~~SECRET//NOFORN/FISA~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DNI/AG 702(h) CERTIFICATIONS 2020-A, 2020-B, 2020-C, AND PREDECESSOR CERTIFICATIONS	Docket Nos. 702(j)-20-01, 702(j)-20-02, 702(j)-20-03, and predecessor dockets
IN RE STANDARD MINIMIZATION PROCEDURES FOR FBI ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH CONDUCTED UNDER FISA	Docket No. 08-1833
IN RE FBI STANDARD MINIMIZATION PROCEDURES FOR TANGIBLE THINGS OBTAINED PURSUANT TO TITLE V OF FISA	Docket No. BR 13-49

ORDER IN RESPONSE TO QUERYING VIOLATIONS

This Order responds to compliance problems regarding the FBI's querying of un-minimized information obtained under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1885c, specifically Section 702 of FISA (codified at § 1881c); Titles I and III of FISA (codified at §§ 1801-1813 and 1821-1829), which concern electronic surveillance and

physical search; and Title V of FISA (codified at §§ 1861-1864), which concerns the production of business records and other tangible things.[1]

I. Violations of the Substantive Querying Standard

The Government has represented that the substantive standard for FBI personnel to run queries of un-minimized information is practically equivalent for collection under any of the above-identified authorities. *See In re DNI/AG 702(h) Certification 2018-A, et al.*, Memorandum Opinion and Order at 70 (FISC Docket Nos. 702(j)-18-01, *et al.* Oct. 18, 2018) ("October 18, 2018 Opinion"), *aff'd in part, In re DNI/AG 702(h) Certifications 2018-A, 2018-B, and 2018-C, and Predecessor Certifications* (FISCR July 12, 2019) (per curiam) ("*In re DNI/AG Certifications*"). The Government

> has characterized [that] standard as a high one, having three elements: (1) a query cannot be overly broad, but rather must be designed to extract foreign-intelligence information or evidence of crime; (2) it must have an authorized purpose and not be run for personal or improper reasons; and (3) *there must be a reasonable basis to expect [it] will return foreign intelligence information or evidence of crime.*

Id. at 67 (emphasis added; internal quotation marks omitted). But the querying standards explicitly stated in the applicable FBI procedures do not include these three elements. Rather, the FBI minimization procedures applicable to information acquired under Titles I, III, and V simply provide that, "[t]o the extent reasonably feasible," authorized users with access to raw information must design queries to find and extract foreign intelligence information or evidence

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[1] The cited version of Title V remains in effect for particular foreign intelligence investigations that began before March 15, 2020. *See* Pub. L. 109-177, § 102, *as amended by* Pub. L. 111-118, § 1004(a), Pub. L. 111-141, § 1(a), Pub. L. 112-3, § 2(a), Pub. L. 112-14, § 2, Pub. L. 114-23, § 705(a) and (c), and Pub. L. 116-69, § 1703.

of crime. Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA § III.D.3.b ("FBI SMPs for Titles I and III"); FBI Standard Minimization Procedures for Tangible Things Obtained Pursuant to Title V of FISA § III. I ("FBI BR SMPs"). In contrast, by the terms of the applicable procedures, FBI queries of "unminimized contents or non-contents (including metadata) acquired pursuant to Section 702 . . . must be reasonably likely to retrieve foreign intelligence information, as defined by FISA, or evidence of a crime, unless otherwise specifically excepted." Querying Procedures used by the FBI in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA § IV.A.1 ("FBI Querying Procedures").

The FBI has not consistently complied with the three-part querying standard articulated by the Government. In October 2018, the Court concluded that "the FBI's repeated non-compliant queries of Section 702 information" precluded findings that its Section 702 querying and minimization procedures, as implemented, satisfied the definition of "minimization procedures" at 50 U.S.C. § 1801(h) and were reasonable under the Fourth Amendment. October 18, 2018 Opinion at 62.[2] The Government acknowledged that those improper queries "generally resulted from fundamental misunderstandings . . . about what the standard 'reasonably likely to return foreign intelligence information' means," and the Court cited the "lack of a common understanding within FBI and NSD [*i.e.*, the National Security Division of the Department of Justice] of what it means for a query to be reasonably likely to return foreign-intelligence

[2] Although that case was a proceeding under Section 702(j), the Court's opinion also examined problems with FBI queries of information acquired under Titles I and V of FISA. *Id.* at 70, 76-77.

information or evidence of crime" as contributing to the FBI's non-compliance. *Id.* at 69, 77 (some internal quotation marks omitted).

The Court expected that a requirement for FBI personnel to document their basis for believing that a query using a U.S.-person query term satisfied the querying standard before accessing Section 702-acquired contents information retrieved by the query would help ensure that they recalled and thoughtfully applied the guidance and training they had received on the standard. *See id.* at 92-93. The Government eventually amended the FBI's Section 702 querying procedures to incorporate such a documentation requirement (among other things). *See In re DNI/AG 702(h) Certification 2018-A, et al.*, Memorandum Opinion and Order at 8-10 (FISC Docket Nos. 702(j)-18-01, *et al.* Sept. 4, 2019) ("September 4, 2019 Opinion"). As revised, the procedures require "FBI personnel to provide a written *statement of facts showing* that the query was reasonably likely to retrieve foreign intelligence information or evidence of a crime" and the FBI to maintain records of such statements of facts "in a manner that will enable oversight by NSD and ODNI." FBI Querying Procedures §§ IV.A.3, IV.B.4 (emphasis added).[3] But the primary means of implementing those requirements is for FBI personnel to select from a pre-set menu of broad, categorical justifications, not to prepare a case-specific explanation of why the standard is met for a particular query. *See In re DNI/AG 702(h) Certification 2020-A, et al.*, Memorandum Opinion and Order at 44-47 (FISC Docket Nos. 702(j)20-01, *et al.* Nov. 18, 2020)

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[3] *See also* October 18, 2018 Opinion at 96 ("The Court contemplates a brief statement of the query justification – in many cases it should suffice to succinctly complete a sentence that starts 'This query is reasonably likely to return foreign-intelligence information [or evidence of crime] because . . . .'").

("November 18, 2020 Opinion") (discussing Query Implementation Report, March 5, 2020 and Nov. 3, 2020 letter and accompanying screenshots). It is questionable how effectively that process results in a "written statement of facts showing" why each query comports with the standard.

In December 2019, "there still appear[ed] to be widespread violations of the querying standard by the FBI." *In re DNI/AG 702(h) Certification 2019-A, et al.*, Memorandum Opinion and Order at 65 (FISC Docket Nos. 702(j)-19-01, *et al.* Dec. 6, 2019) ("December 6, 2019 Opinion"). Despite that widespread non-compliance, the Court did not find another deficiency in the FBI's querying and minimization procedures for Section 702 information. The Court reasoned that, because the FBI was "really just starting to implement the [above-described] documentation requirement on a comprehensive basis," the improper queries did not undermine its prior determination that the FBI's procedures, as augmented by the documentation requirement, met statutory and Fourth Amendment requirements. *Id.* at 68.

One of the non-compliant queries discussed in the December 6, 2019 Opinion provided further evidence of the lack of a common understanding of the querying standard between FBI and NSD. In August 2019, the FBI queried "unminimized Section 702 information using the identifiers for approximately 16,000 persons who [redacted] (S) *Id.* at 67. NSD assessed that those queries violated the querying standard, except for queries relating to seven persons with "ties to a [redacted] (S) investigation." *Id.* The FBI, however, maintained that all of the queries "were reasonably likely to return foreign-intelligence information or evidence of a crime because [redacted] (S)

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[redacted] *Id.* The Court found the FBI's position "unsupportable" and observed: "There is no relevant distinction between the [redacted] (S) queries and other broad, suspicionless queries previously identified by the government and the Court as violations of the querying standard." *Id.* at 67-68 (citing October 18, 2018 Opinion at 68-69).

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In November 2020, the Court again surveyed recent reports of non-compliant FBI queries, which suggested "that the FBI's failure to properly apply its querying standard when searching Section 702-acquired information was more pervasive than was previously believed;" however, most of those queries "occurred prior to the implementation of the FBI's system changes and training" regarding the documentation requirement. November 18, 2020 Opinion at 39, 41 (emphasis added). "In addition, the COVID-19 pandemic severely limited the government's ability to monitor the FBI's compliance" after those systems changes and training had occurred. *Id.* at 41. Under those "unique circumstances," the Court concluded that the latest group of non-compliant queries did not undermine its prior determination that the FBI's procedures, with implementation of the documentation requirement, met statutory and Fourth Amendment requirements. *Id.*

It is now apparent that such violations continue and that a common understanding of the querying standard still eludes the FBI and NSD. When NSD oversight efforts have uncovered queries that clearly violated the above-described standard, the FBI has sometimes insisted, apparently at the management level, that the queries were proper. Specifically:

(1) From at least late 2016 to early 2020, the FBI's [redacted] had a regular practice of querying un-minimized information acquired under Titles I, III, and V of FISA[4] using identifiers of individuals listed in [redacted] homicide reports, including victims, next-of-kin, witnesses, and suspects. Supplemental notice of compliance incidents regarding the FBI's querying of raw FISA-acquired information at 1, 5-7 (May 21, 2021) ("May 21, 2021 Notice"). NSD found these queries to have violated the querying standard because there was no reasonable basis to expect they would return foreign intelligence or evidence of crime. *Id.* at 5. The FBI, however, maintained that querying FISA information using the identifiers for the victims of these homicides – simply because they were homicide victims – was reasonably likely to retrieve evidence of crime. *See id.* at 6; May 28, 2021 Notice at 4-5.[5]

(2) On June 19, 2020, the [redacted] conducted a batch query of un-minimized information acquired under Titles I, III, and V of FISA using identifiers of 133 individuals arrested "in connection with civil unrest and protests between approximately May 30th and June 18th 2020." Preliminary Notice of compliance incidents regarding the FBI's querying of raw FISA-acquired information at 2 (April 26, 2021) ("April 26, 2021 Notice"). The queries were run "to determine whether any counter-terrorism derogatory information on the arrestees existed in FBI databases" and without "any specific potential connections to terrorist related activity" known to the [redacted] when the queries were conducted. *Id.* NSD assessed that the queries were not reasonably likely to retrieve foreign intelligence information or evidence of a crime, and therefore did not comply with the querying standard. May 21, 2021 Notice at 8. The FBI, however, asserted that the queries satisfied the querying standard for evidence of a crime simply because they pertained to persons who had been arrested and therefore reasonably believed to have committed an offense. *Id.* It further maintained that there was a "reasonable basis to believe these queries would return foreign intelligence" because of [redacted] information, not relied upon by the person who ran the queries, that suggested that a [redacted] message on behalf of a [redacted] organization 'protesting' U.S [redacted] violence against African-Americans to various U.S. persons, ostensibly in hopes that the recipients would further proliferate the message." *Id.* at 8-9.

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[4] In November 2019, the [redacted] ran similar queries against un-minimized information acquired under Section 702. *See* Notice of compliance incidents regarding the FBI's querying of raw FISA-acquired information, including information acquired pursuant to Section 702 of FISA at 3 ("May 28, 2021 Notice").

[5] The FBI further suggested that the queries regarding homicide victims "were not entirely unconnected to foreign intelligence." May 21, 2021 Notice at 7.

(3) During June 11-15, 2020, a [redacted] analyst conducted 656 queries of un-minimized information acquired under Titles I, III, and V of FISA using identifiers [redacted] (S) in the United States who were [redacted] thought "to be of particular interest to [redacted] (S) May 21, 2021 Notice at 3-4. The FBI regarded [redacted] as potential sources, and the analyst ran the queries to check for derogatory information without having reason to suspect that any would be found. *Id.* at 3. NSD concluded that these queries "were not reasonably likely to retrieve foreign intelligence information or evidence of a crime." *Id.* The FBI took the contrary position, based on the individuals' [redacted] (S) *Id.* at 3-4.

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The FBI's position that the disputed queries in paragraphs (1) and (2) above satisfied the querying standard is no more supportable than its contention in 2019 that the above-described queries regarding [redacted] (S) met that standard. *See supra* at 5-6. The [redacted] (S) queries in paragraph (3) above may present a closer case, but the Court sees no reason to question NSD's assessment of non-compliance.

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The above-described queries, moreover, were not isolated events. The Government has reported further violations of the querying standard at the [redacted] and elsewhere.[7] (S)

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[6] *See, e.g.*, April 26, 2021 Notice at 2 (May 2020 queries "using variations of the names of two known political activist groups . . . involved in organized protests"); May 21, 2021 Notice at 2 (697 queries conducted during January-June 2020 using identifiers for persons scheduled to visit [redacted] (S) *id.* at 3 (June 2020 queries using identifiers for at least 790 cleared defense contractors from whom the FBI might request cooperation); *id.* at 4-5 (330 queries conducted in June 2020 using identifiers of employees of the [redacted] (S) whom the FBI might want to recruit as sources). The foregoing queries ran against un-minimized information acquired under Titles I, III, and V of FISA. *Id.* at 1; April 26, 2021 Notice at 1. During July-August 2020, additional queries were run against Section 702 information regarding visitors to [redacted] (S) May 28, 2021 Notice at 1-3.

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[7] *See, e.g.*, Preliminary notice of compliance incidents regarding the FBI's querying of raw FISA-acquired information, including information acquired pursuant to Section 702 of FISA at 3 (July 21, 2021) ("July 21, 2021 Notice") (134 "improperly tailored" queries conducted by the (continued...)

The most acute concerns, however, are that the Government is of two minds about what the querying standard means in practice, and that the agency charged with implementing it adheres to an unreasonably lenient interpretation.[8] As long as those circumstances persist, remedial measures can be expected to have only limited effect. For example, requiring personnel to affirmatively select to query FISA information should reduce the number of violations in which personnel inadvertently query FISA information, but they will not address the large number of cases in which they intend to do so. *See* Letter regarding FBI programmatic enhancements to facilitate compliance with applicable requirements regarding queries of FISA-acquired information at 2 (July 26, 2021). And requiring attorney approval of "batch jobs of 100 or more queries" on a particular FBI system may not improve compliance if an incorrect understanding of the querying standard is not limited to non-attorney personnel. *See id.* In view of these concerns, the Court is directing the Government to take the steps described in Part III below.

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[7](...continued)
FBI's [redacted] between November 2019 and August 2020); Notice of compliance incidents regarding the FBI's querying of raw FISA-acquired information, including information acquired pursuant to Section 702 of FISA at 3 (Aug. 10, 2021) ("August 10, 2021 Notice") (27 queries conducted by the FBI's [redacted] in May 2020 "using the name of a [redacted] and the names of individuals who worked at that [redacted] . . . to check for any derogatory information which would assist FBI in deciding whether to develop these individuals as potential sources").

[8] The Court has received no indication that the FBI has changed its understanding of the querying standard since the submission of the May 21, 2021 and May 28, 2021 Notices. NSD has informally advised, however, that future compliance notices will not describe any dissenting views the FBI may have about whether the querying standard was satisfied.

II. Issues Specific to Queries of Section 702 Information to Retrieve Evidence of Crime

Section 702(f)(2) requires the FBI in certain circumstances to obtain approval from the FISC before accessing the contents of communications acquired under Section 702. Specifically, that requirement applies to accessing such contents –

> (1) if they "were retrieved pursuant to a query made using a United States person query term,"
>
> (2) where the query "was not designed to find and extract foreign intelligence information"
>
> (3) and was conducted "in connection with a predicated criminal investigation . . . that does not relate to the national security of the United States,"
>
> (4) unless "there is a reasonable belief that such contents could assist in mitigating or eliminating a threat to life or serious bodily harm."

Section 702(f)(2)(A), (E). The Foreign Intelligence Surveillance Court of Review has observed that Section 702(f)(2) appears to be "intended to address . . . compliance with the Fourth Amendment," and specifically the concern that the "foreign intelligence exception to the Fourth Amendment's warrant requirement . . . might not apply in everyday criminal investigations unrelated to national security and foreign intelligence needs." *In re DNI/AG Certifications* at 29 (internal quotation marks omitted).

The government has never brought an application to the FISC under Section 702(f)(2). It has, however, reported a number of violations of this provision. In December 2019, the Court observed that some of those violations "resulted in part from the manner in which FBI systems displayed information in response to queries," and stressed the importance of designing system modifications to facilitate compliance with Section 702(f)(2). December 6, 2019 Opinion at 69-

70. In November 2020, the Court expressed concern that "the default-choice architecture" for documenting U.S.-person queries of un-minimized Section 702 information may "influence behavior or lead to misunderstandings by FBI personnel." November 18, 2020 Opinion at 47-48. The default assumption is that a query is not an evidence-of-crime-only query.[9] Unless the person conducting the query affirmatively reverses that default, it will be treated as designed to find and extract foreign intelligence information and therefore not subject to Section 702(f)(2)'s requirements. *See id.* at 48. The overly broad understanding of when a query is reasonably expected to return foreign intelligence that the FBI advanced in defense of some of the [redacted] (S) b1 -1 b3 -5 [redacted] queries, *see supra* at 7-8, provides reason to question whether FBI personnel will reverse this default, even when the query's nexus to foreign intelligence is attenuated at best.

In the November 18, 2020 Opinion, the Court also expressed concern that this default assumption may impede compliance with a reporting requirement applicable to certain evidence-of-crime-only queries. *See* November 18, 2020 Opinion at 48. The Court first imposed this requirement in November 2015 because it had "relied on the government's representation that 'queries designed to elicit evidence of crimes unrelated to foreign intelligence rarely, if ever, produce responsive results'" from Section 702 information, and "the Court sought reassurance that its 'risk assessment is valid.'" December 6, 2019 Opinion at 71-72 (quoting *In re DNI/AG 702(g) Certification 2015-A, et al.*, Memorandum Opinion and Order at 44 (FISC Docket Nos. 702(i)-15-01, *et al.*, Nov. 16, 2015)). Under the current form of this requirement, the

[9] In this Order, the phrase "evidence-of-crime-only query" refers to a query designed to return evidence of a crime, and not foreign intelligence information.

Government must, on a quarterly basis, provide specified information about "each instance in which FBI personnel accessed unminimized Section 702-acquired contents information that was returned by a query that used a U.S.-person query term and was not designed to find and extract foreign intelligence information." November 18, 2020 Opinion at 63.[10] The Government also must report on a quarterly basis "the number of U.S.-Person queries run by the FBI against Section 702-acquired information" and "the number of such queries in which the documented justifications indicated an evidence-of-crime-only purpose." *Id.*

The Government's reporting indicates that evidence-of-crime-only queries are an infinitesimal percentage of FBI queries of un-minimized Section 702 information. Indeed, for March through May 2021 it is reported that the FBI conducted over 1,055,000 queries of such information using U.S.-person query terms, as well as over 976,000 queries using query terms for presumed U.S. persons, but "*none* of those queries were conducted for an evidence-of-crime-only purpose." June 2021 Section 702 Quarterly Compliance Report at 87 (emphasis added).[11] For the same period, the Government reported no instances of FBI personnel accessing un-minimized contents information returned by an evidence-of-crime-only query that used a U.S.-person query term. *Id.* at 87.

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[10] Queries for which an application is made to the FISC pursuant to Section 702(f)(2) are not subject to this requirement. *Id.*

[11] FBI documentation indicated that 14 of the queries fell within the evidence-of-crime-only category, but after further examination the FBI concluded that each of them "either had a valid foreign intelligence purpose, was conducted using solely non-United States person identifiers, or was otherwise not conducted for an evidence-of-crime-only purpose." *Id.* n.60.

This reporting strains credulity. It is theoretically possible that in a three-month period the FBI (which, after all, is a law-enforcement agency as well as a member of the Intelligence Community) conducted over two million queries regarding U.S. persons and presumed U.S. persons, without a single one being designed to return non-foreign intelligence evidence of a crime. But it is far more plausible that the FBI is under-reporting such queries, due to factors such as the default assumption that every U.S.-person query is designed to return foreign intelligence information and the FBI's unreasonably broad understanding of when a query may be reasonably expected to return foreign intelligence information. In addition to effectively negating the Court's reporting requirements, failure by the FBI to properly identify and document evidence-of-crime-only queries is likely to result in violations of Section 702(f)(2) in circumstances where the requirement to obtain a FISC order otherwise applies. *See supra* at 10.[12]

III. Conclusion

The problems relating to FBI querying practices are substantial and persistent. Failure to correct them would call into question the continued validity, as implemented, of the FBI SMPs for Title I and Title III and the FBI BR SMPs, as well as the ability of a FISC judge to find the FBI's Section 702 procedures, as implemented, to be consistent with statutory and Fourth Amendment requirements. Some of the systems modifications and training efforts implemented to date have been constructive, especially with regard to situations in which FBI personnel do not intend to query un-minimized FISA information. But they have not been a sufficient response to

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[12] The Court is awaiting the Government's assessment of whether recent oversight efforts at the [redacted] and the [redacted] uncovered further violations of Section 702(f)(2). *See* August 10, 2021 Notice at 1 n.1; July 21, 2021 Notice at 2 n.1. (S) (S) b1 -1 b3 -5

these problems. In the Court's assessment, these problems are likely to remain intractable as long as the FBI and NSD lack a shared, reasonable understanding of the querying standard and, relatedly, of the parameters of Section 702(f)(2) and the reporting requirements regarding evidence-of-crime-only queries.

Accordingly, IT IS HEREBY ORDERED THAT, by November 1, 2021, the Government shall submit:

(1) draft revisions of the FBI SMPs for Titles I and III, the FBI BR SMPs, and the FBI Section 702 Querying Procedures that provide a full and explicit articulation of the requirements for querying un-minimized information in language that is consistent across those three sets of procedures, or an assessment of why it is not feasible to do so;

(2) a description of steps it is taking or will take to ensure that the FBI applies the querying standard in a manner that is consistent with the Government's representations to the Court and the Court's interpretation of that standard in its opinions;

(3) an explanation of how the phrases "not designed to find and extract foreign intelligence information" and "in connection with a predicated criminal investigation . . . that does not relate to the national security of the United States" should be understood for purposes of implementing Section 702(f)(2); and

(4) an assessment of whether the FBI's current systems and practices (a) fully comport with the requirements of Sections IV.A.3 and IV.B.4 of the FBI Querying Procedures and (b) facilitate full compliance with Section 702(f)(2).

IT IS SO ORDERED.

Entered this 2nd day of September, 2021.

RUDOLPH CONTRERAS
Judge, United States Foreign
Intelligence Surveillance Court

I, [redacted] Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.

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