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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION

This matter is before the Court on the Government's Ex Parte Submission of [redacted] and Related Procedures, Ex Parte Submission of Amended Minimization Procedures, and Request for an Order Approving [redacted] and Procedures, filed on [redacted] 2010 ([redacted] Submission") pursuant to 50 U.S.C. § 1881a. For the reasons stated below, the government's request for approval is granted.

I. BACKGROUND

A. [redacted] and the Prior 702 Dockets

The [redacted] Submission includes DNI/AG 702(g) [redacted] filed by the government pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("FISA" or the "Act"), 50 U.S.C. § 1881a. [redacted] certifications were submitted by the government and approved by the Court in Docket Nos. 702(i)-08-01, [redacted]

[redacted] (collectively, the "Prior 702 Dockets").[1] In addition to [redacted] by the Attorney General and the Director of National Intelligence ("DNI"), the [redacted] Submission includes supporting affidavits by the Director of the National Security Agency ("NSA"), the Director of the Federal Bureau of Investigation ("FBI"), and the Director of the Central Intelligence Agency ("CIA"); two sets of targeting procedures, for use by the NSA and FBI respectively; and three sets of minimization procedures, for use by the NSA, FBI, and CIA, respectively.

DNI/AG 702(g) [redacted] and governs the collection of foreign intelligence information [redacted] Like the acquisitions approved by the Court in all of the Prior 702 Dockets, [redacted] limited to "the targeting of non-United States persons reasonably believed to be located outside the United States." Id. at 3.

DNI/AG 702(g) [redacted] an amendment to the [redacted]

[redacted]

[1] The Court's Memorandum Opinions in the Prior 702 Dockets are incorporated by reference herein.

[redacted] handled subject to the same NSA, FBI, and CIA minimization procedures that have been submitted for use in connection with DNI/AG 702(g)[redacted] The Court has previously approved those minimization procedures [redacted]

B. NSA's Problems Purging Data Collected Under Prior 702 Certifications

On [redacted] 2010, the government filed, pursuant to Rule 10(c) of this Court's Rules of Procedure, a preliminary notice of compliance incident, reporting that "previous data purges conducted to comply with NSA's Section 702 targeting and minimization procedures have not extended to at least one analytic database[redacted] 2010 Notice at 1. The government subsequently informed the Court that NSA's prior data purges had not reached other NSA systems, and that incompletely purged information collected pursuant to Section 702 had been found in finished intelligence reports that were disseminated by NSA. See generally Letter from Kevin J. O'Connor, Acting Chief, Oversight Section, Office of Intelligence, Department of Justice, to Hon. John D. Bates,[redacted]; Letters from David S. Kris, Assistant Attorney General for National Security, to Hon. John D. Bates [redacted]

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2 [redacted]

C. The Government's Reliance on Certain Prior Representations

On [redacted] 2010, the United States submitted the Government's Ex Parte Statement Concerning [redacted] Submission"). In that submission, the government noted that the targeting and minimization procedures submitted with DNI/AG 702(g) [redacted] are identical to the procedures that were submitted to and approved by the Court [redacted] See [redacted] Submission at 2. The government asserted that "with the exception of additional information concerning NSA's post-targeting analysis and a clarification regarding oversight," it would be appropriate for the Court to rely upon the same representations regarding the operation of the targeting and minimization procedures that it had relied upon in approving the certifications [redacted] Id. at 3.

Regarding post-targeting analysis, the government revised some of its prior representations to the Court, which did not accurately describe the process used by NSA [redacted]. Id. at 5-9. With respect to oversight, the government disclosed that due to a technical problem, NSA had not provided documentation of certain targeting decisions to the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI), despite the government's past representation to the Court that those entities receive "'all of the documentation concerning every single tasking

decision that NSA has made.'" Id. at 9 (quoting Transcript of [redacted] 2008 [redacted]

[redacted]

D. The Government's Motion for an Extension of Time

On [redacted] 2010, the government filed a motion seeking to extend until [redacted] 2010, the 30-day period in which the Court must otherwise complete its review of DNI/AG 702(g) [redacted] which was then set to end on [redacted] 2010. Motion for an Order Extending Time Limit Pursuant to 50 U.S.C. § 1881a(j)(2) at 2.[3] The government noted in the motion that its efforts to address NSA's purging problems were still ongoing and that it expected corrective measures to be in place by the [redacted] 2010. Id. at 4. The government asserted that "providing the Court with further details of the implementation of these corrective measures will aid the Court" in reviewing [redacted] but that the government would not be able to supplement the record until after the [redacted] deadline. Id. at 5-6. The government further asserted that granting the requested extension of time would be consistent with national security, because, by operation of statute, the government's acquisition of foreign intelligence information concerning [redacted] pursuant to DNI/AG [redacted]

[3] 50 U.S.C. § 1881a(i)(1)(B) requires the Court to complete its review of [redacted] and accompanying targeting and minimization procedures and issue an order under subsection 1881a(i)(3) not later than 30 days after the date on which the certification and procedures are submitted. Pursuant to subsection 1881a(i)(1)(C), the same time limit applies to review of [redacted] or amended procedures. However, 50 U.S.C. § 1881a(j)(2) permits the Court, by order for reasons stated, to extend "as necessary for good cause in a manner consistent with national security," the time limit for the Court to complete its review and issue an order under Section 1881a(i)(3).

could continue pending completion of the Court's review. Id. at 6-7.[4]

On [redacted] 2010, the Court entered an order granting the government's motion. Based upon the representations in the motion, the Court found that there was good cause to extend the time limit for its review of [redacted] to [redacted] 2010, and that the extension was consistent with national security. [redacted] 2010 Order at 4.

E. The Hearing and The Government's Supplemental Submissions

On [redacted] 2010, the Court held a hearing during which the government provided additional information about NSA's efforts to address its purging problems and about the post-targeting review and oversight issues raised in the [redacted] Submission. During the hearing, the government also disclosed another issue regarding NSA's process [redacted] As discussed in more detail below, NSA's targeting and minimization procedures require NSA to routinely monitor available information for signs that a targeted facility is being used from within the United States, to immediately cease collection when it is determined that a target is in the United States, and, subject to certain exceptions, to destroy any communications acquired during any period during which a target was in the United States. [redacted]

[4] [redacted]

[redacted] During the [redacted] hearing, the government revealed that some alerts are not reviewed so promptly, and that, as of [redacted] NSA had a backlog [redacted] Transcript of [redacted] Hearing ([redacted] Hrg. Tr.") at 71.

On [redacted] and [redacted] 2010, the government made supplemental submissions providing additional and updated information regarding the purging and post-targeting review issues. In addition, representatives of the government met with the Court on [redacted] 2010, to discuss the same issues.

II. REVIEW OF [redacted]

The Court must review a certification submitted pursuant to Section 702 of FISA "to determine whether [it] contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A). An amended certification is subject to review under the same standard. See 50 U.S.C. § 1881a(i)(2)(C).

The Court's examination o [redacted] that:

(1) [redacted] been made under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A), [redacted]

(2) [redacted] each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A), [redacted]

(3) as required by 50 U.S.C. § 1881a(g)(2)(B), [redacted] accompanied by the applicable targeting procedures[5] and minimization procedures;[6]

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[5] See Procedures Used by NSA for Targeting Non-United States Persons Reasonably

(continued...)

(4) [redacted] supported by the affidavits of appropriate national security officials, as described in 50 U.S.C. § 1881a(g)(2)(C));[7] and

(5) [redacted] an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D).[redacted]

Regarding the amendment, the Court has previously determined that DNI/AG 702(g) [redacted] contained all the required elements. See April 7, 2009 Memorandum Opinion at 8-9. Like [redacted] the amendment was executed under oath by the Attorney General and the DNI, as required by 50 U.S.C.

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[5](...continued)
Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Targeting Procedures") (attached [redacted] as Exhibit A); Procedures Used by the FBI 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 FISA, as Amended ("FBI Targeting Procedures") (attached as Exhibit C).

[6] See Minimization Procedures Used by the NSA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Minimization Procedures") (attached [redacted] as Exhibit B); Minimization Procedures Used by the FBI in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Minimization Procedures") (attached as Exhibit D); Minimization Procedures Used by the CIA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("CIA Minimization Procedures") (attached as Exhibit E).

[7] See Affidavit of Lt. Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached [redacted] at Tab 1); Affidavit of Robert S. Mueller, III, Director, FBI (attached at Tab 2); Affidavit of Leon E. Panetta, Director, CIA (attached at Tab 3).

[8] The statement described in 50 U.S.C. § 1881a(g)(E) is not required here because there has been no "exigent circumstances" determination under Section 1881a(c)(2).

§ 1881a(g)(1)(A). [redacted] Pursuant to Section 1881a(g)(2)(A)(ii), the amendment includes the attestations of the Attorney General and the DNI that the accompanying NSA, FBI, and CIA minimization procedures meet the statutory definition of minimization procedures and have been approved by this Court in prior dockets. Id. at 3 n.4. The amendment includes an effective date that complies with 50 U.S.C. § 1881a(g)(2)(D) and § 1881a(i)(2). All other aspects of [redacted] – including the attestations originally made therein in accordance with subsection 1881a(g)(2)(A), the targeting procedures submitted therewith in accordance with subsection 1881a(g)(2)(B),[9] and the affidavits executed in support thereof in accordance with subsection 1881a(g)(2)(C) – are unaltered by the amendment.

Accordingly, the Court finds that [redacted] each "contain[] all the required elements." 50 U.S.C. § 1881a(i)(2)(A).

III. REVIEW OF THE TARGETING AND MINIMIZATION PROCEDURES

The Court is required to review the targeting and minimization procedures to determine whether they are consistent with the requirements of 50 U.S.C. § 1881a(d)(1) and (e)(2). 50 U.S.C. § 1881a(i)(1)(2); see also 50 U.S.C. § 1881a(i)(1)(C) (providing that amended procedures must be reviewed under the same standard). Section 1881a(d)(1) provides that the targeting procedures must

[redacted]

9 [redacted]

be "reasonably designed" to "ensure that any acquisition authorized under [the certification] is limited to targeting persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition of any communication as to which the sender and all known recipients are known at the time of the acquisition to be located in the United States." Section 1881a(e)(2) requires that the minimization procedures "meet the definition of minimization procedures under section 1801(h) or 1821(4) of [the Act]." Most notably, that definition requires "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 [or physical search], 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." 50 U.S.C. § 1801(h); see also id. § 1821(4). Finally, the Court must determine whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. 50 U.S.C. § 1881a(i)(3)(A).

The government represents that the targeting and minimization procedures included as part of the [redacted] Submission are identical to the corresponding procedures that were submitted to the Court [redacted]. See [redacted] Submission at 2. The Court has reviewed each of these sets of procedures and confirmed that this is the case. The Court found [redacted] that the same targeting and minimization procedures were consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment.

See [redacted] 2009 Memorandum Opinion at 8-14 [redacted] 2009 Memorandum Opinion at 8-14.

Implicit in the requirement that the government maintain procedures that satisfy the statutory standards is a requirement that it comply with those procedures. NSA's purging and post-targeting review problems implicate this requirement. Since identifying NSA's purging and post-targeting review problems, however, the government has adopted enhanced measures to remedy those problems and to ensure prospective compliance with the applicable procedures. For the reasons stated below, the Court concludes that those measures adequately address NSA's purging and post-targeting review problems and provide a basis for again finding that the targeting and minimization procedures are consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment.

A. NSA's Purging Problems

1. Background

As discussed above, acquisitions pursuant to Section 702 must be limited to targeting non-United States persons reasonably believed to be located outside the United States.[10] As part of the

[10] 50 U.S.C. § 1881a(b) provides that "an acquisition authorized under [Section 702]": (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 of such acquisition 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 (continued...)

regime the government has developed to ensure adherence to the statutory limits, NSA's targeting and minimization procedures not only require it to discontinue the acquisition of communications that are determined to exceed the scope of authorized collection, but also to purge certain of those communications. The minimization procedures provide that a "domestic communication" must be "promptly destroyed upon recognition" unless the Director of NSA "specifically determines, in writing," that the communication contains: "significant foreign intelligence information"; evidence of a crime that has been, is being, or is about to be committed; information retained for cryptanalytic, traffic analytic, or signal exploitation purposes; or "information pertaining to a threat of serious harm to life or property." NSA Minimization Procedures at 5-6. The minimization procedures generally define a "domestic communication" as any communication that does not have "at least one communicant outside of the United States." Id. at 2. In addition, "domestic communications" include "[a]ny communications acquired through the targeting of a person who at the time of the targeting was reasonably believed to be located outside the United States but is in fact located inside the United States at the time such communications were acquired," and "[a]ny communications acquired by targeting a person who at the time of targeting was believed to be a non-United States person but was in fact a United States person." Id. at 4.

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[10](...continued)
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."

NSA's targeting procedures separately require NSA to report to DOJ and ODNI within five business days of learning of any incident involving the intentional targeting of a United States person or a person inside the United States, and to purge any resulting collection from its databases. See NSA Targeting Procedures at 8.[11]

2. Discovery and Investigation of the Purging Problems

The government discovered in [redacted] 2010 that although it was reasonably certain that data subject to purge under the Section 702 targeting or minimization procedures was in fact being purged from some of the collection stores that NSA uses to store unminimized data, NSA's purge processing did not extend to [redacted] systems [redacted] Submission, Attachment at 2-3. Subsequent investigation and testing has revealed the existence of incompletely purged data in a number of NSA [redacted] systems. See [redacted] Submission at 4-5. Investigation has further revealed the existence of a number of disseminated signals intelligence ("SIGINT") reports that were possibly based on Section 702 information that should have been purged. See [redacted] Submission, Attachment at 2-3.

3. Remedial Measures

Since discovering the purging problems in [redacted] 2010, NSA has taken substantial steps to

[11] NSA also sometimes purges Section 702 information for other reasons that are unrelated to FISA, such as pursuant to [redacted] See [redacted] 2010 Letter at 3-4. The Court is concerned here only with purges that are required under the Act or by Court-approved procedures.

address the problem and to ensure prospective compliance with its Section 702 targeting and minimization procedures. See [redacted] Submission at 1; [redacted] Submission, Attachment at 4-6. The government has provided the Court with detailed information about the measures being implemented during the [redacted] hearing and in a number of written submissions. The following is a description of the essential elements of NSA's process for prospectively ensuring that Section 702 communications will effectively and expeditiously be purged when purging is required.[12]

NSA has developed [redacted] to describe the flow of information through its systems and the steps it has taken to remedy the purge problem. See [redacted] Submission, Attachment at 6. [redacted]

[12] The government is continuing to work on locating and deleting past acquisitions that should have been, but were not, purged. See [redacted] Submission at 3-5. The Court's focus in this proceeding, however, is future acquisitions that will be made pursuant to [redacted]

[redacted]

13 [redacted]

[redacted]

[redacted]

4. NSA's Process for Purging Section 702 Communications Is Consistent With its Targeting and Minimization Procedures

NSA's improved process for purging Section 702 information is consistent with its targeting and minimization procedures. As noted above, NSA's minimization procedures require that "domestic communications" be "promptly destroyed upon recognition" unless the Director determines that one of several enumerated exceptions applies. NSA Minimization Procedures at 5-6. In the absence of such determination by the Director, NSA complies with this requirement by promptly deleting communications that are determined to be domestic communications from the agency's [redacted]

NSA will also promptly purge [redacted] any copies of raw communications that are determined to be domestic communications. The government asserts, and the Court agrees, that because there is a clear connection between a copy and the underlying communication, once a communication is recognized as being subject to purge, any copy that is traceable to that communication is simultaneously "recognized" as being subject to purge. See [redacted] Submission at 4.

[redacted]

[redacted]

In light of NSA's improved procedures, the agency's past purging problems do not preclude the Court from finding that targeting and minimization procedures now before the Court meet the

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[14] NSA's improved process for purging communications is also consistent with the separate purging provision of its targeting procedures. As noted above, that provision requires NSA to report to DOJ and ODNI within five business days of learning of any incident involving the intentional targeting of a United States person or a person inside the United States, and to purge any resulting collection from its databases. See NSA Targeting Procedures at 8.

applicable statutory requirements and are consistent with the Fourth Amendment.[15]

B. NSA's Post-Targeting Review Backlog

1. Background

During the [redacted] hearing, the government informed the Court of an issue relating to NSA's post-targeting review process. NSA's targeting procedures require it to conduct post-targeting analysis, a process that is "designed to detect those occasions when a person who when targeted was reasonably believed to be located outside the United States has since entered the United States," and "to 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, or the intentional targeting of a person who is inside the United States." NSA Targeting Procedures at 6. [redacted]

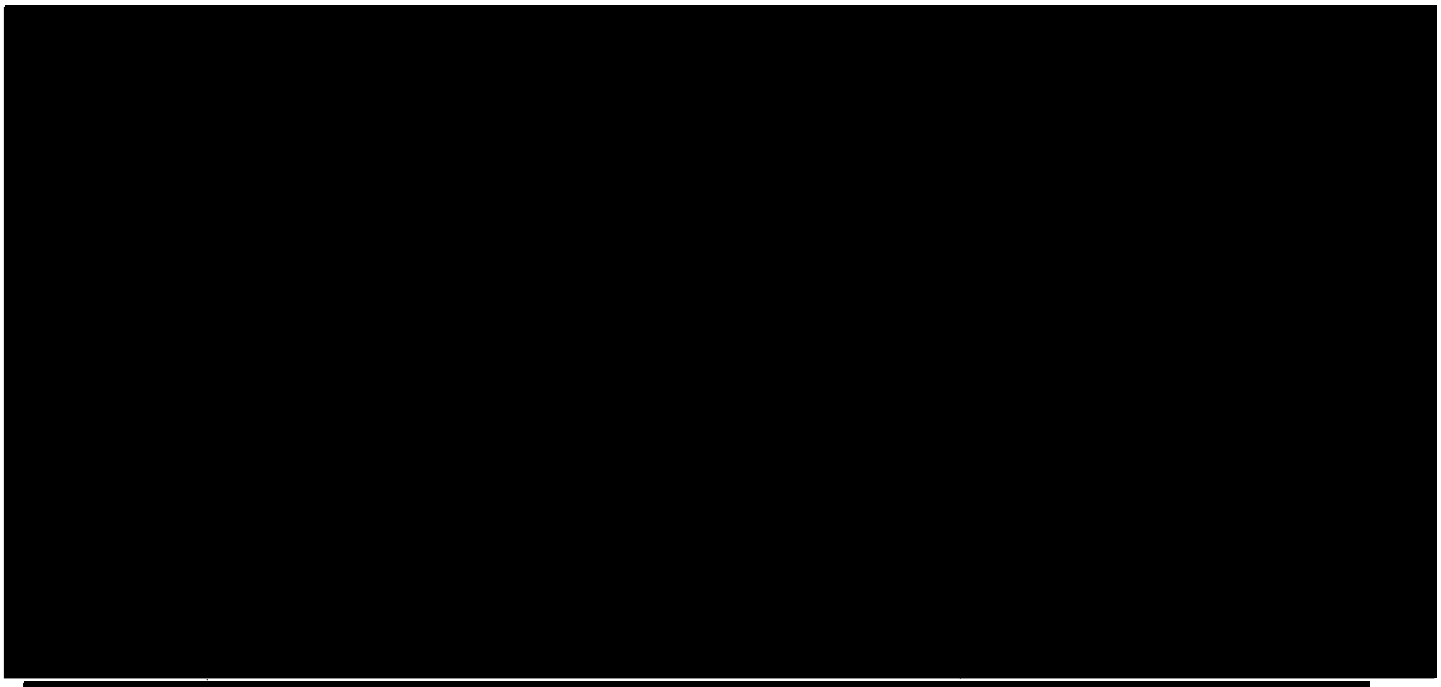
[15] The Court understands that the FBI and CIA have not experienced similar systemic problems in purging Section 702 collection. Accordingly, the Court is satisfied that NSA's purging problems do not preclude the Court from again finding that the FBI Targeting Procedures, the FBI Minimization Procedures, and the CIA Minimization Procedures satisfy the requirements of the Act and the Fourth Amendment.

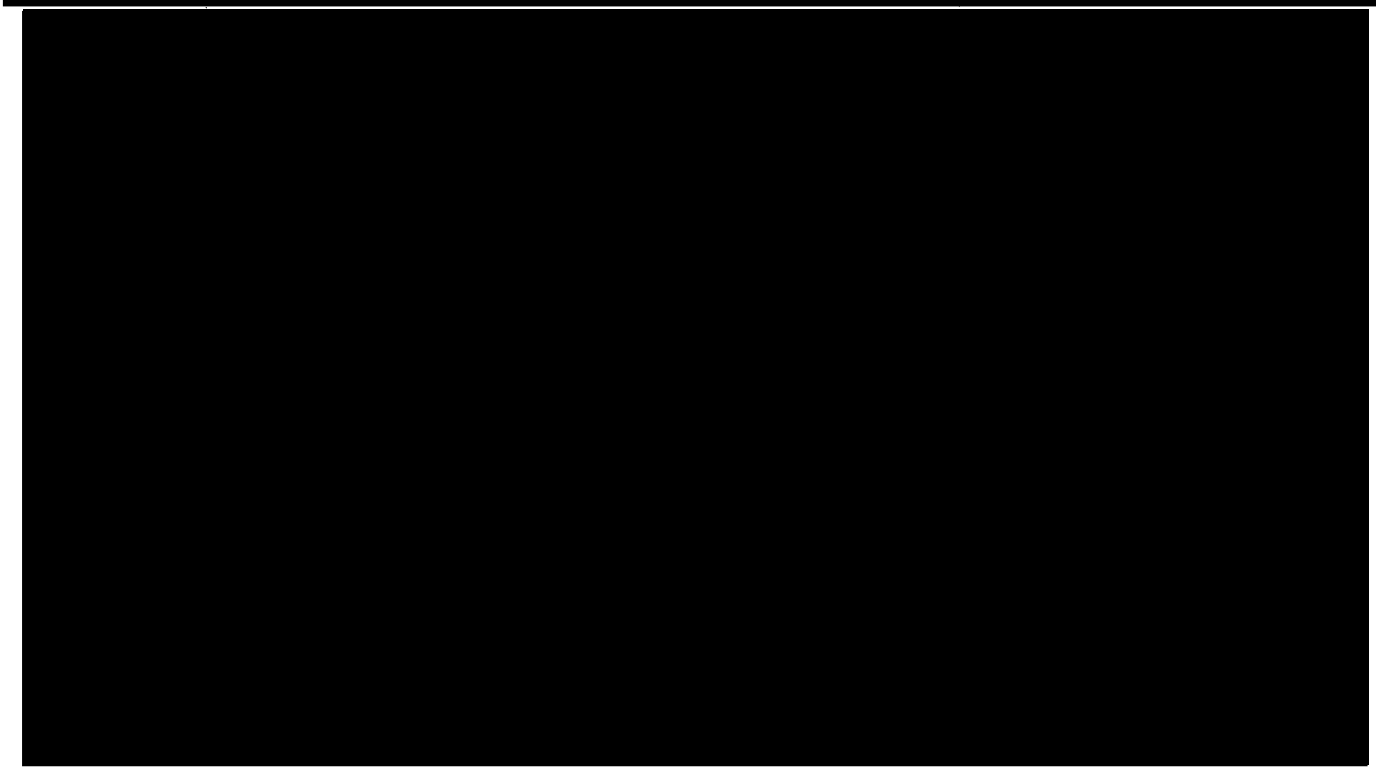
[redacted] As discussed above, NSA's Minimization Procedures require that "any communications acquired through the targeting of a person who at the time of the targeting was reasonably believed to be located outside the United States but in fact is located inside the United States at the time such communications were acquired" be "promptly destroyed upon recognition" unless the Director determines in writing that one of several exceptions applies. NSA Minimization Procedures at 4-6.

In prior proceedings under Section 702, the government has described the process used by NSA to fulfill its obligation under the targeting procedures to "routinely" monitor for indications that tasked electronic communications accounts are being used from inside the United States. [redacted]

2. Disclosure of the Alert Backlog

In its [redacted] Submission, the government disclosed that its prior representations about the post-tasking review process were not completely accurate. See [redacted] Submission at 5-9. The [redacted]





3. Remedial Measures

The government reports that since it disclosed the existence of the alert backlog to the Court on [redacted] 2010, NSA has dedicated additional resources to the alert review process and adopted timing requirements for alert resolution. See [redacted] Submission at 3-4 [redacted] Submission at 2. The government has orally represented that as of [redacted] NSA had reduced its backlog of unreviewed alerts [redacted]

4. NSA's Improved Process for Handling Post-Targeting Alerts is Consistent With its Targeting and Minimization Procedures

The Court concludes that NSA's process for reducing the alert backlog and for prospectively handling unreviewed and unresolved alerts is consistent with the requirements of its targeting and minimization procedures. Application of that process [redacted] – will result in the "routine" monitoring [redacted] With respect to minimization, NSA's improved alert-review process substantially reduces the risk that its recognition of data subject to purge will be delayed for lengthy periods of time.

In light of NSA's improved alert review process and the reduction of its backlog, the Court is satisfied that NSA's alert backlog does not preclude it from renewing its prio[redacted] targeting and minimization procedures that are now before the Court meet the applicable statutory requirements and are consistent with the Fourth Amendment.[16]

16 [redacted]

C. NSA's Problems Providing Targeting-Related Documentation to DOJ and ODNI

In its [redacted] Submission, the government reported another issue relating to NSA's targeting determinations. See [redacted] Submission at 9-10. At the time of targeting, NSA analysts are required to "documen[redacted] information that led them to reasonably believe that a targeted person is located outside the United States." NSA Targeting Procedures at 7. This documentation facilitates later oversight of how the procedures are implemented. See id. Internally, NSA oversight personnel "conduct periodic spot checks of targeting decisions." Id. at 8. In addition, personnel from DOJ and ODNI conduct reviews of NSA's implementation of its targeting procedures "at least once every sixty days." Id. In prior representations to the Court, the government has stated that DOJ and ODNI receive documentation for "every single tasking decision that NSA has made" pursuant to Section 702. See [redacted] Submission at 9. The government reported in the [redacted] Submission, however, that, in light of a software problem, NSA was unable to provide such documentation to DOJ and ODNI for a number of taskings. Id. [redacted] he government has informed the Court that NSA has corrected the problem, and that DOJ and ODNI are now receiving documentation for all NSA targeting decisions [redacted] Hrg. Tr. at 75-76. Accordingly, the Court is satisfied that the now-resolved documentation problem does not preclude a finding that the targeting and minimization procedures accompanying DNI/AG 702 [redacted]

[redacted] satisfy the statutory requirements and comport with the Fourth Amendment.[17]

IV. CONCLUSION

For the foregoing reasons, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that [redacted] and amendment submitted in the above-captioned dockets "in accordance with [Section 1881a(g)] contain[] all the required elements and that the targeting and minimization procedures adopted in accordance with [Section 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States." Orders approving [redacted] the amendment, and the use of the accompanying procedures are being entered contemporaneously herewith.

ENTERED this [redacted] 2010, [redacted]

Mary A. McLaughlin

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

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[17] The government has provided the Court with notice of a number of additional compliance incidents. The Court has considered these incidents, many of which are discussed more fully in recent reports to Congress and the Court. In light of the steps taken by the government to address those incidents and prevent similar occurrences, the Court is satisfied that they do not preclude finding that the targeting and minimization procedures accompanying [redacted] satisfy the requirements of the statute and the Fourth Amendment.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion issued contemporaneously herewith, and in reliance on the entire record in this matter, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that the above-captioned [redacted] submitted in accordance with [50 U.S.C. § 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [50 U.S.C. § 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States."

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that [redacted] and the use of such procedures are approved.

ENTERED this [redacted] 2010, at 8:45 A.M. Eastern Time.

Mary A. McLaughlin

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

exempt under b(6)

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

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