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

SEP -2 PM 1:36
CLERK

IN RE DNI/AG 702(g) CERTIFICATION

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

~~UNDER SEAL~~

Docket No. 702(i)-08-01

NOTICE OF CLARIFICATION AND CORRECTION (U)

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, submits the following clarifications and corrections related to certain documents previously submitted to this Court in the above-referenced matter: (U)

I. CLARIFICATIONS (U)

National Security Agency (NSA) Targeting Procedures ~~(S)~~

1. The second paragraph under the heading "Assessment of the Non-United States Person Status of the Target" on page 4 of NSA's targeting procedures, provides:

~~(S)~~ Furthermore, in order to prevent the **inadvertent** targeting of United States persons, NSA [REDACTED]

[REDACTED]

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Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: ~~1 September 2033~~

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The term inadvertent, as used in this provision of the NSA targeting procedures, refers to the erroneous determination of the non-United States person status of a target. This provision of the targeting procedures does not implicate 50 U.S.C. § 1806(i), because the provision relates to the U.S. person status of the target and not whether the acquisition by NSA was intentional or unintentional. ~~(S)~~

2. The fifth paragraph under the heading "IV. (U) OVERSIGHT AND COMPLIANCE" on page 9 of the NSA's targeting procedures, provides:

~~(S)~~ In the event that NSA concludes that a person is reasonably believed to be located outside the United States and after targeting this person learns that the person is inside the United States, or if NSA concludes that a person who at the time of targeting was believed to be a non-United States person was in fact a United States person, it will take the following steps:

1. Terminate the acquisition without delay and determine whether to seek a Court order under another section of the Act. If NSA **inadvertently** acquires a communication sent to or from the target while the target is or was located inside the United States, including any communication where the sender and all intended recipients are reasonably believed to be located inside the United States at the time of acquisition, such communication will be treated in accordance with the applicable minimization procedures. (emphasis added) ~~(S)~~

The term "inadvertently," as used in this provision of the NSA targeting procedures, refers to the erroneous determination of the location of the target. The term does not refer to NSA's decision to target a person reasonably believed to be outside the United States to acquire foreign intelligence information under section 702 of FISA.

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As noted in the Government's section 1806(i) analysis submitted to this Court on August 28, 2008, under section 702, the Attorney General and the Director of National Intelligence "may authorize jointly . . . the targeting of persons reasonably believed to be outside the United States to acquire foreign intelligence information." This reasonable belief standard allows for an inadvertent erroneous determination of location and recognizes that a target's location may change before the Government learns of the movement. The reasonable belief standard (as well as separate provisions of section 702) preclude the Government from "intentionally target[ing] any person known at the time of the acquisition to be located in the United States," section 702(b)(2), and from "intentionally acquir[ing] any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States," section 702(b)(4). Thus, provided that, at the time of the acquisition, the target was reasonably believed to be outside the United States (and thus not "known" to be here), the acquisition is authorized by section 702. Section 1806(i) provides no limitation on the use of the information because the NSA's acquisition remains intentional even where the target is mistakenly, but reasonably, believed to be outside the United States. ~~(S)~~

National Security Agency Minimization Procedures ~~(S)~~

3. Section 3(b)(1) of the NSA's minimization procedures at page 3 provides:

Personnel shall exercise reasonable judgment in determining whether information acquired must be minimized and shall destroy inadvertently

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acquired communications of or concerning a United States person at the earliest practicable point in the processing cycle at which such communication can be identified either: as clearly not relevant to the authorized purpose of the acquisition (e.g., the communication does not contain foreign intelligence information); or, as containing evidence of a crime which may be disseminated under these procedures. Inadvertently acquired communications of or concerning a United States person may be retained no longer than five years in any event. The communications that may be retained include electronic communications acquired because of limitations on NSA's ability to filter communications. (~~S//SI~~) (emphasis added)

This provision relates to minimization and does not implicate section 1806(i).

Section 3(a), which immediately precedes section 3(b)(1), imposes a general requirement to conduct the authorized acquisition in "a manner designed, to the greatest extent reasonably feasible, to minimize the acquisition of information not relevant to the authorized purpose of the acquisition." Section 3(b)(1) relates to the minimization of communications of or concerning U.S. persons that are neither relevant to the foreign intelligence purpose of the acquisition nor evidence of a crime. (~~S//SI~~)

The phrase "inadvertently acquired" in this context refers to an acquisition of such a communication notwithstanding reasonable steps taken "to minimize the acquisition of information not relevant to the authorized purpose of the acquisition." In this connection, the "inadvertence" does not relate to the intentional or unintentional character of the acquisition as described in the Government's analysis of section 1806(i). Nor does it relate to the correctness of the Government's belief that the target is a non-U.S. person located overseas. The minimization requirement of section 3(b)(1) applies

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equally to all communications acquired and retained by the Government — whether the collection is intentional or unintentional, and without regard to the correctness of the Government's belief as to the location or U.S. person status of the target. ~~(S//SI)~~

For example, this provision would apply with equal force to: (i) a communication unintentionally acquired based on a typographical error but retained in the discretion of the Attorney General pursuant to section 1806(i) because the contents indicates a threat of death or serious bodily harm; (ii) a communication intentionally acquired pursuant to section 702(a) where the sender and all intended recipients are in fact located in the U.S. at the time of acquisition, but where the Government did not know at the time of acquisition that it was intentionally acquiring a purely domestic communication, which is retained in the discretion of the Director of the NSA for any of the reasons provided in section 5 of the NSA's minimization procedures; and (iii) a foreign communication of a non-U.S. person intentionally acquired pursuant to section 702(a). In sum, the use of the phrase "inadvertently acquired" in section 3(b)(1) of the NSA's minimization procedures relates strictly to minimization, and does not implicate section 1806(i). ~~(S//SI)~~

4. Section 3(b)(6) of the NSA's minimization procedures at page 4 provides:

Further processing, retention and dissemination of foreign communications shall be made in accordance with Sections 4, 6, and 7, as applicable, below. Further processing, storage and dissemination of **inadvertently** acquired domestic communications shall be made in accordance with Sections 4 and 5 below. ~~(S//SI)~~ (emphasis added)

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The term "inadvertently," as used in this provision of the NSA minimization procedures, refers again to the erroneous determination of the location of the target. Accordingly, for the same reasons set out in paragraph 2 above, NSA's acquisition is authorized by section 702 and section 1806(i) provides no limitation on the use of the information, because the NSA's acquisition remains intentional even where the target is mistakenly, but reasonably, believed to be outside the United States. ~~(S)~~

II. CORRECTIONS

National Security Agency Minimization Procedures ~~(S)~~

5. At Tab 1 to this Notice, the Government respectfully submits a substitute page 3 of the NSA minimization procedures for the purpose of correcting two typographical errors found in paragraph 3(b)(1). The corrections include: (a) adding the word "not" in the sixth line of paragraph 3(b)(1) between the words "as containing"; and (b) replacing the misspelled word "Inadvertantly" with its correct spelling – "Inadvertently" – in line 7 of the paragraph. ~~(S//SI)~~

Federal Bureau of Investigation Minimization Procedures ~~(S)~~

6. At Tab 2 to this Notice, the Government respectfully submits a substitute first page to the FBI minimization procedures for the purpose of correcting the following typographical error: the removal of the included word "not" between the words "is a" in the last line of paragraph b.1. ~~(S//NF)~~

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Central Intelligence Agency Minimization Procedures ~~(S)~~

7. At Tab 3 to this Notice, the Government respectfully submits a substitute first page to the CIA minimization procedures for the purpose of including the omitted word "communications" between the words "unminimized the" in the first line of the first paragraph. (U)

Respectfully submitted,

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National Security Division
United States Department of Justice

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