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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DNI/AG 702(h) CERTIFICATION 2023-A AND ITS PREDECESSOR CERTIFICATIONS.	**UNDER SEAL** Docket No. 702(j)-23-01 and predecessor dockets
IN RE DNI/AG 702(h) CERTIFICATION 2023-B AND ITS PREDECESSOR CERTIFICATIONS.	Docket No. 702(j)-23-02 and predecessor dockets
IN RE DNI/AG 702(h) CERTIFICATION 2023-C AND ITS PREDECESSOR CERTIFICATIONS.	Docket No. 702(j)-23-03 and predecessor dockets

MEMORANDUM OPINION AND ORDER

Now before the Foreign Intelligence Surveillance Court (FISC) are the "Government's 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," filed on March 13, 2023 ("March 13, 2023 Submission"), which is subject to review under Section 702(j) of the Foreign Intelligence Surveillance Act (FISA) as amended. (Section 702 of FISA is codified at 50 U.S.C. § 1881a.) The government's request for approval of the amended certifications and related procedures is *granted* for the reasons stated herein, subject to certain reporting and other requirements set out at the end of this Opinion.

After summarizing the pertinent procedural history in Part I, the Court finds in Part II that the certifications before it contain the elements required by Section 702(h). Part III examines the targeting procedures. In Part IV, the Court reviews the minimization and querying procedures, with particular attention to revisions to procedures for the National Security Agency (NSA) that relate to the definition of "query" and to vetting non-U.S. persons seeking to enter the United States or receive a benefit under U.S. immigration law. Certain implementation issues relating to those revisions are also discussed in Part IV. The Court concludes that the targeting, minimization, and querying procedures, as written, meet statutory requirements.

In Part V, the Court finds those procedures, as written, to be consistent with Fourth Amendment requirements. In Part VI, the Court assesses how the NSA, Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC) are likely to implement their respective procedures in view of instances of non-compliance and other information reported. Particular attention is paid to FBI querying practices, which have been of substantial concern in prior reviews under Section 702(j).[1] The Court finds that the agencies' likely implementation of their procedures is consistent with applicable statutory and Fourth Amendment requirements. Finally, the Court summarizes its disposition and imposes certain reporting and other requirements in Part VII.

[1] *See* Docket Nos. 702(j)-21-01, *et al.*, Mem. Op. and Order at 23-34, 47-49 (Apr. 21, 2022) ("April 21, 2022 Opinion"); Docket Nos. 702(j)-18-01, *et al.*, Mem. Op. and Order at 68-72, 75-83 (Oct. 18, 2018) ("October 18, 2018 Opinion"), *aff'd in part, In re DNI/AG 702(h) Certifications*, 941 F.3d 547 (FISCR 2019) (per curiam).

I. THE SUBMISSIONS AND PROCEDURAL HISTORY

A. The 2023 Certifications

The March 13, 2023 Submission included three certifications executed by the Attorney General (AG) and the Director of National Intelligence (DNI) pursuant to Section 702(h): DNI/AG 702(h) Certification 2023-A ("Certification 2023-A"); DNI/AG 702(h) Certification 2023-B ("Certification 2023-B"); and DNI/AG 702(h) Certification 2023-C ("Certification 2023-C"). The following documents accompanied each of those certifications (which are collectively referred to as "the 2023 Certifications"):

> (1) Supporting affidavits of the Director of the NSA, the Director of the FBI, the Director of the CIA, and the Director of the NCTC;
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> (2) Two sets of targeting procedures, which govern NSA and the FBI, respectively. The targeting procedures for NSA appear as Exhibit A to each certification and those for the FBI appear as Exhibit C. The targeting procedures for each certification are identical;
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> (3) Four sets of minimization procedures, which govern NSA, the FBI, the CIA, and NCTC, respectively. The minimization procedures for NSA appear as Exhibit B to each certification, those for the FBI appear as Exhibit D, those for the CIA appear as Exhibit E, and those for NCTC appear as Exhibit G. (Exhibit F to Certification 2023-A and Certification 2023-B identifies the individuals or entities targeted under those certifications. Certification 2023-C does not have an Exhibit F.) The minimization procedures for each certification are identical; and
>
> (4) Four sets of querying procedures, which govern NSA, the FBI, the CIA, and NCTC, respectively. The querying procedures for NSA appear as Exhibit H to each certification, those for the FBI appear as Exhibit I, those for the CIA appear as Exhibit J, and those for NCTC appear as Exhibit K. The querying procedures for each certification are identical.

The March 13, 2023 Submission also included a memorandum prepared by the National Security Division (NSD), U.S. Department of Justice ("March 13, 2023 Memorandum") and a Classified

Declaration of [redacted], NSA, Regarding the NSA's Support to Vetting Activities ("NSA Decl. Mar. 13, 2023").

Each of the 2023 Certifications authorizes "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information." Certification 2023-A at 4; Certification 2023-B at 3; Certification 2023-C at 3. Certification 2023-A involves [redacted] *See* Certification 2023-A at 3. Certification 2023-B involves the [redacted] Certification 2023-B at 3. Finally, Certification 2023-C involves [redacted] *See* Certification 2023-C at 1, 3.

The 2023 Certifications generally extend authorizations to acquire foreign intelligence information under certifications approved by the Court in the April 21, 2022 Opinion ("the 2021 Certifications").[2] Those certifications – also denominated "A," "B," and "C" and covering the

[2] In April 2022, the Court approved acquisitions by means of [redacted] pursuant to Certification 2021-A [redacted]

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same subjects as the 2023 Certifications – generally renewed authorizations to acquire foreign intelligence information under a series of certifications dating back to 2008.[3]

Each 2023 Certification also amends the certifications in the Prior 702 Dockets to authorize NSA to apply to information obtained under prior certifications the same minimization and querying procedures that are to be applied to information obtained under the 2023 Certifications. *See* March 13, 2023 Memorandum at 2-3; Certification 2023-A at 4-5; Certification 2023-B at 4-5; Certification 2023-C at 4. As submitted on March 13, 2023, however, Certification 2023-B did not amend Certification 2021-B to authorize use of the revised NSA minimization procedures, even though it amended Certification 2021-B to authorize use of the revised NSA querying procedures. *See* Certification 2023-B at 4-5. Otherwise, the 2023 Certifications, as submitted on that date, amended all prior certifications to authorize NSA to use

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[2](...continued)

[redacted] *See* April 21, 2022 Opinion at 81-120. The Court also established reporting and implementation requirements regarding such acquisitions. *See id.* at 126-27. The government has not submitted any reports of changed circumstances and proposes to continue such acquisitions on the same terms. *See* Affidavit of the Director of NSA in Support of Certification 2023-A at 2-3; NSA Targeting Procedures § VI at 11-12; NSA Minimization Procedures § 4(b)(3) n.1. The Court makes the findings necessary to approve continuation of [redacted] for the reasons stated in the April 21, 2022 Opinion. [redacted]

[3] *See* Docket Nos. 702(i)-08-01, 702(i)-08-02, 702(i)-09-01, 702(i)-09-02, 702(i)-09-03, 702(i)-10-01, 702(i)-10-02, 702(i)-10-03, 702(i)-11-01, 702(i)-11-02, 702(i)-11-03, 702(i)-12-01, 702(i)-12-02, 702(i)-12-03, 702(i)-13-01, 702(i)-13-02, 702(i)-13-03, 702(i)-14-01, 702(i)-14-02, 702(i)-14-03, 702(i)-15-01, 702(i)-15-02, 702(i)-15-03, 702(i)-16-01, 702(i)-16-02, 702(i)-16-03, 702(j)-18-01, 702(j)-18-02, 702(j)-18-03, 702(j)-19-01, 702(j)-19-02, 702(j)-19-03, 702(j)-20-01, 702(j)-20-02, and 702(j)-20-03. Those dockets, together with Docket Numbers 702(j)-21-01, 702(j)-21-02, and 702(j)-210-03, are collectively referred to as "the Prior 702 Dockets."

both sets of revised procedures. *See id.*; Certification 2023-A at 4-5; Certification 2023-C at 4.[4] After the Court, through its staff, inquired about this apparent omission, the government submitted an amendment to Certification 2021-B that duly authorizes NSA to apply the revised minimization procedures to information acquired pursuant to that certification. *See* Amendment to DNI/AG 702(h) Certification 2021-B at 4-5 (Mar. 29, 2023) ("Second Amendment to Certification 2021-B").

B. Briefing and Consideration of Issues Presented by NSA Minimization and Querying Procedures

As noted above, the NSA Querying Procedures and Minimization Procedures include new provisions respecting vetting of non-U.S. persons seeking to enter the United States or receive a benefit under U.S. immigration law ("travel vetting"). Those provisions permit NSA to search and review Section 702-acquired data for information relating to such non-U.S. persons, regardless of whether foreign intelligence information is reasonably likely to be retrieved. *See* NSA Querying Procedures § IV.A, D. The government included a similar, but more far-reaching proposal in the procedures that accompanied the 2021 Certifications as initially submitted to the FISC on October 18, 2021. *See* Government's 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" (Oct. 18,

[4] Because the government has not revised the minimization and querying procedures for the FBI, CIA, and NCTC, the 2023 Certifications do not amend the prior certifications regarding those procedures.

2021) ("October 18, 2021 Submission").[5] Among other differences, the travel-vetting provisions in this submission applied to non-U.S. persons who had [redacted] as well as any other category of non-U.S. persons in the United States, if deemed necessary by NSA and authorized by the DNI (or Principal Deputy) and the AG, with notification to the FISC. *See* NSA Querying Procedures § IV.D (included in the October 18, 2021 Submission). In contrast, the provision now before the Court does not apply to "travel or immigration applicants that NSA knows, or reasonably should know, are located or reside inside the United States." NSA Querying Procedures § IV.D. The Court questioned whether those provisions in the October 18, 2021 Submission comported with the Fourth Amendment and statutory minimization requirements. *See* April 21, 2022 Opinion at 7-8. In particular, "[t]he Court, through its staff, expressed concern" that the described vetting process "might involve a 'query' of raw Section 702 information, as defined at Section III.A of the NSA Querying Procedures, that is not reasonably likely to retrieve foreign intelligence information." *See id.* at 79-80.

The government ultimately decided not to seek approval of the travel-vetting provisions as part of the Court's initial review of the 2021 Certifications. On March 18, 2022, it submitted in final form amendments to the 2021 Certifications, which, among other things, rescinded the travel-vetting changes to NSA's procedures ("March 18, 2022 Submission").[6] An accompanying

[5] The October 18, 2021 Submission included a memorandum by NSD ("October 18, 2021 Memorandum").

[6] *See* Amendment to DNI/AG 702(h) Certification 2021-A ("Amendment to Certification (continued...)

memorandum prepared by NSD ("March 18, 2022 Memorandum") stated that the government intended to include provisions related to travel vetting in "a separate, later amendment to the 2021 Certifications." March 18, 2022 Memorandum at 3. Indeed, to that end it had already submitted amended certifications and revised NSA querying and minimization procedures in draft (or "read copy") form. *See* Government's Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(h) and DNI/AG 702(g) Certifications, and Request for an Order Approving such Amended Certifications (Mar. 1, 2022) ("March 1, 2022 Submission"). That submission included, also in draft form, a NSD memorandum ("March 1, 2022 Memorandum") and a Classified Declaration [redacted] NSA, Regarding the NSA's Support to Vetting Activities.

On March 24, 2022, the Court appointed Amy Jeffress, Esq., and Amanda Claire Hoover, Esq., as amici curiae to address the following issues presented by the March 1, 2022 Submission: (1) whether certain processes described in Section IV.D of the proposed querying procedures for NSA involve a "query" as defined at Section 702(f); and (2) whether those processes, regardless of whether they are reasonably likely to retrieve or identify foreign intelligence information, comport with the definition of "minimization procedures" at 50 U.S.C. §§ 1801(h) and 1821(4) and the requirements of the Fourth Amendment. Order Appointing Amicus Curiae at 3-4 (Mar. 24, 2022). Those issues were briefed as follows: Brief of Amici Curiae, filed May 9, 2022

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[6](...continued)
2021-A"); Amendment to DNI/AG 702(h) Certification 2021-B ("Amendment to Certification 2021-B"); and Amendment to DNI/AG 702(h) Certification 2021-C ("Amendment to Certification 2021-C").

("Amici Br. May 9, 2022"); Government's Amended Response to the Opening Brief of Amici Curiae, filed May 26, 2022 ("Gov't Resp. May 26, 2022"); and Reply Brief of Amici Curiae, filed June 6, 2022 ("Amici Reply Jun. 6, 2022").[7]

In addition, discussion of the issues identified in the travel-vetting context led to recognition that other automated NSA processes may present similar issues. The government proposed by July 21, 2022, to submit "a factual description of the various categories of processing activities that interact with raw Section 702 information, including examples to illustrate the scope of each category, and to describe the parameters of such processing and the controls in place to ensure compliance with NSA's minimization and querying procedures," and to submit "a legal analysis of such processing activities" by August 19, 2022. April 21, 2022 Opinion at 80. The Court accepted that proposal. *Id.* Although the government took somewhat more time than initially anticipated, it submitted its factual assessment on August 23, 2022, *see* Classified Declaration of Natalie N. Laing, NSA, Regarding the NSA's Processing of Section 702-Acquired Information (Aug. 23, 2022) ("NSA Decl. Aug. 23, 2022"), and its legal assessment on October 28, 2022, *see* Government's Legal Assessment Regarding NSA's Report on Automated Processing Activities that Use Unminimized Section 702-Acquired Data (Oct. 28, 2022) ("Gov't Legal Assessment Oct. 28, 2022").[8]

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[7] After this briefing, Ms. Hoover withdrew her appearance as an amicus. *See* Order at 2 n.1 (Dec. 14, 2022) ("Dec. 14, 2022 Order"). The able assistance of Ms. Jeffress and Ms. Hoover is greatly appreciated. For ease of reference, the following discussion attributes arguments simply to "the Amicus."

[8] The legal assessment was accompanied by a second declaration by Ms. Laing. *See* (continued...)

After considering these submissions, the Court, through its staff, "informed the government and the Amicus that it [was] prepared to find that the proposed procedures, with minor modification, are consistent with applicable statutory and Fourth Amendment requirements . . . as limited to the travel-vetting context." Dec. 14, 2022 Order at 3. But section IV.D authorizes NSA [redacted] *see infra* p. 45, and the government had advised that [redacted] may be accessed by NSA analysts for unspecified [redacted] purposes, by queries that are reasonably likely to retrieve foreign intelligence information. *Id.* at 4; NSA Querying Procedures § IV.D. "Without further information, the Court [was] unable to find that these other uses of [redacted] comport with applicable statutory and Fourth Amendment requirements." Dec. 14, 2022 Order at 4. Specifically, the Court noted the possibility that an automated process that does not involve human review – and that the government therefore might not consider to be a query – could still present statutory minimization or Fourth Amendment issues, *e.g.*, by flagging "particular individuals for closer scrutiny or adverse action" outside the travel-vetting context. *Id.* And when information on the [redacted] would be accessed through means acknowledged to be queries, the Court expressed "concern that the standard of 'reasonably likely to retrieve foreign intelligence information' may be applied with undue lenity." *Id.* at 5.

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[8](...continued)
Supplemental Classified Declaration of Natalie N. Laing, NSA, Regarding the NSA's Processing of Section 702-Acquired Information (Oct. 28, 2022) ("NSA Decl. Oct. 28, 2022").

Accordingly, the Court directed the government to provide "a factual description" of "current or anticipated uses of [redacted] outside of the travel-vetting context and "an analysis of whether each such use complies with applicable statutory requirements and provisions of the minimization and querying procedures." *Id.* at 6. The Court specifically directed the government to state whether such analyses involved a conclusion that [redacted] is not a 'query' as defined in the NSA Querying Procedures or in Section 702(f)(3)(B)" or that "a query term could be regarded as reasonably likely to retrieve foreign intelligence information," either because of how [redacted] that in the government's view would not constitute a 'query,' that [redacted] . . contains responsive information." *Id.* at 6-7. Finally, the Court provided for the Amicus to respond to the government's submission and for the government to reply. *Id.* at 7. Under that Order, the Court received the following: Government's Verified Written Submission Regarding NSA's Use of [redacted] (Jan. 10, 2023) ("Gov't Submission Jan. 10, 2023"); Amicus Response to Government's Verified Written Submission Regarding NSA's Use of [redacted] (Jan. 24, 2023) ("Amicus Resp. Jan. 24, 2023"); and Government's Reply to the Response Brief of Amicus Curiae (Feb. 7, 2023) ("Gov't Reply Feb. 7, 2023").

II. REVIEW OF THE 2023 CERTIFICATIONS AND THE PRIOR CERTIFICATIONS, AS AMENDED

The Court reviews a Section 702 certification "to determine whether [it] contains all the required elements." Section 702(j)(2)(A). Having examined the 2023 Certifications, the Court finds that:

> (1) they have been made under oath by the AG and the DNI, as required by Section 702(h)(1)(A), *see* Certification 2023-A at 6-7; Certification 2023-B at 6-7; Certification 2023-C at 5-6;[9]
>
> (2) they include the attestations required by Section 702(h)(2)(A), *see* Certification 2023-A at 1-3; Certification 2023-B at 1-3; Certification 2023-C at 1-3;
>
> (3) as required by Section 702(h)(2)(B), they are accompanied by targeting procedures and minimization procedures adopted in accordance with Section 702(d) and (e), respectively;
>
> (4) they are supported by affidavits of appropriate national-security officials, as described in Section 702(h)(2)(C); and
>
> (5) in accordance with Section 702(h)(2)(D), each certification includes an effective date: April 12, 2023, or the date upon which the Court issues an order concerning the certification under Section 702(j)(3), whichever is later. *See* Certification 2023-A at 4; Certification 2023-B at 3-5; Certification 2023-C at 3. (The statement described in Section 702(h)(2)(E) is not required because there was no "exigent circumstances" determination under Section 702(c)(2).)

The Court therefore finds that the 2023 Certifications contain all the required statutory elements. Similarly, it has reviewed the certifications in the Prior 702 Dockets, as amended by

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[9] FISA defines "Attorney General" to include "the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, . . . the Assistant Attorney General for National Security." 50 U.S.C. § 1801(g). Acting on such designation, the Assistant Attorney General for National Security executed the 2023 Certifications and the Second Amendment to Certification 2021-B.

the 2023 Certifications and the Second Amendment to Certification 2021-B, and finds that they also contain all the elements required by the statute. Those amendments have the same effective dates as the 2023 Certifications. *See* Certification 2023-A at 5; Certification 2023-B at 5; Certification 2023-C at 4; Second Amendment to Certification 2021-B at 5.[10]

The Court now turns to the targeting, querying, and minimization procedures that accompany the 2023 Certifications. These procedures, taken as a whole, must be consistent with statutory and Fourth Amendment requirements; however, because the Court has previously approved versions of each set of procedures, the analysis largely focuses on changes to what was previously approved. Some minor revisions are not material to the Court's review and therefore are not specifically discussed.

III. THE TARGETING PROCEDURES

Targeting procedures must be "reasonably designed" to "ensure that any acquisition authorized under [Section 702(a)] is limited to targeting persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." § 702(d)(1); *see also* § 702(b)(1) (acquisitions "may not intentionally target any person known at the time of acquisition to be located in the United States"); § 702(b)(4) (acquisitions "may not intentionally acquire any communication as

[10] This effective date for the Second Amendment to Certification 2021-B is in accordance with Section 702(h)(1)(C), under which the AG and the DNI "may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures."

to which the sender and all intended recipients are known at the time of acquisition to be located in the United States"). The targeting procedures are also used to ensure that acquisitions do "not intentionally target a United States person reasonably believed to be located outside the United States." § 702(b)(3). Pursuant to Section 702(j)(2)(B), the Court assesses whether the targeting procedures satisfy those criteria. The Court must also determine whether such procedures, along with the querying and minimization procedures, are consistent with the requirements of the Fourth Amendment. *See* § 702(j)(2)(A)-(B).

A. Background on Acquisition and Targeting Under Section 702

> The government targets a person under Section 702 by tasking for acquisition one or more selectors (*e.g.*, identifiers for email or other electronic-communication accounts) associated with that person. Section 702 encompasses different forms of acquisition. The government may acquire information "upstream," as it transits the facilities of an Internet backbone carrier, as well as "downstream," from systems operated by providers of services [redacted] Traditional telephone communications may also be acquired upstream . . . .

October 18, 2018 Opinion at 11 (citation omitted).

NSA is the lead agency for Section 702 targeting decisions. Before tasking a selector, it must determine that the target is reasonably believed to be a non-U.S. person outside the United States (a "foreignness determination"). In making such determinations, NSA reviews certain categories of information about the proposed target and evaluates "the totality of the circumstances based on the information available with respect to that person [redacted] NSA Targeting Procedures § I, at 1. An NSA targeting decision must also be supported by a "particularized and fact-based" assessment that "the target is expected to possess, receive, and/or

is likely to communicate foreign intelligence information" relevant to the subject matter of a Section 702 certification. *Id.* at 4.

NSA is also required to conduct post-targeting analysis "to detect those occasions when a person who when targeted was reasonably believed to be located outside the United States is located in the United States." *Id.* § II, at 6-7. This analysis involves routinely comparing each tasked selector against independently-acquired information for indications that it may be used in the United States, and examination of the content of communications obtained through surveillance of a tasked selector for indications that the target is now in, or may enter, the United States. *Id.* at 7-8. If NSA concludes that a target is in the United States or is a U.S. person [redacted] it must terminate the acquisition without delay. *Id.* § II, at 8, § IV, at 10.

NSA tasks selectors for [redacted] The FBI is responsible for [redacted] in accordance with its own targeting procedures, under which the FBI may [redacted] for selectors that NSA has already approved for tasking under its targeting procedures. *See* FBI Targeting Procedures § I.1. "Thus, the FBI Targeting Procedures apply *in addition to* the NSA Targeting Procedures," [redacted] *See* Docket No. [redacted] Mem. Op. at 20 (Sept. 4, 2008) (emphasis in original) ("September 4, 2008 Opinion").

NSA provides to the FBI an explanation of its foreignness determination for each selector (or "Designated Account") for which NSA [redacted] *See* FBI Targeting

Procedures § I.1-2. The FBI, "in consultation with NSA, will review and evaluate the sufficiency of" that determination. *Id.* § I.3. The FBI also runs certain checks of information in its possession in the course of that review and evaluation. "Unless the FBI locates information indicating that the user of the Designated Account is a United States person or is located inside of the United States, the FBI will [redacted] *Id.* § I.5. If the FBI [redacted] it will inform NSA and will not [redacted] for that account unless and until it "determines that the Designated Account is in fact appropriate for tasking." *Id.* § I.8.

B. NSA Targeting Procedures

The NSA targeting procedures that accompany the 2023 Certifications are identical to those approved in the April 21, 2022 Opinion. The Court finds that these procedures, as written, satisfy applicable statutory requirements.

C. FBI Targeting Procedures

As discussed below, the FBI targeting procedures that accompany the 2023 Certifications include relatively minor revisions to the procedures approved in the April 21, 2022 Opinion. The Court finds that these procedures also satisfy applicable statutory requirements.

The most significant revisions concern how the FBI [redacted] under section I.4 of the FBI's targeting procedures.[11] The FBI is

[redacted]

(continued...)

required to [redacted] *Id.* § I.4, at 3.

The government has revised this provision [redacted] FBI Targeting Procedures § I.4, at 3 n.4.

Based on FBI's experience since 2019, the government believes that [redacted]

[redacted]

[12] In the FBI's targeting procedures, [redacted]

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[redacted] The Court is persuaded that reasonably designed targeting procedures need not rigidly require the FBI to [redacted] *See id.* at 17 [redacted] *see also* Update Regarding Implementation of the FBI's Section 702 Targeting Procedures at 8 (Apr. 18, 2019) [redacted]

Other revisions regarding [redacted] FBI Targeting Procedures § I.4.e; March 13, 2023 Memorandum at 24-25.

The revisions to this provision make two substantive changes. First, it is now specified [redacted] The Court finds this

revision helpful because it clarifies the scope of section I.4.e in relation to section I.4.h, [redacted]

Second, the provision is expanded to permit the FBI to approve a [redacted] if it [redacted] By its terms, this revision would permit the FBI to approve a [redacted] without [redacted] But such [redacted] seems highly unlikely. The FBI is unaware of a single instance in which it relied on [redacted] March 13, 2023 Memorandum at 27. In more likely scenarios, in which [redacted] the FBI would be required to comply with the requirements of section I.4 to the extent possible. The Court understands that result to be the fair import of section I.4.e, which requires [redacted] to be "otherwise in accordance with these procedures." And, as noted above, [redacted] are only made for accounts for which NSA already has made a foreignness determination under its own procedures. All things considered, the possibility that an approval under section I.4.e would result in targeting a U.S. person or a person located in the United States seems remote.

The other revisions to the FBI's targeting procedures are of less moment. One is a clarification to section I.2 that, after making a [redacted] NSA may still provide identifying information to the FBI, until the FBI decides whether to approve the request. *See* March 13, 2023 Memorandum at 14-15. It makes sense that post-request discussion between the agencies will sometimes result in NSA providing additional information. Nevertheless, when in doubt about whether particular information would be useful to the FBI's evaluation of a request, NSA should err on the side of providing it promptly.

Another revision removes a reference in section I.4.b.ii to [redacted] Finally, section III.13 is revised to refer to the FBI's Office of Internal Auditing (OIA) rather than its Inspection Division because OIA is taking responsibility for conducting periodic reviews of the FBI's implementation of its targeting procedures.

D. Conclusion

The FISC has previously found the current versions of the FBI and NSA's targeting procedures to comply with statutory requirements. April 21, 2022 Opinion at 16. For the reasons stated above and in the Court's opinions in the Prior 702 Dockets, the Court concludes that the NSA Targeting Procedures and the FBI Targeting Procedures, as written, are reasonably

designed to: (1) ensure that any acquisition authorized under the 2023 Certifications is limited to targeting persons reasonably believed to be located outside the United States, (2) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States, and (3) prevent targeting U.S. persons for acquisition. The first two of these findings are required by Section 702(d)(1). The third is relevant to the Court's analysis of whether these procedures are consistent with the requirements of the Fourth Amendment. *See infra* p. 69.

IV. THE MINIMIZATION PROCEDURES AND QUERYING PROCEDURES

Pursuant to Section 702(j)(2)(C), the Court must also assess whether the minimization procedures "meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or 1821(4)], as appropriate." That definition requires

> (1) specific procedures . . . that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;[13]

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[13] FISA defines "foreign intelligence information" as:

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against —
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(continued...)

> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that 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).[14]

Because this definition focuses on protecting U.S.-person information and identities, it is significant that Section 702 acquisitions target persons reasonably believed to be non-U.S. persons outside the United States. Although such targets may communicate with or about U.S. persons, Section 702 acquisitions, as a general matter, are less likely to acquire information about U.S. persons that is unrelated to the foreign intelligence purpose of the acquisition than, for example, electronic surveillance or physical search of a home or workplace within the United States that a target shares with U.S. persons.

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[13](...continued)
(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —
(A) the national defense or the security of the United States; or
(B) the conduct of the foreign affairs of the United States.

50 U.S.C. § 1801(e).

[14] The definition of "minimization procedures" at § 1821(4) is substantively identical to the one at § 1801(h) (although § 1821(4)(A) refers to "the purposes . . . of the particular physical search"). For simplicity, subsequent citations refer only to § 1801(h).

The AG, in consultation with the DNI, also must "adopt querying procedures consistent with the requirements of the fourth amendment . . . for information collected" pursuant to a Section 702 authorization, § 702(f)(1)(A), and must "ensure" that those procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B). The FISC must determine whether querying procedures satisfy those requirements. *See* § 702(j)(3)(A)-(B).

Each agency's procedures specify that the querying and minimization procedures are to be read and applied together.[15] The Court therefore will assess whether each agency's minimization procedures, in conjunction with its querying procedures, satisfy § 1801(h).

A. Background on Section 702 Minimization and Querying

Each agency with access to "raw," or unminimized, information obtained under Section 702 (NSA, FBI, CIA, and NCTC) is governed by its own set of minimization procedures for such information.[16] There are significant differences among the agencies' minimization procedures

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[15] *See, e.g.*, NSA Querying Procedures § I ("These querying procedures should be read and applied in conjunction with [the separate] minimization procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those minimization procedures."); FBI Querying Procedures § I (same); NSA Minimization Procedures § I ("These minimization procedures apply in addition to separate querying procedures. . . . [They] should be read and applied in conjunction with those querying procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those querying procedures."); FBI Minimization Procedures § I.A (same).

[16] This opinion uses the terms "raw" and "unminimized" interchangeably. The NCTC Minimization Procedures define "raw" information as:

> section 702-acquired information that (i) is in the same or substantially the same format as when NSA or FBI acquired it, or (ii) has been processed only as

(continued...)

based on such factors as their differing missions, legal and policy constraints, and technical infrastructure. They nonetheless share several important features.

Regarding acquisition, NSA is required to conduct acquisitions "in a manner designed, to the greatest extent reasonably feasible, to minimize the acquisition of information not relevant to the authorized purpose of the acquisition." NSA Minimization Procedures § 4(a). The FBI must follow its targeting procedures in conducting acquisitions. *See* FBI Minimization Procedures § II.A.1. CIA and NCTC do not conduct acquisitions under Section 702.

Regarding handling of information after acquisition, the procedures of all four agencies:

- set criteria for the indefinite retention of information of or concerning United States persons and generally applicable timetables for destroying information that does not meet those criteria, *see* NSA Minimization Procedures § 4; FBI Minimization Procedures § III.C.1.b, D.4, E.4; CIA Minimization Procedures §§ 2, 3; NCTC Minimization Procedures § B.2, 3;

- provide special rules for protecting attorney-client communications, *see* NSA Minimization Procedures § 5; FBI Minimization Procedures § III.D.5, E.6; CIA Minimization Procedures § 7.a; NCTC Minimization Procedures § C.5;

- set standards and procedures for disseminating information, *see* NSA Minimization Procedures §§ 8, 10; FBI Minimization Procedures § IV; CIA Minimization Procedures §§ 5, 7.c; NCTC Minimization Procedures § D; and

- prescribe procedures for obtaining technical or linguistic assistance from other agencies and/or foreign governments, *see* NSA Minimization Procedures § 11(b); FBI Minimization Procedures § IV.D; CIA Minimization Procedures § 7.b; NCTC Minimization Procedures § D.5.

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[16](...continued)
necessary to render it into a form in which it can be evaluated to determine whether it reasonably appears to be foreign intelligence information or to be necessary to understand foreign intelligence information or assess its importance.

NCTC Minimization Procedures § A.3.d.

The minimization procedures also address situations in which the government reasonably believed at the time of acquisition that the target was a non-U.S. person outside the United States, but later learns that the target actually was a U.S. person or inside the United States. The Court has concluded that such acquisitions are authorized under Section 702. *See* September 4, 2008 Opinion at 25-27. Nonetheless, the procedures of each agency require destruction of such information unless the head of the agency authorizes its retention after making certain findings regarding the specific information to be retained. *See* NSA Minimization Procedures §§ 4(d), 6; FBI Minimization Procedures § III.A.3; CIA Minimization Procedures § 8; NCTC Minimization Procedures § B.4.

In response to Section 702(f)(1)(B), each agency's querying procedures contain recordkeeping requirements for use of U.S.-person query terms. *See* NSA Querying Procedures § IV.B; FBI Querying Procedures § IV.B; CIA Querying Procedures § IV.B; NCTC Querying Procedures § IV.B. They permit CIA and NCTC personnel to conduct queries of unminimized Section 702 information for intelligence-analysis or investigative purposes only if they are reasonably likely to return foreign intelligence information. *See* CIA Querying Procedures § IV.A; NCTC Querying Procedures § IV.A. That is also the rule for NSA personnel, *see* NSA Querying Procedures § IV.A, except for certain travel-vetting queries, *see infra* pp. 44, 50-51, 53-55. FBI personnel may conduct such queries only if they are reasonably likely to return foreign intelligence information or evidence of a crime. *See* FBI Querying Procedures § IV.A.

B. Minimization and Querying Procedures for the FBI, CIA, and NCTC

The minimization and querying procedures for the FBI, CIA, and NCTC under the 2023 Certifications are identical to those submitted with the 2021 Certifications and approved by the Court in April 2022. March 13, 2023 Memorandum at 2-3 nn.2-3; *see also* April 21, 2022 Opinion at 58. The Court finds that those procedures, as written, satisfy applicable statutory requirements. The NSA's minimization and querying procedures are discussed below.

C. NSA's Minimization and Querying Procedures

The minimization and querying procedures for NSA include revisions regarding retention of information for oversight purposes. They also include substantial modifications regarding two subjects: the definitions of "query" and "processing" and travel vetting. Because NSA's use of [redacted] for purposes other than travel vetting presents related issues regarding implementation, those uses are also examined in this section.

1. Retention for Oversight Purposes

Heretofore, NSA's minimization procedures have authorized activities necessary for two specified oversight functions and provided that,

> [s]hould NSA determine it is necessary to deviate from an aspect of these procedures to perform lawful oversight functions of its personnel or systems apart from those described . . ., NSA shall consult with NSD and ODNI prior to conducting such an activity. NSD shall promptly report the deviation to the FISC.

NSA Minimization Procedures § 2(b)(5) (accompanying the 2021 Certifications). The NSA Minimization Procedures now before the Court specify a third oversight function justifying deviation from otherwise applicable requirements: "activities necessary to . . . review, approve, or audit queries of section 702-acquired information." NSA Minimization Procedures § 2(b)(5)c.

This revision comes against a backdrop of prior invocations of section 2(b)(5) to deviate from retention limits or destruction requirements that would otherwise apply to Section 702 information within documentation of queries kept for oversight purposes. "In May 2021, NSA advised NSD that it is retaining, as part of query audit records, [redacted] acquired pursuant to various FISA authorities that have been used as query terms, without regard to otherwise applicable destruction requirements." April 21, 2022 Opinion at 78. The pertinent audit records were in a "post-query review system" [redacted] Preliminary Notice of a Potential Compliance Incident Regarding the Unauthorized Retention of Information Acquired Pursuant to FISA and Notice of a Section 702 Minimization Procedures Deviation at 2 & n.2 (Nov. 28, 2022) ("November 28, 2022 Deviation Notice"). The government relied on section 2(b)(5) as grounds to continue to retain the [redacted] that had been used as query terms. Preliminary Notice of a Potential Compliance Incident Regarding the Unauthorized Retention of Information Acquired Pursuant to FISA and Notice of Deviation Pursuant to NSA's Section 702 Minimization Procedures at 3 (Oct. 15, 2021). The Court found "that NSA's retention of query audit records to date has been reasonable under the circumstances," but expected "to be updated regarding the length of the applicable retention period." April 21, 2022 Opinion at 79. The government now has advised that NSA will retain such query records for up to ten years from the date of the query. *See* Supplemental Notice of a Potential Compliance Incident Regarding the Unauthorized Retention of Information Acquired Pursuant to FISA and Notice of Deviation Pursuant to NSA's Section 702 Minimization Procedures at 3 (Mar. 9, 2023). The Court finds that ten-year period to be reasonable.

In November 2022, the government gave notice of a similar incident involving an NSA workflow system [redacted] which includes a tool for analysts to request approval of U.S.-person query terms. November 28, 2022 Deviation Notice at 1. These requests can include FISA-acquired text or [redacted] *Id.* at 2. After the query is run, the request becomes part of the query record and is retained [redacted] *Id.* The government reported that purge checks are run daily against the [redacted] but not against text entries. *Id.* As a result, [redacted] may contain Section 702 data subject to purge requirements. As with [redacted] the entries [redacted] are maintained for audit and oversight purposes and the government invoked section 2(b)(5) as a basis for not removing from [redacted] Section 702 information otherwise required to be purged. *Id.* at 3.[17] NSD and NSA are discussing the appropriate retention period for query records [redacted] *Id.* at 4; Quarterly Report Concerning Compliance Matters Under Section 702 of FISA at 49 (Dec. 16, 2022) ("December 2022 QR").[18] The Court expects to be updated on this point as soon as practicable.

The new exemption in section 2(b)(5)c would permit retention of information for audit and oversight purposes in the circumstances described above. By referring to activities necessary to "review, approve, or audit queries," it also has the potential to sweep more broadly. On balance, in view of the value of oversight of querying practices and the requirement that "NSA

[17] NSD discovered the potential over-retention while "conducting routine oversight activities," *id.* at 1, which suggests that NSA did not consult with NSD and ODNI prior to conducting the activity in question, as required by section 2(b)(5).

[18] Similarly titled quarterly reports on Section 702 compliance issues are cited in the form "[month and year of filing] QR."

personnel . . . limit the scope of their deviation" from otherwise-applicable requirements "and comport with all other provisions . . . to the maximum extent practicable," NSA Minimization Procedures § 2, this revision does not impede a finding that the NSA Minimization Procedures comport with § 1801(h).

2. Definitions of "Query" and "Processing"

A revised definition of "processing" appears in NSA's minimization and querying procedures and a revised definition of "query" appears in NSA's querying procedures. "Processing" is defined as "any action necessary to convert unminimized section 702-acquired information into an intelligible form," as well as "any machine-initiated action designed to identify, curate, label, or organize such information;" however, "processing" does not include "an action that . . . presents information for human inspection" or that "produces and makes affirmative use of information for investigative, intelligence analysis, or preventative purposes" by "means that do not involve human inspection." NSA Minimization Procedures § 3(i); NSA Querying Procedures § III.A. Although the definition of "processing" applies to use of that term in the minimization procedures, *see, e.g.,* § 2(b)(3), its primary work is to modify the definition of "query," which now excludes "activities that constitute the processing of unminimized section 702-acquired information." NSA Querying Procedures § III.A. The combined effect of these definitions is that querying rules, such as the requirement that queries must be reasonably likely to retrieve foreign intelligence information and that records must be kept of U.S.-person query terms, do not apply to processing actions. The Court must determine whether these definitions are consistent with the statutory definition of "query" as "the use of one or more terms to retrieve

the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons obtained through [Section 702] acquisitions." § 702(f)(3)(B).

Under an interpretation advanced by the government, an action does not constitute a "query" under the statutory definition unless (1) the person conducting the operation specifically intends to return communications of or concerning U.S. persons (2) for the purpose of human inspection outside of an agency's storage systems. *See* Gov't Legal Assessment Oct. 28, 2022 at 10. Both of these elements, and Amicus's responses to them, are examined below.

a. Intent to Return U.S.-Person Communications

The government describes an analyst's "use [of] a known United States person's name, phone number, or other similar term to return information for review" as an example of an action that satisfies its asserted specific-intent requirement.[19] *Id.* at 6. In contrast, the government posits that an analyst's use of "a foreign target's name, phone number, or other term to return unminimized information for review. . . would not be a query" under the statutory definition. *Id.* at 7. In Amicus's view, an operation may constitute a "query" if it is designed to and likely will retrieve information from Section 702-acquired communications that include communications of or concerning U.S. persons. Amici Reply Jun. 6, 2022 at 4-10.

[19] The government seems to acknowledge that retrieval of information from communications of or concerning U.S. persons can constitute a query, even if such communications are not returned in their entirety. *Id.* at 6-7 (use of identifiers for a known U.S. person "to return *information* for *review* . . . would constitute a query" under the statutory definition) (emphasis added). The definition of "query" in NSA's procedures refers to retrieval of "the unminimized contents or noncontents (including metadata) of section 702-acquired *information*." NSA Querying Procedures § III.A (emphasis added).

Previously, the FISC declined the government's invitation to interpret Section 702(f)(3)(B) as having such a specific-intent requirement. In that case, the Court only needed to conclude that "searches of government systems that are neither likely to retrieve . . . unminimized [U.S.-person] communications nor intended to do so fall outside the statutory definition of 'query.'" Docket Nos. 702(j)-19-01, *et al.*, Mem Op. and Order at 38 (Dec. 6, 2019) ("December 6, 2019 Opinion"). On that basis, the Court found that searches of user activity monitoring (UAM) systems are not queries as defined at Section 702(f)(3)(B). *See id.*[20]

There is no need for the Court to go further in this case. The government's statutory interpretation notwithstanding, the definition of "query" in NSA's procedures refers to "the use of one or more terms to retrieve the unminimized contents or noncontents (including metadata) of section 702-acquired information that is located on an NSA system." NSA Querying Procedures § III.A (footnote omitted). Neither that core definition nor the specified exclusions from it refer to the intended or likely return of U.S.-person information or communications. The same is true of the definition of "query" in the other agencies' procedures. *See* FBI Querying Procedures § III.A; CIA Querying Procedures § III.A; NCTC Querying Procedures § III.A. For that reason, the Court does not need to delve further into this specific-intent issue to evaluate the revised definitions of "processing" and "query."

[20] NSA "searches conducted in [UAM] systems" are excluded from the definition of "query" in NSA's procedures, "so long as the only unminimized section 702-acquired information that the searches run against are in records captured through [UAM]." NSA Querying Procedures § III.A.

b. Human Inspection of Responsive Information

The government has argued that a "query" does not occur – and specifically that information is not "retrieve[d]" for purposes of the statutory definition – unless and until it is reviewed by a human analyst. October 18, 2021 Memorandum at 17 n.9; Gov't Resp. May 26, 2022 at 10-11, n.6. But the text of Section 702(f)(3)(B) gives no indication that human review is necessary for a query to occur. The government's interpretation, moreover, conflicts with the language of another provision of Section 702(f), under which the FBI, in described circumstances, "may not *access* the contents of communications . . . that *were retrieved pursuant to a query* made using a United States person query term." § 702(f)(2)(A) (emphasis added). This language makes clear that queries resulting in the retrieval of information must be completed before the information retrieved by the queries can be accessed by analysts for review.

In subsequent submissions, the government used language that can be understood to focus on whether an action returns information for the purpose of human inspection, rather than on whether such inspection actually occurs. *See* Gov't Reply Feb. 7, 2023 at 6 ("A query must 'retrieve' information — terms must be used for the purpose of bringing back information for human review."). Such an approach avoids clashing with the language of Section 702(f)(2)(A), but it remains unclear why such a purpose is necessary for an action to qualify as a "query" under the statutory definition.

The government seeks to derive a human-inspection requirement from the part of the definitional language that refers to "retriev[ing] the unminimized contents or noncontents located in electronic and data storage systems." § 702(f)(3)(B). It suggests that information "has been

'retrieved' for purposes of the Act's definition of query only if it is returned to a human for inspection . . . . [W]hen information is returned to a human, that information has been retrieved." Gov't Legal Assessment Oct. 28, 2022 at 10. Both the government and the Amicus cite general dictionary definitions of "retrieve" that incorporate the idea of finding and bringing something back. *See id.* at 9; Gov't Reply Feb. 7, 2023 at 6; Amici Br. May 9, 2022 at 9 & n.7. Based on such definitions, the government analogizes to parking: a customer's car is retrieved from valet parking if it is brought back to the customer, but it is not retrieved if an attendant just moves it from one parking space to another. So too, on the government's account, information located in electronic and data storage systems must be presented to a human analyst for it to be retrieved; merely moving it from one storage system to another is not retrieval. *See* Gov't Reply Feb. 7, 2023 at 7-8.

This analysis is unpersuasive because Section 702-acquired information is not in the possession of NSA analysts before it is put into electronic and data storage systems. Rather, the relevant data flow is generally from the system or network of an electronic communication service provider to a government collection point, and then into an electronic and data storage system, where it first may become accessible to an analyst.[21] To "retrieve" *can* mean to bring something back to its prior location or possessor, but that particular meaning does not apply here.

[21] Another difference from physical retrievals is that electronically stored information is often copied for retrieval, so that the information retrieved may also persist in storage. The government acknowledges that a query may occur even when the retrieved information remains stored. *See* Gov't Legal Assessment Oct. 28, 2022 at 12-13 ("the statutory definition of query is triggered only if unminimized communications of a U.S. person are intended to be returned to a human, even if the information continues to be stored in NSA's systems").

It is more useful to look to the meaning of "retrieve" (and by extension "retrieval") in the specific context of electronic storage.[22] Dictionaries cited by the government and Amicus define "retrieve" in this context as "to recover from storage" and "to gain access to (stored information"). *See* Amici Br. May 9, 2022 at 9; Gov't Reply Feb. 7, 2023 at 7 n.5. Publicly available online resources offer similar definitions.[23] The government and Amicus disagree about how to apply these concepts to automated actions that do not result in human inspection, but rather use search terms to identify responsive information in a storage system and cause it to be stored separately in a form that facilitates future inspection or use. Amicus contends that, for purposes of Section 702(f)(3)(B), such actions retrieve information located in electronic and data storage systems, *see* Amici Br. May 9, 2022 at 9-10; Amicus Resp. Jan. 24, 2023 at 5-6, while the government argues that they do not, *see* Gov't Legal Assessment Oct. 28, 2022 at 13; Gov't Submission Jan. 10, 2023 at 21.

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[22] *See, e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) ("When interpreting statutes, courts take note of terms that carry 'technical meaning[s].'") (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012)); Scalia at 441 (defining "technical-meaning exception" as "[t]he doctrine that the ordinary-meaning canon does not apply when a word or phrase that has acquired a specialized or peculiar meaning in a given context appears in that context"). In *Van Buren*, the Supreme Court looked to the meaning of "access" "[i]n the computing context" in order to interpret a statute that used the term "access" in that context. *Van Buren*, 141 S. Ct. at 1657.

[23] For example, Techopedia provides the following definition of "data retrieval:" "In databases, data retrieval is the process of identifying and extracting data from a database, based on a query provided by the user or application. It enables the fetching of data from a database in order to display it on a monitor and/or use within an application." Data Retrieval, Techopedia (May 22, 2014), https://www.techopedia.com/definition/30140/data-retrieval. Another source defines "information retrieval" as "recovery of information, especially in a database stored in a computer." Information retrieval, Britannica (Mar. 3, 2023), https://www.britannica.com/technology/information-retrieval.

The government's position rests in part on the view that information is not "retrieved" when it is copied from one NSA storage system to another because it does not leave electronic storage. *See* Govt. Legal Assessment at 13 ("A process that reads information from an NSA system and writes its output to an NSA system has not brought back information."). But Section 702(f)(3)(B) refers to retrieving "unminimized contents or noncontents *located in* electronic and data storage systems" (emphasis added), not *from* electronic and data storage systems. Even if the term "'[r]etrieve' necessarily implies a distinction between the initial location of the grammatical object and its end location," Gov't Reply Feb. 7, 2023 at 6-7, it does not foreclose an interpretation under which information could be "retrieved" from one NSA electronic and data storage system to be placed in another.

The government also argues that interpreting the definition of query to encompass transfers of information from one system to another would "produce[ ] anomalous results because the statute provides no insight into where one 'system' ends and another begins." Govt. Legal Assessment at 13. The statute itself may not provide much guidance on this point, but NSA factually distinguishes among various systems that receive and send information in a series of automated actions. *See* NSA Decl. Aug. 23, 2022 at 12-14.

Amicus, on the other hand, advances an interpretation of Section 702(f)(3)(B) under which *any* operation that uses terms to identify unminimized Section 702 data information to be copied into a new storage system would constitute a "query," provided that some of that information is from U.S.-person communications. *See* Amici Br. May 9, 2022 at 8-10, 13;

Amicus Resp. Jan. 24, 2023 at 5-7. On this view, it is immaterial whether the information in question is accessed, reviewed or used in intelligence or investigative analysis.

This approach significantly departs from prior FISC decisions, which have focused on "querying rules" as measures "that guard against the indiscriminate review and use of U.S.-person information." October 18, 2018 Opinion at 64. Moreover, previously-approved procedures include carve-outs from querying requirements for actions that do not result in human inspection of unminimized Section 702 information. *See, e.g.*, NSA Querying Procedures § III.A (accompanying the 2021 Certifications) (excluding from procedures' definition of "query" circumstances "where the user does not receive unminimized section 702-acquired information . . . either because the user has not been granted access to the unminimized section 702-acquired information, or because a user who has been granted such access has limited the query such that it cannot retrieve unminimized section 702-acquired information"). In contrast, Amicus's interpretation extends what constitutes a query further back into NSA's automated operations, so that a Section 702-acquired communication could be retrieved by a query without being reviewed by analysts or used for investigative or intelligence-analysis purposes. For example,

system [redacted] examines Section 702-acquired information "to determine what processing should be performed." *Id.* at 29. Among other things, it [redacted] *Id.* at 12-[redacted]Based on the information provided, each of these steps can plausibly be regarded as using "terms," [redacted][24] to conduct "queries" under the Amicus's interpretation.

This expansive interpretation, which would treat as querying much of NSA's automated, post-acquisition handling of Section 702 data, would have substantial consequences. It would require NSA to implement a "technical procedure whereby a record is kept of each United States person query term" used in the course of preparing Section 702-acquired information for querying and intelligence analysis. § 702(f)(1)(B). Agencies have some leeway under this requirement, particularly when they are not reasonably in a position to know pre-query whether a term is associated with a U.S. person. *See infra* note 37. But, to the extent practicable, NSA would have to devise means of making such records.

The relevant statutory context supports an interpretation closer to the one propounded by the government. Section 702(f) sets out three requirements: (1) that the AG and DNI adopt querying procedures that are consistent with the requirements of the Fourth Amendment,

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[24] *See* NSA Querying Procedures § III.A, at 2 n.1 ("terms" used to conduct a query may include "keywords, identifiers, [redacted]

§ 702(f)(1)(A); (2) that, under narrowly specified circumstances, FBI personnel obtain a FISC order before accessing the contents of communications retrieved by using a U.S.-person query term, § 702(f)(2)(A), (E); and (3) that querying procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query," *see* § 702(f)(1)(B). The first two requirements are plainly aimed at guarding against unreasonable intrusion into U.S.-person communications. The FISCR regarded the second requirement, in particular, as "intended to address . . . compliance with the Fourth Amendment." *See In re DNI/AG 702(h) Certifications*, 941 F.3d at 559. And the FISCR has taken the legislative history to "suggest[ ] that Congress enacted" the third, recordkeeping requirement "in part to respond to concerns that the intelligence community's querying practices might . . . intrude on United States persons' privacy" and "envisaged that the records Section 702(f)(1)(B) requires would be available for its oversight." *Id.* at 561-62.

Yet Amicus's approach would extend Section 702(f)(3)(B)'s recordkeeping requirement to a wide range of actions internal to NSA's systems that do not implicate U.S. persons' privacy to any meaningful extent.[25] Automated actions that convert Section 702-acquired data into intelligible and queryable forms do not meaningfully infringe on U.S. person's privacy, even insofar as they operate on communications to or from U.S. persons. They do not, in and of

[25] A similar point can be made about FISA's public-reporting requirements for queries. *See* 50 U.S.C. § 1873(b)(2)(B)-(C) (DNI shall annually publish "good faith estimate[s]" of "the number of search terms concerning a known United States person used to retrieve the unminimized contents of electronic communications or wire communications obtained" under Section 702 and "the number of queries concerning a known United States person of unminimized noncontents information relating to electronic communications or wire communications obtained" under Section 702").

themselves, deprive such U.S. persons of "the protection of anonymity," April 21, 2022 Opinion at 62, or result in inspection of private communications or heightened governmental scrutiny or investigative interest. Rather, those consequences ensue only if further steps are taken, including but not limited to review of such communications by analysts.

By the same measure, the government's interpretation of what it means "to retrieve" Section 702-acquired information for purposes of Section 702(f)(3)(B) is unduly narrow because it makes human inspection (or at least retrieving information for the purpose of human inspection) a *sine qua non* of a "query."[26] It is true that Section 702(f)(2) indicates that Congress, in the context of FBI law-enforcement efforts, focused on human inspection as a point at which substantial intrusion on Fourth Amendment-protected interests may occur. But automated analysis of private communications could, without human inspection, significantly disadvantage U.S. persons, *e.g.*, an algorithm that analyzes Section 702-acquired communications to identify

[26] In the computer context, the terms "query" and "retrieval" do not necessarily convey actions for the purpose of human inspection. *See supra* note 23 (definition of "data retrieval" that refers to "the fetching of data from a database in order to display it on a monitor *and/or use within an application*") (emphasis added); Query, Computer-Dictionary-Online.org (last visited Apr. 6, 2023), https://www.computer-dictionary-online.org/definitions-q/query.html (defining "query" as "A user's (or agent's) request for information, generally as a formal request to a database or search engine"); User, Computer-Dictionary-Online.org (last visited Apr. 6, 2023), https://www.computer-dictionary-online.org/definitions-u/user.html (defining "user" as "Any person, organisation, process, device, program, protocol, or system which uses a service provided by others"); Agent, Computer-Dictionary-Online.org (last visited Apr. 6, 2023), https://www.computer-dictionary-online.org/definitions-a/agent.html (defining "agent" "[i]n the client-server model" as "the part of the system that performs information and exchange on behalf of a client or server").

persons to be put on a list for heightened scrutiny during air travel.[27] [redacted]

see infra p. 46, suggest that this possibility is not far-fetched from a technological perspective.

In October 2022, the government submitted draft definitions of "processing" and "query" that were premised on the understanding that, in order to be a query, an action must be for the purpose of human inspection. *See* Govt. Legal Assessment at 52-53. After discussions with the Court through its staff, the government revised these definitions. The definition of "processing" now before the Court excludes an action that "presents information for human inspection" *or* that "produces and makes affirmative use of information for investigative, intelligence analysis, or preventative purposes" by "means that do not involve human inspection." *See supra* p. 29. As a result, actions that meet the second criterion are excluded from "processing," and therefore may constitute queries if the other definitional elements are met. The Court is satisfied that, if these definitions are properly applied, actions within the statutory definition of "query" will be appropriately treated under NSA's procedures. In addition, by clarifying that querying requirements may apply to automated actions that do not involve human inspection but nevertheless make affirmative use of information for investigation or intelligence analysis, they bolster the basis for finding that these procedures, as written, satisfy the definition of "minimization procedures" at § 1801(h)(1).

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[27] *See generally* Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L.Rev. 1277, 1339-1348 (Oct. 2018) (discussing use of algorithms to focus investigative attention on persons who fit a particular pattern or to predict persons who pose a threat).

c. Proper Application of the "Processing" and "Query" Definitions

It is necessary, however, for these definitions to be applied in a way that does not artificially sever the use of terms to search for and identify particular information from the retrieval of information so identified. NSA's use of tools [redacted] illustrates this point.

The government describes [redacted] as "a processing capability" that [redacted] These steps enhance efficiency by obviating the need for analysts to conduct complex queries to find such information. *Id.* at 6.

The government takes the view that the actions [redacted] do not constitute a query, or even part of a query. Rather, the government regards the query as entirely performed [redacted]

[redacted] o generate the notices to analysts" – as the only query terms involved. *Id.* at 5 n.3. Because these "identification numbers are not United States person query terms," NSA always records these queries "as non-United States person queries, regardless of what terms [redacted] used to create analyst notifications." *Id.*

The Court rejects this view. If, as the government admits, the above-described sequence involves retrieval of information by queries, then the terms used to scan unminimized Section 702 data to identify information for analysts to review are the terms used in those queries. That conclusion is not altered by the fact that, in order to see responsive information, analysts must click on links provided for that purpose. Otherwise, through a similar bifurcation, an agency could use U.S.-person identifiers to scan Section 702 information to find information about particular U.S. persons of investigative interest, and alert analysts when there is responsive information. If the agency sets up its system so that it retrieves such information only by reference to an agency-assigned identifier, it could, by the government's logic, claim that no U.S.-person query term was used for purposes of recordkeeping under Section 702(f)(1)(B) or, in the case of the FBI, the FISC-order requirement under Section 702(f)(2).

To foreclose such potential evasions of querying requirements, it must be recognized that analysts can use the [redacted] to review information of interest only because [redacted] has already searched for and located that information. In such situations, the query consists of both [redacted] use of query terms to search for desired information and [redacted] retrieval of the information found. In the terminology of the pertinent definitions in NSA's procedures, the searching by [redacted] and

retrieval [redacted] should be regarded as a single "action," which is not "processing" because it retrieves information for human inspection. *See supra* p. 29. Instead, the action falls under the definition of "query" because it uses terms to retrieve unminimized Section 702 information located in an NSA system. *See* NSA Querying Procedures § III.A, at 2.

In this specific context, however, the practical consequences of misidentifying what actions constitute queries and what query terms are used do not appear substantial. On the information provided, the Court expects that [redacted] uses few, if any, U.S.-person query terms. In addition, the information identified by [redacted] may be sufficiently likely to be foreign intelligence information that the querying standard is satisfied. Accordingly, compliance concerns regarding [redacted] do not call into question whether, taken as a whole, the NSA querying and minimization procedures, as written, satisfy the statutory requirements for such procedures. Nonetheless, the Court is directing the government to report on how NSA will ensure that use of those systems will conform to those procedures and the Court's above-stated interpretation of them. *See infra* p. 117.

3. Travel Vetting

NSA's travel vetting is in response to Presidential directives in National Security Presidential Memorandum-9, National Security Presidential Memorandum-7 (NSPM-7), and the Presidential Proclamation on Ending Discriminatory Bans on Entry to the United States[28] to

[28] Under these directives, the sharing and use of "national security threat actor information" must be consistent with applicable law, and such information must be maintained and used "in a manner that appropriately protects individual's privacy, civil rights, civil liberties, and other constitutional and statutory rights, including through compliance with applicable (continued...)

support DHS and DOS in ensuring that applicants do not pose a threat to national security. March 1, 2022 Memorandum at 5. Section IV.D of the NSA Querying Procedures is the primary provision regarding the NSA's Vetting Process.[29] It states:

> Notwithstanding subsection IV.A of these procedures, NSA may use certain unminimized section 702-acquired information for valid counterterrorism foreign intelligence purposes as directed to support the federal government's vetting of non-United States persons who are being processed for travel to the United States or a benefit under U.S. immigration laws (a "travel or immigration applicant").

NSA Querying Procedures § IV.D. The "notwithstanding" clause is noteworthy because section IV.A requires queries of unminimized Section 702 information to be reasonably likely to retrieve foreign intelligence information. Thus, any queries conducted under section IV.D need not satisfy that standard. In that regard, section IV.D breaks new ground. Although the FISC has approved exceptions to this general standard for certain purposes,[30] previously approved procedures have required that queries of unminimized Section 702 information for investigative or intelligence-analysis purposes be reasonably likely to retrieve foreign intelligence information or, in the case of the FBI, evidence of crime.

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[28](...continued)
guidelines governing the collection, retention, and dissemination of personally identifiable information." NSPM-7 § 3.

[29] In this opinion, "the Vetting Process" refers to the specific travel-vetting process described in the March 13, 2023 Submission.

[30] *See, e.g.*, NSA Querying Procedures § IV.C.5 (queries to identify information that must be produced or preserved in connection with litigation); § IV.C.6 (queries to "perform lawful oversight functions of NSA's personnel or systems").

Section IV.D does not, however, permit any type of query for travel-vetting purposes. Rather, it authorizes NSA to take three specific steps. In the first step, under section IV.D.1, NSA uses an automated process to scan [redacted] using as search terms [redacted] under Section 702 (2) [redacted]

In the second step, under section IV.D.2, NSA automatically compares non-U.S. person identifiers from travel or immigration applications [redacted] to determine whether

[redacted] The "TERR" NIPF topic encompasses "information that supports efforts to detect and prevent terrorism directed at U.S. citizens, interests, and allies, and to identify and locate terrorists and their support networks." *Id.*

32 [redacted]

any applicant is a terrorism-related target [redacted] [33] NSA takes several steps to avoid running against [redacted] any U.S.-person identifiers [redacted] These efforts include checking each application "for indicators that the applicant may be a U.S. person," [redacted] running comparisons only for identifiers [redacted] are used by a U.S. person. *Id.* at 10. NSA is also not authorized to run against [redacted] identifiers [redacted] "that NSA knows, or reasonably should know, are located or reside inside the United States." § IV.D. It uses filtering and other methods to avoid doing so. *See* NSA Decl. Mar. 13, 2023 at 10-11.

In the third step, an NSA analyst may "[r]eview the section 702-acquired information underpinning [a] match to assess the analytic significance of the travel or immigration applicant's connection to an international terrorism target." § IV.D.3. [redacted]

[33] The government has advised that "analyst review is required before any dissemination of Section 702-acquired information." NSA Decl. Aug. 23, 2023 at 52. The Court understands that this notification to DHS and DOS does not include Section 702-acquired information; however, this policy has been violated in a [redacted] context. *See infra* p. 98.

[redacted] Section 702-acquired information on the [redacted] an analyst receives [redacted] and [redacted] NSA Decl. Mar. 13, 2023 at 12.[34] At this point the analyst may research [redacted] but is not required to do so. *Id.* at 14-16. Rather, the analyst may proceed directly to reviewing the Section 702-acquired information that was the basis [redacted] *See* § IV.D.3. [redacted] NSA Decl. Mar. 13, 2023 at 17. Further queries of unminimized Section 702 information must conform with the generally-applicable requirements of section IV.A of the NSA Querying Procedures, including that queries must be reasonably likely to retrieve foreign intelligence information. § IV.A.4; NSA Decl. Mar. 13, 2023 at 18.

a. Querying Requirements

NSA's querying procedures must comply with the recordkeeping requirement for U.S.-person query terms and be consistent with the requirements of the Fourth Amendment. *See* § 702(f)(1)(A)-(B). For the reasons stated below, the Court finds that NSA's procedures satisfy that recordkeeping requirement in the context of the Vetting Process. Fourth Amendment issues respecting the Vetting Process are discussed below. *See infra* pp. 76-81.

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34 [redacted]

"NSA must generate and maintain an electronic record of each United States person query term used for a query" of unminimized Section 702 information, including among other information "the query term(s) used or approved" and "the statement of facts showing that the use of the query term(s) is reasonably likely to retrieve foreign intelligence information, as defined by FISA." NSA Querying Procedures § IV.B.1. If "it is impracticable for an NSA system to generate an electronic record," or a "circumstance arises that prevents the generation" of one, NSA must make a written record that contains the same information. *Id.* § IV.B.2.

(i) Generation [redacted]

This recordkeeping requirement only applies to U.S.-person query terms "used for a query." *Id.* § IV.B.1. The procedures exclude "activities that constitute the processing of unminimized section 702-acquired information" from their definition of "query." *See supra* p. 29. They further define "processing" to include "any machine-initiated action designed to identify, curate, label, or organize" "unminimized section 702-acquired information," provided that such action does not "present[ ] information for human inspection" or "produce[ ] and make[ ] affirmative use of information for investigative, intelligence analysis, or preventative purposes," "using means that do not involve human inspection." NSA Querying Procedures § III.A. Under those definitions, generation of [redacted] in the first step of [redacted] nsofar as it draws on raw Section 702 information, is a type of processing: it is a machine-initiated action designed to curate and organize raw Section 702 information for later use. In and of itself, generating [redacted] does not present information for human inspection and does not affirmatively use information for investigative, intelligence-analysis, or

preventative purposes. It follows, under these definitions, that generating [redacted] does not involve queries.

Consistent with Amicus's more expansive interpretation of Section 702(f)(3)(B)'s definition of "query," *see supra* pp. 34-39, Amicus has argued that queries, as defined by the statute, are used to generate [redacted] *See* Amici Br. May 9, 2022 at 13. But, the Court has found that definition inapplicable to automated actions that do not result in human inspection of information or affirmative use of it for investigative or intelligence-analysis purposes, but merely prepares it for such inspection or use in the future. *See supra* 37-40. Accordingly, the Court concludes that generating [redacted] does not involve queries as defined at Section 702(f)(3)(B) and therefore does not implicate the recordkeeping requirement at Section 702(f)(1)(B).

Moreover, even if it were assumed that [redacted] it appears that they rarely would make use of U.S.-person query terms. The automated actions that produce [redacted] scan raw Section 702 information to identify and [redacted] counterterrorism- [redacted] under Section 702 [redacted] NSA Decl. Mar. 13, 2023 at 4-5. The Court understands that such scanning uses these counterterrorism- [redacted] There is no reason to expect that such a [redacted] would be used by a U.S. person. Section 702 acquisitions are conducted under targeting procedures that the Court has found to be reasonably designed to prevent targeting of U.S. persons. *See supra* pp. 20-21; April

21, 2022 Opinion at 13-17, 71-73, 109-115. Those procedures require NSA to terminate acquisition without delay if it determines, through post-tasking analysis, that a Section 702 target is a U.S. person. NSA Targeting Procedures § II at 8. NSA is similarly prohibited from targeting U.S. persons in non-FISA acquisitions under Executive Order No. 12333.[35]

(ii) [redacted]

In the second step of the Vetting Process, NSA runs an automated comparison of [redacted]

Amicus has argued that, in the second step, the automated comparison of applicant's identifiers with [redacted] is a "query" as defined at Section 702(f)(3)(B) and the analyst's examination of the underlying Section 702 information in the third step constitutes review of query results. Amici Br. May 9, 2022 at 13-15. The government has contended otherwise, on the grounds that in this context NSA lacks specific intent to retrieve information

[35] *See* 50 U.S.C. § 1881c(a)(2) ("No element of the intelligence community may intentionally target, for the purpose of acquiring foreign intelligence information, a United States person reasonably believed to be located outside the United States under circumstances in which the targeted person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes" unless the U.S. person is targeted under a FISC order or a FISA emergency authorization by the AG).

concerning U.S. persons. Gov't Resp. May 26, 2022 at 10-12. Here too, it is unnecessary for the Court to decide whether NSA must act with such specific intent in order to conduct a "query," as defined by the statute.

First, the above-described sequence of events involves a "query," as defined in NSA's procedures. Applicants' identifiers are used as terms to identify and retrieve raw Section 702 information for analysts to review. [redacted] *See supra* pp. 42-43. The terms used to conduct these queries are the applicants' identifiers that are compared [redacted] To the extent that such identifiers are U.S.-person query terms, records of their use should be created in conformance with Section IV.B of NSA's querying procedures. It is noteworthy that NSA takes pains not to compare U.S.-person identifiers [redacted] *See supra* p. 46. Those efforts generally appear to be effective, although some U.S.-person identifiers have slipped through.[36] On balance, in view of NSA's avoidance efforts and the flexible nature of this

[36] In January 2023, NSA discovered that it had been receiving from DOS requests to vet [redacted] due to an error in a DOS system. Notice of Matter Under Investigation at 1 (Mar. 6 2023). NSA ascertained that it had received from DOS 498 applications submitted by LPRs since November 2020. Final Update to Notice of Matter Under Investigation at 3 (Apr. 3, 2023). Further investigation revealed that identifiers for only four of these LPR applicants were compared [redacted] and [redacted] *Id.* at 3-4. As of February 2023, NSA implemented system changes to automatically prevent identifiers from applications coded by DOS as submitted by an LPR from running against [redacted] and DOS corrected its system to prevent requests for NSA to vet such applications. *Id.* at 4.

recordkeeping requirement,[37] the Vetting Process does not detract from the Court's ability to find that NSA's procedures satisfy Section 702(f)(1)(B).

b. Minimization Requirements

As previously noted, section IV.D of NSA's querying procedures exempts the Vetting Process from the requirements at section IV.A, including that queries be reasonably likely to retrieve foreign intelligence information. *See supra* p. 44. That exemption presents the cental issue in evaluating section IV.D under the statutory definition of "minimization procedures" as "specific procedures . . . that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of" private U.S.-person information, "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." § 1801(h)(1).

The FISC has held that the reasonableness of minimization procedures that permit prolonged retention of unminimized Section 702 data "depends on querying rules and other access restrictions that guard against the indiscriminate review and use of U.S.-person information." October 18, 2018 Opinion at 63-64.[38] Queries that are reasonably likely to retrieve

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[37] Section 702(f)(1)(B) does not set forth "an inflexible substantive requirement that [agency] personnel exhaustively investigate whether every query term used to query Section 702 information relates to a United States person." *In re DNI/AG 702(h) Certifications*, 941 F.3d at 558. Rather, "the ultimate decision regarding how best to comply with Section 702(f)(1)(B)" is left to the Executive Branch, provided that there is "some kind of technical procedure that requires agency personnel to memorialize, to the extent reasonably feasible, whether a query term is a United States person query term." *Id.* at 557, 559.

[38] *See also* Docket Nos. 702(i)-15-01, *et al.*, Mem. Op. and Order at 24 (Nov. 6, 2015) ("November 6, 2015 Opinion") at 24 (relying on "several important restrictions" of CIA and (continued...)

foreign intelligence information are responsive to foreign intelligence needs, which provides justification for the resulting intrusions into private U.S.-person information. *See* October 18, 2018 Opinion at 81. Given the weight that prior decisions have placed on the "reasonably likely to retrieve" standard, the Court will assess to what extent queries conducted in the Vetting Process fall short of that standard.

The Court has concluded that generating [redacted] in the first step of the Vetting Process does not involve queries, but that the second and third steps should be understood to involve queries, as defined in NSA's procedures, and that those queries use as query terms the identifiers for applicants. *See supra* pp. 48-51. Those queries do not satisfy the "reasonably likely to retrieve" standard. Heretofore, that standard has been understood to require that, in order to use a query term, an analyst must have particular information indicating that using the term will return foreign intelligence information. *See, e.g.*, April 21, 2022 Opinion at 27 (queries using identifiers of arrestees to determine whether they were connected to international terrorism violated standard because persons who conducted them did not know of "any specific potential connections to terrorist related activity") (internal quotation marks omitted); *id.* at 31 (other queries regarding arrestees violated standard because personnel who conducted them "were not

[38](...continued)
NSA minimization procedures, "[m]ost notably" that all terms used to query the contents of communications must be "reasonably likely to return foreign intelligence information") (internal quotation marks omitted); Docket Nos. 702(j)-20-01, *et al.*, Mem. Op. and Order (Nov. 18, 2020) at 16-17 (relying on the "reasonably likely to retrieve" standard in approving NSA's querying procedures).

aware of any potential connections between the query subjects and terrorist or other national security threats").

The government has argued that the retrieval of raw Section 702 information in the third step comports with the "reasonably likely to retrieve" standard because a match between an applicant's identifier and [redacted] someone associated with international terrorism, [redacted] Gov't Resp. May 26, 2022 at 28. It [redacted] also justify a query. *Id.* at 25-26. Finally, the government cites guidance that NSD recently gave to the FBI that "contact with a suspected international terrorist or intelligence operative likely satisfies the querying standard, absent particular reason to believe that the contact is innocent." *Id.* at 29.

These arguments all rely on a match between an applicant's identifier and [redacted] to justify retrieval and examination of the underlying Section 702 information. But sufficient justification for undertaking a query must exist when the query is undertaken. Because the automated comparison of the applicant's identifier with [redacted] constitutes a query, the justification for performing the automated comparison must exist when it is performed. Just as a police officer cannot use the results of a search to establish probable cause, NSA cannot use positive query results to justify a query.

This point is illustrated by a case of noncompliance reported by the government in [redacted] in which the FBI conducted queries using non-U.S. person identifiers in connection with [redacted] NSD found these queries to violate the "reasonably likely to retrieve" standard based on the absence of reasonable suspicion at the time they were conducted. Notice of compliance incident regarding the improper querying of raw FISA-acquired information by the FBI at [redacted] NSD reached that conclusion, notwithstanding that FBI employed a two-step process in which it first ran queries of [redacted] identifiers against non-content information, after which it conducted queries of raw FISA content information for the small percentage of identifiers for which non-content queries yielded a match. *Id.* at 3. Because the FBI had no indication pre-query that any applicant presented a national security threat, NSD concluded that the FBI lacked a reasonable basis to believe that using these identifiers as query terms was likely to return foreign intelligence information or evidence of a crime. *Id.* at 4. NSD rejected the FBI's contention that a positive return from querying non-content information provided a sufficient justification for querying content information. *Id.* at 3-4. Accordingly, the Court views the second and third steps of the Vetting Process as involving suspicionless queries that use identifiers for non-U.S. person applicants as query terms.

The FISC has not previously approved Section 702 procedures that permit suspicionless queries for intelligence or other investigative purposes. The government argues that section IV.D comports with statutory minimization requirements because cross-checking an applicant's identifiers [redacted] is a logical step in assessing whether the applicant is part of an international terrorism network. *See* Gov't Resp. May 26, 2022 at 10, 25. The government

further argues that, by using automation, the Vetting Process limits human review of unminimized information to circumstances where an applicant is [redacted] a counterterrorism-[redacted] *Id.* at 25; March 1, 2022 Memorandum at 20.

Amicus contends that the Vetting Process is likely to result in the retrieval and retention of substantial quantities of communications of or concerning U.S. persons without a reasonable likelihood of returning foreign intelligence information, and therefore does not comport with § 1801(h)(1). Amici Br. May 9, 2022 at 17-21; Amici Reply Jun. 6 at 11. As a less intrusive alternative, Amicus suggests omitting [redacted] Amici Br. May 9, 2022 at 31-32. The government contends that omitting [redacted] *See* NSA Decl. Mar. 13, 2023 at 19 ([redacted]

The Court assesses [redacted] is compatible with the statute's minimization requirements. Section 1801(h)(1) does not rigidly require that Section 702-acquired data be reasonably likely to constitute foreign intelligence information in order to be searched for and copied from one NSA system to another. Despite Amicus's emphasis on the volume of U.S.-person identifiers extracted, the Court does not view generation of [redacted] as significantly intruding on U.S. persons' privacy.

Contrary to Amicus's suggestion, the Court does not view [redacted] It enhances analysts' ability to conduct queries to identify applicants who are [redacted] and to retrieve related Section 702-acquired communications. *See* NSA Decl. Aug. 23, 2022 at 48-49 [redacted] Using automated means [redacted] does not, in and of itself, significantly intrude on the privacy of U.S.-person communicants.

Use [redacted] in the third step is more likely to implicate U.S. persons' privacy interests in their communications. NSA analysts may review U.S.-person communications when an applicant [redacted] Given the apparent scope of the Vetting Process, the Court expects such communications to be reviewed at least occasionally. Such reviews result in a "substantial" intrusion on the privacy of the U.S. persons who are parties to reviewed communications. *See* October 18, 2018 Opinion at 90. But the government has provided reason to think that, in this specific context, some applicants' identifiers that cannot be determined *ex ante* to be reasonably likely to retrieve foreign intelligence information will turn out to do so when [redacted]

[redacted] That circumstance, in turn, provides reason to regard the Vetting Process as consistent with the need to obtain, produce, and disseminate foreign intelligence information concerning non-U.S. person applicants and ties they may have to international terrorism. Thus, generating [redacted] and using it for travel vetting are congruent with the foreign intelligence purpose that justified the terrorism-related taskings that acquired the information at issue. *See* § 1801(e)(1)(B), (h)(1).

On the other side of the balance, the government has a heightened need for prompt identification and production of foreign intelligence information regarding connections that non-U.S. persons who are seeking to enter the United States or obtain a U.S. immigration benefit may have to international terrorism. It therefore is particularly significant that the relaxed rules for queries in the Vetting Process are likely to result in the timely identification of foreign intelligence information regarding such applicants that might otherwise have been overlooked. [redacted] are retained for up to [redacted], after which they must be destroyed [redacted] *See supra* p. 45; Gov't Resp. May 26, 2022 at 18-19. [redacted] retention is permitted "to enable recovery if data corruption or some other issue renders the operational version unavailable or unusable." *Id.* at 18. Otherwise, information returned by the Vetting Process is "subject to the same retention requirements as other section 702-acquired data," *id.* at 18-19, which the Court has previously approved. *See* April 21, 2022 Opinion at 20-21, 58.

Also relevant to evaluating the procedures under § 1801(h) are the limitations on disseminating U.S.-person information returned by the Vetting Process. Such disseminations

must be approved by one of several specified senior NSA officials upon a written determination that the information is "reasonably believed to contain significant foreign intelligence information;" "reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed;" "necessary to understand or assess a communications security vulnerability of a United States Government or National Security system;" or pertinent "to an imminent threat of serious harm to life or property." NSA Minimization Procedures § 8(10) at 15. This approval requirement enhances protection against improper dissemination of such U.S.-person information.

Accordingly, the new provisions regarding the Vetting Process do not preclude a finding that NSA's querying and minimization procedures are reasonably designed, in light of the purpose and technique of the pertinent Section 702 acquisitions, to minimize the retention and prohibit the dissemination of private U.S.-person information, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information, and otherwise are consistent with the definition of "minimization procedures" at § 1801(h).

4. Other Uses [redacted]

The Court directed the government to provide further information and a legal assessment regarding NSA's use [redacted] *See supra* p. 11. The government has identified two such uses: [redacted] As explained below, the Court finds that these uses do not detract from a finding that NSA's

minimization and querying procedures, as likely to be implemented, satisfy applicable statutory requirements.

[redacted] Analysts may for efficiency reasons query [redacted] to learn whether an individual has been [redacted] Thus, such queries serve a similar, but broader, foreign intelligence purpose [redacted] *See id.* at 18 [redacted]

Importantly, such queries [redacted] are subject to the generally applicable querying requirements. "NSA personnel may query [redacted] only if such query satisfies the ["reasonably likely to retrieve foreign intelligence information"] standard in Section IV.A of the NSA Querying Procedures." *Id.* at 7, 13. Before conducting such a query, NSA personnel must have additional facts "beyond simply the nature of the Dataset queried" that make it "reasonable to believe that foreign intelligence information is likely to be returned." *Id.* at 14-15. In addition, access controls must ensure that

queries are conducted only by authorized users with proper training, and queries will not run against Section 702 information [redacted] unless users affirmatively opt for them to do so. *See id.* at 8, 12. Use of a U.S.-person query term to query Section 702-acquired content information requires prior approval by NSA's Office of General Counsel (OGC) and records are kept of such query terms. *Id.* at 16; NSA Querying Procedures § IV.A-B.[39] In view of these requirements, direct queries [redacted] do not call into question whether NSA's procedures meet applicable statutory requirements. Moreover, information reported by the government about recent queries [redacted] does not give rise to concern about implementation.[40]

b. [redacted]

[39] OGC may approve use of a U.S.-person query term for up to one year and renew prior approvals for up to one year. § IV.A. The Court understands that NSA may, on a frequently recurring basis, run repeated queries using large numbers of query terms as new data is acquired under Section 702 and [redacted]

[40] [redacted]

[41] [redacted]

[redacted]

Finally, NSA analysts may use a separate tool to query [redacted] datasets, including unminimized Section 702 information contained therein. *Id.* at 10. In order to do so, an analyst must "identify [redacted] Dataset to query and must specify that [the query] will include section 702-acquired information." *Id.* Such queries must be reasonably likely to

retrieve foreign intelligence information and may only be conducted by authorized users who have received the proper training. *Id.* NSA OGC must approve U.S.-person query terms used in such queries. *Id.* [redacted][42]

(i) Querying Requirements

Consistent with arguments advanced regarding the Vetting Process, *see supra* p. 49, Amicus contends that, under Section 702(f)(3)(B)'s definition of "query," [redacted] queries against the entirety of raw Section 702 information when it searches for communications related [redacted] *See* Amicus Resp. Jan. 24, 2023 at 5-8. The government likewise continues to argue that those actions do not constitute queries because they do not remove information from electronic storage or return it for human inspection. *See* Gov't Reply Feb. 7, 2023 at 5-6.

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[42] The government previously reported an investigation of possible failures by NSA to comply with recordkeeping and approval requirements for U.S.-person query terms used in such queries; however, the government has concluded that the investigated practices were compliant. *See* Update to the Notice of Investigation (Feb. 10, 2023). The practices involved filtering information according to the [redacted] would not be a U.S.-person query term because it would constitute "'a reference to a product by brand or manufacturer's name . . . or related nomenclature . . . or the use of a name in a descriptive sense[.]'" *Id.* at 3 (quoting NSA Querying Procedures § III.A).

The above-described operations [redacted] queryable datasets are "processing" as defined in NSA's procedures, and therefore do not involve queries as defined in those procedures. *See* NSA Querying Procedures § III.A. They are machine-initiated actions designed to identify and organize raw Section 702 information. These actions do not present information for human inspection, nor do they affirmatively use information for investigative, intelligence-analysis, or preventative purposes – they do not, for example, make decisions or recommendations regarding whom to target for foreign intelligence collection or identify in a lead for another agency. Moreover, the Court has concluded that actions that constitute "processing" as defined in NSA's procedures are not encompassed by the definition of "query" at Section 702(f)(3)(B). *See supra* p. 40. Therefore, the Court does not regard [redacted] queryable datasets as themselves involving queries under the statutory definition. They therefore do not implicate Section 702(f)(1)(B)'s recordkeeping requirement.

NSA analysts may query the datasets [redacted] under generally-applicable querying requirements, which the Court understands to include the recordkeeping requirements for U.S.-person query terms at NSA Querying Procedures § IV.B.1. *See supra* pp. 62-63; Gov't Submission Jan. 10, 2023 at 11 [redacted] are maintained . . . in the form of standard section 702 query audit records."). Section 702(f)(1)(B) is thereby satisfied with regard to that type of query.

(ii) Minimization Requirements

Amicus argues [redacted] afoul of FISA's minimization requirements because [redacted]

[redacted]t uses terms that are not reasonably likely to retrieve foreign intelligence information to scan, and extracts information from, raw Section 702 information. *See* Amicus Resp. Jan. 24, 2023 at 5-8. But the language of § 1801(h) does not mandate that every use of terms to find and extract information within raw Section 702 data be reasonably likely to return foreign intelligence information. *See supra* p. 56.

Moreover, it is consistent with § 1801(h)(1) for procedures to permit automated actions to find and extract certain types of information, without significantly intruding on U.S. persons' privacy, in order to facilitate production of foreign intelligence information [redacted] enable more focused queries fits that description. *See* NSA Decl. Aug. 23, 2022 at 30-31. "For example, a query searching for the [redacted] is much narrower" than a query [redacted] across all raw Section 702 information and that "narrower query is only possible once NSA identifies, extracts, and indexes that information." *Id.* at 31. It stands to reason that an analyst [redacted] may gain efficiency and clarity by querying [redacted] nstead of a larger, unstructured mass of data. And the government persuasively contends that querying these narrower datasets "reduc[es] the likelihood that U.S. person information is unnecessarily or indiscriminately reviewed" by analysts. Gov't Reply Feb. 7, 2023 at 14-15.

In comparison to these privacy and foreign-intelligence benefits of using the datasets [redacted] the intrusion on U.S. persons' privacy resulting from [redacted] them seems slight. In the Court's estimation, the automated actions that produce those datasets

do not significantly intrude on such privacy interests for reasons similar to those stated regarding generation of [redacted] *See supra* pp. 56-57.

Amicus further contends that queries [redacted] may present "greater risk of exposure and use" of U.S.-person information than the Vetting Process does. Amicus Resp. Jan. 24, 2023 at 7. That appears to be correct. In the Vetting Process, the query terms used are, at least by and large, identifiers for non-U.S. person applicants. Generally speaking, analysts review Section 702-acquired communications involving U.S. persons only when [redacted] *See supra* p. 57. In contrast, analysts may use U.S.-person identifiers to query [redacted] datasets, subject to generally-applicable querying rules.[43]

There is, however, another significant difference between the travel-vetting [redacted] contexts. Section IV.D of NSA's querying procedures exempts travel-vetting queries from the "reasonably likely to retrieve" standard and permits NSA to conduct what are, in effect, suspicionless queries of [redacted] using travel applicants' identifiers. *See supra* pp. 53-55. Queries [redacted] datasets, however, are authorized only if they are determined *ex ante* to be reasonably likely to retrieve foreign intelligence information. When that standard is

[43] Based on the information provided, it is difficult to assess how much U.S.-person information is likely to be in such datasets. [redacted]

met, the examination of U.S.-person information returned by such queries is justified by the "need of the United States to obtain, produce, and disseminate foreign intelligence information." § 1801(h)(1).

D. Conclusion

For the foregoing reasons and those stated in the Court's opinions in the Prior 702 Dockets, the Court concludes that, as written, the minimization procedures for the FBI, NSA, CIA, and NCTC, in conjunction with the querying procedures for those agencies, satisfy the definition of minimization procedures at 50 U.S.C. § 1801(h) and that those querying procedures, as written, satisfy the requirements of Section 702(f)(1).

V. FOURTH AMENDMENT REQUIREMENTS

The Court must also determine whether the targeting, minimization, and querying procedures are consistent with the requirements of the Fourth Amendment. *See* § 702(j)(3)(A)-(B). That Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The touchstone of the Fourth Amendment is reasonableness." *In re Certified Question of Law*, 858 F.3d 591, 604 (FISCR 2016) (per curiam) ("*In re Certified Question*"). Although "[t]he warrant requirement is generally a tolerable proxy for 'reasonableness' when the government is seeking to unearth evidence of criminal wrongdoing, . . . it fails properly to balance the interests at stake when the government is instead seeking to preserve and protect the nation's security

from foreign threat." *Id.* at 593. A warrant is therefore not required to conduct surveillance "to obtain foreign intelligence for national security purposes . . . directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States." *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004, 1012 (FISCR 2008) ("*In re Directives*").

The FISC has repeatedly reached the same conclusion regarding Section 702 acquisitions. *See, e.g.*, November 6, 2015 Opinion at 36-37; September 4, 2008 Opinion at 34-36. All three United States Circuit Courts of Appeals to consider the issue have held that the incidental collection of a U.S. person's communications under Section 702 does not require a warrant and is reasonable under the Fourth Amendment. *See United States v. Muhtorov*, 20 F.4th 558, 594-606 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 246 (2022); *United States v. Hasbajrami*, 945 F.3d 641, 661-68 (2d Cir. 2019); *United States v. Mohamud*, 843 F.3d 420, 438-44 (9th Cir. 2016).

In prior proceedings under Section 702(j), the FISC has assessed the reasonableness of Section 702 procedures as a whole, consistent with its charge under the statute to determine whether "the targeting, minimization, and querying procedures" are "consistent with . . . the fourth amendment." § 702(j)(3)(A)-(B).[44] Under the applicable totality-of-circumstances approach, the Court must balance "'the degree to which [governmental action] intrudes upon an individual's privacy'" against "'the degree to which it is needed for the promotion of legitimate

[44] *See, e.g.*, December 6, 2019 Opinion at 60 (concluding that "in combination, the proposed targeting, minimization, and querying procedures will adequately guard against error and abuse, taking into account the individual and governmental interests at stake"); November 6, 2015 Opinion at 39 (assessing "combined effect" of targeting and minimization procedures).

governmental interests.'" *In re Certified Question*, 858 F.3d at 604-05 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). "The more important the government's interest, the greater the intrusion that may be constitutionally tolerated." *In re Directives*, 551 F.3d at 1012.

Acquiring "foreign intelligence with an eye toward safeguarding the nation's security serves . . . a particularly intense interest." *In re Certified Question*, 858 F.3d at 606 (internal quotation marks omitted). For that reason, "the government's investigative interest in cases arising under FISA is at the highest level and weighs heavily in the constitutional balancing process." *Id.* at 608. The targeting procedures help ensure that Section 702 taskings are focused on acquiring authorized forms of foreign intelligence information. *See* NSA Targeting Procedures § I at 4 (before tasking, NSA must make a "particularized and fact-based" assessment that the proposed "target is expected to possess, receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory authorized for targeting").

On the other side of the balance, the foreign focus of Section 702 targeting limits to some degree the intrusion on Fourth Amendment-protected interests. The Court has found that the targeting procedures, as written, are reasonably designed to limit acquisitions to targeting persons reasonably believed to be non-United States persons located outside the United States. *See supra* pp. 20-21. Such persons are not within the ambit of Fourth Amendment protection. *See, e.g.*, November 6, 2015 Opinion at 38; September 4, 2008 Opinion at 37 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990)).

Nevertheless, the extent to which Section 702 acquisitions involve U.S. persons should be understood to be substantial in the aggregate, given the overall scope of Section 702 acquisitions. "NSA has reported that, on average, [redacted] individual facilities were tasked at a given time" during June-November 2022. Semiannual Report of the AG Concerning Acquisitions under Section 702 of FISA at 1 (filed Mar. 9, 2023). Presumably, some of the taskings acquire information protected by the Fourth Amendment, *e.g.*, by intercepting a communication between a U.S. person and a Section 702 target.

The government can reduce the intrusiveness of those acquisitions under the Fourth Amendment by restricting use and disclosure of the U.S.-person information acquired.[45] Here, the Court has found that each agency's minimization and querying procedures "are reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination" of private U.S.-person information, "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information" and require that private information "which is not foreign intelligence information, as defined in [§ 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its

[45] *See Maryland v. King* 569 U.S. 435, 465 (2013) (acquiring DNA sample incident to arrest was less intrusive because use was limited to identification purposes); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 832-34 (2002) (drug testing program was less intrusive because results were subject to limited access and use); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (drug testing program found less intrusive due to limitations on use and dissemination of results); *In re Certified Question*, 858 F.3d at 608-10 (prohibition on use of content information acquired under pen register/trap-and-trace order was among factors that made such acquisition reasonable).

importance," in satisfaction of § 1801(h)(1)-(2). *See supra* p. 67. Such protections can weigh considerably – even decisively – in assessing reasonableness.

> If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

In re Directives, 551 F.3d at 1012.

Protections relating to use of U.S.-person query terms are particularly significant in the FISC's Fourth Amendment review. "When the government queries Section 702 data to identify and examine information about a particular U.S. person, . . . it typically has an investigative or analytical interest regarding that person, who necessarily was not a target" of Section 702 acquisition. October 18, 2018 Opinion at 65. Such queries can also result in a further, post-acquisition "intrusion into the privacy of such U.S. persons, who may have enjoyed the protection of anonymity until information concerning them was retrieved" by a query. *Id.* at 65-66 (internal quotation marks omitted). Additional Fourth Amendment concerns can arise when the FBI uses U.S.-person query terms to identify evidence of crimes that are unrelated to national security threats. The exception to the warrant requirement for surveillance "conducted to obtain foreign intelligence for national security purposes and . . . directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States" "might not apply in everyday criminal investigations unrelated to national security and foreign intelligence needs." *In re DNI/AG 702(h) Certifications*, 941 F.3d at 559 (footnote and internal quotation marks omitted).

In 2015, and again in 2018 after the enactment of Section 702(f), *see* FISA Amendments Reauthorization Act of 2017 ("Reauthorization Act") § 101, Pub. L. No. 115-118, 132 Stat. 3 (2018), the FISC entertained amici arguments that queries should be regarded as distinct Fourth Amendment searches. *See* October 18, 2018 Opinion at 85-88; November 6, 2015 Opinion at 40-41. In each instance, the Court declined to do so. The Court concluded in 2018 that, although the querying requirements introduced by the Reauthorization Act "reflect congressional views on the reasonableness of certain querying practices and strongly suggest congressional recognition that Fourth Amendment concerns are implicated" by Section 702 queries, they "expand *statutory* protections, not the scope of what constitutes an independent search under the Fourth Amendment." October 18, 2018 Opinion at 87. The Court was also unpersuaded that cases cited by the amici established that "queries of Section 702 information [must] be considered distinct Fourth Amendment events." *Id.*[46] The Court found that these precedents were not "instructive" regarding "the government's examination of information lawfully acquired under a statutory framework that requires a judicial determination that the totality of attendant circumstances, including the government's acquisition, retention, use, and dissemination of such information, is

[46] Some of those cases "involved property voluntarily provided to law enforcement by a third party and subsequent law-enforcement searches that exceeded the scope of the prior examination by that third party." *Id.* at 87-88 (distinguishing *Walter v. United States*, 447 U.S. 649 (1980), *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), and *United States v. Bowman*, 215 F.3d 951 (9th Cir. 2001)). Amici also relied on *Riley v. California*, 573 U.S. 373 (2014) (warrant required to search cell phone lawfully seized as incident to an arrest), *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (acquisition from a third party of cell-site records revelatory of a person's location constituted a Fourth Amendment search), and *United States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987) (lab tests of tablets received by law enforcement from a hotel employee exceeded scope of the "field test" exception to the warrant requirement).

reasonable under the Fourth Amendment." October 18, 2018 Opinion at 87-88. The Court in 2018 applied the totality-of-circumstances approach discussed above and found that the FBI's querying and minimization procedures were inconsistent with Fourth Amendment requirements because the FBI would likely conduct broad, suspicionless queries. *See id.* at 88-92.

In 2019, the Second Circuit held that querying Section 702 information, at least when designed to retrieve information about particular U.S. persons, should be regarded as "a separate Fourth Amendment event that, in itself, must be reasonable," in order to provide "a backstop to protect the privacy interests of United States persons and ensure that they are not being improperly targeted" by unjustified queries. *Hasbajrami*, 945 F.3d at 670, 672.[47] In so doing, the Second Circuit relied on a number of the cases considered by the FISC in 2018. *See id.* at 670-72 (discussing *Riley*, *Runyan*, *Mulder*, and *Carpenter*).

Most recently in April 2022, this Court examined the FISC's October 18, 2018 Opinion and the Second Circuit's decision in *Hasbajrami* and concluded that it would "respectfully adhere[ ] to the view that [Fourth Amendment] objectives are properly served, at least in the context of the FISC's review of procedures under § 702(j)(3)(A)-(B), by examining the reasonableness of such procedures as a whole." April 21, 2022 Opinion at 66. For the reasons then stated, *see id.* at 62-66, the Court employs the same methodology in this case.

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[47] The district court in the *Mohamud* case, calling it a "very close question," reached the contrary conclusion. *See United States v. Mohamud*, No. 3:10-cr-475-KI-1, 2014 WL 2866749 at *26 (D. Or. June 24, 2014), *aff'd*, 843 F.3d 420 (9th Cir. 2016). The Ninth Circuit did not reach that issue on appeal.

After carefully considering how in combination the targeting, minimization, and querying procedures protect private U.S.-person information, the Court finds that the procedures as written adequately guard against error and abuse, taking into account the individual and governmental interests at stake. The Court accordingly finds that the procedures, as written, are consistent with the requirements of the Fourth Amendment.

Given the importance of querying practices under Section 702, particular discussion of certain amendments to the NSA's querying and minimization procedures is in order. It provides helpful context to review why in 2018 the FISC found FBI queries to be problematic under the Fourth Amendment. The FBI had "conducted tens of thousands of unjustified queries" and it appeared that many subjects of those queries were U.S. persons. October 18, 2018 Opinion at 88-89.[48] Although it was difficult "to assess to what extent U.S.-person information was returned and examined," the Court found "the privacy interests at stake [to be] substantial." *Id.* at 88-89. "At a minimum," the FBI's querying practices presented "a serious risk of unwarranted intrusion into the private communications of a large number of U.S. persons." *Id.* at 89. The severity of that intrusion was partially mitigated by generally-applicable minimization rules that "limit[ ] the further use or disclosure of U.S. person information returned by queries;" nonetheless, the Court "view[ed] as substantial the intrusion on U.S. persons' privacy inherent in FBI personnel's examination of information – especially content information – returned by unjustified U.S.-

[48] These queries did not comply with the requirement that FBI queries be reasonably likely to return foreign intelligence information or evidence of crime. *See id.* at 66-67.

person queries." *Id.* at 90. Although it was "a close question," the Court found that the FBI's procedures were "not consistent with the requirements of the Fourth Amendment." *Id.* at 91-92.

The revised definitions of "processing" and "query" in NSA's procedures, *see supra* pp. 29-43, do not implicate the Fourth Amendment concerns that those FBI queries presented. Although they exclude certain automated actions from the definition of "query," they do not alter the requirement that, when NSA analysts use queries to return information for them to review, they must use terms that are reasonably likely to retrieve foreign intelligence information (unless the query is conducted for an approved purpose other than investigation or intelligence analysis). *See* NSA Querying Procedures §§ III.A.1, at 2-3; IV.A; IV.C. Although human examination of the private communications of persons protected by the Fourth Amendment involves a substantial intrusion, such examination is reasonable when the communications were properly acquired under Section 702 and returned by a query satisfying the "reasonably likely to retrieve" standard. *Cf.* October 18, 2018 Opinion at 67- 68 ("[q]ueries that are reasonably likely to return foreign-intelligence information, are conducted for that purpose, and avoid overbreadth should *contribute* to the minimization of private U.S.-person information, consistent with foreign-intelligence needs") (emphasis added).

In contrast, actions that NSA's procedures regard as processing, and therefore not as queries subject to the "reasonably likely to retrieve" standard, do not result in human inspection or affirmative use of information for investigative, intelligence-analysis or preventative purposes. *See supra* p. 29. Such processing actions do not intrude on interests protected by the Fourth Amendment nearly to the same degree as human review of private communications. Moreover,

processing actions that prepare Section 702 information for analysis (*e.g.*, by identifying encrypted material and attempting to make it intelligible) promote the government's "particularly intense interest" in acquiring foreign intelligence. *See In re Certified Question*, 858 F.3d at 606. Some forms of processing may also limit the overall intrusion on Fourth Amendment-protected privacy. For example, the processing actions by which [redacted] produces focused datasets allow for more efficient queries that should reduce the extent to which analysts review U.S.-person communications that do not relate to the [redacted] in which they are interested. *See supra* p. 65.

The Vetting Process provided for in section IV.D of the NSA Querying Procedures presents different issues under the Fourth Amendment. In the first step of the Vetting Process, automated means are used to "curate[ ] information . . . [redacted] against which NSA compares identifiers to find relevant information. NSA Decl. Mar. 13, 2023 at 4-6, 8-9. Generating [redacted] is essentially a form of processing under the revised definition, and does not in and of itself significantly intrude on Fourth Amendment-protected interests. On the other hand, the second and third steps of [redacted] effectively involve suspicionless queries that result [redacted] and review of communications identified by such queries by NSA personnel. *See supra* pp. 45-47, 53-55. These steps in the Vetting Process present more substantial Fourth Amendment issues.

Although the "reasonably likely to retrieve" standard has been important in the FISC's review of Section 702 procedures, individualized suspicion is not an "irreducible" component of

reasonableness under the Fourth Amendment. *United States v. Martines-Fuerte*, 428 U.S. 543, 560-61 (1976). For searches that are responsive to special needs, the reasonableness inquiry focuses on whether the search program in question supports an important governmental interest beyond ordinary crime control. *See, e.g.*, *In re Directives*, 551 F.3d at 1011 (applying reasoning of special needs cases by analogy to justify a foreign intelligence exception to the warrant requirement for surveillance conducted for national security purposes); *see also In re Sealed Case*, 310 F.3d 717, 745-46 (FISCR 2002) (per curiam) (the programmatic purpose of FISA surveillance is distinguishable from "ordinary crime control"). The prevention of terrorist attacks is clearly a special need beyond ordinary law enforcement. *See Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (preventing terrorist attacks on mass transportation vessels determined to be at heightened risk); *MacWade v. Kelly,* 460 F.3d 260 (2d Cir. 2006) (preventing terrorist bombing of subways).

In evaluating whether a suspicionless search is reasonable under the special needs doctrine, a court conducts a context-specific balancing of the privacy interests affected against the government interest furthered by the intrusion. Three factors are examined: (1) the nature of the privacy interests involved; (2) the character and degree of the intrusion by the government; and (3) the nature and immediacy of the government's interest and the efficacy of the suspicionless searches in advancing that interest. *See Earls*, 536 U.S. at 830-34.

Privacy interests protected by the Fourth Amendment are substantially implicated in the Vetting Process when NSA analysts are alerted [redacted] communications of persons protected by the Fourth Amendment. As previously noted, the Court regards that privacy

interest as substantial. But the degree of intrusion into that interest cannot be precisely quantified. The travel applicants whose identifiers are used as query terms will rarely be protected by the Fourth Amendment, as section IV.D authorizes queries only for non-U.S. person applicants who are not known to be located or reside in the United States. NSA takes steps to limit its queries accordingly, though apparently they have not always been effective. *See supra* pp. 46, 51 and note 36. [redacted] It seems very likely that most communications reviewed in the Vetting Process would not involve these circumstances. Nonetheless, given the scope of the Vetting Process, it appears reasonable to expect that communications subject to Fourth Amendment protection will be reviewed on occasion.

Restrictions on post-acquisition access and use of information may reduce the intrusiveness of government action. In this case, U.S.-person information returned during the Vetting Process is subject to special rules under which dissemination is permitted only if a senior NSA official finds that the specific information to be disseminated meets heightened criteria. *See supra* pages 58-59. The Court expects it would rarely be necessary to disseminate U.S.-person information to another agency in order to dispose of a travel or immigration application. There may, however, be cases in which such information could be disseminated for other

legitimate purposes. For example, if a reviewed communication indicated that an applicant and a U.S. person were raising funds for an international terrorist group, information about the non-U.S. person applicant might be disseminated to DOS for vetting purposes and information about the U.S. person might be disseminated to the FBI for counterterrorism purposes that are independent of vetting the applicant. By providing further assurance against improper dissemination of U.S.-person information, this requirement diminishes to some extent the Vetting Process's intrusion on Fourth Amendment-protected interests.

Finally, the Court must consider the nature and immediacy of the government's objectives and the efficacy of the Vetting Process in meeting them. *See Earls*, 536 U.S. at 834. NSA developed the Vetting Process in response to Presidential direction to leverage national security information to help DHS and DOS ensure that foreign nationals who have applied for travel or immigration to the United States do not pose national-security threats. The "prevention or apprehension of terrorism suspects" is "inextricably intertwined with the national security concerns that are at the core of foreign intelligence collection." *In re Directives*, 551 F.3d at 1011. There is little dispute, therefore, that the need served by the Vetting Process – to identify applicants with connections to terrorism – is compelling. In the context of pending applications for entry into the United States or other immigration benefits, the Court accepts that this need is also immediate.

In evaluating the efficacy of the Vetting Process in meeting that need, the Court is mindful that this inquiry does not "transfer from politically accountable officials to the courts the decision as to which among reasonable alternative . . . techniques should be employed." *Cassidy*,

471 F.3d at 85. That choice "remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources." *Michigan Dept. of State Police v Sitz*, 496 U.S. 444, 454-55 (1990). The Court's role is limited to determining whether the Vetting Process, "at the level of its design," is a reasonably effective means for detecting applicants with connections to international terrorism. *See MacWade,* 460 F.3d at 273-74. The Vetting Process may be expected to result in timely identification of foreign intelligence information regarding applicants' connections to terrorism that might otherwise have been overlooked. NSA describes [redacted] taken from the contents of Section 702-acquired communications as particularly valuable to [redacted] because they are sometimes the only source of pertinent information [redacted] NSA Decl. March 13, 2023 at 8. In some cases, information "critical" to determining whether an applicant is suitable for entry may be found only in the contents of Section 702-acquired communications. *Id.* And the government has provided anecdotal evidence that [redacted] can result in identifying an applicant's connections to terrorism. *See supra* p. 56.

Amicus criticizes as lacking in specifics the government's case for the efficacy of what Amicus sees as the more intrusive aspects of the Vetting Process, such as examining the contents (not just metadata) of Section 702 communications to find [redacted] *See* Amici Reply Jun. 6, 2022 at 15. But, under the special needs doctrine, the benefits "need not be reduced to a quotient before a court may recognize a search program as effective." *MacWade*, 460 F.3d at 274; *see also Earls*, 536 U.S. at 837 ("reasonableness under the Fourth Amendment does not require employing the least intrusive

means"). Rather, the question is whether the Vetting Process is "a reasonably effective means of addressing" the government's interest in determining which applicants may present a terrorist threat. *MacWade*, 460 F.3d at 273. The Vetting Process meets that standard.

Despite the use of suspicionless queries, the Vetting Process as authorized by NSA's querying and minimization procedures is a reasonably effective means of furthering a compelling government interest that intrudes on Fourth Amendment-protected interests only to a limited degree. The Court concludes that the Vetting Process under those procedures, and ultimately the procedures themselves, are consistent with the requirements of the Fourth Amendment.

Issues regarding implementation of the other sets of procedures are addressed in Part VI immediately below.

VI. IMPLEMENTATION AND COMPLIANCE ISSUES

The government's implementation of the Section 702 procedures now in effect "can be relevant to determining whether proposed procedures comply with FISA's requirements," "to the extent that they serve as indicia of how proposed procedures will be implemented in the future." *In re DNI/AG 702(h) Certifications*, 941 F.3d at 564.

A. FBI Querying Practices

The prevalence of non-compliant queries conducted by the FBI, and particularly of broad queries that were not reasonably likely to return foreign intelligence information or evidence of crime, has been a major focus of concern since they contributed to the FISC finding in 2018 that the FBI's querying and minimization procedures were not consistent with statutory and Fourth Amendment requirements. *See* October 18, 2018 Opinion at 62, 68-70.

1. Remedial Efforts

The government has taken several steps to improve FBI querying practices, which include:

(1) The government revised the FBI's querying procedures to make explicit that "the person conducting the query must have a specific factual basis to believe that it is reasonably likely to retrieve foreign intelligence information or evidence of a crime;" that a statement of such specific factual basis must be included in the written documentation FBI personnel must prepare before "reviewing or accessing" raw Section 702 information "retrieved [by] using a United States person query term;" and that queries "must be reasonably tailored to retrieve foreign intelligence information or evidence of a crime without unnecessarily retrieving other information." April 21, 2022 Opinion at 35-36 (internal quotation marks omitted). These provisions appear at FBI Querying Procedures § IV.A.1, 3.

(2) The FBI modified its systems to facilitate compliance with querying rules in various ways. *See* April 21, 2022 Opinion at 36-41. Some modifications supported the requirement to document the specific factual basis for a query under the circumstances discussed above. *See id.* at 36-37. [redacted] a system used to query raw Section 702 information and other categories of data, was modified to require users to state that they have complied with an FBI policy that, subject to emergency exceptions, "batch jobs" comprising 100 or more queries require approval by an FBI attorney.[49] The FBI also changed the default settings of [redacted] and another system

[49] *See* Government's Submission in Response to Court's Order in Response to Querying Violations at 10-11 (Nov. 3, 2021).

called [redacted] so that they do not query raw Section 702 information unless a user affirmatively elects to do so. *See* April 21, 2022 Opinion at 37-38.[50] The Court anticipated that the new default settings "should eliminate non-compliance stemming from inadvertent querying" of such information and noted "preliminary indications" that such changes were "resulting in substantial reductions in the number of U.S.-person queries." *Id.* at 40.

(3) The FBI and NSD also enhanced training and oversight efforts for FBI queries of Section 702 information. NSD, in consultation with ODNI, developed a guidance document, which became the basis for mandatory querying training. *See* April 21, 2022 Opinion at 41-42. The FBI also developed plans for annual follow-up training. *See id.* at 43. NSD resumed oversight reviews of queries at FBI field offices after a pandemic-related suspension. *Id.*

2. Implementation of Querying Standard

There are further indications that these measures are having the desired effect. NSD has reported on querying reviews and training in the following FBI field divisions and headquarters component since the April 21, 2022 Opinion: [redacted]

[50] The FBI plans to retire [redacted] system this month and replace it with a user interface [redacted] and [redacted] repository [redacted] *See* March 22, 2023 [redacted] Notice at 3. At first [redacted] will not include raw Section 702 information, so queries of such information will be conducted in [redacted] and [redacted] which are the systems in which such information is stored. *Id.* at 4-6; Letter Regarding FBI Plans to Retire [redacted] at 1-2 (Feb. 9, 2023). Both [redacted] and [redacted] require users to affirmatively indicate that they want to query Section 702 information before such a query is run. March 22, 2023 [redacted] Notice at 5-6; April 21, 2002 Opinion at 36 n.12. The FBI intends to configure [redacted] so that it also will query raw Section 702 information only if a user affirmatively elects to do so. March 22, 2023 [redacted] Notice at 6. The FBI has also modified [redacted] to support the above-described approval requirement for large batch jobs and plans to configure [redacted] to do so as well. *Id.* at 5.

[redacted][51] Chart 1 summarizes the results of these reviews regarding compliance with the querying standard. The government recently filed reports of two more oversight reviews of FBI queries. *See* Query Notice [redacted] (Apr. 3, 2023); Query Notice [redacted] (Apr. 5, 2023). Information from these two reports is not included in this discussion; however, the Court has reviewed them and determined that they do not alter its assessment of FBI querying practices.

The figures in Chart 1 include queries of any type of FISA information, not just Section 702 information, because the government reported the number of Section 702 queries reviewed by NSD for only 14 of the offices listed in Chart 1. In those offices, NSD reviewed approximately 29,131 Section 702 queries and found violations of the querying standard in approximately 501 of them, or about 1.7%.

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[51] Notice of Compliance Incidents Relating to FBI Queries of Raw FISA-acquired Information, Including Information Acquired Pursuant to Section 702 of FISA, Identified During an NSD Review of Queries Conducted by FBI's [redacted] (June. 24, 2022) (similarly titled notices are cited in the form "Query Notice [city or FBI unit (date of filing)]"); Query Notice [redacted] (Jun. 24, 2022); Query Notice [redacted] (July 6, 2022); Query Notice [redacted] (July 18, 2022); Query Notice [redacted] (July 20, 2022); Query Notice [redacted] July 22, 2022); Query Notice [redacted] (July 22, 2022); Query Notice [redacted] (Sept. 8, 2022); Query Notice [redacted] (Oct. 14, 2022); Query Notice [redacted] (Oct. 18, 2022); Query Notice [redacted] (Oct. 27, 2022); Query Notice [redacted] (Nov. 28, 2022); Query Notice [redacted] Dec. 2, 2022); Query Notice [redacted] Dec. 5, 2022); Query Notice [redacted] (Jan. 27, 2023); Query Notice [redacted] (Jan. 27, 2023); Query Notice [redacted] (Jan. 27, 2023); Query Notice [redacted] (Feb. 8, 2023); Query Notice [redacted] (Feb. 8, 2023); Query Notice [redacted] (Feb. 8, 2023); Query Notice [redacted] (Mar. 3, 2023); Query Notice [redacted] (Mar. 27, 2023); Query Notice [redacted] (Mar. 29, 2023); Query Notice [redacted] Aug. 31, 2022).

Chart 1 – FBI Query Errors

Division	Date Range	Queries Audited	Queries Not Meeting Standard
[redacted]	8/2021-11/2021	7253	13 (0%)
	8/2021-11/2021	2636	4 (0%)
	8/2021-11/2021	914	10 (1.1%)
	8/2021-11/2021	3949	149 (3.8%)
	8/2021-11/2021	1926	33 (1.7%)
	8/2021-11/2021	2841	111 (3.9%)
	8/2021-11/2021	23566	264 (1.1%)
	8/2021-11/2021	2644	209 (7.9%)
	1/2022-3/2022	6178	240 (3.9%)
	1/2022-3/2022	1456	11 (0.7%)
	1/2022-3/2022	3046	0 (0%)
	1/2022-3/2022	4333	56 (1.3%)
	1/2022-3/2022	472	8 (1.7%)
	1/2022-3/2022	1415	52 (3.7%)
	1/2022-3/2022	5750	30 (0.5%)
	1/2022-3/2022	4926	70 (1.4%)
	4/2022-6/2022	677	6 (0.9%)
	4/2022-6/2022	1857	27 (1.5%)
	4/2022-6/2022	165	11 (6.7%)
	4/2022-6/2022	2963	57 (1.9%)
	4/2022-6/2022	316	25 (7.9%)
	9/2022-11/2022	49	14 (28.6%)
	10/2022-1/2023	342	3 (0.9%)
TOTALS		**79,674**	**1,403 (1.8%)**

Several contexts repeatedly gave rise to non-compliant queries across field offices, including support of domestic terrorism assessments, criminal investigations without a foreign nexus, investigations into the January 6, 2021 breach of the U.S. Capitol, and vetting of sources and Afghan refugees. As previously, a number of overbroad queries were reported, as were non-

compliant queries in which government-generated identifiers like FBI report numbers or National Security Letter (NSL) numbers were used as query terms.

Some violations of the querying standard coincided with failure to follow an FBI policy that requires prior Deputy Director approval to use "sensitive query terms" – *e.g.*, identifiers of domestic public officials, domestic political candidates, members of the news media, academics, and religious organizations or persons prominent within them. *See* Letter Regarding FBI Policy Concerning Sensitive Queries of Raw FISA-Acquired Information at 1 (Sept. 7, 2022) ("September 7, 2022 Letter"); NSD Fact Sheet, Recent Efforts to Strengthen FISA Compliance at 3 (Feb. 28, 2023). NSD reviews such approvals after the fact. *See* September 7, 2022 Letter at 2. The following queries did not meet the "reasonably likely to retrieve" standard and also contravened this FBI policy:

- In June 2022, an analyst conducted four queries of Section 702 information using the last names of a U.S. Senator and a state senator, without further limitation. March 2023 QR at 88. The analyst had information that a specific foreign intelligence service was targeting those legislators, but NSD determined that the querying standard was not satisfied. *Id.*

- On October 25, 2022, a Staff Operations Specialist ran a query using the Social Security number of a state judge who "had complained to FBI about alleged civil rights violations perpetrated by a municipal chief of police." *See* Query Notice [redacted] Mar. 29, 2023) at 4.[52]

[52] In addition, on May 9 and 10, 2022, an FBI Staff Operations Specialist ran four queries concerning a U.S. academic without obtaining Deputy Director approval; however, these queries were assessed to have satisfied the querying standard. *See* Query Notice [redacted] (Mar. 3, 2023) at 3.

This policy provides a potentially important safeguard and the Court encourages the FBI and NSD to reinforce its requirements in training and oversight reviews.[53]

Despite the reported errors, there is reason to believe that the FBI has been doing a better job in applying the querying standard. Large-scale, suspicionless queries of Section 702 information contributed in 2018 to a finding of deficiency in the FBI's querying and minimization procedures[54] and remained a concern at the time of the last renewal in April 2022.[55] Since then, the government has not reported violations of comparable magnitude. In some cases, FBI personnel apparently misapplied the querying standard to a group of similarly situated persons, but those violations do not approach the scale of a number of prior ones.[56]

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[53] As noted above, FBI policy also requires approval by an FBI attorney of "batch jobs" that include 100 or more queries. The fourth column on Chart 2 below provides the number of batch queries reported by the government. The FBI's [redacted] office conducted a batch job, consisting of 1,023 individual query terms, without the required attorney approval. *See* Query Notice [redacted] (Oct. 14, 2022) at 3. Nonetheless, NSD determined that these queries were reasonably likely to retrieve foreign intelligence information and otherwise complied with the FBI's querying procedures. *Id.*

[54] *See, e.g.*, October 18, 2018 Opinion at 68-69 ("queries using identifiers for over 70,000 communication facilities 'associated with' persons with access to FBI facilities and systems" in March 2017); *id.* at 69 (over 6,800 queries in December 2017 using identifiers for persons who had obtained [redacted]

[55] *See, e.g.*, April 2022 Opinion at 29 ([redacted] office conducted three batch queries consisting of over 23,000 separate queries using presumed U.S.-person query terms associated with [redacted] reportedly used by a group involved in the January 6 Capitol breach); *id.* ([redacted] office conducted batch query for over 19,000 donors to a congressional campaign).

[56] *See, e.g.*, Query Notice [redacted] (July 18, 2022) at 3 (86 queries for persons from [redacted] in support of a State Department [redacted] Query Notice [redacted] (July 22, 2022) at 3-4 (71 queries relating to [redacted]; Query

(continued...)

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Another positive indication is that two field offices that previously committed serious violations of the querying standard fared better in recent reviews:

- NSD reviewed 1,456 queries of FISA information conducted by the [redacted] office during January-March 2022 and identified only 11 violations of the querying standard. *See* Query Notice [redacted] July 22, 2022) at 2. "Between late 2016 and early 2020," that office had regularly conducted noncompliant queries using identifiers of witnesses, suspects, and other persons appearing in local police reports of homicides. April 21, 2022 Opinion at 26-27. It also ran noncompliant queries on 133 individuals arrested in connection with the civil unrest occurring in May-June 2020, and on hundreds of cleared defense contractors and [redacted] employees in June 2020. *Id.* at 27, 28 n.6.
- NSD reviewed 4,333 queries of FISA information conducted by the [redacted] office during January-March 2022 and identified only 56 violations of the querying standard. *See* Query Notice [redacted] (Sept. 8, 2022) at 2-7. That office previously conducted a non-compliant batch query for over 19,000 donors to a congressional campaign. *See supra* note 55.

The information reported regarding the FBI's recent implementation of the querying standard is encouraging, but it is not based on a complete picture. NSD devotes substantial resources to its oversight efforts, but still can examine only a fraction of total FBI queries. It is therefore possible that serious violations of the querying standard have so far gone undetected. On balance, however, FBI application of the querying standard appears to have improved.

3. Records of Use of U.S.-Person Query Terms

As reflected in Chart 2 below, the number of reported queries in which the FBI used U.S.-person query terms continued to decline in 2022, and now appears to have leveled off in the

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[56] (...continued)
Notice [redacted] (Oct. 14, 2022) at 3 (213 queries relating to [redacted]

range of 40,000 to 50,000 per quarter.[57] Other things being equal, fewer U.S.-person queries should indicate less intrusion into the private communications of U.S. persons. There are, however, concerns about the accuracy of FBI recordkeeping for use of U.S.-person query terms.

Section 702(f)(1)(b) requires that a record be kept of each U.S.-person term used for a query. Accordingly, the FBI is required to maintain a "record of each United States person query term used for a query of unminimized content or noncontent information acquired pursuant to section 702" and to apply presumptions in its procedures regarding U.S.-person status in cases of incomplete information, including one that someone in the United States is a U.S. person, absent specific indication to the contrary. *See* FBI Querying Procedures §§ III.B, IV.B.

In April 2022, the Court took note of inaccuracies in FBI records regarding whether queries had used U.S.-person query terms. *See* April 21, 2022 Opinion at 47-49 (discussing instances in which FBI analysts recorded hundreds or thousands of query terms pertaining to U.S. persons as non-U.S. person or "other."). The government has continued to report errors of this nature. In the above-described oversight reviews of FBI queries, NSD found recordkeeping errors of this type in approximately 2,350 of 79,674 queries reviewed. The Court understands that some of the queries reviewed did not run against Section 702 information and therefore were not subject to this recordkeeping requirement, but cannot tell how many such queries there were because NSD reported the number of Section 702 queries it reviewed for only 14 offices. In

[57] NSD often revises downward the number of U.S.-person queries recorded by the FBI if it determines that a query did not use a U.S.-person query term, contrary to how it was recorded by the person who conducted it. The figures in Chart 2 reflect any such revisions by NSD.

those offices, NSD reviewed approximately 29,091 Section 702 queries and found errors of this type for approximately 1,652 of them, or approximately 5.7%.

Notably, most of the errors of this type – approximately 65% – involved recording a term as pertaining to a U.S. person when in fact it did not. The errors discussed in the April 21, 2022 Opinion went the other way, *i.e.*, recording a U.S.-person query term as pertaining to a non-U.S. person or as "other." Errors in either direction impede accurate recordkeeping and reporting and therefore should be avoided. But mistakenly treating a U.S.-person query term as if it were in a different category can also lead to non-compliance with Section 702(f)(2) or the requirement at section IV.A.3 of the FBI Querying Procedures to document the specific factual basis for a query. Even with most of the reported errors falling in the less consequential category, the overall error rate indicates that training and oversight efforts should emphasize how to determine and record U.S.-person status correctly.

4. Section 702(f)(2)

Section 702(f)(2) requires the FBI to obtain approval from the FISC before accessing the contents of communications acquired under Section 702 under the following narrow circumstances: (1) such contents "were retrieved pursuant to a query made using a United States person query term," (2) the query "was not designed to find and extract foreign intelligence information," and (3) the query was conducted "in connection with a predicated criminal investigation . . . that does not relate to the national security of the United States," but (4) FISC approval is not required if "there is a reasonable belief that such contents could assist in mitigating or eliminating a threat to life or serious bodily harm." § 702(f)(2)(A), (E).

The government has never submitted an application to the FISC under this provision, but it has reported a number of violations of it. The April 2022 Opinion discussed five such violations, which arose in the context of criminal investigations stemming from the January 6 Capitol breach. April 21, 2022 Opinion at 33-34. More recently, the government has reported a similar violation. In March 2022, an FBI Special Agent ran a query of a U.S. person's name in response to a lead sent by another field office in connection with an open predicated criminal investigation related to the Capitol breach. *See* Notice of compliance incidents relating to FBI queries of raw FISA-acquired information, including information acquired pursuant to Section 702 of FISA, at 3 (Sept. 14, 2022). The query returned Section 702 information, which the agent accessed under circumstances that NSD found to trigger Section 702(f)(2)'s requirement for a FISC order. *Id.* NSD also concluded that the querying standard was violated because the agent did not have a specific factual basis to believe that the query was reasonably likely to return foreign intelligence information or evidence of a crime. *Id.* The agent did not use the information for any analytical, investigative or evidentiary purpose. *Id.* The FBI stated that it has taken steps to improve policy, training, and systems to avoid future violations of Section 702(f)(2). *Id.* at 3 n.4.

5. Reporting for Evidence-of-Crime-Only Queries

The FISC first imposed a reporting requirement regarding FBI queries conducted solely to return evidence of crime in November 2015. *See* November 6, 2015 Opinion at 78. On that occasion, the Court's approval of minimization procedures that permitted the FBI to conduct evidence-of-crime-only queries using U.S.-person query terms relied in part on the government's

assessment that "FBI queries designed to elicit evidence of crimes unrelated to foreign intelligence rarely, if ever, produce responsive results" from Section 702 information. *See id.* at 44. The Court imposed the reporting requirement to confirm the continued accuracy of that assessment. *Id.* at 78. The updated results of that reporting are summarized in Chart 2 below.

In the last five quarterly reports, the number of U.S.-person queries identified by the FBI personnel who conducted them as solely for the purpose of returning evidence of crime has generally decreased, as has the number of queries confirmed, after NSD review, to have met that description.[58]

6. Summary of Reporting

Currently, the government must report on a quarterly basis

> each instance in which FBI personnel accessed unminimized Section 702-acquired contents information that the user identified as a Query ONLY for evidence of crime. Except for queries for which an application is filed with the Court pursuant to Section 702(f)(2), the report shall include the FBI's basis for concluding that the query was consistent with applicable procedures. This report shall also include: (i) the number of U.S.-person queries run by the FBI against Section 702-acquired information; (ii) the number of such queries identified by the user as evidence-of-crime-only queries; (iii) the number of instances in which users of [redacted] stated that they had received approval from an FBI attorney to perform a "batch job" that includes 100 or more queries; and (iv) the number of instances in which users of [redacted] did not receive prior approval from an FBI attorney for such a "batch job" due to emergency circumstances.

[58] As is the case with the number of U.S.-person queries, NSD often revises downward the number of queries, as initially recorded by FBI personnel, that were conducted solely to retrieve evidence of crime. For example, of the 19 queries during June-August 2022 for which the user reported an evidence-of-crime-only purpose, NSD concluded that 12 had a foreign-intelligence nexus, three did not involve use of a U.S.-person query term, and three did not result in accessing Section 702-acquired information – leaving one query ultimately assessed to be responsive to this reporting requirement. *See* December 2022 QR at 120.

April 21, 2022 Opinion at 123-24. These reporting requirements are carried forward with minor adjustments. *See infra* pp. 113-14. Information reported in response to them (*see* March 2023 QR at 95, 144; December 2022 QR at 94, 119-20; September 2022 QR at 115, 142-43; June 2022 QR at 101, 132-33; March 2022 QR at 106, 137-41; December 2021 QR at 116; September 2021 QR at 102; June 2021 QR at 87) is summarized in the following chart. (The government was not required to report on approved batch jobs for some of the time reflected on the chart.)

Chart 2 – FBI Query Reporting

Reporting Period	**USPER and Presumed USPER Queries**	**USPER Queries for EOC Purposes Only** (user-reported)	**USPER Queries for EOC Purposes Only** (adjusted per NSD review)	**Approved Batch Jobs** (emergency batch jobs without prior approval in parentheses)
12/2020 - 2/2021	2,051,133	7	7	
3/2021-5/2021	1,119,879	14	0	
6/2021-8/2021	148,258	25	5	
9/2021-11/2021	74,783	88	4	
12/2021- 2/2022	67,537	122	14	
3/2022 - 5/2022	45,835	40	1	51 (0)
6/2022 - 8/2022	40,587	19	1	49 (0)
9/2022 - 11/2022	50,131	4	0	53 (2)
12/2022 - 3/2023	43,342	9	TBD	17 (0)

Given recent indications that the FBI is improving its implementation of Section 702 querying requirements, the Court finds that the FBI's querying and minimization procedures, taken as a whole and as likely to be implemented, are consistent with the requirements of the statute and the Fourth Amendment.

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B. Tasking Errors by NSA's Target Office for

An NSA analytical unit responsible for misapplied Section 702 tasking standards, resulting in a large number of improper taskings. In August 2021, NSD started to raise questions about the targeting practices of this office (Target Office") based on NSD and ODNI targeting reviews. *See* Final Notice of Compliance Incidents Regarding Multiple Section 702-Tasked Facilities Related to at 1-5 (Feb. 10, 2023) ("February 10, 2023 Notice"). NSA initiated its own reviews of taskings by the Target Office in December 2021. *Id.* at 5. NSA OGC, in conjunction with NSD, completed a comprehensive review of the office's Section 702 taskings. This review identified 571 tasking errors under international terrorism Certifications 2016-B, 2018-B, 2019-B, 2020-B, and 2021-B. *Id. passim.*[59] The erroneous taskings targeted

Id. NSD questioned

Id. For example,

Id. The government concluded that many targeting decisions had been improper because the target was

[59] It appears that NSA recently discovered four additional incidents involving Target Office, which are not included in the figures stated in the text. *See* March 2023 QR at 18-19 & n.16.

not reasonably expected to possess or receive, and was not likely to communicate, foreign intelligence information related to [redacted] *Id.*

The government reported other instances as documentation errors because it assessed that a target who lacked [redacted] could nevertheless have been properly targeted on other grounds, *e.g.*, because the target [redacted] *Id.* at 1, 3, 9. The government concluded that, with proper documentation [redacted] these targets could have been properly subject to acquisition under one of the Section 702 certifications. *Id.* at 9.

NSA has indicated that the erroneous taskings resulted from the [redacted] Target Office's misunderstanding of guidance it had received in 2016 and 2018. *Id.* at 12. That guidance included sample statements of targeting rationales, which the [redacted] office mistakenly thought to apply to [redacted] . . As a result of this misunderstanding, the [redacted] target office reused a standard targeting rationale for [redacted] taskings, even when the [redacted] *Id.*

NSA has placed all of the tasked selectors at issue on the Master Purge List and recalled 269 reports containing information from these taskings. *See id.* It has clarified and updated its targeting guidance to the [redacted] Target Office and offered training on drafting targeting rationales to analysts enterprise-wide, *id.* at 12-13, which should reinforce that each tasking decision must be individually justified.

C. Use of NSA's [redacted] Querying Tool

The government recently reported compliance problems regarding an NSA query tool called [redacted] has been in use since at least 2014 and is available to authorized users at NSA, other DoD entities, and a number of Intelligence Community (IC) agencies. *See* Notice of a Compliance Incident and Update to a Notice of Matter Under Investigation at 2, 4 (Mar. 10, 2023) ("March 10, 2023 Notice"). As described below, NSA has altered its functioning over time, largely in response to NSD's compliance concerns. The basic idea, however, is that [redacted] users may perform queries using selectors for foreign intelligence targets as query terms and receive [redacted] involving those targets. *See id.* at 2-3.

Data queried by [redacted] Currently, the only unminimized FISA information queried by [redacted] was acquired under Section 702. *See id.* at 3 n.6. Before December 20, 2022, [redacted] also ran against [redacted] other data) [redacted]

Query terms used with [redacted] Users of [redacted] can enter selectors for facilities known to be used by targets of foreign intelligence interest or unique identifiers for such targets in NSA's [redacted] *Id.* at 3 & n.5. In the latter case, [redacted] will automatically provide the selectors to be queried using [redacted] *Id.* at 3 n.5. At present, only selectors that are currently tasked for acquisition under Executive Order No. 12333

or Section 702 may be used as [redacted] query terms, *see id.* at 4-5,[60] but it appears that selectors tasked under other provisions of FISA may have been used in [redacted] queries previously. *See id.* at 4-5. According to NSA, pre-query screening measures prevented non-NSA users from conducting [redacted] queries using as query terms known selectors of U.S. persons or persons in the United States. *Id.* at 4 n.10.

Information displayed by [redacted] In addition to the [redacted] nformation described above, [redacted] returns "limited, minimized information about" query subjects, "including possibly FISA-acquired information, that is retained in NSA's [redacted] system." *Id.* at 3. For most of the relevant period, nothing prevented [redacted] from displaying such FISA information, including Section 702 information, in response to queries conducted by non-NSA users; however, NSA reportedly employed automatic processes to remove information about [redacted] from the results of such queries before they were displayed to non-NSA users. *Id.* at 5. On September 22, 2022, NSA reconfigured [redacted] to prevent display of *any* FISA-acquired information to non-NSA users. *See id.* at 3 n.7, 5.

The government regards [redacted] display of Section 702 information to non-NSA users before September 22, 2022, as constituting dissemination of such information. *See id.* at 5-6. In view of the limited types of information that [redacted] presented to such users, it seems likely that limited, if any, U.S.-person information acquired under Section 702

[60] The March 10, 2023 Notice states that this restriction came into effect on October 31, 2022, *see id.* at 5; however, NSD has orally corrected that statement and advised that it did not come into effect until March 16, 2023.

was included; however, the government's investigation of potentially non-compliant disseminations is ongoing.

An NSA official stated in a declaration submitted to the Court that "analyst review is required before any dissemination of section 702-acquired information." NSA Decl. Aug. 23, 2022 at 52. The government now describes this as an accurate statement of NSA policy and [redacted] presentation of Section 702 information to non-NSA users as having violated that policy. *See* March 10, 2023 Notice at 6-7. Because the Court regards the statement in the declaration as an important representation about how NSA implements dissemination requirements, it is directing the government to promptly report any other deviations from it. *See infra* p. 116.

It appears that [redacted] users generally do not apply, at least on a query-by-query basis, the "reasonably likely to retrieve foreign intelligence information" standard stated in NSA Querying Procedures § IV.A. The personnel who managed [redacted] "relied on rules generally applicable to information acquired pursuant to Executive Order 12333, despite the fact that [redacted] queried and disseminated FISA-acquired information. NSA advises that this error stemmed from a misunderstanding among NSA personnel." March 10, 2023 Notice at 3-4. The government acknowledges concern about whether "queries of identifiers tasked pursuant to Executive Order 12333" currently conducted using [redacted] comply with querying requirements. *Id.* at 6. By negative implication, the government does not have similar concerns about other queries being conducted using [redacted], but it is not clear to the Court why that should be the case.

NSD has requested that NSA "investigate possible remedial measures to prevent potential non-compliant queries," *id.*, but those measures are not yet in effect. Despite the prospect of further non-compliance regarding internal NSA queries, the Court concludes that use of [redacted] does not render NSA's procedures, as likely to be implemented, inconsistent with applicable statutory requirements or those of the Fourth Amendment. The Court bases that conclusion substantially on the limited type of Section 702 information returned by [redacted] and the nature of the query terms used, *i.e.*, selectors for current foreign intelligence targets under Section 702 or Executive Order No. 12333. Nonetheless, in view of ongoing compliance concerns and pending investigation into prior non-compliance, the Court is directing the government to provide further information. *See infra* pp. 116-117.

D. Improper Retention by NSA

Since the April 21, 2022 Opinion, the government has provided notice of several instances in which NSA potentially or actually retained Section 702-acquired information that was subject to a destruction requirement. These include:

- [redacted]

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- Starting in 2017, NSA retained raw FISA information in a folder [redacted] There was no indication that records in the folder had been accessed and NSA had deleted them all as of March 24, 2022. *Id.*

- An NSA workflow system called [redacted] may contain Section 702 data subject to purge or age-off requirements. *See supra* p. 28.

- NSA had improperly retained data in a backup system called [redacted] NSA deleted all improperly retained data from [redacted] as of July 27, 2022. *Id.*

- [redacted]

- [redacted] s a system that processes data acquired pursuant to Section 702 and other authorities. [redacted]

[redacted] NSA discovered on August 16, 2022, that a software error caused the age-off mechanism to stop running in [redacted] on July 28, 2021, resulting in retention of Section 702 data beyond the age-off period. *Id.* NSA is still investigating the cause of the error, but has implemented system monitoring to alert technical personnel when the age-off process is not running. *Id.*

NSA is unlikely to have used this improperly retained data for any investigative or analytical purpose because the systems involved are not SIGINT Collection-Source Systems of Record (SC-SSR). SC-SSRs are repositories for raw SIGINT information that "have appropriate data management controls (including purging)." March 2023 QR at 3 n.8. With very limited exceptions, information must reside in an SC-SSR to be authorized for use by NSA analysts. *See, e.g.*, July 11, 2022 [redacted] Notice at 2 (noting that [redacted] "are not used to support FISA applications, intelligence reporting, or Section 702 taskings as they are not SC-SSR records"); November 28, 2022 Deviation Notice at 4 (noting NSA assessment that data maintained for audit and oversight purposes in [redacted] "would not be able to be used in any FISA applications, disseminations, or taskings pursuant to Section 702 of FISA"). Records in [redacted] and [redacted] were not accessible to analysts. *See* May 6, 2022 [redacted] Notice at 2; October 12, 2022 [redacted] Notice at 2; November 22, 2022 [redacted] Notice at 2. And system logs for [redacted] indicated that the data in question was not accessed in that system. *See* June 30, 2022 [redacted] Notice at 2. Nonetheless, the number of these incidents indicates a need for NSA to focus more attention on ensuring that systems that contain Section 702-acquired information comply with retention limitations.

E. Improper U.S.-Person Queries by NSA Using [redacted]

The April 21, 2022 Opinion described how NSA's use of a querying tool called [redacted] had sometimes resulted in violations of recordkeeping and approval requirements for use of U.S.-person query terms. April 21, 2022 Opinion at 68. In addition to conducting queries, [redacted]

[redacted]

In order to avoid use of unapproved U.S.-person query terms in queries of Section 702 information, [redacted] automatically checks seed identifiers against a "defeat list" of known U.S.-person identifiers drawn from two other NSA systems. *Id.* But the defeat list did not comprehensively include all identifiers associated with ones placed on it, with the result that [redacted] sometimes ran queries using unapproved U.S.-person query terms. *Id.* at 69-70. The government reports that, as of July 8, 2022, NSA successfully implemented a previously-described plan to augment the defeat list so that it includes all such identifiers. *See id.* at 70-71; September 2022 QR at 130. This problem therefore appears to have been resolved.

F. Failure to Purge Recalled Reports

It came to light in 2019 that NCTC, NSA, and CIA had retained intelligence reports after they had been recalled for FISA-compliance reasons. *See* April 21, 2022 Opinion at 73. In response, the ODNI revised its DNI IC policy memorandum on recalling intelligence products to add a new category for recipients to be notified of recalls for FISA-compliance reasons. *Id.* The

revised IC policy memorandum ("ICPM 200(01)") also directed all IC elements to make conforming changes to their internal regulations. *Id.*

The Court has required periodic reporting on the IC's implementation of ICPM 200(01). These reports have detailed steady progress in the form of system changes, internal policy standards and training, and interagency coordination. *Id.* at 74. Developments since April 2022 include:

- **NCTC**: NCTC has deleted from its systems the recalled NSA reports containing FISA information that it had been retaining as of 2019 and completed its own recall process for three NCTC products that relied on one of those reports. *See* Final Notice of a Compliance Incident Regarding the Incomplete Purges of Data Acquired Pursuant to FISA at 2-3 (Aug. 4, 2022). NCTC now receives automatic notice of FISA-compliance recalls by NSA. *Id.* at 3. Receipt of such a notice triggers a process within NCTC to determine whether the recalled report exists in NCTC systems or has been used in any disseminated reports or analytical products. *Id.* If so, NCTC initiates a process to remove the report and any products based on it. *Id.*

- **CIA**: On May 17, 2022, ODNI oversight identified a report that had been recalled by NSA for FISA-compliance reasons in CIA's [redacted]. Notice of a Compliance Incident Regarding Retention of Data Acquired Pursuant to FISA at 3 (July 6, 2022). [redacted] is accessible throughout the IC. *Id.* CIA compared a list of all NSA reports recalled for FISA-compliance reasons with reports in [redacted] and identified another 24 recalled reports. *Id.* As of May 26, 2022, all copies of these 25 recalled reports were removed from [redacted]. *Id.* CIA now uses a subscription search in NSA's reporting system to alert it to FISA-compliance recalls of NSA reports. *See id.* at 4; Report in Response to April 21, 2022 Memorandum Opinion and Order at 21 (Feb. 16, 2023) ("February 16, 2023 Recall Report") (noting that "the subscription service has proven to be reliable and complete").

- **FBI**: 305 reports recalled by NSA for FISA-compliance reasons – including 235 that contained information acquired from improper taskings relating to [redacted] *see* April 21, 2022 Opinion at 52-55 – remained accessible in FBI systems until late July 2022. *See* Final Notice of a Compliance Incident Regarding Retention of Data Acquired Pursuant to FISA at 3-4 (Jan. 20, 2023).

On June 30, 2022, the FBI discovered that its [redacted] had not been properly updated to distinguish between administrative recall notices and FISA-compliance recall notices. *See id.* at 3. The FBI has corrected this error and, as of July 24, 2022, has removed copies of these reports from [redacted] *Id.* at 4.

- **Army**: In March 2022, the Department of Defense (DoD) discovered about 30 NSA reports that had been recalled for FISA-compliance reasons in the Department of the Army [redacted] messaging platform. February 16, 2023 Recall Report at 25. Further Army investigation identified 762 recalled reports, all of which have now been removed from the system. *Id.* at 26. The government is still investigating these incidents and the effectiveness of the Army's remediation efforts, including the possibility that [redacted] transmitted FISA-recalled reports to other systems. *Id.* at 26-27.

In addition to addressing these incidents, ODNI has engaged with NSA, CIA, FBI, and NCTC to ensure that they employ the FISA-compliance recall category appropriately and consistently. For purposes of the ODNI policy, the agencies have adopted a working definition of "disseminated intelligence products" as "serialized textual intelligence products – which can be accompanied by imagery – that are made broadly accessible by an IC element to intelligence recipients." *Id.* at 9-10. They are also developing a plan for outreach to other recipients to ensure handling in accordance with ICPM 200(01). *Id.* at 11.

"A *FISA-compliance recall* notice shall explicitly state the product is being recalled for a FISA-compliance reason and must be removed with steps taken to prevent its further use or disclosure." ICPM 200(01) § B.3 (italics in original). Other types of recall notices are merely required to "state why the product is being revised or recalled and what action is expected or required of the recipients of the notice." *Id.* The government has advised that a FISA-compliance recall is permitted, but not required, for "[i]nformation that is subject to purge but is not the result of a FISA-compliance incident." February 16, 2023 Recall Report at 12 n.8.

> For example, if a non-United States person properly targeted pursuant to Section 702 of FISA traveled to the United States, and NSA detasked the relevant facilities without delay after learning of the travel, the information collected while the target was in the United States is not the result of a FISA-compliance incident. However, that information is generally subject to purge and NSA may choose to use the FISA-compliance recall process in such a situation.

Id.

It is unlawful to intentionally disclose or use information "knowing or having reason to know that the information was obtained through electronic surveillance not authorized" under FISA or another applicable statute. 50 U.S.C. § 1809(a)(2). In approving procedures that permit an agency to retain and use information from such acquisitions if certain requirements are met, the FISC has accepted that Section 702 acquisitions are authorized in circumstances where NSA has a reasonable, albeit mistaken, belief that the target is a non-U.S. person and is located overseas. *See supra* p. 25. "Nonetheless, the procedures of each agency require destruction of information obtained under those circumstances, unless the head of the agency authorizes its retention after making certain findings for the specific information to be retained." April 21, 2022 Opinion at 20-21. By their terms, these destruction requirements[61] apply to minimized

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[61] *See* NSA Minimization Procedures §§ 4(d)(2) ("[a]ny information acquired" under the above-described circumstances "will be treated as domestic communications"), 6 (domestic communications, "including information treated as a domestic communication, will be promptly destroyed upon recognition unless the Director (or Acting Director) of NSA" makes a specific written finding that "the sender or intended recipient of the domestic communication had been properly targeted" and that the communication falls within one of four specified categories); FBI Minimization Procedures § III.A.3 ("[a]ny information acquired" under the above-described circumstances "will be removed from FBI systems upon recognition, unless the Director or Deputy Director of the FBI" makes a specific written finding that the information is reasonably believed to fall within one of three specified categories); CIA Minimization Procedures § 8 ("[a]ny information received by CIA that is acquired" under the above-described circumstances (continued...)

information, as well as raw information. If one of those agencies disseminates a report that is later determined to contain information subject to such a destruction requirement, the agency must either (1) obtain specific authorization to retain the information or (2) destroy the information in whatever form it may appear. The Court is requiring the government to explain further why an agency that is obligated to destroy such information should have the discretion not to issue a FISA-compliance recall for any reports it has disseminated that contain such information. *See infra* p. 115.

G. Update on User Activity Monitoring Activities

The minimization procedures for the FBI, CIA, and NSA have specific provisions for retention of Section 702 information recorded by monitoring of employee activities to detect insider threats ("user activity monitoring" or "UAM"). *See* NSA Minimization Procedures § 12; FBI Minimization Procedures § III.F.7; CIA Minimization Procedures § 7.e. Such recording may occur when, for example, an analyst reviews raw Section 702 information on a workstation subject to UAM. Searches of information recorded by UAM are excluded from the definitions of "query" in those agencies' querying procedures. *See* FBI Querying Procedures § III.A; NSA Querying Procedures § III.A; CIA Querying Procedures § III.A. When it first approved these

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[61](...continued)
"will be destroyed unless the Director of the CIA" makes a specific written finding that the information "is reasonably believed to contain significant foreign intelligence information or evidence of a crime"); NCTC Minimization Procedures § B.4 ("[a]ny information received by NCTC that is acquired" under the above-described circumstances "will be promptly destroyed upon recognition, unless the Director of NCTC" makes a specific written finding that the information "is reasonably believed to contain significant foreign intelligence information or evidence of a crime").

provisions in December 2019, the Court noted that changes in how the agencies conduct UAM could affect the grounds for such approval and ordered the government to provide periodic updates regarding UAM systems and processes. *See* December 6, 2019 Opinion at 35, 41, 82-83. The Court carried forward that requirement in April 2022, *see* April 21, 2022 Opinion at 125-26, and does so again now. *See infra* p. 116.

In late March 2023, the government filed updates on the agencies' UAM activities.[62] NSA reported that it is collecting the same types of UAM data, but has made "analytic improvements to facilitate greater use" of such data. NSA UAM Update March 31, 2023 at 8. [redacted] *Id.* at 9-10. NSA limits access to UAM data on such platforms to authorized personnel. *Id.* at 10. It has also increased the number of personnel authorized to access UAM data from [redacted]. *Id.* at 11.

CIA reported that it is performing additional analysis of audit data for systems that personnel use to access unminimized FISA information; however, this audit data does not include such FISA information. CIA/NCTC UAM Update March 29, 2023 at 8. *Id.* CIA has increased the number of personnel who have access to UAM data from [redacted], due to an increase in the number and complexity of systems involved. *Id.* at 14-15. Access to CIA UAM

[62] Specifically, one was for the FBI, one for the CIA and NCTC, and one for NSA, each titled "Government's Updated Description of the [agency name] Insider Threat and Routine Employee Monitoring Activities and Assessed Implications for the FISA Standard Minimization and Querying Procedures." The respective reports are cited as "FBI UAM Update March 31, 2023," "CIA/NCTC UAM Update March 29, 2023," and "NSA UAM Update March 31, 2023."

repositories continues to be restricted to authorized personnel for UAM purposes and their interaction with the data is logged and available for audit. *Id.* at 14-16.

The FBI appears to have granted many more persons access to UAM data. In 2021, the FBI reported that approximately [redacted] persons were authorized to access its UAM tool. *See* FBI UAM Update March 26, 2021 at 11. Now access to UAM data at the FBI includes, but is not limited to, the following:

- approximately [redacted] persons currently have authorized access to networks containing UAM data in [redacted][63] *see* FBI UAM Update March 31, 2023 at 14-15;
- approximately [redacted] persons currently have authorized access to [redacted][64] *see id.* at 16;
- approximately [redacted] persons have access to UAM data in [redacted] Collaboration Services Unit (UCSU) repository,[65] *see id.* at 17-18; and
- approximately [redacted] persons have authorized access to [redacted][66] *see id.* at 18.

Such proliferation of access may increase risk of error or misuse of any Section 702 information within UAM data. But here the risk still appears manageable, partly because "UAM systems

63 [redacted]

64 [redacted]

65 [redacted]

66 [redacted]

contain a limited amount of unminimized Section 702 information, particularly in comparison to the main repositories of such information." December 6, 2019 Opinion at 38. Indeed, the FBI reports that, "[i]n carrying out its UAM activities, [it] has not identified any instances in which unminimized FISA-acquired information has been recorded." *Id.* at 18.

Based on the information provided, the Court sees no reason to depart from its prior conclusion that the agencies' UAM-related practices are consistent with finding that the querying and minimization procedures, as likely to be implemented, are consistent with statutory and Fourth Amendment requirements.

H. Other Incidents

The Court has also considered the nature and frequency of other instances of non-compliance reported since the April 22, 2022 Opinion and generally regards as reasonable the steps taken by the government to mitigate them and prevent similar occurrences.[67] After considering the overall state of implementation of the targeting, querying, and minimization procedures now in effect, the Court finds that the procedures submitted with the 2023

[67] These include tasking errors, *see, e.g.*, March 2023 QR at 6-21, 68-72 (reporting [redacted] tasking errors at NSA and [redacted] of non-compliance with FBI targeting procedures during the most recent quarterly reporting period); delayed detasking of selectors, *see, e.g.*, *id.* at 21-43 (reporting [redacted] such incidents at NSA); dissemination errors, *see, e.g.*, *id.* at 45-47 (reporting [redacted] such errors at NSA); querying errors, *see, e.g.*, *id.* at 48-53, 97 (reporting [redacted] such errors at NSA, of which [redacted] involved U.S. person query terms, and [redacted] such errors at NCTC). Most of these incidents resulted from human error and were addressed through retraining of the personnel involved. *But see, e.g.*, Preliminary Notice of Compliance Incident Regarding System Error Resulting in Multiple Delayed Detaskings at 1-2 (Jan. 9, 2023) (system error during October 29-31, 2022, resulted in delayed transmittal and implementation of [redacted] detasking orders).

Certifications, as likely to be implemented, comply with applicable statutory and Fourth Amendment requirements.

VII. CONCLUSION

For the foregoing reasons, the Court finds that:

(1) The 2023 Certifications, as well as the certifications in the Prior 702 Dockets, as amended by the 2023 Certifications and the Second Amendment to Certification 2021-B, contain all the required statutory elements;

(2) The targeting procedures for acquisitions conducted pursuant to the 2023 Certifications are consistent with the requirements of Section 702(d) and of the Fourth Amendment;

(3) With respect to information acquired under the 2023 Certifications, the minimization procedures and querying procedures are consistent with the requirements of Section 702(e) and Section 702(f)(1), respectively, and of the Fourth Amendment;

(4) With respect to information acquired under the certifications in the Prior 702 Dockets, as amended, the minimization procedures (including, as referenced therein, the requirements of the respective agencies' querying procedures) are consistent with the requirements of Section 702(e) and of the Fourth Amendment; and

(5) The querying procedures approved for use in connection with DNI/AG 702(h) Certification 2018-A, DNI/AG 702(h) Certification 2018-B, DNI/AG 702(h) Certification 2018-C, DNI/AG 702(h) Certification 2019-A, DNI/AG 702(h) Certification 2019-B, DNI/AG 702(h) Certification 2019-C, DNI/AG 702(h) Certification 2020-A, DNI/AG 702(h) Certification 2020-

B, DNI/AG 702(h) Certification 2020-C, DNI/AG 702(h) Certification 2021-A, DNI/AG 702(h) Certification 2021-B, and DNI/AG 702(h) Certification 2021-C are consistent with the requirements of Section 702(f)(1) and of the Fourth Amendment. (The Court does not make an equivalent finding regarding the other certifications in the Prior 702 Dockets because Section 702(f) only applies "with respect to certifications submitted under [Section 702(h)] . . . after January 1, 2018." Reauthorization Act § 101(a)(2).); and, accordingly,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The government's submissions are approved, as set out below:

a. The 2023 Certifications and the certifications in the Prior 702 Dockets, as amended, are approved;

b. The use of the targeting procedures for acquisitions conducted pursuant to the 2023 Certifications is approved; and

c. With respect to information acquired under the 2023 Certifications and the certifications in the Prior 702 Dockets, the use of the minimization procedures and querying procedures is approved;

(2) Separate orders memorializing the dispositions described above are being issued contemporaneously herewith pursuant to Section 702(j)(3)(A);

(3) The government shall adhere to the following requirements (prospectively, the government need not comply with reporting requirements imposed by FISC opinions and orders in the Prior 702 Dockets, except as reiterated below):

a. Raw information obtained by NSA's [redacted] under Section 702, [redacted] shall not be provided to the FBI, the CIA or NCTC unless it is done pursuant to revised minimization procedures that are adopted by the AG and DNI and submitted to the FISC for review in conformance with Section 702;

b. On or before December 31 of each calendar year, the government shall submit a written report to the FISC: (a) describing all administrative-, civil-, or criminal-litigation matters necessitating preservation by the FBI, NSA, CIA, or NCTC of Section 702-acquired information that would otherwise be subject to destruction, including the docket number and court or agency in which such litigation matter is pending; (b) describing the Section 702-acquired information preserved for each such litigation matter; and (c) describing the status of each such litigation matter;

c. The government shall promptly submit a written report describing each instance in which an agency invokes the provision of its minimization or querying procedures providing an exemption for responding to congressional mandates, as discussed in Part IV.D.3 of the October 18, 2018 Opinion. Each such report shall describe the circumstances of the deviation from the procedures and identify the specific mandate on which the deviation was based;

d. The government shall submit in each quarterly report on Section 702 compliance matters a report of each instance in which FBI personnel accessed unminimized Section 702-acquired contents information that the user identified as a Query ONLY for evidence of crime. Except for queries for which an application is filed with the Court pursuant to Section

702(f)(2), the report shall include the FBI's basis for concluding that the query was consistent with applicable procedures. This report shall also include: (i) the number of U.S.-person queries run by the FBI against Section 702-acquired information; (ii) the number of such queries identified by the user as evidence-of-crime-only queries; (iii) the number of instances in which users stated that they had received approval from an FBI attorney to perform a "batch job" that includes 100 or more queries; and (iv) the number of instances in which users did not receive prior approval from an FBI attorney for such a "batch job" due to emergency circumstances;

e. The government shall continue to submit reports to the Court on a quarterly basis on its use [redacted] under Section 702. This report shall: (i) describe the [redacted] (ii) explain how the government is ensuring that it will only acquire communications to or from a Section 702 target [redacted] and (iii) describe methods the government is using to monitor compliance with the abouts limitation [redacted] collection and report on the results of such monitoring;

f. No later than ten days after tasking for upstream collection under Section 702 [redacted] the government shall submit a notice to the Court. This notice shall: (i) describe [redacted] (ii) explain how [redacted] will comply with the abouts limitation; and (iii) describe steps that will be taken

during the course of the proposed acquisition to ensure that [redacted] is only acquiring communications to or from authorized Section 702 targets;

g. On or before December 31 of each calendar year, the government shall submit in writing a report to the Court containing the following information: (i) the number of Section 702-acquired products disseminated or disclosed to the National Center for Missing and Exploited Children (NCMEC); and (ii) the number of disseminations or disclosures by the NCMEC to other law-enforcement entities of Section 702-acquired information;

h. Prior to implementing changes to policies or practices concerning (i) the release of Section 702-acquired information from the NCMEC to Interpol's International Child Sexual Exploitation database or (ii) approval to use Section 702-acquired information disseminated to the 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;

i. The government shall submit an update by February 16, 2024, specifying, as applicable: (i) steps taken or to be taken by the FBI, NSA, CIA, and NCTC to coordinate their policies and procedures to identify and handle disseminated analytical reports derived from FISA-compliance recalled reports, and to verify receipt of notice of reports recalled for FISA-compliance reasons; (ii) ODNI guidance regarding the definition of the term "disseminated intelligence products" as used in ICPM 200(01); and (iii) steps taken or to be taken to facilitate a consistent application among the FBI, NSA, CIA, and NCTC of the FISA-compliance recall category;

j. The government shall make a written submission within 90 days of this Order addressing: (i) how the respective agencies comply with the destruction requirements of NSA Minimization Procedures §§ 4(d)(2), (6); FBI Minimization Procedures § III.A.3; CIA Minimization Procedures § 8; and NCTC Minimization Procedures § B.4 for Section 702-acquired information that was put in reports issued to other agencies before it was recognized that such information had been acquired at a time when the agency conducting the acquisition reasonably, but mistakenly, believed that the target was both a non-U.S. person and located outside of the United States, including but not limited to whether and how such reports are recalled;

k. The requirement to provide an update to each agency's user activity monitoring (UAM) submission that appears on pages 82-83 of the December 6, 2019 Opinion shall remain in effect, with the next report due in March 2025 and subsequent reports due at two-year intervals thereafter;

l. No later than ten days after the NCTC Director delegates authority to any Group Chief or official within the Directorate of Identity Intelligence to make the determination required under NCTC Minimization Procedures § D.3.b., the government shall submit a notice to the Court. This notice shall: (i) identify the individual to whom the delegation was made; (ii) describe the duties of such individual; and (iii) explain the reason(s) for the delegation to such individual and the scope and duration of the delegation;

m. The government shall promptly report to the Court: (i) any change to the requirement that Section 702 information be reviewed by a human analyst before it is disseminated by NSA,

as referenced in the NSA Decl. Aug. 23, 2022 at 52; and (ii) any discovery of a dissemination by NSA of Section 702 information without prior review by an analyst, notwithstanding the referenced requirement;

n. The government shall make a written submission within 90 days of this Order: (1) updating the Court on the investigation of prior non-compliance regarding use of [redacted] including any remedial measures taken or to be taken; and (2) describing any steps taken or to be taken to prevent potential non-compliant queries of Section 702-acquired information using [redacted] If the planning and implementation of the steps described in (1) and (2) above are not completed at the time of such written submission, the government shall submit written updates at 90-day intervals thereafter;

o. The government shall make a written submission within 120 days of this Order describing how NSA will ensure that its use of [redacted] and [redacted] conform to NSA's querying procedures as interpreted at pages 42-43 of this Opinion;

p. [redacted] discussed herein, NSA's post-tasking review shall include periodic examination of information recently obtained [redacted] and

q. The government shall provide to the Court a written description of any of the following occurrences:

(a) NSA comes to believe that (i) [redacted]

[redacted]

[redacted]

(b) NSA comes to believe [redacted] or

(c) NSA comes to believe [redacted]

Such descriptions shall be submitted within 10 days of the applicable occurrence and describe the government's response thereto and assess any statutory or Fourth Amendment issues presented.

ENTERED this 11th day of April, 2023.

RUDOLPH CONTRERAS
Presiding Judge, United States Foreign Intelligence Surveillance Court