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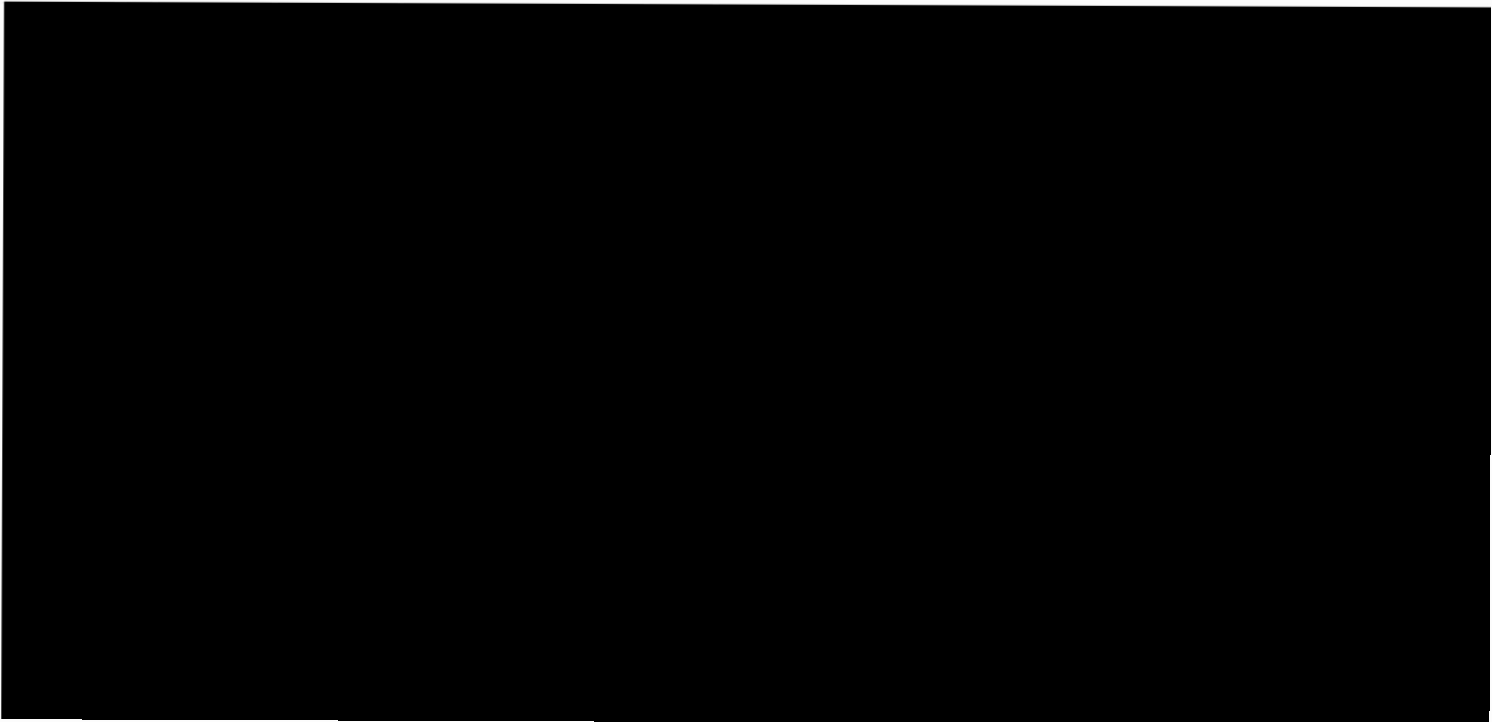
SEP 04 2019

UNITED STATES

LeeAnn Flynn Hall, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



MEMORANDUM OPINION AND ORDER

The Foreign Intelligence Surveillance Court today addresses the “Government’s Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(g) Certifications, and Request for an Order Approving Such Amended Certifications,” filed on August 12, 2019 (“August 12, 2019, Submission”). The August 12, 2019, Submission amended certifications and procedures that were filed on March 27, 2018, see “Government’s Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and

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Request for an Order Approving Such Certifications and Amended Certifications,” filed on March 27, 2018 (“March 27, 2018, Submission”), and previously amended on September 18, 2018, see “Government’s Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(g) Certifications, and Request for an Order Approving Such Amended Certifications” (“September 18, 2018, Submission”). The government’s request for approval of the amended certifications and procedures is *granted* for the reasons stated herein.

I. BACKGROUND

The Court previously reviewed [REDACTED] certifications executed by the Attorney General and the Director of National Intelligence pursuant to Section 702 of the Foreign Intelligence Surveillance Act, as amended, codified at 50 U.S.C. § 1881a: [REDACTED]

[REDACTED] (collectively referred to as “the 2018 Certifications”). See Mem. Op. and Order, Oct. 18, 2018 (“October 18, 2018, Opinion”). The 2018 Certifications authorize the acquisition of foreign-intelligence information pursuant to the targeting procedures, minimization procedures, and querying procedures adopted therein. See id. at 3-4, 6-8. They also amend earlier certifications to apply the accompanying minimization procedures and querying procedures to the handling of information acquired pursuant thereto. Id. at 9. (Those prior certifications were reviewed by the FISC in Docket Numbers [REDACTED])

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which

are collectively referred to as “the Prior 702 Dockets.”)

The Court approved the government’s certifications and procedures in most respects. Specifically, the Court found that (1) the 2018 Certifications, as well as the prior certifications, as amended, contained all the required statutory elements; (2) the targeting procedures were consistent with the requirements of Section 702(d) and of the Fourth Amendment; (3) the minimization procedures and querying procedures to be implemented by the National Security Agency, the Central Intelligence Agency, and the National Counterterrorism Center under the 2018 Certifications were consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment; and (4) with respect to information acquired under the prior certifications, the minimization procedures to be implemented by NSA, the CIA, and NCTC (including as referenced therein the requirements of the respective agencies’ querying procedures) were consistent with the requirements of Section 702(e) and of the Fourth Amendment. See October 18, 2018, Opinion at 132.

The Court found two deficiencies, however, regarding procedures to be implemented by the Federal Bureau of Investigation under the 2018 Certifications: (1) the FBI querying procedures were inconsistent with the requirements of Section 702(f)(1)(B) to keep records of each United States-person query term used to query Section 702 information, id. at 52-62, 133; and (2) the FBI minimization procedures and querying procedures were inconsistent with the requirements of Section 702(e) and Section 702(f)(1)(A) respectively and of the Fourth

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Amendment because they did not require adequate documentation of the justifications for queries that use United States-person query terms, id. at 133-34. With respect to information acquired under the Prior 702 Dockets, the Court found that the FBI minimization procedures (including as referenced therein the FBI querying procedures) were inconsistent with the requirements of Section 702(e) and of the Fourth Amendment because they did not require adequate documentation of the justifications for queries that use United States-person query terms. Id. In other respects, the Court approved the FBI querying procedures and minimization procedures. Id. at 133. The Court directed the government, pursuant to Section 702(j)(3)(B), either (1) to correct the identified deficiencies within 30 days, or (2) to cease, or not begin, the implementation of the FBI minimization procedures and querying procedures, insofar as such implementation involved those deficiencies. See Docket Nos. [REDACTED] [REDACTED] Orders issued on Oct. 18, 2018, at 3.

The government appealed those orders to the Foreign Intelligence Surveillance Court of Review on November 15, 2018. See Docket No. [REDACTED] In re DNI/AG 702(h) Certifications [REDACTED] Predecessor Certifications at 21 (FISCR July 12, 2019) (per curiam) (“In re DNI/AG Certifications”). On November 16, 2018, the FISCR granted the government’s request “to stay the implementation of those aspects” of the FISC’s orders “that would preclude the FBI from conducting queries of Section 702 information” while the appeal was pending. Id. at 21 n.60.

In an opinion issued on July 12, 2019, the FISCR affirmed the FISC’s finding that the FBI querying procedures were inconsistent with the recordkeeping requirement of Section

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702(f)(1)(B). See id. at 4-5, 22-38, 42-43. The FISC did not reach whether, as the FISC had found, the FBI's procedures also were deficient because they did not require adequate documentation of the justifications for queries that use United States-person query terms. See id. at 38, 43. The FISC declined to reach that issue because its holding regarding Section 702(f)(1)(B) "will require the Government to amend the proposed procedures." Id. at 38. The FISC explained that,

[a]s the Government undertakes the required revisions, it can consider whether – and, if so, how – to respond to the statutory and constitutional deficiencies the FISC identified. The FISC will then be able to evaluate whether the newly revised procedures – which will include, at a minimum, a procedure that complies with Section 702(f)(1)(B) – comport with the requirements of FISA and the Fourth Amendment.

Id. at 4-5. Finally, the stay imposed on November 16, 2018, remains "in effect until further order of the FISC when it issues a decision approving or declining to approve . . . newly revised procedures." Id. at 43.

In order to address this Court's findings of deficiencies, which were affirmed or otherwise left intact on appeal, the Attorney General and Director of National Intelligence amended the 2018 Certifications. The August 12, 2019, Submission includes an Amendment

which authorize the FBI to use revised querying procedures. (No other changes are effected by those amendments.) Each amendment is accompanied by:

(1) revised FBI querying procedures, which appear at Exhibit I to each amended certification ("Revised FBI Querying Procedures"); and

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(2) a supporting affidavit of the Director of the FBI. Except for references to their corresponding certifications, those affidavits are nearly identical and will be referred to generically as “FBI Affidavit.”

The August 12, 2019, Submission also includes an explanatory memorandum prepared by the Department of Justice (“August 12, 2019, Memorandum”). The amended certifications and the Revised FBI Querying Procedures are now before the Court for review pursuant to Section 702(j).

II. THE REVISED FBI QUERYING PROCEDURES

The Revised FBI Querying Procedures incorporate the following changes, which are intended to remedy the above-described deficiencies.

A. Keeping Records of United States-Person Query Terms

Querying procedures must “include a technical procedure whereby a record is kept of each United States person query term used for a query.” § 702(f)(1)(B). The FBI querying procedures previously examined by this Court and the FISCRC stated that the FBI “intends to satisfy” that requirement “by keeping a record of *all* queries” of un-minimized Section 702 information. See September 18, 2018, Submission, FBI Querying Procedures § IV.B.3 at 4 n.4 (emphasis added). That statement served to codify the “FBI’s longstanding practice of keeping a record of all queries . . . , without distinguishing between U.S. person query terms and other query terms.” August 12, 2019, Memorandum at 8. In contrast, other agencies who work with un-minimized Section 702 information would keep records that identify when United States-person query terms are used. See October 18, 2018, Opinion at 50-52. Both this Court and the FISCRC held that it would be inconsistent with Section 702(f)(1)(B) for the FBI’s records not to indicate

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whether a term used to query Section 702 information is a United States-person query term. See id. at 52-62; In re DNI/AG Certifications at 22-38.

The government has now removed from the Revised FBI Querying Procedures the problematic statement of intent. The revised procedures simply state: “The FBI must generate and maintain an electronic record of each United States person query term used for a query of unminimized content or noncontent information acquired pursuant to section 702.” Revised FBI Querying Procedures § IV.B.1. The electronic record must include, “at a minimum,” “the query term(s) used”; “the date of the query”; and “the identifier of the user who conducted the query.” Id. “In the event it is impracticable for an FBI system to generate an electronic record of each United States person query term,” or an electronic record cannot be generated due to “an unanticipated circumstance,” “the FBI must generate and maintain a *written* record of each United States person query term” used. See § IV.B.2 (emphasis added). FBI personnel may conduct “a query in a system that does not generate” electronic records of queries only after determining that querying a system that does so “would be insufficient for technical, analytical, operational, or security reasons.” Id. The FBI must maintain records of such United States-person query terms for at least five years in a manner that will allow the National Security Division (NSD) of the Department of Justice and the Office of the Director of National Intelligence (ODNI) to conduct effective oversight. See § IV.B.3. NSD and ODNI will review FBI queries that involve U.S.-person query terms to monitor compliance with the procedures. Id.

Because the above-summarized provisions “require the FBI to keep records that identify which queries of unminimized Section 702 information use a U.S. person identifier” as a query

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term, August 12, 2019, Memorandum at 7-8, the Revised FBI Querying Procedures, as written, comport with Section 702(f)(1)(B).

B. Documenting the Factual Basis for Use of United States-Person Query Terms

As stated above, this Court also found a deficiency because the FBI's procedures did "not require adequate documentation of the justifications for queries that use United States-person query terms." October 18, 2018, Opinion at 133. While CIA, NSA, and NCTC personnel were required to provide written statements of why their U.S.-person queries met the applicable querying standard, FBI personnel were not. *Id.* at 73. In the Court's estimation, the lack of such documentation contributed to the risk that the FBI would continue to conduct unjustified U.S.-person queries and hindered oversight of FBI querying practices. *See id.* at 68-74, 93-94.

To address those concerns, *amici curiae* proposed that "FBI personnel be required to document in writing their bases for believing that queries of Section 702 data using U.S.-person query terms were reasonably likely to return foreign-intelligence information or evidence of crime *before* they examine content information returned by such queries." *Id.* at 92 (emphasis in original). The Court expressed the view "that adopting and implementing that proposal, in combination with the other protections" of the FBI's procedures, would satisfy statutory and Fourth Amendment requirements. *Id.* at 96-97. The FISC described the proposal as "a modest measure" that "could have several potential benefits," including facilitating oversight and "motiv[at]ing FBI personnel to carefully consider . . . whether a query satisfies the querying standard." *In re DNI/AG Certifications* at 41.

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The government has now adopted *amici*'s proposal. "Prior to reviewing the unminimized contents of section 702-acquired information retrieved using a United States person query term," FBI personnel will be required to "provide a written statement of facts showing that the query was reasonably likely to retrieve foreign intelligence information or evidence of a crime," and the FBI will maintain those statements "in a manner that will enable oversight by NSD and ODNI." Revised FBI Querying Procedures §§ IV.A.3, IV.B.4. FBI personnel are not required to provide such a written statement before reviewing noncontents information. See § IV.A.3 n.4. ("Contents" is defined as as "any information concerning the substance, purport, or meaning of a communication." § III.A.)

The new documentation requirement does not apply to contents information retrieved by queries that are described in Section 702(f)(2) of FISA. See Revised FBI Querying Procedures §§ IV.A.2, IV.A.3. That section requires FBI personnel to obtain from the FISC a probable-cause-based order before accessing contents retrieved by using a U.S.-person query term to query un-minimized Section 702 information, if the query was conducted "in connection with a[n] [FBI] predicated criminal investigation . . . that does not relate to the national security of the United States" and was "not designed to find and extract foreign intelligence information." FISA § 702(f)(2)(A), (D). A FISC order is not required, however, 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)(E).

In sum, FBI personnel may query un-minimized Section 702 information for foreign-intelligence or law-enforcement purposes if the queries are reasonably likely to retrieve foreign-

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intelligence information or evidence of a crime. See Revised FBI Querying Procedures § IV.A.1. Before FBI personnel examine contents information retrieved by using U.S.-person query terms, they must provide a written statement of facts showing that the query satisfied that standard, unless it came within the parameters of Section 702(f)(2). See §§ IV.A.2, IV.A.3. In the latter case, FBI personnel must apply for and obtain an order from the FISC before accessing the contents information retrieved, unless they reasonably believe it could assist in mitigating or eliminating a threat to life or serious bodily harm. See FISA § 702(f)(2)(A), (E); Revised FBI Querying Procedures § IV.A.2. As written, the Revised FBI Querying Procedures remedy the previously found deficiency regarding documentation of the basis for U.S.-person queries.

III. IMPLEMENTATION OF THE NEW REQUIREMENTS

The authorization to use the Revised FBI Querying Procedures comes into effect on the date that the Court issues an order regarding the amendments in the August 12, 2019,

Submission. See Amendment

at 3-4. As a result, the FBI is required to implement the revised procedures as of the date of this Opinion and Order. The government acknowledges, however, that the FBI is not yet able to comply fully with those procedures. It represents that the new recordkeeping and documentation requirements described above “necessitate modifications to FBI systems, as well as training of FBI personnel, in order to facilitate full compliance The FBI will complete modifications of its systems and train its personnel as soon as practicable in order to comply with these new provisions.” FBI Affidavit at 2. By what means, and how quickly, the government proposes to bring the FBI into full

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compliance is relevant to the Court's review of the Revised FBI Querying Procedures, insofar as the Court looks beyond the text of the procedures to examine how the FBI will actually implement them. See In re DNI/AG Certifications at 38-40; October 18, 2018, Opinion at 68.

The August 12, 2019, Memorandum discusses three FBI electronic and data-storage systems for which additional steps must be taken for the FBI to comply fully with the new procedures: [REDACTED] system; the [REDACTED] and the [REDACTED]. See August 12, 2019, Memorandum at 10. The government has also identified a fourth system [REDACTED] on which the FBI plans to store un-minimized Section 702 information in the future. See Notice [REDACTED] Pursuant to Section 702, Aug. 23, 2019 ("[REDACTED] Notice") at 4 n.8.

A. [REDACTED] System

An independent contractor manages and controls [REDACTED] system. Id. at 10 n.6. Upgrading it to support the new recordkeeping and documentation requirements "reportedly would require modification [REDACTED] and could require an amendment to the [REDACTED] contract," which entails "additional time and increased cost." Id. The modifications would "potentially [take] ten months to complete." Id. at 10. "The FBI is evaluating whether it would be worthwhile to invest the resources necessary to modify [REDACTED] system." Id. In the meantime, as of August 30, 2019, the FBI is requiring [REDACTED] users to maintain written records of U.S. person queries of unminimized Section 702-acquired information and written records of justifications to the extent required by the amended procedures." Id. at 10-11. Those records "will be available for oversight by NSD and ODNI." Id. at 11.

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The government's proposal regarding [REDACTED] system does not preclude a finding that the FBI's procedures satisfy applicable statutory and Fourth Amendment requirements. Indeed, if FBI personnel create written records that properly identify U.S.-person query terms and, when required, document the factual basis for U.S.-person queries, they may be complying with the Revised FBI Querying Procedures. Those procedures contemplate "a written statement of facts showing that the query was reasonably likely to retrieve foreign intelligence information or evidence of a crime" that is "maintained in a manner that will enable oversight," without specifying how it is created or in what form it is kept. See §§ IV.A.3, IV.B.4. And if it "is impracticable" for [REDACTED] system "to generate an electronic record of each United States person query term" used for a query, and it "would be insufficient for technical, analytical, operational, or security reasons" to run the query on a system that would generate such an electronic record, then it would be permissible to query [REDACTED] "generate and maintain a written record" of each U.S.-person query term used. See § IV.B.2.

Moreover, Section 702(f)(1)(B) "is best interpreted as requiring some kind of technical procedure that requires intelligence agency personnel to memorialize, *to the extent reasonably feasible*, whether a particular query term is a United States person query term." In re DNI/AG Certifications at 38 (emphasis added). Standards of reasonableness also apply under the Fourth Amendment, see, e.g., In re Certified Question of Law, 858 F.3d 591, 604 (FISCR 2016) (*per curiam*) ("The touchstone of the Fourth Amendment is reasonableness."), and FISA's minimization requirements, see, e.g., 50 U.S.C. § 1801(h)(1) (requiring procedures to be "reasonably designed in light of the purpose and technique of the particular surveillance, to

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minimize . . . the retention, and prohibit the dissemination” of private U.S.-person information, “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information”). In the short term, the only reasonably available means of complying with the new recordkeeping and documentation requirements for queries on [REDACTED] system is for the FBI to maintain written records outside of that system. The Court expects that, in the longer term, the FBI will seriously consider upgrading or replacing [REDACTED] system to support the generation of electronic records in response to the new requirements.

B. [REDACTED]

The FBI assesses that it will have completed the necessary modifications [REDACTED] by approximately November 15, 2019, and to [REDACTED] by approximately December 13, 2019. See August 12, 2019, Memorandum at 10. The necessary training will be made available to FBI personnel by November 15, 2019, and anyone who has not completed the training by December 13, 2019, will lose access to un-minimized Section 702 information on those systems. *Id.* Thus, by December 13, 2019, the FBI expects to have completed the steps necessary for users of [REDACTED] and [REDACTED] to comply with the new provisions of the Revised FBI Querying Procedures.

In comparison to [REDACTED] system, the government plans to upgrade [REDACTED] more quickly, but not to do anything to comply with the new requirements until the upgrade is finished. The government contends that creating separate written records for queries on [REDACTED] as the FBI will do for queries on [REDACTED] system, “would be impractical and overly burdensome,” “given the magnitude of queries conducted” on [REDACTED] “as compared to [REDACTED] August 12, 2019, Memorandum at 11. It indeed appears that a large number of [REDACTED]

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queries are at issue. In Fiscal Year 2017, FBI personnel “ran approximately 3.1 million queries” “against raw FISA-acquired information in [REDACTED] Declaration of the Director of the FBI included within the September 18, 2018, Submission, at 6. But burden to the FBI is not the only relevant factor. On the government’s proposal, a large volume of U.S.-person queries of Section 702 information [REDACTED] before December 13, 2019, entails a correspondingly high incidence of non-compliance with the new requirements.

One alternative to the government’s proposal would be to prohibit FBI personnel from conducting U.S.-person queries of un-minimized Section 702 information in [REDACTED] until the upgrading and training related to those systems have been completed. The Court is mindful, however, of the important national-security interests furthered by the FBI’s querying such information. See, e.g., In re DNI/AG Certifications at 12 (“The ability to query Section 702 information – as opposed to reviewing it communication-by-communication – greatly facilitates the agencies’ ability to assess and respond to potential national security threats.”). Another alternative would be for the FBI to create written records responsive to the new recordkeeping and documentation requirements for queries on [REDACTED] in the same manner as it will for queries on the [REDACTED] system. After careful consideration, the Court has concluded that it would not be reasonable to expect the FBI now to instruct all the users of [REDACTED] to create written records of U.S.-person queries outside of those systems, only to train them in late November and early December on how to create electronic records within those systems. Rather, the Court believes that the efforts of the trainers and the attention of the systems’ users should be

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focused on proper implementation of the long-term solution – creating the requisite records in electronic form on [REDACTED]

That conclusion, however, depends on the FBI’s completing the systems modification and training for [REDACTED] in accordance with the timetable described above. If that timetable slips, the Court may have to reassess whether the FBI’s procedures, as they are being implemented, satisfy the applicable statutory requirements and are consistent with the Fourth Amendment. The government has undertaken to “submit a report every 45 days” from August 12, 2019, “apprising the Court of FBI’s progress in implementing its amended querying procedures.” August 12, 2019, Memorandum at 11. As set out below, the Court is ordering the government to make such reports in order to monitor the FBI’s implementation of the new procedures.

C.

[REDACTED]

FBI plans to store un-minimized information

id. at 3-4. Before putting any Section 702 information into

FBI will ensure that [REDACTED] fully complies” with the Revised FBI Querying

Procedures, including their new recordkeeping and documentation requirements. Id. at 4 n.8. [REDACTED]

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[REDACTED] is not able to automatically generate and maintain the required electronic records . . . , FBI personnel will generate and maintain” written records in response to the new requirements. Id. For the reasons discussed above in the context of [REDACTED] system, the described practices for queries of Section 702 [REDACTED] do not preclude the Court from approving the Revised FBI Querying Procedures.

IV. CONCLUSION

For reasons stated above and in the October 18, 2018, Opinion, the Court finds that:

- (1) The 2018 Certifications and the certifications in the Prior 702 Dockets, as most recently amended by the August 12, 2019, Submission, contain all the required statutory elements;
- (2) With respect to information acquired under the 2018 Certifications, as most recently amended by the August 12, 2019, Submission, the FBI’s minimization procedures and querying procedures are consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment; and
- (3) With respect to information acquired under the certifications in the Prior Section 702 Dockets, as most recently amended by the August 12, 2019, Submission, the FBI’s minimization procedures (including, as referenced therein, the FBI’s querying procedures) are consistent with the requirements of Section 702(e) and of the Fourth Amendment; and, accordingly,

IT IS HEREBY ORDERED AS FOLLOWS:

- (1) The government’s request for approval of the 2018 Certifications and the certifications in the Prior 702 Dockets, as so amended, is granted;

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(2) The government’s request for approval of use of the Revised FBI Querying Procedures in connection with information acquired pursuant to the 2018 Certifications and the certifications in the Prior 702 Dockets is granted;

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

(4) By September 26, 2019, the government shall submit a written report on the implementation of the new recordkeeping and documentation requirements of the Revised FBI Querying Procedures. The report shall provide updates regarding:

- a. steps taken toward, and anticipated date of completion of, required modifications to [REDACTED] and training of users of [REDACTED]
- b. implementation of the requirements by creating written records regarding queries of un-minimized Section 702 information in [REDACTED] system and [REDACTED] and [REDACTED]
- c. the government’s longer-term plans regarding use of [REDACTED] system and [REDACTED] to query un-minimized Section 702 information and possible modifications to those systems in response to the new requirements.

Thereafter, the government shall submit such reports at intervals of no more than 45 days until it is reported that the FBI has completed the steps necessary to comply fully with the new requirements; and

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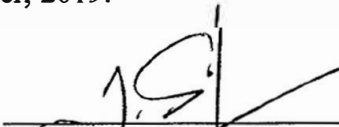
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(5) The requirements stated in paragraphs (3), (4)a, and (4)b on pages 135-38 of the October 18, 2018, Opinion shall remain in effect.

ENTERED this 4th day of September, 2019.



JAMES E. BOASBERG
Judge, United States Foreign
Intelligence Surveillance Court

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