IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MO HAILONG, a/k/a Robert Mo, and MO YUN, Defendants.	)	No: 4:13-cr-00147-SMR-CFB **ORDER**

This matter is before the Court on a Motion to Compel (ECF No. 153) filed on December 15, 2014, by Defendant Mo Hailong, and joined on December 24, 2014, by Defendant Mo Yun (ECF No. 166). This Motion was referred to the undersigned by the District Court, pursuant to 28 U.S.C. § 636(b)(1)(A). *See* Docket Entry for ECF No. 153. On February 26, 2015, the Court held a hearing on limited issues related to the Motion to Compel, which have been fully briefed as stated below in this Order. At the February 26 hearing, Jason Griess and Marc Krickbaum appeared for the Government, Mark Weinhardt and Mark Beck appeared for Mo Hailong, and Terry Bird and Leon Spies appeared for Mo Yun.

I. BACKGROUND

Defendants are currently charged—along with five others who have not appeared before the Court—in a Superseding Indictment with conspiracy to steal trade secrets in violation of 18 U.S.C. § 1832(a)(1)–(3).

On March 11, 2014, the Government filed a Notice (ECF No. 42) regarding Mo Hailong, which stated that "the United States intends to offer into evidence, or otherwise use or disclose

. . . information obtained or derived from electronic surveillance or physical search conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801–1812 and 1821–1829." Notice at 1, ECF No. 42. On October 15, 2014, the Government filed an identical Notice (ECF No. 124) regarding Mo Yun.

Defendants' Motion to Compel seeks production by the Government of all material required by Fed. R. Crim. P. 16, and *Brady v. Maryland*, 373 U.S. 83 (1963), and similar or interpreting authorities. One specific category of information sought by the motion is "all evidence obtained by search and seizure and the legal authority permitting the search or seizure (e.g., federal search warrant under the Foreign Intelligence Surveillance Act ("FISA") . . .)," and classified materials, as required and appropriate under Fed. R. Crim. P. 16 and the Classified Information Procedures Act (CIPA). Def. Mot. Compel at 2, ECF No. 153. The parties continue to confer regarding omnibus scope and production issues. Currently before the Court and ripe for decision is a dispute over the adequacy of the Government's Notices filed to alert Defendants that it intends to use evidence obtained pursuant to FISA, and whether the Government has adequately disclosed the use of other covert, warrantless surveillance techniques.

On January 16, 2015, the Government filed a limited Response (ECF No. 177) to Defendants' Motion to Compel. In its Response, the Government argues that Defendants are not entitled under FISA or the Federal Rules of Criminal Procedure to identification of evidence obtained pursuant to FISA, and that disclosure of materials supporting the FISA surveillance (e.g., applications to, and orders from, the Foreign Intelligence Surveillance Court (FISC), also known as "FISA dockets") is premature at this time, and should only be made after the *in camera ex parte* review of such material prescribed by 50 U.S.C. §§ 1806(f) and 1825(g). Regarding material obtained through covert surveillance other than through FISA, the Government states

that "neither the U.S. Attorney's Office [(USAO)] [n]or FBI personnel involved with this case are aware of any such evidence." Gov't Response at 2, ECF No. 177.

On February 3, 2015, Mo Hailong filed a Reply Brief (ECF No. 194). In his Reply, Hailong argues that 50 U.S.C. §§ 1806(c) and 1825(d), and Fed. R. Crim. P. 12(b)(4)(B) both require the Government to identify which evidence already disclosed was obtained pursuant to FISA. Hailong also argues that the Government's disclosure obligation regarding evidence obtained pursuant to other search authorities—specifically mentioning the FISA Amendments Act (FAA) and Executive Order (E.O.) 12333—is not limited to searches within the knowledge of *local* USAO and FBI personnel, but rather extends to all knowledge held by any persons in those agencies nationwide. Hailong asserts that the explicit domains of officials such as attorneys in the Department of Justice National Security Division (DOJ NSD) and agents of the FBI Counterintelligence Division, and post-PATRIOT Act cooperation between law enforcement and intelligence agencies, demonstrate that the local investigating and prosecuting officials could obtain knowledge of whether other classified or covertly-obtained information was included in applications to the FISC, and therefore used to obtain the FISA information the Government has stated it intends to use to prosecute Defendants.

II. DISCUSSION AND ANALYSIS

Section 1806 of Title 50 of the United States Code governs the use of information acquired from electronic surveillance conducted pursuant to FISA, and Section 1825 of Title 50 governs the use of information acquired from physical searches conducted pursuant to FISA. *See* 50 U.S.C. §§ 1806(a), 1825(a).[1]

FISA's notice provisions, the meaning of which the parties dispute, provide:

[1] These provisions are largely identical. When quoting these statutes, this Order will use the text of section 1806, with materially differing text from section 1825 in brackets.

> Whenever the Government intends to enter into evidence or otherwise use or disclose . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person [or from a physical search] pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court . . . in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

50 U.S.C. §§ 1806(c), 1825(d). The parties agree that Defendants are aggrieved persons who must be given notice under the statute. Defendants argue that the statutory notice requirements' plain language—notably the phrases "any information," "that information," "the information," and "such information"—"clearly require[s] that the government's notice identify the information at issue." Def. Reply at 14, ECF No. 194.

To interpret a statute, a federal court first looks to the statute's language, "giving the words used their ordinary meaning." *Lawson v. FMR, LLC*, 134 S.Ct. 1158, 1165 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)) (internal quotation marks omitted). In sections 1806(c) and 1825(d), only one of the uses of the word "information" pointed to by Defendants is used to describe the Government's duty of notification. What the statutes require is that the Government "notify the aggrieved person and the court . . . that the Government intends to so disclose or so use such information." 50 U.S.C. §§ 1086(c), 1825(d). In this context, "such" is an adjective that modifies "information." As such, "such" means "of the character, quality, or extent previously indicated or implied." *Such*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/such (last visited February 12, 2015). The character and quality of information indicated earlier in each notice provision is "information obtained or derived from an electronic surveillance of that aggrieved person [or from a physical search] pursuant to the authority of [FISA]." 50 U.S.C. §§ 1806(c), 1825(d). The statute's plain language therefore

requires that the government notify an aggrieved person that it intends to disclose or use "information obtained or derived from an electronic surveillance of that aggrieved person [or from a physical search] pursuant to the authority of [FISA]." *Id.* The Government has so notified Defendants and the Court of its intent, and nothing in this language requires the Government to "identify" or take any other action with regard to the information or evidence itself.

The other uses of the word "information" pointed to by Defendants do not impose additional substantive requirements on the Government's notice, but rather prescribe only when and to whom the Government is to give notice. First, the phrase "any information" is simply part of the language indicating when the Government's notification obligation is triggered, namely, when it "intends to enter into evidence or otherwise use or disclose . . . against an aggrieved person, *any information* obtained or derived from an electronic surveillance of that aggrieved person [or from a physical search] pursuant to [FISA]." *Id.* (emphasis added). Next, the phrase "that information" is part of the language imposing a timing requirement on the Government's notice, namely, that it make its required notice "prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use *that information* or submit it in evidence." *Id.* (emphasis added). Finally, the phrase "the information" simply applies to what entity the Government must give notification to, in addition to the aggrieved person, namely "the court or other authority in which *the information* is to be disclosed or used." *Id.* (emphasis added).

Under the plain language of the statutes, the Government's obligation to provide notice of intended use of FISA material under 50 U.S.C. §§ 1806(c) and 1825(d) does not include stating which items of evidence produced in discovery were obtained pursuant to FISA.

Defendants additionally argue that Federal Rule of Criminal Procedure 12(b)(4)(B) "[i]ndependently . . . authorizes the Court to require notice of the information obtained through FISA and other covert surveillance techniques." Def. Reply at 15.

Rule 12(b)(4)(B) provides that:

> At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

Fed. R. Crim. P. 12(b)(4)(B). Defendants do not assert that the Government has not produced in discovery the actual evidence that may be used at trial, nor do they seek now the notice that they are entitled to request under Rule 12(b)(4)(B). Defendants are correct that "Rule 12(b)(4)(B) requires the government . . . to identify the evidence it intends to use in its case-in-chief . . . to allow the defense to make suppression decisions." Def. Reply at 15. But the relief Defendants currently seek is not identification of which evidence the Government intends to use in its case-in-chief, but rather identification of which evidence the Government obtained pursuant to FISA, regardless of the Government's intent to use it at trial. Def. Reply at 2 ("[T]he relief Mr. Mo seeks here is quite modest: He simply asks that the government be required to tell him what items, of the evidence *already in his possession*, were obtained through [FISA] or similar methods.") (emphasis in original). Defendants assert that they need to know what information was obtained pursuant to FISA to "formulate coherent motions to suppress where statutory and constitutional grounds exist." Def. Reply at 2. The Government acknowledges this difficulty. *See* Gov't Response at 4 n.4, ECF No. 177. But while knowing what evidence they have was obtained pursuant to FISA may help Defendants make more reasoned pretrial motions, Rule 12(b)(4)(B) does nothing more than empower them to ask the Government what evidence it

intends to use at trial. *See United States v. Anderson*, 416 F.Supp.2d 110, 112–13, 116 (D.D.C. 2006).

The main limitation on disclosure of FISA-related material in sections 1806 and 1825—which, more broadly than notice, govern use of FISA-obtained information generally—is the requirement that a Court that receives notice of the Government's intent to use FISA-obtained information "review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted," if the Attorney General has filed an affidavit stating "that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1806(f). This provision applies only to the application(s) to, and the order(s) of, the FISC in relation to the defendant, and other materials necessary to determine the lawfulness of the surveillance. *See id.* If the Attorney General files the specified affidavit, the Court "may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance *only where such disclosure is necessary to make an accurate determination of the legality of the surveillance*." *Id.* (emphasis added).

The only purpose Defendants state for needing to have the FISA-obtained material among the Government's discovery identified is to be able to intelligently formulate or determine the need for a motion to suppress such material. The Government states that the *in camera ex parte* review of the legality of the FISA surveillance at issue would be triggered by a Motion to Suppress, plus its filing the Attorney General's affidavit in response to such a motion.

Motions to suppress evidence obtained pursuant to FISA are necessarily generalized, speculative, and vague, given the statutory framework. *Cf. United States v. Belfield*, 692 F.2d

141, 148 (D.C. Cir. 1982) ("We appreciate the difficulties of appellants' counsel in this case. They must argue that the determination of legality is so complex that an adversary hearing with full access to relevant materials is necessary. But without access to the relevant materials their claim of complexity can be given no concreteness. It is pure assertion."); *United States v. Abu-Jihaad*, 531 F.Supp.2d 299, 311 (D. Conn. 2008) ("Since defense counsel has not had access to the Government's submissions they—quite understandably—can only speculate about their contents."); *United States v. Mubayyid*, 521 F.Supp.2d 125, 131 (D. Mass. 2007) ("The Court obviously recognizes the difficulty of defendants' position: because they do not know what statements were made by the affidavit in the FISA applications, they cannot make any kind of a showing that those statements were false. . . . The balance struck under FISA—which is intended to permit the gathering of foreign intelligence under conditions of strict secrecy, while providing for judicial review and other appropriate safeguards—would be substantially undermined if criminal defendants were granted a right of disclosure simply to ensure against the possibility of a *Franks* violation."); *United States v. Rosen*, 447 F.Supp.2d 538, 547 (E.D. Va. 2006) ("Defendants' necessarily speculative contention that the FISC must have erred when it found probable cause to believe that the targets are agents of a foreign power is without merit.").

FISA's *in camera ex parte* review is arguably triggered absent a motion to suppress when the Government gives notice of its intent to use FISA-obtained evidence. *See* 50 U.S.C. § 1806(f) (prescribing *in camera ex parte* review "[w]henever a court . . . is notified pursuant to subsection (c) . . . *or* whenever a motion is made pursuant to subsection (e)") (emphasis added). But the Court finds little burden to Defendants in filing a *pro forma* Motion to Suppress, which would seemingly end the parties' impasse on this point, and advance the progress of this matter, including prompting the Government to file the Attorney General's affidavit triggering the *in*

camera FISA review. Although the Court could locate no cases addressing the specific question at issue—whether the Government must disclose to Defendants which evidence was collected under authorization from FISA—the review of the legality under FISA of the surveillance at issue must at least begin with an *ex parte in camera* review of the FISA dockets, and with Defendants having no more than speculative grounds for arguing against the surveillance's legality. No cited authority requires the Government to identify what produced evidence was obtained pursuant to FISA.

Defendants' Motions to Compel are **denied in part**, to the extent they seek an order requiring the Government to identify FISA-obtained evidence. If Defendants determine they have a need for such identification apart from ascertaining grounds for suppression of the evidence, they may renew this request alongside consideration of other disputes under the omnibus Motion to Compel, which the parties indicate are forthcoming. In the interest of advancing the case calendar and commencing the *in camera ex parte* review of FISA material, the Court orders Defendants to file any Motion to Suppress, pursuant to 50 U.S.C. §§ 1806(e) and 1825(f), by **March 13, 2015**. This motion will necessarily be generalized and speculative, and may argue any possible ground for suppression under FISA. The District Court's *in camera ex parte* review will be comprehensive and *de novo*, and will evaluate all requirements needed to establish the surveillance's legality. *See Mubayyid*, 521 F.Supp.2d at 131–32. Although the Court previously adopted the parties' agreed-upon schedule, which allows the Government 90 days to respond to a motion to suppress FISA material, *see* ECF No. 175 at 2, the Government is urged to file the Attorney General's affidavit as expeditiously as possible. The Pretrial Motions deadline of March 27, 2015, shall remain for Motions to Suppress any non-FISA-obtained evidence.

Defendants' expressed interest in being informed generally of all surveillance or evidence-gathering methods employed also seems related only to their interest in attacking the legality of the FISA-obtained information. *See* Def. Reply at 11–12 ("[T]he DOJ NSD knows or can readily determine which covert surveillance techniques were used to intercept Mr. Mo's communications or otherwise obtain information about him and the extent to which information derived from those techniques was included in the FISA applications at issue in this case. . . . [T]he FBI counterintelligence agents who furnished the declarations that supported the applications for FISA surveillance that the government seeks to use in this case know what surveillance techniques produced the information on which the declarations relied."). As stated above, however, the review of the legality of the FISA-obtained information will be *ex parte*, unless and until the Court determines that certain disclosures are "necessary to make an accurate determination of the legality of the surveillance [or physical search]." 50 U.S.C. §§ 1806(f), 1825(g). Further, at the February 26 hearing, Government counsel stated that the wording of its Response was not intended to indicate that the local USAO was compartmentalized from national authorities, and that the Government was responding for all of its agents and agencies when it stated that no other surveillance or evidence-gathering techniques were used on Defendants. For these reasons, Defendants' Motions to Compel are also **denied in part** to the extent they seek an order compelling the Government to disclose unspecified surveillance mechanisms. Defendants' request may be renewed for consideration with other discovery matters if Defendants later encounter a need for this information apart from attacking the legality of the FISC applications and orders.

III. CONCLUSION AND ORDER

Defendants' requests for identification of the specific evidence obtained pursuant to the Foreign Intelligence Surveillance Act (FISA), and for notification of use of any other covert, warrantless surveillance mechanisms, have only been shown to be related to Defendants' desire to obtain grounds for suppressing FISA-obtained evidence. Determination of FISA suppression issues begins *ex parte,* and if the District Court decides that disclosure of certain FISA-related material or notice of other surveillance techniques is necessary to decide the legality of the FISA surveillance conducted on Defendants, it will order such disclosure. *See* 50 U.S.C. §§ 1806(f), 1825(g). Defendants' Motions to Compel (ECF Nos. 153 and 166) are **denied in part**, to the extent they seek such disclosures and identification.

In the interest of advancing the case calendar and commencing FISA's *in camera ex parte* review, Defendants shall file any Motion to Suppress FISA-obtained evidence by **March 13, 2015**. Regardless of the content of such a Motion, the District Court's review of the FISC dockets for all FISA-obtained evidence that the Government intends to use will be comprehensive, searching, and will evaluate all grounds for potential illegality of the surveillance. In any event, Defendants are free to raise in their Motion(s) whatever grounds for suppression under FISA that they suspect might exist. The Pretrial Motions deadline of March 27, 2015, remains set for motions relating to all other evidence.

At the February 26 hearing, the parties agreed to the following deadlines, which the Court adopts:

1. By **March 2, 2015**, Defendants submit to the Government a list of outstanding discovery to which they believe they are entitled;

2. By **March 16, 2015**, the Government will respond to Defendants' list with additional production or objections.

The parties will thereafter meet and confer. By no later than **March 30, 2015**, Defendants shall file a Status Report informing the Court whether there are any outstanding disputes under the omnibus Motion to Compel (ECF No. 153), and submit a proposed briefing schedule to ensure prompt submission of these matters.

IT IS SO ORDERED.

Dated this 6th day of March, 2015.

CELESTE F. BREMER
CHIEF UNITED STATES MAGISTRATE JUDGE