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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

2016 SEP 26 PM 12:25

LEAHN FLYNN HALL
CLERK OF COURT

~~UNDER SEAL~~

~~(S)~~ GOVERNMENT'S EX PARTE SUBMISSION OF REAUTHORIZATION
CERTIFICATIONS AND RELATED PROCEDURES, EX PARTE SUBMISSION OF
AMENDED CERTIFICATIONS, AND REQUEST FOR AN ORDER APPROVING
SUCH CERTIFICATIONS AND AMENDED CERTIFICATIONS

~~(S//OC/NF)~~ In accordance with subsection 702(g)(1)(A) of the Foreign
Intelligence Surveillance Act of 1978, as amended (FISA or "the Act"), the United States
of America, by and through the undersigned Department of Justice attorney, hereby
submits ex parte and under seal the attached certifications, DNI/AG 702(g) Certification

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Classified by: ~~Chief, Operations Section, OI, NSD, DOJ~~
Reason: ~~Multiple Sources~~
Declassify on: ~~20410926~~

These certifications reauthorize DNI/AG 702(g) Certification [REDACTED]

[REDACTED] respectively (hereinafter "the 2015 Certifications"), all of which expire on November 5, 2016. Attached as

Exhibits A, B, C, D, E, and G to DNI/AG 702(g) Certifications [REDACTED]

[REDACTED] are the targeting and minimization procedures to be used under these certifications.¹

~~(S//OC/NF)~~ In addition, DNI/AG 702(g) Certifications [REDACTED]

[REDACTED] also include amendments to the certifications being reauthorized, DNI/AG 702(g) Certifications [REDACTED] as well as to their predecessors.²

Specifically, these amendments authorize the use of the minimization procedures

submitted herewith as Exhibits B, D, E, and G to DNI/AG 702(g) Certifications [REDACTED]

[REDACTED] in connection with foreign intelligence information acquired in

¹ ~~(S//OC/NF)~~ Specifically, the targeting procedures to be used by the National Security Agency (NSA) and Federal Bureau of Investigation (FBI) are attached as Exhibits A and C, respectively. The minimization procedures to be used by NSA, the FBI, the Central Intelligence Agency (CIA), and the National Counterterrorism Center (NCTC) are attached as Exhibits B, D, E, and G, respectively. The NSA targeting procedures attached as Exhibit A were submitted in connection with DNI/AG 702(g) Certifications [REDACTED] on July 15, 2015, and were approved by the Court on November 6, 2015. The remaining targeting and minimization procedures are being submitted with AG/DNI 702(g) Certifications [REDACTED] for approval by the Court.

² [REDACTED]

accordance with DNI/AG 702(g) Certifications

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~~(S//OC/NF)~~ With the exception of the NSA targeting procedures attached as Exhibit A, the targeting and minimization procedures being submitted with DNI/AG 702(g) Certifications [REDACTED] contain a number of changes from the targeting and minimization procedures approved for use under the 2015 Certifications. To aid the Court in its review of the targeting and minimization procedures, below is a discussion of the key changes made to NSA's, FBI's, CIA's, and NCTC's minimization procedures, as well as FBI's targeting procedures. For the reasons described below, the government believes that this submission of the above-described reauthorization DNI/AG 702(g) certifications and amended DNI/AG 702(g) certifications does not present any novel or significant interpretations of the law.

³ ~~(S//OC/NF)~~ The NSA targeting procedures submitted herewith as Exhibit A are identical to the NSA targeting procedures that already have been approved for use by this Court in connection with foreign intelligence information acquired in accordance with DNI/AG 702(g) Certification [REDACTED]

Thus, with respect to those procedures, no amendments are necessary.

(U) **Circumstances Under Which NSA, FBI, CIA and NCTC May Deviate from Their Minimization Procedures**

~~(S//NF)~~ The proposed NSA, FBI, and CIA section 702 minimization procedures, submitted herewith as Exhibits B, D, and E, respectively, contain a modified provision to clarify the circumstances under which NSA, FBI, and CIA are permitted to deviate from the minimization procedures. The current NSA, FBI, and CIA section 702 minimization procedures state that "nothing in these procedures shall prohibit the retention, processing, or dissemination of information reasonably necessary to comply with specific constitutional, judicial, or legislative mandates." *See, e.g.,* Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, DNI/AG 702(g) Certification [REDACTED] [REDACTED], submitted July 15, 2015, at p. 1 (hereinafter "NSA 2015 Minimization Procedures"); Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, DNI/AG 702(g) [REDACTED], submitted July 15, 2015, at p. 3 (hereinafter "FBI 2015 Minimization Procedures"); and Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance

Act of 1978, as Amended, DNI/AG 702(g) [REDACTED]

submitted July 15, 2015, at pp. 4-5 (hereinafter "CIA 2015 Minimization Procedures").

This provision was new to each agency's 2015 section 702 minimization procedures.

(U) In its 2015 Memorandum Opinion, this Court suggested that "[t]he apparent breadth of [the provision at issue] gives the Court pause . . . A provision that would allow [the agencies] to deviate from any of the [section 702 minimization procedure] restrictions based upon unspecified 'mandates' could undermine the Court's ability to find that the procedures satisfy the . . . statutory requirement." *In re DNI/AG*

Certifications [REDACTED]

[REDACTED] Mem. Op. at pp. 21-22 (FISA Ct. Nov. 6, 2015) (hereinafter "2015 Mem. Op."). The Court determined that "to avoid a deficiency under the . . . definition of 'minimization procedures,' the Court must construe the phrase 'specific constitutional, judicial, or legislative mandates' 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." *Id.* at p. 23.

(U) To address the Court's concerns, the proposed NSA, FBI, and CIA section 702 minimization procedures, submitted herewith as Exhibits B, D, and E, respectively, have been modified to clarify that NSA, FBI, and CIA are permitted to deviate from the section 702 minimization procedures in cases where necessary to comply with a legal

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mandate of Congress or a court within in the United States. Specifically, the new language states that "nothing in these procedures shall prohibit the retention, processing, analysis, or dissemination of information necessary to comply with a specific congressional mandate or order of a court within the United States." See Ex. B at p. 1; Ex. D at p. 3; and Ex. E at pp. 4-5. The proposed NCTC minimization procedures, submitted herewith as Exhibit G, contain this same provision. See Ex. G at p. 4.

(U//FOUO) Related to this provision, the NSA minimization procedures submitted herewith as Exhibit B also state that "[n]othing in these procedures shall restrict NSA's performance of lawful oversight functions of its personnel or systems or lawful oversight functions of the Department of Justice's National Security Division, Office of the Director of National Intelligence, or the applicable Offices of the Inspectors General." Ex. B at p. 1.⁴ The government believes that this provision would allow NSA to take action otherwise not permitted by the procedures (e.g., using a U.S. person identifier to query communications acquired pursuant to Section 702, including upstream communications, for purposes of attempting to quantify the number of

⁴ (U//FOUO) Similar provisions appear in the FBI's minimization procedures, *see* Ex. D at p. 3, CIA's minimization procedures, *see* Ex. E at p. 5, and NCTC's minimization procedures, *see* Ex. G at p. 4, all submitted herewith. The government believes that these three other agencies would be able take action similar to NSA as described in this paragraph.

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incidentally acquired United States person communications) so that it may respond to inquiries facilitating congressional oversight of the implementation of section 702 that are not covered by the provision described above. *See, e.g.*, April 22, 2016, correspondence from 14 members of the Committee on the Judiciary, U.S. House of Representatives, to the Honorable James R. Clapper requesting "a public estimate of the number of communications or transactions involving United States persons subject to Section 702 surveillance"; *see also* May 27, 2016, response from the Office of the Director of National Intelligence, Director of Legislative Affairs. To the extent that NSA uses this provision to respond to such congressional oversight inquiries, the government will promptly notify the Court.

(U) Updated Classification Markings

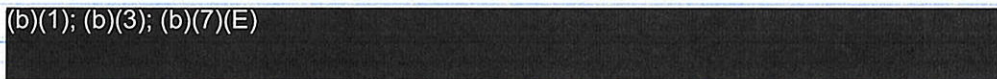
(U) The proposed minimization procedures for NSA, FBI, and CIA, submitted herewith as Exhibits B, D, and E, respectively, contain modified classification markings throughout, often in light of information that was declassified as part of the Intelligence Community's continued focus on transparency. *See* Ex. B at pp. 1, 4-10, 12-16; Ex. D at pp. 1-4, 6-15, 17, 19-23, 26-30, 32-39; and Ex. E at pp. 5, 10-11.

(b)(1); (b)(3); (b)(7)(E)

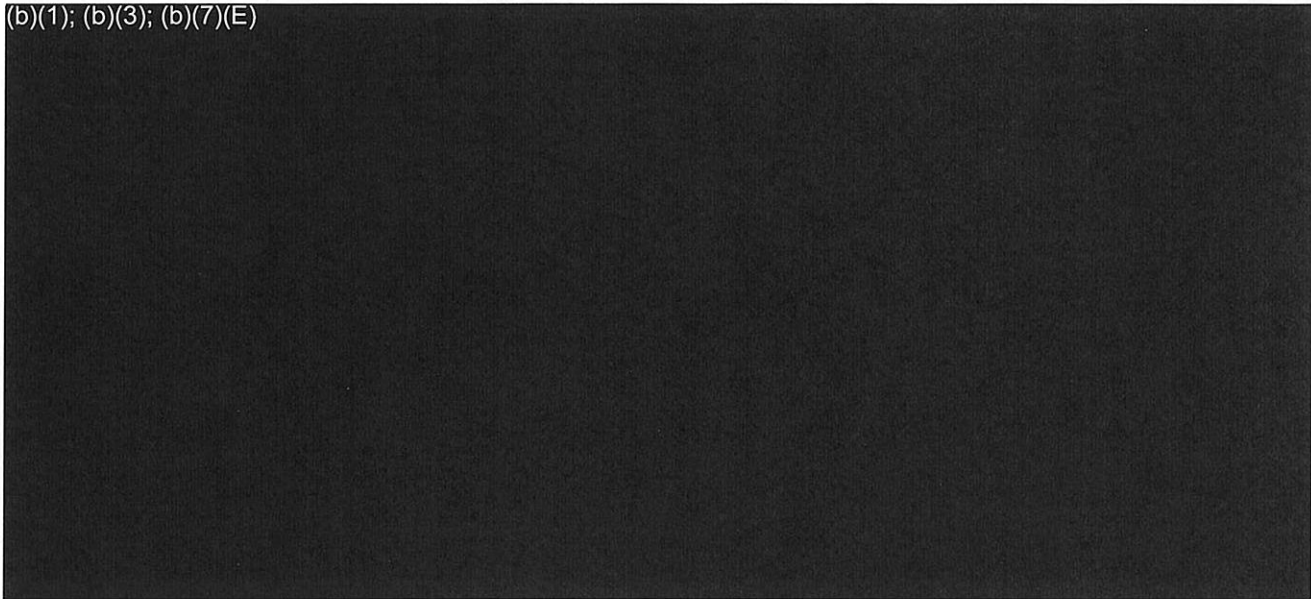


~~(S//NF)~~ The proposed FBI targeting procedures, submitted herewith as Exhibit C, contain a

(b)(1); (b)(3); (b)(7)(E)



(b)(1); (b)(3); (b)(7)(E)



(b)(1); (b)(3); (b)(7)(E) See, e.g., Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, DNI/AG 702(g) , submitted July 15, 2015, at p. 3 (hereinafter "FBI 2015 Targeting Procedures").

~~(S//NF)~~ Pursuant to this provision in its current targeting procedures 

(b)(1); (b)(3); (b)(7)(E)



(b)(1); (b)(3); (b)(7)(E). However, this language could result in compliance incidents in situations

where the (b)(1); (b)(3); (b)(7)(E)

See, e.g., Quarterly Report

Concerning Compliance Matters Under Section 702 of FISA, at pp. 17-18 (Dec. 7, 2010).

~~(S//NF)~~ This provision in the proposed FBI targeting procedures, submitted

herewith as Exhibit C, (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

See Ex. C at p. 3 (*emphasis added*). (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E) Having concluded that such requirements are best addressed through executive branch policy, and seeking to avoid other compliance incidents in the future, the government (b)(1); (b)(3); (b)(7)(E) In

addition, as discussed in greater detail below, the proposed FBI targeting procedures submitted as Exhibit C to DNI/AG 702(g) (b)(1); (b)(3); (b)(7)(E)

provide that (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

pursuant to the DNI/AG 702(g) Certification (b)(1); (b)(3); (b)(7)(E) to

(b)(1); (b)(3); (b)(7)(E)

See *id.*

(U) Raw Take Sharing with NCTC

~~(S//NF)~~ NCTC's currently applicable section 702 minimization procedures were not designed to address NCTC's handling of unminimized communications, and instead apply only to a narrow set of minimized communications that NCTC received from FBI (described below). The proposed minimization procedures for NSA and FBI, submitted herewith as Exhibits B and D, respectively, and the (b)(1); (b)(3); (b)(7)(E)

contain language to permit NSA and FBI to provide NCTC – the government's primary organization for counterterrorism analysis, coordination, and planning – unminimized communications acquired under

As with FBI and CIA, at this time NCTC will only receive (b)(1); (b)(3); (b)(7)(E)

acquired by or with the assistance of the FBI from (b)(1); (b)(3); (b)(7)(E), and will not be receiving unminimized section 702 telephony or upstream Internet

⁶ ~~(S//NF)~~ The government notes for the Court that corresponding changes have also been made to the proposed DNI/AG 702(g) and corresponding affidavits, including, *inter alia*, the addition of supporting affidavits by Nicholas Rasmussen, Director of the NCTC. Although NCTC's proposed section 702 minimization procedures will be the same for all certifications submitted herewith and their predecessor certifications, unless otherwise permitted by the section 702 minimization procedures for the agencies (e.g., if NCTC were providing technical assistance to another agency),

communications acquired by NSA.⁷ Cf. 2015 Mem. Op. at p. 25 n.21 (noting that “only NSA receives ‘upstream collection’”); *In re DNI/AG 702 Certifications* [REDACTED]

[REDACTED]
Mem. Op. at p. 18 n.17 (FISA Ct. Oct. 3, 2011) (“The FBI and the CIA do not receive unminimized communications that have been acquired through NSA’s upstream collection of Internet communications.”).

~~(S//NF)~~ The proposed NCTC minimization procedures submitted as Exhibit G to Certifications [REDACTED] are modeled on the National Counterterrorism Center Standard Minimization Procedures for Information Acquired by the Federal Bureau of Investigation Pursuant to Title I, Title III, or Section 704 or 705(b) of the Foreign Intelligence Surveillance Act, which have been adopted by the Attorney General and are on file with this Court in docket number [REDACTED] as most recently modified on May 18, 2012 (hereinafter “NCTC Title I Procedures”).⁸ In broad

⁷ ~~(S//NF)~~ To the extent that the FBI, CIA, or NCTC intend to receive unminimized section 702 telephony or upstream Internet collection from NSA at some point in the future, the government will notify the Court beforehand.

⁸ ~~(S//NF)~~ The principal differences between the NCTC Title I Procedures and the procedures submitted herewith as Exhibit G relate to either the change in underlying legal authority (e.g., the Exhibit G procedures address how to handle section 702 targets who enter the United States) or to use updated language that has been submitted to the Court in other minimization procedures (e.g., the Exhibit G procedures feature language for handling attorney-client communications that was taken from the NSA and CIA section 702 minimization procedures,

terms, the (b)(1); (b)(3); (b)(7)(E) as well as the NSA, FBI, and NCTC minimization procedures, will put NCTC on the same footing as CIA with regard to unminimized communications acquired pursuant to [REDACTED] [REDACTED] which NCTC will handle in accordance with the proposed NCTC minimization procedures submitted herewith.

(U) As the government's primary organization for analyzing and integrating all intelligence possessed or acquired by the United States government pertaining to terrorism and counterterrorism, NCTC has a compelling (b) [REDACTED] for access to unminimized communications acquired pursuant to [REDACTED] [REDACTED]. The Director of NCTC has broad authority and responsibility within the United States Government for "analysis of terrorism and terrorist organizations (except purely domestic terrorism and domestic terrorist organizations) from all sources of intelligence, whether collected inside or outside the United States." 50 U.S.C. § 3056(i). Its responsibilities include "provide[ing] strategic operational plans for the civilian and military counterterrorism intelligence and operations across agency boundaries, both inside and outside the United States." *Id.* § 3056(f)(1)(B). The Director of NCTC also is assigned "primary responsibility within

which were updated on this point subsequent to the submission of the NCTC Title I Procedures).

the United States Government for conducting net assessments of terrorist threats." *Id.* § 3056(f)(1)(G). Accordingly, NCTC produces a wide range of analytic and threat information for "the President, the Vice President, the Secretaries of State, Defense and Homeland Security, the Attorney General, the Director of the Central Intelligence Agency, and other officials of the executive branch as appropriate, and to the appropriate committees of Congress." *See* Affidavit of the Director of the National Counterterrorism Center, DNI/AG 702(g) Certifications [REDACTED] at p.

1. In addition, "NCTC serves as the primary organization for strategic operational planning for counterterrorism, and establishes the information technology systems and architectures within the NCTC and between the NCTC and other agencies that enable access to, as well as integration, dissemination, and use of, terrorism information." *Id.* Essentially, NCTC brings a broad, interdisciplinary perspective and innovative analysis to bear on information related to terrorism and counterterrorism; greater access to information, therefore, enhances NCTC's ability to produce counterterrorism foreign intelligence information.

~~(S//NF)~~ Under its currently applicable section 702 minimization procedures, NCTC's access to section 702-acquired information is limited to information that the FBI has reviewed, determined to meet the standard set forth in the FBI minimization procedures, and disseminated to a system or cable to which NCTC has access. NCTC's

proposed access to unminimized communications as detailed in the certifications submitted herewith would allow NCTC to (a) review data in its original form, or a form closer to the original; (b) draw on its own analytical judgments rather than relying on those of FBI reviewers; (c) view data as soon as it enters NCTC's raw systems, rather than wait for it to be reviewed, identified as meeting applicable standards, analyzed, and disseminated; and (d) apply NCTC's analytical tools in the context of all information in NCTC systems.

~~(TS//SI//NF)~~ The Court has previously reviewed and permitted the FBI to

(b)(1); (b)(3); (b)(7)(E)

The Court was "persuaded that bringing NCTC's expertise and resources to bear on the immediate analysis of

(b)(1); (b)(3); (b)(7)(E) in comparison with its working with derivative reporting after it is prepared by the FBI, will enhance the government's ability to identify, extract, and exploit counterterrorism information," and that the FBI's provision of unminimized communications to NCTC is consistent with the requirements of section 1801(h)(1). See

(b)(1); (b)(3); (b)(7)(E)

Mem. Op. at p. 7 (FISA Ct. May 18, 2012). Since 2012, NCTC has successfully used unminimized communications provided by the FBI to identify terrorism linkages and

produce leads for operational agencies. For example, using such communications,

NCTC [REDACTED]

[REDACTED]

[REDACTED]

The information developed by NCTC was provided to NSA, FBI, and CIA.

~~(S//NF)~~ The proposed NCTC minimization procedures are designed 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." 50 U.S.C. § 1801(h)(1); 50 U.S.C. § 1881a(e)(1). For example, NCTC is required to mark all information acquired pursuant to section 702 and provided to NCTC in raw form and restrict access to such information only to appropriately trained NCTC employees.⁹

⁹ (U) The NCTC minimization procedures attached herewith as Exhibit G generally refer to "NCTC employees," a defined term. In one instance, however, the procedures refer more broadly to "NCTC personnel." Specifically, in Section E., "Information in FBI General Indices," subsection 4 provides that "NCTC personnel may only access FBI general indices, or review section 702-acquired information from FBI general indices that has been ingested or transferred into NCTC systems, if they first receive training regarding these limitations." Ex. G. at p. 14. The reason for this difference in language is that "NCTC employees" does not include assignees from other agencies, and NCTC needs such assignees to have access to minimized information in FBI general indices, but not raw section 702-acquired information. This language regarding "NCTC personnel" is consistent with the language in the 2015 NCTC Section 702 minimization procedures pertaining to access to minimized information in FBI's general indices. *See also* Government's Ex Parte Submission of Reauthorization Certifications and Related

See Ex. G at p. 4. Queries of such information must be "reasonably likely to return foreign intelligence information, as defined in FISA." *Id.* at p. 7. Moreover, raw information, including metadata, is subject to a specific retention schedule and specific protections apply to attorney-client communications and the dissemination of information that contains nonpublicly available information of unconsenting U.S. persons. *Id.* at pp. 5, 8-12. The proposed NCTC minimization procedures also provide for retention and dissemination of information that is evidence of a crime, but not foreign intelligence information.¹⁰ NCTC may only retain or disseminate such

Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications, *In re DNI/AG 702(g) Certifications* [REDACTED] at 26 (filed Aug. 24, 2012).

¹⁰ ~~(S//NF)~~ Specifically, the proposed NCTC minimization procedures state that "[n]otwithstanding other provisions of these minimization procedures, information that is not foreign intelligence information, but reasonably appears to be evidence of a crime that has been, is being, or is about to be committed, may be retained and disseminated (including United States person identities) to the FBI and other appropriate federal law enforcement authorities, in accordance with 50 U.S.C. §§ 1806(b) and 1825(c), Executive Order No. 12333 (as amended), and any other applicable crimes reporting requirements or procedures." Ex. G at p. 4. In its Opinion approving FBI's provision of raw FISA Title I and III information to NCTC, the Court found this identical provision met the definition of minimization procedures in Section 1801(h)(3), which specifies that minimization procedures shall "allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes." (b)(1); (b)(3); (b)(7)(E) [REDACTED]

[REDACTED] Mem. Op. at p. 12 (FISA Ct. May 18, 2012).

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information for a law enforcement purpose. As this Court is aware, NCTC is not a law enforcement agency. NCTC's authorization to retain and disseminate evidence of a crime that is not foreign intelligence information—for law enforcement purposes only—is intended to provide NCTC, like NSA and CIA, with the flexibility to handle such information as necessary to fulfill its crimes reporting obligations, and to respond to any unanticipated need to retain or disseminate such information, while remaining consistent with 50 U.S.C. §§ 1801(h)(3), 1821(4)(C), and 1881a(e).

~~(S//NF)~~ While NCTC does not engage in its own collection under section 702 of the Act, the proposed minimization procedures for NSA and FBI allow NCTC to receive collection avoidance information from NSA and FBI. *See* Ex. B at p. 13, and Ex. D at p. 6. The proposed NSA and FBI minimization procedures submitted herewith allow for information sharing with NCTC for collection avoidance purposes because, *inter alia*,

~~(S//NF)~~ However, for section 702-acquired information obtained from FBI's general indices that NCTC determines is evidence of a crime, but does not reasonably appear to be foreign intelligence information or necessary to understand or assess the importance of foreign intelligence information, the crimes reporting obligations outlined in the proposed NCTC minimization procedures would not apply. *See* Ex. G at pp. 13-14. In these instances, the section 702-acquired information would have already been acquired, reviewed, minimized, and disseminated by the FBI, a law enforcement agency. Thus, NCTC would not have a need to retain the information, and "[i]f NCTC discovers any section 702-acquired information transferred from FBI general indices to NCTC systems that NCTC determines is evidence of a crime, but does not reasonably appear to be foreign intelligence information or necessary to understand or assess the importance of foreign intelligence information, NCTC shall promptly remove such information from all NCTC systems." *Id.* at p. 14.

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while NCTC does not engage in its own collection, a situation could arise in which NCTC is able to use the collection avoidance information to connect the dots and find another section 702 target who also should not be targeted. In addition, the information shared for collection avoidance purposes is generally only that which is necessary. For example, with regard to NSA, when FBI or CIA nominates a selector for section 702 acquisition, (b)(1); (b)(3); (b)(7)(E) NSA checks a specified database during the tasking process to ensure that the selector has not been previously identified as used by a United States person or a person located in the United States. If a CIA, FBI, or NCTC selector is not tasked pursuant to Section 702 (b)(1); (b)(3); (b)(7)(E) because it was flagged in the above-noted NSA database, then NSA would inform the relevant agency of the flag without providing additional information. NCTC would thus be on notice that the selector may not be suitable for future tasking, but would not be provided any detailed information regarding the selector.

~~(S//NF)~~ For the reasons provided, there is counterterrorism and analytic merit to the NSA and FBI sharing with NCTC raw information acquired under (b)(1); (b)(3); (b)(7)(E). The government respectfully submits that the proposed NSA, FBI, and NCTC minimization procedures submitted as Exhibits B, D, and G, respectively, meet the definition of minimization procedures as

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required by the Act, *see* 50 U.S.C. §§ 1801(h)(1), 1821(4), and 1881a(e)(1), and that the FBI targeting procedures submitted as Exhibit C to DNI/AG 702(g) Certifications [REDACTED]

[REDACTED] are reasonably designed to ensure that an acquisition authorized pursuant to subsection 702(a) of the Act is limited to targeting persons reasonably believed to be located outside the United States, and prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States, *see* 50 U.S.C. § 1881a(d).

(U) Additional Changes to the FBI Minimization Procedures

1. ~~(S//NF)~~ Revised (b)(1); (b)(3); (b)(7)(E) Language

~~(S//NF)~~ The government has modified the language in the proposed FBI minimization procedures, submitted herewith as Exhibit D, to permit the retention of section 702-acquired information subject to a [REDACTED]

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

[REDACTED] See Ex. D at p.

25. The currently applicable FBI minimization procedures do not address the FBI's retention of section 702-acquired information that has been improperly collected but is otherwise subject to a [REDACTED]

(b)(1); (b)(3); (b)(7)(E)

See FBI 2015 Minimization Procedures at pp. 24-25. Both the

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currently applicable and proposed NSA and CIA section 702 minimization procedures

address the retention of improperly collected information subject to a (b)(1); (b)(3); (b)(7)(E)

and the government has modified the proposed FBI minimization

procedures to be consistent with the existing provisions in the NSA and CIA

minimization procedures. See NSA 2015 Minimization Procedures at p. 9; CIA 2015

Minimization Procedures at p. 11; Ex. B at p. 9; and Ex. E at p. 11.

~~(S//NF)~~ Under the proposed FBI minimization procedures submitted herewith, if FBI and NSD determine that FBI shall retain specific section 702-acquired information

(b)(1); (b)(3); (b)(7)(E)

See *id.*

2. ~~(S//NF)~~ Clarification on Applicable Age-Off Period for Information that Appears to be Encrypted or to Contain Secret Meaning

~~(S//NF)~~ In its 2015 Memorandum Opinion, this Court suggested that the government make explicit in the FBI's minimization procedures the applicable age-off requirements for raw section 702-acquired information that appears to be encrypted or

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to contain secret meaning. Specifically, the Court stated that “[t]o avoid confusion regarding the applicable age-off requirements, the government is encouraged to make this calculation methodology [for section 702-acquired information that is encrypted or believed to contain secret meaning] explicit in future versions of these procedures.” *See* 2015 Mem. Op. at p. 20 n. 19. To address the issue raised by the Court, the government has modified the language in the proposed FBI minimization procedures to clarify that the retention time periods described in the procedures (b)(1); (b)(3); (b)(7)(E)

[REDACTED]

[REDACTED]

See Ex. D at pp.

26, 28. The government respectfully submits that this proposed calculation is consistent with the need to obtain and produce foreign intelligence information while minimizing the retention of nonpublicly available information concerning United States persons. In addition, the modified language is consistent with a similar provision in FBI’s Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under the Foreign Intelligence Surveillance Act, effective August 15, 2016. *See* Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act, (b)(1); (b)(3); (b)(7)(E) et al., at pp. 41-42 (filed May 17, 2016).

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~~TOP SECRET//SI//ORCON/NOFORN~~**(U) Reporting Requirements from the 2015 Memorandum Opinion**

~~(S)~~ In the 2015 Memorandum Opinion, the Court ordered the government to submit written reports on three specified issues: (i) NSA's retention of certain information in its [REDACTED] and [REDACTED] systems; (ii) NSA's or CIA's invocation of a provision allowing deviation from their minimization procedures "to comply with specific constitutional, judicial, or legislative mandates" (described above); and (iii) FBI's use of U.S. person queries in section 702-acquired communications that are not designed to find and extract foreign intelligence information. *See* 2015 Mem. Op. at p. 78. Separately, in its 2015 Memorandum Opinion, the Court ordered the government to appear at a hearing regarding certain identified compliance matters, including NSA's purging of data from its [REDACTED] repository. *See id.* at pp. 59-60, 79. The government provides the following updates concerning each of these four issues.

1. ~~(S//NF)~~ NSA's Retention of Data in [REDACTED] and [REDACTED]

~~(TS//SI//NF)~~ In the 2015 Memorandum Opinion, the Court directed the government to report further information regarding NSA's retention of certain categories of information in NSA's [REDACTED] and [REDACTED] tools. *Id.* at p. 78. In response, on December 18, 2015, the government submitted a detailed description of its three-phased plan and timeline for addressing the issues raised by the Court. NSA committed to (1) age-off historical FISA-acquired information in [REDACTED] and

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[REDACTED] according to the time periods set forth in the relevant minimization procedures; (2) delete all historical data subject to section 1809(a)(2) from [REDACTED] and [REDACTED] and (3) delete from [REDACTED] and [REDACTED] (a) incidentally acquired communications of or concerning a United States person that are clearly not relevant to the authorized purpose of the acquisition or that do not contain evidence of a crime which may be disseminated under the minimization procedures; (b) attorney-client communications that do not contain foreign intelligence information or evidence of a crime; and (c) "any instances in which the NSA discovers that a United States person or person not reasonably believed to be outside the United States at the time of targeting has been intentionally targeted under Section 702" In response to the Court's Order, the government provided the Court additional information regarding the retention of information in [REDACTED] and [REDACTED] at a section 702 compliance hearing held on February 11, 2016. The government provided an additional update to the Court in the supplemental letter discussed below.

~~(TS//SI//NF)~~ In a letter filed with the Court on September 22, 2016, the government explained that NSA completed its three-phased plan noted above and that all data collected as a result of unauthorized electronic surveillance as well as all other categories of information subject to purge or age-off pursuant to its section 702 targeting and minimization procedures have been removed from [REDACTED] and [REDACTED]

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In addition, NSA completed the design and implementation of measures to ensure that prospectively all such information will be timely removed from the two systems. As a result, the government assesses that NSA has completed all work necessary to address the issues identified in this matter and to bring [REDACTED] and [REDACTED] into compliance with statutory and minimization procedure requirements regarding purge and age-off.

2. (U) Compliance with Certain Legal Mandates

~~(S//NF)~~ As described above, in its 2015 Memorandum Opinion, the Court also raised concerns regarding the potential scope of a provision added to the NSA and CIA minimization procedures in 2015 stating that "[n]othing in these procedures shall prohibit the retention, processing, or dissemination of information reasonably necessary to comply with specific constitutional, judicial, or legislative mandates." See NSA 2015 Minimization Procedures at p. 1; CIA 2015 Minimization Procedures at p. 4-5; and 2015 Mem. Op. at pp. 21-23. Accordingly, the Court ordered that "[t]he government shall promptly submit in writing a report describing each instance in which NSA or CIA invokes [this] provision[.]" 2015 Mem. Op. at p. 78. Each report is to "describe the circumstances of the deviation from the procedures and identify the specific mandate on which the deviation was based." *Id.* The government has not filed

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any such reports since the Court issued its 2015 Memorandum Opinion because the government has not invoked the provision at issue to deviate from NSA's or CIA's section 702 minimization procedures.

3. ~~(S//NF)~~ Certain FBI Queries Designed to Identify Evidence of a Crime

~~(S//NF)~~ In addition, the Court found in its 2015 Memorandum Opinion, *inter alia*, that the querying provisions of FBI's minimization procedures struck a reasonable balance between the privacy interests of U.S. persons and persons in the United States and the government's national security interests, and found that FBI's use of those provisions to conduct queries designed to return evidence of crimes unrelated to foreign intelligence did not preclude the Court from concluding that taken together, the FBI's targeting and minimization procedures submitted with the 2015 Certifications were consistent with the requirements of the Fourth Amendment. *See* 2015 Mem. Op. at pp. 44-45. The Court also noted that, "according to the government, FBI queries designed to elicit evidence of crimes unrelated to foreign intelligence rarely, if ever, produce responsive results from the Section 702-acquired data." *Id.* at p. 44. To "reassure itself that this risk assessment is valid," the Court required the government to submit in writing a report concerning each instance after December 4, 2015, in which FBI personnel receive and review section 702-acquired information that FBI identifies as concerning a United States person in response to a query that is not designed to find

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and extract foreign intelligence information. *Id.* at pp. 44 and 78. Such reports are to 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. *Id.* at p. 78. The reports also are to identify the query terms used to elicit the information and provide FBI's basis for concluding that the query is consistent with the applicable minimization procedures. *Id.*

~~(S//NF)~~ In a letter filed on December 4, 2015, the government noted that there is no automated way for the FBI to track whether a query is run solely for a foreign intelligence purpose, to extract evidence of a crime, or both. However, the December 4, 2015 letter detailed the processes FBI put in place to attempt to identify those queries that are run in FBI systems containing raw section 702-acquired information after December 4, 2015, that are designed solely to extract evidence of a crime. In addition, the December 4, 2015 letter explained that FBI had issued guidance to its personnel about this reporting requirement and the process to enable FBI to centrally track such scenarios and report any such queries to NSD that would fall under the reporting requirement described above. Additionally, NSD conducts minimization reviews in multiple FBI field offices each year. As a part of these minimization reviews, NSD and FBI National Security Law Branch have emphasized the above requirements and processes during field office training. Further, during the minimization reviews, NSD

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audits a sample of queries performed by FBI personnel in the databases storing raw FISA-acquired information, including raw section 702-acquired information. Since December 2015, NSD has reviewed these queries to determine if any such queries were conducted solely for the purpose of returning evidence of a crime. If such a query was conducted, NSD would seek additional information from the relevant FBI personnel as to whether FBI personnel received and reviewed section 702-acquired information of or concerning a U.S. person in response to such a query. Since the above processes were put in place in December 2015, FBI and NSD have not identified any instance in which FBI personnel have received and reviewed section 702-acquired information of or concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information.

4. ~~(S//NF)~~ NSA's Purging of Data in [REDACTED]

~~(TS//SI//NF)~~ In a letter filed on September 22, 2016, the government provided an update on NSA's age-off process for FISA-acquired information in [REDACTED] an NSA mission management system. In prior notices filed with the Court on July 10, 2015, October 5, 2015, October 28, 2015, and January 14, 2016, the government explained that with the exception of section 702 upstream data acquired prior to October 31, 2011, and not otherwise exempt from purge because it was not identifiable as section 702 upstream collection, NSA had removed from [REDACTED] neither records

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associated with purged section 702 collection nor records of domestic communications that had been marked in another system with the disposition code (b)(3)¹¹ and added to NSA's Master Purge List (MPL).¹² NSA implemented the necessary system changes to effectuate the deletion of records in [REDACTED] associated with identifiers that are on the MPL, irrespective of the authority under which the data was acquired or the reason for the purge. The January 14, 2016, notice indicated that NSA was continuing to address the removal from [REDACTED] of historical section 702-acquired records subject to purge, as well as records of domestic communications that had been marked in another system with the disposition code (b)(3) and added to NSA's MPL. As of February 2016, NSA completed the removal from [REDACTED] of historical section 702-acquired records subject to purge, as well as records of domestic communications that had been marked in another system with the disposition code (b)(3) and added to NSA's MPL.

¹¹ ~~(TS//SI//NF)~~ In accordance with NSA's Standard Minimization Procedures for the relevant authorities, communications fitting specific characteristics (e.g., FISA Title I or section 702 communications identified as "domestic communications") must be destroyed unless an exception is applicable. As previously described to the Court, to implement this destruction requirement, NSA personnel mark domestic communications that should be destroyed with the disposition code (b)(3).

¹² ~~(S//NF)~~ Following the Court's May 13, 2011, Order regarding the retention of unauthorized collection in [REDACTED] NSA began deleting from [REDACTED] records associated with Title I and section 704/705(b) collection that NSA determined were subject to purge in connection with compliance incidents reported to the Court in Rule 13 filings.

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~~(S//NF)~~ In addition, as noted in the January 2016 notice, [REDACTED] is not configured to age-off FISA-acquired information pursuant to the relevant minimization procedures, with the exception of section 702 upstream data acquired prior to November 1, 2011. As of August 3, 2016, NSA aged-off from [REDACTED] section 702 information identified as being over the retention limit pursuant to the retention time periods in the section 702 minimization procedures and, moving forward, is aging off section 702 information in [REDACTED] prior to the information reaching the applicable retention limit. Furthermore, as of September 4, 2016, NSA has restricted access to FISA Title I information identified as being over the retention limit in NSA's FISA Title I minimization procedures to [REDACTED] system administrators. As a result, analysts and collection management personnel no longer have access to FISA Title I data in [REDACTED] that has reached its retention limit. NSA plans to remove over-retained FISA Title I information by the end of December 2016. While moving forward with age off, NSA is performing verification activities to ensure appropriate age off of FISA-acquired information.

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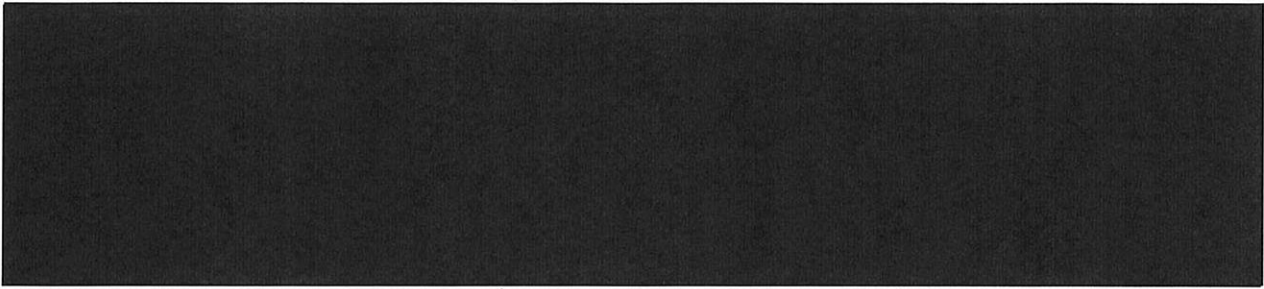
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(U) Conclusion

~~(S//OC/NF)~~ DNI/AG 702(g) Certifications [REDACTED] contain all of the elements required by the Act, and the targeting and minimization procedures submitted with these certifications are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Likewise, the amended minimization procedures to be used in connection with foreign intelligence information acquired in accordance with DNI/AG 702(g) Certifications [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Accordingly, the government respectfully requests that this Court enter orders pursuant to subsection 702(i)(3)(A) of the Act approving: DNI/AG 702(g) Certifications [REDACTED] the use of the targeting and minimization procedures attached thereto as Exhibits A, B, C, D, E, and G in connection with acquisitions of foreign intelligence information in accordance with those certifications; and the use of the minimization procedures attached as Exhibits B, D, E, and G to DNI/AG Certifications [REDACTED] in connection with foreign intelligence information acquired in accordance with DNI/AG 702(g) Certifications [REDACTED]

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Respectfully submitted,

John P. Carlin
Assistant Attorney General

Stuart J. Evans
Deputy Assistant Attorney General

(b)(6); (b)(7)(C)

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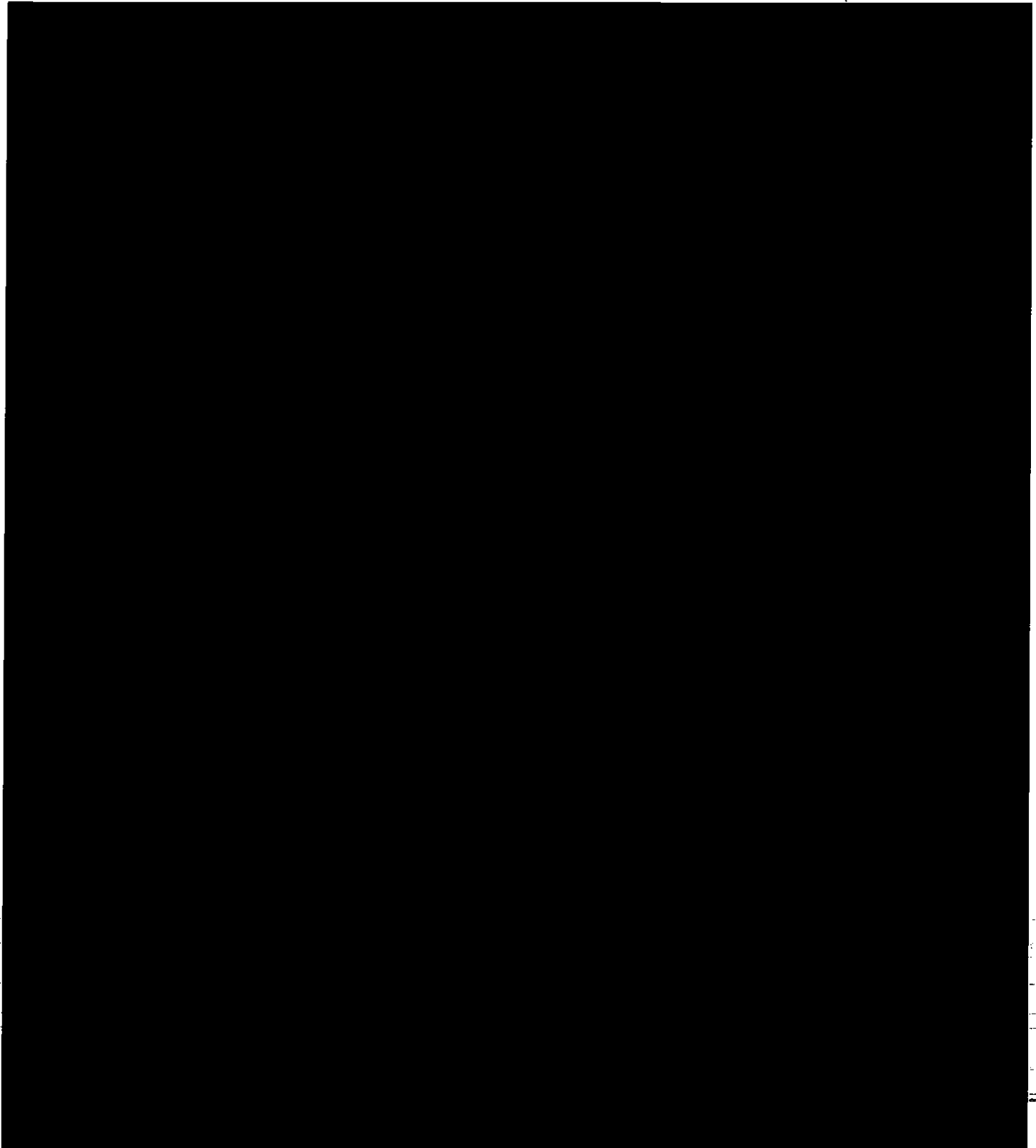


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National Security Division
U.S. Department of Justice

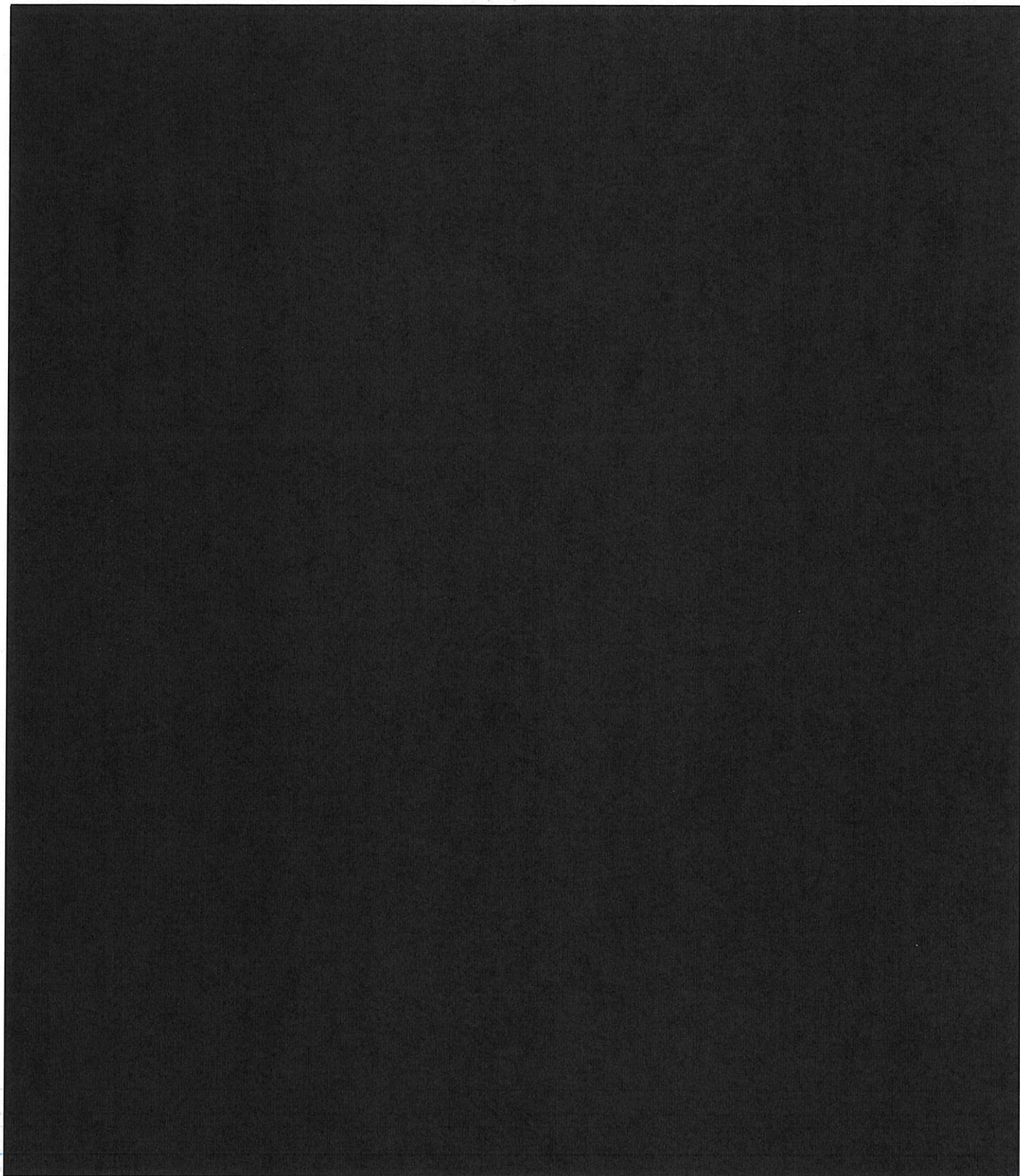
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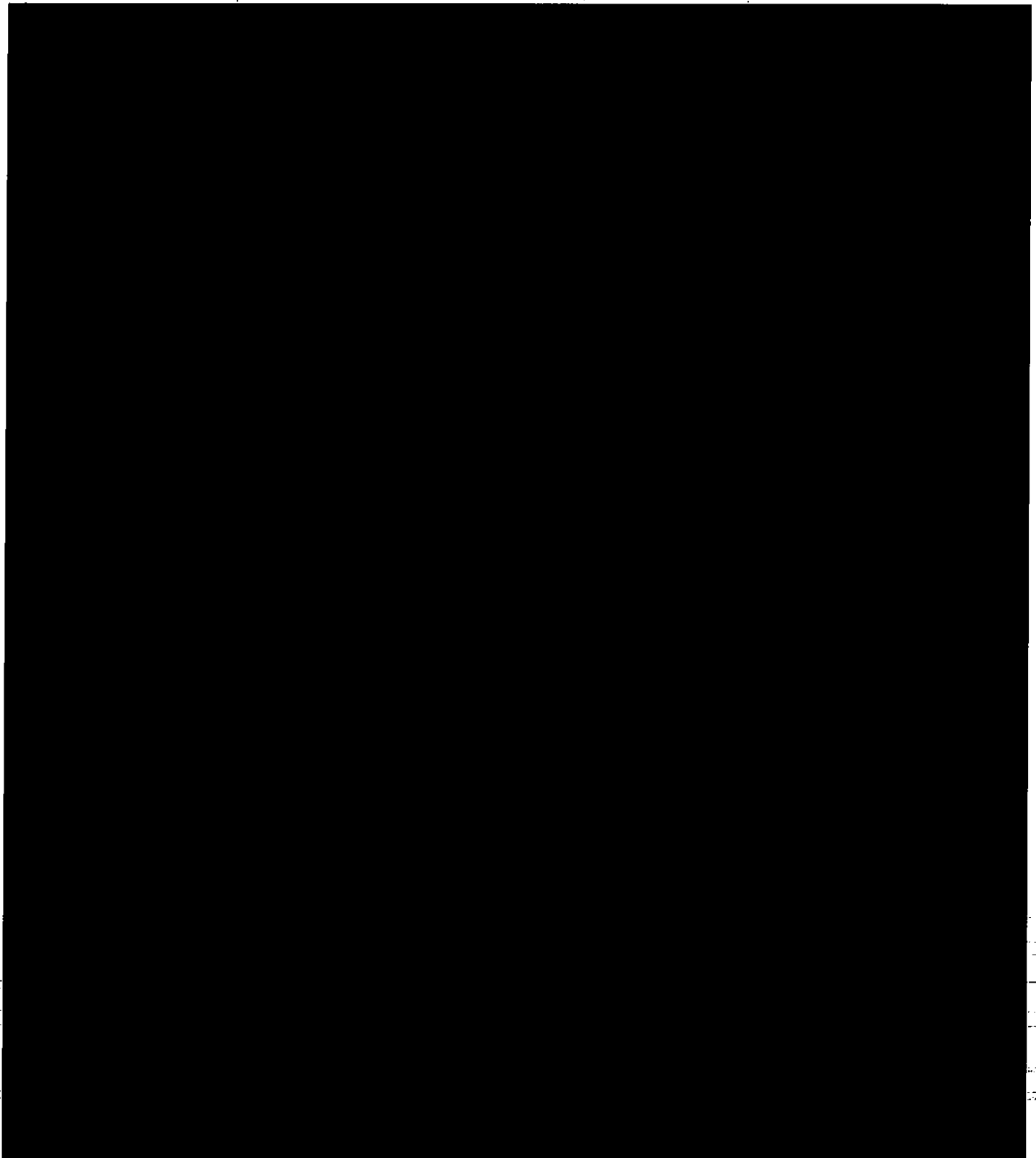


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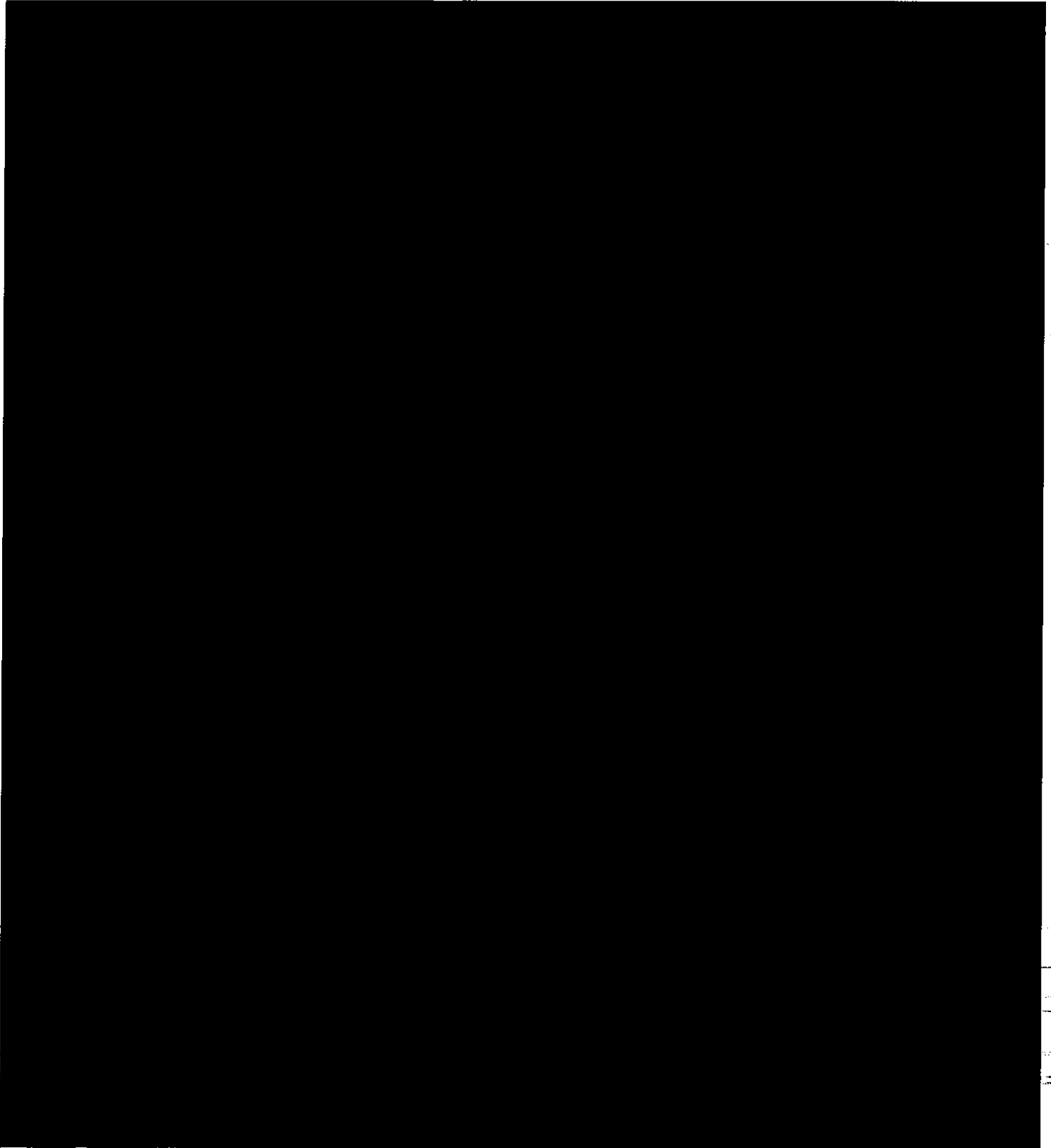


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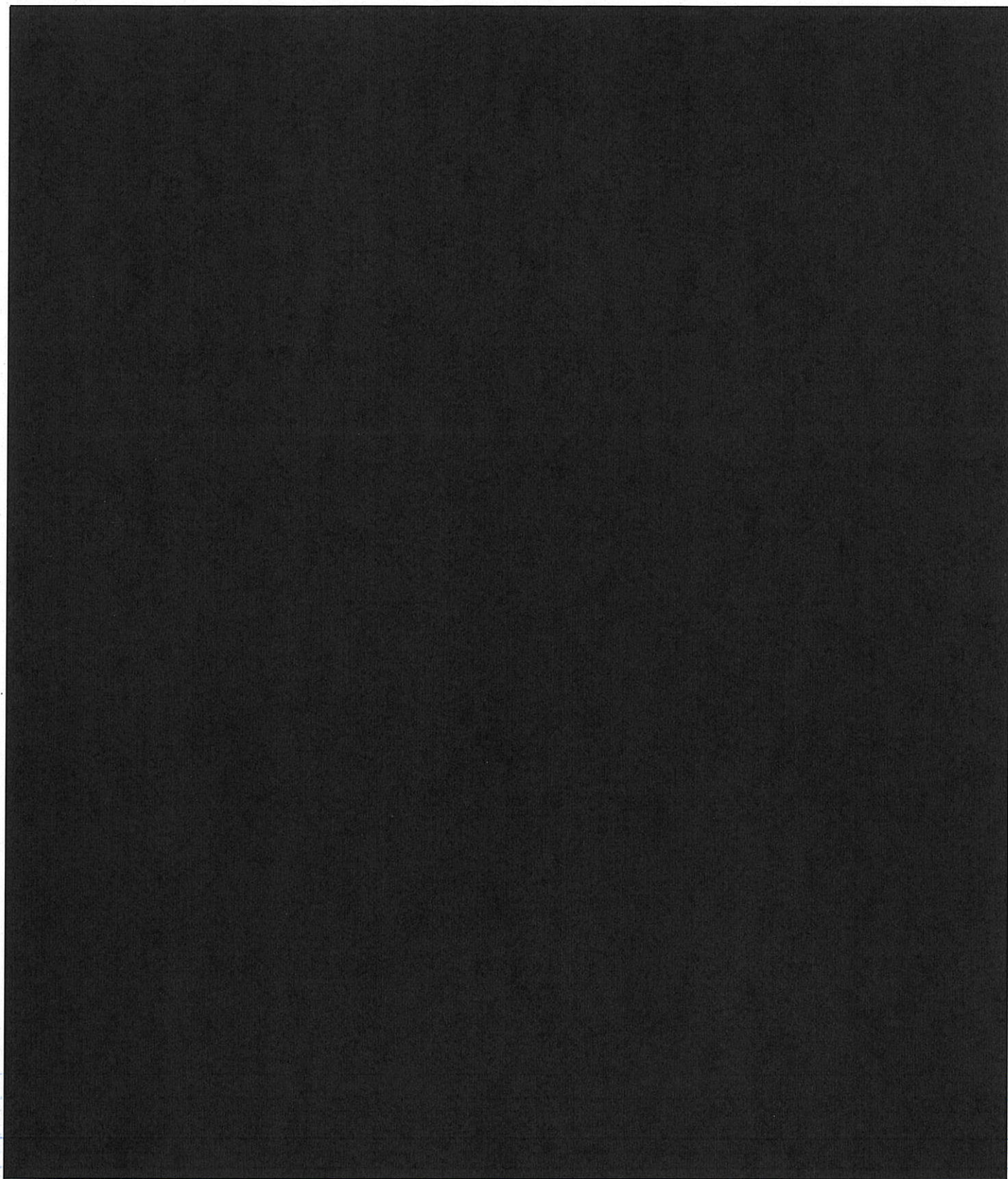
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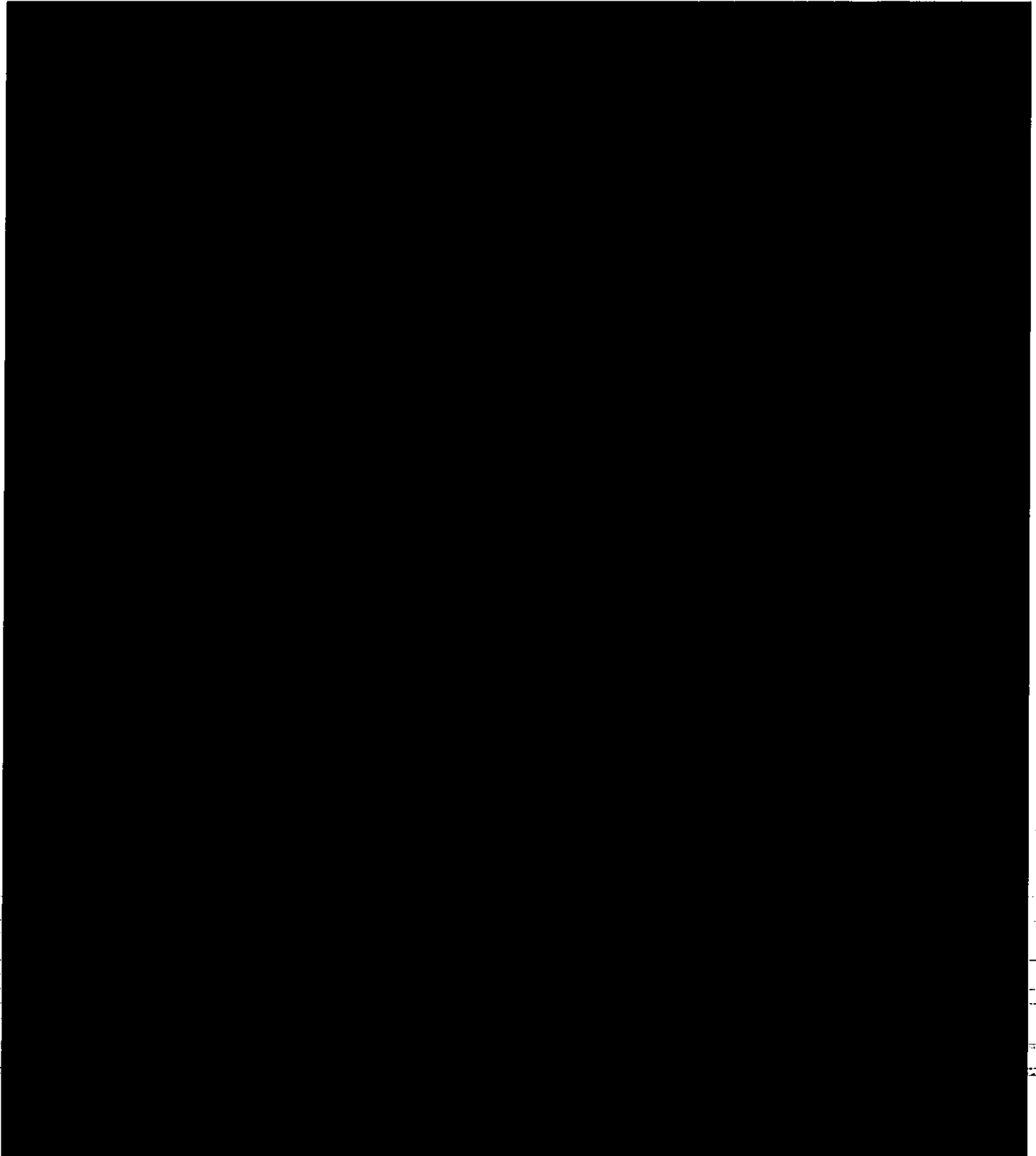


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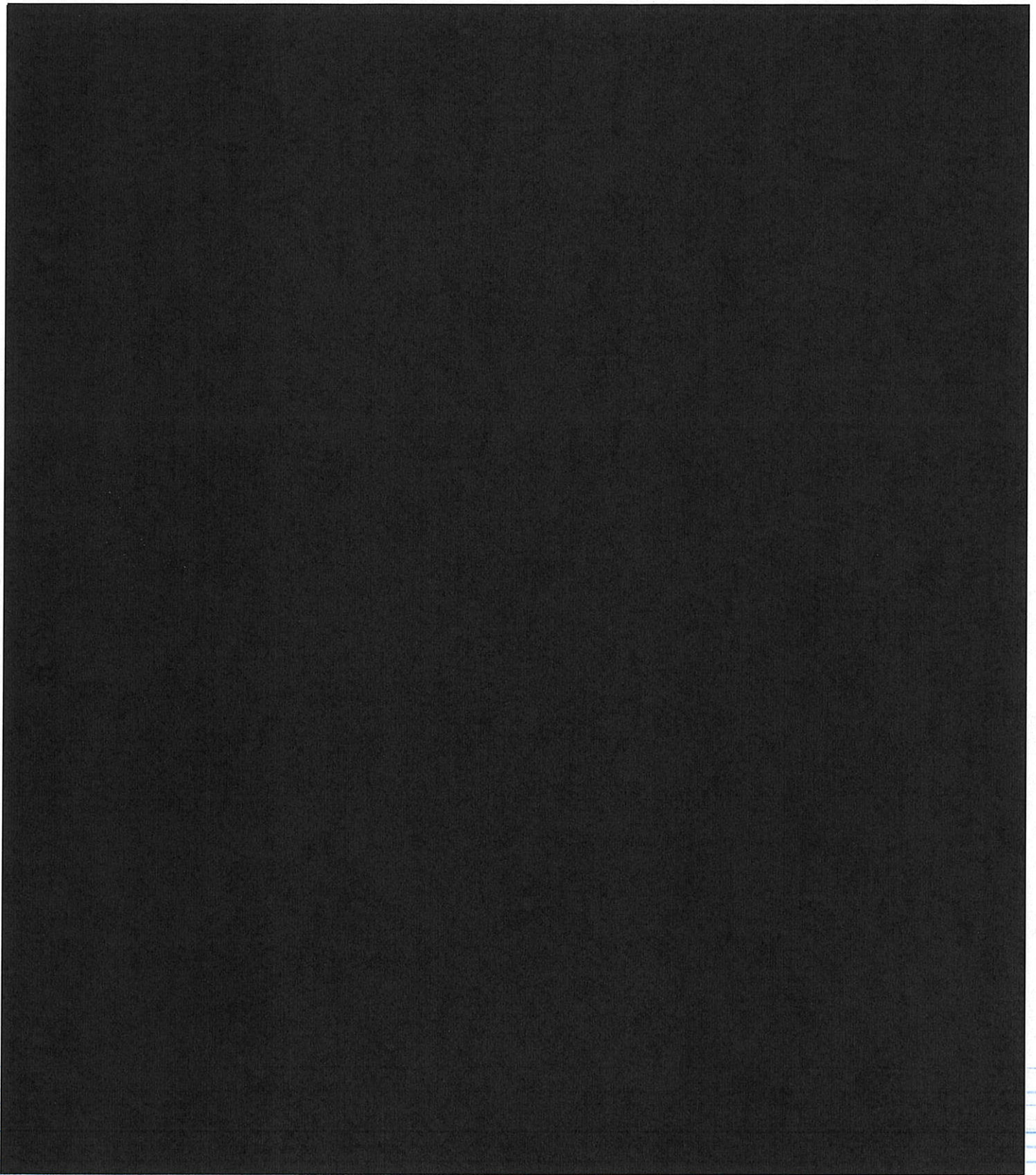
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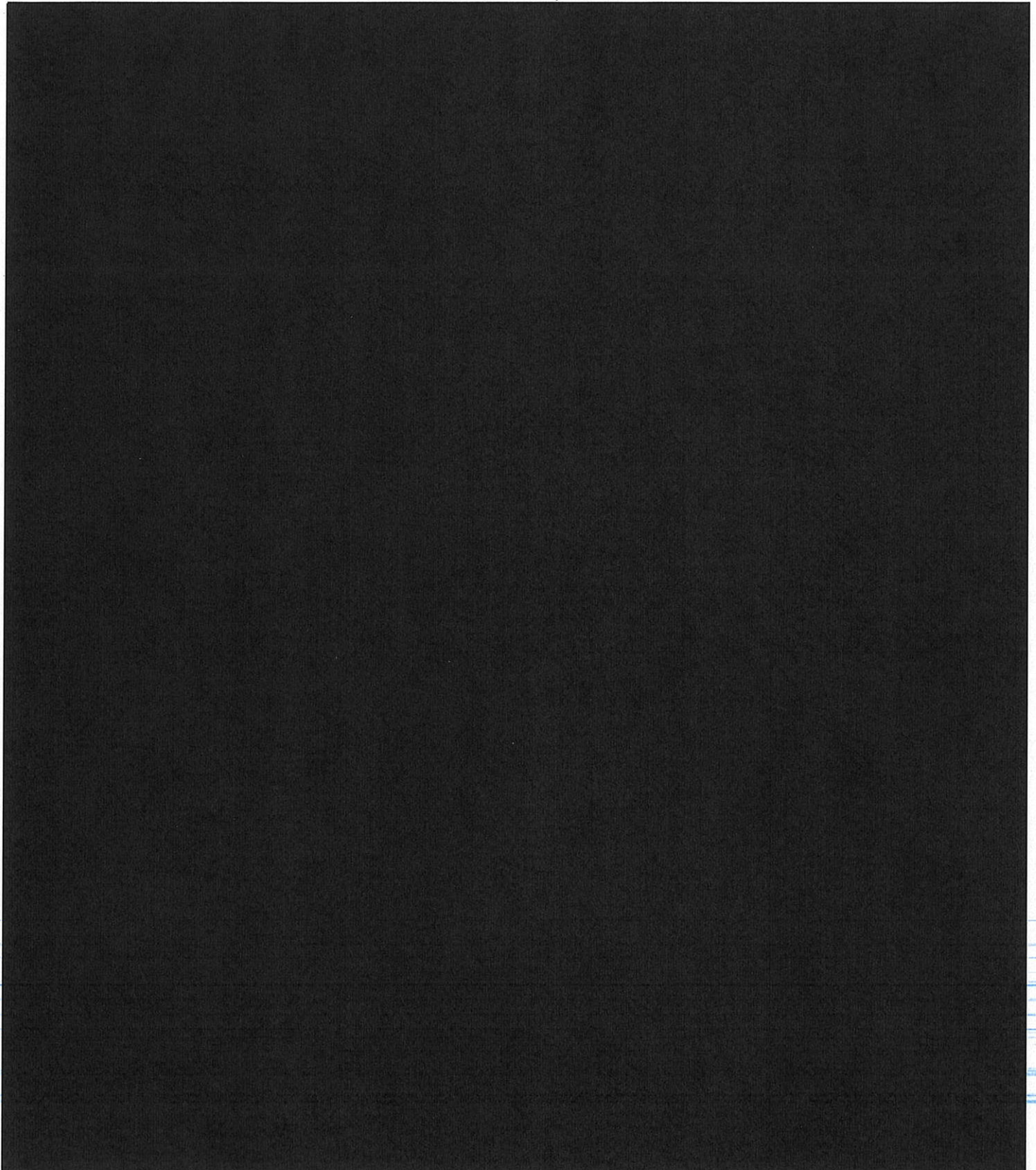


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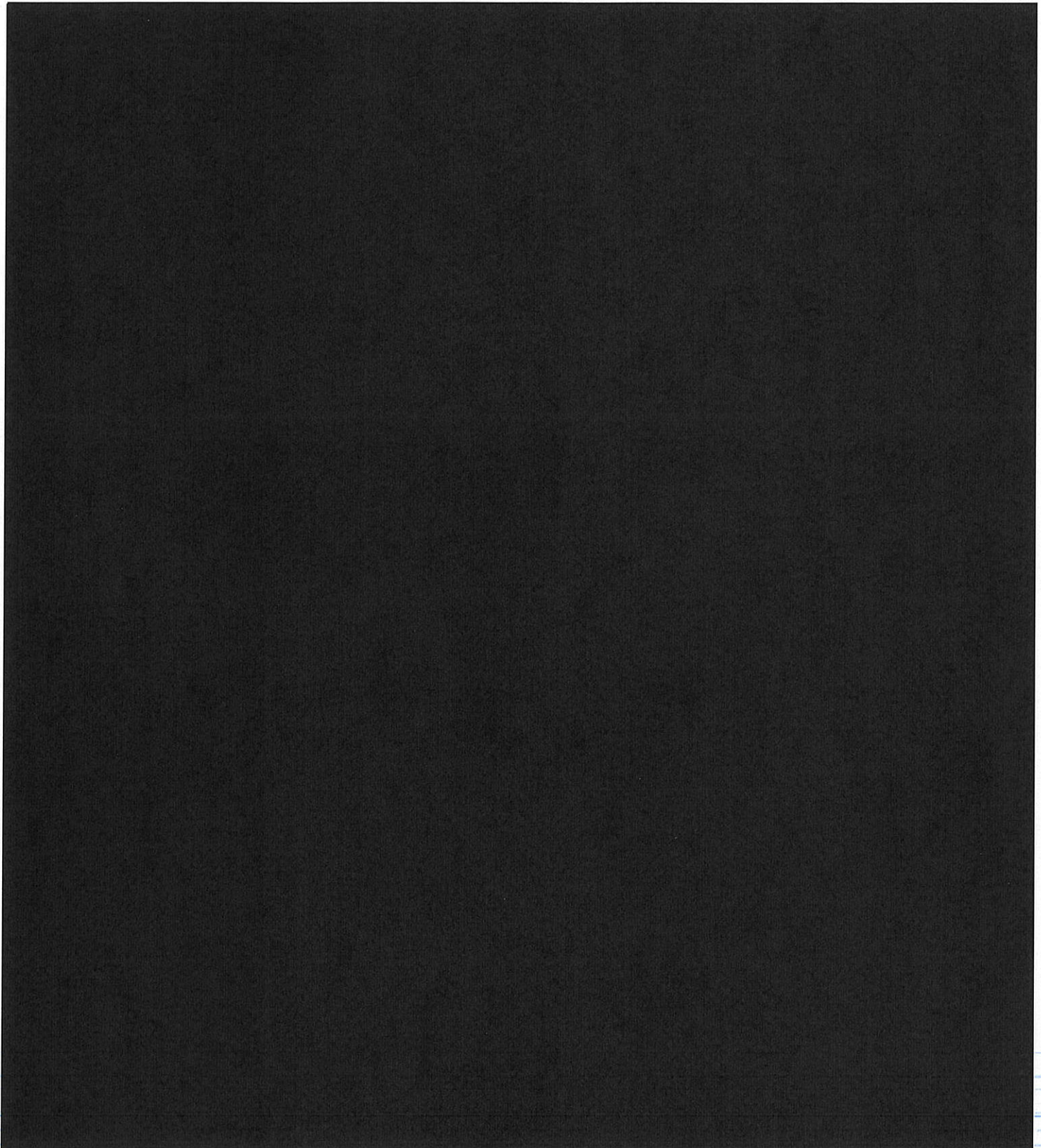


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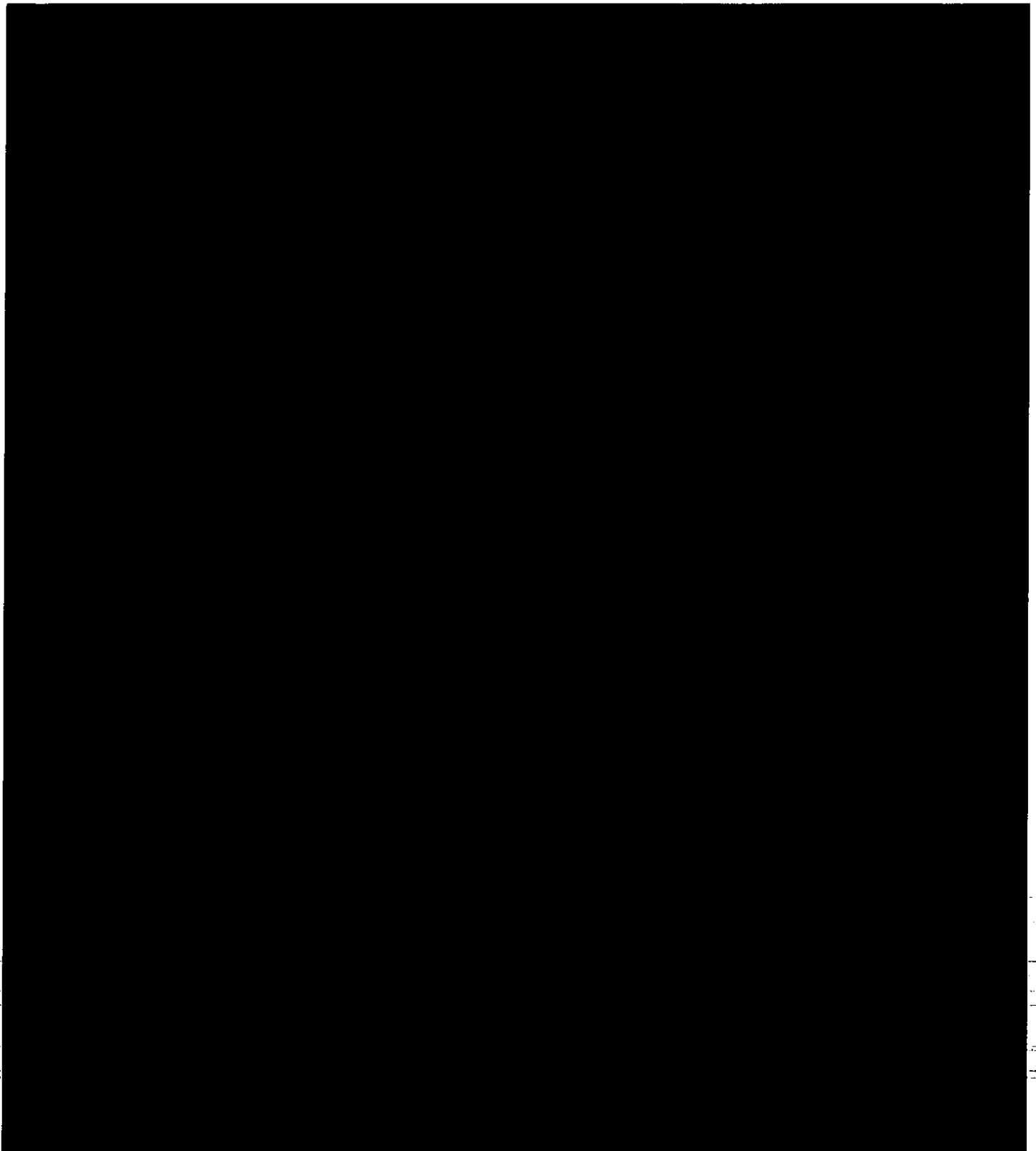


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