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Date: June 12, 2018
Appraiser: Jeremy P. Schmidt, ACR1
Agency: Federal Bureau of Investigation (FBI)
Subject: DAA-0065-2016-0001

INTRODUCTION

Schedule Overview

Electronic Surveillance (ELSUR) Media

Additional Background Information

The FBI submits this schedule in order to revise the existing disposition authorities for ELSUR recordings. There were three reasons for the re-scheduling. First, the FBI wished to reduce the retention period for all ELSUR recordings from a minimum of 11 years to a minimum of 10 years from collection, in order to align the retention period with agency needs while also standardizing the retention period for all ELSUR records. (Title III collections need to be maintained for 10 years, thus 10 years is the period that meets both requirements.) The adequacy of the retention period is discussed below under each item's appraisal. Second, the FBI also sought to consolidate the number of disposition authorities, from three to two, for simplicity of records operations. Thirdly, the FBI and the National Archives wished to eliminate the note that appears on the schedule: "Prior to final disposition, the FBI will evaluate the electronic surveillance material related to each case to determine whether or not the records have historical value. If so, the records will be proposed for permanent under a separate disposition authority." This note is not necessary because the FBI has the authority (36 CFR 1225.14) to identify potentially permanent records and submit a schedule to NARA. Since approval of the existing schedule, few recordings have been recommended for permanent retention, and NARA determined that none of those warranted permanent retention. Going forward, offers of potentially permanent records will be handled through the scheduling process, rather than an ad hoc offer.

ELSUR is the process of monitoring and/or recording sounds and/or images at a distance by electronic means (cameras, microphones, wiretapping, etc.). The FBI's authority to conduct electronic surveillance comes from several sources: 1) consent of one party; 2) a court order issued in accordance with Title 18, USC § 2518 [often referred to as Title III wiretaps]; 3) court order issued in accordance with Title 50, USC, Section 1801 (Foreign Intelligence Surveillance Act); 4) court order issued in accordance with Rule 41 (b) of the Federal Rules of Criminal Procedure and the All writs Act [Title 28, USC § 1651]; and 5) Attorney General Guidelines for

"Procedures for Lawful Warrantless Interceptions of Verbal Communications". Note that FISA ELSUR is not covered by this schedule. It continues to be governed by item 1 on the N1-065-03-002 schedule.

As part of its investigations, the FBI identifies the significant portions of the recordings. The FBI reviews the ELSUR as it is being conducted and creates logs of the events (e.g., for conversations, the time, participants in the conversation, subject of the conversation, etc.). The significant portions are then transcribed and the transcriptions are filed in the corresponding investigative case file.

Documentation found in the FBI's investigations case files provides evidence of the surveillance activities used during an investigation. The file contains documentation requesting the surveillance as well as the authority for the surveillance and any restrictions imposed on the surveillance. The file also documents the administration of the surveillance through the surveillance logs which record the subject of the surveillance, the location, date and time of the surveillance, and summaries of the activity captured during the surveillance. Investigative case files contain either complete transcripts of all surveillance activity or transcripts of criminal activity captured by surveillance.

Copies of the significant portions of the recordings are provided to the U.S. Attorney, Department of Justice, or other appropriate prosecutor. Depending on the case, the recording may be played in Court and be filed as evidence with the Court. However, neither the Courts nor the prosecuting agency are supposed to keep the recording. Under rules of evidence the Court would return the recording to the prosecutor, who would, in turn, return the recording to the FBI. The FBI stores the returned recording in its ELSUR collection (the subject of this schedule).

Overall Recommendation

I recommend approval of the attached schedule.

APPRAISAL

The appraisal of these records in conjunction with the review of the N1-065-03-002 schedule confirmed that ELSUR recordings should continue to be temporary records since transcripts and other accounts of events were found in the corresponding investigatory case file. In the vast majority of the cases, the actual recording itself adds little if anything to documenting the investigative activities of the FBI or to the information gathered about the individual or organization. In those few instances where the recordings may have high value, the FBI can propose those specific recordings for permanent retention. Since the FBI continues to maintain ELSUR materials (such as transcripts, authorizations, etc.) with other case material, there is no need to consider a change to the final disposition of the recordings.

Item 0001: Consensual Monitoring; Court Ordered Collections; Warrantless and Other Collections

Proposed Disposition: Temporary

Appropriateness of Proposed Disposition: Appropriate

Appraisal Justification:

* Previously approved as temporary. [Court ordered ELSUR (N1-065-03-002 / I), Consensual ELSUR (N1-065-03-002 / II), and Authorizing Official Approved ELSUR (N1-065-03-002 / III)]

* Captured elsewhere in permanent records. Transcripts and other descriptions of the recordings are filed in investigative case files. Although not all FBI case files are permanent, the N1-065-03-002 appraisal indicated that there was anecdotal evidence that most of the ELSUR collections are associated with permanent items. This is logical since ELSUR is generally only collected in cases of substantial investigations. Many temporary case files relate to cases where there is only a preliminary investigation.

Adequacy of Proposed Retention Period: Adequate from the standpoint of legal rights and accountability. Despite the reduction in the retention period by one year, the retention period is still sufficient for impacted parties to discover these records as part of a claim against the U.S. Government (28 USC § 2401) for ELSUR conducted contrary to law or a Bivens claim for a violation of the Fourth Amendment to the U.S. Constitution.

Media Neutrality: Approved

Item 0002: Title III Collections

Proposed Disposition: Temporary

Appropriateness of Proposed Disposition: Appropriate

Appraisal Justification:

* Previously approved as temporary. [Court order ELSUR (N1-065-03-002 / I)]

* Captured elsewhere in permanent records. Transcripts and other descriptions of the recordings are filed in investigative case files. Although not all FBI case files are permanent, the N1-065-03-002 appraisal indicated that there was anecdotal evidence that most of the ELSUR collections are associated with permanent items. This is logical since ELSUR is generally only collected in cases of substantial investigations. Many temporary case files relate to cases where there is only a preliminary investigation.

Adequacy of Proposed Retention Period: Adequate from the standpoint of legal rights and accountability. Despite the reduction in the retention period by one year, the retention period is still sufficient for impacted parties to discover these records as part of a claim against the U.S. Government (28 USC § 2401) for ELSUR conducted contrary to law or a Bivens action for a violation of the Fourth Amendment to the U.S. Constitution.

Media Neutrality: Approved



JEREMY P. SCHMIDT
Appraiser