

The government has also disclosed misapplications of the FBI querying standard that are similar to those described above, except that they involved queries of Section 702 data to return information for just one person:

- At some time before March 2015, the FBI's [REDACTED] conducted a query [REDACTED] See May 1, 2018, Notice at 2-3.

- At some time before May 2016, the FBI's [REDACTED] conducted a query on [REDACTED] before serving a classified order on [REDACTED] See id.

- On October 11, 2017, the FBI's [REDACTED] queried [REDACTED] to identify cleared personnel on whom to serve process. Feb. 21, 2018, Notice at 2.

- On November 11, 2017, the FBI's [REDACTED] conducted a query on a potential recipient of a FISA order. Apr. 24, 2018, Notice at 2.

The government has reported a number of other non-compliant queries of Section 702 information by the FBI, which do not appear to result from comparable misunderstandings of the querying standard. Those include:

- A small number of cases in which FBI personnel apparently conducted queries for improper personal reasons – for example, a contract linguist who ran queries on himself, other FBI employees, and relatives. See Jan. 30, 2018, Notice at 1-2.
- A number of instances in which FBI personnel inadvertently ran queries against Section 702 information. See, e.g., May 8, 2018, Notice [REDACTED] Nov. 27, 2017, Notice [REDACTED]
- A set of queries (overlapping to some extent with the set of inadvertent queries of Section 702 data) apparently intended to return FBI documents or material. See, e.g., May 17, 2018, Notice at 2 [REDACTED] May 4, 2018, Notice at 2 [REDACTED]

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Those instances of non-compliant queries, in the Court's view, do not present the same level of concern as those that evidence misunderstanding of the querying standard. It would be difficult to completely prevent personnel from querying data for personal reasons. As a general rule, inadvertent queries of Section 702 information and queries intended to retrieve finished intelligence reports or other FBI work product do not seem likely to return raw 702 information or, if they happen to do so, to result in personnel examining U.S.-person information contained therein, the above-described queries regarding [REDACTED] notwithstanding.

4. Factors Contributing to the Court's Concerns

Of serious concern, however, is the large number of queries evidencing a misunderstanding of the querying standard – or indifference toward it: [REDACTED] queries were conducted against the advice of FBI OGC. That concern is heightened by three factors: (1) limitations on the government's oversight mechanisms; (2) the FBI's policy to encourage routine and maximal querying of Section 702 information; and (3) apparent complications in applying the querying standard. The Court discusses each.

a. Limitations on Oversight

As noted above, in 2017 the FBI conducted over three million queries of FISA-acquired information on just one system. [REDACTED] See Supplemental FBI Declaration at 6. In contrast, during 2017 NSD conducted oversight of approximately 63,000 queries in [REDACTED] and 274,000 queries in an FBI system [REDACTED] See Gov't Response at 36.

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Personnel from the Office of Intelligence (OI) within the Department of Justice's National Security Division (NSD) visit about half of the FBI's field offices for oversight purposes in a given year. Id. at 35 & n.42. Moreover, OI understandably devotes more resources to offices that use FISA authorities more frequently, so those offices, [REDACTED] are visited annually, id. at 35 n.42, which necessitates that some other offices go for periods of two years or more between oversight visits. The intervals of time between oversight visits at a given location may contribute to lengthy delays in detecting querying violations and reporting them to the FISC. See, e.g., Jan. 18, 2018, Notice [REDACTED] [REDACTED] had been conducting improper queries in a training context since 2011, but the practice was not discovered until 2017).

When OI does visit a field office, it reviews queries conducted during a specific interval (e.g., 90 days) by a subset of the persons with access to FISA information. See Gov't Response at 35. OI receives from the FBI a list of queries conducted by the designated persons during the relevant time, which includes the "query terms, the user who conducted the query, the date and time of the query, the system queried," and in certain cases "information indicating which datasets [were] excluded from the query if the user chose to limit or opt out of certain datasets." Id. As discussed above, FBI does not keep records of which terms are U.S.-person query terms. Neither do FBI personnel currently memorialize their reasons for believing query terms are reasonably likely to return foreign-intelligence information or evidence of crime. In contrast, the CIA, NSA, and NCTC are all required to provide written statements of why queries using U.S.-person query terms are reasonably likely to return foreign-intelligence information. See NCTC

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Querying Procedures § IV.B.2 at 4; CIA Querying Procedures § IV.B.2 at 4; NSA Querying Procedures § IV.B.1.d at 4. The FBI does not even record whether a query is intended to return foreign-intelligence information or evidence of crime. See July 13, 2018, Proposed Tr. at 14 (DOJ personnel “try to figure out” from FBI query records which queries were run for evidence-of-crime purposes). DOJ personnel ask the relevant FBI personnel to recall and articulate the bases for selected queries. Sometimes the FBI personnel report they cannot remember. See July 9, 2018, Notice.

The government contends that “oversight of FBI’s queries is substantial and effective,” Gov’t Response at 35, but OI personnel review only a small portion of the queries conducted and the documentation available to them lacks basic information that would assist in identifying problematic queries. In particular, it is apparent that contemporaneous documentation of the bases for queries would facilitate oversight efforts. By way of comparison, the Court understands that the oversight conducted by NSD and the Office of the Director of National Intelligence (ODNI) of NSA’s queries makes use of such documentation. See April 26, 2017, Opinion at 28 n.32 (“DOJ and ODNI review all U.S.-person identifiers approved for [NSA’s] use in querying contents of Section 702-acquired communications as well as the written documentation of the foreign intelligence justifications for each such query during bi-monthly compliance reviews.”). Given the limitations on the oversight of FBI querying practices, it appears entirely possible that further querying violations involving large numbers of U.S.-person query terms have escaped the attention of overseers and have not been reported to the Court.

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In addition to articulating the above-described querying standard, the 2016 FBI Minimization Procedures require FBI personnel, to the extent reasonably feasible, to design queries of Section 702 data to find and extract foreign-intelligence information or evidence of crime. See 2016 FBI Minimization Procedures § III.D at 11. They also state it is “a routine and encouraged practice for the FBI to query” 702 information in furtherance of authorized intelligence and law-enforcement activities, including when “making an initial decision to open an assessment.” Id. at 11 n.3. The FISC previously approved FBI minimization procedures containing that statement prior to the disclosure of the above-described querying violations. See November 6, 2015, Opinion at 29 n.27. The FBI Querying Procedures do not contain the quoted language, but the FBI’s policy has not changed. See Supplemental FBI Declaration at 6 (FBI uses queries, among other reasons, “to quickly determine whether a new tip or lead . . . warrants opening an investigation, is related to an existing investigation,” or requires no further action); id. at 7 (“FBI encourages its personnel to make maximal use of queries – provided they are compliant with the FBI’s minimization procedures and other applicable law – in order to perform their work.”).

On the one hand, the FBI is obligated to query Section 702 and other FISA information only in circumstances satisfying a querying standard that does not apply to FBI information generally. On the other hand, it has set up its systems to facilitate running the same query simultaneously across FISA and non-FISA datasets, id. at 5, and encourages personnel to make maximal use of such queries, even at the earliest investigative stages. Those policy decisions

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may well help FBI personnel work efficiently and “connect dots” to protect national security, id. at 7, but they also create an environment in which unduly lax applications of the Section 702 querying standard are more likely to occur.

c. Complications in Applying the Querying Standard

Delays in reporting some of the querying violations discussed in Part IV.C.3 above suggest that FBI and NSD personnel charged with applying the querying standard may lack a common understanding of it. On May 1, 2018, the government first reported to the FISC non-compliant queries at [REDACTED] that had been examined during oversight reviews that took place in March 2015 and May 2016, respectively. See May 1, 2018, Notice at 2 n.2. The government did not identify them as non-compliant during those reviews; it did so only upon re-examination in the wake of incidents [REDACTED] and “the government’s interpretation of the query provision as reflected in recent compliance notices.” May 1, 2018, Notice at 2-3.

Another instance of delayed notice concerned the non-compliant queries conducted by the [REDACTED] during March 24-27, 2017. FBI OGC and NSD were aware of the proposal to conduct those queries before they were run, and FBI OGC learned they had been conducted on March 29, 2017. See Nov. 22, 2017, Notice at 2-3. The government did not notify the FISC, however, until November 22, 2017. The government attributed that delay of nearly eight months “to the time needed by FBI to gather facts regarding the matter and for the government to determine whether the queries were consistent with the FBI minimization procedures.” Id. at 3 n.6. That sequence of events is similar to the government’s ongoing assessment of the queries

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that used approximately 57,000 identifiers for persons [REDACTED] In April 2018, the government was examining whether that standard was met by those queries, see [REDACTED] Apr. 27, 2018, Notice at 2, and counsel for the government represented at the September 18, 2018, oral argument that discussions of the FBI's justifications for those queries were still ongoing. Sept. 28, 2018, Proposed Tr. at 30.

It is reasonable to suspect from the facts available to the Court, including the broad and apparently suspicionless nature of those queries, that the government's prolonged deliberations in those matters resulted in part from the lack of a common understanding within FBI and NSD of what it means for a query to be reasonably likely to return foreign-intelligence information or evidence of crime. The government addressed another set of potentially non-compliant queries at the September 28, 2018, oral argument. Id. at 28-30. [REDACTED]

[REDACTED] The government generally referenced those queries in a notice that was primarily directed at other compliance problems and filed on February 15, 2018. See Feb. 15, 2018, Notice at 2 n.1. As of that time, the government was "continuing to review whether [certain] queries of raw-FISA datasets [REDACTED] . . . complied with the query standard." Id. Counsel for the government reported at the September 28, 2018, oral argument that such examination had not been completed and agreed to update the Court within 60 days. Sept. 28, 2018, Proposed Tr. at 29-30.

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Finally, it appears that the government may interpret the FBI querying standard more leniently than its language fairly conveys. The FBI Querying Procedures state: “*Each query . . . must be reasonably likely to retrieve foreign intelligence information . . . or evidence of a crime. . .*,” FBI Querying Procedures § IV.A.1 at 3 (emphasis added), which seems to indicate that each individual query must have an adequate justification. The government nonetheless expresses the view that an aggregation of individual queries can satisfy the querying standard, even if each individual query in isolation would not be reasonably likely to return foreign-intelligence information or evidence of crime. Specifically, the government describes a situation in which “threat information” indicates “that there is an employee at a cleared defense contractor who has access to certain technology” and plans to sell it [REDACTED] See September 18, 2018, Memorandum at 22 n.20. If 100 employees of the contractor are known to have access to that technology, the “government assesses that the FBI could run a categorical query of the identifiers associated with these 100 employees as there is a reasonable basis to assess that the queries would return foreign intelligence information of evidence of a crime.” *Id.*

By no stretch of language could one say that an individual query for a randomly selected one of those 100 employees would be reasonably likely to return foreign-intelligence information or evidence of crime. The government’s assessment that it nonetheless would be permissible to query using the identifiers of all 100 employees must rest on the idea that, if those identifiers are aggregated and run together in ostensibly a single query, there would be a reasonable likelihood that foreign-intelligence information or evidence of crime would be returned. Perhaps in the abstract it would be reasonable for the FBI to run such an aggregated query, but it is by no means

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obvious how such justification-by-aggregation would be consistent with the requirement that “[e]ach query” must be reasonably likely to return foreign-intelligence information or evidence of crime. See FBI Querying Procedures § IV.A.1 at 3.

5. The Government’s Response to the Non-Compliant Queries

The government has taken steps in response to the FBI’s non-compliance with the querying standard. It reports that it now emphasizes issues related to categorical query justifications in training, see Gov’t Response at 38, and has promulgated within the FBI detailed guidance on querying requirements, which also focused on categorical justifications for queries. See id.; July 13, 2018, Proposed Tr. at 50. That guidance recommended consultation with FBI lawyers regarding queries based on a “categorical reason,” rather than an “individual reason for each identifier.” July 13, 2018, Proposed Tr. at 50.

As part of the amended procedures submitted on September 18, 2018, the government has added to the FBI Querying Procedures a requirement in certain circumstances to consult with an FBI attorney regarding queries supported by categorical justifications. That provision, which apparently formalizes a version of the above-noted recommendation, states:

Prior to reviewing the unminimized content of section 702-acquired information retrieved *using a categorical batch query (as opposed to queries conducted on the basis of individualized assessments)*, FBI personnel will obtain approval from an attorney from either their Chief Division Counsel’s Office or the National Security and Cyber Law Branch. This requirement does not apply if the persons whose identifiers are queried are (1) targets of lawful collection, (2) subjects of predicated investigations, or (3) in contact with targets of lawful collection or subjects of predicated investigation. Approvals to review the content returned by such queries will include a justification for the queries, the approving official, and the duration of such approval.

FBI Querying Procedures § IV.A.3 at 4 (emphasis added).

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The government apparently promulgated the enhanced guidance in June 2018. See Gov't Response at 38 (guidance "expected to be provided to appropriate FBI personnel in June 2018"). There accordingly has been insufficient time to assess its effect. As to Section IV.A.3, the requirement to consult with an attorney applies in narrow circumstances: after a categorical batch query has been conducted and prior to FBI personnel's reviewing content information returned by the query, unless one of three exceptions applies. The government explains that the provision is "tailored to focus on a particular type of query that potentially presents greater compliance risk and privacy impact" – those "based on a categorical, rather than individualized, justification." See September 18, 2018, Memorandum at 21. At the oral argument on September 18, 2018, counsel for the government stated that querying to retrieve information regarding as few as two persons, based on a common justification, would be regarded as a categorical batch query for purposes of § IV.A.3. Sept. 28, 2018, Proposed Tr. at 24, 26.

6. Analysis

The Court finds that the FBI's Section 702 minimization procedures, as they have been implemented, are not consistent with the requirements of Section 1801(h)(1) and (h)(3), or the Fourth Amendment.

a. Statutory Deficiency

As noted above, minimization procedures must be

reasonably designed in light of the purpose and technique of the particular surveillance, to minimize . . . the 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.

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§ 1801(h)(1). In this case, the “purpose and technique” of Section 702 collection involves targeting non-U.S. persons reasonably believed to be located outside the United States to obtain foreign-intelligence information with the assistance of communications service providers. See § 702(a), (b)(3), (i)(1). Those acquisitions include the contents of communications to or from non-target U.S. persons. Queries that are in fact reasonably likely to return foreign-intelligence information are responsive to the government’s need to obtain and produce foreign-intelligence information, and ultimately to disseminate such information when warranted. For that reason, queries that comply with the querying standard comport with § 1801(h), even insofar as they result in the examination of the contents of private communications to or from U.S. persons. On the other hand, queries that lack a sufficient basis are not reasonably related to foreign-intelligence needs and any resulting intrusion on U.S. persons’ privacy lacks any justification recognized by § 1801(h)(1). Because the FBI procedures, as implemented, have involved a large number of unjustified queries conducted to retrieve information about U.S. persons, they are not reasonably designed, in light of the purpose and technique of Section 702 acquisitions, to minimize the retention and prohibit the dissemination of private U.S. person information.

With regard to evidence-of-crime queries, the FISC has previously found that by providing for minimization procedures that permit the retention and dissemination of evidence of crime for law-enforcement purposes, Section 1801(h)(3) fairly contemplates queries reasonably designed to return evidence of crime. See November 6, 2015, Opinion at 32-33. The issue in this case, however, is the prevalence of FBI queries that were unlikely to return evidence of crime (even though they may have been subjectively intended to do so). The government has not

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argued that Section 1801(h)(3) permits such queries, and the Court declines to adopt such a conclusion.

The Court also has considered carefully whether the recently improved guidance and training referenced by the government adequately addresses the problems with the FBI's querying practices such that the Court should find that the FBI's querying and minimization procedures, as amended, comport with § 1801(h). It has concluded that, while the government has taken constructive steps, they do not adequately justify such a finding.

First, as discussed above in Part IV.C.2, many, though not all, recent misapplications of the querying standard by the FBI involved categorical batch queries. More significantly, the Court is doubtful that in practice FBI personnel will consistently channel categorical batch queries into § IV.A.3's approval process before they examine content information retrieved by those queries. As stated in § IV.A.3, a query conducted on the basis of an individualized assessment is not a categorical batch query. Implementation of § IV.A.3 will depend on the ability of the FBI's front-line personnel to determine which queries are supported by individualized assessments, and therefore not subject to the approval requirement of § IV.A.3, and which rely on categorical justifications and are subject to the approval requirement. Given the documented misunderstandings of the querying standard among FBI personnel, the government's reliance on them to make those distinctions seems misplaced. Indeed, the personnel most in need of guidance from an attorney may not receive it because they have difficulty in determining when they are supposed to consult with one.

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Finally, the broad exceptions to Section IV.A.3's approval requirement are also of concern. Most notably, one of those exceptions applies if the persons whose identifiers are queried are "in contact with targets of lawful collection or subjects of predicated investigations." § dV.A.3. There are two levels of FBI predicated investigations: full and preliminary. See Att'ya General Guidelines for Domestic FBI Operations § II.B.4 at 21, Sept. 29, 2008. The FBI may initiate a full investigation "if there is an articulable factual basis for the investigation that reasonably indicates" that, for example:

a.aAn activity constituting a federal crime or a threat to the national security *has or may have occurred, is or may be occurring, or will or may occur* and thea investigation may obtain information relating to the activity or the involvement ora role of an individual, group, or organization in such activity[; or]a

b.aAn individual, group, organization, entity, information, property, or activity *is or may be* a target of attack, victimization, acquisition, infiltration, or recruitmenta in connection with criminal activity in violation of federal law or a threat to thea national security and the investigation may obtain information that would help toa protect against such activity or threat.a

Id. at §§ II.B.3, II.B.4.b.i at 21-22 (emphasis added). The FBI may open a preliminary investigation with even less of a factual predicate: "on the basis of *information or an allegation* indicating the existence of a circumstance" described in paragraph a. or b. above. Id. § II.B.4.a.i at 21 (emphasis added). A query using identifiers for persons known to have had contact with any subject of a full or preliminary investigation would not require attorney approval under § IV.A.3, regardless of the factual basis for opening the investigation or how it has progresseda since then.

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b. Fourth Amendment Deficiency

Applying the totality-of-circumstances analysis the FISC employed in previous Section 702 proceedings, the Court finds that the FBI Minimization Procedures and Querying Procedures are similarly unreasonable under the Fourth Amendment.

(i) Applicable Fourth Amendment Framework

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.

“The touchstone of the Fourth Amendment is reasonableness.” In re Certified Question of Law, 858 F.3d 591, 604 (FISA Ct. Rev. 2016) (per curiam) (“In re Certified Question”). Although “[t]he warrant requirement is generally a tolerable proxy for ‘reasonableness’ when the government is seeking to unearth evidence of criminal wrongdoing, . . . it fails properly to balance the interests at stake when the government is instead seeking to preserve and protect the nation’s security from foreign threat.” Id. at 593. Accordingly, a warrant is not required to conduct surveillance “to obtain foreign intelligence for national security purposes . . . directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.” See In re Directives Pursuant to Section 105B of FISA, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) (“In re Directives”). The FISC has repeatedly reached the same conclusion

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regarding Section 702 acquisitions. See, e.g., November 6, 2015, Opinion at 36-37; September 4, 2008 Opinion at 34-36.

In assessing the reasonableness of a governmental intrusion under the Fourth Amendment, a court must “balance the interests at stake” under the “totality of the circumstances.” In re Directives, 551 F.3d at 1012. In prior reviews of Section 702 procedures, the FISC has assessed the reasonableness of the government’s procedures as a whole, rather than separately analyzing the reasonableness of discrete forms of action taken thereunder, such as querying. See, e.g., November 6, 2015, Opinion at 39 (assessing “the combined effect” of the targeting and minimization procedures).

Amici, however, argue that the Court should regard querying as a separate Fourth Amendment event subject to its own reasonableness analysis. See Amici Brief at 57-59. First, they contend that the Reauthorization Act mandates that the querying procedures be constitutional in their own right. Id. at 48 (“Section 101 requires the Attorney General, in consultation with the DNI, to establish Querying Procedures relating to 702-acquired information that comport with the Fourth Amendment” and citing § 702(f)). Amici also point to Section 702(f)(2), which requires the FBI, in specified narrow circumstances, to obtain a FISC order before examining content information retrieved by querying Section 702 data, as mandating a change to the Court’s analysis. See id. Amici argue that by enacting that requirement “Congress has acknowledged the reality that FBI agents querying databases containing raw 702 information for a variety of purposes are, in effect, undertaking new ‘searches,’ some of which now require a court order.” Amici Brief at 56-57.

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Amici also argue that reviewing querying as an independent Fourth Amendment event would be in line with evolving case law. See id. at 57 (citing Riley v. California, 134 S.Ct. 2473, 2493 (2014), as “requiring law enforcement to obtain a warrant before searching a cell phone lawfully seized incident to arrest”); see also id. at 58 (citing Walter v. United States, 447 U.S. 649, 654 (1980), United States v. Mulder, 808 F.2d 1346 (9th Cir. 1987), United States v. Bowman, 215 F.3d 951 (9th Cir. 2001) and United States v. Runyan, 275 F.3d 449, 461 (5th Cir. 2001), for the proposition that “even if law enforcement comes into possession of an object lawfully because it has been seized or searched by a private party, subsequent actions taken by law enforcement to inspect or review the object’s contents constitute separate events for purposes of the Fourth Amendment”). Amici also point to the recent holding in Carpenter v. United States, 138 S.Ct. 2206 (2018), for further support. See July 13, 2018, Proposed Tr. at 37. They analogize (1) a cellular-phone provider’s collection of cell-site location information (CSLI) to the government’s acquisition of Section 702 information, and (2) the provider’s subsequent compiling and production to the government of CSLI revealing the location of a particular suspect over time to the FBI’s subsequent querying of Section 702 information for a particular U.S. person. Based on those analogies, they contend that the Supreme Court’s holding in Carpenter that the government’s obtaining and accessing CSLI information involved a search under the Fourth Amendment has implications for whether querying Section 702 data might also be a Fourth Amendment search. See id.

The Court has considered these authorities and declines to find that they require that querying of information lawfully acquired under Section 702 be considered a distinct Fourth

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Amendment event requiring a reasonableness determination independent of the other circumstances of acquisition.

With regard to the Reauthorization Act, the provisions cited by amici reflect congressional views on the reasonableness of certain querying practices and strongly suggest congressional recognition that Fourth Amendment concerns are implicated by the querying of Section 702 information. Their effect, however, is to expand *statutory* protections, not the scope of what constitutes an independent search under the Fourth Amendment.

The Court also declines to find that the case law cited by amici mandate that queries of Section 702 information be considered distinct Fourth Amendment events. Three of the cases involved property voluntarily provided to law enforcement by a third party and subsequent law-enforcement searches that exceeded the scope of the prior examination by that third party. See Walter, 447 U.S. at 654-57 (finding that FBI's screening of films that had been contained in shipment mistakenly sent to and opened by third party violated Fourth Amendment); Runyan, 275 F.3d at 464 (finding that police examination of compact disks that had not been viewed by third party who turned them over violated Fourth Amendment); Bowman, 215 U.S. at 963 (government conceded that viewing of film contained in footlocker provided by third party exceeded third party's prior examination). In Mulder, the court found that toxicology lab tests of tablets, which a hotel employee had turned over to law enforcement, exceeded the scope of the "field test" exception to the warrant requirement. Mulder, 808 F.2d at 1348-49 (citing United States v. Jacobsen, 466 U.S. 109, 123 (1984)). None of these cases is instructive regarding circumstances like those present in this case, which involve the government's examination of

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information lawfully acquired under a statutory framework that requires a judicial determination that the totality of attendant circumstances, including the government's acquisition, retention, use, and dissemination of such information, is reasonable under the Fourth Amendment.

In any event, the Court arrives at the same conclusions as amici, albeit under a totality-of-circumstances analysis: the FBI's procedures are unreasonable under the Fourth Amendment and the amici's proposal to require the FBI to document the basis for its queries in certain additional circumstances, see Part IV.C.7 below, would cure that deficiency.

(ii) Reasonableness Under the Totality of Circumstances

Under the totality-of-circumstances approach, a court must balance “the degree to which [governmental action] intrudes upon an individual's privacy” against “the degree to which it is needed for the promotion of legitimate governmental interests.” In re Certified Question, 858 F.3d at 604-05 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). “The more important the government's interest, the greater the intrusion that may be constitutionally tolerated.” In re Directives, 551 F.3d at 1012.

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.

Id. (emphasis added).

The Court regards the privacy interests at stake as substantial. As described above in Part IV.C.3, the FBI has conducted tens of thousands of unjustified queries of Section 702 data. Based on the information available – e.g., queries for [REDACTED] and for

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persons with access to FBI facilities – it appears that many subjects of those queries were U.S. persons. Beyond that, it is difficult on the record before the Court to assess to what extent U.S.-person information was returned and examined as a result of those queries. At a minimum, however, the reported querying practices present a serious risk of unwarranted intrusion into the private communications of a large number of U.S. persons.

The Court believes that serious risk weighs substantially in the assessment of reasonableness. The goal of the Fourth Amendment is to protect individuals from arbitrary governmental intrusions on their privacy. See Carpenter, 138 S. Ct. at 2213 (““basic purpose”” of the Fourth Amendment ““is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials””) (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967)). The FBI’s use of unjustified queries squarely implicates that purpose: the FBI searched for, and presumably examined when found, private communications of particular U.S. persons on arbitrary grounds

See

Part IV.C.3 above.

The government is not at liberty to do whatever it wishes with those U.S.-person communications, notwithstanding that they are “incidental collections occurring as a result of” authorized acquisitions. In re Directives, 551 F.3d at 1015. The FISC in In re Directives relied on the government’s assurance “that it does not maintain a database of incidentally collected information from non-targeted United States persons” when it held on the facts of that case that “incidentally collected communications of non-targeted United States persons do not violate the

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Fourth Amendment.” Id. In this matter, while the FBI may not maintain a *separate* database of U.S.-person communications acquired under Section 702, it routinely queries raw Section 702e data in order to identify and examine communications of particular U.S. persons. Whether those querying practices adequately protect the privacy of those U.S. persons, or instead unjustifiably invade U.S. persons’ privacy, bears on the analysis of reasonableness under the Fourth Amendment. See In re Certified Question, 858 F.3d at 609 (examining intra-FBI restrictions on access to information acquired pursuant to a FISA pen register/trap-and-trace authorization as part of assessment of Fourth Amendment reasonableness).

Under the totality-of-circumstances framework, the Court must take into account protections afforded by other provisions of the government’s procedures and assess whether their combined effect is reasonable under the Fourth Amendment. Those protections include requirements in the targeting procedures that “direct the government’s acquisitions toward communications that are likely to yield foreign intelligence information” and “substantial restrictions on the use and dissemination of information derived from queries.” November 6, 2015, Opinion at 41-42. Compliance with those provisions mitigates the intrusion on U.S. persons’ privacy resulting from unjustified queries, either by limiting the scope of information acquired and therefore subject to querying or limiting the further use or disclosure of U.S.-person information returned by queries. The Court nonetheless views as substantial the intrusion on U.S. persons’ privacy inherent in FBI personnel’s examination of information – especially content information – returned by unjustified U.S.-person queries.

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On the other side of the balance, it must be acknowledged that acquiring “foreign intelligence with an eye toward safeguarding the nation’s security serves . . . a particularly intense interest.” In re Certified Question, 858 F.3d at 606 (internal quotation marks omitted). For that reason, the FISC has observed that “the government’s investigative interest in cases arising under FISA is at the highest level and weighs heavily in the constitutional balancing process.” Id. at 608. The Court must also consider, however, the degree to which the governmental action in question is needed for the promotion of the relevant governmental interest. Id. at 605. Here, the relevant governmental action is the FBI’s continuing to run queries without taking further measures to ensure they actually satisfy the querying standard FBI personnel are supposed to apply.

Whether the balance of interests ultimately tips in favor of finding the procedures to be inconsistent with the Fourth Amendment is a close question. Reasonableness under the Fourth Amendment does not require perfection. See In Re Directives, 551 F.3d at 1015 (“the fact that there is some potential for error is not a sufficient reason to invalidate” surveillances as unreasonable under the Fourth Amendment). Nonetheless, if “the protections that are in place for individual privacy interests are . . . insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.” Id. at 1012. Here, there are demonstrated risks of serious error and abuse, and the Court has found the government’s procedures do not sufficiently guard against that risk, for reasons explained above in the discussion of statutory minimization requirements.

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Finally, for reasons explained below, the government has not made a persuasive case that the documentation requirement proposed by amici, which would provide a further check against unjustified intrusions on the privacy of U.S. persons and should also enhance oversight of FBI queries, would impede the FBI's ability to respond to national-security threats. On the current record and subject to future oversight of the FBI's querying practices, the Court believes that its adoption would remedy the statutory and Fourth Amendment deficiencies discussed above.

The Court accordingly finds that the FBI's querying procedures and minimization procedures are not consistent with the requirements of the Fourth Amendment.

7.e Amici's Documentation Proposal as a Remedy

The government offers § IV.A.3 in part as an alternative to a proposal made by amici. See September 18, 2018, Memorandum at 21. Amici propose 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. See Amici Brief at 69, 72. (Amici alternatively discussed a more far-reaching requirement to document the basis for queries before they are conducted, see July 13, 2018, Proposed Tr. at 34, but stated at the September 28, 2018, argument that the above-described option would be adequate. The FISC declined to adopt a pre-querying documentation requirement in a prior Section 702 proceeding, see November 6, 2015, Opinion at 39-41, though the record in that case did not reflect similar problems with the FBI's querying practices.)

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Like § IV.A.3, the documentation requirement proposed by amici would apply only when a query has returned Section 702-acquired content information that FBI personnel wish to examine. The amici proposal is further limited to U.S.-person queries. Because of those limitations, it applies only to the subset of queries that are particularly likely to result in significant intrusion into U.S. persons' privacy. In contrast to § IV.A.3, the documentation requirement proposed by amici would impose a less onerous requirement on FBI personnel who wish to examine such contents (written memorialization of the basis for the query vs. attorney approval), but in a larger number of cases (U.S.-person queries vs. categorical batch queries).

In the Court's assessment, the documentation requirement proposed by amici would facilitate oversight of queries likely to have intruded on U.S. persons' privacy interests by providing contemporaneous documentation of why FBI personnel believed the querying standard was satisfied. The requirement to create that documentation would also help ensure that FBI personnel, in fact, have thought about the querying standard and articulated why they believe it has been met. By so doing, it would prompt FBI personnel – much more frequently than the attorney-approval process under § IV.A.3 – to recall and apply the guidance and training they have received on the querying standard. Over time and with review by oversight personnel, those written statements may also suggest how to improve that guidance and training, or even the formulation of the standard in the querying procedures.

The government, however, objects that such a requirement would not be effective and would unduly burden and hinder the FBI's work. Regarding effectiveness, the government contends that such a documentation requirement would not have prevented the most serious

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reported instances of non-compliance, such as the queries performed at [REDACTED] for persons with [REDACTED] July 13, 2018, Proposed Tr. at 12. In the government's estimation, the relevant personnel in those cases mistakenly but genuinely thought they had a sufficient basis for the queries, so they would have documented that basis and proceeded to examine the content information retrieved. See Gov't Response at 36-37; July 13, 2018, Proposed Tr. at 9-10. The Court has not heard from the personnel who conducted those non-compliant queries and is not well positioned to assess what courses of action they would have taken if they had been obligated to state in writing why they thought the queries were justified. But it accords with common sense and experience that some persons in comparable circumstances may, as amici suggest, realize their queries "could not be justified" when they are required to articulate the justification. See Amici Brief at 54.

The government further objects that requiring a written justification to examine the contents provided in response to U.S.-person queries of Section 702 information "would substantially hinder the FBI's ability to investigate and protect against threats to national security." Supplemental FBI Declaration at 17. Different forms of hindrance are claimed.

First, the government identifies burdens and potential error costs associated with identifying which terms are U.S.-person query terms. Id. at 15; July 13, 2018, Proposed Tr. at 13, 15. But those are the same burdens and costs anticipated by the government with regard to the statutory obligation to keep records that differentiate U.S.-person query terms from other terms. See Part IV.B.2.c above. If for some reason, moreover, FBI personnel are in doubt about

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whether a particular query used a U.S.-person query term, they can always choose to document the justification for the query rather than try to resolve that doubt.

The government also assesses that “there is a substantial likelihood” that the impact on the FBI’s “resources and operations” of amici’s documentation proposal “would be significant.” Supplemental FBI Declaration at 16. The government is not, however, able to quantify that impact. Id. at 15-16. For example, given the above-described FBI recordkeeping practices, it cannot say how often the FBI conducts U.S.-person queries, nor can it state how often queries return content information acquired under Section 702, id. at 6 n.3, or how often FBI personnel review FISA information returned in response to a query. Id. at 15-16. The government does acknowledge, however, that a U.S.-person query of Section 702 information may not return any such information, and even if it does, the FBI may not review it. See Gov’t Response at 35 n.41. In either of those situations, the documentation requirement would not apply.

The government nonetheless contends that “a requirement that FBI must include a written justification prior to reviewing *any* section 702-acquired results that are returned using a U.S. person query term would . . . hinder the FBI’s ability to perform its national security and public safety missions.” Supplemental FBI Declaration at 15 (emphasis added). But the burden associated with documenting the basis for any particular query should be minimal. FBI personnel must determine that every query they conduct is reasonably likely to return foreign-intelligence information or evidence of a crime before they run it. See Gov’t Response at 33-34 (“The lack of a requirement for written documentation of the query justification does not mean that FBI personnel are not required to have a justification for each query” and they are “required

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to have a justification for each query of raw FISA-acquired information, as each query has to meet the substantive query standard . . .”). For that reason, memorializing the basis for a query should involve no additional research or analysis. Nor should composing the written statement be time consuming. The Court contemplates a brief statement of the query justification – in many cases it should suffice to succinctly complete a sentence that starts “This query is reasonably likely to return foreign-intelligence information [or evidence of crime] because”

At the heart of the government’s objections to the documentation requirement proposed by amici is an understandable desire to ensure that FBI personnel can

perform their work with the utmost efficiency and “connect dots” in an effort to protect the national security. Given the lessons learned following 9/11 and the Fort Hood shooting, as well as the FBI’s significant reliance on queries to effectively and efficiently identify threat streams in its holdings, the FBI is *extremely concerned about anything that would impede, delay, or create a disincentive* to querying FBI databases.

Supplemental FBI Declaration at 7 (emphasis added). But amici’s documentation proposal would in no way affect the FBI’s ability to query its databases. Only if a U.S.-person query returns Section 702 content information *and* the FBI decides to review that information is the documentation requirement triggered. Non-content metadata, which may help the FBI “connect the dots,” will be immediately available without having to document the basis for a query. And FBI personnel could dispense with the otherwise-required documentation if needed to protect against an immediate threat to human life. See FBI Querying Procedures § II at 1.

The Court regards amici’s documentation proposal as a measured and reasonable response to the statutory and Fourth Amendment deficiencies it has found in the FBI’s implementation of its querying standard. The Court believes that adopting and implementing

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that proposal, in combination with the other protections of the FBI Querying Procedures and FBI Minimization Procedures, would satisfy the definition of “minimization procedures” at § 1801(h) and render those procedures consistent with the requirements of the Fourth Amendment. Indeed, while other modifications to the procedures could have the same effect, it is difficult to conceive of their doing so while imposing so modest a burden on the FBI’s work.

D. Exemptions in the Minimization and Querying Procedures

The minimization and querying procedures proposed by the government contain several exemptions for activities relating to oversight and training, as well as activities responsive to congressional mandates. Although the Court assessed that the oversight and training exemptions included in the March 27, 2018, Submission were unreasonably broad, it concludes that the revised exemptions in the September 18, 2018, Submission comport with the statutory requirements and the Fourth Amendment.

1. Exemptions for Oversight Activities

One broad category of exemptions proposed by the government in March 2018 concerned oversight activities conducted by independent executive-branch entities or the agencies themselves.

The first type of exemption, which is not new, addresses oversight conducted by independent executive-branch entities. This exemption is included in each of the four sets of minimization procedures. For example, Section 1 of NSA’s proposed minimization procedures provides: “Nothing in these procedures shall restrict the lawful oversight functions of [NSD, ODNI] or the applicable Offices of the Inspectors General, or the provision by NSA of the

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assistance necessary for these entities to perform their lawful oversight functions.” March 27, 2018, NSA Minimization Procedures § 1 at 1; see also March 27, 2018, FBI Minimization Procedures § I.G at 4; March 27, 2018, CIA Minimization Procedures § 6.f at 4; March 27, 2018, NCTC Minimization Procedures § 6.e at 4. The initially proposed querying procedures contained a similar provision, see March 27, 2018, Querying Procedures § II.e at 1, which is carried forward in the amended querying procedures for each agency submitted in September 2018. See FBI Querying Procedures § IV.C at 5; NSA Querying Procedures § IV.C at 5; CIA Querying Procedures § IV.C at 4; and NCTC Querying Procedures § IV.C at 4.

The second type of exemption – for oversight conducted by the agencies themselves – was quite broad as initially proposed by the government. For example, the exemption initially proposed for FBI provided:

[N]othing in these procedures shall restrict the FBI’s performance of lawful oversight functions of its personnel or systems, which includes activities performed: in support of FBI’s investigation and remediation of a possible compliance incident; in support of FBI’s application of the destruction requirements in these minimization procedures; in support of

and in support of FBI Inspection Division and Records Management Division audits.

March 27, 2018, FBI Minimization Procedures § I.H at 4. The minimization procedures proposed for the other three agencies contained similar exemptions. See March 27, 2018, NSA Minimization Procedures § 1 at 2; March 27, 2018, CIA Minimization Procedures § 6.h at 5; March 27, 2018, NCTC Minimization Procedures § 6.g at 4.

Amici challenged the breadth of these proposed exemptions as insufficiently defined, see Amici Brief at 63-67, 82-84, and asserted the exemptions allow any deviation from otherwise-

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applicable restrictions “no matter how disproportionate the Government’s purpose may be to the deviation,” Amici Reply at 13, and “do not aim for a reasonable balance between the Government’s interest in performing . . . oversight, on the one hand, and the privacy interest of U.S. persons affected by deviations from the procedures on the other” Id. at 13-14.

In support of the lawful-oversight exemption, the government emphasized that the exemption furthers its interest in ensuring that the Section 702 procedures are correctly implemented, which should increase protection of U.S. persons’ privacy. See Gov’t Response at 21 (asserting “a strong government interest in supervising personnel to mitigate the risk of non-compliance by government employees accessing raw section 702 information”); id. at 43 (the exemption “permits the government to engage in essential oversight activities that in fact promote the privacy interests of U.S. persons”). The government also contended that the proposed exemption provided greater specificity without expanding the scope of exempted conduct as previously approved by the FISC. See Gov’t Response at 42-43.

The Court did not accept the government’s premise that the proposed modifications resulted in exemptions that were no broader than those previously approved. Although similar language did appear in previously approved minimization procedures, the government did not disclose, nor did the Court recognize, how broadly the government understood “lawful oversight functions” until June 2017. In an attempt to mitigate the scope of the minimization violations raised by the FBI’s retention of unminimized Section 702-acquired information in repositories containing [REDACTED] classified email and instant messages (see Part IV.E.2 below), the government articulated a view of “lawful oversight functions” that spanned a wide range of

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disparate functions, such as overseeing compliance with federal records-management requirements, identifying executive-level email messages subject to an archiving requirement imposed by the National Archives and Records Administration, and conducting [REDACTED]

[REDACTED]

See Report Regarding Retention of Raw FISA-Acquired Information in Certain FBI Special Purpose Systems, June 16, 2017, at 4-5, 10-12. The Court, moreover, agreed with amici regarding the unjustified breadth and lack of specificity of the lawful-oversight exemption initially proposed by the government.

In response to those concerns, the government significantly modified the proposed exemption. In the modified procedures submitted on September 18, 2018, it described more particularly the types of activity conducted by each agency that constitute lawful-oversight functions. For example, the FBI's modified procedures identify the following types of activity as lawful-oversight functions: (1) review of Section 702-acquired information the FBI determines is necessary to remediate a potential spill of Section 702-acquired information; (2) review, retention, and disclosure of Section 702-acquired information subject to destruction, including under these minimization procedures; and (3) review and retention of unminimized Section 702-acquired information contained in employee electronic communications by the FBI's Inspection Division, as part of its record of what it has provided to the Office of the Inspector General. See September 18, 2018, FBI Minimization Procedures § II.H at 5. Notably, the amended provisions

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do not specify activities relating to [REDACTED] and no longer reference investigations into [REDACTED]

The modified provision also limits the scope of the authorized deviation by requiring (1) compliance with the minimization procedures to the maximum extent practicable, see September 18, 2018, NSA Minimization Procedures § 2 at 3; September 18, 2018, FBI Minimization Procedures § I.H at 5 n.4; September 18, 2018, CIA Minimization Procedures § 6 at 4 n.2; September 18, 2018, NCTC Minimization Procedures § A.6 at 4 n.1; and (2) destruction of information in accordance with the applicable procedures once it is no longer reasonably believed to be necessary to the lawful-oversight function. See September 18, 2018, NSA Minimization Procedures § 2(b)(5) at 2; September 18, 2018, FBI Minimization Procedures § I.H at 6; September 18, 2018, CIA Minimization Procedures § 6.i at 5; and September 18, 2018, NCTC Minimization Procedures § A.6.g at 4-5.

Each agency is also permitted to deviate from the procedures when necessary to conduct lawful-oversight functions that are not described in the procedures, but only after consultation with NSD and ODNI, followed by prompt reporting of the deviation to the FISC. See September 18, 2018, NSA Minimization Procedures § 2(b)(5) at 2; September 18, 2018, FBI Minimization Procedures § I.H at 5-6; September 18, 2018, CIA Minimization Procedures § 6.i at 5; September 18, 2018, NCTC Minimization Procedures § A.6.g at 4. At the hearing on September 28, 2018, the government confirmed that this provision is not intended to include activities related to investigations of [REDACTED]. See September 28, 2018, Proposed Tr. at 12-13.

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The amended querying procedures contain corresponding exemptions. For example, NSA's provide:

[N]othing in these procedures shall prohibit NSA from conducting queries it determines are necessary to: . . . perform the following lawful oversight functions of NSA's personnel or systems:

- a. support NSA's investigation and remediation of a possible section 702e compliance incident;
- b. remediate a potential spill of classified section 702-acquired information in NSA systems;
- c. identify section 702-acquired information subject to destruction, including under NSA's section 702 minimization procedures;
- d. ensure the effective application of marking or segregation requirements in NSA's section 702 minimization procedures; and
- e. support NSA's audit or review, for quality control purposes, of work done related to section 702 collection by NSA personnel[.]

NSA Querying Procedures § C.6 at 5-6 (followed by corresponding catchall provision permitting deviations from querying procedures for unspecified lawful-oversight functions after consultation with NSD and ODNI followed by prompt reporting to the FISC); see also CIA Querying Procedures § IV.C.7 at 5 (similar); NCTC Querying Procedures § IV.C.6 at 5 (similar); and FBI Querying Procedures § IV.C.7 at 6 (delineating similar exemptions as well as an exemption for queries conducted to "assess compliance with federal record-keeping requirements, where such queries are conducted [REDACTED] or audit and oversight systems, as defined in FBI's section 702 minimization procedures, that contain FBI personnel e-mails [REDACTED] that may contain unminimized section 702-acquired information").

The Court is satisfied that the exemptions for lawful-oversight functions conducted by the agencies are sufficiently defined and no broader than reasonable to permit the effective exercise of those functions. To the extent the need to conduct additional but unspecified lawful-oversight

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activities arises and those activities require deviation from applicable procedures, the Court views the required pre-implementation consultation with NSD and ODNI and prompt notification to the FISC as reasonable means of monitoring and, if necessary, checking any other deviations from applicable procedures based on the lawful-oversight exemption.

2. Exemptions for Training Activities

Each agency's initially proposed minimization procedures also contained a broad exemption from otherwise-applicable rules for activities conducted during training or for system-administration purposes. See March 27, 2018, NSA Minimization Procedures § 1 at 1 ("Nothing in these procedures shall restrict NSA's performance of lawful training functions of its personnel or activities undertaken for creating, testing, or maintaining its systems."); March 27, 2018, FBI Minimization Procedures § I.G at 4 ("Nothing in these procedures shall restrict the FBI's performance of lawful training functions of its personnel or creating, testing, or maintaining the functions of its systems."); March 27, 2018, CIA Minimization Procedures § A.6.g at 4-5 ("Nothing in these procedures shall prohibit . . . CIA's performance of lawful training functions of its personnel, or activities undertaken for creating, testing, or maintaining its systems."); March 27, 2018, NCTC Minimization Procedures § A.6.f at 4 ("Nothing in these procedures shall prohibit . . . NCTC's performance of lawful training functions of its personnel, or creating, testing, or maintaining its systems."). A similar provision was included in the querying provisions. See March 27, 2018, Querying Procedures § III at 1 ("Nothing in these procedures shall restrict a covered agency's performance of lawful training functions of its personnel, or creating, testing, or maintaining its systems.").

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Prior minimization procedures under Section 702 did not have a comparable exemption for training, which the government proposed in March 2018 after numerous instances of queries conducted during training that did not comply with the FBI minimization procedures. See March 27, 2018, Memorandum at 8 n.9. The Court notes that the practice of conducting queries of unminimized Section 702-acquired information that do not meet the querying standard during training was not limited to isolated mistakes, see, e.g., Jan. 5, 2018, Notice at 2; May 2, 2018, Notice at 2, but appears to have been a systemic practice that went largely undetected for years. See Jan. 18, 2018, Notice at 2-3 (reporting that since 2011, a unit in FBI's [REDACTED]

[REDACTED] had been routinely conducting training sessions with FBI employees on the use of databases containing FISA-acquired information, including Section 702 information, during which trainees were asked to conduct queries using terms provided by the trainers, which generally involved the use of names of former subjects of FBI investigations as query terms).

Amici objected to the provisions proposed in March 2018 insofar as they sought a wholesale exemption from otherwise-applicable querying, retention, and dissemination rules. See Amici Brief at 61-63, 82-84; Amici Reply at 13-16. Specifically, amici questioned whether effective training really required the use of U.S.-person query terms, see Amici Brief at 62, or departures from retention and dissemination standards. Id. at 83. Amici also noted that “the procedures do not assign any responsibility for training, provide any guidance as to what it should entail, or describe how it must be designed” Id. at 61.

The government responded that queries “conducted for training purposes promote both the government interest in ensuring an effective workforce while simultaneously protecting the

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interests of U.S. persons by reducing the risk of non-compliant use or disclosure of sensitive data.” Gov’t Response at 19. That rationale was undercut by the breadth of the provisions, which by their terms were not limited to training that pertains to protecting U.S.-person information. The government also disclaimed any intent to use the exemptions to retain information otherwise subject to destruction requirements or to make otherwise prohibited disseminations. Id. at 41-42.

In response to concerns regarding the breadth of the proposed training exemption raised by amici and the Court, the government narrowed the training exemption in the procedures in three significant ways. First, the training exemption in the minimization procedures was narrowed to only permit deviations from procedures governing access and review of information, and limited those deviations to only those reasonably necessary for effective training. See, e.g., September 18, 2018, NSA Minimization Procedures § 2(b) at 2; September 18, 2018, FBI Minimization Procedures § I.G at 4; September 18, 2018, NCTC Minimization Procedures § B.1 at 5. The training exemption in the CIA minimization procedures was removed after the CIA determined that such an exemption was unnecessary. See September 18, 2018, Memorandum at 6. In addition, the government limited the exemption for training queries to queries the agency determines are necessary to the training of its personnel regarding proper implementation of FISA and FISA procedures, and to permit the use of U.S.-person identifiers to perform such queries only when there is a particular need to do so in the conduct of such training. See FBI Querying Procedures § IV.C.1 at 5; NSA Querying Procedures § IV.C.1 at 4; CIA Querying Procedures § IV.C.1 at 4; NCTC Querying Procedures § IV.C.1 at 4.

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These modifications appear to meaningfully limit the types of training activity exempted from otherwise-applicable rules. In light of the long-term non-compliance with the querying standard during training sessions conducted by the FBI's [REDACTED] however, it appears prudent to clarify the Court's understanding of the limited exemption from the querying procedures sought for queries conducted using U.S.-person query terms deemed necessary for effective training. It is not apparent why U.S.-person query terms that are known to objectively meet the general querying standard (*i.e.*, reasonably likely to retrieve foreign-intelligence information or evidence of a crime) should not be used whenever U.S.-person query terms are necessary to effective training. Trainers should pre-select U.S.-person query terms known to return foreign-intelligence information to prevent any unnecessary querying of U.S.-person identifiers unassociated with national-security investigations. The deviation from the querying standard for training queries should be understood to permit the use of queries conducted for training rather than foreign-intelligence purposes, but which nevertheless are reasonably likely to return foreign-intelligence information or evidence of a crime.

3. Exemptions for Responding to Congressional Mandates

Each set of proposed minimization procedures includes new language regarding agency compliance with congressional mandates that would require the agency to deviate from otherwise-applicable rules. The new language describes the types of process that would trigger this exemption as "a subpoena or similar process consistent with congressional oversight." See September 18, 2018, NSA Minimization Procedures § 2(b)(3) at 2 ("Nothing in these procedures shall restrict: . . . the retention, processing, analysis, or dissemination of information necessary to

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comply with an order of a court within the United States or a specific congressional mandate, *such as a subpoena or other similar process consistent with congressional oversight*)” (emphasis added); see also September 18, 2018, FBI Minimization Procedures § I.G at 4; September 18, 2018, CIA Minimization Procedures § 6.h at 4-5; September 18, 2018, NCTC Minimization Procedures § A.6.d at 4. The proposed querying procedures also permit queries the agency determines are necessary to comply with “a specific congressional mandate, such as a subpoena or similar process consistent with congressional oversight[.]” NSA Querying Procedures §dV.C.3 at 5; FBI Querying Procedures § IV.C.3 at 5; CIA Querying Procedures § IV.C.3 at 4;e NCTC Querying Procedures § IV.C.3 at 4.

The Court has previously observed that procedures that permit exemptions “based on unspecified mandates could undermine the Court’s ability to find that the procedures satisfy statutory requirements.” See April 26, 2017, ●opinion at 53 (citing November 6, 2015, ●opinion at 22)(internal quotation marks omitted). In approving this provision in 2015, the Courte emphasized that the language, which at that time referred to “specific constitutional, judicial or legislative mandates,” must be interpreted narrowly to include only those mandates containing language “that clearly and specifically requires action in contravention of an otherwise-applicable provision of the requirement of the minimization procedures,” and directed the government to report any action taken in reliance on this provision. See April 26, 2017, Opinion at 53 (internal citation omitted).

The government sought to modify this provision in September 2016 to describe the contemplated activity requiring a departure as “necessary to comply with a specific congressional

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mandate or order of a court within the United States.” See id. at 53-54. The Court approved the revised language but reiterated its expectation that the provision be narrowly interpreted, id., and directed the government to provide prompt written notification of any instance in which an agency acted in contravention of otherwise-applicable minimization procedures in reliance on that provision. See id. at 96-97.

To date, the government has not relied on the exemption for activities responsive to a specific congressional mandate. The government did, however, receive a congressional request to calculate the number of communications of U.S. persons that have been acquired pursuant to Section 702. That request “was not in the form of a subpoena or other legal process” and therefore would not have constituted a legal mandate for purposes of the exemption. See id. at 54. The government asserted, however, that any action it undertook in response to the request in contravention of otherwise-applicable minimization requirements would be permitted under the lawful-oversight exemption. Id. Although the Court believed both provisions could be clearer, it did not take issue with the government’s interpretation. The Court did, however, direct the government to provide prompt notification of any instance in which an agency acts in contravention of otherwise-applicable minimization requirements to respond to an oversight request from any outside entity other than the executive-branch entities specified in the procedures. See id. at 55, 97. The government filed a notice of such actions taken in an effort to respond to the above-described congressional request. See Report on NSA Action Pursuant to Section 1 of Section 702 Minimization Procedures in Response to Oversight Request of

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Congress, June 19, 2017 (advising that NSA conducted queries of Section 702 data in attempt to provide requested estimates).

In response to the government's March 2018 submission (which described the exempted activity as that "necessary to comply with a specific congressional mandate," see, e.g., March 27, 2018, NSA Minimization Procedures § 1 at 1), amici asserted that the exemption concerning congressional mandates did not adequately protect privacy interests because it was not clear whether a letter from a single member of Congress could be considered a mandate for purposes of the exemption. See Amici Brief at 67. Amici also recommended that the Court's interpretation of the term as directives in "the form of a subpoena or other legal process" be added to the querying procedures. Id. at 67-68. And, given the government's historical intent to rely on the "lawful oversight function" exemption when a congressional request for information does not qualify as a "mandate," amici argued that the congressional-mandate exemption appeared to be superfluous, unless it could be narrowed in a way that made it distinct from the "lawful oversight" exception. Id. at 68.

In response to these concerns, the government proffered the revisions to the congressional-mandate language noted above – *i.e.*, adding the descriptor "such as a subpoena or other similar process consistent with congressional oversight" in both the minimization procedures and querying procedures. The Court believes that the requirement that such process be "consistent with congressional oversight" sufficiently circumscribes the type of mandate subject to the exemption.

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The Court also believes that the modifications made to the lawful-oversight functions provision (discussed above) help clarify the respective spheres of that exemption and the exemption for specific congressional mandates: responding to a congressional request is not among the specified lawful-oversight functions, and the provision permitting deviations necessary to the conduct of unspecified lawful-oversight functions only applies to such functions of the agency over its personnel and systems. See, e.g., September 18, 2018, FBI Minimization Procedures § I.H at 5. Should an agency rely on this provision to deviate from generally applicable rules to respond to a request from a member of Congress, it would be required to consult with NSD and ODNI beforehand and report promptly to the FISC the specific oversight activity involved. Id. § I.H at 5-6. Any such submission should also explain why the action taken constitutes lawful oversight of the agency's personnel or systems.

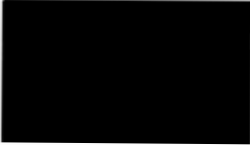
The Court is satisfied that the congressional-mandate provisions and lawful-oversight provisions of the procedures as now proposed adequately address the concerns raised regarding the potential breadth of the congressional-mandate exemption. Consistent with prior approvals, however, the Court will require the government to promptly report the circumstances of any deviation from applicable minimization or querying procedures taken in reliance on the congressional-mandate provision.

E. Other Changes to the FBI Minimization Procedures

The government proposes changes to the FBI's minimization procedures concerning retention of Section 702-acquired metadata and retention of unminimized Section 702

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information in copies of emails and instant messages in  The Court assesses each proposal below.

1. Retention of Metadata

In assessing the metadata proposals, it is useful to distinguish between provisions relating to the use of metadata for link analysis and those relating to queries for other purposes.

a. Metadata Used for Link Analysis

Section III.G.1 of the 2016 FBI Minimization Procedures currently exclude Section 702-acquired metadata in systems used solely for link analysis from the retention timetables that generally apply to raw Section 702 information in electronic storage. See 2016 FBI Minimization Procedures § III.G.1 at 22. The government seeks to modify Section III.G to permit the FBI to indefinitely retain such metadata for purposes of link analysis on all electronic and data-storage systems and ad hoc systems. See September 18, 2018, FBI Minimization Procedures § III.G.2 at 32. This change would harmonize the FBI's Section 702 minimization procedures with a parallel provision of the FBI's minimization procedures applicable to electronic surveillance and physical search under Titles I and III of FISA, which the Court approved in May 2016. See May 17, 2016, Opinion at 46-48.

One incident of FBI over-retention of Section 702-acquired metadata was reported during the prior authorization period and is worth noting here. In implementing the change allowing indefinite retention of metadata acquired pursuant to Title I and III, the FBI mistakenly reconfigured its systems to eliminate the time limits on retention for all FISA-acquired metadata, including Section 702-acquired metadata that should have aged off systems not used solely for

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link analysis. See Preliminary Notice of Compliance Incident Involving Retention of Raw Section 702-Acquired Metadata by FBI, April 27, 2018, at 2-3 (reporting improper retention of unminimized Section 702-acquired metadata that should have been purged from systems not solely used for link analysis within five years of expiration of certification under which it was obtained pursuant to Section III.G.1 of FBI's current Section 702 minimization procedures). The FBI remediated the violation by limiting access to the over-retained Section 702-acquired metadata to a tool used solely for link analysis. See Supplemental Notice of Compliance Incident Involving Retention of Raw Section 702-Acquired Metadata by FBI, July 2, 2018, at 2-3. That restriction would become unnecessary if the Court approves the proposed modification to Section III.G to permit indefinite retention of Section 702-acquired metadata on systems other than those used solely for link analysis.

In support of the modification to the FBI Title I and III minimization procedures requested in 2016, the government argued that the limitations on retention periods for FISA-acquired metadata based on the nature of the system on which the metadata resides impaired the FBI's ability to use metadata in data-storage systems not solely used for link analysis without commensurately increasing privacy protections, and that the ability to conduct link analysis of metadata in other systems would enhance the FBI's capacity to make connections about targets and their networks. See Gov't Mot. to Amend Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, May 17, 2016, at 35-38. The Court concluded that the FBI's compliance with the querying standard as well as other protections set forth in the applicable minimization procedures strikes a reasonable balance

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between the government's foreign-intelligence needs and the protection of U.S. persons' privacy, and approved the modification. See May 17, 2016, Opinion at 47-48.

The government presents similar arguments now. See March 27, 2018, Memorandum at 71-73. When evaluating the government's current request to add Section 702-acquired metadata to the cache of information indefinitely retained on all electronic-data storage and ad hoc systems, the Court must consider the same governmental and privacy interests in relation to the protections afforded by the applicable procedures.

The FBI's procedures seek to protect privacy in a variety of ways. Most pertinent to the requested modification is the requirement that FBI personnel may only conduct queries of Section 702-acquired information that are "reasonably likely to retrieve foreign intelligence information" or "evidence of a crime." FBI Querying Procedures § IV.A.1 at 3. That standard applies to queries of Section 702-acquired metadata, not just content information. (For reasons discussed in Part IV.B above, the Court has found the FBI's querying practices deficient and is contemporaneously ordering the government to correct that deficiency.) In addition, any dissemination of metadata acquired under Section 702 that is of or concerning a U.S. person must meet the criteria of Section IV of the September 18, 2018, FBI Minimization Procedures, and disclosure for law-enforcement purposes must comply with Section III.H.2 of those procedures.

Consistent with the May 2016 approval of the FBI's standard minimization procedures for electronic surveillance and physical search, the Court finds that the FBI's proposed Section 702 minimization and querying procedures provide sufficient protection for U.S.-person privacy

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concerns related to the indefinite retention of Section 702-acquired metadata on all FBI data-storage and ad hoc systems when balanced against the important and substantial interests asserted by the government. The Court notes, however, that for purposes of evaluating Section 702 minimization procedures, the *diminished* privacy interest in non-content information generally recognized (including by amici, see Amici Brief at 73), does not equate to *no* privacy interest. And, in a digital era in which U.S. persons share an expanded amount of data electronically, the type and volume of metadata associated with U.S. persons' communications acquired under Section 702 may also expand. It is not unreasonable to expect that the type of metadata available for querying across all FBI data-storage and ad hoc systems, particularly when retained indefinitely and aggregated over longer periods of time, could provide a cache of information the use of which might implicate greater privacy concerns. Cf. Carpenter, 138 S.Ct. at 2215-17 ("the unique nature of cell phone location records" at issue distinguished it from other third-party records such as dialed numbers or negotiable instruments). Mindful of the need to consider the type and volume of metadata acquired under Section 702 and the manner in which the government uses such metadata when evaluating the sufficiency of the targeting, minimization, and querying procedures, the Court will require the government to describe the types of information acquired by the FBI under Section 702 that the government regards as metadata and the extent to which such metadata can reveal location information about U.S. persons.

b. Metadata Queried for Other Purposes

As noted above, Section III.G.1 of the FBI's current minimization procedures permits the indefinite retention of Section 702-acquired metadata only on systems used solely for link

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analysis. Section 702 metadata stored on other systems must be aged off those systems pursuant to the same retention limits applicable to the contents of the corresponding communications. Specifically, information that has not been reviewed must be purged within five years of the date of expiration of the certification under which it was acquired, unless a specific extension is obtained. See 2016 FBI Minimization Procedures § III.G.1.a at 22. Information that has been reviewed but not identified as meeting the retention standard – *i.e.*, information that reasonably appears to be foreign-intelligence information, to be necessary to understand foreign-intelligence information or assess its importance, or to be evidence of a crime – must be access-restricted after ten years and purged after fifteen years, unless a specific extension is obtained. See id. § III.G.1.b at 23. Information that is subject to those access restrictions may be queried, but personnel must obtain approval from a designated FBI official before accessing the results of the query.

The government has advised that it intends to implement the ten-year access-restriction provision (under both the FBI's standard minimization procedures for electronic surveillance and physical search and its Section 702 minimization procedures) to allow immediate access to metadata responsive to a query, regardless of whether the query was run for purposes of link analysis or for other analytical purposes. See Letter Regarding FBI's Implementation of Section III.D.4.c of Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, Feb. 5, 2018, at 2. The ten-year mark will be reached in November 2018 for data acquired under FISA Title I and Title III but not until September 2019 for Section 702 information. Id. at 1 n.1, 2. The government also advised that if access to a

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restricted communication is approved, the FBI intends to make the communication, including the contents, accessible in a non-restricted state “to all users who would otherwise be authorized to access such information” in the pertinent system for six months or until fifteen years from the expiration of the authority under which the communication was acquired, whichever is sooner. Id. at 3. In order to fully assess the reasonableness of the intended action, FISC Presiding Judge Rosemary M. Collyer directed the government to, among other things, submit a written explanation of the basis for its assessment that access to the metadata results of queries that are not conducted for purposes of link analysis is permitted under the applicable retention limits and describe how metadata may be queried or analyzed for purposes of link analysis and how it may be queried or analyzed for other purposes. See Docket Nos. [REDACTED] Order, July 26, 2018, at 3. The Court anticipates that the information regarding the actual implementation of these provisions provided by the government will significantly inform the Court’s evaluation of the reasonableness of the government’s actions in the context of Titles I and III and, beginning in [REDACTED] under Section 702.

2. Retention on Email and Instant-Messaging [REDACTED]

The government seeks modifications to the FBI’s 702 minimization procedures that would permit the FBI to retain unminimized Section 702 information in certain repositories that do not comply with the FBI’s current minimization procedures. The government seeks these modifications as part of an effort to address such noncompliance, which was first reported to the Court in the context of information acquired pursuant to Titles I and III of FISA in December 2016.

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In December 2016, the government informed the Court that FBI systems containing classified email and instant messages might be retaining unminimized FISA information in violation of FBI's standard minimization procedures. See April 26, 2017, Opinion at 88 n.70. In March 2017, the government identified the same systems as presenting compliance issues under the FBI's 702 minimization procedures. See Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Mar. 17, 2017 ("March 2017 Quarterly Report") at 78-79.e

According to that report, all email messages on the FBI's secret-level email system are

[REDACTED] retained in [REDACTED] maintained by the FBI's [REDACTED] assist the FBI in responding to discovery requests. Id. That [REDACTED] is also used for records management and FOIA processing, and by the FBI's [REDACTED] investigative purposes. Id. [REDACTED] is also storing instant messages from FBI's secret-level instant-messaging system in a separate system used primarily for investigative purposes. See id. at 79. The April 26, 2017, Opinion directed the government to report the extent to which unminimized FISA, including Section 702, information was being retained on those systems and to assess whether such retention complied with applicable minimization requirements; and to the extent that noncompliance was found, to describe the remediation steps the government was taking. See April 26, 2017, Opinion at 97-98.

In subsequent months, the government provided the Court additional details regarding the FBI's retention of Section 702 and other FISA information on those systems⁴ and reported an additional discovery – namely, that the FBI's [REDACTED] was [REDACTED] instant messages on the FBI's top secret enclave. See March 27, 2018, Memorandum at 80. In

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December 2017, the government notified the Court that the FBI intended to prohibit users from placing unminimized FISA-acquired information in classified instant messages, but because FBI personnel needed the ability to include unminimized Section 702 and other FISA information in classified emails, that practice would not be prohibited. See Supplemental Information Regarding Retention of Raw FISA-Acquired Information in Certain FBI Special Purpose Systems, Dec. 14, 2017, at 2. The government further advised that the FBI was working on a solution that would require [REDACTED] instant messages and emails (except for those subject to litigation holds) to age off within five years. See id. at 2-3. Recognizing these measures would not bring the FBI into full compliance with the minimization procedures, the government advised the Court it also intended to seek modifications to the applicable procedures. See id. at 3.

In the March 27, 2018, Submission, the government proposed changes to the FBI's current Section 702 minimization procedures. The first change would prohibit the further placement of unminimized Section 702-acquired information in classified-email and instant-message systems. See March 27, 2018, Memorandum at 81-82. Even though the FBI assesses there is still an operational need to place such information on classified email systems, the government is prepared to take that step because of its inability to delete information from the [REDACTED] email system and instant-message repositories in conformance with the generally applicable retention limits while still retaining information subject to a litigation hold. See id. at 81-82. Because the non-compliant systems will not ingest any additional unminimized Section 702-acquired information, the volume of information "over-retained" in those systems will effectively be capped.

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With regard to information already in [REDACTED] email system and instant-message repositories, the government contends that it is not currently possible to globally search for messages containing unminimized Section 702-acquired information. Id. at 82-83. The government therefore proposes two new provisions to the FBI's Section 702 minimization procedures, which would permit the indefinite retention of unminimized Section 702-acquired information on these systems notwithstanding otherwise-applicable retention limits. See September 18, 2018, FBI Minimization Procedures § III.F.5 at 30-31 ("FBI-Designated

[REDACTED]
[REDACTED] System") and § III.F.6 at 31-32 ("FBI-Designated

[REDACTED] Systems") (exempting those systems

from specified retention rules). Although no maximum retention period would apply to either system, access to the databases would be limited to "FBI personnel who require access to perform their official duties or assist in a lawful and authorized governmental function, including system administrators and other technical personnel, and who have received training on these minimization procedures and the Querying Procedures." Id. §§ III.F.5 at 30 and III.F.6 at 31. The proposed provisions also require that the FBI maintain records of all personnel who have been granted access to such repositories and all accesses to such repositories. Id. at 30-32. Finally, FBI personnel authorized to access these repositories may do so only "to assist in

[REDACTED]
investigations, and to respond to inquiries related to records management and discovery," and may only query those systems to find and provide information, which may include raw FISA-

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acquired information, in furtherance of such inquiries, functions, and investigations. Id. Any queries in those repositories must also comply with the querying standard described above. Id.

Amici expressed several concerns regarding the government's proposal, including lack of specificity regarding who may have access to [REDACTED] email system and instant-message repositories, the purposes for which those repositories are used, and the justification for exempting them from U.S.-person masking requirements. See Amici Brief at 92-94. Amici also recommended that the FBI be required to provide a written statement justifying access. Id. at 94.

The Court shares amici's concerns to some extent but is also cognizant of the general nature and purpose of these systems, which do not include the retention of unminimized Section 702 information in any amount approaching the quantity found in systems primarily used by the FBI for analytical and investigative work. In that light, the proposed modifications to the FBI's minimization procedures greatly mitigate the potential impact of indefinite retention of unminimized Section 702 information in those systems. The necessity of categorically exempting them from *any* limits on retention, however, is not apparent. The Court will therefore approve proposed Sections III.F.5 and III.F.6 subject to the following: in the event the FBI recognizes unminimized Section 702-acquired information in a system defined by Section III.F.5 or III.F.6, and seeks to retain such information in that system, the government shall report in its next quarterly report concerning compliance matters under Section 702: (1) whether the information could be retained on an FBI classified-email or instant-messaging system as described in Section III.F.4, or in connection with litigation matters as described in Section

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III.1.3; and (2) if not, the reason retention of the information in that system is necessary to the purposes served by the system.

F. Conclusion

For the reasons stated in Parts IV.B and IV.C above, the Court finds that the FBI Querying Procedures do not comply with the recordkeeping requirement at § 702(f)(1)(B) and that, in view of the FBI's querying practices, the FBI Querying Procedures and FBI Minimization Procedures do not, as implemented, satisfy the definition of "minimization procedures" at 50 U.S.C. § 1801(h) and are unreasonable under the Fourth Amendment.

In other respects, the government's querying and minimization procedures, including those provisions examined in Parts IV.D and IV.E above, comport with applicable statutory requirements and the Fourth Amendment. In particular, the changes to the FBI Minimization Procedures that provide more detailed guidance on the storage and handling of information on various types of systems and related organizational changes to those procedures, see March 27, 2018, Memorandum at 43-70, 74-75, present no impediment to making those findings.

V. OTHER NON-COMPLIANCE

Although the other instances of non-compliance reported by the government do not bear significantly on the Court's disposition of these matters, it is desirable to touch briefly on the current status of two additional matters discussed in the April 26, 2017, Opinion, as well as two more recent matters.

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A. Incidents Addressed in the April 26, 2017, Opinion

Several significant compliance issues were addressed in the April 26, 2017, Opinion, four of which were not fully resolved at the time of the Opinion: (1) issues arising from NSA's upstream collection of Internet communications, see April 26, 2017, Opinion, at 78-81; (2) improper disclosure of unminimized Section 702 information by the FBI, id. at 83-87; (3) concerns about the frequency of NSA's post-tasking review of contents, id. at 75-78; and (4) the potential over-retention of unminimized Section 702 information by the FBI, id. at 87-89. The first and fourth issues are discussed above in Part III.A and Part IV.E.2, respectively. The other two are discussed briefly below.

1. Frequency of NSA's Post-Tasking Review of Contents

NSA's targeting procedures require that analysts take reasonable steps to confirm that a selector continues to be used by a non-U.S. person located outside the United States. Such steps may include content review, as well as ascertaining whether a tasked facility is being used inside the United States, such as

see NSA Targeting Procedures § II at 6-7. NSA's targeting procedures provide that content review "will be conducted according to analytic and intelligence requirements and priorities" and do not require analysts to review the contents of communications acquired from tasking a particular selector at fixed intervals. See id. at 7. The government has advised the Court, however, that NSA follows a policy whereby such content review is performed no later after the first acquisition and at intervals of

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no more than [REDACTED] hereafter. See Update Regarding Post-Targeting Content Reviews, Sept. 13, 2016, at 2.

As indicated in the April 26, 2017, Opinion, the Court has had concerns about the government's ability to monitor analysts' compliance with this policy. See April 26, 2017, Opinion at 76-77 (citing Supplement Letter Regarding Post-Targeting Content Reviews, Mar. 13, 2017 (indicating that NSA had [REDACTED] for monitoring compliance with the policy in only one of its Section 702 repositories and therefore does not comprehensively monitor or verify analysts' compliance with the policy)). To address the Court's concern, the government undertook to include in its quarterly reports any instances in which a failure to conduct timely content review in accordance with this policy was discovered, whether or not such failure resulted in a violation of the targeting procedures themselves (*e.g.*, a delayed detasking resulting from the failure to conduct timely post-targeting content review). April 26, 2017, Opinion at 77.

The information submitted in the six quarterly reports filed since April 2017 revealed several instances in which NSA did not comply with the policy, only a small fraction of which led to violations of the targeting procedures. See, e.g., Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 14, 2018 ("September 2018 Quarterly Report") at 97 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] likely resulted in delayed detasking); see also Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, June 15, 2018 ("June 2018 Quarterly Report") at 101 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] associated with delayed detaskings); Quarterly Report to FISC Concerning

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Compliance Matters Under Section 702 of FISA, Mar. 16, 2018, at 91 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Dec. 15, 2017 ("December 2017 Quarterly Report") at 89 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 15, 2017 ("September 2017 Quarterly Report") at 81 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, June 16, 2017 ("June 2017 Quarterly Report") at 99 (reporting [REDACTED] of failure to conduct timely post-targeting content review, [REDACTED] associated with delayed detaskings).

The quarterly reports also revealed that in several of these incidents the CIA or the FBI was responsible for conducting post-targeting content review but did not conduct timely reviews. See, e.g., June 2017 Quarterly Report at 99 n.54 (identifying incidents for which FBI had responsibility for conducting timely post-targeting content review); September 2017 Quarterly Report at 81 n.39 (same); September 2018 Quarterly Report at 64 & n.40 (identifying incident in which CIA had responsibility for conducting timely post-targeting content review).

In addition, in June 2018, the government notified the Court that because of reliability issues, NSA had disabled two features of the system used to remind analysts of their obligations

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to conduct post-targeting content review. See Supplemental Letter Regarding Post Targeting Content Reviews, June 12, 2018, at 1.

Despite these setbacks, the Court does not view the reported deviations from the policy as presenting significant concerns, principally because (1) only a small fraction of the deviations from NSA's post-tasking content review policy resulted in an improper delay in detasking; and (2) the number of missed or untimely reviews reported, regardless of whether a delay in detasking resulted, is small when viewed in relation to the total number of current taskings. See, e.g., September 2018 Quarterly Report at 1, 97 (reporting [REDACTED] facilities under task at any given time between June 1, 2018, and August 31, 2018 [REDACTED] failures to conduct timely post-targeting content review during the same period). The Court notes, however, that compliance with NSA's post-targeting content-review policy remains an area susceptible to improvement. The government is encouraged to continue to explore additional means of prompting analysts to conduct the content reviews required by NSA's policy and, to the extent the FBI or the CIA is responsible for conducting such review, to ensure compliance with the policy. The government is also expected to continue to report instances of non-compliance with the policy in its quarterly reports.

2. Improper Disclosures of Unminimized Information by the FBI

The April 26, 2017, Opinion also discussed [REDACTED] the FBI allowed unauthorized personnel to access Section 702 information, only one of which presented a continuing issue of concern to the Court. See April 26, 2017, Opinion at 83-87. That matter involved the provision of unminimized Section 702 information pertaining to [REDACTED]

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[REDACTED] contractor that was developing software intended to facilitate review of Section 702 information. See Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 15, 2016, at 131. At the time of the Court's April 2017 decision, [REDACTED] returned the information in question to the FBI, but the FBI still planned [REDACTED] personnel to install the software on an FBI system. See April 26, 2017, Opinion at 86. The Court ordered the government to report (1) the results of an investigation it had undertaken to determine whether there were other instances of improper access or disclosures, and (2) to report the circumstance [REDACTED] anticipated installation of the software on an FBI system, including whether its personnel received access to unminimized Section 702 information in the course of their work; and if so, an assessment whether such access complied with the FBI's minimization procedures. See April 26, 2017, Opinion at 98.

On June 8, 2017, the government reported that its investigation had revealed no additional instances of improperly accessed, unminimized FISA-acquired information on FBI systems between 2008 and March 2017. See Supplemental Response Regarding Improper Disclosures by FBI of Raw FISA-Acquired Information, Including Section 702-Acquired Information, June 8, 2017, at 2. The government also reported [REDACTED] not installed the software and undertook to inform the Court of the circumstances of any future installation. Id. at 4.

The results of the FBI's investigation reported in June 2017 eased the Court's concerns regarding the possibility of further noncompliance with access restrictions. The FBI must, of course, report any future unauthorized access of Section 702 information; however, in the event

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██████████ software is installed in a manner fully consistent with the FBI's minimization procedures, such installation need not be reported to the Court.

B. New Compliance Issues

In addition to the incidents of non-compliance concerning querying practices and over-retention of Section 702-acquired information discussed above, the government has identified a number of other incidents of noncompliance with the applicable procedures. For example, there have been several instances in which NSA has tasked selectors under Section 702 without conducting the necessary foreignness checks, failing to perform timely foreignness checks (*i.e.*, the results of a foreignness check had grown stale by the time the selector was tasked), or failing to consider the totality of circumstances when making a foreignness determination. See, e.g., September 2017 Quarterly Report at 6-41. In other instances, the government failed to timely detask accounts because of human error, staffing issues, communications failures between agencies, or misunderstandings of the rules. See, e.g., December 2017 Quarterly Report at 28-63. Notices filed over the last year also indicate that the FBI continues to encounter difficulty with the timely establishment of review teams, which its minimization procedures require when a Section 702 target has been charged with a federal crime, see, e.g., Supplemental Notice of Compliance Incident Regarding Two Section 702-Tasked Facilities, Aug. 8, 2018; Rule 13 Notice Regarding [Target and Multiple Docket Numbers] and Three Section 702-Tasked Facilities, Jan. 11, 2018, and that NSA continues to experience problems of varying magnitude with the over-retention of 702-acquired information on its many systems. See, e.g., June 2018 Quarterly Report at 85-87, 93, 97.

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After considering these and other incidents reported since April 2017, the Court finds reasonable and sufficient the steps taken by the government to address them and to prevent similar occurrences. It concludes that only one new incident and one potential compliance incident merit specific discussion here.

1. NSA's Backlog in Processing Purge Orders

In addition, when reporting incidents of non-

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compliance to the FISC, the government frequently represents that information has been placed
on the MPL [REDACTED]

On May 25, 2018, the government reported to the FISC that, since September 2017, NSA had a growing backlog of purge-discovery orders, which resulted in significant delays in placing information on the MPL. Id. at 2. The majority of the backlogged orders pertained to Section 702 collection [REDACTED] id., which suggested that NSA was not timely complying with its purge obligations under the applicable Section 702 procedures. See, e.g., 2016 NSA Minimization Procedures, as amended Mar. 30, 2017, § 3 at 4, 6-10, § 5 at 12, § 6 at 13-14. On May 29, 2018, Judge Collyer held a hearing to learn how the government proposed to address [REDACTED] backlog. She directed the government to report on its progress in writing every two weeks.

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As of October 1, 2018, NSA has successfully automated its processing of purge-discovery orders in some but not all of its SSRs, and is processing new purge-discovery orders at a rate similar to its pre-September 2017 rate. See Ninth Update at 2. Accordingly, the NSA considers [REDACTED] backlog to have been eliminated. The government has not yet, however, provided to the Court a proposed standard for determining whether a backlog in processing purge-discovery orders develops in the future. As a result, until the government is able to assure the Court that purge-discovery orders are being timely processed, NSA will continue to: (1) [REDACTED] and (2) provide bi-weekly reports with the number of pending purge discovery orders. See id.

Based on the NSA's processing of previously backlogged purge-discovery orders and its bi-weekly checks and updates, the Court finds that the [REDACTED] backlog issue does not impede a finding that the NSA's purge procedures, as currently implemented, are consistent with statutory and Fourth Amendment requirements.

2. Insider-Threat Monitoring

In the March 27, 2018, Submission, the government informed the Court that it had identified certain insider-threat-monitoring activities, [REDACTED] and the subsequent placement of that information into systems maintained by insider-threat personnel. See March 27, 2018, Memorandum at 11. The government refers to those activities as "user activity monitoring" or "UAM." See September 18, 2018, Memorandum at 24. [REDACTED]

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The government is currently investigating “to what extent the agencies’ UAM processes .

. . . encounter raw section 702-acquired information” and “whether such activities implicate the section 702 minimization and querying procedures.” Id. at 27. The government’s submission also includes a timeline: (1) NSD has requested that the covered agencies provide information concerning the user-activity-monitoring practices that may implicate raw section 702-acquired information no later than November 1, 2018; (2) the government anticipates that it will conclude any subsequent investigation by mid-January; and (3) “[b]y the end of February 2019, the government intends to provide the Court with a written update on whether UAM activities at each agency implicate the section 702 minimization and/or querying procedures and, if so, the extent to which those procedures need to be amended in order to address those UAM activities.” Id. at 28.

The timeline proposed by the government for its investigation of the reported practices appears reasonable, except to the extent it intends to delay reporting any discovery of actual noncompliance with applicable minimization or querying procedures. At present, the government has advised the Court only that user-activity monitoring *may have* resulted in violations of applicable procedures. Any confirmation of that concern should be immediately reported to the Court in accordance with Rule 13(b) of the Court’s Rules of Procedure, even though the Court anticipates that any report of such an incident may be limited in content until

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the completion of the investigation described by the government. And, to the extent noncompliance with applicable procedures is identified, the government is directed to consider and address options other than amending the procedures to remediate the violations.

V. CONCLUSION

For the foregoing reasons, the Court finds that:

(1) The 2018 Certifications, as amended by the September 18, 2018, Submission, as well as the certifications in the Prior 702 Dockets, as amended by those documents, contain all the required statutory elements;

(2) The targeting procedures for acquisitions conducted pursuant to the 2018 Certifications, as amended, are consistent with the requirements of Section 702(d) and of the Fourth Amendment;

(3) With respect to information acquired under the 2018 Certifications, as amended, the minimization procedures and querying procedures to be implemented by NSA, the CIA, and NCTC are consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment;

(4) With respect to information acquired under the certifications in the Prior Section 702 Dockets, as amended, the minimization procedures to be implemented by NSA, the CIA, and NCTC (to include, 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. (The Court makes no findings regarding whether any querying procedures, as applied to information acquired under the certifications in the Prior Section 702 Dockets, are

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consistent with the requirements of Section 702(f)(1) because Section 702(f) only applies “with respect to certifications submitted under [Section 702(h)] . . . after January 1, 2018.”

Reauthorization Act § 101(a)(2).);

(5) With respect to information acquired under the 2018 Certifications, as amended, the minimization procedures and querying procedures to be implemented by the FBI are consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment, except insofar as they are inconsistent with (a) the recordkeeping requirement at Section 702(f)(1)(B) because they do not require the FBI to keep records of United States-person query terms used to conduct queries of Section 702 information in a manner that fairly identifies United States-person query terms as such or differentiates them from other terms used to query Section 702 information and (b) the requirements of Section 702(e) and Section 702(f)(1)(A) respectively and of the Fourth Amendment because they do not require adequate documentation of the justifications for queries that use United States-person query terms. In those two respects, the Court finds deficiencies in those procedures within the meaning of Section 702(j)(3)(B); and

(6) With respect to information acquired under the certifications in the Prior Section 702e Dockets, as amended, the minimization procedures to be implemented by the FBI (to include, as referenced therein, the requirements of the FBI’s querying procedures) are consistent with the requirements of Section 702(e) and of the Fourth Amendment, except insofar as they are inconsistent with those requirements because they do not require adequate documentation of the justifications for queries that use United States-person query terms. In that respect, the Court

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finds a deficiency in those procedures within the meaning of Section 702(j)(3)(B); and, accordingly,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The government's request for approval of the March 27, 2018, Submission, as amended by the September 18, 2018, Submission, is approved in part and denied in part, as set out below:

a.eThe 2018 Certifications, as amended, and the certifications in the Prior Section 702 Dockets, as amended, are approved;

b.eThe use of the targeting procedures for acquisitions conducted pursuant to the 2018 Certifications, as amended, is approved;

c.eWith respect to information acquired under the 2018 Certifications, as amended, the use of the minimization procedures and querying procedures to be implemented by NSA, the CIA, and NCTC is approved;

d.eWith respect to information acquired under the certifications in the Prior Section 702 Dockets, as amended, the use of the minimization procedures to be implemented by NSA, the CIA, and NCTC (to include, as referenced therein, the requirements of the respective agencies' querying procedures) is approved;

e.e With respect to information acquired under the 2018 Certifications, as amended, the use of the minimization procedures and querying procedures to be implemented by the FBI is approved, except insofar as they (a) do not require the FBI to keep records of United States-person query terms used to conduct queries of Section 702 information in a manner that

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fairly identifies United States-person query terms as such or differentiates them from other terms used to query Section 702 information and (b) do not require adequate documentation of the justifications for queries that use United States-person query terms; and

f. With respect to information acquired under the certifications in the Prior Section 702 Dockets, as amended, the use of the minimization procedures to be implemented by the FBI (to include, as referenced therein, the requirements of the FBI's querying procedures) is approved except insofar as those procedures do not require adequate documentation of the justifications for queries that use United States-person query terms;

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

(3) The following provisions of the April 26, 2017, Opinion shall remain in effect for the reasons stated therein. Prospectively, the government need not comply with reporting requirements imposed by the April 26, 2017, Opinion, except as reiterated below:

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

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

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court or agency in which such litigation matter is pending; (b) describing the Section 702-acquired information preserved for each such litigation matter; and (c) describing the status of each such litigation matter;

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

d. The government shall promptly submit in writing a report concerning each instance in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign-intelligence information. The report should include a detailed description of the information at issue and the manner in which it has been or will be used for analytical, investigative, or evidentiary purposes. It shall also identify the query terms used to elicit the information and provide the FBI's basis for concluding that the query was consistent with applicable minimization procedures. The government need not file such a report for a query for which it files an application with the FISC pursuant to Section 702(f)(2); and

(4) For the reasons stated herein, the government shall comply with the following requirements:

a. The government shall submit reports to the Court on a quarterly basis, beginning not more than 90 days after the issuance of this Memorandum Opinion and Order, on

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This report shall: (i) describe the

(ii) explain how the government is ensuring that it will only acquire

communications to or from a Section 702 target and (iii)

describe methods the government is using to monitor compliance with the abouts limitation

and report on the results of such monitoring;

b. No later than ten days after tasking for upstream collection under Section 702 a

the government shall submit a notice to the Court. This notice shall: (i) describe

(ii) explain how will comply with the abouts

limitation; and (iii) describe steps that will be taken during the course of the proposed acquisition

to ensure that is only acquiring communications to or from

authorized Section 702 targets;

c. By January 31, 2019, the government shall make a written submission: (i) o

describing t acquires with the assistance of downstream

providers under Section 702; and (ii) stating to what extent

derives from any communication(s), and if so, whether those communication s

authorized Section 702 targets. For any communications that

an authorized Section 702 target, the government's submission shall describe the source

and nature of those communications, to include a description of the parties thereto;

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d.e By January 31, 2019, the government shall submit a written report that describes the types of information acquired by the FBI under Section 702 that the government regards as metadata and the extent to which such metadata can reveal location information about U.S. persons; and

e.e In the event the FBI recognizes unminimized Section 702-acquired information in a system defined by Section III.F.5 or III.F.6 of its September 18, 2018, Minimization Procedures, and seeks to retain such information in that system, the government shall report in its next quarterly report concerning compliance matters under Section 702: (i) whether the information could be retained on an FBI classified-email or instant-messaging system as described in Section III.F.4 of those procedures, or in connection with litigation matters as described in Section III.I.3 of those procedures; and (ii) if not, the reason retention of the information in that system is necessary to the purposes served by that system.

ENTERED this 18 day of October, 2018.


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

 Chief Deputy Clerk,
 FISC, certify that this document is a
 true and correct copy of the original.

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