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FILED
LEEANN FLYNN HALL, CLERK
[redacted] 2014
U.S. Foreign Intelligence Surveillance Court

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

[redacted]

~~(S)~~ GOVERNMENT'S REPLY TO [redacted] TO PETITION

~~(S//NF)~~ The United States of America hereby replies to [redacted]. As explained below, the directives [redacted] were issued in accordance with Section 702(h)(1) and are otherwise lawful. [redacted] the directives presents a critical, ongoing foreign intelligence gap, including [redacted]. See Gov't's Pet. Ex. 2, at 2. [redacted]. This claim is without merit, and the government's petition should be granted.

(U) The Government's Targeting Procedures Are Consistent with the Requirements of Section 702 and the Fourth Amendment

~~(S)~~ This Court has repeatedly found the government's targeting procedures to be consistent with the requirements of Section 702 and the Fourth Amendment. See, e.g., In re DNI/AG 702(g) [redacted], [redacted] Mem. Op. [redacted]

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~~Classified by: Stuart J. Evans, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: [redacted] 2039~~

[redacted], Mem. Op. & Order (FISA Ct. Aug. 26, 2014) (hereinafter "2014 Op."). Under these procedures, for each targeting decision, "NSA is required to determine 'whether a person is a non-United States person reasonably believed to be outside the United States' before that person is targeted for acquisition," and such a determination must be made "in light of the totality of the circumstances based on the information available with respect to that person, *including* [redacted]." 2008 Op. at 8 (emphasis added). In addition, the targeting procedures require there to be a fact-based reasonable belief that the tasking of a communication facility (account) used by a target will yield foreign intelligence information. The facts used to make each of these required determinations may include, for example, human source reporting, signals intelligence, and intelligence reporting from other agencies [redacted].

~~(S)~~ The government's obligation to have a sufficient factual basis for tasking a target's account under Section 702 does not end once the initial targeting determination is made. Once tasked, post-targeting analysis is required for all tasked accounts, [redacted], to ensure that the targeted user of that account is and remains: a) a non-U.S. person; b) reasonably believed to be located outside the United States; and c) a source of the sought-after foreign intelligence information. This post-targeting analysis includes [redacted] content analysis, [redacted] content analysis beginning shortly after tasking and continuing regularly thereafter.[1] See (b)(6) [redacted]

[1] ~~(S)~~ The government also uses these targeting procedures "as a means of complying with Section 1881a(b)(3), which provides that acquisitions 'may not intentionally target a United States person reasonably believed to be located outside the United States.'" 2014 Op. at 7.

~~(S)~~ The Targeting Procedures Are Reasonable as Applied [redacted]

[redacted]

[redacted]

[2] ~~(S)~~ [redacted]

In addition, [redacted], the targeting procedures contain factors used to determine that the tasking of an account will yield foreign intelligence information, which this Court has recognized "direct the government's acquisitions toward communications that are likely to yield

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[3] ~~(S)~~ The targeting procedures also require the facts relied on in making a "foreignness" determination to be documented and subjected to regular oversight by the Department of Justice and Office of the Director of National Intelligence. See NSA Targeting Procedures at 7-8.

[4] ~~(S)~~ In addition, if a tasking results from a lack of due diligence to identify facts indicating that the tasked facility may be used by a U.S. person or person located in the United States, this constitutes noncompliance with the targeting procedures, is reported to the Court, and the resulting collection is purged.

[5] ~~(S)~~ [redacted]

the foreign intelligence information sought, and thereby afford a degree of particularity that is reasonable under the Fourth Amendment." 2008 Op. at 39-40 (footnote and citation omitted); see id. at 39 & n.4 (recognizing that these factors are "substantively identical" to foreign intelligence purpose factors that the FISA Court of Review found, in In re Directives, to be "in conformity with the particularity showing contemplated by [the Fourth Amendment.]") (citation omitted).[6]

~~(S)~~ Moreover, the government's due diligence does not end once the initial targeting determination is made. The targeting procedures require the above-discussed post-targeting analysis for all tasked facilities, including regular review to ensure the tasked facility is used by the intended target. See (b)(6) [redacted]

[6] ~~(S)~~ [redacted]

[redacted]

[redacted].[7]

~~(S)~~ [redacted]

~~(S)~~ [redacted]

[7] ~~(S)~~ [redacted]

[8] ~~(S)~~ [redacted]

[9] ~~(S)~~ [redacted]

~~(S)~~ This Court repeatedly has found that the government's minimization procedures ensure that U.S. person information acquired under Section 702, whether it be acquired incidentally or as a result of a reasonable but mistaken targeting, is handled in accordance with statutory and Fourth Amendment requirements. See, e.g., 2008 Op. at 40 ("These [minimization] procedures constitute a safeguard against improper use of information about U.S. persons that is inadvertently or incidentally acquired, and therefore contribute to the Court's overall assessment that the targeting and minimization procedures are consistent with the Fourth Amendment."); see also In re Directives, 551 F.3d at 1015 (finding it "significant," in assessing the Fourth Amendment reasonableness of Section 702's predecessor statute,

[redacted]

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

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

[redacted]

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that "effective minimization procedures are in place" to "serve as an additional backstop against identification errors as well as a means of reducing the impact of incidental intrusions into the privacy of non-targeted United States persons"). That such procedures permit U.S. person identifiers to be used as query terms under certain circumstances does not, [redacted], render them unreasonable. See [Caption Redacted], 2011 WL 10945618, at *7 (FISA Ct. Oct. 3, 2011) (concluding that such queries "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").

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

~~(S)~~ [redacted]

[redacted]. That such a determination may later prove to be incorrect because of changes in circumstances or information of which the government was unaware does not render unreasonable either the initial targeting determination or the procedures used to reach it.[11] Moreover, [redacted]

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[10] ~~(S)~~ [redacted]

[11] ~~(S)~~ See In Re Directives, Slip Op. at 28-30 ("[T]he fact that there is some potential for error is not a sufficient reason to invalidate the surveillance . . . . A prior judicial review process does not ensure that the types of errors complained of here . . . would have been prevented. It is also significant that effective minimization procedures are in place. These procedures serve as an additional backstop against

[redacted] NSA's targeting procedures require ongoing, post-targeting content [redacted] analyses designed to detect such a change in circumstances, which would result in the account being detasked, just as they would for a foreign target who roams into the United States. See (b)(6) [redacted]

~~(S)~~ [redacted]

~~(S)~~ Similarly, [redacted] cannot find support in its other asserted bases for noncompliance – such as the [redacted]

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identification errors as well as a means of reducing the impact of incidental intrusions into the privacy of non-targeted United States persons.").

[12] ~~(S)~~ [redacted]

[13] ~~(S)~~ [redacted]

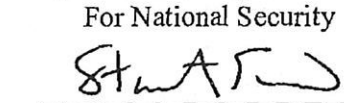
[redacted] [redacted]

[redacted].[15]

~~(S)~~ For the foregoing reasons, the United States respectfully requests that this Court grant the Petition and enter an order compelling [redacted]

Respectfully submitted,

JOHN P. CARLIN
Assistant Attorney General
For National Security



STUART J. EVANS
Deputy Assistant Attorney General

(b)(6); (b)(7)(C) [redacted]

Attorneys for the United States

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[14] ~~(S)~~ Questions such as those raised on page 16 of the Response are policy questions properly consigned to the Executive Branch or Congress.

[15] ~~(S)~~ [redacted] seeks to limit the foreign intelligence exception to the warrant requirement to exclude circumstances where a "substantial portion" of U.S. person communications are searched or seized. See Resp. at 17. This argument is inconsistent with the other recognized special needs exceptions to the warrant requirement, all of which primarily implicate the rights of U.S. persons. See, e.g., Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Treasury Employees v. Von Raab, 489 U.S. 656 (1989); Griffin v. Wisconsin, 483 U.S. 868 (1987).

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WASHINGTON, DC

[redacted]

(U//~~FOUO~~) **DECLARATION OF** (b)(6) [redacted]

(U//~~FOUO~~) 1. I, (b)(6) [redacted], am the Section 702 Authority Lead for the Signals Intelligence Directorate, National Security Agency (NSA). In this role, I assist in the NSA's oversight and implementation of authorizations issued pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA).

~~(S)~~ **A Facility to be Tasked Must be Appropriately Linked to a Valid Target**

~~(S)~~ 2. NSA's Section 702 targeting decisions may not be made in a vacuum. In addition to making a fact-based determination that the person to be targeted is a non-U.S. person reasonably believed to be located outside the United States, NSA must also have a fact-based reasonable belief that the person to be targeted is using the particular communications facility to be tasked. [redacted]. Before [redacted] is tasked, NSA has applied its Section 702 targeting procedures, and based on the totality of the information available, determined that [redacted]

(b)(6) [redacted]

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[redacted] are facilities used by a non-United States person, reasonably believed to be located outside the United States, who possesses, is expected to receive, and/or is likely to communicate the types of foreign intelligence information authorized under the Section 702 certifications.

~~(S)~~ **Review of the [redacted] Tasked Under the 2014 Section 702 Directives**

~~(S)~~ 3. I have reviewed all of the government's tasking determinations for each selector tasked [redacted] under each of the 2014 directives. After application of its targeting procedures, NSA tasked [redacted] under the 2014 Section 702(g) Certification directives.[1] In addition to having a reasonable belief that each target was a non-U.S. person located abroad, and an appropriately authorized foreign intelligence target under an approved Certification, the following explains the factual basis for NSA's reasonable belief that each target was using [redacted].

~~(TS//SI//NF)~~ 4. [redacted]

~~(TS//SI//NF)~~ 5. [redacted]

[1] ~~(S)~~ [redacted]

[redacted]

~~(TS//SI//NF)~~ 6. [redacted]

~~(TS//SI//NF)~~ 7. [redacted]

~~(S)~~ [redacted]

~~(TS//SI//REL TO USA, FVEY)~~ 8. [redacted]

[redacted]

(U) **Post-Tasking Checks**

~~(S)~~ 9. After tasking, post-targeting analysis is required for all tasked accounts to ensure that the target is and remains: a) a non-U.S. person; b) reasonably believed to be located outside the United States; and c) a source of the sought-after foreign intelligence information. This post-targeting analysis has [redacted] element. [redacted]

[redacted]

[2] ~~(TS//SI//NF)~~ [redacted]

[redacted]. In the event the government receives information that results in a determination that a targeted user of a tasked facility is, for example, located in the United States or is not the intended target, *all* facilities used by that target must be detasked.

~~(S)~~ [redacted]

[redacted]

(U) I declare under penalty of perjury that the foregoing is true and correct.

DATE: [redacted] / 2014

(b)(6) [redacted]

Signals Intelligence Directorate
National Security Agency