Sunset of USA Patriot Act and Its Affect on FISA Business Records Requests

Without FISA Business Records Requests, the FBI will often be left without any method to obtain business records and/or electronic communications transactional records in many of its counterterrorism and counterintelligence investigations. To understand why this is the case, a brief review of where business records request originated and their evolution under the Foreign Intelligence Surveillance Act (FISA) is helpful.

As originally enacted in 1978, FISA did not contain any provision authorizing the government to require the production of documents or tangible things. Between 1978 and 1994, when FISA was amended to include physical search authority, the government had no general authority to obtain business records, documents, or other tangible things as part of a national security investigation. After FISA's amendment in 1994, the government could obtain a Foreign Intelligence Surveillance Court (FISC) order authorizing a search for documents and other tangible items, but it had to meet the probable-cause requirements under the statute's physical search provisions.

In 1998, Congress amended FISA to allow the government to apply to the FISC for a court order to obtain "records" from "a common carrier, public accommodation facility, physical storage facility or vehicle rental facility." Congress included these entities within the business records provision "because of their frequent use by subjects of FBI foreign intelligence and international terrorism investigations" and the government could obtain records from these entities if the Director or a designated high-ranking official of FBI filed an application with the FISC specifying that the records were sought for "an investigation to gather foreign intelligence information or an investigation concerning international terrorism" being conducted by the FBI. The application had to provide "specific and articulable facts giving reason to believe that the person to whom the records pertain [was] a foreign power or an agent of a foreign power." FISA remained in this form until the passage of the USA Patriot Act in October 2001. [REDACTED]

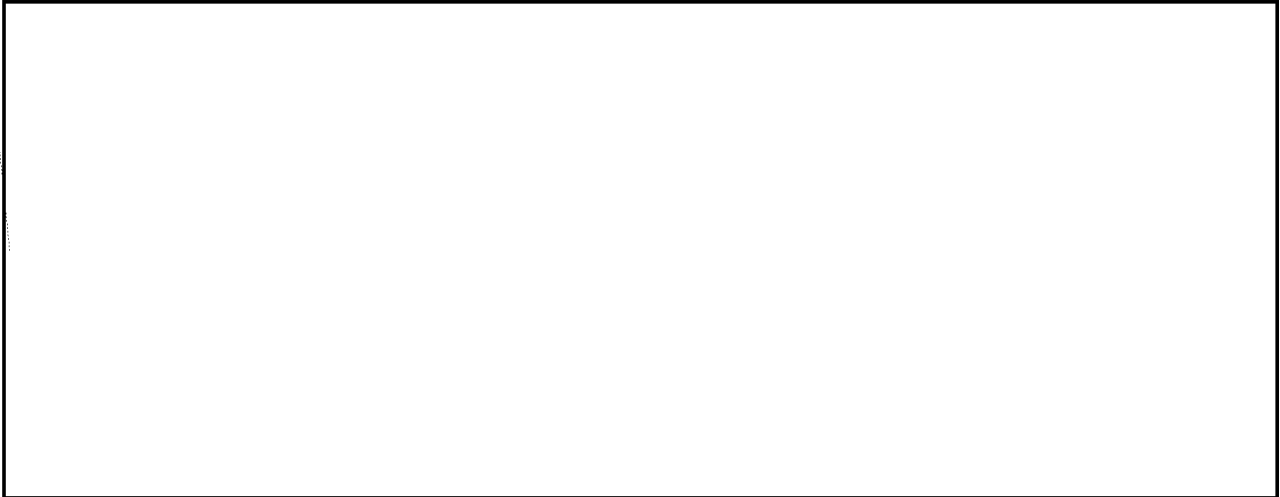
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Section 215 of the USA Patriot Act amended FISA's business records provision in four key respects. First, it authorized the government to obtain an order "requiring the production of any tangible things (including books, records, papers, documents, and other items)." The Act therefore expanded the type of items for which an order could be sought from "records" to "any tangible things." Second, the Act deleted the restriction on the types of entities that could be served with a tangible-things order. Under the Patriot Act amendments, the government could obtain tangible things from any person or entity, not merely from common carriers and certain others. Third, the Patriot Act eliminated the requirement that an application for a tangible-things order specify that "there are 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." Fourth, the Patriot Act (as further amended by the Intelligence Authorization Act for 2002) altered the kinds of investigations in which the government may seek a tangible-things order. Under the amendment, the government could obtain a tangible thing "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international

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terrorism or clandestine intelligence activities,” and not for an investigation of a United States person “conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

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