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U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2015 JUL 15 PM 3:17
LEEANN FLYNN HALL
CLERK OF COURT

(U) 2015 Summary of Notable Section 702 Requirements

(U) The Privacy and Civil Liberties Oversight Board ("PCLOB") has recommended that the Government submit to the Foreign Intelligence Surveillance Court ("FISC" or "Court"), "[a]s part of the periodic certification process," a document containing "the rules for operation of the Section 702 program that have not already been included in certification orders by the FISA court, and that at present are contained in separate orders and opinions, affidavits, compliance and other letters, hearing transcripts, and mandatory reports filed by the government." PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, at p. 142 (July 2, 2014). In accordance with that recommendation, the Government submits the following summary containing references to Court opinions, agency targeting and minimization procedures, hearing transcripts, or other relevant documents regarding the operation of certain aspects of the Section 702 program. This document does not, nor is it intended to, create any new rules or obligations regarding the operation of the Section 702 program. This document is not inclusive of all currently applicable rules and requirements for the operation of the Section 702 program, but is intended as a reference guide to prominent concepts governing the program. Accordingly, to the extent that any statement contained in this document conflicts with applicable targeting or minimization procedures, any prior representation to the Court, or any written Opinion, Order, or other requirement issued by the Court, such other documents are controlling. In all cases it is the actual representations made by the Government to the Court, representations of understanding made by the Court to the Government, and the written Opinions, Orders, and requirements issued by the Court (or where applicable the Foreign Intelligence Surveillance Court of Review) which constitute controlling precedent.

I. ~~(S//NF)~~ All Users of Section 702-Tasked Facilities Are Regarded as Targets of the Acquisition

~~(TS//SI//OC/NF)~~ Although the targeting procedures generally refer to the target or targets of acquisition, with limited exception, the Government has represented to the FISC that "any user of a tasked facility is regarded as a person targeted for acquisition." *In Re DNI/AG 702 Certifications* [redacted], Memorandum Opinion and Order ("2014 Mem. Op."), at p. 8 (August 26, 2014). This includes, for example, [redacted] There is

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one limited exception provided in the National Security Agency ("NSA") targeting [redacted] *Procedures Used by the National Security Agency for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* ("2014 NSA Targeting Procedures"), at p. 1 (July 28, 2014). According to the FISC, this exception "should be understood to apply only where [redacted]." 2014 Mem. Op., at p. 10.

II. (U) Pre- and Post- Tasking Due Diligence

~~(TS//SI//OC/NF)~~ The Government has an obligation, both before and after tasking a selector, to exercise due diligence when assessing that any Section 702 target (1) is a non-U.S. person; (2) reasonably believed to be located outside the United States; and (3) possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. *See, e.g.*, 2014 NSA Targeting Procedures, pp. 2-4. The Government has represented to the Court that, "the statute requires [the Government] to have a reasonable belief that a [Section 702] target is located outside the United States. The targeting procedures are designed to ensure that NSA analyzes information that gives rise to that reasonable belief. So it is the targeting procedures that imposes [sic] the due diligence requirement on the NSA in that respect." *In re DNI/AG Certification* [redacted], Hearing Transcript, at p. 6 (August 27, 2008).

~~(TS//SI//OC/NF)~~ The Government has represented to the Court that the exercise of due diligence is a continuous obligation: "the government's due diligence does not end once the initial targeting decision is made. The targeting procedures require the [] post-targeting analysis for all tasked facilities, including regular review to ensure that the tasked facility is used by the intended target." [redacted] Similarly, the Court has found that "[d]iligent and prompt response to credible

indications that a tasked facility has been accessed from the United States goes to the heart of the requirement of 50 U.S.C. § 1881a(d)(1)(A) that targeting procedures be reasonably designed to ensure that acquisitions target persons reasonably believed to be outside the United States." 2014 Mem. Op., at p. 30. If there is information that indicates a target may be a United States person, the agencies are required to resolve that issue, and are required to [redacted] *In Re DNI/AG 702 Certifications* [redacted] Transcript of Hearing, at pp. 4-8 (Aug. 4, 2014). For example, [redacted] *Verified Response to Order, In Re DNI/AG 702(g) Certification* [redacted] *at 25-26 (July 18, 2014).* The FBI and NSA have issued similar guidance.

~~(TS//SI//OC/NF)~~ Finally, the Government has an obligation, both at the time of tasking and on a continuous basis thereafter, to assess that a target possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. *See, e.g.*, 2014 NSA Targeting Procedures, at p. 4. If the Government later assesses that the continued tasking of a target's selector is not expected to result in the acquisition of foreign intelligence information, prompt detasking is required, and delay may result in a reportable compliance incident. *See, e.g., Quarterly Report to the Foreign Intelligence Surveillance Court Concerning Compliance Matters under Section 702 of the Foreign Intelligence Surveillance Act*, at p. 46 (item 28) (March 2015) (hereinafter "March 2015 Quarterly Report").

III. (U) Totality of the Circumstances

~~(TS//SI//OC/NF)~~ According to Section I of NSA's Section 702 targeting procedures, "NSA determines whether a person is a non-United States person reasonably believed to be outside the United States in light of the totality of the circumstances[.]" 2014 NSA Targeting Procedures, at p. 1. The Government has represented to the Court that "[t]he facts used to make each of these required

determinations may include, for example [redacted]. NSA is permitted to make reasonable presumptions regarding the target's foreignness in light of the available evidence; the Court specifically noted, however, that a presumption of foreignness would be applied only after NSA had exercised due diligence in looking for other indicators of the target's location. *See In re DNI/AG Certification* [redacted], Mem. Op., at p.10 (September 4, 2008); *see also In re DNI/AG Certification* [redacted], Government's Preliminary Responses to Certain Questions Posed by the Court, at p. 5 (August 26, 2008) ("It is important to note that the use of the presumption is only one aspect of a broader range of information upon which a targeting determination is made. Targeting decisions under the targeting procedures are made 'in light of the totality of the circumstances based on information available with respect to the new target.'" (internal brackets removed)).

~~(S)~~ According to NSA's proposed targeting procedures, NSA "must also reasonably assess, based on the totality of the circumstances, that the target is expected to possess, receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. This assessment must be particularized and fact-based, informed by analytic judgment, the specialized training and experience of the analyst, as well as the foreign intelligence information expected to be obtained. In making this assessment NSA will consider the circumstances that led to NSA's identification of the intended target and other relevant factors." *In re DNI/AG 702(g) Certifications* [redacted] *Procedures Used by the National Security Agency for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* , Ex. A, at p. 4 (filed July 15, 2015). This change to NSA's targeting procedures reflects NSA's current practice of also considering the totality of the circumstances in assessing the foreign intelligence purpose for targeting a person for acquisition under Section 702.

~~(TS//SI//NF)~~ Once a selector has been tasked, NSA must continue to assess, based on the totality of the circumstances, that the targets of Section 702 acquisition remain non-United States persons located outside the United States. [redacted]

[redacted]

IV. (U) Obligation to Review

~~(TS//SI/OC/NF)~~ "[B]ecause targets can travel, and even reasonable determinations can be called into question by new facts, the targeting procedures mandate an additional layer of protection in the form of post-tasking analysis. Specifically, the Government is required to conduct post-targeting analysis to detect those occasions when a target, i.e., a user of a selector tasked for acquisition under Section 702: 1) is located in the United States; or 2) is a United States person." [redacted] For example, [redacted] To that end, in order to ensure that content is reviewed in a timely manner, NSA has an [redacted] system that reminds analysts to review the content from tasked electronic communications accounts . . . at least five business days after the first acquisition of data and at least every thirty business days thereafter." [redacted]

V. ~~(TS//SI//NF)~~ Resolving [redacted] Within [redacted] Business Days

~~(TS//SI/OC/NF)~~ As discussed above, the Government must conduct post-tasking analysis of Section 702 collection and diligently and promptly respond "to credible indications that a tasked facility has been accessed from the United States." 2014 Mem. Op., at p. 30. This obligation "goes to the heart of the requirement of 50 U.S.C. § 1881a(d)(1)(A) that targeting procedures be reasonably designed to ensure that acquisitions target persons reasonably believed to be outside the United States." *Id.* To help identify targeted electronic communications accounts/addresses/identifiers used by targets located in the United States, NSA uses [redacted] . . to generate and prioritize [redacted] possible use of targeted accounts in the United States." *In re*

DNI/AG 702(g) Certification [redacted] Government's Supplemental Report Regarding NSA's Post-Targeting Analysis, at p. 1 (May 7, 2010). In a letter to the Court dated May 21, 2010, the Government represented that "[t]o ensure that [redacted] do not go unresolved for an unreasonable period of time, NSA [redacted] Letter from (b)(6); (b)(7)(C), NSD, to the Hon. Mary A. McLaughlin, at p. 2 (May 21, 2010); *see also* 2014 Mem. Op., at pp. 29-30 ([redacted]) (emphasis added). As reflected in this quote from the Court's 2014 Memorandum Opinion, it is important to note, however, that [redacted] and NSA must resolve [redacted] as soon as possible.

[redacted]

[redacted]

~~(S//NF)~~ As has been represented to the Court, [redacted] like [redacted] should be resolved as soon as possible, and in no case [redacted]

VI. (U) Waivers

~~(TS//SI/NF)~~ NSA's, FBI's, and CIA's Section 702 minimization procedures all allow for waiver of the destruction requirement for any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-U.S. person located outside the United States but who is located inside the United States at the time of acquisition or is subsequently determined to be a U.S. person on a communication-by-communication basis. *See Minimization Procedures Used by the National Security Agency in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended,* at pp. 9-10 (July 28, 2014) ("A communication identified as a domestic communication . . . will be promptly destroyed upon recognition unless the Director (or Acting Director) of NSA specifically determines, in writing and on a communication-by-communication basis, that the sender or intended recipient of the domestic communication had been properly targeted under section 702 of the Act, and the domestic communication satisfies one or more of the following conditions: (1) such domestic communication is reasonably believed to contain significant foreign intelligence information . . . (2) Such domestic communication does not contain foreign intelligence information but is reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed. . . (3) such domestic communication is reasonably believed to contain technical data base information . . . or information necessary to understand or assess a communications security vulnerability . . . or (4) such domestic communication contains information pertaining to an imminent threat of serious harm to life or property."); *Minimization Procedures Used by the Federal Bureau of Investigation in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended,* at p. 6 (July 28, 2014) ("Any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or is subsequently determined to be a United States person

will be removed from FBI systems upon recognition, unless the Director or Deputy Director of the FBI specifically determines in writing on a communication-by-communication basis that such communication is reasonably believed to contain significant foreign intelligence information, evidence of a crime that has been, is being, or is about to be committed, or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes."); *Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, at p. 8 (July 28, 2014) ("Any communication received by CIA that is acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States but is in fact located inside the United States at the time such communication is acquired or was in fact a United States person at the time of targeting will be destroyed unless the Director of the CIA specifically determines in writing and on a communication-by-communication basis that such communication is reasonably believed to contain significant foreign intelligence information or evidence of a crime that has been, is being, or is about to be committed.").

~~(TS//SI/OC/NF)~~ The NSA, FBI and CIA waiver provisions are limited to situations in which the target, at the time of targeting, was "reasonably believed to be a non-United States person located outside the United States." *Id.; In re DNI/AG 702(g) Certification* [redacted] Mem. Op., at p. 40 (September 20, 2012) (hereinafter "2012 Mem. Op.") (noting that the change to NSA's minimization procedures requiring the NSA Director or Acting Director to determine in writing that "the sender or intended recipient of the domestic communication had been properly targeted under Section 702 of the Act . . . has the practical effect of limiting the reach of the waiver provision to domestic communications acquired with the reasonable but mistaken belief that the target is a non-U.S. person located outside the United States"). This means that the waiver provisions are not available for any communication or information acquired after agency personnel determine that the target is no longer reasonably believed to be a non-United States person located outside the United States, including, for example, any such communications or information acquired during a detasking delay. *See, e.g.*, 2012 Mem. Op. at 40. "Destruction waivers are most frequently sought when [redacted]" *Memorandum for Assistant Attorney General for National Security, United States Department of Justice, RE: Discussion with the Foreign Intelligence Surveillance Court on 24 July 2012 regarding the*

waiver provisions of NSA's minimization procedures governing data acquired pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended, at p. 1 (August 28, 2012). In any situation in which the waiver provisions would apply, agency determinations must be made on a case-by-case basis based on an individualized finding by appropriate personnel. *Id.*

VII. ~~(TS//SI/NF)~~ [redacted] Overcollection

~~(TS//SI/NF)~~ [redacted] Overcollection ("[redacted]O") "occurs when, while collecting communications [redacted] [NSA] also inadvertently acquires other communications that [redacted]" *In Re DNI/AG Certification* [redacted] Government's Supplement to its Response to the Court's Order of January 16, 2009, at p. 4 (March 17, 2009). "NSA has [redacted] to prevent [redacted]O. With regard to minimizing the retention of such information, NSA has enhanced [redacted] to ensure that overcollections are identified and purged before non-targeted information enters NSA's data repositories. Should any overcollected information regarding U.S. persons survive those safeguards, it would have to be destroyed upon recognition." *In Re DNI/AG Certification* [redacted] Mem. Op., at pp. 24-25 (April 7, 2009) (internal citations omitted). Accordingly, all agency personnel who have access to Section 702-acquired information must report any identified or potential incident resulting in overcollected data to their agency's oversight personnel to ensure that it is appropriately addressed.

IX. ~~(S/NF)~~ FBI's Use of a Target's [(b)(1); (b)(3); (b)(7)(E)] [redacted] During its Process to Approve the Acquisition of [(b)(1); (b)(3); (b)(7)(E)] [redacted]

~~(S//NF)~~ After the application of its own targeting procedures to task a selector to Section 702 acquisition for [redacted], NSA may request that the FBI [redacted] (b)(1); (b)(3); (b)(7)(E) from such selector (a "(b)(1); (b)(3); (b)(7)(E)"). Prior to approving the acquisition of (b)(1); (b)(3); (b)(7)(E) [redacted] FBI (b)(1); (b)(3); (b)(7)(E) [redacted] *Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to Be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* ("FBI Targeting Procedures"), at p. 2 (July 28, 2014). "(b)(1); (b)(3); (b)(7)(E) [redacted]

(b)(1); (b)(3); (b)(7)(E)

~~(S//NF)~~ As explained to the Court in a September 2014 letter:

> In order to ensure that its queries of its systems are 'reasonably calculated' to uncover information about a target's location or United States person status, (b)(1); (b)(3); (b)(7)(E)

Supplemental Notice Regarding the Acquisition of (b)(1); (b)(3); (b)(7)(E) OI Tracking No. 126097, at pp. 3-4 (September 30, 2014) (emphasis added). This Notice established the following requirements further clarifying the FBI's obligations with respect to implementing th(b)(1); (b)(3); (b)(7)(E) used by the target:

- ~~(S//NF)~~ With certain limited exceptions,[1] '(b)(1); (b)(3); (b)(7)(E) (b)(1); (b)(3); (b)(7)(E) *Id.* at 4-5 & n.4.

[1] ~~(S//NF)~~ "In certain situations, (b)(1); (b)(3); (b)(7)(E)

- ~~(S//NF)~~ In addition, (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 6.
- ~~(S//NF)~~ (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.*

- ~~(S//NF)~~ "[T]he Government assesses tha(b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 6.
- ~~(S//NF)~~ (b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 10.

(b)(1); (b)(3); (b)(7)(E) [redacted] *Id.* at 4 n.4.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE STANDARD MINIMIZATION PROCEDURES FOR FBI ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH CONDUCTED UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Docket Nos.: Multiple, including (b)(1); (b)(3); (b)(7)(E)

OPINION AND ORDER

On August 8, 2014, the Government filed its "Motion to Amend the Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act (FISA)." The Government requests modifications to the Standard Minimization Procedures (SMPs) for the purpose of disseminating information to the National Center for Missing and Exploited Children (NCMEC) for a law enforcement purpose, and to amend the retention provisions to exempt information from destruction that the Government determines must be retained for litigation-related reasons. The Court will grant the Motion as modified, below.

NCMEC

FISA defines "minimization procedures" as those that, notwithstanding other restrictions, "allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes." 50 U.S.C. § 1801(h)(3). The Government has identified, and continues to identify, FISA-acquired information that is "indicative of a crime related to child exploitation material, including child pornography," and the Attorney General has adopted amendments to the SMPs that would permit the Government to disseminate to NCMEC, for law enforcement purposes, such information that "reasonably appears to be evidence of a crime." Mot. at 4. Modification of the SMPs is required because NCMEC is a non-governmental organization and the SMPs generally restrict disseminations to governmental entities. See SMPs § IV.A.

Congress established NCMEC in 1984 as a non-governmental organization and it is funded through grants administered by the Department of Justice. One of its purposes is to assist

law enforcement in identifying victims of child pornography and other sexual crimes. Indeed, Congress has mandated Department of Justice coordination with NCMEC on these and related issues. See Mot. at 5-8. Furthermore, this Court has approved modifications to these SMPs in individual cases to permit the Government to disseminate information to NCMEC. See Docket Nos. [redacted]. Because of its unique role as a non-governmental organization with a law enforcement function, and because it will be receiving what reasonably appears to be evidence of specific types of crimes for law enforcement purposes, the Government's amendment to the SMPs comply with FISA under Section 1801(h)(3).[1]

FISA requires that any disclosure of FISA information for a law enforcement purpose must be accompanied by a statement that "such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General." 50 U.S.C. § 1806(b). Beyond this statutory restriction, the Government's Motion states that there are policies and practices in place that will prohibit disseminations of FBI-obtained information from NCMEC to Interpol's International Child Sexual Exploitation (ICSE) database, and that more generally if FISA-obtained information were to be used "in a proceeding," advance approval from the Attorney General will be required. Mot. at 8 n.2 & 12. If the Government intends to change these policies or practices, the Government is directed to give prior notice and explanation to the Court.

Litigation Hold

Section III.G. of the SMPs establishes timelines for the destruction of FISA-acquired information. The Government seeks to modify this requirement by adding a provision to Section III.G. that would permit the FBI to retain information temporarily that would otherwise have to be destroyed if the FBI and the Department of Justice's National Security Division "determine[s] that such information is reasonably believed to be necessary for, or potentially discoverable in, administrative, civil, or criminal litigation." Mot. at 15. Such a determination would be made in writing, and would identify the information to be retained and the litigation involved. The information retained under this provision would be accessed only by those involved in the litigation matter and only for a litigation purpose.

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[1]These amended SMPs would also permit the FBI to (b)(1); (b)(3); (b)(7)(E) [redacted] III.C.2.(d).

On October 31, 2013, this Court granted similar relief in the above-captioned docket from the destruction requirement of Section III.G.1(a) on a temporary basis for case files subject to a litigation hold. Since that time the Government has reported to the Court concerning the number of litigation matters and the number of products subject to such holds. The Court also granted separate relief for the retention of information related to (b)(1); (b)(3); (b)(7)(E) [redacted]. The Government requests that the specific relief granted in those matters to remain in effect and that the amended provisions for retention pursuant to this Motion not apply.

The Government requests this relief to eliminate the tension between the destruction requirements contained in the SMPs and obligations to preserve information for litigation in other courts. The restrictions on access that the Government proposes, along with the reporting requirements that would be required, strike an appropriate balance between the competing concerns of not retaining data longer than necessary and having the Government comply with its litigation obligations.

The Court having reviewed the Government's Motion, and finding that the modified minimization procedures proposed in the Motion meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) and 1821(4), it is HEREBY ORDERED that the Motion is GRANTED. In addition, the Court ORDERS as follows:

(1) On or before December 31 of each calendar year, the Government shall submit in writing a report to the Court containing the following information: (a) the number of FISA-acquired products disseminated or disclosed to NCEMC; (b) the number of FISA dockets from which collected information was disseminated or disclosed to NCEMC; and, (c) the number of disseminations or disclosures by NCEMC to other law enforcement entitites of FISA-acquired information.

(2) Prior to implementing changes to policies or practices concerning: (i) the release of FISA-acquired information to Interpol's ICSE; or (ii) approval to use FISA-acquired information disseminated to NCMEC in any proceeding, the Government shall make a written submission to the Court describing such changes and explaining why implementing them would be consistent with applicable minimization procedures and statutory minimization requirements.

(3) On or before December 31 of each calendar year, the Government shall submit in writing a report to the Court containing the following information: (a) all administrative, civil, or criminal litigation matters necessitating a "litigation hold" of FBI investigative case files associated with FISA dockets; (b) the docket numbers and court information for

those administrative, civil, or criminal litigation matters; (c) all FISA dockets (and the dates of their expiration) associated with the FBI investigative case files subject to a "litigation hold;" and (d) a description of the status of the litigation matters discussed in the report.

(4) The terms of the Orders issued in (b)(1); (b)(3); (b)(7)(E) [redacted] shall remain in effect, notwithstanding the approval of these Standard Minimization Procedures.

(5) The Court's Order of October 31, 2013, in this docket granting the Government's "Motion to Temporarily Exempt Unreviewed Communications in Multiple Dockets from Section III.G.(1)(a) of the FBI Standard Minimization Procedures for Electronic Surveillance and Physical Search" is hereby rescinded.

Entered this 11th day of August, 2014.

Rosemary M Collyer

ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court

I, (b)(6) [redacted] Deputy Clerk, FISC, certify that this document is a true and correct copy of the original (b)(6) [redacted]

All withheld information exempt under (b)(1) and (b)(3) unless otherwise noted.

Approved for Public Release

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U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
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CLERK OF COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted] ~~UNDER SEAL~~ [redacted]

(U) GOVERNMENT'S RESPONSE TO THE COURT'S ORDER OF JULY 7, 2015

~~(S//OC/NF)~~ The United States respectfully submits this response as required by the Order of the Foreign Intelligence Surveillance Court (FISC or Court) issued on July 7, 2015, in the above-captioned docket numbers. The Order directs the government to file a written submission explaining whether an extension of the time limit for the Court to complete its review of and issue orders concerning proposed DNI/AG 702(g) Certifications [redacted], and the accompanying targeting and minimization procedures, with the assistance of amicus curiae would be consistent with national security. As discussed below, the government respectfully submits that if the

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~~Reason: Multiple Sources~~
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Court were to appoint an amicus curiae to assist the Court in its consideration of the [redacted] Certifications, an extension of the Court's thirty-day deadline to conduct its review would be consistent with national security.

(U) **Procedural Background**

~~(S//OC/NF)~~ On June 15, 2015, the government submitted to the Court in draft form certain documents associated with proposed DNI/AG 702(g) Certifications [redacted] Included among these documents were the draft targeting procedures to be used by the National Security Agency (NSA) and the draft minimization procedures to be used by the NSA, Federal Bureau of Investigation (FBI), and Central Intelligence Agency (CIA), under proposed DNI/AG 702(g) Certifications [redacted] ("the 2015 Reauthorization

Certifications").[1] Proposed DNI/AG 702(g) Certifications [redacted] would reauthorize DNI/AG 702(g) Certifications [redacted] ("the 2014 Certifications"), which currently expire on August 28, 2015.

~~(S//OC/NF)~~ On or about July 15, 2015, the government intends to file with the Court the 2015 Reauthorization Certifications, targeting and minimization procedures, and a memorandum addressing changes to those procedures as compared to those submitted with the 2014 Certifications. In accordance with 50 U.S.C. § 1881a(i)(1)(B) and (3), the Court is required to conduct its review and issue an order and written statement of the reasons for the order within thirty days after section 702(g) certifications are submitted to the Court in final form. This deadline, however, may be extended "as necessary for good cause in a manner consistent with national security." 50 U.S.C. § 1881a(j)(2).

~~(S//OC/NF)~~ On July 7, 2015, the Honorable Thomas F. Hogan issued an Order regarding the provisions of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, enacted on June 2, 2015 (USA FREEDOM Act), that amended 50 U.S.C. § 1803 to create a framework for the participation of amicus curiae in proceedings before the

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[1] ~~(S)~~ The FBI targeting procedures, and National Counterterrorism Center (NCTC) minimization procedures, that will be submitted with the 2015 Reauthorization Certifications are the same as those submitted with DNI/AG 702(g) Certifications [redacted], and were most recently approved by the Court on August 26, 2014.

Court. *See In re DNI/AG 702(g) Certification* [redacted] Order (FISA Ct. July 7, 2015) (hereinafter "July 7 Order"). Specifically, the USA FREEDOM Act requires that, consistent with statutory requirements that the Court "act expeditiously or within a stated time," the Court "shall appoint" a designated amicus curiae to assist in considering "any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such an appointment is not appropriate." 50 U.S.C. § 1803(i)(2)(A). In addition, the Court "may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate." *Id.* § 1803(i)(2)(B). The July 7 Order stated that the Court is considering appointment of an amicus curiae for its review of the 2015 Reauthorization Certifications and acknowledges that "[a]bsent an extension of time under section 702(j)(2), it would be difficult to provide for meaningful assistance by an amicus curiae in considering the 2015 Certifications and revised procedures."[2] July 7 Order, at 3. The

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[2] ~~(S//OC/NF)~~ In the July 7 Order, the Court noted that, "[b]ased on its review of the drafts filed on June 15, 2015," it believes that the 2015 Reauthorization Certifications and revised targeting and minimization procedures are "likely to present one or more novel or significant interpretations of the law, which would require the Court to consider an appointment of an amicus curiae." July 7 Order, at 3. However, the Court also noted that it "has not yet had the benefit of the memorandum that the government is expected to file with the final form of the 2015 Certifications and revised procedures." *Id.* The government

July 7 Order further directs that the government submit a written response by July 14, 2015, explaining "whether – and if so, how long – an extension of the time for the Court to review the 2015 Certifications and revised procedures would be consistent with national security, taking into account that the government would be authorized to continue to acquire foreign intelligence information under the 2014 Certifications and procedures, as now in effect, for the duration of an extended period for Court review." *Id.* at 4.

(U) **Response**

~~(S//OC/NF)~~ This Court has recognized that "[t]he government's national security interest in conducting acquisitions pursuant to Section 702 'is of the highest order of magnitude.'" *In Re DNI/AG 702 Certifications* [redacted] Mem. Op. at 39 (FISA Ct. August 26, 2014) (quoting *In re DNI/AG Certification* [redacted] Mem. Op. at 37 (FISA Ct. Sept. 4, 2008)). As noted by the Court, however, were the Court to issue orders under 50 U.S.C. § 1881a(j)(2) extending the time limits for its review of the certifications so that the Court could appoint amicus curiae, the authorizations in the certifications being reauthorized, DNI/AG 702(g) Certification

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submits that the Court may determine, following review of that memorandum, that appointment of an amicus curiae is not necessary.

[redacted] would, by operation of 50 U.S.C. § 1881a(i)(5)(B), continue despite their expiration dates.[3] The government respectfully submits that this result would be consistent with national security because it would allow the government's acquisition of vitally important foreign intelligence information under the 2014 Certifications to continue pending the completion of the Court's review of the 2015 Reauthorization Certifications.

~~(S//OC/NF)~~ As will be described in detail in the memorandum submitted in support of the 2015 Reauthorization Certifications, which the government intends to file with the Court on or about July 15, 2015, the 2015 Reauthorization Certifications and attached targeting procedures do not expand the government's targeting authority as compared with what is already authorized by the 2014 Certifications. Similarly, although certain changes have clarified and expanded several provisions in the NSA, CIA, and FBI minimization procedures, the extent to which these changes provide immediate operational benefits is relatively limited. Therefore, the government assesses

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[3] ~~(S//OC/NF)~~ The government's intended filing of the proposed 2015 Reauthorization Certifications on or about July 15, 2015, will comport with 50 U.S.C. § 1881a(i)(5)(A), which requires that if the government seeks to reauthorize an authorization issued under 50 U.S.C. § 1881a(a), the government must, to the extent practicable, submit to the Court a new certification executed under 50 U.S.C. § 1881a(g), with supporting documents, at least thirty days before the expiration of the certification being reauthorized. If a new certification is filed in accordance with 50 U.S.C. § 1881a(i)(5)(A), 50 U.S.C. § 1881a(i)(5)(B) provides that the existing certification being reauthorized shall remain in effect, notwithstanding its expiration date, until the Court issues an order under 50 U.S.C. § 1881a(i)(3) with respect to the new certification.

that a reasonable delay in the approval and implementation of the 2015 Reauthorization Certifications would be consistent with national security.[4]

~~(S//OC/NF)~~ In 2011, this Court, first at the government's request and then *sua sponte*, ultimately extended its time period for review pursuant to 50 U.S.C. § 1881a(j)(2) for a total of approximately 153 days. This extension was accomplished in three separate orders in durations of 73 days,[5] 60 days,[6] and finally by 20 days.[7] In each case, the Court considered all relevant circumstances, including appropriate durations based upon the complexity of the issues and posture of its review, before issuing each order. Consistent with this past practice and based upon its understanding of current circumstances, the government assesses that an extension of 60 to 90 days with respect to the 2015 Reauthorization Certifications would be consistent with national security. The government respectfully submits that in determining whether a further extension would be consistent with national security, all relevant circumstances, including

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[4] ~~(S//OC/NF)~~ The government notes that under different circumstances, such as the submission of a new, additional certification or an important change to the targeting or minimization procedures that provides the government with expanded authorities, an extension may not be consistent with national security.

[5] ~~(S)~~ *See, e.g., In re DNI/AG 702(g) Certification* [redacted], Order (FISA Ct. May 9, 2011) (noting original deadline of May 10, 2011, and extending review period to July 22, 2011).

[6] ~~(S)~~ *See, e.g., In re DNI/AG 702(g) Certification* [redacted], Order (FISA Ct. July 14, 2011) (extending deadline from July 22, 2011, to September 20, 2011).

[7] ~~(S)~~ *See, e.g., In re DNI/AG 702(g) Certification* [redacted], Order (FISA Ct. Sept. 14, 2011) (summarizing prior extensions and extending time in same matter to Oct. 10, 2011).

complexity of the issues, posture of the Court's review and length of any additional proposed extension would need to be assessed at that time.[8]

~~(S//OC/NF)~~ Should the Court choose to extend the time limits for its review of the 2015 Reauthorization Certifications, pursuant to 50 U.S.C. § 1881a(j)(2), the government would request, consistent with prior practice, that the Court issue a Notice of Extension to the electronic communication service providers that have received directives pursuant to 50 U.S.C. § 1881a(h) and the 2014 Certifications informing them of the extension and that the existing directives shall remain in effect for the duration of the extension. A Notice of Extension for providers will help ensure the continued cooperation of the providers under the 2014 Certifications.

~~(S//OC/NF)~~ Additionally, and as was noted in the Court's extension order of September 14, 2011, any order that may result in the immediate, or near immediate, transition from one set of certifications to another set of certifications may, for technical reasons, compromise the government's ability to seamlessly transition from one set of

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[8] ~~(S//OC/NF)~~ Although the government assesses that an extension would be consistent with national security, the government notes that extensions are not without costs. Whenever a certification expires, the expiration date assigned to each individual tasking with certain providers must be modified. Each extension requires an additional set of modifications to these expiration dates. Preliminary assessments, based on past experience, are that an extension would likely cost [redacted] to effectuate and require the time of multiple personnel at the FBI and the providers over a several day period.

Certifications to the next.[9] As an abrupt transition between Certifications may result in collection loss that could impact national security and/or cause compliance issues, the government respectfully requests that any extension of time take into account the fact that the government will need approximately 7 to 10 days' notice prior to the Court's final order pursuant to 50 U.S.C. § 1881a(i)(3) to transition between Certifications in a responsible manner.

---- *The remainder of this page intentionally left blank.* ----

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[9] ~~(S)~~ *See In re DNI/AG 702(g) Certification* [redacted], Order at 2 ("[T]he Court orally informed the government that it intended to issue a one-week extension. The government informed the Court that, for technical reasons, such a brief extension would compromise the government's ability to ensure a seamless transition from one Certification to the next. Instead, the government requested that the Court issue an extension for a longer period of time.").

(U) Conclusion

~~(S//OC/NF)~~ For the foregoing reasons, the government respectfully submits that should the Court issue orders under 50 U.S.C. § 1881a(j)(2) extending the time limit for the Court to complete its review of, and issue orders under 50 U.S.C. § 1881a(i)(3) concerning, proposed DNI/AG 702(g) Certifications [redacted], such an extension would be consistent with national security. Additionally, the government respectfully requests that the Court issue a Notice of Extension consistent with any such orders.

Respectfully submitted,

John P. Carlin
Assistant Attorney General

Stuart J. Evans
Deputy Assistant Attorney General

By: [redacted]
(b)(6); (b)(7)(C)

Deputy Chief, Operations Section
Office of Intelligence
National Security Division
U.S. Department of Justice

All withheld information exempt under (b)(1) and (b)(3) unless otherwise noted.

Approved for Public Release

Filed
United States Foreign
Intelligence Surveillance Court

AUG 13 2015

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER APPOINTING AN AMICUS CURIAE

For the reasons set out below, the Court appoints Amy Jeffress to serve as amicus curiae in the above-captioned matter for the purpose of assisting the Court in considering the issues specified herein. This appointment is made pursuant to section 103(i)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (FISA), codified at 50 U.S.C. § 1803(i)(2)(B), as most recently amended by the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268. This Order also addresses certain administrative matters relating to the participation of the amicus.

Background

On July 15, 2015, the government submitted [redacted] certifications and accompanying targeting and minimization procedures ("the 2015 Certifications") pursuant to section 702 of FISA, codified at 50 U.S.C. § 1881a. The 2015 Certifications reauthorize certifications under

section 702 that the Court approved on August 26, 2014 ("the 2014 Certifications"). They also amend the 2014 Certifications, as well as predecessor certifications under section 702, to provide that information acquired pursuant to those certifications shall henceforward be governed by the minimization procedures that accompany the 2015 Certifications.

The government had submitted versions of the 2015 Certifications in draft form on June 15, 2015. After reviewing those drafts, the Court concluded "that this matter is likely to present one or more novel or significant interpretations of the law, which would require the Court to consider appointment of an amicus curiae" under section 103(i)(2). See [redacted], Order issued on July 7, 2015 ("July 7 Order"), at 3. The Court further noted that the 30-day review period specified by section 702(i)(1)(B) would, as a practical matter, foreclose amicus participation. Id.

The Court may, however, extend that 30-day review period "as necessary for good cause in a manner consistent with national security." § 702(j)(2). To help the Court decide "whether to extend the time it would have to act on the 2015 Certifications and revised procedures in order to allow for meaningful amicus assistance in reviewing them," the Court ordered the government to "explain in writing whether – and if so, how long – an extension of the time for the Court to review the 2015 Certifications and revised procedures would be consistent with national security." July 7 Order at 4.

On July 14, 2015, the government timely filed its Response to the July 7 Order, advising that "the government assesses that an extension of 60 to 90 days . . . would be consistent with national security." See [redacted], Government's Response to the Court's Order of July 7, 2015, filed on July 14, 2015, at 7.

On July 23, 2015, the Court found that "the need for an extension to allow for [amicus] participation constitutes 'good cause'" for an extension under section 702(j)(2). See [redacted] and predecessor dockets, Order issued on July 23, 2015, at 3. Accordingly, it extended "the period for Court review under section 702(i)(1)(B) for 90 days, such that this review must be completed no later than November 12, 2015." Id. The Court explained that it

> does not expect or intend to use the entirety of this extended period. Rather, in order to avoid the burdens and costs that the government has ascribed to implementing multiple extensions, see Response at 8 n.8, the Court has decided in a single order to extend the period to the outermost date that is consistent with the government's assessment of national security.

Id.

Appointment of Amicus Curiae

By the terms of section 103(i)(2)(A), the court "shall appoint" to serve as amicus curiae an individual who has been designated as eligible for such service under section 103(i)(1) "to assist . . . in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate." Under section 103(i)(1), the presiding judges of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review have until November 29, 2015, to jointly designate individuals as eligible to serve as amicus under section 103(i)(1).[1] To date, no such designations have been made. Under present circumstances, therefore, the appointment of such an individual "is not appropriate" under section 103(i)(2)(A), because, as of yet, there are no designated individuals who can serve.

[1] Section 103(i)(1) requires such designations to be made "not later than 180 days after" the date of enactment of the USA FREEDOM Act, which was June 2, 2015.

Section 103(i)(2)(B) provides that the Court "may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate." Persons appointed under this provision need not have been designated under section 103(i)(1). They shall, however, "be persons who are determined to be eligible for access to classified information, if such access is necessary to participate in the matters in which they may be appointed." § 103(i)(3)(B).

Here, the Court finds it appropriate to appoint Amy Jeffress as amicus curiae under section 103(i)(2)(B). Ms. Jeffress is well qualified to assist the Court in considering the issues specified herein. The Security and Emergency Planning Staff (SEPS) of the Department of Justice has advised that she is eligible for access to classified information.

Accordingly, it is HEREBY ORDERED as follows:

(1) Amy Jeffress is appointed as amicus curiae (hereinafter "amicus") in this matter pursuant to section 103(i)(2)(B).

(2) Pursuant to section 702(i)(2)(C) and (i)(3)(A)-(B), the Court must assess, among other things: (a) whether the minimization procedures that accompany the 2015 Certifications meet the definition of minimization procedures under 50 U.S.C. § 1801(h) or § 1821(4), as appropriate; and (b) whether those procedures are consistent with the fourth amendment to the Constitution of the United States. The amicus is directed to address whether these requirements are satisfied in view of the provisions of the procedures that apply to:

> (i) queries of information obtained under section 702, particularly insofar as queries may be designed to return information concerning United States persons, see NSA Minimization Procedures at 7, FBI Minimization Procedures at 11-12, and CIA Minimization Procedures at 3-4; and
>
> (ii) preservation for litigation purposes of information otherwise required to be destroyed under the minimization procedures, see NSA Minimization Procedures

at 8-9, FBI Minimization Procedures at 24-25, and CIA Minimization Procedures at 10-11.

The Court anticipates setting a briefing schedule at a later date.

(3) Pursuant to section 103(i)(6)(A)(i), the Court has determined that the materials identified in Exhibit A (attached hereto) are relevant to the duties of the amicus. By August 21, 2015, or after receiving confirmation from SEPS that the amicus has received the appropriate clearances and access approvals for such materials, whichever is later, the Clerk of the Court shall make the materials identified in Exhibit A available to the amicus.

(4) With the guidance and assistance of SEPS, the amicus shall handle classified information in accordance with the Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court And the Foreign Intelligence Surveillance Court of Review (Feb. 21, 2013) ("Security Procedures") (copy attached at Exhibit B). For purposes of the Security Procedures, the amicus shall be regarded as court personnel.

(5) Section 103(i)(6)(C) provides: "An amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States." The Court believes that, in this matter, the amicus's access to classified information pursuant to paragraphs (3) and (4) above is consistent with the national security of the United States. If, however, the government believes otherwise, it shall provide written notice and explanation to the Court by August 18, 2015.

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(6) The attorney for the government shall ensure that the Attorney General receives a copy of this Order pursuant to the notification requirement at section 103(i)(7).

ENTERED this 13th day of August 2015, in [redacted]

[redacted]

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

(b)(6) [redacted]

FISC, certify
true and correct copy of the
(b)(6) [redacted]

EXHIBIT A

Foreign Intelligence Surveillance Court of Review Materials

In re Directives, FISCR Docket No. 08-01, Opinion issued on Aug. 22, 2008

Foreign Intelligence Surveillance Court Materials

From [redacted]:

Order issued on July 7, 2015

Government's Response to the Court's Order of July 7, 2015, filed on July 14, 2015

From [redacted], and predecessor dockets:

Order Appointing Amicus Curiae (to which this Exhibit A is attached)

Order issued on July 23, 2015

The Government's filing on July 15, 2015, of its Ex Parte Submission Of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications (including Certifications [redacted], accompanying targeting and minimization procedures, and supporting affidavits; unclassified discussion of the government's oversight efforts regarding Section 702 implementation; 2015 Summary of Notable Section 702 Requirements; and redline-strikeout versions of selected documents)

From predecessor 702(i) Dockets:

All Opinions or Orders approving or disapproving certifications, targeting procedures, and minimization procedures pursuant to Section 702(i)(3), including written statements of the reasons for such approval or disapproval

From [redacted], et al.:

Opinion and Order issued on Aug. 11, 2014

Exhibit B

Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court And the Foreign Intelligence Surveillance Court of Review

1. *Purpose.* The purpose of these procedures, as revised, is to meet the court security requirements of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, as amended ("the Act").[1] These security procedures apply to both the Foreign Intelligence Surveillance Court established under § 103(a) of the Act and the Foreign Intelligence Surveillance Court of Review established under § 103(b), and to all supporting personnel of said courts. Except for the judges of the two courts, the same facilities, personnel, and security procedures shall be used by both courts, subject to such exceptions as may be authorized by the Chief Justice. These procedures have been adopted in consultation with the Attorney General and the Director of National Intelligence as required by the Act and supersede the security procedures issued on May 18, 1979. The term "court" as used herein refers to both Courts.

2. *Quarters and Facilities.* The quarters and facilities of the court, including a hearing room, work chambers, and storage facilities for court records, shall be constructed and maintained in accordance with applicable construction standards pertaining to sensitive compartmented information facilities adopted by the Director of National Intelligence. The location of court facilities may be changed by the court from time to time in consultation with the Chief Justice, the Attorney General, and the Director of National Intelligence.

3. *Members of the Court.* Judges to be designated as members of the court pursuant to § 103 of the Act shall be subject, before designation, to an updated background investigation to be conducted by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information, insofar as they may be deemed applicable to the court. If a question of suitability to serve on the court is raised at any time after initial appointment, the matter is to be referred to the Chief Justice, who may elect to consult with the Attorney General and the Director of National Intelligence regarding the security significance of the matter before taking such action as the Chief Justice deems appropriate.

4. *Appointment of Personnel.* The court may have a Clerk of Court and such other legal, administrative or support personnel as it may require. The court may also arrange for the services of a court reporter, as it deems appropriate. Such personnel may have access to court

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[1] Section 103(c) of the Act reads in pertinent part: "The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." *See also* § 302(e) (physical search proceedings); § 501(f)(4) (proceedings regarding the production of records or other tangible things); § 702(k)(1) (proceedings regarding certain acquisitions of foreign intelligence information).

records and proceedings, including sensitive compartmented information or other classified national security information contained therein, only as authorized by the court and only to the extent necessary to the performance of an official function. Personnel appointed by or designated for service to the court shall undergo appropriate background investigation by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information. All court personnel having access to sensitive compartmented information or other classified national security information shall sign appropriate security agreements. If a question concerning the security clearance of court personnel is raised subsequent to appointment, the matter shall be referred to the court, which may consult with the Attorney General and the Director of National Intelligence regarding its security significance before taking such action as it deems appropriate.

5. *Security Officer.* The court shall designate as security officer the Director, Security and Emergency Planning Staff, Department of Justice, or another individual who has demonstrated competence in providing security for classified national security information and sensitive compartmented information from among candidates submitted by the Attorney General and the Director of National Intelligence. One or more alternate security officers may be designated by the court as required. The security officer shall serve at the pleasure of the court and will not be subject to removal by the Executive Branch without the concurrence of the court. The security officer (and alternates) may be Executive Branch employees and may perform other duties in the Executive Branch, so long as such duties do not conflict with their responsibilities to the court. Additional personnel may be provided by the Department of Justice to perform incidental security and administrative functions for the court provided appropriate security clearances have been obtained.

The security officer shall be responsible to the court for document, physical, personnel, and communications security. Under the supervision of the court, the security officer shall take measures reasonably necessary to fulfill these responsibilities. The security officer shall arrange, at a minimum, for an annual security review of court quarters and facilities and shall submit a report to the court.

6. *Security Functions of the Clerk of Court.* The Clerk of Court, with the advice and concurrence of the security officer, shall establish and maintain a control and accountability system for all records of proceedings before the court that involve classified national security information, and any other records or documents the court may designate. The Clerk, in consultation with the security officer, shall further ensure that all court records are marked with appropriate security classifications in accordance with Executive Order 13526 and its successors, and procedures to be established by the court.

7. *Court Proceedings.* The court shall ensure that all court records (including notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch security standards for storing and handling

classified national security information. Records of the court shall not be removed from its premises except in accordance with the Act, applicable court rule, and these procedures. Insofar as the court may direct, the Clerk of the Court may, in coordination with the security officer, arrange for off-site storage of court records, provided that classified national security information contained therein is maintained according to the above-referenced security standards. Reports and exhibits submitted in support of applications to the court may be returned by the court to the applicant on a trust receipt basis.

Whenever a party other than the government makes a submission to the court that potentially contains classified national security information, the court shall promptly coordinate with the security officer to determine whether the submission contains classified national security information. The security officer shall, as directed by the court, consult with appropriate executive branch officials with regard to such a determination. The court may consider the submission while such a determination is pending, provided that the court safeguards the information in question as classified national security information in accordance with these procedures. The security officer shall, after consulting with the court, advise the parties of the results of the determination. If it is determined that the submission does contain classified national security information, the security officer shall ensure that it is marked with appropriate classification markings and the Clerk of Court shall ensure that it is handled in accordance with those markings under these procedures.

8. *Security Procedures for Section 102(a) and Section 302(a).* Certifications transmitted by the Attorney General to the court under seal pursuant to Section 102(a) or Section 302(a) of the Act shall be numbered in sequence by the Clerk of Court, who shall maintain a record of all certifications received by the designated number and date of receipt.

Certifications received by the court for retention only shall be filed under seal in separate storage compartments. They shall only be accessed jointly by a representative designated by the court and a representative of the Executive Branch designated by the Attorney General. They may be unsealed only in accordance with the provisions of the Act.

9. *Training.* Members of the court and court personnel shall be briefed on security measures appropriate to the functions of the court by designees of the Attorney General and the Director of National Intelligence.

10. *Term.* These procedures shall remain in effect until modified in writing by the Chief Justice after consultation with the Attorney General and the Director of National Intelligence.

Issued this 21st day of FEBRUARY, 2013, after consultation with the Attorney General of the United States and the Director of National Intelligence as required by the Foreign Intelligence Surveillance Act.

John G. Roberts, Jr.
Chief Justice of the United States

The Attorney General concurs in the procedures for safeguarding certifications filed under Section 102(a) or Section 302(a) of the Act, as set forth in paragraph 8.[2]

Eric H. Holder, Jr.
Attorney General of the United States

[2] Section 103(c) provides that the Chief Justice shall establish security procedures for the court in consultation with the Attorney General and the Director of National Intelligence. Sections 102(a)(3) and 302(a)(3) provide that certifications of the Attorney General issued in accordance with Section 102(a)(1) or Section 302(a)(1)(A) of the Act shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence.

All withheld information exempt under (b)(1) and (b)(3) unless otherwise noted. Approved for Public Release

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U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2015 AUG 18 PM 5:05
LEEANN FLYNN HALL
CLERK OF COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted] UNDER SEAL [redacted]

~~(S)~~ **NOTICE CONCERNING THE COURT'S ORDER OF AUGUST 13, 2015, APPOINTING AN AMICUS CURIAE**

~~(S)~~ By Order dated August 13, 2015, this Court appointed Amy Jeffress as amicus curiae (hereinafter "amicus") in the above-captioned matter. The Court also determined that materials identified in Exhibit A to the Order are relevant to the duties of the amicus, and that the provision of those materials to her was consistent with the national security of the United States. Accordingly, the Order directed that by August 21, 2015, or after receiving confirmation that the amicus has received the appropriate clearances and access approvals for such materials, whichever is later, the Clerk of the

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Classified by:	Chief, Operations Section, OI, NSD, DOJ
Reason:	Multiple Sources
Declassify on:	20400815

Court was to make those materials available to the amicus. The Order further directed the government to provide written notice and explanation to the Court by August 18, 2015, if the government did not believe that the amicus's access to the classified information in the materials identified in Exhibit A to the Order was consistent with the national security of the United States.

~~(S)~~ The government hereby notifies the Court that the government believes the amicus's access to the classified information in the materials identified in Exhibit A to the Order would be consistent with the national security of the United States, provided that she has received the appropriate clearances and access approvals for such information.

Respectfully submitted,

John P. Carlin
Assistant Attorney General

Stuart J. Evans
Deputy Assistant Attorney General

(b)(6); (b)(7)(C)

By: [redacted]

Office of Intelligence
National Security Division
U.S. Department of Justice

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Approved for Public Release

Filed
United States Foreign
Intelligence Surveillance Court

SEP 16 2015

LeeAnn Flynn Hall, Clerk of Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

BRIEFING ORDER

On July 15, 2015, the government submitted [redacted] certifications and accompanying targeting and minimization procedures ("the 2015 Certifications") pursuant to section 702 of FISA, codified at 50 U.S.C. § 1881a. The 2015 Certifications reauthorize certifications under section 702 that the Court approved on August 26, 2014 ("the 2014 Certifications"). They also amend the 2014 Certifications, as well as predecessor certifications under section 702, to provide that information acquired pursuant to those certifications shall henceforward be governed by the minimization procedures that accompany the 2015 Certifications.

The government had submitted versions of the 2015 Certifications in draft form on June

15, 2015. After reviewing those drafts, the Court concluded "that this matter is likely to present one or more novel or significant interpretations of the law, which would require the Court to consider appointment of an amicus curiae" under section 103(i)(2). See [redacted] Order issued on July 7, 2015 ("July 7 Order"), at 3. The Court further noted that the 30-day review period specified by section 702(i)(1)(B) would, as a practical matter, foreclose amicus curiae (hereinafter "amicus") participation. Id.

The Court may, however, extend that 30-day review period "as necessary for good cause in a manner consistent with national security." § 702(j)(2). To help the Court decide "whether to extend the time it would have to act on the 2015 Certifications and revised procedures in order to allow for meaningful amicus assistance in reviewing them," the Court ordered the government to "explain in writing whether – and if so, how long – an extension of the time for the Court to review the 2015 Certifications and revised procedures would be consistent with national security." July 7 Order at 4.

On July 14, 2015, the government timely filed its Response to the July 7 Order, advising that "the government assesses that an extension of 60 to 90 days . . . would be consistent with national security." See [redacted], Government's Response to the Court's Order of July 7, 2015, filed on July 14, 2015, at 7.

On July 23, 2015, the Court found that "the need for an extension to allow for [amicus] participation constitutes 'good cause'" for an extension under section 702(j)(2). See [redacted] Order issued on July 23, 2015, at 3. Accordingly, it extended "the period for Court review under section 702(i)(1)(B) for

90 days, such that this review must be completed no later than November 12, 2015." Id.

On August 13, 2015, the Court appointed Amy Jeffress as amicus in this matter pursuant to section 103(i)(2)(B) of the Foreign Intelligence Surveillance Act of 1978, codified at 50 U.S.C. § 1803(i)(2)(B), noting that it anticipated setting a briefing schedule at a later date. See [redacted], Order Appointing An Amicus Curiae, issued on August 13, 2015 ("August 13 Order"), at 4-5. The August 13 Order identified the following issues to be addressed by the amicus:

> Pursuant to section 702(i)(2)(C) and (i)(3)(A)-(B), the Court must assess, among other things: (a) whether the minimization procedures that accompany the 2015 Certifications meet the definition of minimization procedures under 50 U.S.C. § 1801(h) or § 1821(4), as appropriate; and (b) whether those procedures are consistent with the fourth amendment to the Constitution of the United States. The amicus is directed to address whether these requirements are satisfied in view of the provisions of the procedures that apply to:
>
> > (i) queries of information obtained under section 702, particularly insofar as queries may be designed to return information concerning United States persons, see NSA Minimization Procedures at 7, FBI Minimization Procedures at 11-12, and CIA Minimization Procedures at 3-4; and
> >
> > (ii) preservation for litigation purposes of information otherwise required to be destroyed under the minimization procedures, see NSA Minimization Procedures at 8-9, FBI Minimization Procedures at 24-25, and CIA Minimization Procedures at 10-11.

Id.

The August 13 Order further outlined the Court's plan for providing the amicus with access to the relevant materials after confirming that she had received the appropriate clearances and access approvals. Id. at 5. It also gave the government an opportunity to provide a written notice and explanation if it believed this plan was inconsistent with the national security of the

United States. Id. On August 18, 2015, the government notified the Court that it believed the amicus' access to relevant materials was consistent with the national security of the United States, provided she had received appropriate clearances and access approvals. See [redacted] Notice Concerning The Court's Order of August 13, 2015, Appointing An Amicus Curiae, filed on August 18, 2015, at 2. The Court has confirmed that the amicus has the appropriate clearances and access approvals; the amicus has reviewed the relevant materials; and the Court is now prepared to set a briefing schedule.

Accordingly, it is HEREBY ORDERED as follows:

The amicus and the government shall file briefs addressing the aforementioned issues outlined at pages 4-5 of the August 13 Order no later than 2 PM on October 16, 2015. The Court anticipates receiving oral arguments on the same issues from the amicus and the government at 2 PM on October 20, 2015, if, after its review of the briefs, the Court determines that oral arguments would be beneficial.

ENTERED this 16th day of September, 2015, [redacted]

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

All withheld information exempt under (b)(1), (b)(3), and (b)(7)(E). Approved for Public Release

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535-0001

October 20, 2014

The Honorable Thomas F. Hogan
United States Foreign Intelligence Surveillance Court
333 Constitutional Avenue, NW
Washington, DC 20001

Dear Judge Hogan:

(U//FOUO) Subsection 702(1)(3) of the Foreign Intelligence Surveillance Act, as amended ("the Act"), requires that the head of each element of the Intelligence Community conducting an acquisition authorized under subsection 702(a) of the Act shall conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. The Federal Bureau of Investigation has conducted acquisitions authorized under subsection 702(a) and provides the attached report to fulfill the reporting requirement for the period September 1, 2012, to August 31, 2013.

(U//FOUO) Should you have any questions, please contact James A. Baker, General Counsel.

Sincerely,

James B. Comey
Director

Enclosure

This correspondence may be downgraded to FOR OFFICIAL USE ONLY upon removal of the enclosure.

(U) ANNUAL REPORT ISSUED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

(U//FOUO) The report is made pursuant to the requirements of Section 702(*l*)(3) of the Foreign Intelligence Surveillance Act, as amended (FISA). This annual report covers the period from September 1, 2012, through August 31, 2013. This report is provided to the Foreign Intelligence Surveillance Court (FISC), the Attorney General, the Director of National Intelligence, the United States Senate Select Committee on Intelligence and the United States House of Representatives Permanent Select Committee on Intelligence, and the United States Senate Committee on the Judiciary and the United States House of Representatives Judiciary Committee.

FISA INFORMATION

(U//FOUO) This document contains information from Foreign Intelligence Surveillance Act (FISA) collection, including information collected pursuant to FISA Section 702. The FISA information, and any information derived therefrom, may not be used in any foreign or domestic criminal, administrative, or other proceeding without the advance authorization of the Attorney General. If concerning a United States person(s), this information may be disseminated to a foreign government only with prior authorization from FBI Headquarters. Any reproduction, dissemination, or communication (including, but not limited to, oral briefings) of this information must be accompanied by a statement of these restrictions.

I. (U//FOUO) The FBI's Role in the Implementation of FISA Section 702

~~(S//NF)~~ During this reporting period, the Federal Bureau of Investigation (FBI) has been authorized by the FISC, per its approval of certifications filed for the period of [redacted], and [redacted], to implement Section 702 in the following ways:

- ~~(S//NF)~~ The FBI [redacted] foreign intelligence information in the form of [redacted] A selector [redacted] is an identifier for internet communications, such as an email address. The [redacted] must be conducted pursuant to the FBI's targeting procedures.[1]

- ~~(S//NF)~~ The FBI provides [redacted]

[1] [redacted], both the CIA and the NSA apply their own court-approved minimization procedures.

~~Classified By: J21J24T75~~
~~Derived From: FBI NSIC, dated 20140809~~
~~Declassify On: 20390809~~

[redacted]

- ~~(S//NF)~~ The FBI retains raw data in its searchable database systems for analysis. The FBI, in consultation with the Office of the Director of National Intelligence and the Department of Justice National Security Division, has developed a variety of internal protocols to ensure agents and analysts comply with the FBI's minimization procedures in utilizing this data.

H. (U//FOUO) Foreign Intelligence Information Aquired under FISA Subsection 702(a)

~~(S//NF/FISA)~~ Section 702(*l*)(3)(A) requires the head of each element of the United States Intelligence Community (USIC) conducting an acquisition authorized under subsection (a) to conduct "an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition." During this reporting period, the FBI has conducted acquisitions under Section 702(a) of FISA. Further, the FBI has determined that it has acquired valuable foreign intelligence information pursuant to Section 702(a). Examples of the valuable foreign intelligence information that has been obtained through use of this subsection include:

- ~~(S//NF//FISA)~~ [redacted]
- ~~(S//NF//FISA)~~ [redacted]
- ~~(S//NF//FISA)~~ [redacted]

- ~~(S//NF/FISA)~~ [redacted]

- ~~(S//NF//FISA)~~ [redacted]

- ~~(S//NF//FISA)~~ [redacted]

[redacted]

(U//FOUO) The FBI has every reason to believe that acquisition pursuant to subsection 702(a) will continue to provide valuable foreign intelligence.

III. (U//FOUO) Data Required by Subsection 702(*l*)(3)(A)(i)-(iii)

(U//FOUO) Section 702(*l*)(3)(A) further requires that the head of each element provide, with respect to acquisitions authorized under subsection: (a) "(i) an accounting of the number of disseminated intelligence reports containing a reference to a United States person identity; (ii) an accounting of the number of United States person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting; (iii) the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed."

i. (U) Disseminated Intelligence Reports Referencing United States Person Identities

~~(S//NF)~~ During this reporting period, the FBI made a total of [redacted] disseminations [redacted] by FBI nominations and [redacted] by accounts nominated by the IC [redacted][2] where the 702-acquired information in an intelligence report contained a reference to a United States person identity.[3]

ii. (U) Subsequent Identifications of United States Persons Not Initially Identified

~~(S//NF)~~ Consistent with our minimization procedures, the FBI's practice is to disseminate United States person information contained in Section 702 information when that information reasonably appears to be foreign intelligence information, information necessary to understand foreign intelligence, or is evidence of a crime. United States person information that

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[2] ~~(S//NF)~~ These figures represent intelligence reports that included a United States person identity as part of the 702 information. For example, if the [redacted] under Section 702 included the name of a United States person and that name was inserted into the intelligence report that was disseminated, it was counted. If an intelligence report included 702 information and included a United States person identity not derived from the 702 information, that intelligence report was not counted.

[3] ~~(S//NF)~~ FISA defines a United States person as a citizen of the United States; an alien lawfully admitted for permanent residence; an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence; or a corporation that is incorporated in the United States, but not a corporation or an association that is a foreign power. [redacted]

is not foreign intelligence, necessary to understand foreign intelligence, or is evidence of crime would not be eligible for dissemination to other agencies and would be masked upon dissemination. On occasion, an agency may determine that masked information does in fact reasonably appear to be foreign intelligence information or evidence of a crime and would ask that the information be unmasked. During this reporting period, [redacted] such unmaskings occurred.

iii. (U) Targets Later Determined to be Located in the United States

~~(S//NF)~~ Based on the system in place to collect this data during this reporting period, a total of [redacted] targets whose communications were [redacted] the FBI were later determined to be located in the United States.[4]

IV. (U) Procedures to Assess Extent of Acquisitions of United States Persons' Communications

(U//FOUO) Subsection 702(*l*)(3)(A)(iv) requires that the head of each element provide "a description of any procedures developed by the FBI and approved by the Director of National Intelligence to assess—in a manner consistent with national security, operational requirements, and the privacy interests of United States persons—the extent to which the acquisitions authorized under subsection (a) acquire communications of United States persons, and the results of any such assessment."

(U//FOUO) Existing targeting and minimization procedures, FBI internal oversight procedures, and oversight by the Department of Justice, the Office of the Director of National Intelligence, two Offices of the Inspectors General, and the FISC, assure that Section 702 authorities are being executed appropriately and in a manner consistent with the statute and the Fourth Amendment of the Constitution of the United States. During the relevant reporting period, the FBI did not develop any additional procedures to assess the extent to which the acquisitions authorized under subsection 702(a) acquire the communications of United States persons. Communications of United States persons that are acquired under subsection 702(a) are treated in accordance with applicable legal and policy requirements and procedures to safeguard the privacy interests of United States persons.

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[4] ~~(S//NF)~~. To avoid duplicate reporting, this figure only includes communications collected pursuant to the FBI's targeting procedures. NSA separately reports instances where it collects communications of persons located in the United States pursuant to its targeting procedures.