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USP Query Guidance for Personnel with Access to Unminimized FISA Section 702 Data

Background: In July 2014, the Privacy and Civil Liberties Oversight Board (the Board) completed its study of the Foreign Intelligence Surveillance Act (FISA) Section 702 Program.¹ The Board found that the information the program collects has been valuable and effective in protecting the nation's security and producing useful foreign intelligence information, and that the program has been subject to judicial oversight and extensive internal supervision. However, the Board also found that certain aspects of the program's implementation raise privacy concerns, to include the use of queries to search the information collected under the program for the communications of specific U.S. persons. One of the Board's recommendations was to institute additional measures to ensure that CIA personnel access or view communications acquired under Section 702 that involve or concern U.S. persons only when there is a valid foreign intelligence reason to do so.² The guidance below implements the Board's recommendation and will be incorporated into the regular briefings/trainings.

Guidance: All queries of unminimized FISA Section 702 communications – including United States person (USP)³ queries – are permitted only when reasonably likely to return foreign intelligence information, as defined in FISA.⁴ All such USP queries of content⁵ must be so marked and accompanied by a statement of facts that illustrates why the query is reasonably likely to return foreign intelligence information.

A USP query is one that uses a particular USP identifier (i.e., email address, name) as a query term or is otherwise designed to identify communications that are to, from or about a particular USP.⁶ A query is not a USP query if the user of the identifier being used as a query term is located inside the United States, but known not to be a USP, so long as the query is also not designed to identify communications that are to, from or about a particular USP.

¹ PRIVACY AND CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (JULY 2, 2014) [hereinafter PCLOB REPORT]. Under FISA Section 702 the government may collect the communications of non-U.S. persons located outside the United States, with the compelled assistance of electronic communications service providers, in order to acquire foreign intelligence information.

² Recommendation 3 of the Board's Report said that "the NSA and CIA minimization procedures should permit the agencies to query collected Section 702 data for foreign intelligence purposes using U.S. person identifiers only if the query is based upon a statement of facts showing that the query is reasonably likely to return foreign intelligence information as defined in FISA. The NSA and CIA should develop written guidance for agents and analysts as to what information and documentation is needed to meet this standard, including specific examples." PCLOB REPORT, *supra* note 1, at 139-40.

³ As defined in FISA, a USP is a United States citizen, LPR (a green card holder), corporation incorporated in the United States, or an unincorporated association substantially composed of United States citizens or LPRs. 50 U.S.C. § 1801(i).

⁴ The statutory definition of foreign intelligence information under FISA is narrower when the information in question involves U.S. persons than it is when information pertains only to non-U.S. persons. Foreign intelligence information concerning U.S. persons is defined in FISA as information that is necessary to: (1) the ability of the United States to protect against an actual or potential attack by a foreign power; (2) sabotage, international terrorism, or the proliferation of weapons of mass destruction by a foreign power; or (3) clandestine intelligence activities by a foreign power. Additionally, foreign intelligence information concerning U.S. persons is also defined as information that is necessary to the national defense or security of the United States or the conduct of the foreign affairs of the United States, but only insofar as that information concerns a foreign power (such as international terrorist groups, foreign governments or any component thereof, or non-USP entities engaged in the proliferation of weapons of mass destruction) or foreign territory. 50 U.S.C. § 1801(c).

⁵ CIA's metadata-only repository does not have the capacity for documenting why the query is reasonably likely to provide foreign intelligence information. Upon opening the repository, however, users will be met with a pop-up window reiterating the query standard and requiring their assent before they may proceed.

⁶ Queries that use a USP identifier paired with one or more other terms (i.e., non-USP terms) are also considered to be USP queries.

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The Department of Justice and Office of the Director of National Intelligence will review all of CIA's USP queries of content during the bimonthly oversight reviews to ensure that they were reasonably likely to return foreign intelligence information.

A query is reasonably likely to return foreign intelligence information as defined in FISA if it concerns one or more of the following:

- (1) the activities or intentions of foreign governments, foreign factions, foreign government entities, or foreign-based political parties;
- (2) international terrorist groups, or individuals involved in international terrorism or activities in preparation therefor;
- (3)
- (4) individuals engaged in clandestine intelligence gathering for an intelligence service or group noted in (1), (2), or (3) above;
- (5)
- (6) the fact that a USP may be a target of intelligence activities of a group noted in (1), (2), or (3) above; or
- (7) the safety of any persons or organizations, including those who are targets, victims, or hostages of groups engaged in international terrorism (i.e., threats to the U.S. or allied Armed Forces or other U.S. or allied personnel).

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