~~TOP SECRET//SI//ORCON/NOFORN~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

(b) (1)
(b) (3)-50 USC 3024(i)

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

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

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Classified by: Chief, Operations Section, OI, NSD, DOJ
Reason: Multiple Sources
Declassify on: 20430327

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[redacted] respectively (hereinafter "the 2016 Certifications"),[2] all of which expire on [redacted] b3, b7E per FBI Attached as Exhibits A, B, C, D, E, G, and H to the 2018 Certifications are the targeting, minimization, and querying procedures to be used under these certifications.[3] The government is also providing the Court with updated

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[1] (U) Prior to passage of the FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018), the current subsection (h) of section 702, "CERTIFICATIONS," was located at subsection (g). The government will continue to refer to certifications adopted prior to that Act using their historical statutory reference (i.e., "DNI/AG 702(g) Certification").

[2] (U) The 2016 Certifications were submitted to the Court on September 26, 2016. During the Court's consideration of the those certifications, the government updated the Court concerning certain compliance incidents; in light of those compliance incidents, the Court twice extended its time for consideration of those certifications, until [redacted] b3, b7E per FBI Because the 2016 Certifications became effective on April 26, 2017, and are effective for one year, the government did not need to submit certifications reauthorizing those certification during 2017. Accordingly, there are no 2017 certifications intervening between the 2016 Certifications and the 2018 Certifications.

[3] (U) Specifically, the targeting procedures to be used by the National Security Agency (NSA) and Federal Bureau of Investigation (FBI) are attached as Exhibits A and C, respectively. The minimization procedures to be used by NSA, the FBI, the Central Intelligence Agency (CIA), and the National Counterterrorism Center (NCTC) are attached as Exhibits B, D, E, and G, respectively. The consolidated querying procedures to be used by NSA, FBI, CIA, and NCTC are attached as Exhibit H.

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Attorney General Guidelines adopted pursuant to 50 U.S.C. § 1881a(g).[4]

~~(S//OC/NF)~~ In addition, the 2018 Certifications also include amendments to the certifications being reauthorized [redacted] as well as to their predecessors.[5] Specifically, these amendments authorize the use of the minimization procedures submitted herewith as Exhibits B, D, E, and G, and querying procedures submitted herewith as Exhibit H, to the 2018 Certifications in connection with foreign intelligence information acquired in accordance with the 2016 Certifications and their predecessors.[6]

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[4] (U) Although these Guidelines are not subject to Court review, the government notes that the changes made to them are generally to conform the Guidelines to the requirements of newly added statutory sections 50 U.S.C. § 1881a(b)(5) (prohibiting "abouts" collection, described below), 50 U.S.C. § 1881a(f)(1) (requiring that any query of unminimized section 702-acquired information must be conducted in accordance with querying procedures adopted by the Attorney General, in consultation with the Director of National Intelligence, and approved for use by the Court), and 50 U.S.C. § 1881a(f)(2) (absent certain emergencies, requiring the FBI to obtain a Court order prior to reviewing the contents of unminimized section 702-acquired communications that were retrieved using United States person query terms that were not designed to find and extract foreign intelligence information).

[5] ~~(S//OC/NF)~~ [redacted]

[6] (U) The FISA Amendments Reauthorization Act of 2017 does not include a requirement that the querying procedures required by subsection 702(f)(1) apply to information acquired

~~(S//OC/NF)~~ The targeting and minimization procedures being submitted with the 2018 Certifications contain a number of changes from the targeting and minimization procedures approved for use under the 2016 Certifications. With the exception of certain changes to the FBI's targeting and minimization procedures, discussed below, the purpose of these changes is generally to conform to amendments to section 702 of FISA made by the FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018), in particular the prohibition against the collection of "abouts" communications[7] and the requirement for querying procedures.

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pursuant to prior section 702 certifications. However, the querying provisions of the minimization procedures currently applicable to the NSA, FBI, CIA, and NCTC have been removed in the minimization procedures submitted herewith, which instead refer to the querying procedures submitted herewith to govern these agencies' queries of section 702-acquired information. Because the 2018 Certifications include amendments authorizing the use of the minimization procedures attached herewith as Exhibits B, D, E, and G, to information acquired pursuant to all prior section 702 certifications, these agencies would be left without provisions governing their queries of such information unless the querying procedures submitted herewith as Exhibit H were also to apply to that information. The government believes that authorizing each agency to use a single set of querying procedures for the entirety of that agency's holdings of section 702-acquired information will result in more uniform application of querying standards to that information. Moreover, authorizing each agency to use a single set of querying procedures for that information also will significantly simplify oversight of each agency's adherence to those standards.

[7] ~~(S)~~ NSA previously acquired not only communications to or from section 702 targets, but also communications "about" such targets. *See, e.g., In re* [redacted] Mem. Op. at 8, 17-20 (FISA Ct. Sept. 4, 2008) (describing NSA's acquisition of "abouts" communications, which are "communications that contain a reference to the name of the tasked account," [redacted]

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The querying procedures being submitted herewith are procedures now formally required by subsection 702(f)(1) of the Act, as recently amended, although each agency historically has had provisions governing querying contained in their standard minimization procedures and internal agency procedures. Exhibit H contains consolidated procedures applying to the four agencies with access to unminimized information collected pursuant to section 702 of the Act, i.e., NSA, FBI, CIA, and NCTC. To aid the Court in its review of the targeting, minimization, and querying procedures submitted herewith, below is a discussion of the querying procedures (Exhibit H), as well as key changes made to the FBI's targeting and minimization procedures (Exhibits C and D, respectively).

(U) **Querying Procedures**

(U) The FISA Amendments Reauthorization Act of 2017, enacted January 19, 2018, amended FISA section 702 by, *inter alia*, re-designating former subsections (f) through (l) as subsections (g) through (m), as discussed briefly above, and by inserting a new subsection 702(f). In part, the newly enacted subsection 702(f)(1) requires the Attorney General, in consultation with the Director of National Intelligence, to "adopt querying procedures consistent with the requirements of the fourth amendment to the

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Constitution of the United States." 50 U.S.C. § 1881a(f)(1)(A). The government has adopted a single set of querying procedures, attached to the 2018 Certifications as Exhibit H, applicable to NSA, FBI, CIA, and NCTC (collectively, "covered agencies"), the only Intelligence Community elements that receive unminimized section 702-acquired information. *Cf.* H.R. Rep. No. 115-475, at 18 (2017) ("The Attorney General has discretion to adopt . . . a single set of [querying] procedures, which would be applicable to all Intelligence Community elements that receive unminimized FISA Section 702 collection[.]")

(U) In addition to several provisions applicable to all of the covered agencies (Sections I through V), the querying procedures contain individualized sections for each of the covered agencies (Sections VI through IX). Except as otherwise described herein, the new querying procedures generally incorporate the pre-existing requirements governing the conduct of queries previously located in each of the covered agency's minimization procedures. *Cf. id.* at # ().

(U) **Generally Applicable Provisions (Sections I Through III)**

(U) Following an introductory paragraph, Section II provides that the covered agencies may deviate from the querying procedures to prevent harm to human life in those cases where obtaining a modification to the procedures is not feasible. *See* Ex. H at 1. Each of the covered agencies' current minimization procedures contains a similar

provision applicable under identical circumstances.[8] Just as with the covered agencies' current minimization procedures, the querying procedures require that any such action must be reported to the Department of Justice's National Security Division (NSD) and the Office of the Director of National Intelligence (ODNI) which, in turn, are obligated to inform the Foreign Intelligence Surveillance Court (FISC). *See* Ex. H at 1.

(U) Section III of the querying procedures clarifies the circumstances under which the covered agencies are permitted to deviate from the querying procedures. A deviation-related provision is contained in the current NSA, FBI, CIA, and NCTC section 702 minimization procedures. *See, e.g.*, NSA 2016 Minimization Procedures at 1; FBI 2016 Minimization Procedures at 3; CIA 2016 Minimization Procedures at 4-5; and

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[8] ~~(S)~~ *See, e.g.*, Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, [redacted] submitted March 30, 2017, at 1 (hereinafter "NSA 2016 Minimization Procedures"); Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, [redacted] submitted September 26, 2016, at 3 (hereinafter "FBI 2016 Minimization Procedures"); 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, [redacted] submitted September 26, 2016, at 10 (hereinafter "CIA 2016 Minimization Procedures"); and Minimization Procedures used by the National Counterterrorism Center in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, [redacted] submitted September 26, 2016, at 7 (hereinafter "NCTC 2016 Minimization Procedures").

NCTC 2016 Minimization Procedures at 4. However, Section III of the querying procedures differs from the current language contained in the covered agencies' minimization procedures in that Section III more clearly articulates the specific limited range of activities to which it applies. First, Section III provides that the querying procedures do not restrict a covered agency's performance of lawful training functions. *See* Ex. H at 1. Specifically, the covered agencies may need to run United States person queries to demonstrate for training purposes the manner in which queries must be conducted and recorded.[9] Although such queries may not be for foreign intelligence or evidence of a crime purposes, such queries are a useful tool in ensuring that agency personnel understand how to properly apply that standard in their daily work.

(U) Second, Section III permits the covered agencies to run queries that otherwise do not meet the applicable standards in order to create, test, or maintain agency systems. *See id.* at 1. The current minimization procedures allow queries for the agencies' "performance of lawful oversight functions of [their] . . . systems." *See, e.g.*, CIA 2016 Minimization Procedures at 5. This provision in the querying procedures is

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intended to more clearly reflect the manner in which an agency may be permitted to conduct queries in support of creating, maintaining, and testing its systems, and will allow agency technical personnel the ability to perform queries to ensure the proper functioning of agency systems, such as by running queries to ensure that all of a tasked selector's communications are being loaded into a viewing program.

(U) Third, rather than allowing agencies to generally depart from the procedures for "performance of lawful oversight functions of [their] personnel or systems," *see, e.g.*, CIA 2016 Minimization Procedures at 5, Section III of the querying procedures enumerates narrowly tailored circumstances more clearly specifying when covered agencies are permitted to deviate from the querying procedures for the performance of lawful oversight functions. The specific activities listed include queries performed:

> in support of a covered agency's investigation and remediation of a possible compliance incident, including a potential spill of classified information; to identify information subject to destruction, including under a covered agency's minimization procedures; to ensure the effective application of marking or segregation requirements in relevant agency minimization procedures or federal records requirements; in support of a covered agency's audit or review, for quality control purposes, of work done by agency personnel; in support of authorized work conducted in systems used solely for audits and oversight; or in support of agency investigations of potential misconduct by an employee that otherwise would not meet the query standards detailed for each agency [in the querying procedures] below.

Ex. H at 1-2. If an agency plans to deviate from any aspect of the querying procedures for oversight purposes in any circumstance other than the six specifically listed, the

covered agency must consult with NSD *prior to* conducting such query and NSD must report the deviation promptly to the FISC.[10] *Id.* at 2. As provided in Section III, the covered agencies remain obligated to record all United States person queries of unminimized section 702-acquired information conducted for the reasons provided therein, including training purposes. *Id.*

(U) Fourth, Section III makes clear that the covered agencies may conduct queries in order to comply with the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

(U) Fifth, Section III explicitly permits the agencies to conduct queries "designed to identify information that must be produced or preserved in connection with a litigation matter." *Id.* The current minimization procedures include sections detailing the covered agencies' handling of unminimized section 702-acquired information for purposes of preservation for administrative, civil, or criminal litigation matters. *See* NSA 2016 Minimization Procedures at 5-7; FBI 2016 Minimization Procedures at 24-25; CIA 2016 Minimization Procedures at 10-11; and NCTC 2016 Minimization Procedures

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[10] ~~(S//NF)~~ The corresponding provisions in each of the covered agencies' minimization procedures submitted herewith, Exhibits B, D, E, and G, have also been changed to include similar, narrowly tailored lists of oversight functions that may warrant a deviation from the minimization procedures, as well as the same reporting requirement for oversight functions performed that deviate from the minimization procedures but are not specifically included in that list. *See* Ex. B at 2; Ex. D at 4-5; Ex. E at 5; & Ex. G at 4.

at 6. Although the government believes that the authority to query such information for litigation-related reasons was implicit in those provisions, the querying procedures now make that explicit.

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~~(S//NF)~~ In addition, during the preparation of this submission [redacted]

[redacted]

[redacted]

The government will provide future updates to the Court as they become available.

(U) **Record-Keeping Requirement (Section IV)**

(U) Subsection 702(f)(1)(B) of the Act requires that the Attorney General, in consultation with the Director of National Intelligence, "ensure that the procedures adopted under subparagraph (A) [i.e., the querying procedures] include a technical procedure whereby a record is kept of each United States person query term used for a query." Each of the covered agencies' current minimization procedures contain query documentation provisions. *See* NSA 2016 Minimization Procedures at 5; FBI 2016 Minimization Procedures at 11;[11] CIA 2016 Minimization Procedures at 3; and NCTC 2016 Minimization Procedures at 7. The querying procedures carry forward the same basic record-keeping requirements as those currently applicable in the 2016 minimization procedures, *see* Ex. H at 4-6, but also include additional requirements.

(U) In particular, given the new statutory requirement for a "technical procedure" to record United States person query terms, Section IV of the querying procedures specifically requires that "the covered agencies must generate and maintain an electronic record of each United States person query term," unless it is impracticable

[11] (U) The FBI complies with its current record-keeping provision by keeping records of all queries, including query terms, used by those with access to raw FISA-acquired information.

to generate an electronic record or unexpected circumstances arise – in which case the record must be written. *Id.* at 2. In either case, the electronic or written records must contain, at a minimum: (1) the query term(s) used or approved; (2) the date of the query or approval, and (3) an identifier for the user conducting the query or seeking approval therefor. *Id.* NSA must also record for any content queries the approving official in NSA's Office of General Counsel and the duration of the approval. *Id.* NSA, CIA and NCTC must also maintain records of the statement of facts establishing that the use of a selection term is "reasonably likely to retrieve foreign intelligence information." *Id.*[12] If

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[12] ~~(S//NF)~~ Although the FBI is not required to maintain a statement of facts establishing that a selection term is reasonably likely to return foreign intelligence information or evidence of a crime, the Court has previously found the FBI procedures to be reasonable under the Fourth Amendment without such a requirement. Specifically, in connection with the 2015 Certifications, an amicus curiae argued that the FBI Minimization Procedures were not reasonable under the Fourth Amendment because of their querying provisions and argued that they should be revised to "'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.'" *See In re* [redacted] Memorandum Opinion and Order, at 39-40 (FISA Ct. Nov. 6, 2015) (hereinafter "2015 Memorandum Opinion"). The Court disagreed, and concluded that even without such a requirement, the FBI Minimization Procedures were reasonable under the Fourth Amendment. The Court found that, although "the FBI's querying process is relevant to the Court's reasonableness analysis," the Court must "assess the constitutionality of the framework created by the targeting and minimization procedures" under the "totality of the circumstances," and that pursuant to such assessment the FBI procedures were constitutional, noting, among other things, that the FBI's queries run against information that has been collected after application of NSA's section 702 targeting procedures. *Id.* at 40-41.

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any agency intends to conduct a query in a system that does not generate an electronic record of a query, before conducting such query, "the covered agency personnel must reasonably determine that conducting a query in a system that generates an electronic record would be insufficient for technical, analytical, operational, or security reasons."[13] *Id.* For example, if a covered agency needed to place raw section 702-acquired information on a system that does not generate an electronic record in order to use an analytical tool that was otherwise not available on the system that generates an electronic record to more effectively or efficiently analyze a large volume of data acquired from the tasked selector, this provision would permit the agency to maintain written records of any United States person queries of this raw data.

(U) Section IV also requires that a covered agency maintain such records for a period of at least five years from when: (a) the query term was approved for NSA content queries; or (2) from when the query was run, for all other types of queries by NSA, FBI, CIA and NCTC. *Id.* Although the current minimization procedures do not contain a specific time period for which records of United States person queries must be

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[13] ~~(S//NF)~~ As provided in the FBI's minimization procedures attached herewith, "If the ad hoc system that FBI personnel determine they may use is not capable of generating electronic records of queries, then their determination that they may use the ad hoc system for review or analysis also serves as their determination that they may conduct queries in that system, as described in paragraph IV of the Querying Procedures." Ex. D at 23.

kept, the government submits that a five-year period is reasonable and allows for meaningful oversight of such queries by NSD, ODNI, the FISC, and Congress.[14]

(U) **Definitions and Presumptions (Section V)**

(U) In Section V, the querying procedures define key terms and presumptions used in the procedures. *See* Ex. H at 2-4. These definitions are not intended to alter the covered agencies' current understanding of key terms or any descriptions that have previously been provided to the Court, but are intended only to aid covered agency personnel in using these procedures by including in one document the interpretation of commonly used terms. Likewise, the specified presumptions regarding whether a

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[14] ~~(S)~~ Although the Act does not address the time period that query records must be maintained, the legislative history indicates that Congress intended that the government set a "reasonable retention period consistent with [the covered agencies respective missions] and the desire to ensure such records are retained for appropriate oversight purposes." H.R. Rep. No. 115-475, at 18. The government assesses that, in this context, a five-year retention period sufficiently protects the privacy interests of Americans, while also allowing for appropriate oversight. The government included a five-year retention provision in the querying procedures [redacted] *See, e.g.*, NSA 2016 Minimization Procedures at 5 [redacted] FBI 2016 Minimization Procedures at 22; CIA 2016 Minimization Procedures at 2; NCTC 2016 Minimization Procedures at 5. This is a longstanding practice, and the Court has previously determined that a five-year retention period is reasonably designed to minimize the retention of non-publicly available information concerning unconsenting United States persons while still allowing for the interests of the government in reviewing and analyzing data. *See, e.g., In re* [redacted] Mem. Op. at 30-31 (FISA Ct. Sept. 4, 2008) (finding an outside retention period of five years in NSA's minimization procedures to be reasonable).

person must be considered a United States person are consistent with those in the current minimization procedures and previously represented to the Court.

(U) Definitions

(U) Many of the definitions contained in Section V are those contained in current Minimization Procedures (e.g. "National Security Agency," "Federal Bureau of Investigation") and/or have been presented to the Court in other contexts (e.g., "Contents," "Metadata"), and therefore will not be discussed herein. Although "United States person query term" is not a defined term in any of the current minimization procedures, the definition contained in Exhibit H is consistent with the broad interpretation of a United States person identifier in the current NSA, CIA, and NCTC 2016 Minimization Procedures. *See, e.g.*, NSA 2016 Minimization Procedures at 2; CIA 2016 Minimization Procedures at 1; NCTC 2016 Minimization Procedures at 2. While focused on the manner in which a query term has been crafted – "reasonably likely to identify one or more specific United States persons," either on its own or in combination with other information -- the examples provided illustrate the breadth of what could be considered a United States person identifier, depending on the context.[15]

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[15] (U) The phrase "identify one or more specific United States persons" applies to the query term itself and not the results of the query. For example, a query of a United States person's name that does not produce any results would nonetheless be considered a Untied States

See Ex. H at 3. The examples include, *inter alia*, names or unique titles, corporate identification numbers, financial information, and Internet Protocol address information. *Id.* In addition, consistent with past practice, descriptive or commercial terms involving United States person identities (or related nomenclature, including part numbers), such as an example provided, "Ford Crown Victoria," are excluded from the definition of United States person query term, "so long as such term is not intended to retrieve information concerning a specific United States person." *Id.*

(U) The other notable defined term is that of a "query." The definition of a query contained in the procedures is consistent with the covered agencies' current procedures, prior representations made to the FISC, and subsection 702(f)(3) of the Act.[16] Consistent with current minimization procedures and practice, the definition of "query" exempts a query of unminimized section 702 information "where the user does not receive unminimized section 702-acquired information either because the user has not been granted access to the unminimized section 702-acquired information, or

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person query term. However, a query using a non-United States person's name that produces communications involving United States persons would not be considered a United States person query term.

[16] (U) Subsection 702(f)(3) defines "query" as "the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic data storage systems of communications of or concerning United States persons obtained through acquisitions authorized under subsection [702](a)."

because a user who has been granted such access has limited the query such that it cannot retrieve unminimized section 702-acquired information." Ex. H at 3; *accord*, FBI 2016 Minimization Procedures at 11, CIA 2016 Minimization Procedures at 4. The Court has previously found that such provisions are consistent with the definition of minimization procedures in 50 U.S.C. §§ 1801(h) of the Act. *See, e.g.*, 2015 Mem. Op. at 28 & n.26, 36 (discussing the FBI provision and finding the FBI minimization procedures to satisfy the statutory requirements).

(U) In addition, the definition of "query" in Section V of the querying procedures makes clear that post-query sorting or other examination or manipulation, including by technical means, of documents or communications for purposes of carrying out minimization does not fall within the definition of query. Both post-query sorting and manipulation of documents or communications are not conducted for the purpose of retrieving unminimized section 702-acquired information, but rather are conducted to, *inter alia*, aid an operator in viewing or minimizing information already retrieved in response to a query. For example, if an analyst ran a query in a database containing unminimized section 702-acquired information that retrieved 20 communications, the analyst may sort the communications to view the most recent messages first, and such sorting action would not be considered a query. Likewise, where an analyst is working with those 20 communications, the user may take certain

actions to minimize the document or communication without such actions being considered a query. For instance, an analyst might use the "find and replace" function to automatically find any instances of a known United States person's name and replace that name with a generic term, for example "U.S. person 1" rather than doing so manually without that computer action being considered a query. It is not the case, however, that every subsequent manipulation of the data is excluded from the definition of a query. Accordingly, the language in the querying procedures includes two commonly used actions by the covered agencies to manipulate data. *Cf. In re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under the Foreign Intelligence Surveillance Act*, Memorandum Opinion and Order, at 26 (FISA Ct. May 17, 2016) ("The form of sorting contemplated by this exception involves 'reorder[ing] the objects in a dataset according to standard filters presented by the software' - such as 'by date, duration or length of the communication... [or] caller identification' - but not 'based on criteria created by an individual user (such as keywords or identifiers).' The described type of sorting has clear utility for reviewing data and presents little risk of misuse. Accordingly, excluding these actions from record-keeping requirements is consistent with § 1801(h).") (citation omitted).

(U) Presumptions

(U) The querying procedures include the presumptions that apply in determining whether a person whose status is unknown is a United States person. *See* Ex. H at 4-5. These presumptions track those contained in the current minimization procedures and are not viewed by the government as a change from current practices or information previously presented to the Court. *See, e.g.*, NSA 2016 Minimization Procedures at 3; FBI 2016 Minimization Procedures at 2-3; and NCTC 2016 Minimization Procedures at 3.

(U) **NSA Querying Procedures (Section VI)**

(U) The specific section of the querying procedures addressing NSA, section VI, tracks very closely the language contained in NSA's 2016 Minimization Procedures. In particular, the substance of the querying provision in NSA's current minimization procedures remains the same in the querying procedures submitted herewith. *Compare* NSA 2016 Minimization Procedures at 4-5 *with* Ex. H at 5. Past sets of NSA's section 702 minimization procedures have included a statement that "any use of United States person identifiers as terms to identify and select communications must first be approved in accordance with NSA procedures." *See, e.g.*, NSA 2016 Minimization Procedures at 5. Section VI of the querying procedures does not include a reference to NSA's internal procedures; rather, the query requirements are included in Section VI

itself. Because Section VI does not refer to NSA's internal procedures, which differentiated requirements depending on whether the queries were of content or metadata, the particular requirements for content and metadata queries are now detailed in Section VI. For example, any use of a United States person query term to query unminimized section 702-acquired metadata must be accompanied by a statement of facts showing that the use of any such query term is reasonably likely to retrieve foreign intelligence information, as defined by FISA. For queries of unminimized section 702-acquired content using a United States person query term, such terms must be approved by the NSA Office of General Counsel and include a statement of facts establishing that the United States person query term is reasonably likely to retrieve foreign intelligence information, as defined by FISA. As is the current practice, the statement of facts does not have to accompany each query of section 702 content using the approved United States person identifier during the period of authorization for that query term. However, the United States person query term may be approved to query section 702-acquired content for a period of no longer than one year.[17]

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[17] ~~(S//NF)~~ [redacted]

(U) Section VI also includes the following other changes: (1) changing the description of the media that may be queried from "magnetic tapes or other storage media containing communications acquired pursuant to section 702" to "NSA systems containing unminimized information acquired in accordance with section 702 of the Act", (2) changing the word "communications" to "information" (e.g., "storage media containing information"), (3) changing the word "return" to "retrieve," to track the new statutory definition of query, *see* 50 U.S.C. § 1881a(f)(3)(B) (an approach taken with respect to all covered agencies), and (4) making other minimal conforming changes, such as including a specific reference to the record-keeping requirements in Section IV of the querying procedures. Additionally, one provision from section 3.b.4.a of NSA's current minimization procedures concerning restricting access to Internet transactions acquired on or before March 17, 2017, *see* NSA 2016 Minimization Procedures at 4, has also been incorporated in NSA's section of the querying procedures, *see* Ex. H at 5.[18]

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[18] ~~(TS//SI//NF)~~ However, as described in the Government's Ex Parte Submission of Amendments to [redacted] and Ex Parte Submission of Amended Targeting and Minimization Procedures, [redacted] submitted March 30, 2017 (hereinafter, "2016 Amendments Cover Filing"), NSA has retained and may access or scan certain specified

(U) **FBI Querying Procedures (Section VII)**

~~(S//NF)~~ Although the section of the querying procedures that applies to the FBI, Section VII, is somewhat different from the FBI 2016 Minimization Procedures, the changes are due in large part to [redacted]

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[redacted] Any changes to the substance of the FBI's querying procedures from those in the 2016 FBI Minimization Procedures are discussed herein.

~~(S//NF)~~ The FBI's currently applicable Section 702 minimization procedures state that the FBI may query unminimized section 702 information "to find, extract, review, translate, and assess whether such information 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" and that such queries must be designed to extract information meeting that standard. *See* FBI 2016 Minimization Procedures at 11. In practice, the applicable standard remains the same for all agencies. The querying procedures harmonize the language governing FBI's query practice with the language used in CIA, NSA, and NCTC's minimization procedures. In particular, the querying procedures provide that any query, whether or not using a United States person query term, must be "reasonably likely to retrieve" foreign intelligence information or evidence of a crime. This language is based on text in the NSA, CIA, and NCTC 2016 Minimization Procedures, which limit query terms to those "reasonably likely to *return* foreign intelligence information, as defined by FISA" (emphasis added). *See* NSA 2016 Minimization Procedures at 4; CIA 2016 Minimization Procedures at 3; NCTC 2016 Minimization Procedures at 7.

~~(S//NF)~~ This standard applicable to the FBI does not represent a substantive change from the FBI's understanding of its query standard, however, because the government interprets the term "reasonably designed" to permit queries of unminimized section 702-acquired information only if there is a reasonable basis to believe the query is likely to return foreign intelligence information or, in the case of the FBI only, evidence of a crime. In 2015, the government conveyed this interpretation to the Court in the context of litigating the agencies' section 702 minimization procedures, when the government assured the Court that the FBI minimization procedures prohibit the government from running queries against section 702-acquired information without any basis to believe foreign intelligence information or evidence of a crime would be returned by the query.[19] Therefore, the querying procedures adopt a standard that formalizes the standard currently followed by all four covered agencies. In other words, before conducting a query of unminimized section 702-acquired information, there must be a reasonable basis to believe that the query is likely to return foreign intelligence information or, in the case of the FBI only, evidence of a crime.

(b)(1)
(b)(3)-50 USC 3024(i)

[19] ~~(S//NF)~~ *See In re* [redacted] Government's Response to the Court's Briefing Order of September 16, 2015, filed Oct. 16, 2015, at 12-14; *see also In re* [redacted] Transcript of Proceedings Held Before the Honorable Thomas F. Hogan at 19-20 (Oct. 20, 2015).

(U) Because the vast majority of the FBI's investigative activity occurs in the United States, the FBI generally treats everyone located inside the United States the same, consistent with the Constitution and laws of the United States, when conducting investigations or identifying threat streams. Accordingly, when conducting queries to determine if an individual poses a threat to the national security, FBI personnel often elect not to initially focus their efforts on determining United States person status, but rather focus on identifying threat streams and "connecting the dots." Thus, as noted in the querying procedures, the FBI intends to satisfy the record-keeping requirement of subsection 702(f)(1)(B) by continuing its current practice of keeping records of all queries of unminimized information that the FBI acquires by targeting non-United States persons in accordance with section 702. The government submits that this proposed method of record-keeping is consistent with (1) the requirements of subsection 702(f)(1)(B); (2) Congress's understanding of the FBI's existing practice as applied to section 702-acquired information and the limitations of FBI systems' technical record-keeping functions; and (3) enabling effective oversight of the FBI's use of FISA-acquired information.

(U) First, the text of subsection 702(f)(1)(B) is consistent with the FBI's current record-keeping practices. Subsection 702(f)(1)(B) states that the querying procedures must include a "technical procedure whereby a record is kept of each United States

person query term used for a query." Subsection 702(f)(1)(B) does not include any other term, such as "separately" or "segregated," specifying that United States person query terms must be retained apart from other queries; instead, the provision only employs the term "technical" to modify the term "procedure" for retaining United States person query terms. The legislative history underlying the provision confirms that Congress did not intend to impose any specific requirements pertaining to record-keeping practices, but rather left it to the discretion of the Attorney General, in consultation with the Director of National Intelligence, to determine how an agency would keep records of queries in a manner that would allow for meaningful oversight. The House Report for the FISA Amendment Reauthorization Act of 2017 states, in pertinent part, that subsection 702(f)(1)(B):

> is not intended to, and does not impose a requirement that an Intelligence Community element maintain records of United States person query terms in any particular manner, so long as appropriate records are retained and thus available for subsequent oversight. This section ensures that the manner in which the element retains records of United States query terms is within the discretion of the Attorney General, in consultation with the Director of National Intelligence and subject to the approval of the FISC.

H.R. Rep. No. 115-475, at 18. Historically, the FBI's record-keeping practice has been to retain all queries without distinguishing between the types of query term. To date the Executive Branch has been able to conduct effective oversight of the FBI's queries, and the government submits that maintaining the FBI's historical record-keeping practices

will continue to enable effective oversight of the FBI's section 702 program. Indeed, as the Court is aware, the government has in the past identified and reported instances of non-compliant FBI queries to the Court. Additionally, reports of such non-compliant FBI queries have been submitted to Congress, which clearly considered the FBI's querying practices during the recent reauthorization of section 702. Thus, it has been the government's experience that the FBI's existing record-keeping practices allows for effective oversight of FBI queries.

(U) Second, both the FISA Amendments Reauthorization Act of 2017 and prior legislation make clear that, when enacting subsection 702(f)(1)(B), Congress understood the FBI's existing practice as applied to section 702 and the limitations of FBI systems' technical record-keeping. In the recent reauthorization, the House Report cited above clearly states that "the Committee believes that the Intelligence Community should have separate procedures *documenting their current policies and practices related to*" queries.[20] H.R. Rep. No. 115-475, at 17 (emphasis added)

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[20] (U) Congress also recognized that each agency's querying procedures need not be identical. The House Report states that the querying procedures should be "designed to account for the differing missions of" each agency. H.R. Rep. 115-475, at 18. The government does note that during the Senate Select Committee on Intelligence's consideration of an earlier but similar version of the FISA Amendments Reauthorization Act of 2017, one Senator stated that the Act "would require the Director of National Intelligence and the Attorney General to ensure there is a technical procedure in place to keep a record of all queries referencing a known American,

(U) Additionally, Congress's decision to continue to exempt the FBI from certain reporting requirements, first made in the 2015 USA FREEDOM Act, further evidences its intent that the FBI's current record-keeping practices need not be modified. When enacting reporting requirements under the 2015 USA FREEDOM Act, Congress required the Director of National Intelligence (DNI) to publicly report on an annual basis certain statistics, such as (1) the number of search terms concerning a known United States person used to retrieve unminimized contents of section 702-acquired information, and (2) the number of queries concerning a known United States person of unminimized non-contents. *See* 50 U.S.C. §§ 1873(b)(2)(B)&(C). However, Congress made clear in subsection 1873(d)(2) that the above reporting requirements regarding United States person queries were not applicable to queries conducted by FBI. The legislative history for the 2015 USA FREEDOM Act notes with respect to these exemptions that "the FBI is exempted from reporting requirements that the agency has indicated it lacks the capacity to provide." H.R. Rep. No. 114-109, pt. 1, at 26 (2015).

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which the FBI currently does not do." S. Rep. 115-182, at 11 (Minority Views of Senator Heinrich). The precise meaning of the Senator's statement is uncertain. However, to the extent he was suggesting that the FISA Amendments Reauthorization Act of 2017 would require such separate tracking of United States person queries by the FBI, the government submits, for the reasons discussed herein, that such a view goes beyond the plain text of the Act itself and is inconsistent with other more authoritative provisions of the legislative history referenced herein.

Despite enacting further amendments to section 1873's reporting requirements in the FISA Amendments Reauthorization Act of 2017, including adding additional reporting requirements for the FBI (*see e.g.*, subsection 1873(b)(2)(D)) and re-numbering the sections in the FBI exemption paragraph in subsection 1873(d)(2), Congress left intact the substance of subsection 1873(d)(2) that provides that the above reporting requirements regarding United States person queries are not applicable to queries conducted by FBI. Thus, if Congress intended for FBI to distinguish and separately track United States person queries of unminimized section 702-acquired information, it presumably would have included such queries in the statistics required to be reported in the annual DNI report, as provided by subsection 1873(b), and Congress would have amended subsection 1873(d)(2) to remove the exemption to the reporting requirements for queries conducted by FBI.

(U) Third, the legislative history evidences Congress's recognition that the FBI's current record-keeping practices are consistent with subsection 702(f)(1)(B). This furthers the conclusion that Congress intended the querying procedures, including the record-keeping requirement, to codify into statute existing practices, rather than to impose new obligations. Similarly, the House Report further states that the query procedures should be "designed to account for the differing missions of" each agency. H.R. Rep. No. 115-475, at 18. Thus, as the above statutory analysis with respect to the

statistical reporting indicates, Congress clearly recognized that each agency has differing missions, and that the query procedures should account for that, just as the differing regimes for statistical reporting recognize the FBI's practice with respect to queries.

(U) Finally, Congress continued to recognize FBI's existing practice as applied to section 702 and the limitations of FBI systems' technical record-keeping functions when Congress included section 112 of the FISA Amendments Reauthorization Act of 2017. Section 112 requires a Justice Department Inspector General report on the implementation, interpretation, and oversight of FISC-approved querying procedures to include, *inter alia*, a discussion of "[a]ny impediments, including operational, technical, or policy impediments for the [FBI] to count ... the total number of . . . queries [of section 702-acquired information] that used known United States person identifiers," demonstrating that Congress understands the technical limitations of FBI's ability to record only United States person queries to the exclusion of other queries of unminimized section 702-acquired information. *See* FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3, §112(b)(8)(B). It is clear, therefore, that Congress did not intend to impose any new obligation on the FBI to differentiate queries based on United States person status.

(U) **CIA Querying Procedures (Section VIII)**

(U) The section of the querying procedures that applies only to the CIA, Section VIII, is significantly similar to the querying provisions in the CIA 2016 Minimization Procedures with substantive changes to account for new technological advances at the CIA. The differences in the querying procedures include: (1) an explicit requirement that personnel permitted to query unminimized section 702 information must receive training in both CIA's section 702 minimization procedures and the section 702 querying procedures; (2) moving the sentence in the current minimization procedures beginning [b3 National Security Act redacted] (3) specifically referencing the record-keeping requirements of section IV; and (4)_having the same requirements apply to CIA's queries of both content and metadata. *Compare* 2016 CIA Minimization Procedures at 3-4 *with* Ex. H at 7. Regarding this final difference, the current CIA 2016 Minimization Procedures distinguish between queries of the content of communications and queries of metadata, such that certain query requirements in Paragraph 4 of those procedures did not apply to queries of solely unminimized metadata. *See* CIA 2016 Minimization Procedures at 3-4. [b3 (National Security Act) redacted] As a

result, under the querying procedures, metadata queries conducted by the CIA are no longer exempt from the requirement to log the use of any United States person identifier as a query term as well as the reason that term is reasonably likely to retrieve foreign intelligence information, and will now be included in NSD and ODNI's oversight of CIA's queries. *See* Ex. H at 7. Thus, the CIA query requirements are more protective of United States person information in these querying procedures than in prior sets of CIA minimization procedures.

(U) **NCTC Querying Procedures (Section IX)**

(U) As with the other covered agencies, the section of the querying procedures addressing the NCTC specifically, Section IX, tracks the language contained in the current NCTC 2016 Minimization Procedures with a few conforming edits. For example, "unminimized communications" has been changed to "unminimized information." *Compare* NCTC 2016 Minimization Procedures at 7 *with* Ex. H at 7. In addition, the term "electronic and data storage systems" has been replaced with "NCTC systems," as the querying procedures will govern all covered agencies and the term "electronic and data storage systems" has a particular meaning within the FBI. Ex. H at 7. Whereas the current NCTC 2016 Minimization Procedures reference queries of "the content of communications," that distinction was removed in the proposed querying

procedures so that the provision applies to any use of a United States person query term. *Id.*

(U) **Changes to Documents Related to Section 705(b)(5)**

~~(S//NF)~~ Many of the documents submitted with the 2018 Certifications reflect changes made in response to the newly enacted subsection 705(b)(5) of the Act. That subsection provides that the government "may not intentionally acquire communications that contain a reference to, but are not to or from, a target of [section 702 acquisition] except as provided under section 103(b) of the FISA Amendments Reauthorization Act of 2017." 50 U.S.C. § 1881a(b)(5). In response to the Act's new prohibition on the collection of communications that contain a reference to, but are not "to or from," a section 702 target, the NSA, FBI, CIA, and NCTC section 702 minimization procedures, submitted herewith as Exhibits B, D, E, and G, respectively, each provide that any communications acquired that contain a reference to, but are not to or from, a target are unauthorized acquisitions and must be destroyed upon recognition. *See, e.g.*, Ex. B at 5; Ex. D at 6; Ex. E at 2; & Ex. G at 6.

~~(S//NF)~~ In addition, changes were made across all agencies' documents to provide clarity regarding the types of [redacted] acquired pursuant to section 702 that is related to [redacted]

(b) (1)
(b) (3)-50 USC 3024(i)

(b) (1)
(b) (3)-50 USC 3024(i)

(b) 1, 3 per ODNI

Ex. C at 3. Corresponding language is also included in the FBI Director's Affidavits submitted with the 2018 Certifications.

~~(S//NF)~~ To more fully reflect the electronic data acquired by the government pursuant to section 702, the government also changed in a number of places across all agencies' Director Affidavits and targeting and minimization procedures. (b) 1, 3 per ODNI

See, e.g.,

~~(S//NF)~~ b1, b3 per ODNI

(b) (1)
(b) (3) -50 USC 3024(i)

Such acquisitions are wholly consistent with section 702, as made clear by the legislative history.

~~(S//NF)~~ b1, b3 per ODNI

b1, b3 per ODNI

b1, b3 per ODNI

The legislative history for the FISA Amendments Reauthorization Act of 2017 makes clear that Congress intended subsection 702(b)(5) to codify "the Intelligence Community's (IC's) current prohibition on a subset of FISA collection under 50 U.S.C.

§ 1881a . . . known as 'Abouts' *Upstream* collection." S. Rep. No. 115-182, at 1 (2017) (emphasis added); *see also* H.R. Rep. No. 115-475, at 20 ("The new limitation established by Section [103] is intended to codify only current procedures and is not intended to affect acquisitions currently being conducted under FISA Section 702."); *cf.* Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, July 2, 2014, at 119 ("'About' collection takes place exclusively in the NSA's acquisition of Internet communications through its upstream collection process.").[21]

(U) **FBI Targeting Procedures**[22]

(U) In addition to conforming changes relating to the statutory amendments made by the FISA Amendments Reauthorization Act of 2017, the FBI targeting procedures contain substantive changes both to the process for FBI checks prior to approving the acquisition [redacted] and to the reporting timeframe for the Inspection Division.

(b)(1)
(b)(3)-50 USC 3024(i)

[21] (U) *Available at* http://www.pclob/gov/library/702-Report-2.pdf.

[22] ~~(S//OC/NF)~~ Unless otherwise described herein, changes made to the minimization procedures to be used by the NSA, CIA, and NCTC, attached as Exhibits B, E, and G, respectively, generally relate to changes made by the FISA Amendments Reauthorization Act of 2017 and the addition of the Exhibit H querying procedure. Accordingly, the details of changes to those procedures will not be further individually discussed herein.

(b) (1)
(b) (3)-50 USC 3024(i)

~~(S//NF)~~ As previously described to the Court:

In re 2015 Summary of Notable Section 702 Requirements, filed July 15, 2015 (hereinafter "Summary of Notable Section 702 Requirements"), at 9. The FBI's current targeting procedures include two circumstances under which the FBI may approve the acquisition (b) 1, 3 per ODNI

(b) 1, 3 per ODNI

account. *See, e.g.*, Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to be Located outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign

(b) (1)
(b) (3)-50 USC 3024(i)

Intelligence Surveillance Act of 1978, as Amended [redacted] b3, b7E per FBI (hereinafter "FBI 2016 Targeting Procedures").

~~(S//NF)~~ The FBI targeting procedures submitted herewith as Exhibit C include one additional circumstance in which the FBI [redacted] (b) 1, 3 per ODNI [redacted] For [redacted]

(b) (1)
(b) (3)-50 USC 3024(i)

~~(S//NF)~~ (b) 1, 3 per ODNI

(b) 1, 3 per ODNI

(b) 1, 3 per ODNI

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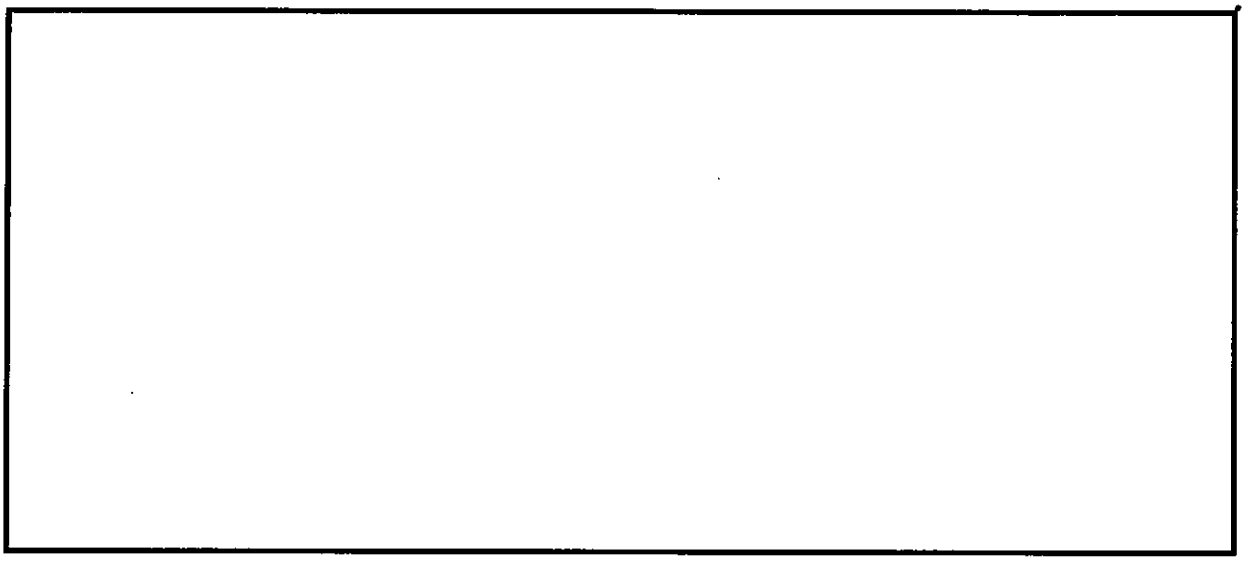
[23] ~~(S)~~ (b) 1, 3 per ODNI
(b) 1, 3 per ODNI

(b) (1)
(b) (3)-50 USC 3024(i)



~~(S//NF)~~ As mentioned above, the other substantive change to the FBI 2016 Targeting Procedures involves the reporting timeframe for the FBI Inspection Division. The FBI targeting procedures submitted as Exhibit C to the 2018 Certifications contain a modification to Section III.13. The section in the FBI's current procedures requires the FBI Inspection Division to "conduct oversight of the FBI's exercise of these procedures . . b3, b7E per FBI The modification to Section III.13 will require the FBI Inspection Division to conduct its oversight b3, b7E per FBI *See* Ex. C at 5.

~~(S//NF)~~ The modification is based on three factors. First, the FBI Inspection Division has noted that between 2013 and 2016, b3, b7E per FBI b3, b7E per FBI b3, b7E per FBI has reduced the number of compliance errors to a near-constant

zero rate when implementing the FBI targeting procedures. In its 2016 inspection report, the FBI Inspection Division stated that, based on its auditing of a sampling of targeting decisions, "over the last four years, [the FBI Inspection Division] identified zero compliance errors[.]"[24]

(b) (1)
(b) (3)-50 USC 3024(i)

~~(S//NF)~~ Second, in 2017 the FBI Inspection Division audited approximately [redacted] in which queries required by the FBI targeting procedures yielded results from FBI databases. This represents a small sample of requests for [redacted] in which queries required by the FBI targeting procedures yielded results from FBI databases. As a result of this audit, the FBI Inspection Division found *zero* compliance errors. This was consistent with prior FBI Inspection Division's audits.[25]

~~(S//NF)~~ Third, the modification is based on the extensive auditing and oversight of the FBI's implementation of the FBI targeting procedures by NSD and ODNI. These

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[24] ~~(S//NF)~~ b3, b7E per FBI [redacted]

[25] ~~(S//NF)~~ b3, b7E per FBI [redacted]

audits occur on an approximately monthly basis, during which NSD and ODNI assess FBI's compliance with its targeting procedures. Based upon the near-zero rate of compliance errors for the prior several years and the expansive section 702 oversight regime within the executive branch of government, the FBI concluded that a biennial inspection by the FBI Inspection Division would fulfill the FBI's duties and obligations in conducting internal oversight of FBI's implementation of the section 702 targeting procedures.

(U) **FBI Minimization Procedures**

(U) The FBI minimization procedures submitted herewith as Exhibit D to the 2018 Certifications contain several changes from the FBI 2016 Minimization Procedures, as described in detail below.

A. (U) **Reorganization of Section III**

~~(S//NF)~~ The government's proposed modifications to the FBI's current section 702 minimization procedures seek to harmonize the FBI's section 702 minimization procedures with the Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under the Foreign Intelligence Surveillance Act (FBI Title I/III SMPs), effective August 15, 2016, primarily by: merging Section III (retention) and Section IV (ad hoc databases) of the FBI 2016 Minimization Procedures into a reorganized Section III; adding a subsection within Section III to address the FBI's use

[redacted] and making adjustments to other language in Section III and language in Section IV of the FBI 2016 Minimization Procedures to conform with the corresponding provisions in Section III of the FBI's Title I/III SMPs.

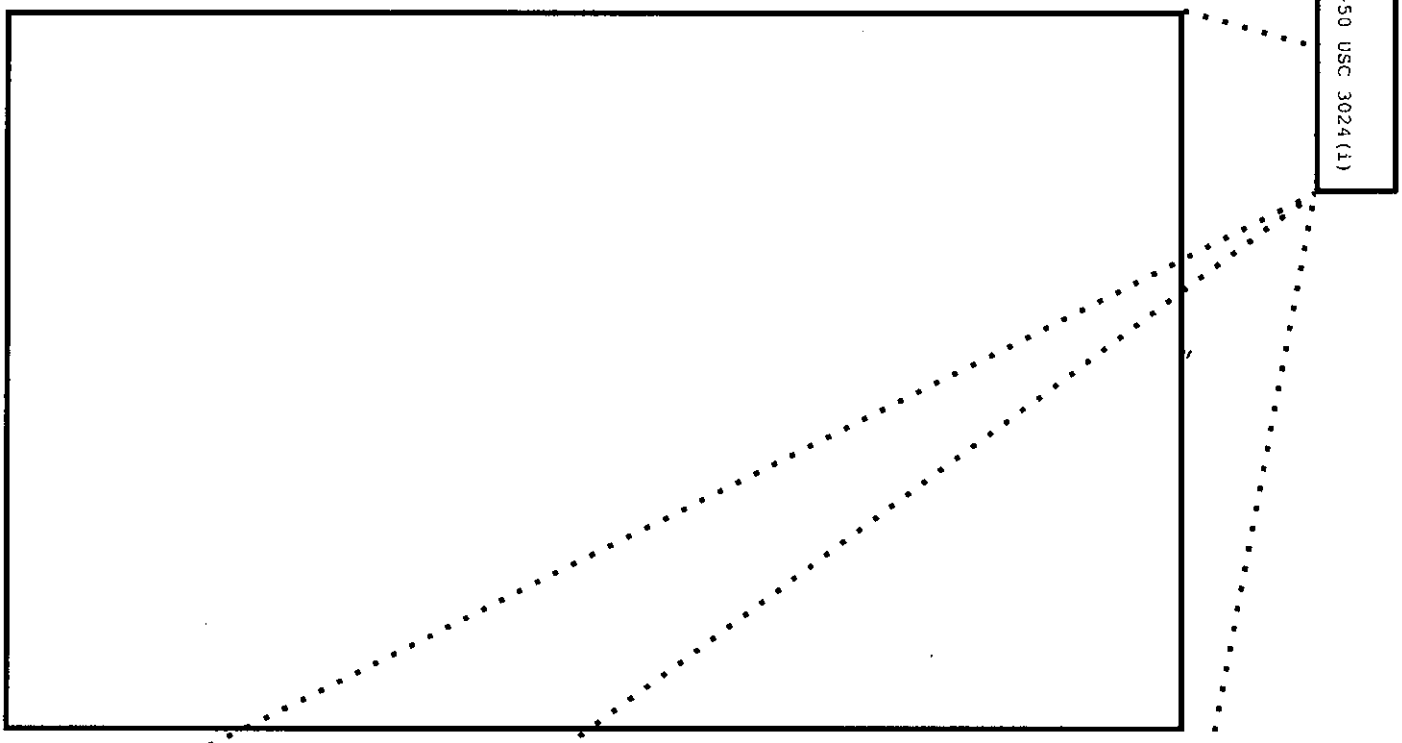
~~(S//NF)~~ To address technological advancements in how the FBI processes, analyzes, and stores FISA-acquired information, as well as the FBI's operational need to efficiently, fully, and effectively analyze [redacted] the government filed a motion with the Court on May 17, 2016, seeking to incorporate amendments adopted by the Attorney General to the FBI Title I/III SMPs. b3, b7E per FBI (b)(1) (b)(3)-50 USC 3024(i) b3, b7E per FBI [redacted] (hereinafter "government's May 17, 2016 motion"). As summarized in the government's May 17, 2016 motion, the revised FBI Title I/III SMPs proposed by the government improved upon the version of the FBI Title I/III SMPs then in effect by: listing the types of systems [redacted] including definitions of those systems to facilitate compliance with the procedures; and restructuring Section III, the retention section, by clearly identifying retention

requirements that apply to FISA-acquired information retained in any of the listed types of systems or in any form. *See* Government's May 17, 2016 motion at 7. The government's May 17, 2016 amendments to the FBI Title I/III SMPs consisted primarily of revisions to Section III, which governs the retention of FISA-acquired information. Those amendments restructured Section III to accomplish the objectives noted above; namely, to enumerate the retention requirements that apply to all FISA-acquired information regardless of location, and to clarify by category the retention requirements that may vary depending on the type of information acquired and/or the type of system

[redacted] (b)(1) (b)(3)-50 USC 3024(i)

~~(S//NF)~~ On May 17, 2016, the Court found that the revised FBI Title I/III SMPs proposed by the government meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) and 1821(4). *See In re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under the Foreign Intelligence Surveillance Act*, Memorandum Opinion and Order (hereinafter "May 2016 SMP Opinion"), at 55-56 (FISA Ct. May 17, 2016). In doing so, the Court observed, "[i]n a noteworthy improvement on the current FBI SMPs, the Proposed SMPs explicitly describe various categories of storage systems and specify requirements that apply to each category." *Id.* at 18.

~~(S//NF)~~ The government's proposed modifications to Sections III and IV of the FBI's 2016 Minimization Procedures seek to accomplish the same objectives that the revisions to Section III of the FBI Title I/III SMPs accomplished by harmonizing Section III of the FBI's section 702 minimization procedures with Section III of the FBI Title I/III SMPs. Although the FBI 2016 Minimization Procedures address both the FBI's use of



(b) (1)
(b) (3)-50 USC 3024(i)

Therefore, it is necessary to update the FBI 2016 Minimization Procedures to reflect every type of system or repository the FBI uses The government respectfully submits that harmonizing Section III of the FBI's section 702 minimization procedures with Section III of the FBI Title I/III

SMPs will not only accomplish this objective but will also help facilitate the FBI's compliance with both sets of procedures.

~~(S//NF)~~ Specific revisions to Sections III and IV of the FBI 2016 Minimization Procedures are discussed in greater detail below. With certain exceptions noted below, the proposed revisions to Sections III and IV of the FBI 2016 Minimization Procedures are identical to the May 17, 2016 revisions to Section III of the FBI Title I/III SMPs, which were addressed in the government's May 17, 2016 motion.

1. (U) Retention requirements that apply to FISA-acquired information retained in any form (Sections III.A, III.B, and III.C)

~~(S//NF)~~ Sections III.A and III.C of the proposed FBI section 702 minimization procedures set forth the retention requirements that apply to all section 702-acquired information, regardless of type or location. Pursuant to the general requirements in Section III.A, the FBI must retain all section 702-acquired information under appropriately secure conditions. Additionally, the FBI must limit access to section 702-acquired information to individuals who need this access in order to perform their official duties, or who need access to section 702-acquired information to assist in the execution of a lawful, authorized governmental function (*e.g.*, FBI personnel accessing section 702-acquired information to assist another government agency in a national security or criminal matter).

~~(S//NF)~~ Section III.B provides definitions of key terms in the procedures, including a clarification regarding the definition of "raw FISA-acquired information." Although this term is defined in the FBI 2016 Minimization Procedures, the definition has been revised to match the definition of this term in the FBI Title I/III SMPs. The FBI 2016 Minimization Procedures define "raw FISA-acquired information" as information that "is in the same or substantially same format as when the FBI acquired it" or "has been processed only as necessary to render it into a form in which it can be evaluated" to determine whether it meets the retention standard. To match the definition of this term in the FBI Title I/III SMPs, the second part of this sentence in the proposed procedures has been modified to refer to information that "has been processed only as necessary to render it into a form in which it can be evaluated." The proposed FBI section 702 minimization procedures clarify that "raw FISA-acquired information" "does not include information the FBI has determined, in accordance with these procedures, to reasonably appear to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime." Ex. D at 8. The government added this language to the proposed procedures to clarify that after FISA-acquired information is determined to meet the

SMP retention standard, including complying with the restrictions on U.S. person identities in Section III.C.1.c[26] of the proposed procedures, the FBI can share the FISA-acquired information with others who do not have the required training to access raw FISA-acquired information or can disseminate the information more broadly in its case management system. In addition, if the FBI determines that a FISA-acquired communication meets the SMP retention standard, but a United States person identity in the communication or of one of the communicants does not meet the SMP retention standard, when making this FISA-acquired communication, for example, available to a wider range of personnel outside an ad hoc system or electronic and data storage system, the U.S. person identity that does not meet the retention standard should be stricken or substituted with a characterization in accordance with the provisions in Section III.C.1.c. In its May 2016 SMP Opinion, the Court found that this modified definition of "raw FISA-acquired information" does not present minimization concerns. *See* May 2016 SMP Opinion at 21-22. Finally, proposed section III.B also defines

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[26] ~~(S//NF)~~ Section III.C.1.c requires that before using any FISA-acquired information for further investigation, analysis, or dissemination, the FBI must eliminate or substitute a characterization for information of or concerning a United States person, including that person's identity, unless that information reasonably appears to be foreign intelligence information, is necessary to understand or assess the importance of foreign intelligence information, or is evidence of a crime. *Id.* at 11.

"query" the same way it is defined in the section 702 querying procedures attached herewith as Exhibit H.

~~(S//NF)~~ In the proposed FBI section 702 minimization procedures, the government made a key change to Section III.C.1.c. In both the current procedures and the proposed procedures, the FBI is not required to strike or substitute a characterization for references to United States persons in raw FISA-acquired information being stored in an electronic and data storage system. The new language in this section clarifies this point and specifically notes that the requirement to strike or substitute a characterization for United States person identities in this section does not apply when the FBI transfers or copies raw FISA-acquired information between or among electronic and data storage systems, ad hoc systems, b3, b7E per FBI [redacted] or systems used solely for audits and oversight. Ex. D at 11-12. In contrast, for example, when FBI transfers or copies FISA-acquired information b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] any information of or concerning a U.S. person, including that person's identity, being transferred that does not meet the retention standard must be stricken or a substitution made before the transfer. *Id.* As the Court observed in its May 2016 SMP Opinion, "[t]his provision helps ensure that the Proposed SMPs satisfy the statutory requirement that 'nonpublicly available information' (other

than foreign intelligence information as defined in 50 U.S.C. § 1801(e)(1) or evidence of a crime being disseminated for a law enforcement purpose) 'shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance." May 2016 SMP Opinion at 20 (citing, *inter alia*, 50 U.S.C. § 1801(h)(2), (3)).

~~(S//NF)~~ Significantly, proposed Section III.C affirms that many of the more specific retention requirements in the current minimization procedures will continue to apply to all section 702-acquired information. In fact, most of the proposed provisions in Section III.C are identical to the current provisions in the FBI 2016 Minimization Procedures. For example, the proposed retention requirements in Section III.C governing exculpatory, impeachment, discoverable, and sensitive information have remained unchanged. Ex. D at 12. In addition, the provisions in Section III.C.2 regarding access restrictions to FISA-acquired information are similar to provisions in the FBI 2016 Minimization Procedures.

a. (U) **System Definitions (Section III.B)**

~~(S//NF)~~ In the FBI minimization procedures attached herewith as Exhibit D, the government proposes to revise Section III.B to add definitions of two terms not currently defined in the FBI 2016 Minimization Procedures: electronic and data storage

systems and ad hoc systems. Ex. D at 8-9. By including these new definitions, the government seeks to eliminate confusion or ambiguity about which subsection of revised Section III will govern retention of particular section 702-acquired information.

~~(S//NF)~~ In these proposed Section 702 minimization procedures, the definition of "electronic and data storage systems" mirrors the definition of the same term in the FBI Title I/III SMPs.[27]

~~(S//NF)~~ "Ad Hoc Systems" (referred to as "ad hoc databases" in the FBI 2016 Minimization Procedures) are defined in Section III.B to include any FBI application, program, device or process that (1) is not an electronic and data storage system, (2) does

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[27] ~~(S//NF)~~ As explained in the government's May 17, 2016 motion, the definition of the term "electronic and data storage systems" in the proposed FBI Title I/III SMPs was intended to capture the systems identified as "primary systems" in the government's February 18, 2014 Supplemental Notice Regarding Storage of Raw FISA-Acquired Information by the FBI, by virtue of the fact that such systems meet the electronic and data storage requirements in the previous version of the FBI Title I/III SMPs.

~~(S//NF)~~ The term "electronic and data storage systems" is also used in the FISA Amendments Reauthorization Act of 2017. *See* 50 U.S.C. § 1881a(f)(3)(B) ("The term 'query' means the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons obtained through acquisitions authorized under subsection (a).") As set forth in the section 702 querying procedures, however, the government interprets the term "electronic and data storage systems," as that term is used in 50 U.S.C. § 1881a(f)(3)(B), as referring to any system used by FBI to retain raw section 702-acquired information. Ex. H. Therefore, the intended meaning of the term "electronic and data storage system" in the proposed FBI section 702 minimization procedures (as well as the FBI Title I/III SMPs) is narrower than the government's interpretation of that term as it is used in the FISA Amendments Reauthorization Act of 2017.

not fall within one of the categories of [b3, b7E per FBI] described in Section III.F, and (3) retains or provides access to raw FISA-acquired information. Ex. D at 9. Additional language in this definition establishes that ad hoc systems can only be used by FBI personnel engaged in or assisting with [b3, b7E per FBI]

[b3, b7E per FBI]

2. ~~(S//NF)~~ Electronic and data storage systems (Section III.D)

~~(S//NF)~~ Section III.D of the proposed FBI section 702 minimization procedures includes additional provisions that apply solely to an FBI electronic and data storage system, including access, marking, query, retention time period, and attorney-client privileged communications requirements. Ex. D at 14-16.

~~(S//NF)~~ The rules that govern access to electronic and data storage systems that contain raw FISA-acquired information are set forth in proposed Section III.D.1, which supplements the global access restrictions in proposed Section III.C by specifying that the FBI must maintain accurate records of individuals who access FISA-acquired information in an electronic and data storage system, and regularly audit these records to ensure that only authorized individuals are accessing this information. *Id.* at 14. As in the corresponding provision of the FBI Title I/III SMPs, there is no requirement that FBI personnel who are authorized to access raw FISA-acquired information in an electronic and data storage system have case-specific responsibilities to access information for a particular target. In its May 2016 SMP Opinion, the Court assessed that "[t]his ability should enhance efforts to 'connect the dots' and produce and evaluate foreign intelligence information." May 2016 SMP Opinion, at 24 (citing, *inter alia, In re Sealed Case,* 310 F.3d 717, 743 (FISC Rev. 2002) (per curiam)). The Court went on to find these access restrictions "appropriate." *See id.* at 25.

~~(S//NF)~~ Proposed Section III.D.2, which is identical to the relevant marking provisions in the FBI Title I/III SMPs, provides that the FBI personnel designated as case coordinators must control the marking of raw FISA-acquired information in an electronic and data storage system. Ex. D at 14. In addition, this section requires that FBI identify FISA-acquired information in an electronic and data storage system that has been reviewed, and whether that information has been determined to reasonably appear to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime. *Id.* As the Court observed in its May 2016 SMP Opinion, "[t]hese markings facilitate proper implementation of the retention criteria and timetables applicable to electronic and data storage systems." May 2016 SMP Opinion at 27. Proposed Section III.D.2 is not intended to alter the provisions in Section III.C.1 of the FBI 2016 Minimization Procedures requiring "the primary case agent(s) and his/her/their designees . . . to control the marking of information in a particular case in accordance with FBI policy" and requiring the FBI to "identify FISA-acquired information in its storage systems, other than those used solely for link analysis of metadata, that has been reviewed and meets these standards." FBI 2016 Minimization Procedures at 9. Rather, the intent of proposed Section III.D.2 is to make those existing requirements more explicit by consolidating them into a single subsection labeled "marking."

~~(S//NF)~~ As noted in proposed Section III.D.3, queries conducted in electronic and data storage systems must comply with the section 702 querying procedures. Ex. D at 15.

~~(S//NF)~~ Proposed Section III.D.4 provides the retention time periods for section 702-acquired information stored in an electronic and data storage system. *Id.* at 15-16. These time periods are identical to the relevant provisions in the FBI 2016 Minimization Procedures, as applied to electronic and data storage systems. Specifically, this section permits FBI to retain indefinitely section 702-acquired information stored in an electronic and data storage system that reasonably appears to be foreign intelligence information, is necessary to understand foreign intelligence information or to assess its importance, or is evidence of a crime. *Id.* In addition, absent a modification, the FBI must destroy unreviewed section 702-acquired information in an electronic and data storage system within five years of the expiration of the certification authorizing the collection. Section 702-acquired information that the FBI reviews, but does not identify as meeting the applicable retention standard, may be retained and accessed by authorized personnel for b1, b3, b7E per after the expiration of the certification authorizing the collection. Thereafter, the FBI may retain the information that does not meet the retention standard for an additional five years, but during this five-year period, access to the information is limited to search capabilities that would notify an authorized user

that information responsive to a query exists.[28] FBI personnel cannot access the content of this information without approval from an executive at FBI Headquarters in a position no lower than an Assistant Director (or their designee). Section 702-acquired information that the FBI reviews but does not mark as meeting the applicable standard must be destroyed [b1, b3, b7E per FBI] from the expiration of the certification authorizing the collection, absent approval of a new retention period by the Court. In evaluating the identical time periods for retention in the FBI Title I/III SMPs, the Court found these to be "reasonable retention criteria and timetables." May 2016 SMP Opinion at 26-27.

~~(S//NF)~~ Finally, proposed Section III.D.5 addresses the retention of attorney-client privileged communications in an electronic and data storage system. Ex. D at 16-21. As an initial matter, the intended effect of the attorney-client privilege provisions in both the current and proposed minimization procedures is that for attorney-client privileged communications retained in any form, concerning the charged criminal matter between a target charged pursuant to the United States Code and the attorney representing the target in that matter, a target who is charged with a non-Federal crime in the United States and the attorney representing the individual in the criminal matter, or between a person other than a target charged with a crime in the United States and

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[28] ~~(S//NF)~~ Any such queries would be subject to the section 702 querying procedures.

the attorney representing the individual in the criminal matter, these communications will not be used for evidentiary or investigative purposes.

~~(S//NF)~~ In addition, proposed Section III.D.5 generally preserves the framework of the attorney-client privileged communications provisions in the FBI 2016 Minimization Procedures, incorporating certain minor modifications. b1, b3, b7E per FBI

b1, b3, b7E per FBI

3. ~~(S//NF)~~ Ad Hoc Systems (Section III.E)[30]

~~(S//NF)~~ The FBI 2016 Minimization Procedures already provide for the FBI's use of "ad hoc databases" to retain and analyze raw section 702-acquired information. As

b1, b3, b7E per FBI

[30] ~~(S//NF)~~ Examples and descriptions of ad hoc systems can be found at Tab A of the government's February 2014 Supplemental Notice. The government notes that section 702-acquired information is not retained in all of the systems mentioned in Tab A of the government's February 2014 Supplemental Notice.

part of the government's proposed reorganization of Section III of the procedures, the provisions in Section IV of the FBI 2016 Minimization Procedures (regarding ad hoc databases) have been moved to Section III of the proposed procedures (as Section III.E), and the language used in Section IV of the current procedures has been updated to match the language in the corresponding provisions of the FBI Title I/III SMPs (*e.g.*, the term "ad hoc databases" has been changed to "ad hoc systems").

~~(S//NF)~~ Proposed Section III.E.1 begins by establishing the presumption that raw FISA-acquired information will be retained only in an electronic and data storage system, unless "FBI personnel who are engaged in or assisting with a particular investigation reasonably determine that for technical, analytical, operational, or security reasons they cannot fully, completely, efficiently or securely review or analyze raw FISA-acquired information in an electronic and data storage system." Ex. D at 23. The FBI minimization procedures attached herewith as Exhibit D also provide that if FBI personnel meet this standard of use for an ad hoc system that does not generate an electronic record of queries conducted in the system, that determination will mean that FBI would be permitted to maintain a written record of the queries conducted in that system pursuant to Section V of the section 702 querying procedures. Section V of the querying procedures provides that a standard must be met before using a system to

conduct queries of raw section 702-acquired data that does not generate an electronic record of the queries. *See* Ex. H at 2.

~~(S//NF)~~ In addition, for raw FISA-acquired information that is retained in an ad hoc system, Section III.E.2 clarifies that this information is subject to the same dissemination, disclosure, and compliance provisions that govern raw FISA-acquired information in an electronic and data storage system. Ex. D at 24. Thus, the minimization requirements that govern electronic and data storage systems and ad hoc systems differ only with respect to retention. In this area, the approach of the ad hoc system provisions is to relax certain marking and auditing requirements for ad hoc systems in recognition of the technical limitations of systems that fall into this category, but counterbalance these less stringent marking and auditing requirements with elevated standards for access and shorter retention time limits.

a. ~~(S//NF)~~ Access to FISA-acquired information in an ad hoc system

~~(S//NF)~~ Pursuant to proposed Section III.E.1, access to raw FISA-acquired information in ad hoc systems is limited to FBI personnel engaged in or assisting with a particular investigation, individuals involved in assessing or analyzing information in support of that investigation, and system administrators or other similar technical personnel who require this access in order to perform their official duties. Ex. D at 24. The FBI is required to notify personnel with access to ad hoc systems that raw FISA-

acquired information resides in the system and is required to keep records of individuals who either have been granted access to raw FISA-acquired information in an ad hoc system or have accessed such information in an ad hoc system. *Id.* Because electronic and data storage systems have the capability to automatically log accesses to the system and the FISA-acquired information being accessed (and these logs must be regularly audited), proposed Section III.D does not limit access to raw FISA-acquired information in an electronic and data storage system to those FBI personnel actively participating in the pertinent investigation. In contrast, only some FBI ad hoc systems have the capability to automatically log accesses to the systems and the FISA-acquired information being accessed. Thus, there are more restrictive limitations regarding who may access raw FISA-acquired information in an ad hoc system. As the Court noted in its May 2016 SMP Opinion, "[t]he limited, case-specific access afforded by ad hoc systems is an important factor in assessing whether the other minimization rules proposed for those systems are reasonable and comply with the applicable statutory definitions." May 2016 SMP Opinion at 31.

b. ~~(S//NF)~~ Retention time limits for FISA-acquired information in ad hoc systems

~~(S//NF)~~ Proposed Section III.E.4.b provides that – like raw FISA-acquired information in an electronic and data storage system – the FBI can retain FISA-acquired information in an ad hoc system indefinitely if it 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. Ex. D at 24. However, under proposed Section III.E.4.c, FISA-acquired information that has not been determined to meet the retention standard must be removed from an ad hoc system within five years of the expiration of the certification that authorized the collection,[31] absent specific authority from an appropriate executive at FBI Headquarters and Court approval of a new retention period. *Id.* at 25. By contrast, proposed Section III.D.4.c permits the equivalent information in an electronic and data storage system to be retained and accessed without restriction [b1, b3, b7E per FBI] from the expiration of the docket authorizing the collection. In addition, such data that has been reviewed but does not meet the retention standard that is retained in an electronic and data storage system would not have to be destroyed [b1, b3, b7E per FBI] from the expiration of the certification authorizing the collection, absent approval of a new retention period by the Court.

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[31] ~~(S//NF)~~ Similarly, FBI must destroy unreviewed FISA-acquired information in an electronic and data storage system within five years of the expiration of the certification authorizing the collection. As the Court observed in its May 2016 SMP Opinion, "the provisions of the Proposed SMPs governing ad hoc systems do not distinguish between information that has not been reviewed and information that has been reviewed, but has not been determined to be pertinent, as the provisions for electronic and data storage systems do." May 2016 SMP Opinion at 33.

~~(S//NF)~~ Finally, proposed Section III.E.4.d requires that in addition to maintaining access records for ad hoc systems, the FBI shall keep records documenting FISA-acquired information in an ad hoc system that is deemed to meet the retention standard and the removal of FISA-acquired information that must be aged off an ad hoc system in accordance with the retention time limits in Section III.E. *Id.* As the Court noted in its May 2016 SMP Opinion, the FBI's documentation of FISA-acquired information in an ad hoc system that is deemed to meet the retention standard "would not necessarily take the same form as the marking process for information in an electronic and data storage system," but "[g]iven the variety of types of systems that may serve as ad hoc systems and the limited access to raw FISA-acquired information permitted on ad hoc systems, as compared to electronic and data storage systems, the Court believes that greater flexibility in record-keeping practices for ad hoc systems is reasonable." May 2016 SMP Opinion at 33. "[I]f the documentation maintained by the FBI does not clearly indicate that raw FISA-acquired information on an ad hoc system has been found to be pertinent, it should be removed from that system in accordance with the timetable set by § III.E.4.c." *Id.* at 33-34.

c. ~~(S//NF)~~ Analysis and queries of raw FISA-acquired information in ad hoc systems

~~(S//NF)~~ Queries conducted in ad hoc systems must be made in accordance with the section 702 querying procedures. Ex. D at 25.

d. ~~(S//NF)~~ Retention of attorney-client privileged communications in ad hoc systems

~~(S//NF)~~ The rules for retaining attorney-client privileged communications in ad hoc systems closely track the analogous rules for retaining such communications in an electronic and data storage system. *See id.* at 26-27 (Section III.E.6). In addition, if FBI personnel discover attorney-client privileged communications in an ad hoc system sent or received by (1) a target charged with a federal crime in the United States, (2) a target charged with a non-federal crime in the United States, or (3) a non-target charged with a crime in the United States, the attorney-client privileged communications must be removed from the system. If the same privileged communications are accessible in an electronic and data storage system, the FBI is required to follow the relevant privileged communication rules for an electronic and data storage system. For other types of attorney-client privileged communications, Section III.E.6 requires the FBI to identify such communications to those with access to the communications in the ad hoc system.

b1, b3, b7E per FBI

[redacted]

~~(S//NF)~~ In concluding its evaluation of the provisions in the FBI Title I/III SMPs regarding ad hoc systems, the Court noted that "[a]lthough some documentation

requirements are more flexible for ad hoc systems than for electronic and data storage systems, investigators and intelligence analysts working on ad hoc systems can only access raw information from particular investigations on which they are working. That restriction reduces the potential for improper 'trolling' for information about U.S. persons. This more limited form of access, in combination with a shorter retention schedule, provides reasonable protection for U.S. person information, consistent with the requirements of § 1801(h), while giving the FBI flexibility needed to work with a variety of ad hoc systems." May 2016 SMP Opinion at 44.

4. ~~(S//NF)~~ b1, b3, b7E per FBI

~~(S//NF)~~ Although they are not defined in the FBI's minimization procedures attached herewith as Exhibit D, b1, b3, b7E per FBI are specific categories of systems that may contain raw FISA-acquired information. b1, b3, b7E per FBI

b1, b3, b7E per FBI

In its May 2016 SMP Opinion, the Court observed that "[a]lthough b1, b3, b7E per FBI

b1, b3, b7E per FBI

b1, b3, b7E per FBI [redacted]

b1, b3, b7E per FBI [redacted] The Court further noted that:

b1, b3, b7E per FBI [redacted]

The same reasoning applies to treating b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] as exempt from similar marking,

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[32] ~~(S//NF)~~ Systems used to maintain emergency backup or original evidence copies of FISA-acquired information are similarly not used for investigative work or intelligence analysis. The restrictions pertaining to systems used to maintain emergency backup or original evidence copies of FISA-acquired information are included in Section III.I.2 of the proposed FBI section 702 minimization procedures. That proposed provision is identical to the corresponding provision in the FBI 2016 Minimization Procedures (Section III.G.3).

> auditing, and notification requirements under the Proposed SMPs. Given the applicable restrictions on access, the non-investigative purposes for which data may be used, and the one-year retention limitations, the Court finds that the provisions of the Proposed SMPs b1, b3, b7E per FBI b1, b3, b7E per FBI present no difficulties under the requirements of 50 U.S.C. §1801(h).

May 2016 SMP Opinion at 36-37 (footnote and some internal citations omitted). As described in a notice filed with the Court on February 1, 2018, FBI's b1, b3, b7E per FBI b1, b3, b7E per FBI uses the same collection platforms to enable or facilitate the acquisition, validation, or processing of raw information acquired pursuant to section 702 as it does with respect to raw information acquired pursuant to Titles I, III, IV, and V of FISA. *See* Description of Measures Used by FBI to Limit Retention and Use of Unauthorized Collection (filed February 1, 2018), at 1.[33]

~~(S//NF)~~ b1, b3, b7E per FBI

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[33] ~~(S//NF)~~ Proposed footnote 12 provides that "[n]othing in these Procedures permits the retention of information obtained through unauthorized acquisitions." Ex. D at 27. The government's February 1, 2018 notice described systems and processes used by b7E to legally validate FISA-acquired information and purge any such information determined to be overproduced or overcollected. Proposed footnote 14 envisions that any unauthorized acquisitions identified through these legal validation systems and processes will be purged in accordance with the timelines set forth in the government's February 1, 2018 notice.

[redacted]

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[34] ~~(S//NF)~~ Similarly, the Court noted in its May 2016 SMP Opinion that these types of [redacted] are also not subject to the requirements of § III.C and the querying and attorney-client provisions of §§ III.D and III.E. Given that [redacted] systems are not used for intelligence analysis and investigative purposes, the requirements of § III.C and the querying requirements of §§ III.D and III.E are inapposite to those systems. Similarly, the attorney-client provisions of §§ III.D and III.E are principally directed at ensuring that privileged communications are promptly identified as such and handled appropriately, and especially that in criminal matters they are not provided to the prosecution team. These objectives and concerns are greatly reduced in systems that are not used for investigative or intelligence analysis purposes." May 2016 SMP Opinion at 37 n.21 (internal citation omitted).

b1, b3, b7E per FBI

[redacted]

b1, b3, b7E per FBI

"Given the short-term use of such systems and the restriction of access

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[35] ~~(S//NF)~~ b1, b3, b7E per FBI

b1, b3, b7E per FBI

[redacted]

[36] ~~(S//NF)~~ b1, b3, b7E per FBI

b1, b3, b7E per FBI

[redacted]

for intelligence purposes to a single person," the Court found in its May 2016 SMP Opinion that "exemption of these systems from the requirements of §§ III.D and III.E is consistent with the requirements of § 1801(h)." May 2016 SMP Opinion at 39.

~~(S//NF)~~ Finally, the government's revisions to Section III of the FBI 2016 Minimization Procedures also include the addition of three new subsections within Section III to address certain systemic compliance issues described in reports filed with the Court on December 28, 2016, June 16, 2017, and December 28, 2017, as well as during a hearing held on August 2, 2017, before the Honorable Rosemary M. Collyer. Those three subsections are discussed in greater detail below in section B.

5. (U) Metadata (Section III.G)

~~(S//NF)~~ The FBI 2016 Minimization Procedures provide two options for retaining raw FISA-acquired metadata:[37] the FBI [redacted] keep the metadata in an electronic and data storage

[redacted]

[37] ~~(S//NF)~~ Section III.G.1 of the proposed procedures defines "metadata" as dialing, routing, addressing, or signaling information associated with a communication, but does not include information concerning the substance, purport, or meaning of the communication."

system, in which case the metadata must be aged off under the same time limits that govern other FISA-acquired information in an electronic and data storage system. *See* FBI 2016 Minimization Procedures at 22 (Section III.G.1), 11-12 (Section III.D). This rule, which diminishes the utility of FISA-acquired metadata [b1, b3, b7E per FBI] [b1, b3, b7E per] impairs the FBI's ability to use metadata in other data storage systems to support national security investigations, without commensurately enhancing the security or privacy of this information. [b1, b3, b7E per FBI]

[b1, b3, b7E per FBI]

[redacted]

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[38] ~~(S//NF)~~ [b1, b3, b7E per FBI]
[b1, b3, b7E per] [redacted]

b1, b3, b7E per FBI

[redacted]

b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] In its May 2016 SMP Opinion, the Court noted that "[t]he current FBI [Title I/III] SMPs rest on a judgment, which the Court shares, b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] and other provisions strikes a reasonable balance between the government's foreign intelligence needs and the protection of U.S. persons' privacy." May 2016 SMP Opinion at 47 (footnote omitted). b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] Accordingly, the Court finds that this proposed revision is consistent with § 1801(h)." *Id.*[39]

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[39] ~~(S//NF)~~ The Court's May 2016 SMP Opinion also noted that b1, b3, b7E per FBI [redacted] b1, b3, b7E per FBI [redacted] b1, b3, [redacted] As a general rule, Fourth Amendment protections do not extend to the operation of PR/TT devices, *see, e.g., Smith v. Maryland*, 442 U.S. 735 (1979), but they do extend to surveillance that intercepts the full contents of private communications. *See, e.g., Katz v. United States*, 389 U.S. 347 (1967). Moreover, unlike authorizations of electronic surveillance and physical search, for which FISA requires FISC review and approval of minimization procedures, *see* 50 U.S.C. §§ 1805(a)(3) and 1824(a)(3), the statute entrusts the Attorney General, acting independently from

6. (U) Additional Procedures for Retention, Use, and Disclosure (Section III.H)

~~(S//NF)~~ Proposed Section III.H of the proposed section 702 minimization procedures tracks Section III.F of the FBI 2016 Minimization Procedures, with certain modifications. Proposed Section III.H.4.c incorporates modifications to the provisions in the FBI 2016 Minimization Procedures that govern the disclosure of raw FISA-acquired information to federal prosecutors. In several places the proposed procedures remove references in Section III.H.4.c to "electronic and data storage systems," since the provisions in this section will apply to the disclosure of raw FISA-acquired information retained in any form, including ad hoc and electronic and data storage systems approved for the retention of FISA-acquired information. *See* Ex. D at 34-36. Additionally, Section III.H.4.c.ii delineates the required approval level within the FBI when raw FISA-acquired information is being disclosed to a prosecutor. *See id.* at 34-35. If the raw FISA-acquired information is being provided to a prosecutor via an electronic and data storage system or ad hoc system, the access must be approved by an FBI official in a position no lower than Deputy Assistant Director. A prosecutor's access to

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the FISC, with ensuring that 'appropriate policies and procedures are in place' to safeguard PR/TT information concerning U.S. persons. § 1842(h)(1). Whether 'to impose additional privacy or minimization procedures' is left to the discretion of the FISC. § 1842(h)(2)." May 2016 SMP Opinion at 47 n.26.

raw FISA-acquired information in any other form must be approved by an FBI official no lower than a Section Chief in the FBI's National Security Branch.[40] In both instances, the approvals must be coordinated with a specified official in the FBI's National Security and Cyber Law Branch. As the Court noted in its May 2016 SMP Opinion, "[b]ecause disclosures that do not involve an electronic and data storage system or ad hoc system are less likely to involve large volumes of information and robust analytical capabilities, it is reasonable for the approval level to be lower for those disclosures." May 2016 SMP Opinion at 48.

7. (U) Other Time Limits for Retention (Section III.I)

~~(S//NF)~~ Sections III.G.2 (retention on media), III.G.3 (backup and evidence copies in FBI systems), III.G.4 (information retained in connection with litigation matters), III.G.5 (encrypted information), and III.G.6 (retention of information in other forms) of the FBI 2016 Minimization Procedures have been included unchanged within proposed Section III.I, which provides time limits for retention of these specific categories of section 702-acquired information. *See* Ex. D at 36-39.

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[40] ~~(S//NF)~~ For example, the government may decide that placing raw section 702-acquired information on a CD is the most practical way to facilitate a prosecutor's review of such information for discoverable material.

B. ~~(S//NF)~~ Changes Regarding Compliance

~~(S//NF)~~ The proposed procedures include several changes to Section V, which concerns compliance and oversight of the section 702 minimization procedures. For example, Section V.A.3 of the proposed section 702 minimization procedures includes additional information regarding the scope of NSD's audits of queries of raw-FISA acquired information. *See* Ex. D at 47. As noted in this section, the audits include assessing compliance with the provisions detailed in the section 702 querying procedures and that these audits may include reviewing a sample of query logs of FBI personnel and their queries and accesses to raw FISA-acquired information. One of the changes to this provision includes a statement that these audits may assist in determining whether FBI personnel receive and review section 702-acquired information that FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign intelligence information. Such queries are required to be reported to the Court. 2015 Mem. Op. at 44 and 78. Although the proposed revisions to Section V.A.3 now reflect this aspect of NSD's oversight, NSD's query audits at FBI field offices since December 2015 have included this type of oversight. The other change to Section V.A.3 of the section 702 minimization procedures indicates that NSD will also assess compliance with subsection 702(f)(2) of FISA.

C. ~~(S//NF)~~ New provisions to address compliance issues involving raw Section 702-acquired information b1, b3, b7E per FBI b1, b3, b7E per FBI

~~(S//NF)~~ The government's proposed revisions to Section III of the FBI 2016 Minimization Procedures include the addition of three new subsections within Section III, discussed in detail below, to address certain compliance issues described in reports filed with the Court on December 28, 2016, June 16, 2017, and December 28, 2017, as well as during a hearing held on August 2, 2017, before the Honorable Rosemary M. Collyer.

1. (U) Background

~~(S//NF)~~ The Court's May 2016 SMP Opinion established an annual reporting requirement regarding retention of raw FISA-acquired information in FBI systems b1, b3, b7E per FBI in the FBI Title I/III SMPs. *See* May 2016 SMP Opinion at 57. Specifically, the Court ordered the government to submit a written report, no later than December 30, 2016, and on an annual basis thereafter, assessing the FBI's compliance with the time periods for retention of raw FISA-acquired information on four types of special purpose systems:

b1, b3, b7E per FBI

b1, b3, b7E per FBI

Id.

~~(S//NF)~~ On December 28, 2016, the government filed its first annual report assessing the FBI's compliance with time periods for retention of raw FISA-acquired information on the above-listed b3, b7E per FBI (government's December 28, 2016 report). That report also provided the Court with preliminary notice of compliance incidents discovered while gathering information for the report. The government indicated in the report that it intended to address three such incidents in a subsequent filing:

b1, b3, b7E per FBI

See Government's December 28, 2016 report at 8, 10-11. In its March 2017 Quarterly Report to the Foreign Intelligence Surveillance Court Concerning Compliance Matters Under section 702 of the Foreign Intelligence Surveillance Act (March 2017 Quarterly Report), the government reported that two of the three instances listed above[41] also violated the FBI's section 702 minimization procedures. *See* March 2017 Quarterly Report, at 82-83. In its Memorandum Opinion and Order regarding the 2016 Certifications, the Court noted that the government had not yet addressed the above-listed incidents in a subsequent filing. *See In re DNI/AG 702(g) Certifications* b1, b3, b7E per FBI b1, b3, b7E per FBI b1, b3, b7E per FBI Accordingly, the Court ordered that no later than June 16, 2017, the government shall submit a written report providing certain specified information regarding these systems. *See id.* at 97-98.

~~(S//NF)~~ On June 16, 2017, the government filed a report that provided an update regarding the extent to which raw FISA-acquired information is being retained in the systems listed above, the government's assessment regarding whether such retention

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[41] ~~(S//NF)~~ b1, b3, b7E per FBI b1, b3, b7E per FBI

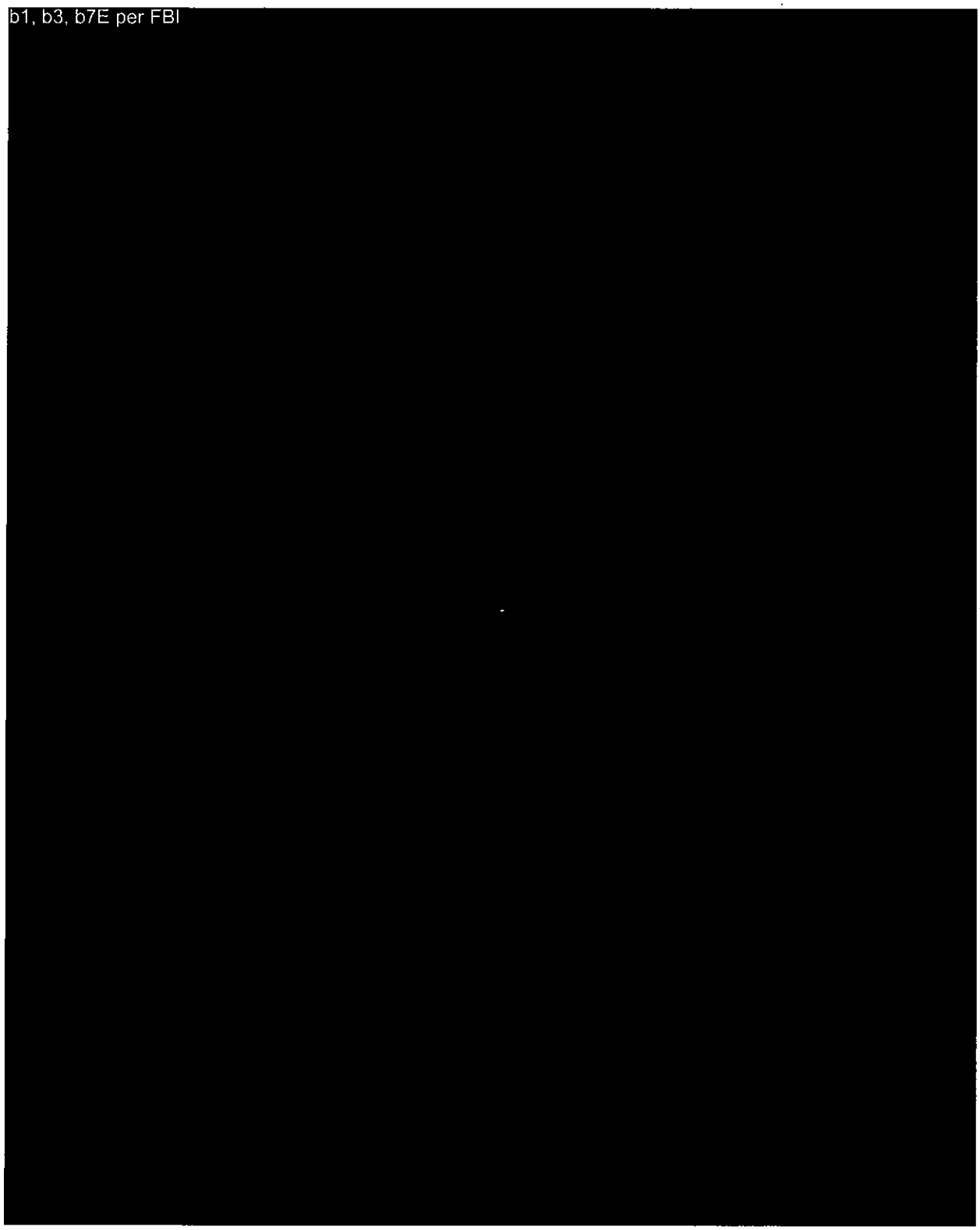
complies with applicable minimization requirements, and steps the government is taking to address these instances of non-compliance with applicable minimization requirements. On August 2, 2017, a hearing was held on this matter before the Honorable Rosemary M. Collyer. During the hearing, FBI expressed its commitment to resolving the compliance issues described above. In addition, in preparation for the hearing, the government identified that FBI's Security Division was also archiving b1, b3, b7E per FBI [redacted] Since the hearing, FBI has been exploring options to bring these systems into compliance with its minimization procedures. In a letter filed on December 14, 2017, the government provided the Court with additional information regarding the steps being taken to address these non-compliant systems and indicated that the government intended to propose amendments to both sets of minimization procedures, including a proposed new category of special purpose systems to address the use of these types of systems. The new categories of b1, b3, b7E per FBI [redacted] proposed by the government, which appear in Sections III.F.5 and III.F.6 of the proposed FBI section 702 minimization procedures submitted herewith as Exhibit D, discussed below. Further, the FBI has proposed changes to its minimization procedures to prohibit the placement of raw FISA-acquired information b1, b3, b7E per FBI [redacted] while it pursues technical changes to

bring its systems into compliance with the minimization procedures, as discussed in greater detail below.

2. ~~(S//NF)~~ b1, b3, b7E per FBI [redacted]

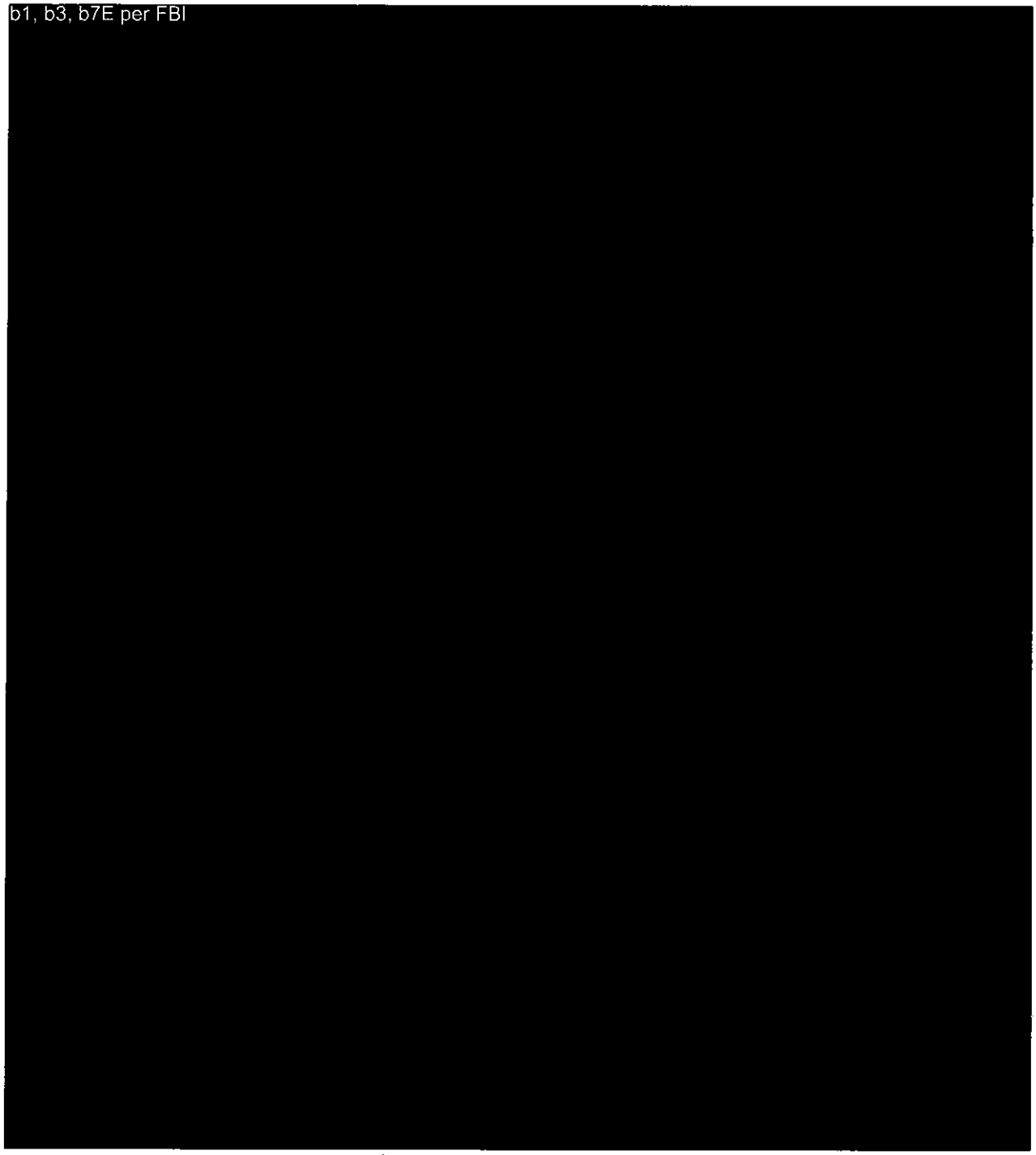
b1, b3, b7E [redacted]

b1, b3, b7E per FBI [redacted]



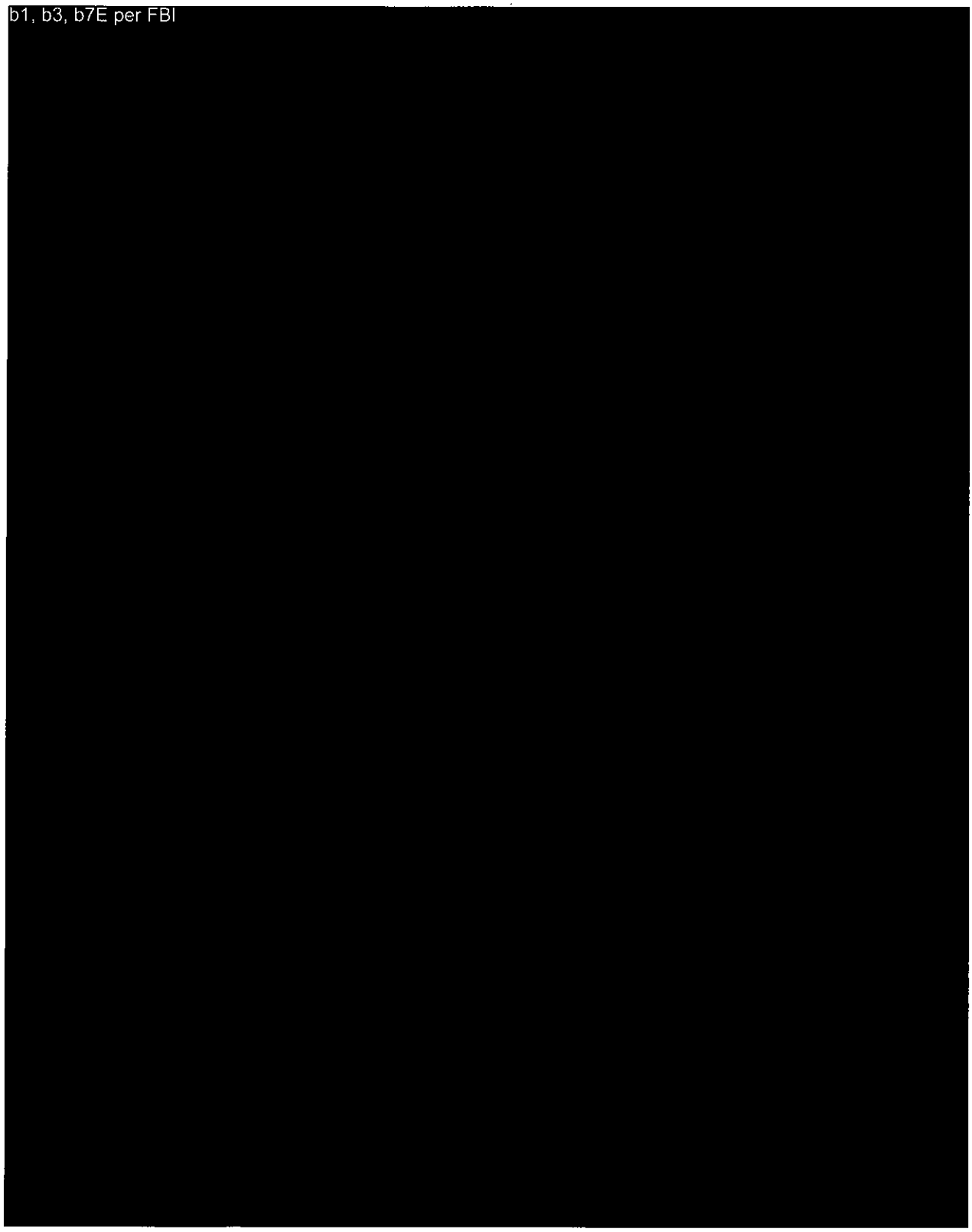
b1, b3, b7E per FBI

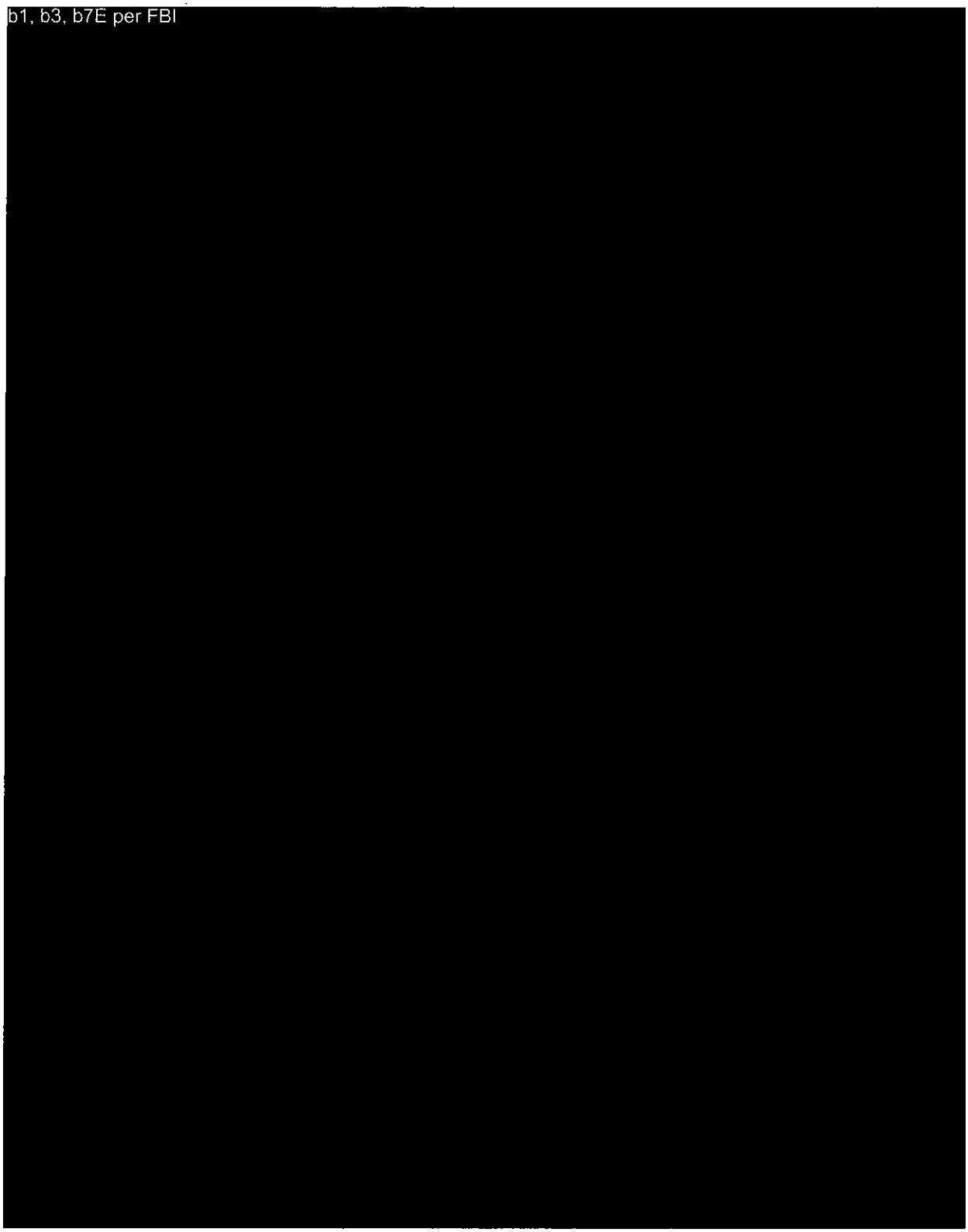
[redacted]



b1, b3, b7E per FBI

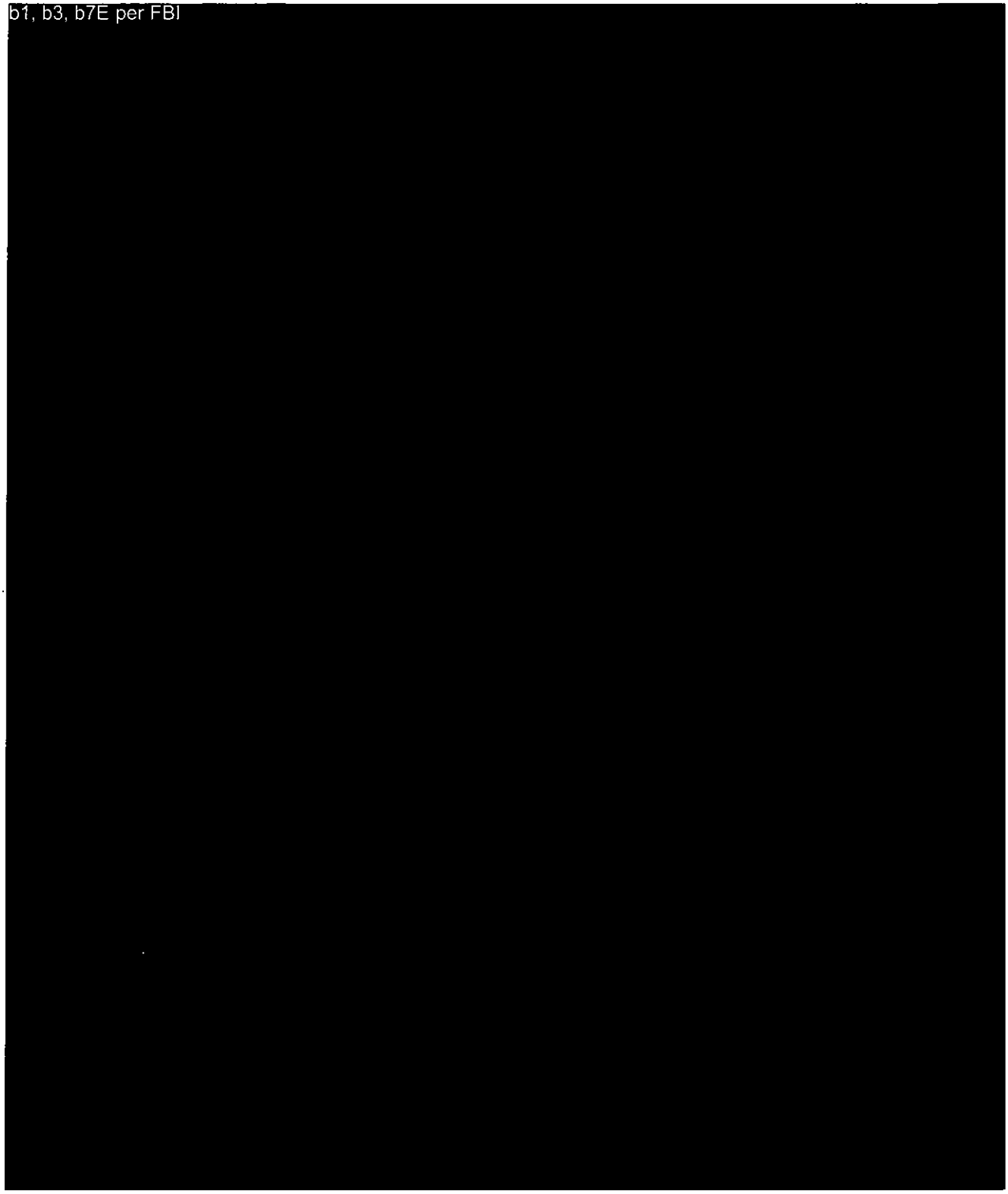
[redacted]



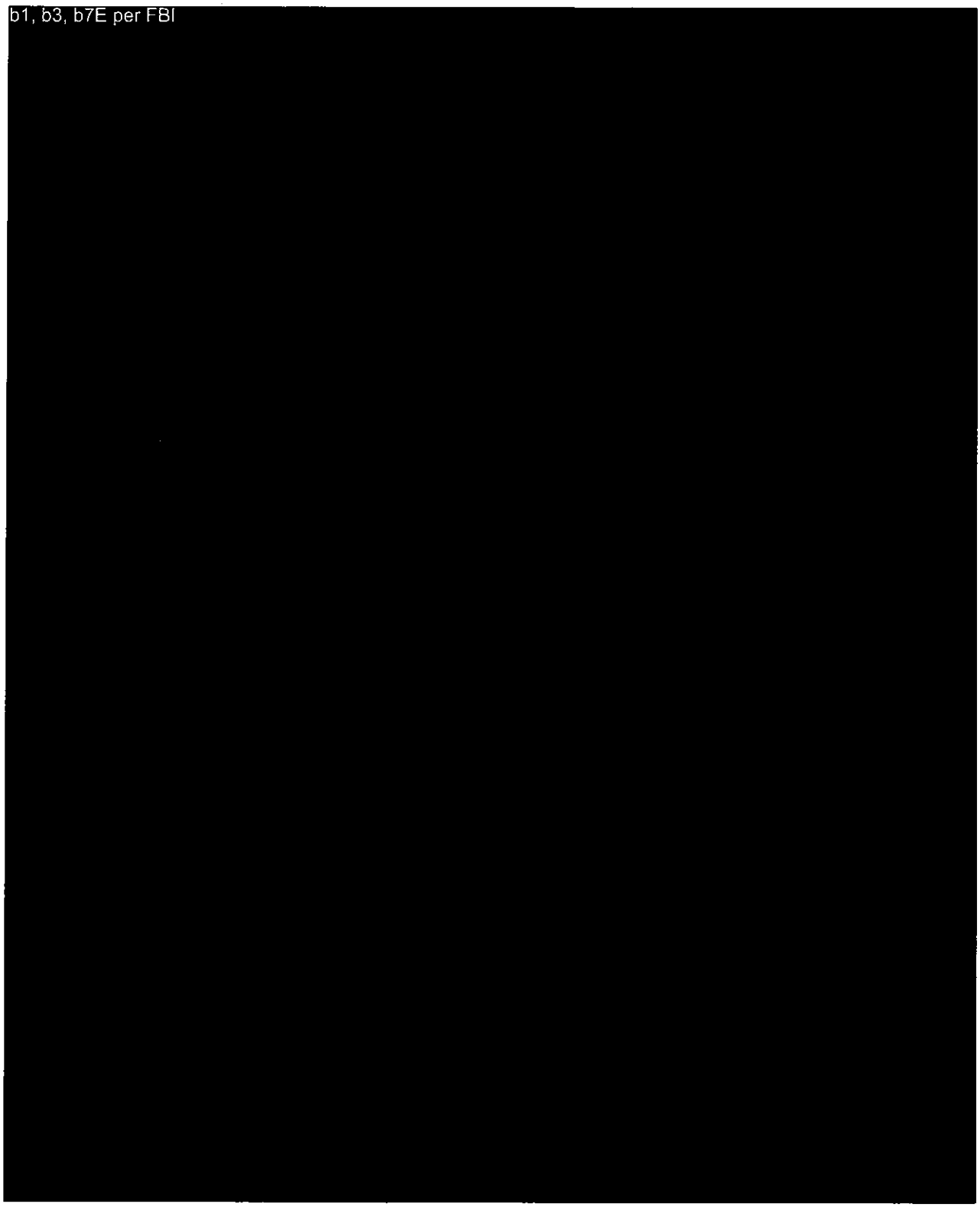


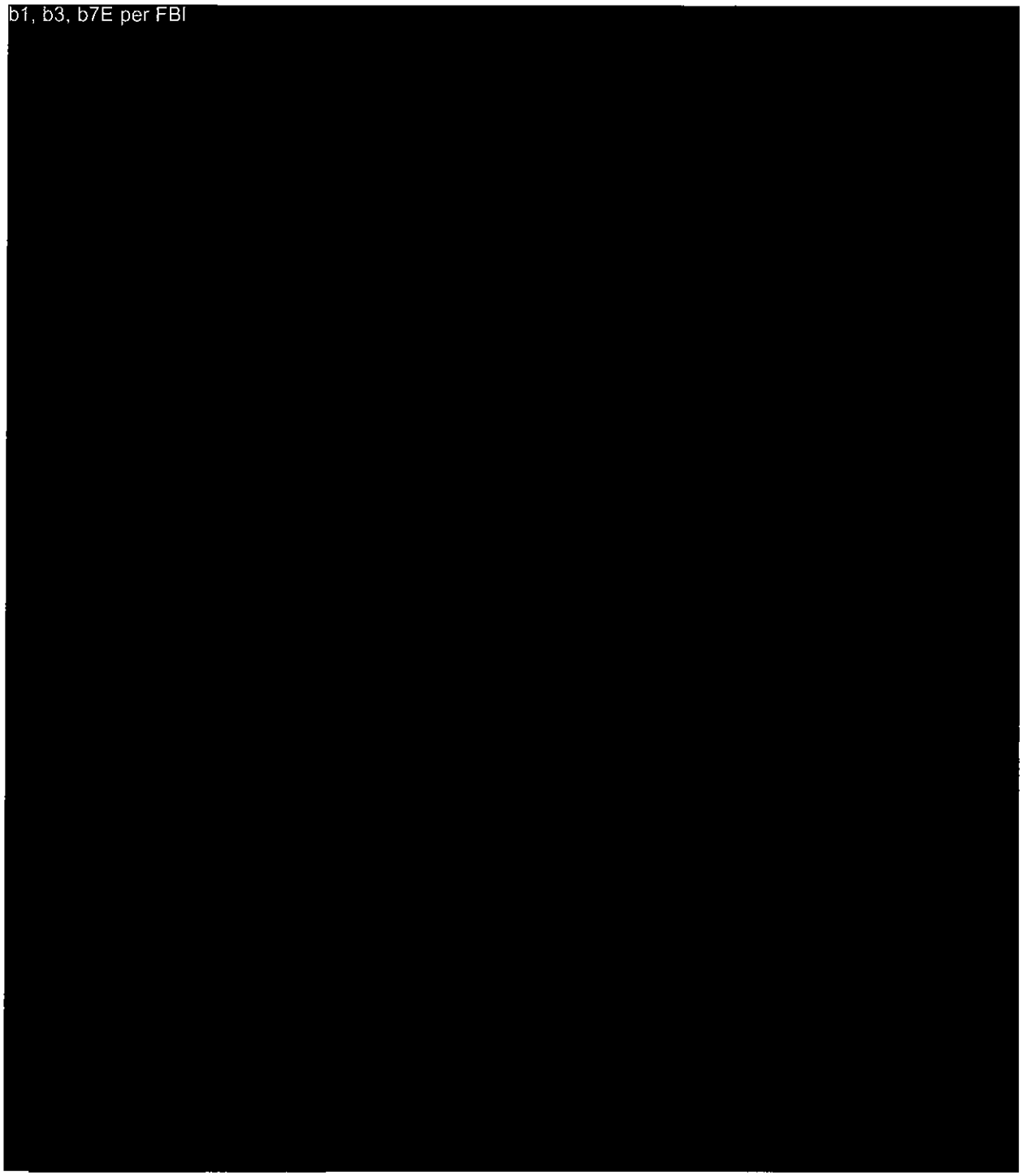
b1, b3, b7E per FBI

[redacted]



[46] ~~(S//NF)~~ In previous Court filings, ESOC was identified as the FBI's Security Division. It was recently moved from the Security Division to the FBI's Information and Technology Branch.





[42] ~~(S//NF)~~ The term "ESOC" also includes any successor entity and any other entity that assumes ESOC's responsibilities for computer network defense and insider threats.

b1, b3, b7E per FBI

[redacted]

b1, b3, b7E per FBI

[redacted]

(U) **Conclusion**

(b) (1)
(b) (3)-50 USC 3024(i)

~~(S//OC/NF)~~ [redacted] contain all of the elements required by the Act, and the targeting, minimization, and querying

procedures submitted with these certifications are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Likewise, the amended minimization procedures and querying procedures to be used in connection with foreign intelligence information acquired in accordance with [redacted] are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Accordingly, the government respectfully requests that this Court enter orders pursuant to subsection 702(j)(3)(A) of the Act approving: [redacted] the use of the targeting, minimization, and querying procedures attached thereto as Exhibits A, B, C, D, E, G, and H in connection with acquisitions of foreign intelligence information in accordance with those certifications; the use of the minimization procedures attached as Exhibits B, D, E, and G to [redacted] in connection with foreign intelligence information acquired in accordance with all predecessor certifications; and the use of the querying procedures attached as Exhibit H to [redacted]

(b)(1)
(b)(3)-50 USC 3024(i)