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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

**BRIEF OF AMICUS CURIAE**

On July 15, 2015, the government submitted to this Court [redacted] certifications and accompanying targeting and minimization procedures (collectively, "the 2015 Certifications") seeking approval of the government's activities under Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), codified at 50 U.S.C. Section 1881a. The Court found that this matter raised "one or more novel or significant interpretations of the law" requiring the appointment of amicus curiae, and on August 13, 2015, the Court issued an Order ("Order") appointing me to serve as amicus curiae under section 103(i)(2)(B) of the FISA, 50 U.S.C.



ACLU 16-CV-8936 (RMB) 00049

Section 1803(i)(2)(B), as amended by the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268.

The Order directed me to address whether the minimization procedures that accompany the 2015 Certifications (a) meet the definition of minimization procedures under 50 U.S.C. Section 1801(h) or Section 1821(4), as appropriate, and (b) are consistent with the Fourth Amendment, with respect to two specific provisions of those procedures. Specifically, the Order directed me to address the provisions that apply to (i) queries of information obtained under section 702 that may be designed to return information concerning U.S. persons; and (ii) preservation for litigation purposes of information otherwise required to be destroyed under the applicable minimization procedures. Order, at 4. I will address these issues separately in turn.

Before turning to the issues, some background information may be helpful for purposes of the record regarding my appointment and service as amicus. The Order designating my appointment was issued on August 13, 2015. On August 23, 2015, I was provided with a copy of that Order and received a briefing from Judge Hogan and the staff of the Foreign Intelligence Surveillance Court ("FISC") concerning the questions presented. [redacted] This material included the Court's several Orders relating to the amicus appointment; the government's explanatory memorandum or "Cover Note," entitled "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" ("Cover Note"), along with the relevant DNI/AG certifications and targeting and minimization

procedures (in both clean form and in redlined form reflecting changes from the 2014 procedures) and other exhibits that were submitted to the Court with the 2015 Certifications; and [redacted] prior FISC or FISA Court of Review decisions relating to the Section 702 program and the issues I was directed to address. I was also provided with the unclassified Privacy and Civil Liberties Oversight Board ("PCLOB") Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, issued on July 2, 2014 ("PCLOB Report").

I already possessed a security clearance issued by the Department of Justice ("DOJ") for other matters, and that clearance was verified by the DOJ's Security and Emergency Planning Staff ("SEPS") for purposes of this assignment. I do not have regular access to a facility where I can keep classified information, however, so I was not able to take possession of any of the classified materials. I was provided access to a secure conference room in the SEPS offices at 145 N Street, NE, where I could work and have access to the classified materials. SEPS personnel assisted with providing access to the conference room and the classified materials and secured the classified materials when I was not using them. While the space was not available after 5:00 pm in the evening or on weekends or during periods of unexpected government closures (such as during the Pope's September visit to Washington), I had access during regular work hours.[1]

My understanding of my role as amicus was informed by the statute, 50 U.S.C. Section 1803(i), as well as the Court's Orders and my briefing from the Court. Section 1803(i)(4) sets

[1] In addition, the FISC staff provided access to secure space at the Courthouse on one federal holiday and one evening after hours.

forth the specific duties of amicus curiae. The duties relevant to this assignment include providing "legal arguments that advance the protection of individual privacy and civil liberties" or "legal arguments or information regarding any other area relevant to the issue presented to the court" as appropriate. 50 U.S.C. Sections 1803(i)(4)(A) and (C). In order to understand and present these arguments, I reviewed the PCLOB report and the written submissions and testimony before the PCLOB for its hearings on Section 702 surveillance, as well as commentary on Section 702 from academic experts and non-government advocacy groups. In addition, I met with attorneys from the DOJ National Security Division (NSD) Office of Intelligence, who answered specific questions about the operation of the Section 702 program and their oversight of it. I also met with a member of the PCLOB, and again asked questions to ensure that I fully understood the concerns that motivated the PCLOB's recommendations. See 50 U.S. C. Section 1803(i)(6)(A)(ii). With that background, I should explain that I was not instructed to serve as an advocate for any particular point of view, but as an amicus to the Court. This Brief contains my opinion and recommendations on the issues presented based on the material that I have reviewed and my analysis of those issues.[2]

[2] I have some familiarity with FISA and the government's surveillance programs generally due to my previous government service (in particular as Counselor to the Attorney General for national security and international matters and as Chief of the National Security Section for the U.S. Attorney's Office for the District of Columbia). That background in intelligence collection and national security law satisfies the criteria of Section 1803(i)(3)(A). I have never worked in the National Security Division or worked directly on the Section 702 program, however, so the attorneys representing the government in this matter will have far greater familiarity with the program. That said, I understand the Court's need for an independent view of the issues I was directed to address and am honored to serve the Court in this capacity.

I. Queries Designed to Return Information Concerning U.S. Persons

The use of queries to search the information collected under Section 702 for the communications of specific U.S. persons was one of the areas in which the PCLOB Report made specific recommendations for improvement. The PCLOB spent more than a year studying and debating the Section 702 program, including holding numerous public hearings and receiving written submissions from a wide variety of government officials, academic experts, interest groups, and any interested parties who chose to submit views. Given the PCLOB's bipartisan makeup, the record of its serious and diligent effort to understand the program, and the thoroughness and high quality of its Report, I give its recommendations great weight.

A. Background

The PCLOB Report contains a thorough explanation of the Section 702 surveillance program. That description is set forth on pages 16-79 of the Report. For purposes of my analysis, I have relied upon the PCLOB Report's explanation of how the Section 702 program operates as well as the Report's description of the principal safeguards in place (as of the date the Report was issued) to protect privacy and civil liberties interests.

Section 702 provides for the joint authorization by the Attorney General and Director of National Intelligence of "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. Section 1881a(a). The principal limitations to the Section 702 program are statutory. Specifically, the authorization of acquisitions under Section 702 must comply with Section 702(b), which provides:

An acquisition under subsection (a)--

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and

(5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.[3]

50 U.S.C. Section 1881a(b). Acquisition under subsection (a) must also be conducted in accordance with targeting and minimization procedures that are adopted by the Attorney General, in consultation with the Director of National Intelligence, and subject to judicial review. 50 U.S.C. Section 1881a(c)(1)(A) and 50 U.S.C. Section 1881a(d) and (e).

Minimization procedures with respect to electronic surveillance are defined in 50 U.S.C. Section 1801(h):

"Minimization procedures" . . . means—

specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.

[3] "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.

50 U.S.C. Section 1801(h)(1).

As those limitations make clear, the program is directed at communications of non-U.S. persons located outside the United States. U.S. persons may not be targets of collection, so the collection of their communications is "incidental" to the program's purpose and requires strict procedures to ensure that the information is treated appropriately. The PCLOB Report thus rightly focused on the querying of the collection using U.S. person identifiers as warranting particular scrutiny to ensure that the privacy and civil liberties interests of U.S. persons are adequately protected.

B. PCLOB Recommendations

While the PCLOB Report concluded that "the core of the Section 702 program" was reasonable under the Fourth Amendment, it identified three aspects of the program as areas of concern and issued recommendations to improve upon existing policies and practices in order to further strengthen protections under the program in those areas. As stated in the PCLOB Report's Executive Summary:

> On the whole, the text of Section 702 provides the public with transparency into the legal framework for collection, and it publicly outlines the basic structure of the program. The Board concludes that PRISM collection is clearly authorized by the statute . . . . The Board also concludes that the core of the Section 702 program - acquiring the communications of specifically targeted foreign persons who are located outside the United States, upon a belief that those persons are likely to communicate foreign intelligence, using specific communications identifiers, subject to FISA court-approved targeting rules and multiple layers of oversight - fits within the 'totality of the circumstances' standard for reasonableness under the Fourth Amendment, as that standard has been defined by the courts to date. Outside of this fundamental core, certain aspects of the Section 702 program push the program close to the line of constitutional reasonableness. Such aspects include the unknown and potentially large scope of incidental collection of U.S. persons' communications, the use of 'about'

> collection to acquire Internet communications that are neither to nor from the target of surveillance, and the use of queries to search for the communications of specific U.S. persons within the information that has been collected.

PCLOB Report at 8-9. The Court has directed me to address the third of those aspects – the use of queries to search for communications of specific U.S. persons.

The PCLOB Report made two specific recommendations to address its concerns with the use of U.S. person identifiers for querying Section 702-acquired information. The government has thoughtfully considered these recommendations and has made several changes to the Section 702 program in response.

PCLOB's Recommendation 2 focused on the FBI's use of U.S. person queries and made two specific suggestions:

> The FBI's minimization procedures should be updated to more clearly reflect the actual practice for conducting U.S. person queries, including the frequency with which Section 702 data may be searched when making routine queries as part of FBI assessments and investigations. Further, some additional limits should be placed on the FBI's use and dissemination of Section 702 data in connection with non-foreign intelligence criminal matters.

PCLOB Report, at 11-12.

Recommendation 3 suggested changes to the NSA and CIA minimization procedures governing U.S. person queries:

> The NSA and CIA minimization procedures should permit the agencies to query collected Section 702 data for foreign intelligence purposes using U.S. person identifiers only if the query is based upon a statement of facts showing that it is reasonably likely to return foreign intelligence information as defined in FISA. The NSA and CIA should develop written guidance for agents and analysts as to what information and documentation is needed to meet this standard, including specific examples.

PCLOB Report, at 12. The use of U.S. person queries was also the subject of two separate statements, each signed by two PCLOB members, as described more fully below.

C. Scope of Collection of U.S. Person Communications

The use of U.S. person queries must be examined in the context of the scope of Section 702 collection. It is worth noting how the PCLOB's other concerns, relating to the scope of incidental and "about" collection, bear upon this analysis. The use of U.S. person identifiers in the querying process is of greater concern when considered in the context of the larger concerns with the scope of the information being queried. The Court has not directed me to examine the scope of "incidental" and "about" collection more broadly, but the PCLOB's concerns about the use of U.S. person identifiers to query the data are heightened due to the concerns that "incidental" and "about" collection result in a large and unknown quantity of U.S. person communications. (The incidental collection of U.S. person communications is the more relevant category given that the NSA does not query its "upstream" collection using U.S. person identifiers.[4])

The "incidental" collection of communications of U.S. persons under Section 702 is "incidental" only in that the communications are not targeted based on the U.S. person involved. Yet some of those communications are the most important communications obtained under Section 702, to the extent that they may reveal U.S.-based operatives communicating with foreign targets about terrorist plots, weapons of mass destruction, or other threats in the United States. In other words, while the U.S. person involved in an incidentally acquired

[4] 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 (Exhibit B to the 2015 Certifications) ("NSA Minimization Procedures"), Section 3(b)(5).

communication would not (by definition) be the target of Section 702 collection, that person's communication may be highly relevant to the purpose of the collection – as the ultimate purpose of the program is to collect foreign intelligence information (and in so doing to protect national security). This point is worth bearing in mind in the context of analyzing the querying process.

Yet the concerns with incidental collection are not with the would-be plotter and those in communication with him. Those communications are at the extreme end of the spectrum, where the justification for collecting and querying the communications is strongest. But not all Section 702 targets are international terrorists. [redacted]

[redacted] These scenarios suggest a potentially very large and broad scope of incidental collection of communications between lawful targets and U.S. persons that are not the type of communications Section 702 was designed to collect.[5] This area of collection is where the privacy interests in the U.S. persons' communications that are incidentally collected are strongest.

D. Analysis of Minimization Procedures

The scope of the incidental collection is broad. The potential for collecting a large quantity of U.S. person communications that have no foreign intelligence value raises significant Fourth Amendment concerns. I therefore agree with the PCLOB that the use of U.S. person information to query Section 702-acquired information must be governed by stringent procedures in order to meet the Fourth Amendment's reasonableness requirement. The question is whether the minimization procedures that the agencies have adopted with respect to U.S. person queries meet that standard and protect the privacy interests of U.S. persons sufficiently to comply with the Fourth Amendment. In addition, the minimization procedures must comply with the purpose and statutory requirements of Section 702.

The agencies have different minimization procedures that are designed in light of their differing missions and roles in the acquisition and use of Section 702-acquired information. The use of U.S. person identifiers in querying is most difficult for FBI given its responsibilities for domestic law enforcement. The government has made changes to NSA's and CIA's

[5] The American Civil Liberties Union highlighted similar concerns with the actual targets of surveillance in its submission to the PCLOB: "[T]he government's surveillance targets may be political activists, victims of human rights abuses, journalists, or researchers. The government's targets may even be entire populations or geographic regions." Submission of Jameel Jaffer, Deputy Legal Director, ACLU Foundation (March 19, 2014) (available at PCLOB website, www.pclob.gov).

minimization procedures to provide safeguards for U.S. person information, and their procedures now have specific requirements for U.S. person queries that protect against their misuse. The FBI's procedures do not have such requirements. While I recognize that the FBI's role makes it more difficult to adopt such procedures, the FBI's existing minimization procedures do not in my view provide adequate safeguards for U.S. person queries of Section 702-acquired information and are not consistent with the purpose of Section 702. I therefore respectfully recommend that the Court find that the existing FBI minimization procedures must be changed to include additional protections in order to comply with the Fourth Amendment and the statutory requirements.

1. NSA and CIA Minimization Procedures

The NSA and CIA minimization procedures have both been amended in response to the PCLOB's recommendation, which stated:

> The NSA and CIA minimization procedures should permit the agencies to query collected Section 702 data for foreign intelligence purposes using U.S. person identifiers only if the query is based upon a statement of facts showing that the query is reasonably likely to return foreign intelligence information as defined in FISA. The NSA and CIA should develop written guidance for agents and analysts as to what information and documentation is needed to meet this standard, including specific examples.

PCLOB Report, at 139. The NSA and CIA minimization procedures that were submitted with the 2015 Certifications reflect this change, and both sets of procedures now require a written statement explanation of their justification of a U.S. person query.

The NSA procedures now provide (with newly added language emphasized in bold):

> Any use of United States person identifiers as terms to identify and select communications must first be approved in accordance with NSA procedures,

> **which must require a statement of facts establishing that the use of any such identifier as a selection term is reasonably likely to return foreign intelligence information, as defined in FISA.** NSA will maintain records of all United States person identifiers approved for use as selection terms. The Department of Justice's National Security Division and the Office of the Director of National Intelligence will conduct oversight of NSA's activities with respect to United States persons that are conducted pursuant to this paragraph.

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 (Exhibit B to the 2015 Certifications) ("NSA Minimization Procedures"), Section 3(b)(5).

Similarly, the CIA procedures provide (with newly added language emphasized in bold):

> CIA personnel may query CIA electronic and data storage systems containing unminimized communications acquired in accordance with section 702 of the Act. [redacted] Such queries must be reasonably **likely to return** foreign intelligence information **as defined in FISA. Any United States person identity used to query the content of communications must be accompanied by a statement of facts showing that the use of any such identity as a query term is reasonably likely to return foreign intelligence information as defined in FISA.** CIA will maintain records of all such queries using United States person identities, and NSD and ODNI will review CIA's queries of content **using any such identity as a query term to ensure that they were reasonably likely to return foreign intelligence information as defined in FISA.**

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 (Exhibit E to the 2015 Certifications) ("CIA Minimization Procedures"), Section 4.

The requirement by both agencies of a written statement of facts is a significant enhancement to the safeguards of U.S. person communications acquired pursuant to Section 702.

Agency personnel conducting the queries must now set forth their reasons for each query based on a U.S. person identifier, and explain why the query is likely to return foreign intelligence information. That process ensures that every U.S. person query conducted by NSA and CIA is the subject of considered judgment reduced to writing. This requirement alone helps ensure that U.S. person queries are not overused or abused. In addition, the written statement of facts will be maintained and subject to supervisory review as well as oversight. The substantial oversight by DOJ and ODNI (described in NSD's unclassified summary of the oversight program, attached to the government's Cover Note at tab 1) provides an additional important layer of protection to help ensure that the U.S. queries of Section 702 data are not used excessively or improperly. These procedures appear to be sufficient to ensure that the NSA and CIA are using U.S. person identifiers in a manner consistent with the Fourth Amendment and statutory requirements.

The government's Cover Note states that these procedures are the subject of written guidance and training, comporting with the second part of the PCLOB Report's Recommendation 3, namely: "The NSA and CIA should develop written guidance for agents and analysts as to what information and documentation is needed to meet this standard, including specific examples." PCLOB Report, at 139; Cover Note, at 20-21.

The government has fully implemented the PCLOB's recommendations with respect to the NSA and CIA's use of U.S. person identifiers in querying Section 702-acquired information. I conclude that the NSA and CIA minimization procedures are sufficient to ensure that the use of U.S. person identifiers for that purpose complies with the statutory requirements of Section 702 and with the Fourth Amendment.

2. FBI Minimization Procedures

The PCLOB Report did not similarly recommend that the FBI minimization procedures require a written statement of facts to justify every use of a U.S. person identifier in querying the Section 702-acquired information. The difference in the majority's recommendations for NSA and CIA on the one hand and FBI on the other is based on the differences between the missions of the agencies and the way that they conduct queries of the Section 702 collection. As the PCLOB Report explained: "The FBI's rules relating to queries do not distinguish between U.S. persons and non-U.S. persons; as a domestic law enforcement agency, most of the FBI's work concerns U.S. persons." PCLOB Report, at 137.

The PCLOB Report therefore made a more modest recommendation with respect to the FBI:

> The FBI's minimization procedures should be updated to more clearly reflect actual practice for conducting U.S. person queries, including the frequency with which Section 702 data may be searched when making routine queries as part of FBI assessments and investigations. Further, some additional limits should be placed on the FBI's use and dissemination of Section 702 data in connection with non-foreign intelligence criminal matters.

PCLOB Report, at 137.

The government has revised the FBI minimization procedures in response to the first part of this recommendation, and the procedures now explain in some greater detail the FBI's practice for conducting these queries. The new language can be found in two footnotes in the FBI Minimization Procedures, specifically footnotes 3 and 4 at pages 11 and 12, respectively.

Footnote 3 provides:

> It is a routine and encouraged practice for the FBI to query databases containing lawfully acquired information, including FISA-acquired information, in furtherance of the FBI's authorized intelligence and law enforcement activities, such as assessments, investigations and intelligence collection. Section III.D. [of the minimization procedures] governs the conduct of such queries. Examples of such queries include, but are not limited to, queries reasonably designed to identify foreign intelligence information or evidence of a crime related to an ongoing authorized investigation or reasonably designed queries conducted by FBI personnel in making an initial decision to open an assessment concerning a threat to the national security, the prevention of or protection against a Federal crime, or the collection of foreign intelligence, as authorized by the Attorney General Guidelines [regarding opening assessments]. These examples are illustrative and neither expand nor restrict the scope of the queries authorized in the language above.

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 (Exhibit D to the 2015 Certifications) ("FBI Minimization Procedures"), Section III.D.

Footnote 4 provides:

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

[redacted]

(b)(1); (b)(3); (b)(7)(E) [redacted]

FBI Minimization Procedures, Section III.D.

These footnotes clarify the existing practice, but as noted in footnote 3, they do not restrict the use of U.S. person queries. In my view, restrictions like those adopted in the NSA and CIA procedures are necessary to comply with the Fourth Amendment.

Before turning to that analysis, it is worth noting the government has also made changes in response to the second point in PCLOB's Recommendation 2. Specifically, the government has taken steps to impose additional limits on the FBI's use of Section 702 data in connection with non-foreign intelligence criminal matters, though these limits are not reflected in the minimization procedures. The ODNI announced these reforms in its Signals Intelligence Reform 2015 Anniversary Report (available at http://icontherecord.tumblr.com/ppd-28/2015/privacy-civil-liberties#section-702, a website maintained by the ODNI). The specific reforms are described in the report as follows:

> [C]onsistent with the recommendation of the Privacy and Civil Liberties Oversight Board, information acquired under Section 702 about a U.S. person will not be introduced as evidence against that person in any criminal proceeding except (1) with the approval of the Attorney General, and (2) in criminal cases with national security implications or certain other serious crimes. This change will ensure that, if the Department of Justice decides to use information acquired under Section 702 about a U.S. person in a criminal case, it will do so only for national security purposes or in prosecuting the most serious crimes.

http://icontherecord.tumblr.com/ppd-28/2015/privacy-civil-liberties#section-702. ODNI General Counsel Bob Litt elaborated on these limitations in remarks to the Brookings Institution (available at http://icontherecord.tumblr.com/post/110632851413/odni-general-counsel-robert-

litts-as-prepared) on February 4, 2015. Specifically, he listed the "most serious crimes" for which the use of Section 702-acquired information would be permitted:

> Under the new policy, in addition to any other limitations imposed by applicable law, including FISA, any communication to or from, or information about, a U.S. person acquired under Section 702 of FISA shall not be introduced as evidence against that U.S. person in any criminal proceeding except (1) with the prior approval of the Attorney General and (2) in (A) criminal proceedings related to national security (such as terrorism, proliferation, espionage, or cybersecurity) or (B) other prosecutions of crimes involving (i) death; (ii) kidnapping; (iii) substantial bodily harm; (iv) conduct that constitutes a criminal offense that is a specified offense against a minor as defined in 42 USC 16911; (v) incapacitation or destruction of critical infrastructure as defined in 42 USC 5195c(e); (vi) cybersecurity; (vii) transnational crimes; or (vii) [sic] human trafficking.

http://icontherecord.tumblr.com/post/110632851413/odni-general-counsel-robert-litts-as-prepared. These limitations are responsive to the PCLOB's recommendation and provide additional assurances that the government's use of U.S. person identifiers will be cabined in a manner consistent with the Fourth Amendment. As policy statements made in reports and official remarks, they are not formally part of the complex structure of requirements that apply to Section 702 collection. I would recommend that these policies be specifically incorporated into the FBI's minimization procedures, to ensure that they become binding and lasting reforms.

These changes respond to some of the PCLOB's concerns and are improvements. Yet in my view they do not go far enough. I am not persuaded that the FBI should not be subject to similar requirements as NSA and CIA because of the difficulties in separating U.S. person queries from non-U.S. person queries or because of how the Section 702-acquired information is maintained in FBI's databases. The civil liberties and privacy concerns with the Section 702 collection are not any less compelling in the context of FBI querying than they are with respect

to NSA and CIA – to the contrary, they are more so, precisely because the FBI's mission includes domestic law enforcement. Furthermore, the FBI's use of U.S. person queries strays well beyond the foreign intelligence purpose of the Section 702 program. In my view, the FBI should require a particularized statement of facts to support each query of Section 702-acquired information that justifies the need for the query. I conclude that the FBI's minimization procedures without that requirement do not adequately comply with the Fourth Amendment and statutory requirements of Section 702.

The FBI's querying procedures effectively treat Section 702-acquired data like any other database that can be queried for any legitimate law enforcement purpose. The minimization procedures do not place any restrictions on querying the data using U.S. person identifiers – in part because the FBI does not distinguish between U.S. and non-U.S. persons in querying its databases. As a result, FBI may query the data using U.S. person identifiers for purposes of any criminal investigation or even an assessment. There is no requirement that the matter be a serious one, nor that it have any relation to national security. For the reasons set forth below, these practices do not comply with Section 702 or the Fourth Amendment.

E. Legal Analysis

The FBI's minimization procedures fall short of what Section 702 and the Fourth Amendment require. They permit the FBI to go far beyond the purpose for which the Section 702-acquired information is collected in permitting queries that are unrelated to national security. They do not provide sufficient safeguards to protect the privacy and civil liberties interests at stake. For both reasons, the FBI's minimization procedures should be revised to ensure that U.S.

person queries are conducted in a manner consistent with Section 702 and the Fourth Amendment.

1. The FBI's Queries Are Inconsistent with the Purpose of Section 702

In one of the few decisions of the FISA Court of Review, that Court stated: "the FISA process cannot be used as a device to investigate wholly unrelated crimes." In re Sealed Case, 310 F.3d 717, 736 (FISA Ct. Rev. Nov. 18, 2002) (holding that FISA did not require the government to demonstrate to the Court that its primary purpose in conducting surveillance was not criminal prosecution). Yet the FBI's minimization procedures permit precisely such use of the Section 702-acquired information. Per the PCLOB Report:

> With some frequency, FBI personnel will also query this data, including Section 702-acquired information [which is stored in the same repositories as traditional FISA data], in the course of criminal investigation sand assessments that are unrelated to national security efforts. . . . [A]n assessment may be initiated "to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence information" (citing the Attorney General's Guidelines for Domestic FBI Operations, § II.A.).

PCLOB Report, at 60. While the decision in In re Sealed Case predates the enactment of Section 702, Section 702 did not fundamentally change the purpose of FISA. The FBI's virtually unrestricted querying of FISA and Section 702-acquired data is inconsistent with the purpose of Section 702 and should not be permitted.

Moreover, the FBI's minimization procedures do not provide sufficient safeguards to ensure that U.S. person queries of Section 702-acquired information are justified and reasonable given the privacy interests those queries implicate. The FBI's minimization procedures must

therefore be amended to provide similar safeguards to those that the changes to CIA's and NSA's procedures now provide.

2. Precedents Regarding Prior Certifications Are Not Binding on This Court

The Court has not previously found the agencies' minimization procedures with respect to queries involving U.S.-person identifiers to be deficient. Even without the improvements that have been made through the changes described above, the Court found in reviewing Certifications for prior years that the minimization procedures governing the use of U.S. person identifiers under Section 702 met the statutory requirements of Section 702. When the government initially broadened the NSA's minimization procedures to permit queries using U.S. person identifiers, Judge Bates considered the issues raised by this change and found that the minimization procedures (without the change described above in response to the PCLOB Report) were consistent with the statutory requirements and the Fourth Amendment.

> This relaxation of the querying rules does not alter the Court's prior conclusion that NSA minimization procedures meet the statutory definition of minimization procedures. The Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act ("FBI SMPs") contain an analogous provision allowing queries of unminimized FISA-acquired information using identifiers – including United States-person identifiers – when such queries are designed to yield foreign intelligence information. See FBI SMPs § III.D. In granting hundreds of applications for electronic surveillance or physical search since 2008, including applications targeting United States persons and persons in the United States, the Court has found that the FBI SMPs meet the definitions of minimization procedures at 50 USC 1801(h) and 1821(4). It follows that the substantially-similar querying provision found at Section 3(b)(5) of the amended NSA minimization procedures should not be problematic in a collection that is focused on non-United States persons located outside the United States and that, in the aggregate, is less likely to result in the acquisition of nonpublic information regarding non-consenting United States persons.

(Oct. 3, 2011), at 23-24. The purpose of queries in the current version of the FBI Minimization Procedures, § III.D., is broader, however, than what the Court described, in permitting queries that identify 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**"[6] (emphasis added). In addition, while I agree with the Court's analysis that the Section 702 collection may be less likely than traditional FISA-acquired information to contain U.S. person information, traditional FISA acquisition occurs pursuant to individualized judicial determinations, so the scope and scale of the incidental collection in those cases does not raise the same concerns as the incidental collection under Section 702, as explained in Section I.C. above and in the PCLOB Report.

The Court's prior decisions should not, in my view, preclude the Court from reaching a different conclusion with respect to the 2015 Certifications. Prior FISC decisions should not be viewed (and have not been so understood by the Court) as binding precedent to the same extent as in the traditional Article III context. While the Court's decision and rationale in approving the 2011 Certifications and other prior decisions are instructive, the fact that the Court has previously approved similar or identical procedures should not be binding on this Court in evaluating the sufficiency of the procedures submitted with the Section 2015 Certifications. Due to the unusual nature of proceedings before the FISC, its consideration of substantially similar certifications from one year to the next may change due to developments in the Court's understanding of the relevant programs over time, in addition to changes in the law. The Court's

[6] I do not have the 2011 Procedures and do not know whether the language was the same as the current version.

consideration of the issues before it is also constrained by the ex parte nature of FISC proceedings. In my view, there is both new information available to the Court as well as an intervening legal development that the Court can and should take into account in reaching a different conclusion in evaluating the 2015 Certifications.

The PCLOB Report and its observations and recommendations with respect to incidental collection and U.S. person queries constitute significant new information available to the Court.[7] It would not be unprecedented for this Court to reach a different conclusion than the Court has reached in the past based on new information. Developments in the understanding of how the Section 702 program operates have provided a sufficient basis in prior years for the Court to reject certifications that had previously been approved in identical or substantially similar form. For example, in ruling on the 2011 Certifications, Judge Bates took into account new information regarding NSA's "upstream" collection, and based on concerns with that collection, ruled that minimization procedures that had previously been approved for prior years were not constitutional. In re DNI/AG 702(g) Certification [redacted], at 80 (Oct. 3, 2011). The Court explained that the new information about the government's collection fundamentally altered its understanding of the scope of collection pursuant to Section 702 and required a reexamination of its prior approvals of the program. Id. at 15.

[7] While the PCLOB Report was issued in July, 2014, which was prior to the Court's approval of the 2014 Certifications, the time frame for submission and consideration of the 2014 Certifications did not permit consideration of its observations and recommendations. The 2014 Certifications were filed with the Court on July 28, 2014. In re DNI/AG 702(g) Certification [redacted] (Aug. 26, 2014), at 1. The Court issued its decision on August 26, 2014 (Id. at 43), and the decision makes no mention of the PCLOB Report.

In addition, Congress enacted the USA FREEDOM Act in June, 2015, authorizing the appointment of amicus curiae, in recognition that there may be matters presented to the Court that present a "novel or significant" interpretation of the law. 50 U.S.C. Section 1803(i)(2)(A). Congress envisioned that there would be matters for which information and argument from amicus curiae would help the Court evaluate the arguments and information presented by the government. The Court has found that the 2015 Certifications present such issues, in recognition of its ongoing obligation to evaluate the Certifications presented each year in light of all available information concerning the operation of the Section 702 program. That information now includes the PCLOB Report's substantial and weighty analysis of the Fourth Amendment issues surrounding the use of U.S. person identifiers to query Section 702-acquired information.

3. The Fourth Amendment Applies to Querying

The government may argue[8] that the Fourth Amendment should not apply at all to the querying of Section 702-acquired information, because the Court has already found that the collection itself – which is the actual "search" – satisfies the Fourth Amendment's reasonableness requirement. The argument would be that the collection itself is the search, and once that collection is authorized, querying the collection is simply a use of the information like any other, and not subject to the Fourth Amendment. That argument should be rejected in the context of electronic evidence. The issues relating to electronic evidence have changed the law

[8] Due to the statutory deadlines and costs associated with extending the deadlines for authorizing the program (see Government's Response to the Court's Order of July 7, 2015 (July 14, 2015), at 8, n. 8), the Court ordered that the amicus brief and the government's brief in this matter be submitted at the same time, on October 16, 2015, so we are not in a position to respond directly to one another's arguments until oral argument, which the Court scheduled for October 20, 2015, if the Court determines that oral arguments would be beneficial. Briefing Order (Sept. 16, 2015), at 4.

regarding what constitutes a search. A separate warrant is required to search the contents of a cell phone or computer hard drive when those items are lawfully seized in connection with an individual's arrest or a lawfully authorized search that does not specifically authorize such searches. See Riley v. California, 573 U.S. ___, 134 S.Ct. 2473, 2493 (2014) (holding that police must obtain warrant to authorize search of digital contents of cell phone lawfully seized incident to arrest).

The government may seek to rely on case law from other contexts that suggests that if information is lawfully collected in a manner consistent with the Fourth Amendment, the querying of that information does not implicate the Fourth Amendment. See Boroian v. Mueller, 616 F.3d 60, 67-68 (1st Cir. 2010) (running search of an individual's DNA profile against other profiles in a DNA database "does not violate an expectation of privacy that society is prepared to recognize as reasonable, and thus does not constitute a separate search under the Fourth Amendment"); Johnson v. Quander, 440 F.3d 489, 498-99 (D.C. Cir. 2006) (accessing records stored in a DNA database is not a "search" for Fourth Amendment purposes). The scope and manner of Section 702 collection is so unusual and so different from the manner of collection of DNA that these cases should not control. DNA is generally collected within the traditional structures of the criminal justice system in compliance with constitutional guarantees. It is collected from persons who are subject to arrest based on probable cause. It may also be collected pursuant to court order.[9] The government is not incidentally collecting large quantities of DNA using methods unrelated to specific law enforcement objectives and depositing it in its

[9] The government may also occasionally collect "abandoned" DNA, such as from the discarded coffee cup of a known suspect, but this practice is significantly infrequent that it does not substantially increase the contents of DNA databases.

databases. The incidental collection of Section 702 information is far removed from the stringent requirements of criminal procedure and warrants different treatment.

4. Amended Minimization Procedures Would Provide Sufficient Protection

PCLOB Chairman Medine and Board Member Wald, in their separate statement, made a recommendation that would go further than the PCLOB majority recommendation, and further than mine as well. They recommended:

> Each U.S. person identifier should be submitted to the FISA court for approval before the identifier may be used to query data collected under Section 702 for a foreign intelligence purpose, other than in exigent circumstances or where otherwise required by law. The court should determine, based on documentation submitted by the government, whether the use of the U.S. person identifier for Section 702 queries meets the standard that the identifier is reasonably likely to return foreign intelligence information as defined under FISA.

PCLOB Report, Annex A, at 151-152 (footnotes omitted). This recommendation has the appeal of restoring the traditional case by case assessment that the FISA court conducts in reviewing individual applications for electronic surveillance and physical searches. While such court approval for every U.S. person query would be ideal, in my view the requirement that each U.S. person query be supported by a written statement explaining why the query is likely to return foreign intelligence information or is otherwise justified, subject to oversight and review, is sufficient to meet the statutory and constitutional requirements.

My recommendation goes beyond the suggestion in the separate statement by PCLOB Board Members Rachel Brand and Elisebeth Collins Cook. Their statement explained that the issue of queries using U.S. person identifiers divided the Board. Specifically with respect to the FBI, they noted:

> In the case of the FBI, this issue is intertwined with questions about querying Section 702 information for non-foreign intelligence purposes, the potential use of Section 702 information in criminal proceedings, and longstanding efforts to ensure information sharing within the agency.

PCLOB Report, Annex B, at 161. They did not recommend limiting FBI's ability to query using U.S. person identifiers. Instead, they endorsed the majority report's more limited recommendations. They also raise numerous objections to the other separate statement's proposed requirement of specific FISC approval for queries using U.S. person identifiers.

The PCLOB majority recommendation does not in my opinion go far enough. In my view, specific changes to the FBI minimization procedures are required in order to ensure that U.S. person queries are conducted in a manner consistent with Section 702 and the Fourth Amendment. The procedures should require a written justification for each U.S. person query of the database that explains why the query is relevant to foreign intelligence information or is otherwise justified. If that means in practice that every FBI query of the Section 702-acquired information requires a written justification, that practice may be what is needed. Imposing such a requirement would not substantially restrict the FBI's ability to query Section 702-acquired information when there is a legitimate reason to do so. Rather, it would impose an internal check on the querying process, and a fairly minimal one. If an FBI agent is querying Section 702-acquired information to return information regarding a U.S. person, there should be a sufficient basis to justify that query. This requirement may therefore limit querying the Section 702-acquired information when there is no value to the query. That restriction does not seem unreasonable.

There are several ways in which the FBI may be able to amend its minimization procedures to ensure that querying is conducted in a manner consistent with the requirements of Section 702. The requirement that NSA and CIA have adopted in their minimization procedures is one option, but there may be other language that better accommodates the different manner in which FBI maintains and queries the information. The Court should reject the minimization requirements as drafted on the ground that they do not provide sufficient protection for this information and require amended procedures that do.

## II. Litigation-Related Preservation of Material Otherwise Required to be Destroyed

The second issue that I have been directed to address is "the preservation for litigation purposes of information otherwise required to be destroyed under the minimization procedures." Order, at 4.

### A. Relevant Minimization Procedures

The NSA, FBI, and CIA minimization procedures all contain provisions that permit the agencies to retain information that would otherwise be subject to destruction requirements based on a determination that such retention is necessary given competing obligations to maintain information for litigation purposes.

Specifically, NSA's minimization procedures provide:

> Notwithstanding the destruction requirements set forth in these minimization procedures, NSA may retain specific section 702-acquired information if the Department of Justice advises NSA in writing that such information is subject to a preservation obligation in pending or anticipated administrative, civil, or criminal litigation. . . . The Department of Justice shall notify NSA in writing once the section 702-acquired information is no longer required to be preserved for such

> litigation matters, and then NSA shall promptly destroy the section 702-acquired information as otherwise required by these procedures.

NSA Minimization Procedures, Section 3(c)(4)a. NSA must provide NSD a summary of all such matters each year. NSA's procedures also include a requirement that the retention of this information be reported to the FISC and coordinated with the Department of Justice so that NSA is promptly notified when the preservation obligation is no longer in force and can take steps to destroy the material upon such notification:

> The Department of Justice's National Security Division will promptly notify and subsequently seek authorization from the FISC to retain the material as appropriate and consistent with law. NSA will restrict access to and retain such information in the manner described in subparagraph 4(a), at the direction of the Department of Justice until either the FISC denies a government request for authorization to retain the information or the Department of Justice notifies NSA in writing that the information is no longer required to be preserved for such litigation matters. After receiving such notice, NSA shall promptly destroy the section 702-acquired information as otherwise required by these procedures.

NSA Minimization Procedures, Section 3(c)(4)b.

CIA's minimization procedures include similar requirements:

> Notwithstanding the destruction requirements set forth in these minimization [redacted]

CIA Minimization Procedures, Section 11.a. CIA must similarly report to NSD a summary of all material retained under this provision. Id.

FBI's minimization procedures are substantially similar to those of NSA and CIA with respect to this issue. They provide:

The FBI may temporarily retain specific FISA-acquired information that would otherwise have to be destroyed under these procedures, (b)(1); (b)(3); (b)(7)(E) [redacted]

FBI Minimization Procedures, Section III.G.4.

B. Legal Analysis

This issue has been the subject of several prior FISC opinions. Specifically, Judge Collyer addressed this issue in ruling on the lawfulness of a change to the FBI's minimization procedures (applicable to FISA electronic surveillance and physical searches, not Section 702 collection) relating to the retention of litigation-related information. She noted: "The Government requests this relief [the changes to the minimization procedures] to eliminate the tension between the destruction requirements contained in the [Special Minimization Procedures] and the obligations to preserve information for litigation in other courts." In re Standard Minimization Procedures for FBI Electronic Surveillance and Physical search Conducted Under the Foreign Intelligence Surveillance Act, Docket Nos.: Multiple, including (b)(1); (b)(3); (b)(7)(E) (b)(1); (b)(3); (b)(7) at 3. In ruling, the Court found that "the restrictions on access that the Government proposes, along with the reporting requirements . . . strike an appropriate balance between the

competing concerns of not retaining the data longer than necessary and having the Government comply with its litigation obligations." Id.

Judge Hogan agreed with these conclusions in ruling on the same issues in the context of the 2014 DNI/AG Certifications for the Section 702 program. The Court reasoned:

> As with the corresponding provision of the FBI Minimization Procedures, the Court is satisfied that this approach – preservation of particular information as long as there is a litigation need for that information, subject to strict controls on access – strikes a proper balance between the protection of United States person information, on the one hand, and the litigation obligations of the government and fairness to other parties to that litigation, on the other.

In re DNI/AG 702 Certifications [redacted] (Aug. 26, 2014), at 23.

The Court's Order approving the 2014 Certifications required the government to submit a written report, on or before December 31 of each calendar year, detailing the information being retained pursuant to these litigation-retention provisions. I requested and have reviewed two reports that the government submitted in 2014 to meet this requirement. The names and other identifying information that would reveal the specific cases at issue were redacted, but the information presented in unredacted form is sufficient for me to confirm that the reports meet the requirements of the Order, and that the reports demonstrate that the amount of information retained for this purpose relates to a relatively small number of matters. In addition, the reports demonstrate that the cases at issue are being monitored so that the destruction requirements can be met once the cases have been resolved so that preserving the relevant information is no longer required.

Both reports were submitted by the National Security Division's Office of Intelligence. The first report, dated December 15, 2014, informed the Court that [redacted] The second report, dated December 30, 2014, informed the Court that the FBI did not retain any unminimized Section 702-acquired information otherwise subject to destruction.

As noted above, NSA's minimization procedures were amended to require NSA to provide the information necessary for this report. NSA Minimization Procedures, Section 3(c)(4)a.1. CIA's minimization procedures were similarly amended. CIA Minimization Procedures, Section 11. The FBI's minimization procedures were not amended to reflect this obligation, though my understanding is that the FBI is complying with the Court's Order and the report that I reviewed shows that the FBI did comply. For completeness and in order to ensure compliance, the FBI's minimization procedures should be amended to incorporate this requirement.

The government has also taken steps to respond to the Court's suggestion in its 2014 Memorandum and Opinion regarding section 702-acquired information that is subject to destruction requirements other than the "age-off" requirement but may need to be preserved to satisfy litigation preservation obligations. The government's explanation of those steps is set forth in its Cover Note, at page 22. These changes adequately respond to the Court's concerns

and ensure that the Court is duly informed of the circumstances where the government finds that Section 702-acquired information must be preserved for litigation purposes that otherwise conflict with the minimization procedures.

The Court's 2014 Order and the government's submissions pursuant to the Order reflect a reasonable and diligent accommodation of the two competing directives that the government must follow. The government's usual destruction policies for the Section 702-acquired information are in direct conflict with the need to preserve information that is necessary to or potentially discoverable in a relatively small number of criminal, civil, and administrative litigation matters. In the [redacted] for which information is preserved by NSA and CIA, according to the December 15, 2014, report submitted by NSD, [redacted] requires that the information be preserved. The privacy interests that lie behind the destruction requirements are in direct conflict [redacted] Those privacy interests, while compelling, are general in nature. The litigation preservation requirement, on the other hand, is specific to [redacted] Moreover, [redacted] (and others that may arise in the future that would similarly require preservation) will eventually be resolved in court, at which point the information being preserved will be subject to destruction pursuant to the normal policies.

In ruling on the 2014 Certifications, the Court recognized the competing interests at stake and therefore issued its August 26, 2014, Order directing the government to file annual reports that set forth what information is being preserved for litigation purposes. Those reports enable

the Court to conduct effective oversight of this requirement and to ensure that the competing interests are properly balanced.

## III. Conclusion

With respect to the issue of U.S. person queries of Section 702-acquired information, I conclude that the 2015 Certifications meet the statutory requirements of Section 702, with one exception: the Court should require that the FBI minimization procedures be revised to include safeguards for querying Section 702-acquired information using U.S. person identifiers to ensure that querying is conducted in a manner consistent with the purpose of Section 702 and its statutory requirements.

With respect to the issue of preservation of information for litigation purposes, I conclude that the Court's Order and the government's reports reflect a proper balance of the competing requirements to destroy information pursuant to the applicable minimization procedures and to preserve information necessary for litigation purposes. I recommend that the Court's Order in response to the 2015 Certificates contain the same annual reporting requirement that was included in the 2014 Order and do not recommend any further steps to address this issue.

Respectfully submitted,

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