

INFORMATION SHARING WITH ISRAEL RAISES QUESTIONS ABOUT EFFICACY OF NSA'S MINIMIZATION PROCEDURES

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The Guardian's latest Edward Snowden story yesterday reported that an information sharing Memorandum of Understanding written sometime after March 2009 laid out the sharing of unminimized US collections with Israel. The agreement appears to newly share such unminimized content based on unenforceable assurances from Israel that it will minimize US person data and destroy any communication involving a US government official.

Whatever else this story may do, it casts serious questions on the efficacy of the minimization procedures that lie at the core of FISA Court oversight over the government's spying program.

NSA's minimization procedures in place (per a date stamp) on July 29, 2009 only allow the government distribution of unminimized data to foreign governments for cyrptoanalysis or translation. And it requires the foreign government to return the data once it has provided assistance.

Dissemination to foreign governments will be solely for translation or analysis of such information or communications, and assisting foreign governments will make no use of any information or communication of or concerning any person except to provide technical and linguistic assistance to

NSA.

[snip]

Upon the conclusion of such technical or linguistic assistance to NSA, computer disks, tape recordings, transcripts, or other items or information disseminated to foreign governments will either be returned to NSA or be destroyed with an accounting of such destruction made to NSA.

But the information sharing agreement with Israel not only envisions it keeping this data (with the requirement that it “strictly limit access ... to properly cleared ISNU personnel and properly cleared members of Israeli intelligence services”) but also circulating it, so long as it complies with an unenforceable promise to minimize US person data.

Disseminate foreign intelligence information concerning U.S. persons derived from raw SIGINT provided by NSA – to include any release outside ISNU in the form of reports, transcripts, gists, memoranda, or any other form of written oral document or transmission – on in a manner that does not identify the U.S. person.

The only data that the US requires Israel destroy is that involving US government personnel.

Destroy upon recognition any communication contained in raw SIGINT provided by NSA that is either to or from an official of the U.S. Government. “U.S. Government officials” include officials of the Executive Branch (including the White House, Cabinet Departments, and independent agencies); the U.S. House of Representatives and Senate (members and staff); and the U.S. Federal Court system (including, but not

limited to the Supreme Court).

So unless the government canceled this agreement just 4 months after it reached it, it means the NSA misrepresented to the FISA Court the legal and privacy implications of the collection the court approved based on those minimization procedures. The court approved broad collections based on the understanding minimization would be strictly enforced, but here we learn it has been outsourced to a foreign government in terms that don't seem to abide by the minimization procedures themselves.

And consider the implications of this. Two years ago, the Israeli press reported that it would start monitoring Western groups for what it considers attempts to delegitimize Israel.

The new MI unit will monitor Western groups involved in boycotting Israel, divesting from it or imposing sanctions on it. The unit will also collect information about groups that attempt to bring war crime or other charges against high-ranking Israeli officials, and examine possible links between such organizations and terror groups.

And, as others have noted, the Israelis killed US citizen Furkan Dogan in an attack on a Gaza relief flotilla after this MOU went into place. US intelligence would be hard pressed to dream up a justification for spying on US peace and pro-Palestinian groups (though the government used Eric Harroun's opposition to Zionism as evidence to charge him with terrorism). But if we share SIGINT with Israel under this unenforceable MOU, it could mean Israel conducts such spying using data we've collected, effectively expanding the targets of US spying well beyond those envisioned by law.

We don't know how Israel is using this data. And so long as the US shares unminimized data, it's not clear it does either.

In its response to the Guardian., the NSA emphasized that it abides by “legal restrictions.”

NSA cannot, however, use these relationships to circumvent US legal restrictions. Whenever we share intelligence information, we comply with all applicable rules, including the rules to protect US person information.

But note carefully: it says it abides by rules to protect US person information, which this MOU pays lip service to doing. It doesn't say it abides by procedures approved by the courts. There's a difference, and I do look forward to NSA assuring the courts that it hasn't, again, violated the rules the courts impose on it.