UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

UNDER SEAL

IN RE DNI/AG 702(h) CERTIFICATION 2024-A AND ITS PREDECESSOR CERTIFICATIONS.	Docket No. 702(j)-24-01 and predecessor dockets
IN RE DNI/AG 702(h) CERTIFICATION 2024-B AND ITS PREDECESSOR CERTIFICATIONS.	Docket No. 702(j)-24-02 and predecessor dockets
IN RE DNI/AG 702(h) CERTIFICATION 2024-C AND ITS PREDECESSOR CERTIFICATIONS.	Docket No. 702(j)-24-03 and predecessor dockets

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order concerns 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" ("2024 Submission") filed on March 5, 2024, in accordance with Section 702(h) of the Foreign Intelligence Surveillance Act (FISA), as amended.[1] This Court, the Foreign Intelligence Surveillance Court (FISC), has jurisdiction under Section 702(j) to review such certifications and the targeting, minimization, and querying procedures submitted therewith. For

[1] Section 702 of FISA is codified at 50 U.S.C. § 1881a, but for clarity is referenced herein as "Section 702."

the reasons stated below, the Court finds that the certifications contain all the required elements and that the targeting, minimization, and querying procedures are consistent with all applicable statutory requirements and the Fourth Amendment to the Constitution of the United States, and accordingly, approves the certifications and the use of the procedures for Section 702 acquisitions.

I. SECTION 702 OVERVIEW

At the outset, a word is in order about the future of Section 702. "Except as provided in section 404" of the FISA Amendments Act of 2008, as amended (FAA), Title VII of FISA (which includes Section 702) will be repealed "effective April 19, 2024" by operation of section 403(b)(1) of the FAA.[2] If Title VII is not extended by that date, the provisions of section 404 of the FAA

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[2] Title VII of FISA was enacted on a temporary basis in 2008, *see* FISA Amendments Act of 2008 §§ 101(a), 403(b)(1), Pub. L. 110-261, 122 Stat. 2436, 2437-2458, 2474 (2008), and extended in 2012 and 2018, *see* FAA Reauthorization Act of 2012 § 2(a)(1), Pub. L. 112-238 (2012); FISA Amendments Reauthorization Act of 2017 ("2017 Reauthorization Act") § 201(a)(1), Pub. L. 115-118 (2018). Most recently, Congress extended Title VII until April 19, 2024. *See* National Defense Authorization Act for Fiscal Year 2024 § 7902(a)(1), Pub. L. 118-31 (2023).

After a corresponding series of amendments to section 404(b)(1)-(2) of the FAA, *see* FAA Reauthorization Act of 2012 § 2(b); 2017 Reauthorization Act § 201(b)(1), (3); National Defense Authorization Act for Fiscal Year 2024 § 7902(b), those provisions now read:

> (b) TRANSITION PROCEDURES FOR FISA AMENDMENTS ACT OF 2008 PROVISION—
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> (1) ORDERS IN EFFECT ON APRIL 19, 2024.—Notwithstanding any other provision of this act, any amendment made by this Act, or [FISA], any order, authorization, or directive issued or made under title VII of [FISA], as amended by section 101(a) and by the FISA Amendments Reauthorization Act of 2017, shall continue in effect until the date of the expiration of such order, authorization, or directive.
>
> (2) APPLICABILITY OF TITLE VII OF FISA TO CONTINUED ORDERS, AUTHORIZATIONS, DIRECTIVES.—Notwithstanding any other provision of this Act, any amendment made by this Act, or [FISA], with respect to any order, authorization, or directive referred to in paragraph (1), title VII of such Act, as amended by section 101(a) and by the FISA Amendments Reauthorization Act of 2017, shall continue to apply until the later of—(A) the expiration of such order, authorization, or directive; or (B) the date on which final judgment is entered for any petition or other litigation relating to such order, authorization, or directive.

addressing the continuing effect of Title VII orders, authorizations, and directives, and the continuing applicability of Title VII to them, may bear on issues that come before the Court, as may any future legislation in this field. At present, the Court's task is to apply the law now in effect to the pending case.

Under Section 702, the government may target non-U.S. persons reasonably believed to be located outside the United States to acquire foreign intelligence information.[3] Unlike electronic surveillance and physical search authorizations under Titles I and III of FISA, Section 702 acquisitions do not require a judicial finding of probable cause to believe that a target is a foreign power or agent of a foreign power. Rather, under Section 702, the Attorney General (AG) and the Director of National Intelligence (DNI) may authorize jointly, for a period of up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information, upon the issuance of an order

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[3] 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 —
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> > (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
>
> (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).

of this Court made in accordance with Section 702(j)(3), or a determination of exigent circumstances by the AG and DNI under Section 702(c)(2).

Partly to ensure that only non-U.S. persons located outside the United States are targeted, Section 702(b) imposes specific limitations:

> An acquisition authorized under subsection (a)--
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> (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
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> (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
>
> (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
>
> (4) may not intentionally acquire 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;
>
> (5) may not intentionally acquire communications that contain a reference to, but are not to or from, a target of an acquisition authorized under subsection (a), except as provided under section 103(b) of the FISA Amendments Reauthorization Act of 2017; and
>
> (6) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

§ 702(b)(1)-(6).

Generally speaking, "[t]he 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." Docket Nos. 702(j)-23-01, et al., Mem. Op. and Order (Apr. 11, 2023) ("April 11, 2023 Opinion"), at 14 (citation omitted). Information for tasked selectors is acquired from or with the assistance of electronic communication service providers pursuant to directives issued by the AG and DNI to "immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition" in a manner that

protects its secrecy. § 702(h)(2)(A)(vi) & (G)(i)(1). For example, NSA may acquire communications [redacted] *See* Aff. of Dir. of NSA in Supp. of Certification 2024-A ("DirNSA Aff.") at 1-2. Such forms of acquisition are sometimes referred to as "upstream" collection. *See* Apr. 11, 2023 Op. at 14 (citation omitted). NSA may also acquire communications from or with the assistance of "Internet Service Providers," including providers [redacted] such acquisitions are sometimes referred to as "downstream" collection. *Id.*; DirNSA Aff. at 2.[4] The FBI may acquire [redacted] from downstream providers. Aff. of Dir. of FBI in Supp. of Certification 2024-A at 1.

[4] In April 2022, the Court first approved acquisitions by means of [redacted] Certification 2021-A [redacted] *See* Docket Nos. 702(j)-21-01, et al., Mem. Op. and Order at 81-120 (Apr. 21, 2022) ("April 21, 2022 Opinion"). The Court also established reporting and implementation requirements regarding such acquisitions. *See id.* at 126-27. In April 2023, the Court approved continuation of such acquisitions on the same basis. *See* Apr. 11, 2023 Op. at 4-5 n.2. The government has not reported any changed circumstances and proposes to continue such acquisitions on the same terms pursuant to Certification 2024-A. *See* DirNSA Aff. at 2-3; NSA Targeting Proc. § VI at 11-12; NSA Minimization Proc. § 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. The Court is also carrying forward previously established requirements relating to [redacted] *See infra* pp. 78-79.

The CIA and NCTC do not implement taskings or conduct acquisitions under Section 702. They do, however, receive unminimized[5] information acquired by FBI and NSA. *See* NSA Minimization Proc. § 9(1), (3); FBI Minimization Proc. § IV.E.

II. THE 2024 SUBMISSION

The 2024 Submission includes three certifications executed by the AG and DNI pursuant to Section 702(a):

- DNI/AG 702(h) Certification 2024-A, [redacted] ("Certification 2024-A"). This certification concerns the acquisition of foreign intelligence information about [redacted] *See* Certification 2024-A at 3.
- DNI/AG 702(h) Certification 2024-B, [redacted] ("Certification 2024-B"). This certification concerns the acquisition of foreign intelligence information about

[5] 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 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 Proc. § A.3.d.

[redacted] *See* Certification 2024-B at 3.

- DNI/AG 702(h) Certification 2024-C, [redacted] ("Certification 2024-C"). This certification concerns the acquisition of foreign intelligence information concerning [redacted] *See* Certification 2024-C at 1, 3.

Each 2024 Certification is accompanied by supporting affidavits of the Directors of the National Security Agency (NSA), Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC). Each 2024 Certification is also accompanied by several sets of procedures: NSA targeting and minimization procedures (Exhibits A and B, respectively), FBI targeting and minimization procedures (Exhibits C and D, respectively), CIA minimization procedures (Exhibit E), NCTC minimization procedures (Exhibit G), and querying procedures for the NSA, FBI, CIA, and NCTC (Exhibits H, I, J, and K, respectively). These procedures are identical for each certification. Exhibit F to Certifications 2024-A and 2024-B identify the individuals or entities targeted under those respective certifications.

The AG and DNI "may amend a certification submitted" to the Court "or the targeting, minimization and querying procedures . . . as necessary at any time, including if the Court is conducting or has completed review of such certifications and procedures." § 702(j)(1)(C).

Amended certifications or procedures shall be submitted to the Court, which "shall review any amendment . . . under the procedures set forth in [Section 702(j)]," i.e., the same procedures that govern FISC review of certifications and procedures submitted in the first instance. *Id.* When a reauthorization certification is accompanied by revised minimization or querying procedures, the government has amended the corresponding procedures adopted under prior certifications, so that the same set of procedures will govern the minimization or querying of Section 702 information, regardless of when it was acquired. *See, e.g.*, Apr. 11, 2023 Op. at 5. In accord with that practice, each 2024 Certification amends the prior Section 702 certifications[6] to authorize the FBI to apply the 2024 FBI querying procedures in connection with information previously acquired and states that "[a]ll other aspects of the Predecessor Certifications, as amended, remain unaltered and are incorporated herein." *See* Certification 2024-A at 4-5; Certification 2024-B at 4; Certification 2024-C at 3-4.

The 2024 Submission also includes a memorandum prepared by the National Security Division (NSD), U.S. Department of Justice (DOJ) ("2024 Memorandum"), which describes the contents of the submission and summarizes the differences between the FBI's 2023 and 2024 querying procedures.

[6] *See* Certifications submitted in 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, 702(j)-20-03, 702(j)-21-01, 702(j)-21-02, 702(j)-21-03, 702(j)-23-01, 702(j)-23-02, and 702(j)-23-03 (collectively "the Prior 702 Dockets").

III. ANALYSIS

The Court has jurisdiction to review a Section 702 certification and the accompanying targeting, minimization, and querying procedures. § 702(j)(1)(A). The FISC reviews the certifications to determine whether they contain the required elements and the accompanying procedures to assess whether they satisfy statutory requirements and are consistent with the Fourth Amendment. § 702(j)(2).

The provisions governing entry of an order respecting a certification and accompanying procedures appear at Section 702(j)(3)(A)-(C):

> (A) Approval
> If the Court finds that a certification submitted in accordance with subsection (h) contains all the required elements and that the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.
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> (B) Correction of deficiencies
> If the Court finds that a certification submitted in accordance with subsection (h) does not contain all the required elements, or that the procedures adopted in accordance with subsections (d), (e), and (f)(1) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order—(i) correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order; or (ii) cease, or not begin, the implementation of the authorization for which such certification was submitted.
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> (C) Requirement for written statement
> In support of an order under this subsection, the Court shall provide, simultaneously with the order, for the record a written statement of the reasons for the order.

§ 702(j)(3)(A)-(C).

This section (Section III) of this Opinion provides the required written statement of reasons and comprises three parts. Part A discusses the Court's finding that the 2024 Certifications contain

all of the statutorily required elements. Part B discusses the required procedures: subsections 1, 2 and 3 of Part B concern the targeting, minimization, and querying procedures, respectively, and set forth the basis for the Court's findings that such procedures, as written, meet the statutory requirements; and subsection 4 discusses the Court's finding that such procedures, as written, are consistent with Fourth Amendment. Part C explains the Court's conclusion, after examining a new CIA capability for review of Section 702 information and reported instances of noncompliance, that the 2024 procedures are also likely to be implemented in a manner that is consistent with statutory and Fourth Amendment requirements. Section IV summarizes the Court's disposition of this matter.

A. *Review of the 2024 Certifications*

Section 702 requires certifications to meet several criteria. The Court's review of the certifications themselves is limited to determining whether all of those criteria are met. § 702(j)(2)(A) ("The Court shall review . . . [a] certification submitted in accordance with [Section 702(h)] to determine whether the certification contains all the required elements.").

First, certifications must be made under oath by the AG[9] and DNI. § 702(h)(1)(A). The 2024 Certifications meet this requirement. *See* Certification 2024-A at 6-7; Certification 2024-B at 5-6; Certification 2024-C at 5-6.

Certifications must attest that:

> (i) there are targeting procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to—

[9] FISA defines "Attorney General" to mean "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). The Assistant Attorney General for National Security executed the 2024 Certifications acting on such a designation.

> (I) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (II) 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;
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> (ii) the minimization procedures to be used with respect to such acquisition—(I) meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate; and (II) have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court;
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> (iii) guidelines have been adopted in accordance with subsection (g) to ensure compliance with the limitations in subsection (b) and to ensure that an application for a court order is filed as required by this chapter;
>
> (iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;
>
> (v) a significant purpose of the acquisition is to obtain foreign intelligence information;
>
> (vi) the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider; and
>
> (vii) the acquisition complies with the limitations in subsection (b).

§ 702(h)(2)(A). The 2024 Certifications make all of the required attestations. *See* Certification 2024-A at 1-3; Certification 2024-B at 1-3; Certification 2024-C at 1-3.

Certifications must include targeting and minimization procedures adopted in accordance with Section 702(d) and (e). § 702(h)(2)(B). The 2024 Certifications include targeting and minimization procedures adopted in accordance with Section 702(d) and (e). *See* Certification 2024-A at 1-2, and Exhibits A-E, G; Certification 2024-B at 1-2, and Exhibits A-E, G; Certification 2024-C at 1-2, and Exhibits A-E, G. The AG and DNI are also required to adopt querying procedures for information collected pursuant to Section 702(a). § 702(f)(1). The 2024 Certifications evidence adoption of such querying procedures. *See* Certification 2024-A at 2, and

Exhibits H-K; Certification 2024-B at 2, and Exhibits H-K; Certification 2024-C at 2, and Exhibits H-K.

Certifications must also "be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is—appointed by the President, by and with the advice and consent of the Senate; or the head of an element of the intelligence community[.]" § 702(h)(2)(C). As noted at page 7 above, each 2024 Certification is supported by affidavits of the Directors of the NSA, CIA, FBI, and NCTC.

Finally, a certification must include an effective date for the authorization that is at least 30 days after the submission of the written certification to the Court; however, if the acquisition has begun or the effective date is fewer than 30 days after such submission, the certification must include the date the acquisition began or the effective date for the acquisition. § 702(h)(2)(D).[7] The 2024 Certifications each include as an effective date either April 4, 2024—which is 30 days from the filing of the 2024 Certifications—or the date upon which the Court issues an order concerning the certification under Section 702(j)(3), whichever is later. *See* Certification 2024-A at 4; Certification 2024-B at 3; Certification 2024-C at 3. The same effective date applies to the amendments to prior certifications respecting use of the FBI querying procedures. *See* Certification 2024-A at 5; Certification 2024-B at 4; Certification 2024-C at 4. *See* § 702(j)(2)(A).

The Court finds that the 2024 Certifications and the certifications in the Prior 702 Dockets, as amended by the 2024 Certifications, contain all of the required statutory elements.

B. *Review of the Procedures as Written*

The Court also must review:

[7] The statement described in Section 702(h)(2)(E) is not required because there was no "exigent circumstances" determination under Section 702(c)(2).

> (1) the targeting procedures "to assess whether [they] are reasonably designed to—(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (ii) 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(j)(2)(B);
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> (2) the minimization procedures "to assess whether [they] meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or § 1821(4)], as appropriate," § 702(j)(2)(C); and
>
> (3) the querying procedures "to assess whether [they] comply with the requirements of [Section 702(f)(1)]." § 702(j)(2)(D).

With one exception, the procedures now under review are identical to those that the FISC approved under the above-stated standards in the April 11, 2023 Opinion. 2024 Mem. at 3. The FBI's querying procedures have been revised, but only in ways that enhance privacy protections as compared to the 2023 procedures. *See infra* pp. 21-24. Accordingly, the following discussion of why the procedures, as written, satisfy those standards is relatively brief.

1. Targeting Procedures

NSA has sole responsibility for tasking selectors to [redacted] while FBI shares responsibility for tasking selectors to [redacted]

a) NSA Targeting Procedures

Under its targeting procedures, NSA must determine whether a prospective target is a non-U.S. person reasonably believed to be outside the United States. NSA Targeting Proc. § I at 1. In making such a "foreignness determination," NSA is required to review "the totality of the circumstances based on the information available with respect to [the prospective target], including information concerning [redacted] *Id.* The procedures describe the types of information to be considered, including lead information, information NSA has about the target's location [redacted]

[redacted] as well as the standards for assessing non-U.S. person status. *Id.* § I at 1-4. The procedures also require that targeting decisions 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 and identify factors to consider in making that assessment. *Id.* § I at 4-6.

NSA's targeting procedures also require post-targeting analysis to detect whether a person who was reasonably believed to be located outside the United States when targeted is now located inside the United States. *Id.* at § II at 6-9. That analysis involves routinely checking independently acquired information for indications that a tasked selector may be used in the United States, and examining the content of communications acquired for a tasked selector for indications that the target is now in, or may enter, the United States, or is a U.S. person. *Id.* 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. Section III of NSA's targeting procedures provides rules for documenting the factual basis for each tasking. *Id.* § III. Additional procedures address oversight and compliance, *id.* § IV, requirements for temporary departure from the procedures to respond to immediate threats, *id.* § V,[8] and specific provisions [redacted] discussed in note 4 above, *id.* § VI.

b) FBI Targeting Procedures

The FBI targeting procedures delineate the requirements for [redacted] FBI's

[8] Other Section 702 procedures have similar departure provisions. *See* FBI Targeting Proc. § I.4.h; NSA Minimization Proc. § 1; FBI Minimization Proc. § I.F; CIA Minimization Proc. § 10; NCTC Minimization Proc. § A.5; NSA Querying Proc. § II; FBI Querying Proc. § II; CIA Querying Proc. § II; NCTC Querying Proc. § II.

procedures require NSA, after following its own targeting procedures, to provide to FBI an explanation of NSA's foreignness determination for a designated account, including specified identifying information. *See* FBI Targeting Proc. § I.1-2. FBI must then evaluate the sufficiency of NSA's information and run certain checks of information in its possession. *See id.* § I.3-4. If NSA locates information indicating that the user of the account is a U.S. person or is located inside the United States, it must promptly advise the FBI and FBI must terminate the collection. *Id.* § II.7. If FBI locates information indicating that the user of the account is a U.S. person or is located inside the United States, it must inform NSA and refrain from [redacted] unless it determines the tasking is in fact appropriate. *Id.* § I.8. Additional provisions address documentation requirements, *id.* § II, and compliance and oversight, *id.* § III.

* * *

As noted above, both sets of targeting procedures accompanying the 2024 Certifications are identical to those approved in the April 11, 2023 Opinion. Having no reason to believe they are now deficient, the Court finds that the procedures, as written, are reasonably designed to ensure that any acquisition authorized under Section 702 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. *See* § 702(j)(2)(B).

2. Review of for Minimization Procedures

Section 702 requires the adoption and Court approval of statutorily defined minimization procedures. §§ 702(e)(1)-(2) (cross-referencing 50 U.S.C. §§ 1801(h) and 1821(4)), and (j)(2)(C). Those definitions require, in pertinent part:

> (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;
>
> (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). *See also* 50 U.S.C. § 1821(4).[14]

These definitions, which also apply to electronic surveillance and physical search conducted under Titles I and III of FISA, *see* 50 U.S.C. §§ 1805(a)(3), 1824(a)(3), focus on protecting U.S.-person information and identities. While FISA electronic surveillance and physical search may target U.S. persons and persons in the United States, Section 702 acquisitions may only target persons reasonably believed to be non-U.S. persons located outside the United States, as noted above. Section 702 information is therefore less likely to concern U.S. persons than the results of FISA electronic surveillance and physical search. The Court's assessment of Section 702 minimization procedures takes that circumstance into account.

Respecting minimization of acquisition under section 1801(h)(1), NSA's minimization procedures require it 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 Proc. § 4(a). NSA's targeting procedures provide

[14] Except for section 1821(4)(A)'s reference to "the purposes . . . of the particular physical search," the definition of "minimization procedures" at section 1821(4) is substantively identical to the definition at section 1801(h). For simplicity, subsequent discussion cites only to section 1801(h).

the principal means by which NSA meets this obligation. FBI acquisitions similarly must comply with that agency's targeting procedures. *See* FBI Minimization Proc. § II.A.1.[9] As a result, Section 702 acquisitions do not sweep up private U.S.-person information in a bulk or indiscriminate fashion. Rather, as a general rule, Section 702 acquisitions involve U.S.-person information only insofar as a Section 702 target, i.e., a foreign-intelligence target who is reasonably believed to be a non-U.S. person overseas, has communicated with a U.S. person or has discussed or possessed U.S.-person information.

There are a large number of Section 702 tasked facilities, however,[10] which suggests that, despite the above-described limits on acquisition, large amounts of private U.S.-person information are likely to be acquired under Section 702. All four agencies' minimization procedures provide detailed post-acquisition protections for such information. For example, they require agencies to maintain unminimized Section 702 information in controlled repositories that are accessible only to personnel trained in applying these procedures. NSA Minimization Proc. § 2(c); FBI Minimization Proc. § III.A.1; CIA Minimization Proc. § 2; NCTC Minimization Proc. § B.1. In addition, the rules for querying unminimized Section 702 information in each agency's querying procedures are an important element of minimization. The minimization and querying procedures work hand in hand, *see e.g.*, NSA Minimization Proc. § 1 ("[t]hese minimization procedures should be read and applied in conjunction with [NSA's] querying procedures"), and the FISC examines querying requirements as part of its review of whether minimization

[9] CIA and NCTC do not conduct acquisitions under Section 702, so their minimization procedures do not address acquisition.

[10] Pursuant to 50 U.S.C. § 1881f, the government reported that on average approximately [redacted] individual facilities were tasked pursuant to Section 702 at any given time during June-November 2023. *See* Semiannual Report of Attorney General Concerning Acquisitions under § 702 of FISA (Mar. 2024) at 1-2.

procedures satisfy section 1801(h). *See, e.g.*, Apr. 11, 2023 Op. at 23. The agencies' querying procedures are discussed at pages 19-24 below.[11]

Each set of procedures establishes criteria for the indefinite retention of U.S.-person information, *see, e.g.,* NSA Minimization Proc. § 6; FBI Minimization Proc. § III.C.1.b; CIA Minimization Proc. § 3; NCTC Minimization Proc. § B(3), as well as timetables for destroying U.S.-person information that does not meet such criteria. *See, e.g.,* NSA Minimization Proc. §§ 4(c), 7; FBI Minimization Proc. § III.D.4, E.4; CIA Minimization Proc. § 2; NCTC Minimization Proc. § B.2-3.

Setting aside disseminations of evidence of crime for law enforcement purposes, the minimization procedures of all four agencies prohibit the dissemination of nonpublicly available information (other than foreign intelligence information as defined in 50 U.S.C. § 1801(e)(1)) in a manner that identifies any U.S. person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance. *See* NSA Minimization Proc. § 8(1); FBI Minimization Proc. § IV at 41; CIA Minimization Proc. § 5(a); NCTC Minimization Proc. § D.1. These provisions track the statutory prohibition at section 1801(h)(2) and help ensure that disseminations of private U.S.-person information comport with section 1801(h)(1). In addition, each agency's procedures authorize dissemination of private U.S.-person information only in limited circumstances that are consistent with the need of the

[11] The agencies' minimization procedures also provide exceptions from generally-applicable requirements for certain actions taken for purposes other than investigation or intelligence analysis, such as actions necessary for lawful oversight functions, training of personnel, maintenance and security of systems, and compliance with court orders or a "specific Congressional mandate." *See* NSA Minimization Proc. § 2(b)(1)-(5); FBI Minimization Proc. § I.G-H; CIA Minimization Proc. § 6; NCTC Minimization Proc. § A.6. The querying procedures contain similar exceptions. *See* NSA Querying Proc. § IV.C; FBI Querying Proc. § IV.F; CIA Querying Proc. § IV.C; NCTC Querying Proc. § IV.C.

United States to disseminate foreign intelligence information or provide for the dissemination of evidence for law enforcement purposes, per section 1801(h)(1), (3). *See* NSA Minimization Proc. §§ 8-11; FBI Minimization Proc. § IV; CIA Minimization Proc. §§ 5.b and 7.b-d.; NCTC Minimization Proc. § D.

* * *

As noted above, all four sets of minimization procedures accompanying the 2024 Certifications are identical to those approved in the April 11, 2023 Opinion. Having no reason to believe they are now deficient, the Court finds that the procedures, which include the limitations on access to Section 702-acquired information imposed by the querying procedures (discussed below), satisfy the definition of minimization procedures.

3. Statutory Requirements for Querying Procedures

Section 702(f)(1) requires the AG and DNI to adopt querying procedures which are consistent with the requirements of the Fourth Amendment and which include a technical procedure whereby a record is kept of each U.S.-person query term used for a query. *See* § 702(f)(1)(A)-(B).

a) Overview of Querying Procedures

In general, analysts can search databases containing unminimized information acquired pursuant to Section 702 using one or more terms to discover and retrieve information of interest. *See In re DNI/AG 702(h) Certifications 2018*, 941 F.3d 547, 552-53 (FISCR. 2019) (per curiam). Such queries must be conducted in accordance with the relevant agency's querying procedures. *See* § 702(f)(1)(A). For purposes of that requirement, "query" is defined 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 acquisitions authorized under [Section 702(a)]." § 702(f)(3)(B).

Each set of procedures establishes a general standard for querying unminimized Section 702 information. For NSA, CIA, and NCTC, queries must be reasonably likely to retrieve foreign intelligence information. NSA Querying Proc. § IV.A.; CIA Querying Proc. § IV.A; NCTC Querying Proc. § IV.A. Notably, for NSA, any U.S.-person query term used to query unminimized content information must be approved in advance by NSA's Office of General Counsel (OGC) and NSA personnel seeking such approval must provide a statement of facts establishing that the term is reasonably likely to retrieve foreign intelligence information. NSA Querying Proc. § IV.A.

NSA's procedures allow a specific type of query that uses as query terms identifiers for non-U.S. person applicants to travel to the United States or receive a U.S. immigration benefit, regardless of whether the query is reasonably likely to retrieve foreign intelligence information. *See* NSA Querying Proc. § IV.D. The FISC approved this form of querying for the reasons discussed at pages 55-59, 76-81 of the April 11, 2023 Opinion. Subject to this exception and the narrow "temporary departure" provisions referenced above at page 4 and note 8, NSA, CIA, and NCTC queries for investigative or intelligence-analysis purposes must be reasonably likely to retrieve foreign intelligence information.

FBI queries of FBI unminimized Section 702 information for investigative or intelligence-analysis purposes must be reasonably likely to retrieve foreign intelligence information or evidence of a crime. This standard is further defined at page 21 below.

Each agency's querying procedures also prescribe the requirements for creating and maintaining records of the use of U.S.-person query terms, in compliance with

Section 702(f)(1)(B). *See* NSA Querying Proc. § IV.B; FBI Querying Proc. § IV.E; CIA Querying Proc. § IV.B; NCTC Querying Proc. § IV.B. The FBI's querying procedures also require the FBI to comply with Section 702(f)(2), FBI Querying Proc. § IV(C), the parameters of which are discussed at pages 43-44 below.

b) Modifications to FBI Querying Procedures

Under both the 2023 and 2024 procedures, FBI queries of unminimized Section 702 information

> must be reasonably likely to retrieve foreign intelligence information . . . or evidence of a crime, unless otherwise specifically excepted in [the FBI querying] procedures. In order to meet this standard:
>
> (a) the person conducting the query must have the purpose of retrieving foreign intelligence information or evidence of a crime;
>
> (b) 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; and
>
> (c) the query must be reasonably tailored to retrieve foreign intelligence information or evidence of a crime without unnecessarily retrieving other information.

FBI Querying Proc. § IV.A.[12] This standard applies to queries of raw Section 702 information for investigative or intelligence-analysis purposes, subject to the limited "temporary departure" provisions discussed above at page 4 and note 8.

The 2024 FBI querying procedures require users to enter "a written statement of the specific factual basis to believe that the query is reasonably likely to retrieve foreign intelligence information or evidence of a crime" prior to querying Section 702 information "using a United States person query term." 2024 FBI Querying Proc. § IV.B. This provision is more stringent than

[12] When used herein in the FBI context, "querying standard" refers to this requirement.

the corresponding 2023 provision, which only requires entry of such written statements prior to reviewing or accessing Section 702-acquired content information retrieved by such queries, thus permitting FBI personnel to conduct such a query and view any non-content metadata retrieved without entering such a statement. 2023 FBI Querying Proc. § IV.A.3. As of September 12, 2023, however, the FBI reconfigured systems used to query Section 702 information to require users to enter such written statements prior to running U.S.-person queries. 2024 Mem. at 7. In effect, the 2024 procedures codify the existing practice.

The 2024 FBI querying procedures also require prior approval of three categories of queries presenting heightened privacy concerns. These requirements generally track FBI policy guidance previously issued, but with some changes. The approval requirements apply to any query within one of the three categories described below, "[e]xcept in cases in which FBI has a reasonable belief that queries could assist in responding to or preventing an immediate threat to life or serious bodily harm or an imminent cyber or infrastructure attack." 2024 FBI Querying Proc. § IV.D.

Two types of queries involving sensitive subject-matters require prior approval:

1. queries using a term that is reasonably believed to identify a U.S. elected official, appointee of either the President or a state or territorial Governor, U.S. political candidate, U.S. political organization or individual prominent in such organization, or U.S. news media organization or member of the U.S. news media, *see* § IV.D.1; and

2. queries using a term reasonably believed to identify a U.S. religious organization or individual prominent in such organization, or individuals, organizations, or groups reasonably believed to have a U.S. academic nexus. *See* § IV.D.2.

For the first category of sensitive queries, users must obtain prior approval from an official no lower than the FBI Deputy Director (or successor position). For the second, users must obtain pre-query approval from an FBI attorney. Although these requirements will apply to a narrower set of queries than currently covered by FBI policy (which the FBI plans to revise to match the 2024

procedures, if approved), *see* 2024 Mem. at 12-13,[13] the modified procedures unquestionably provide more privacy protection than the 2023 FBI querying procedures, which have no comparable requirements.

The 2024 FBI querying procedures also require approval from an FBI attorney before conducting a query using "the FBI's batch technology or successor tool." *See* 2024 FBI Querying Proc. § IV.D.3. Some FBI systems have a tool that allows users to conduct multiple queries at the same time, i.e., in a single "batch." Batch queries sometimes have resulted in large-scale noncompliance with the querying standard.[14] In response to such incidents, the FBI adopted internal policy guidance in 2021 that required pre-query approval by an attorney for batch jobs resulting in 100 or more queries. 2024 Mem. at 14. In 2023, the FBI extended this policy requirement to all batch jobs, regardless of size, subject to four exceptions: "(1) threat to life/serious bodily harm; (2) loss of significant foreign intelligence/evidence of crime; (3) threat to critical infrastructure/cyber infrastructure; and (4) flight of subject." *Id.* at 14 & n.10. FBI systems with a batch querying tool were also configured to require users to indicate compliance with the policy before running a batch query of Section 702 information. Apr. 11, 2023 Op. at 82.

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[13] The pre-query approval requirements in the 2024 FBI querying procedures are narrower than the current policy guidance in two respects: (1) they apply only to *U.S.* religious, media or academic organizations and individuals; and (2) they limit the categories of pertinent public officials. 2024 Mem. at 12. With regard to the latter change, the government asserts that implementing the current guidance, which requires advance approval of queries involving "[d]omestic public officials (including elected officials and candidates)," has shown it to be "overinclusive in ways FBI did not originally anticipate." *Id.* Advance approval of "queries that reasonably identify a first-line supervisor at a federal, state, or local government agency, such as a police sergeant or a supervisor in a municipal sanitation department," would be required under the current guidance, but not under the 2024 procedures. *Id.* at 12-13.

[14] *See* Apr. 21, 2022 Op. at 29 ("three batch queries consisting of approximately 23,132 separate queries, using presumed U.S.-person query terms" that reportedly were associated with [redacted] used by a group involved in the January 6[, 2021] Capitol breach"); *id.* ("batch query for over 19,000 donors to a congressional campaign").

Advance approval of batch queries by an attorney should significantly lower the compliance risk presented when system tools are used to run numerous queries in the same batch. The 2024 FBI querying procedures require such advance approval, without the above-stated exceptions provided by the current policy guidance (but subject to the narrower "temporary departure" provision, as discussed above at page 4 and note 8).

All of these modifications appear likely to improve compliance with the querying standard and enhance privacy protection for U.S. persons, especially for queries that may present particular First Amendment or separation-of-powers sensitivities.

* * *

For the foregoing reasons and those stated in the Court's opinions in the Prior 702 Dockets, the Court concludes that, as written, the targeting, minimization, and querying procedures that accompany the 2024 Certifications satisfy the applicable statutory requirements. Under Section 702(j)(3)(A), the Court must also assess whether those procedures are consistent with the requirements of the Fourth Amendment. That issue is addressed next.

4. Review of the Procedures under the Fourth Amendment

The Fourth 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.

U.S. Const. Amend. IV.

Although the Fourth Amendment often requires the government to obtain a probable cause-based warrant before executing a search, that is not always the case. As most pertinent here, the Foreign Intelligence Surveillance Court of Review (FISCR) has found that surveillance conducted

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 does not require a warrant. *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("*In re Directives*"). *See also In re Certified Questions of Law*, 858 F.3d 591, 607 (FISA Ct. Rev. 2016) (finding probable-cause based warrant not required for surveillance directed at person reasonably believed to be engaged in clandestine intelligence activities on behalf of foreign power). This foreign-intelligence exception to the warrant requirement extends to Section 702 acquisition, including the incidental collection of U.S. persons' communication under Section 702. *United States v. Muhtorov*, 20 F.4th 558, 601-02 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 246 (2022); *United States v. Hasbajrami*, 945 F.3d 641, 664, 666 (2d Cir. 2019).

Searches that fall within an exception to the warrant requirement must still comply with the Fourth Amendment. *E.g.*, *Maryland v. King*, 569 U.S. 435, 448 (2013); *cf. In re Directives*, 551 F.3d at 1012 (requiring that acquisitions under the Protect America Act (a precursor to Section 702) be reasonable under the Fourth Amendment, despite applicability of foreign-intelligence exception to warrant requirement). "[T]he ultimate touchstone of the Fourth Amendment"—reasonableness—is not displaced. *In re Certified Question of Law*, 858. F.3d at 607, citing *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

Courts determine the reasonableness of governmental action under the Fourth Amendment by balancing "'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 governmental interests.'" *See In re Certified Question of Law*, 858 F.3d at 604-05 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In making this assessment, courts must consider the totality of

circumstances. *In re Directives*, 551 F.3d at 1012. "The more important the government's interest, the greater the intrusion that may be constitutionally tolerated." *Id.*

On the government-interest side of the balance, acquiring "foreign intelligence with an eye toward safeguarding the nation's security serves . . . a particularly intense interest." *In re Certified Question of Law*, 858 F.3d at 606 (internal quotation marks omitted). *See also id.* at 608 ("[T]he Supreme Court has stated that 'no governmental interest is more compelling' than national security."), citing *Haig v. Agee*, 453 U.S. 280, 307 (1981). As noted above at page 11, the AG and DNI have certified that a significant purpose of the acquisitions to be conducted under the 2024 Certifications is to obtain foreign intelligence information. As the FISCR stated, "the government's investigative interest in cases arising under FISA is at the highest level and weighs heavily in the constitutional balancing process." *In re Certified Question*, 858 F.3d at 608.

Relying on the logic of "plain view" and "inadvertent overhear" precedents, the Second Circuit Court of Appeals found that the government's "manifest need to monitor" the communications of foreign agents of terrorist organizations operating abroad outweighed the defendant's privacy interest in email conversations with a foreign operative, rendering the incidental collection of such email communications pursuant to Section 702 reasonable under the Fourth Amendment. *Hasbajrami*, 945 F.3d at 666-67. The other two Courts of Appeal to have considered the issue also found that the incidental collection of U.S.-person information pursuant to Section 702 reasonable under the Fourth Amendment, after taking into account the privacy-protecting measures required by the targeting and minimization procedures. *See Muhtorov*, 20 F.4th at 602-06; *Mohamud*, 843 F.3d at 441-44.

The FISCR has indicated that protections that limit access and use of incidentally collected Section 702 information can be decisive in assessing reasonableness under the Fourth Amendment:

> 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. *See also Maryland v. King*, 569 U.S. at 465 (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 of Law*, 858 F.3d at 607-10 (prohibition on use of content information acquired under pen register/trap-and-trace order was among factors that made such acquisition reasonable).

Accordingly, the FISC considers the protections for individual privacy interests afforded by the targeting, minimization, and querying procedures when evaluating the intrusion side of the balance. *See, e.g.*, Apr. 11, 2023 Op. at 68-74 ("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."). Considering how those procedures function together is appropriate because each set of procedures limits potential privacy intrusions in different ways.

As noted above at pages 13-15, proper implementation of the targeting procedures limits Section 702 targeting to persons reasonably believed to be non-U.S. persons located outside the United States. Even within that set of persons, who are generally not within the ambit of Fourth Amendment protection, *see, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75

(1990), Section 702 acquisitions are not conducted indiscriminately. The targeting procedures help ensure that Section 702 taskings are focused on acquiring authorized forms of foreign intelligence information by requiring NSA to make a "particularized and fact-based" assessment that a proposed target is expected to possess or receive, or is likely to communicate, foreign intelligence information. *See supra* p. 14. Thus, the resulting intrusion on Fourth Amendment-protected interests is incidental to a focused acquisition of foreign intelligence that targets persons reasonably believed to be non-U.S. persons overseas.

In addition, each agency's minimization procedures, as written, are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of private U.S.-person information, consistent with the need to obtain, produce, and disseminate foreign intelligence information, and limit how information that identifies U.S. persons may be disseminated. *See supra* pp. 15-19. The minimization procedures thereby provide meaningful protection against unnecessary infringement on the privacy of U.S. persons while allowing for appropriate use of acquired foreign intelligence information (or evidence of crime for law enforcement purposes).

With regard to querying Section 702 information using U.S.-person query terms, the FISC has previously recognized:

> 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. 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.

Apr. 11, 2023 Op. at 71 (citing Docket Nos. 702(j)-18-01, et al., Mem. Op. and Order at 65 (Oct. 18, 2018) ("October 18, 2018 Opinion"), *aff'd in part*, *In re DNI/AG 702(h) Certifications 2018*, 941 F.3d 547 (internal quotation marks and citation omitted)). The Court, however, has declined to treat queries as distinct Fourth Amendment searches, the reasonableness

of which should be considered in isolation. *See* Apr. 11, 2023 Op. at 72-72 (referencing prior occasions when the FISC considered that approach, and concluding that it remained appropriate to assess reasonableness of querying procedures in the context of Section 702 program as a whole). *See also United States v. Mohamud*, No. 3:10-CR-475-KI-1, 2014 WL 2866749 at *26 (D. Or. June 24, 2014) (finding that querying of Section 702 collection using U.S. identifiers is not a separate search and does not make Section 702 surveillance unreasonable), *aff'd*, 843 F.3d 420 (9th Cir. 2016). *But see Hasbajrami*, 945 F.3d at 672 (finding that query of Section 702 information should be treated as a separate Fourth Amendment event that, in and of itself, must be reasonable). Consistent with the approach historically taken by the FISC, the Court now evaluates the querying procedures' consistency with the Fourth Amendment in the context of the entirety of the Section 702 program.

Under each agency's querying procedures, any U.S.-person term used to query Section 702 information for investigative or intelligence-analysis purposes must be reasonably likely to retrieve foreign intelligence information (or, in the case of the FBI, evidence of a crime). Indeed, *all* queries of raw Section 702 information for such purposes must satisfy that standard, with the exception of travel-vetting queries by NSA as discussed above at page 20.

In the case of U.S.-person queries that are reasonably likely to return foreign intelligence information, the Constitutional balancing of privacy interest versus governmental purpose tilts in favor of national security. Regarding queries that are intended to retrieve evidence of crime that is not foreign intelligence information, the FISC has observed:

> 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."

Apr. 11, 2023 Op. at 71 (quoting *In re DNI/AG 702(h) Certifications 2018*, 941 F.3d at 559 (footnote and internal quotation marks omitted)). Nevertheless, this Court has repeatedly approved minimization and querying procedures permitting evidence-of-crime (EOC) queries[15] of raw Section 702 information based on a totality-of-circumstances analysis. Several factors mitigate the intrusive consequences of EOC-only queries of raw Section 702 information under the FBI's 2024 querying procedures:

- Databases housing such information are access-controlled. Only personnel trained on FBI's minimization procedures are permitted access to such information. *See supra* p. 17.
- There must be a specific factual basis to believe that such a query is reasonably likely to retrieve evidence of crime and the query must be reasonably tailored to avoid unnecessarily retrieving other information. *See supra* p. 21.
- Any use of U.S.-person query terms must be recorded and a written justification for such a query must be provided before the query is conducted. *See supra* pp. 20-21. Those records are subject to internal oversight and auditing, including internal agency disciplinary measures to address incidents of noncompliance, and reporting of such incidents to the FISC and statutorily designated Congressional committees. FBI Querying Proc. § IV.E.3;

[15] A substantial number of queries may be reasonably likely to retrieve both foreign intelligence information and EOC because these categories overlap. *In re Sealed Case*, 310 F.3d 717, 722-23 (FISCR 2002) (per curiam). The discussion of EOC queries in the text refers to queries reasonably likely to retrieve EOC and not reasonably likely to retrieve foreign intelligence information. The FBI apparently conducts just a small number of U.S.-person, EOC-only queries. *See infra* pp. 46-47.

FBI Minimization Proc. § V.A.3; 2024 Mem. at 14-17; FISA Ct. R. 13(b); 50 U.S.C. § 1881f(a), (b)(G).

- Prior approval by senior officials or attorneys within the FBI is required for certain sensitive queries and batch queries. *See supra* pp. 22-24.
- For certain EOC queries in the context of a predicated criminal investigation, the FBI must obtain a probable-cause based order from the FISC before it may access contents retrieved by the query. *See* § 702(f)(2) (discussed *infra* pp. 43-44).

It is also relevant how the information to be queried was acquired. The targeting procedures focus Section 702 acquisitions on persons reasonably believed to be non-U.S. persons outside the United States who are assessed to possess, communicate or be likely to receive foreign intelligence information. *See supra* pp. 13-15. Because the targeting criteria are not directed at evidence of a crime that is not also foreign intelligence information, situations in which a U.S.-person query of Section 702 information is reasonably likely to retrieve non-foreign intelligence evidence of a crime may be rare. Indeed, the reported number of such queries generally, and particularly of ones that retrieved content information accessed by the FBI, is quite small in comparison to the total number of U.S.-person queries (which itself is declining). *See infra* pp. 46-47. Nevertheless, such queries serve an important government interest. In view of the protections afforded provided by the Section 702 procedures as a whole, it is reasonable under the Fourth Amendment for the FBI's querying procedures to permit U.S.-person queries that are reasonably likely to retrieve non-foreign intelligence evidence of crime. In combination, those protections ensure that the querying procedures, including those permitting EOC-only queries, fulfill the fundamental purpose of the Fourth Amendment—"safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. 296, 303 (2018).

In sum, the 2024 targeting, minimization, and querying procedures, which the Court has found meet all statutory requirements and are identical to or improve upon the prior procedures, do much to protect the privacy interests of U.S. persons whose information is incidentally collected under Section 702. In light of these protections and the substantial government interests at stake, the Court finds that the targeting, minimization, and querying procedures are consistent with the requirements of the Fourth Amendment.

C. *IMPLEMENTATION AND COMPLIANCE ISSUES*

After considering a new means by which CIA will [redacted] Section 702 information (subsection 1 below) and evaluating significant compliance issues (subsection 2 below), the Court finds that the agencies' procedures are likely to be implemented in a manner consistent with statutory and Fourth Amendment requirements.

1. CIA's Use of [redacted]

The government has notified the Court of "a new capability," called [redacted] which the CIA [redacted] acquired under Section 702. Letter Re [redacted] § 702 Collection at 1 (Feb. 8, 2024).[16] Based on the government's representations, CIA's planned use of this capability does not undermine the Court's finding that CIA's minimization and querying procedures are likely to be implemented in a manner consistent with statutory and Fourth Amendment requirements.

[redacted] is intended to help CIA personnel review large volumes of information efficiently. *Id.* at 1-2. As applied to Section 702 information, it will be an optional feature available

[16] As of February 8, 2024, CIA planned to deploy this capability for Section 702 information no earlier than April 1. *Id.*

to CIA analysts when they conduct queries in a specific CIA system. *Id.* at 2. [redacted]

Section 702 data will be [redacted] for this information as it is ingested into CIA systems. *Id.* Thereafter, when an analyst enables the [redacted] for a particular query, the query results presented to the analyst [redacted] *Id.* [redacted] The analyst does not receive information about [redacted] in any Section 702 data other than what was retrieved by the analyst's query. The analyst is able to [redacted] Any further review or use of [redacted] requires a separate query that must comply with the CIA's querying procedures. *Id.*

Applying the analysis of the April 11, 2023 Opinion, the Court concludes that the [redacted] described above does not involve a "query" as defined at Section 702(f)(3)(B). In that opinion, the

Court discussed automated operations that use terms to identify and manipulate Section 702 information in various ways:

> For example, an NSA collection system may [redacted]

Apr. 11, 2023 Op. at 36-37 (citations and internal quotation marks omitted). Nevertheless, the Court concluded that such operations are not queries under the statutory definition, which applies to "*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 acquisitions authorized under [Section 702(a)]." § 702(f)(3)(B) (emphasis added). The Court reasoned that the relevant statutory context indicates that the purpose of regulating queries under Section 702(f) is to protect U.S. persons' privacy, consistent with the Fourth Amendment. *See id.* at 38. From that perspective,

> [a]utomated actions that convert Section 702-acquired data into intelligible and queryable forms do not meaningfully infringe on U.S. persons' privacy, even insofar as they operate on communications to or from U.S. persons. They do not, in and of themselves, deprive such U.S. persons of the protection of anonymity, or result in inspection of private communications or heightened governmental scrutiny or investigative interest. Rather, those consequences ensue only if further steps are taken.

Id. at 38-39 (citations and internal quotation marks omitted). On the other hand, the Court found that searching raw Section 702 data to identify and retrieve information for human inspection or other affirmative use for investigative, preventative or intelligence-analysis purposes could constitute a query, if the other elements of the statutory definition are met. *Id.* at 39-40.

The Court applied these principles to an operation that [redacted] *Id.* at 62 (quotation marks omitted). [redacted] *Id.* (quotation marks omitted). The Court concluded that the process by which those datasets are created does not involve queries under the statutory definition because it does "not present information for human inspection . . . [or] affirmatively use information for investigative, intelligence-analysis, or preventative purposes." *Id.* at 64. Such steps would not occur unless an analyst runs a subsequent query against the datasets generated, which would be governed by NSA's querying procedures.

[redacted] resembles operations regarded as non-querying forms of processing in the April 11, 2023 Opinion. The described use of [redacted] raw Section 702 information in and of itself will not involve a query under the statutory definition because it will not retrieve information for human inspection or otherwise make affirmative use of information for investigative, intelligence-analysis or preventative purposes. Any significant privacy intrusion occurs only when a CIA analyst later runs a query with [redacted] enabled, and that query must comply with CIA's querying rules.

Finally, the Court noted in April 2023 that "processing actions" that "do not result in human inspection or affirmative use of information for investigative, intelligence-analysis or preventative purposes" "do not intrude on interests protected by the Fourth Amendment nearly to the same degree as human review of private communications." *Id.* at 75. On the other side of the balance, "processing actions that prepare Section 702 information for analysis . . . promote the government's 'particularly intense interest' in acquiring foreign intelligence." *Id.* at 76 (quoting *In*

re Certified Question, 858 F.3d at 606). Under a similar balancing of interests, the planned use of [redacted] does not preclude a finding that CIA's procedures are likely to implemented in a manner consistent with the Fourth Amendment.

2. Instances of Noncompliance

The government's implementation of the current Section 702 procedures "can be relevant to determining whether proposed procedures comply with FISA's requirements," to the extent that such practices "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 noncompliant FBI queries, and in particular, broad queries not reasonably likely to return foreign intelligence information or evidence of crime, has been a major focus of concern since the FISC found in 2018 that, as likely to be implemented, the FBI's querying and minimization procedures were not consistent with statutory and Fourth Amendment requirements. *See* Oct. 18, 2018 Op. at 62, 68-70. In response to this concern, the government has revised the FBI's querying procedures, most recently in the manner discussed at pages 21-24 above. It also enhanced auditing and oversight and implemented system changes and training. *See, e.g.*, Apr. 11, 2023 Op. at 82-83. In April 2023, the Court noted "indications that these measures [we]re having the desired effect." Apr. 11, 2023 Op. at 83. The Court now examines reporting received since April on FBI's implementation of, and compliance with, querying requirements.

i) Recent Implementation of Querying Standard

The applicable FBI querying standard is set out at page 21 above. Compliance with that standard has been a primary focus of the government's Section 702 oversight efforts. Typical violations of this standard include queries that lack the requisite factual basis and ones that, due to

a typographical error, involved query terms that were not reasonably likely to retrieve foreign intelligence information or evidence of a crime. *See, e.g.*, Prelim. Notice Re Queries in Multiple Divs. and Headquarters Components, at 5-7 (Jan. 31, 2024) ("First Query Sample Notice") (separately identifying querying violations that involved "substantive justification" errors and those involving other errors).

Since the April 11, 2023 Opinion, NSD has reported on query reviews and training conducted in the following FBI field divisions and headquarters components: [redacted] [17] Chart 1 summarizes the results of

[17] Notice of Compliance Incidents Relating to FBI Queries of Raw FISA-Acquired Info. Identified During NSD Review of Queries Conducted by FBI's [redacted]

The government recently filed reports of additional oversight reviews of FBI queries. *See* Query Notice [redacted] nformation from these 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.

these reviews regarding compliance with the querying standard.[18] (As a baseline, approximately 1.8% of queries reviewed by NSD and summarized in the April 11, 2023 Opinion did not meet the querying standard. *See* Apr. 11, 2023 Op. at 85.)

Chart 1 – FBI Query Standard Errors (Division-Level Reviews)

[redacted]	Date Range	Audited Queries including Section702 Data	Queries Not Meeting Standard
	1/2022- 3/2022	3614	952 (26%)
	4/2022- 6/2022	956	96 (10%)
	4/2022- 6/2022	730	16 (2.2%)
	4/2022- 6/2022	5685	76 (1.3%)
	10/2022-12/2022	880	11 (1.3%)
	10/2022-12/2022	248	13 (5.2%)
	11/2022- 1/2023	2889	3 (0.1%)
	12/2022- 2/2023	86	0 (0%)
	12/2022- 2/2023	290	3 (1%)
	1/2023- 3/2023	72	0 (0%)
	1/2023- 3/2023	2500	135 (5.4%)
	1/2023- 3/2023	3538	6 (0.2%)
	2/2023- 4/2023	18	0 (0%)
	2/2023- 4/2023	235	0 (0%)
	2/2023- 4/2023	4466	19 (0.4%)
	3/2023- 5/2023	122	0 (0%)
	3/2023- 5/2023	2108	45 (2.1%)
	3/2023- 5/2023	649	42 (6.5%)
	4/2023- 6/2023	2068	62 (3%)
	4/2023- 6/2023	74	0 (0%)
	5/2023- 7/2023	557	3 (0.5%)
	6/2023- 8/2023	480	3 (0.6%)
	8/2023-10/2023	3506	10 (0.3%)
	8/2023-10/2023	0	0 (0%)
TOTALS		**35,711**	**1,495 (4.2%)**

[18] Between July 2021 and June 2023, 152 queries were conducted in the [redacted] Division that used as query terms the names of a national park and three nearby cities without further limitation. *See* Query Notice re Incident Reported to NSD by FBI's [redacted] Div. and [redacted] Those queries did not comply with the querying standard, but they are not included in Chart 1 because they were self-reported by the [redacted] Division and not part of an oversight review. *See id.*

Of the 952 noncompliant queries in the [redacted] Division during January-March 2022, 936 were conducted by two Staff Operation Specialists who routinely ran queries of raw FISA information for Guardian threat assessments[19] in criminal matters. Query Notice [redacted] at 3-4 (May 5, 2023).[20] After retraining on these issues, a review conducted in [redacted] a year later for the period from February to April 2023 found *no* queries that violated the standard. Query Notice [redacted] at 2 (Aug. 2, 2023). Excluding the queries from the first [redacted] review, the overall percentage of queries not meeting the standard falls to 1.7%.

Several contexts appear repeatedly in noncompliant queries across field offices, including support of domestic terrorism assessments, criminal investigations without a foreign nexus, and vetting of human sources. As previously, a number of overbroad queries were reported, e.g., ones that use geographic terms, surnames, or other common words or phrases as the only query terms. A number of other noncompliant queries used as query terms government-generated identifiers like FBI report, case file, or National Security Letter (NSL) numbers; those queries seem of less practical concern because they would be expected to retrieve little, if any, unminimized Section 702 information.

Also noteworthy are the results of an enterprise-wide review of FBI queries. In May 2023, FBI's Office of Internal Auditing (OIA) released the results of a follow-up to its May 2021

[19] "Guardian is the FBI's central system for tracking and assigning for investigation criminal and national security threats." FBI Privacy Impact Assessment for [eGuardian] at 1 n.3 (Sept. 19, 2022) (available at www.fbi.gov\pia-eguardian-system-091922.pdf).

[20] Of those 936 queries, 201 were also incorrectly identified as non-U.S. person queries, and 27 of those returned Section 702 content information to which the user received access. Supplemental Query Notice [redacted] at 3 (Mar. 5, 2024).

enterprise-wide audit of FISA queries in [redacted][21] *See* Letter re: FBI OIA FISA Query Audit Recommendations (May 10, 2023). OIA conducted an audit of 558 queries run between July 2021 and March 2022. *See* Query Notice re NSD Review of Draft Results of a Query Audit Conducted by FBI's OIA at 1-2 (June 6, 2023). Of those, approximately 70 were part of batch jobs. *Id.* at 2 n.3. NSD expanded its review of the OIA results to include the corresponding batch jobs, so that a total of 112,902 queries were examined, 66,444 of which included Section 702 data. *Id.* at 2. Of those 66,444 queries, NSD identified 60 that failed to meet the querying standard. *Id.* at 3. Of those 60, 54 were from a batch job that related to persons arrested by the [redacted] and was conducted to identify potential human sources. *Id.* at 4-5. The user indicated that she had not intended to search FISA data, *see id.* at 4, which suggests that she inadvertently opted to run the query against raw FISA information.[22] There may have been similar noncompliant queries in the [redacted] Division, but the FBI assesses that they were not likely part of a widespread practice there. *See* Query Notice re NSD Review of Draft Results of a Query Audit Conducted by FBI's OIA at 5.

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[21] [redacted] is a system that previously stored "data from multiple FBI datasets," including unminimized Section 702 information, and allowed users to query across those datasets. FBI Decl. filed with the Gov't Submission in Resp. to Ct.'s Order in Resp. to Querying Violations ("Jan. 19, 2022 FBI Decl.") at 8 n.3 (Jan. 19, 2022). The FBI is replacing [redacted] with a user interface called [redacted] and a data repository called [redacted] *See* Letter Re the [FBI's] Removal of Raw FISA-Acquired Info. from [redacted] and Changes to Handling of Raw FISA-Acquired Info. in [redacted] ("Oct. 6, 2023 [redacted] Removal Notice") at 1 (Oct. 6, 2023). On September 12, 2023, the FBI rendered raw FISA information inaccessible on [redacted] for intelligence and investigative purposes. *Id.* at 2. [redacted] "is not yet equipped to present raw FISA-acquired information to users," so for now queries of such information are performed in the electronic and data storage systems in which it resides. *Id.* One such system is [redacted] Jan. 19, 2022 FBI Decl. at 7 n.2.

[22] This batch job was run in [redacted] on July 8, 2021. *See id.* at 4. The FBI reported that it had reconfigured [redacted] as of June 29, 2021, to require users to affirmatively choose to run a query against unminimized FISA information. *See* Apr. 21, 2022 Op. at 37-38.

NSD and FBI have also conducted two enterprise-wise samples of queries run in [redacted] one of queries run during September-November 2022 and the other of queries run during January-March 2023. *See* First Query Sample Notice at 1-2; Prelim. Notice Re Queries in Multiple FBI Divs. and Headquarters Components at 1-2 (Jan. 29, 2024) ("Second Query Sample Notice"). The first sample consisted of 60,332 queries by 111 users, 59,355 of which involved Section 702 data. *See* First Query Sample Notice at 1-2. To date, 143 of such queries involving Section 702 data have been found not to meet the querying standard, *see id.* at 3-10, with NSD and FBI still investigating whether another 40 had met the standard, *see* Supplemental Query Notice for Multiple FBI Divs. and Headquarters Components (relating to Sample #1) at 2 (Mar. 11, 2024).

The second sample consisted of 8,444 queries by 148 users conducted during January-March 2023, 7,600 of which involved Section 702 data. *See* Second Query Sample Notice at 1-2. To date, 91 of the queries involving Section 702 data have been found not to meet the querying standard, *see* Supplemental Query Notice for Multiple FBI Divs. and Headquarters Components at 3 (Feb. 22, 2024), with NSD and FBI still investigating whether another 99 had met the standard, *see* Second Supplemental Query Notice for Multiple FBI Divs. and Headquarters Components (relating to Sample #2) at 2 (Mar. 11, 2024). If one assumes that all of the queries still under investigation were noncompliant, the percentage of noncompliant queries across both samples would be approximately 0.6%.

Large-scale, suspicionless queries of Section 702 information contributed in 2018 to a finding of deficiency in the FBI's querying and minimization procedures[23] and remained a concern at the time of the April 21, 2022 Opinion.[24] Since then, the government has not reported comparable violations of the querying standard, but there are recent reports of some FBI personnel repeatedly misapplying it. *See supra* p. 39 (queries by two individuals in the [redacted] Division during January-March 2022 regarding Guardian assessments). Training and oversight efforts should continue to prioritize proper application of this standard by the FBI.

ii) Records of Use of U.S.-Person Query Terms

The FBI must keep a record of each U.S.-person query term used to query raw Section 702 information. *See supra* pp. 20-21. When it has incomplete information, the FBI must apply presumptions, e.g., someone in the United States is presumed to be a U.S. person "unless the person is identified as an alien who has not been admitted for permanent residence or the circumstances give rise to the reasonable belief that such person is not a United States person." FBI Querying Proc. § III.B.1.

In April 2022, the Court noted inaccuracies in such FBI records. *See* Apr. 21, 2022 Op. 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."). Some reduction in the overall

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[23] *See, e.g.,* Oct. 18, 2018 Op. 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]

[24] *See, e.g.,* April 21, 2022 Op. 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, 2021 breach of the U.S. Capitol); *id.* [redacted] office conducted batch query in December 2020 for over 19,000 donors to a congressional campaign).

error rate during the last two years is apparent. The reviews discussed at pages 37-41 above examined a total of 169,110 queries of Section 702 data. The records for approximately 3,827 (or 2.3%) of those queries misidentified whether the query used a U.S.-person query term. The reports examined in the April 11, 2023 Opinion yielded a corresponding error rate of approximately 5.7%. Apr. 11, 2023 Op. at 89-90.[25]

All such recordkeeping errors "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" is of greater concern because it can "lead to non-compliance with Section 702(f)(2) or the requirement . . . to document the specific factual basis for a [U.S-person] query." *Id.* at 90. Most of the recordkeeping errors discussed in last year's opinion—approximately 65%—involved recording a term as a U.S.-person query term when it was not. *Id.* That is reversed in the query reviews discussed herein, for which 2,751 of the reported errors—or 72%—involved misidentifying what should have been recorded as a U.S.-person (or presumed U.S. person) query term. The Court encourages the FBI and NSD to focus on this requirement, and the applicable presumptions regarding U.S.-person status, in future training.

iii) Section 702(f)(2)

Under the following circumstances, Section 702(f)(2) requires the FBI to obtain approval from the FISC before accessing the contents of communications acquired under Section 702:

[25] This percentage was calculated for the approximately 29,091 queries of Section 702 information at the 14 field offices for which the number of Section 702 queries was separately reported. *Id.*

(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).

It remains the case that the government has not submitted any applications to the FISC under this provision. The April 21, 2022 Opinion discussed five violations of this requirement in the context of criminal investigations stemming from the January 6, 2021 breach of the U.S. Capitol. Apr. 21, 2022 Op. at 33-34. The April 11, 2023 Opinion discussed another violation involving a query conducted in connection with a predicated criminal investigation related to that event. Apr. 11, 2023 Op. at 91. Since that opinion, the government has not reported any *confirmed* violations of Section 702(f)(2); however, it cannot rule out the possibility that problems with the design and use of certain FBI systems resulted in violations of Section 702(f)(2) that have gone undetected. *See infra* pp. 48-52.

iv) Reporting for Evidence-of-Crime-Only Queries and Batch Jobs

The Court first imposed a reporting requirement regarding FBI queries conducted solely to return evidence of crime (EOC) in November 2015. *See* Docket Nos. 702(i)-15-01, et al., Mem. Op. and Order at 78 (Nov. 6, 2015). On that occasion, the Court's approval of minimization procedures that permitted the FBI to conduct EOC-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.

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; [and] (ii) the number of such queries identified by the user as evidence-of-crime-only queries.

Apr. 11, 2023 Op. at 112-13. Updated results of that reporting are summarized in Chart 2 below.

Prior to September 12, 2023, FBI users were prompted to record whether a U.S.-person query was conducted solely for EOC purposes only upon "attempting to access the unminimized contents of Section 702-acquired information" retrieved by the query. *See* Mar. 2024 QR at 112 n.72. On September 12, 2023, the FBI changed [redacted] to require users, *before* they run a U.S.-person query, to record whether it is for EOC purposes only. *Id.* Since then, the FBI has started to report the total number of U.S.-person queries for EOC-only purposes, as well as the number of such queries for which users sought to access any retrieved contents. *Id.* Chart 2 includes both figures, beginning in the fourth quarter of 2023.

Chart 2 – FBI Reporting of U.S. Person and Presumed U.S.-Person Queries

Quarterly Reporting Period	Total	EOC Purposes Only		
		reported by user pre-query	reported by user and content accessed[26]	content accessed, adjusted by NSD
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
6/2022- 8/2022	40,587		19	1
9/2022-11/2022	50,131		4	0
12/2022- 2/2023	43,342		9	0
3/2023- 5/2023	28,161		9	3
6/2023- 8/2023	19,033		11	0
9/2023-11/2023	3,666	248	11	4
12/2023- 2/2024	1,979	334	9	----

The most striking information represented on Chart 2 is the continuing decline in the number of U.S.-person queries conducted by the FBI. Even allowing for the possibility of errors in recording the use of U.S.-person query terms, *see supra* pp. 42-43, it is clear that in recent months the FBI conducted only a small fraction of the number of such queries it conducted two or three years ago. That fact alone indicates that overall FBI querying practices are less intrusive of U.S.-persons' privacy than previously. Chart 2 also indicates that only a small percentage of

[26] This column does not include the 936 queries conducted in the [redacted] Division and discussed above at page 39 because the personnel involved did not contemporaneously identify them as EOC-only queries. Also not included are three queries conducted in the [redacted] Division that were not contemporaneously identified as U.S.-person queries or as for EOC purposes only, but were later determined by NSD to have met those descriptions. *See* Query Notice [redacted] at 3-5. FBI personnel accessed information returned by those queries. *Id.* at 4-5.

U.S.-person queries conducted by the FBI are for EOC purposes only, and very few of those queries result in FBI personnel accessing responsive content information.[27]

The Court has also ordered the government to report on a quarterly basis "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 "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." Apr. 11, 2023 Op. at 113. The updated results of that reporting are summarized in Chart 3 below. The FBI has reported a much lower number of batch jobs in recent months.

Chart 3 – FBI Reporting of Batch Jobs

Quarterly Report	Total Approved Batch Jobs	Emergency Batch Jobs Without Prior Approval
3/2022- 5/2022	51	0
6/2022- 8/2022	49	0
9/2022-11/2022	53	2
12/2022- 2/2023	17	0
3/2023- 5/2023	33	0
6/2023- 8/2023	11	0
9/2023-11/2023	1	0
12/2023- 2/2024	0	0

The Court is reiterating these reporting requirements with modifications at pages 75-76 below.

[27] As reflected in the two rightmost columns, NSD often revises the number of U.S.-person queries and the number of such queries conducted solely to retrieve EOC, as initially reported by the FBI. The chart contains the latest figures reported. Typically, the revision is downward. For example, of the nine queries during March-May 2023 for which the user reported an EOC-only purpose, NSD concluded that six had a foreign-intelligence nexus and three did not involve use of a U.S.-person query term. *See* Sept. 2023 QR at 103. But NSD later adjusted this figure upward to include the three [redacted] Division queries described in the preceding footnote. *See* Query Notice [redacted] at 4-5. For June-August 2023, NSD revised the number contemporaneously reported by FBI personnel downward from 11 to zero. *See* Dec. 2023 QR at 91-92.

v) Circumvention of Prompts for U.S.-Person Queries

The FBI rendered raw FISA information on [redacted] inaccessible for intelligence and investigative purposes on September 12, 2023. *See supra* note 21. Previously, FBI personnel using [redacted] to conduct a query they identified as employing a U.S.-person query term were not presented with responsive Section 702 content information until they answered prompts designed to ascertain whether the query was an EOC-only query and whether, under Section 702(f)(2), a FISC order was required to access such contents. They also were required to enter a written statement documenting why the querying standard was satisfied. *See* Notice of Systemic Compliance Incident Relating to Method by Which Some Users Accessed/Reviewed § 702-Acquired Info. Retrieved as Result of U.S.-Person Queries in [redacted] at 3-4 (Jan. 31, 2024). Before FBI personnel received those prompts, however, [redacted] would display to them the [redacted] product identifiers (PIDs) for information responsive to the query, which could be used in [redacted] to retrieve such information, including contents, without recording the justification for the query or answering the other prompts described above. *Id.* at 3, 5.

NSD discovered this practice after inquiring why [redacted] logs indicated that some users had performed a significant number of U.S.-person queries, but had not accessed the information returned. *Id.* at 4. At least five persons in four FBI field offices are known to have engaged in this practice routinely, and one of them told NSD that she believed it was permitted and common. *See id.* at 5-8. The government asserts that it has "not discovered any indications that the FBI personnel who engaged in this method were motivated by an intent to circumvent the query requirements" or that they even knew that their actions were noncompliant. *Id.* at 5 n.5. Rather, these FBI employees indicated that they were trying to avoid delays in accessing [redacted] from [redacted] or preferred how [redacted] formatted and presented information, as compared to [redacted] *Id.* at 5.

Some of these queries presented additional compliance issues. For example, a Staff Operations Specialist in the [redacted] Division conducted hundreds of queries relating to U.S. persons [redacted] Some of these queries misidentified U.S.-person query terms as non-U.S. person query terms. NSD is continuing to investigate whether such queries failed to comply with the querying standard and requirements applicable to EOC-only queries. *See id.* at 6 & nn.6-8. A Staff Operations Specialist in [redacted] conducted 126 U.S.-person queries for "mandatory baseline checks for Guardians" on the mistaken belief that querying Section 702 information was required "if the case involved an overseas nexus." *Id.* at 7. NSD is investigating whether these queries satisfied the querying standard. *Id.* n.9. It is not apparent how widespread this practice was and how often it may have resulted in violations of Section 702(f)(2), underreporting of EOC-only queries to the FISC or failures to provide the required written statement of why the querying standard was satisfied.

As noted above, the FBI removed raw FISA information from [redacted] in September 2023. In addition, [redacted] now requires users to provide written justifications and indicate whether queries are for EOC-only purposes *before* queries using U.S.-person query terms are executed. But users are not prompted to state whether they obtained a Court order pursuant to Section 702(f)(2), when required, until they attempt to access content retrieved by a query. It therefore remains possible for FBI personnel to use a displayed PID to retrieve such information without receiving and responding to "the system prompts designed to ensure compliance with Section 702(f)(2) and the Court's reporting requirements for queries conducted to retrieve only [EOC]." *Id.* at 10. "NSD is advising users against this practice during in-person training" and the FBI is "planning to send out

guidance to divisions" not to engage in it. *Id.*[28] The government is directed to update the Court on such efforts at page 78 below.

vi) [redacted] Operations Found to Involve Queries

The April 11, 2023 Opinion distinguished automated NSA operations that involve queries of Section 702 information from those that do not. Apr. 11, 2023 Op. at 29-67. Since then, the government has reported that certain types of queries in [redacted] had not been treated as queries, and therefore did not present users with the prompts designed to record use of a U.S.-person query term, document the basis for believing that use of a U.S.-person query term satisfied the querying standard, confirm compliance with Section 702(f)(2) or report EOC-only queries.

Standing Alerts: On May 26, 2023, the government reported that an FBI alert mechanism did not comply with certain querying, and potentially minimization, requirements. *See* Prelim. Notice of Potential Compliance Incidents Relating to FBI's Use of Alert Function in [redacted] (May 26, 2023). Since 2012, [redacted] has had an alert feature that would notify a user if data meeting certain specified criteria was ingested into [redacted]. *Id.* at 2. The alerts are specific to a case file number and a targeted facility, so that the alert mechanism only runs against data acquired by targeting a particular facility associated with a particular FBI case file number. *Id.* at 2. A user can also apply "additional specifications to the alert template." *Id.*

Ten types of alerts could be created. The government first concluded that five of them constituted queries: [redacted] *Id.* at 2-3. The FBI disabled these five types of alerts as of May 16, 2023. *Id.* at 2. The government later identified and disabled

[28] The FBI is also considering "long-term solutions that may require a system design change"; decisions in that regard will take into consideration potential statutory changes. *Id.*

two other alerts that constituted queries: [redacted] *See* Supplemental Notice of Potential Compliance Incidents Relating to FBI's Use of Alert Function in [redacted] at 3 (Sept. 6, 2023).[29] Based on the descriptions provided, it appears that some of these alerts may have resulted in violations of the querying standard. The types of alerts that constituted queries presented additional compliance concerns because personnel were not "prompted to respond to any of the questions presented to users conducting queries in [redacted]—for example, concerning U.S. person query term labeling, evidence-of-a-crime-only purpose, or sensitive query terms used." Prelim. Notice of Potential Compliance Incidents Relating to FBI's Use of an Alert Function in [redacted] at 2.

This alert functionality can also be used to automatically mark Section 702 information that triggers an alert, e.g., marking communications as needing translation, as products of interest or as meeting criteria for permanent retention. *See* Supplemental Notice of Potential Compliance Incidents Relating to FBI's Use of Alert Function in [redacted] at 4. The government is "continuing to investigate whether this [marking] feature may have caused any potential compliance incidents." March 2024 QR at 143. The Court is ordering specific reporting on compliance concerns posed by this alert functionality. *See infra* p. 78.

Product Hyperlinks: From May 16, 2013 to July 11, 2023, [redacted] afforded users the ability to see the number of times certain communication facilities found within the results of a previously conducted query appeared within all of the information contained in [redacted] *See* Notice of Potential

[29] The remaining three types of alerts notify analysts when a product for a specified facility is loaded into FBI systems, when a product ingested into [redacted] contains no content, and when user-specified minimization markings are applied to a product for a specified facility. The government concluded that these types of alerts do not constitute queries, *see id.* at 3-4; Sept. 2023 QR at 102, and the Court concurs.

Compliance Incidents Relating to Certain FBI Queries in [redacted] at 2 (Oct. 17, 2023). Users could opt to view [redacted] which was generated by running a query against all information within [redacted] to which the user had been granted access "regardless of whether the user had included raw FISA-acquired information in the original query." *Id.* The government determined that any such queries of Section 702 information for facilities used by U.S. persons would not have complied with the requirement to keep a record of each use of a U.S.-person query term. *Id.* This functionality also may have enabled violations of the querying standard and Section 702(f)(2). *Id.* at 3. The FBI deactivated this functionality on July 11, 2023, but reinstated it on August 15, 2023, following modifications that brought it into compliance with the querying rules. *Id.* at 3-4.

"Search Within" Function: For some time prior to February 2023, a system error could cause a [redacted] user who intended to search for a term within the results of a previously conducted query to instead initiate a second query for that term against all of the information in [redacted] to which the user had access. Notice of Potential Compliance Incidents Relating to a System Error in FBI's [redacted] Search Within Feature at 1-2 (Nov. 27, 2023). "In addition, [redacted] did not prompt the user to answer the FISA questions (e.g., questions relating to the U.S. person labeling and evidence of a crime-only queries)." *Id.* at 2. Although no specific incidents of noncompliance were identified, NSD concluded that it was possible "that certain queries were conducted that did not satisfy the . . . query standard. In addition, because [redacted] did not prompt users to answer the standard FISA query questions and prompts, NSD assesses that queries conducted as a result of this system error did not satisfy the requirements" to record U.S.-person query terms and to provide a written justification for use of a U.S.-person query term before accessing content information retrieved by it. *Id.*

RA Index Analytic: NSD has determined that a [redacted] analytic called RA Index involved queries of Section 702 information. RA Index, which was disabled in March 2020, identified facilities [redacted] *See* Notice of Compliance Incident Relating to FBI Queries of Raw FISA-Acquired Info. in RA Index Analytic at 1-2 (Oct. 17, 2023). RA Index then presented the facilities so identified to analysts. *Id.* at 2. Based on the analysis in the Court's April 11, 2023 Opinion, NSD concluded that RA Index conducted queries when it searched Section 702 information [redacted] *Id.* at 2. Insofar as [redacted] RA Index [redacted] *Id.* In addition, RA Index did not require users "to answer [redacted] standard FISA query prompts." *Id.*

The Court concludes that the FBI has taken appropriate steps to address the concerns these [redacted] operations might otherwise present regarding the FBI's prospective implementation of its procedures.

b) Querying and Dissemination Issues Presented by NSA Tools and Systems

i) [redacted]

The April 11, 2023 Opinion discussed compliance problems regarding [redacted] an NSA query tool. Apr. 11, 2023 Op. at 96-99. [redacted] had been used for Section 702 information since 2013 and was available to authorized users at NSA, [redacted] *See* Notice of Compliance Incident and Update to Notice of Matter Under

Investigation at 2 & n.8 (Mar. 10, 2023) ("Mar. 10, 2023 Notice"); Report in Resp. to Ct.'s Mem. Op. and Order Dated Apr. 11, 2023 at 6 & n.6 (Oct. 5, 2023) ("Oct. 5, 2023 Update"). allowed users to perform queries using selectors for foreign-intelligence targets as *See* Mar. 10, 2023 Notice at 2-3 displayed to non-NSA users Section 702-acquired information Oct. 5, 2023 Update at 13. The government regards display of Section 702 information to non-NSA users as constituting dissemination of such information. *See* Mar. 10, 2023 Notice at 3.

It appears that at least some queries did not satisfy the "reasonably likely to retrieve foreign intelligence information" querying standard because the personnel who managed "relied on rules generally applicable to information acquired pursuant to Executive Order 12333," which are not the same as the rules for Section 702 information. "NSA advise[d] that this error stemmed from a misunderstanding among NSA personnel." *Id.* at 3-4.

In April 2023, the Court ordered the government to provide additional information. Apr. 11, 2023 Op. at 99, 116. In response, the government has reported:

- After April 10, 2023, and an associated analytic no longer displayed any FISA-acquired information to non-NSA users.[30]
- Due to "continuing concerns with how functions, on July 6, 2023, NSA initiated the process to remove all remaining FISA data from

[30] *See* Mar. 10, 2023 Notice at 2, 3 n.7, 5 (stating that NSA made system changes to prevent disseminations of FISA-acquired information on September 22, 2022); Oct. 5, 2023 Update at 6 (stating that a related analytic may have allowed to disseminate FISA-acquired information to non-NSA users until April 10, 2023).

Report in Resp. to Ct.'s Mem. Op. and Order Dated Apr.11, 2023 at 3-4 (July 10, 2023).

- "NSA took [redacted] offline and began the process of decommissioning" it on August 7, 2023. *See* Oct. 5, 2023 [redacted] Update at 28.
- "[B]efore [NSA] disseminated any FISA-acquired information in response to a non-NSA user request, [redacted] removed any information associated [redacted] *Id.* at 14-15.

In view of the limited types of information that [redacted] presented to non-NSA users, it seems likely that limited, if any, U.S.-person information acquired under Section 702 was included.[31] And, because the [redacted] system has been decommissioned, it is no longer pertinent to the Court's findings.

ii) [redacted]

While investigating [redacted] NSA identified compliance concerns regarding a separate system [redacted] used to query Section 702 information. *See* Prelim. Notice of Potential Compliance Incidents Re Non-Compliant Queries at 2 (Dec. 20, 2023). [redacted] *Id.* at 2 n.4. NSA analysts can

[31] An NSA official stated in a declaration submitted to the Court in 2022 that "analyst review is required before *any* dissemination of section 702-acquired information." Classified Decl. of Natalie N. Laing, NSA, Re NSA's Processing of § 702-Acquired Info. at 52 (Aug. 23, 2022) ("NSA Decl. Aug. 23, 2022") (emphasis added). The government has described this declaration as accurately stating NSA policy and [redacted] presentation of Section 702 information to non-NSA users without review by an NSA analyst as having violated that policy. *See* Mar. 10, 2023 [redacted] Notice at 7.

conduct queries of Section 702 information on this system, using "identifiers tasked pursuant to Executive Order 12333" as query terms, without confirming that such queries meet the querying standard. *Id.* at 3. The government has acknowledged the potential that some such queries did not satisfy that standard, while offering an unexplained assessment that such queries, "if they occurred, would be rare." *Id.*

"NSD continues to work with NSA to understand how [redacted] queries FISA-acquired information and discuss any relevant mitigation." *Id.* The Court is directing the government to report more fully on the potential for noncompliant queries of Section 702 information on this system and the government's response thereto. *See infra* p. 78.

iii) [redacted] and [redacted]

[redacted] is an NSA capability which identifies within Section 702 holdings particular information that falls within categories deemed by NSA as likely to contain foreign intelligence information. *See* Apr. 11, 2023 Op. at 41. [redacted]

id. In April 2023, the Court concluded that "the searching by [redacted] and retrieval by [redacted] should be regarded as a single 'action,'" which "falls under the definition of 'query' because it uses terms to retrieve unminimized Section 702 information" for human inspection. *Id.* at 42-43. The Court anticipated that [redacted] would use few, if any, U.S.-person query terms, and that such queries may satisfy the querying standard because [redacted] *Id.* at 43. The Court directed the government to report on how NSA would

ensure that its use of [redacted] and [redacted] conform to NSA's querying procedures. *Id.* at 116.

In response, the government reported that [redacted] *See* Docket Nos. 702(j)-23-01, et al., Verified Report in Resp. to Requirement in Apr. 11, 2023 Op. Re [redacted] and [redacted] at 3 (Sept. 11, 2023). [redacted] *Id.* at 4. In so doing, [redacted] uses terms [redacted][32] NSA has reviewed all such terms, approximately [redacted] sets, and concluded that none constitutes a U.S.-person query term. *Id.* at 8-9.

[redacted] *Id.* at 4-5. Even assuming that [redacted] should be regarded as query terms used by [redacted], they would not constitute U.S.-person query terms. Thus, use of [redacted] does not implicate the requirement to record use of U.S.-person query terms. And because an alert is sent to an analyst only if [redacted] identifies information [redacted] for which the analyst has requested such alerts, *id.* at 8, these practices involve limited, if any, intrusions on U.S. persons' privacy interests.

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32 [redacted]

The government reports, based on years of NSA analytical experience, that using the first type of query term has proven likely to identify particular categories of information that is of foreign intelligence value to analysts. *Id.* at 3-4. In essence, the government's position is that queries that use those terms, in conjunction with ones that limit the results to information associated with [redacted] designated by an analyst, are reasonably likely to retrieve foreign intelligence information. The Court sees no reason to dispute that conclusion. Based on the record before it, the Court is persuaded that the operation of [redacted] and [redacted] complies with NSA's procedures and does not suggest that NSA will implement those procedures in a manner inconsistent with statutory or Fourth Amendment requirements.

iv) NSA's [redacted]

As noted at page 20 above, section IV.D of NSA's querying procedures provide for a specific form of query used to vet certain non-U.S. persons seeking to travel to the United States or receive a U.S. immigration benefit. In what the FISC has previously called the first step of this travel-vetting process, NSA uses automated means to [redacted] Apr. 11, 2023 Op. at 45.[33] It then automatically compares [redacted]

[33] [redacted]

[redacted]

The April 11, 2023 Opinion considered this vetting process in the context of evaluating which types of automated operations that interact with raw Section 702 information are subject to statutory requirements for queries and which types are not. *See id.* at 29-40. The Court found that the automated generation of [redacted] at Step One does not involve queries, but that Steps Two and Three, taken together, do involve queries. *Id.* at 48-51. These queries are "suspicionless" in that there is no reason to believe *ex ante* that a particular applicant has any connection to terrorism or that [redacted] is reasonably likely to return foreign intelligence information. *See id.* at 44, 53-55. The Court observed, however, that neither the statutory definition of minimization procedures nor the Fourth Amendment inflexibly requires that queries of Section 702-acquired data be reasonably likely to retrieve foreign intelligence information.[34] After weighing the national-security benefits of suspicionless travel-vetting queries against the resulting intrusion on U.S.-person privacy, the Court found that such travel-vetting queries were consistent with statutory and Fourth Amendment requirements. *See id.* at 56-59, 77-81.

Improper Generation [redacted] Due to a filter misconfiguration that commenced in or about July 2021 and was corrected as of April 15, 2023, NSA populated [redacted]

[redacted]

[34] *See id.* at 57-59 (discussing statutory definition of minimization procedures); *id.* at 76-77 ("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") (citation omitted).

[redacted] Notice of Compliance Incident at 2 (Feb. 15, 2024) ("Feb. 15, 2024 [redacted] Notice").[35] [redacted] *Id.* Generating [redacted] in this fashion violated minimization rules applicable to these [redacted] of FISA information. *See id.* at 3. It also was inconsistent with Section IV.D.1 of the NSA querying procedures, which authorizes NSA to populate [redacted]

As noted above, the government reports that this problem was corrected as of April 15, 2023. For that reason, this problem does not materially detract from a finding that NSA's Section 702 procedures, as likely to be implemented henceforward, satisfy statutory and Fourth Amendment requirements. Nevertheless, the situation raises concerns. In March 2023, NSA submitted a declaration describing the composition of [redacted] *See* Docket Nos. 702(j)-23-01, et al., Classified Decl. of [redacted] NSA, Re NSA's Supp. to Vetting Activities at 4-6 (Mar. 13, 2023). The Court relied on that description. *See* Apr. 11, 2023 Op. at 49. Several weeks after submitting that declaration NSA identified and corrected the

[35] The improper filtering reportedly resulted from a "modernization of the analytic process that supports the generation of [redacted] which took place in or about July 2021." *Id.*

filtering problem.[36] Yet the government took until February 2024 to report the circumstances to the Court, notwithstanding that FISC Rule of Procedure 13 requires immediate notification when the government discovers that it has made a material misstatement or omission or implemented a FISC authorization in a noncompliant manner. The government attributes the delayed notice "to competing mission demands within NSD and NSA's investigation," without further explanation. Feb. 15, 2024 [redacted] Notice at 1 n.1. In order to ensure that NSA will generate [redacted] in a manner that complies with NSA Querying Procedures § IV.D.1 and that any failure to do so is promptly detected and reported, the Court is ordering the government to describe what steps are being taken or will be taken to verify that the automatic processes used to generate [redacted] are functioning properly. *See infra* p. 78.

Improper Queries of [redacted] NSA is not permitted to "compare against [redacted] belonging to non-United States person travel or immigration applicants that NSA knows, or reasonably should know, are located or reside inside the United States." NSA Querying Proc. § IV.D. Nonetheless, in February 2024, "an NSA system developer discovered that [redacted] associated with domestic renewals of certain work-related non-immigrant visas for applicants expected to be located in the United States and with United States home addresses appear to have been compared against [redacted]" Notice of Matter Under Investigation at 2 (Feb. 23, 2024). This incident occurred because NSA had not applied a filter intended to prevent such comparison to the correct data flow; that error has since been corrected. *Id.* Even before that correction, filtering prevented [redacted] such impermissible vetting requests from

[36] The government has not made clear exactly when NSA became aware of the improper filtering, stating both that NSA determined on May 19, 2023, that the creation of [redacted] "had inadvertently included [redacted] beyond its intended scope and that "as of April 15, 2023, NSA technical personnel made changes to correct the inadvertent inclusion in [redacted] *Id.* at 2.

being run against [redacted] *Id.* Of the [redacted] that were impermissibly compared to the [redacted] *Id.* The Court does not view this filtering problem as undermining the requested findings regarding NSA's procedures.

c) [redacted]

[redacted]

[37] [redacted]

[38] [redacted]

[redacted]

39 [redacted]

40 [redacted]

[redacted]

41 [redacted]

42 [redacted]

[redacted]

d) Improper Retention by NSA and FBI

The April 11, 2023 Opinion noted several instances in which NSA did not properly implement destruction requirements applicable to certain Section 702-acquired information. Apr. 11, 2023 Op. at 99-101. One of those instances involved a system called [redacted] which "processes data acquired pursuant to Section 702 and other authorities. NSA discovered on

August 16, 2022, that a software error[43] 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." Apr. 11, 2023 Op. at 100-101 (internal citations omitted). The data over-retained in [redacted] was not accessible to analysts. *Id.* at 101. NSA fixed this software error on November 11, 2022, and deleted the improperly retained data by August 3, 2023. Nov. 1, 2023 Improper Retention Notice at 2.

Since the April 11, 2023 Opinion, the government has reported additional noteworthy incidents of over-retention or incomplete purges by NSA, including the following:

- Some NSA efforts to purge Section 702 data in [redacted] have been incomplete. *See* Prelim. Notice of Potential Compliance Incident Re Incomplete Purges of Info. Obtained Pursuant to FISA at 1 (Sept. 13, 2023). The scope and cause of this incident have not been reported. NSA undertook "a manual scan" of the system to identify records that should have been purged, but have not been. *Id.* The government reports that any improperly retained data might have been accessible to NSA analysts but would likely not have been used because the identifiers for the data were on NSA's Master Purge List (MPL). *Id.*[44] The government has not provided updated information on this matter and the scanning for records that should have been purged apparently has not been completed. *See* Mar. 2024 QR at 132-33.
- [redacted] is a suite of high-performance computing systems that run analytics on data acquired pursuant to Section 702 and other authorities. Prelim. Notice of Compliance Incident Re Unauthorized Retention of Info. Obtained Pursuant to § 702 and Title I of FISA at 1 (June 13, 2023). On January 31, 2023, and again on February 28, 2023, NSA discovered data feeds in [redacted] that, due to an

[43] Subsequently, the government reported that this incident was caused by a "combination of a software error and an increase in data volume." Final Notice of Compliance Incident Re Improper Retention of Info. Obtained Pursuant to FISA at 2 (Nov. 1, 2023) ("Nov. 1, 2023 Improper Retention Notice").

[44] The MPL is a record of all NSA information that has been subject to a purge requirement. Oct. 18, 2018 Op. at 128. Placing information on the MPL alerts NSA personnel that it "may not be used in SIGINT reporting, FISA applications, or to support Section 702 targeting." Docket Nos. 2018-473, et al., Report in Resp. to Ct.'s Supplemental Order Dated May 25, 2018 at 3 (June 22, 2018).

oversight, had not been properly integrated into the system's purge process. *Id.* at 1-2.[45] Further investigation identified another data feed that presented similar circumstances. *See* Supplemental Notice of Compliance Incident Re Unauthorized Retention of Info. Obtained Pursuant to FISA at 3 (Dec. 14, 2023). [redacted] "data objects" acquired pursuant to Section 702 had not been properly purged. *See id.* at 2-3. The government reports that all data subject to purge has now been deleted from [redacted] *Id.* at 3. The improperly retained data had not been accessible by analysts and had been listed on the MPL. *Id.* at 2-3.

- On May 26, 2023, NSA technical personnel identified [redacted] Section 702-acquired [redacted] that should already have been purged. *See* Notice of Compliance Incident Re Unauthorized Retention of Info. Acquired Pursuant to FISA at 1 & n.1 (Aug. 22, 2023). Due to a "software bug," [redacted] had been improperly retained since July 28, 2022. *Id.* at 1-2. NSA manually purged them, along with [redacted] hat had been identified, on May 24-25, 2023. *Id.* at 2. The government reports that NSA has added a purge validation mechanism to [redacted] *Id.*

The government has also recently reported over-retention of Section 702-acquired information by the FBI in [redacted] Absent an appropriate extension, the FBI is required to destroy unminimized Section 702-acquired information that has not been reviewed five years from the expiration date of the certification under which the information was acquired. FBI Minimization Proc. § III.D.4.b. In violation of that requirement, the FBI has retained such information in [redacted] for an unspecified number of selectors tasked pursuant to DNI/AG Section 702(h) Certifications 2015-A, 2015-B, 2015-C, 2016-A, 2016-B, and 2016-C. *See* Prelim. Notice of Compliance Incident Re Retention of Raw FISA-Acquired Info. at 1 (Mar. 12, 2024). The government describes the apparent cause of this over-retention as a "software coding issue" that the FBI is "working to correct." *Id.* at 2. The FBI is continuing to investigate the incident and whether FBI personnel accessed or reviewed any information after its required destruction date. *Id.* The FBI has

[45] NSA first reported this compliance incident to NSD and ODNI on February 13, 2023, yet it was not reported to the Court until June 13. *Id.* at 1. This delay is attributed to NSA's investigation of the incident, *id.* at 1 n.1; however, no justification is apparent for a four-month delay in providing even preliminary notice to the Court. *See* FISC Rule of P. 13(b) (requiring the government report instances of noncompliance "immediately" upon discovery).

rendered the information "inaccessible except to technical personnel" and is in the process of removing it from [redacted] *Id.* It is concerning how long this information apparently was over-retained in [redacted] which is widely used by FBI personnel, before it was recognized as improperly retained.

These incidents indicate a continuing need for the FBI and NSA to focus attention on ensuring that systems that contain Section 702-acquired information comply with retention limitations. The Court is ordering the government to report more fully on improper retention in [redacted] and [redacted] and the government's responses thereto. *See infra* p. 78.

e) Reports Containing Information Subject to a Purge Requirement

"It came to light in 2019 that NCTC, NSA, and CIA had retained intelligence reports after they had been recalled for FISA-compliance reasons." Apr. 11, 2023 Op. at 102. In response, ODNI revised IC policies to provide a specific notification category for recalls for FISA-compliance reasons. *Id.* The Court has required the government to report on implementation of the revised policy, which is stated in a policy memorandum designated "ICPM 200(01)." *Id.* at 102-03, 114.

On January 6, 2024, ODNI issued a memorandum defining the term "disseminated intelligence products" as used in ICPM 200(01) as "serialized textual intelligence products, which can be accompanied by imagery, that are made broadly accessible by an IC element to intelligence recipients." *See* Docket Nos. 702(j)-23-01, et al., Report in Resp. to Ct.'s Apr. 11, 2023 Op. at 16-17 (Feb. 15, 2024) ("Feb. 15, 2024 Recall Report"). This memorandum reminds IC elements that they must "not only remove the original [recalled] product but also prevent any further use or disclosure of the product." *Id.* at 17 (internal quotation marks omitted). The agencies are

continuing to develop "a plan for outreach to the recipients of disseminated intelligence products, outside of FBI, NSA, CIA, and NCTC, to ensure compliance" with ICPM 200(01). *Id.* at 18-19.

The April 11, 2023 Opinion discussed the discovery of [redacted] recalled reports in the Department of the Army [redacted] messaging platform. Apr. 11, 2023 Op. at 104. [redacted] an additional [redacted] tearlines and reports subject to FISA-compliance recalls, which were removed from its systems as of October 2023. *Id.* at 22-23 (footnotes omitted). The Army is refining its process for recalled reports and has put in place a "semi-automated process" to identify and purge them. *Id.* at 23.

The government previously advised that a FISA-compliance recall was permitted, but not required, for FISA information that is subject to purge for reasons other than noncompliance. Apr. 11, 2023 Op. at 104. For example, if NSA acquired information under Section 702 with a reasonable, but mistaken belief that a target was a non-U.S. person located outside the United States, the government regarded that information as generally subject to purge,[47] but did not regard the acquisition as unauthorized. The government contended that in such a case, a FISA-compliance

[46] Tearlines are "portions of an intelligence report or product that provide the substance of a more highly classified or controlled report without identifying sensitive sources, methods, or other operational information," so that they can be released with "less restrictive dissemination controls, and when possible, at a lower classification." Feb. 15, 2024 Recall Report at 20 n.13.

[47] *See* NSA Minimization Proc. §§ 4(d)(2) ("[a]ny information acquired" under the above-described circumstances "will be treated as domestic communications"); 6 ("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 . . . communication had been properly targeted" and that the communication falls within one of four specified categories).

recall was not required. Apr. 11, 2023 Op. at 105. That distinction is significant because, under the ODNI policy, FISA-compliance recall notices must "'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,'" while other recall notices need only "'state why the product is being revised or recalled and what action is expected or required of the recipients of the notice.'" *Id.* at 104 (quoting ICPM 200(01) § B.3). In April 2023, the Court required the government to explain why an agency should have the discretion not to issue a FISA-compliance recall for reports containing such information. *See id.* at 115.

The government has now clarified that "NSA, CIA, and NCTC, as a matter of policy and/or practice, issue FISA-compliance recall notices for reports containing an underlying FISA source subject to purge, including those that *are not* the result of a FISA-compliance incident." Feb. 15, 2024 Recall Report at 12 (emphasis in original). FBI has put out policy guidance to the same effect. *See id.* at 12-13.[48]

f) Other Incidents

The Court has also considered the nature and frequency of other compliance problems reported since the April 11, 2023 Opinion. Overall, the Court views as reasonable the agencies' efforts to mitigate these incidents and guard against their recurrence, but one recent report of possible noncompliance merits specific discussion.

The FBI's targeting procedures generally require the FBI to search certain systems [redacted]

[48] If, however, "such information can be supported from a different source that is not subject to purge, substitution of that different source shall be permitted without requiring a FISA-compliance recall." *Id.* at 12 n.9.

[redacted] FBI Targeting Proc. § I.4 at 2-3 (footnotes omitted).[49] The purpose of those searches is to ascertain, based on information in FBI's possession, whether the [redacted] is a U.S. person or is located in the United States. On March 22, 2024, the government reported that, "in an unknown number of cases, the FBI approved requests for the [redacted] Prelim. Notice of Possible Compliance Incident Re FBI's § 702 Targeting Proc. at 1 (Mar. 22, 2024) ("March 22, 2024 FBI Targeting Notice"). The "government is assessing whether this practice is consistent with FBI's Targeting Procedures" and "will update the Court regarding its assessment." *Id.*

The reported information does not undermine the basis for finding that the FBI's procedures, as likely to be implemented, comport with statutory and Fourth Amendment requirements. The FBI's possible noncompliance is confined to not searching for [redacted] As reported, the possible noncompliance does not involve a failure by the FBI to conduct searches for identifying information received from NSA, or a general failure to conduct searches for identifying information uncovered by its own research. In addition, the FBI's targeting procedures are always applied in addition to NSA's targeting procedures. *See supra* pp. 13-15. Accordingly, FBI implementation of its procedures serves to backstop foreignness determinations that have already been made by NSA under its targeting procedures [redacted]

49 [redacted]

[redacted] under Section 702. NSA is required to review the contents of communications acquired for a tasked account and the results of that review inform the assessment of continued foreignness that NSA provides to the FBI in support of any request to [redacted] *See supra* pp. 14-15.

The possibility that the FBI deviated from its targeting procedures in the particular way described does not warrant a finding of deficiency; however, to confirm the limited scope of any noncompliance, the Court is directing the government to report on the progress of its investigation. *See infra* p. 78.

* * *

In sum, the FBI has made progress in addressing the concerns arising from its queries of Section 702 information. Compared to just a few years ago, the reported number of such queries using U.S.-person query terms has greatly decreased, which in and of itself indicates less intrusion into the private communications of U.S. persons. The results of audits and oversight reviews suggest that the FBI's training efforts are bearing fruit, notwithstanding that some personnel do not understand querying rules or are prone to errors in recording whether a query involved a U.S.-person query term. It is evident that the FBI and NSD should continue to focus training and oversight efforts on those issues.

Otherwise, a number of FBI and NSA violations of restrictions on querying, retaining, and disseminating Section 702 information stem from systems that in the first instance were not designed to comply with those restrictions [redacted] or that came into noncompliance due to errors in software coding, filtering or the like (e.g., over-retention in [redacted] The agencies should take steps to ensure systems that store or operate on Section 702 information are designed to comply with applicable rules. They should also consider what further measures could be taken

to ensure that such systems continue to function in a compliant manner and that any failures in that regard are promptly detected.

"Perfect implementation is unrealistic and 'some potential for error is not a sufficient reason' to invalidate procedures as unreasonable." Apr. 21, 2022 Op. at 67 (quoting *In re Directives*, 551 F.3d at 1015). On balance, and in view of the remedial measures taken by the agencies, the Court finds that the procedures submitted with the 2024 Certifications, as likely to be implemented, comply with applicable statutory and Fourth Amendment requirements.

IV. CONCLUSION

For the foregoing reasons, the Court finds that:

(1) The 2024 Certifications, as well as the certifications in the Prior 702 Dockets, as amended by the 2024 Certifications, contain all the required statutory elements;

(2) The targeting procedures for acquisitions conducted pursuant to the 2024 Certifications are consistent with the requirements of Section 702(d) and of the Fourth Amendment;

(3) With respect to information acquired under the 2024 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, DNI/AG 702(h) Certification 2021-C, DNI/AG 702(h) Certification 2023-A, DNI/AG 702(h) Certification 2023-B, and DNI/AG 702(h) Certification 2023-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." 2017 Reauthorization Act § 101(a)(2).) Accordingly,

IT IS HEREBY ORDERED AS FOLLOWS:

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

a. The 2024 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 2024 Certifications is approved; and

c. With respect to information acquired under the 2024 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 is hereby relieved of any reporting requirements imposed by FISC opinions and orders in the Prior 702 Dockets that are not reiterated below):

a. Raw information obtained by NSA's upstream Internet collection under Section 702, including information [redacted] discussed herein, shall not be provided to the FBI, CIA or NCTC unless 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 describing (a) 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) the Section 702-acquired information preserved for each such litigation matter; and (c) 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 exempting responses 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 U.S.-person queries identified by the user as evidence-of-crime-only queries and the number of times the FBI accessed Section 702-

acquired contents information retrieved by such a query; (iii) the number of instances in which users stated that they had received approval from an FBI attorney to perform a "batch job"; and (iv) the number of instances in which users did not receive prior approval from an FBI attorney for such a "batch job";

e. The government shall continue to report on its [redacted] under Section 702 on a quarterly basis. These reports shall: (i) describe the intended targets of each [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] 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 which: (i) describes the [redacted] (ii) explains how [redacted] will comply with the abouts limitation; and (iii) describes 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 year, the government shall report: (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 submit a report 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 14, 2025, specifying, as applicable: (i) further 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; and (ii) steps taken or to be taken to facilitate consistent application of the FISA-compliance recall category by the FBI, NSA, CIA, and NCTC;

j. The requirement to provide an update to each agency's user activity monitoring submission, *see* Docket Nos. 702(j)-19-01, et al., Mem. Op. and Order at 82-83 (Dec. 6, 2019), shall remain in effect, with the next report due on March 3, 2025, and subsequent reports due at two-year intervals thereafter;

k. 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: (i) identifying the individual to whom the delegation was made; (ii) describing the duties of such individual; and (iii) explaining the reason(s) for the delegation to such individual and the scope and duration of the delegation;

l. The government shall promptly report: (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;

m. The government shall submit a written update within 90 days of this Order regarding its investigation of (i) the application of automated markings in [redacted] including those indicating that particular Section 702-acquired information satisfies the criteria for permanent retention; (ii) the retention of Section 702-acquired information after it was required to be destroyed by the FBI in [redacted] and by the NSA in [redacted] (iii) potential querying violations in [redacted] and (iv) possible noncompliance with FBI Targeting Procedures § I.V, as described in the March 22, 2024 FBI Targeting Notice. These submissions shall address what, if any, remedial measures have been or will be taken. If the investigation and any remedial measures are not completed at the time of such written submissions, the government shall submit written updates at 90-day intervals thereafter;

n. The government shall make a written submission within 90 days of this Order updating the Court on steps being taken to ensure that (i) entries on the NSA [redacted] are limited to selectors described in the NSA Querying Procedures § IV.D.1; and (ii) FBI personnel do not retrieve Section 702-acquired data on [redacted] by use of PIDs in a manner that may circumvent prompts that facilitate compliance with applicable procedures and reporting requirements.

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

p. The government shall file a description of any of the following occurrences:

(a) NSA comes to believe that [redacted]

(b) NSA comes to believe that [redacted]

(c) NSA comes to believe that [redacted]

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

ENTERED this 4th day of April, 2024.

ANTHONY J. TRENGA
Presiding Judge, United States
Foreign Intelligence Surveillance Court

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