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## Why James Clapper's Trump comments may not conflict with reports of secret court order

*Analysis: the ex-director of national intelligence rejected the president's claims of wiretapping – but reports of secret court orders could still hold true*

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A Donald Trump supporter holds a sign calling for an investigation of Trump's claim that Trump Tower was wiretapped. The former director of national intelligence rejected the claim. Photograph: Mary Altaffer/AP

The insistence by the former US intelligence chief James Clapper that there was no electronic surveillance of Donald Trump or his presidential campaign directly contradicted the president's claims he was being wiretapped.

However, Clapper's assertion does not necessarily conflict with reports that secret court orders were issued in the course of a justice department investigation of Russian efforts to skew the election in Trump's favour, and possible collusion in those effort by his associates.

The News Corp-owned Heat Street news site and later the BBC published reports in November and January respectively that a secret surveillance order had been issued by a special court allowing the justice department to investigate two Russian banks suspected of being part of the Kremlin's efforts to hurt Hillary Clinton's campaign and aid Trump's.

The BBC said the justice department request had originally been based on a tip-off from an intelligence agency in one of the Baltic states, saying that the banks were being used to channel Kremlin money into the US presidential campaign.

Both reports said the Foreign Intelligence Surveillance Act (Fisa) court gave permission in mid-October for monitoring of the activities of the two banks that also covered Trump associates.

The Guardian has been unable to independently verify that reporting. However, the Guardian reported earlier this year that the Fisa court last summer turned down an application for an order that would have involved four members of the Trump campaign.

A source familiar with the case said that the intention behind the application was to explore the nature of contacts between individuals linked to the campaign and Moscow. The Fisa court, established in 1978, is housed in a specially built annex to the federal courthouse in Washington. One of its 11 judges drawn from around the country is on duty in any given week. It very rarely rejects applications outright but quite frequently asks the government to tighten the focus of its request to minimise any unnecessary surveillance of Americans.

The Heat Street and BBC reports said that after the first unsuccessful application, the justice department had refined its request. According to the BBC, the successful application in October named only the banks as direct targets, but the request was part of a broader investigation into possible collusion, in which three Trump associates were under scrutiny.

Asked about Trump's tweeted claims that he had been the subject of wiretapping by Barack Obama, Clapper told NBC's Meet the Press: "There was no such wiretap activity mounted against the president, the president-elect at the time, or as a candidate, or against his campaign."

Asked if there had been a Fisa warrant to that end, Clapper – who was Director of National Intelligence (DNI) in the Obama administration – flatly declared: "I can deny it."

However, former US officials and legal experts said there were various ways Clapper's remarks could be consistent with the reports of a Fisa court order.

If the Fisa order only named the Russian banks, then it would be technically correct to say it did not target the Trump camp, even if the order was part of a broader investigation of links between members of his team and Moscow.

Furthermore, the court order could refer to a clause in legislation allowing the justice department to demand business records, such as bank transfer records or archived emails, rather than a full surveillance warrant.

In the case of electronic communications, those records could be just a few seconds old, so almost as valuable as live wiretap, but the Fisa court order would be easier to obtain.

Julian Sanchez, a senior fellow at the Cato Institute, said that for the justice department to target US persons under Fisa directly, it would have to show probable cause that they were acting as "agents of a foreign power".

"An application targeting only foreign corporate entities – especially entities openly controlled or directed by the Russian government – would require no such showing, even if the FBI's ultimate interest were in communications concerning those US persons," Sanchez wrote on the Just Security website.

Lastly, the Trump advisers most closely linked to Russia – Trump's former campaign manager Paul Manafort and the businessman Trump once described as a foreign policy adviser, Carter Page – had left the campaign over the summer, after reports surfaced about their ties. If they had been covered by the court order, it would not count as targeting the campaign.

“Anyone who is in the intelligence community would understand what Clapper said as there being no wiretap targeting of Trump or his campaign,” Todd Hinnen, a former acting assistant attorney general for national security at the justice department, said. “I don’t think what Clapper said contradicts the BBC report that there was a Fisa order targeting Russian banks.”

However, even if an investigation did go ahead with the aid of the Fisa court ruling, it is not clear whether it produced any incriminating evidence of collaboration between the Trump camp and Moscow’s election meddling. In his Sunday interview Clapper said by the time he left office on January 20, “We had no evidence of such collusion.”