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2022

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UNITED STATES

Maura Peterson, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL)
BUREAU OF INVESTIGATION FOR AN)
ORDER REQUIRING THE PRODUCTION OF)
TANGIBLE THINGS FROM b1, b3)
_____)

Docket No. b1, b3

MEMORANDUM OPINION AND ORDER

On b1, b3 2021, the Federal Bureau of Investigation (FBI) submitted in the above-captioned matter an Amended Application seeking the production of tangible things (referred to as “business records”) under section 501 of the Foreign Intelligence Surveillance Act of 1978 (FISA), which is codified at 50 U.S.C. § 1861. The Court granted the Amended Application after carefully considering the original application, appointing three amici curiae who provided helpful legal arguments and technical advice, holding a hearing, permitting the application to be amended, and considering briefs submitted by the amici and by the U.S. Department of Justice (DOJ) on behalf of the FBI. That briefing culminated with the legal amicus concluding that, although the FBI had not fully answered all questions posed, “the statutory criteria” for granting the application appear to have been met, given the limitations on the production requested by the Amended Application. Amicus Reply to Govt. Resp. at 2 (b1, b3 2021). The Court agrees.

Accordingly, this Memorandum Opinion and Order sets out the Court’s reasons for finding that the Amended Application satisfies applicable statutory requirements because it includes (1) a statement of facts showing that there are reasonable grounds to believe that the

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business records sought are relevant to an authorized investigation to protect against clandestine intelligence activities and (2) a specific selection term (SST) to be used as the basis for the production.¹ It also discusses the Court's reasons for imposing more stringent reporting requirements than those proposed in the Amended Application in view of inadequate reporting on a similar production provided in a prior case.

I. Factual Background

The Amended Application seeks an order to

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It also states that the investigation is "being

conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order), and is not being conducted solely upon the basis of activities protected by the First Amendment." *Id.*

In the Amended Application, the FBI cites

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¹ The provisions codified at § 1861 are part of Title V of FISA, which expired on March 15, 2020, except with respect to any particular foreign intelligence investigation that began before that date. *See* Pub. L. 109-177 § 102(b), 120 Stat. 192, 195 (2006), *as amended by* Pub. L. 111-118 § 1004(a), 123 Stat. 3409, 3470 (2009), Pub. L. 111-141 § 1(a), 124 Stat. 37 (2010), Pub. L. 112-3 § 2(a), 125 Stat. 5 (2011), Pub. L. 112-14 § 2(a), 125 Stat. 216 (2011), Pub. L. 114-23 § 705(a), (c), 129 Stat. 268, 300 (2015), and Pub. L. 116-69 § 1703(a), 133 Stat. 1134, 1143 (2019). Because the FBI's b1, b3 investigation began before March 15, 2020, Amend. App. at 3, it is subject to the exception. The Court accordingly applies the provisions of § 1861 that were in effect on March 14, 2020, immediately before the general expiration date.

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II. Procedural History

The Foreign Intelligence Surveillance Court (FISC) granted a previous FBI application for a production of b1, b3 investigation on b1, b3 2020. *See* FISC Docket No. b1, b3 That was a separate case; however, after the instant case had commenced and in belated response to reporting requirements imposed in the b1, b3 Docket, the FBI reported to the Court information relevant to the instant case. That history bears on what reporting requirements are appropriate in this case. For those reasons, the Court includes reporting in the b1, b3 Docket in setting out this case's procedural history.

b1, b3 *Id.* at 5 n.2.

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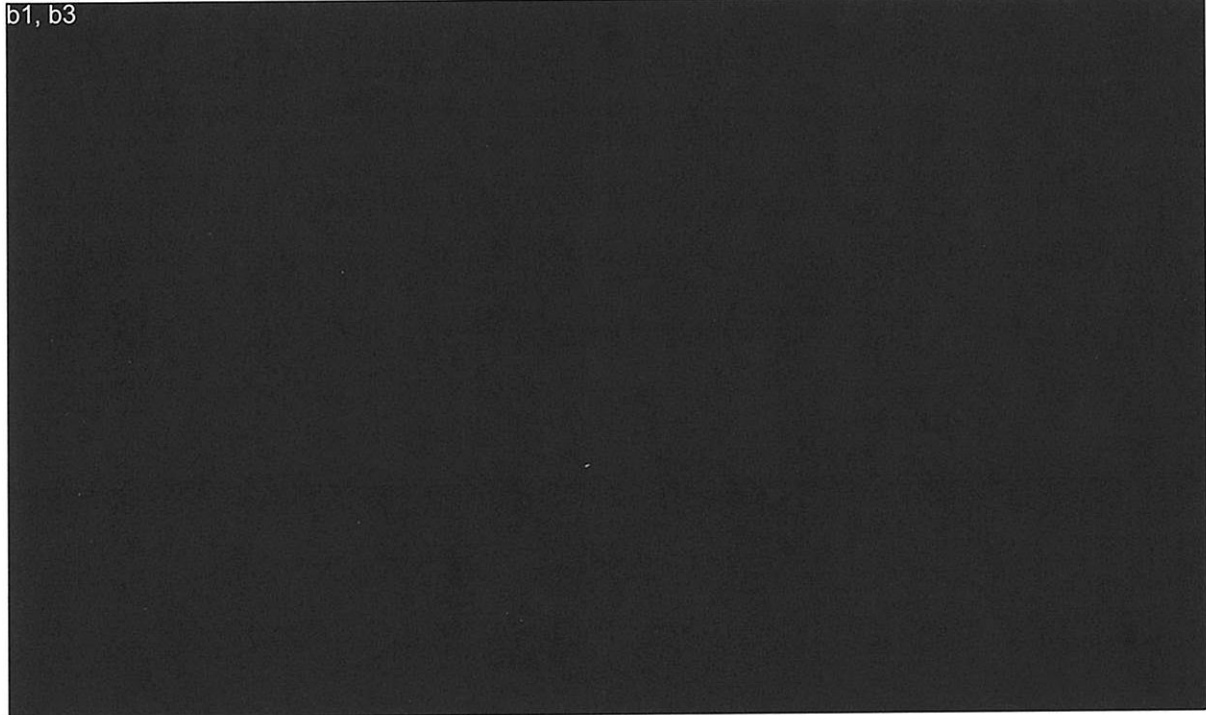
b1, b3 *Id.* at 5 n.2.

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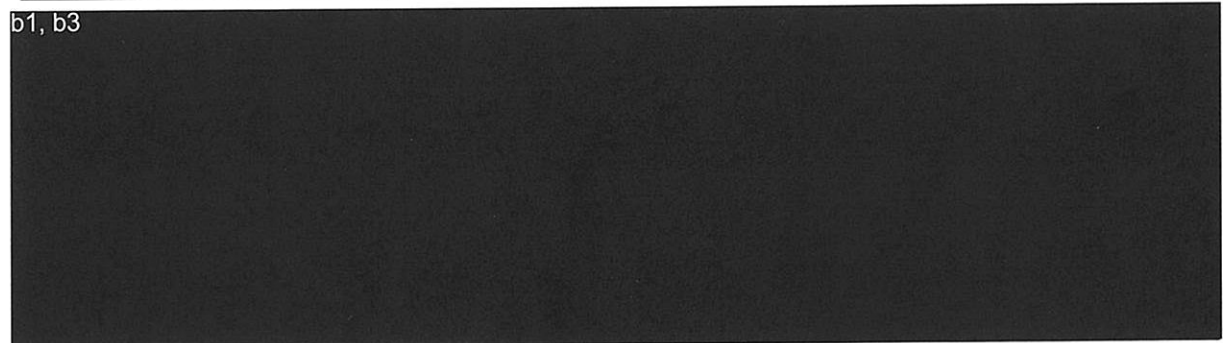
In the b1, b3 Docket, the Court ordered the government to report on the business records produced, including any “anomalous or unexpected results” suggesting that some produced records may not pertain to b1, b3 Supp. Order at 2, FISC b1, b3 2020). According to a report filed on b1, b3 2020, b1, b3 produced records to the FBI on

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On b1, b3 2021, the government filed an application in the instant case, which sought a second production of business records from b1, b3 (“Original

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Application”). b1, b3

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On b1, b3 2021, pursuant to 50 U.S.C. § 1803(i)(2)(B), the Court appointed Mary B. McCord, Esq., as a legal amicus curiae and Ben Johnson as a technical amicus curiae to assist in considering issues posed by the Original Application. *See* Order Appointing Amici Curiae b1, b3 b1, b3 2021) (“Appt. Order”). The Court also established a schedule under which briefing would be completed by b1, b3 2021. *Id.* at 3. The Court later appointed Amy Jeffress, Esq., to serve as an additional amicus after Ms. McCord requested to consult with her.⁸ The Court has benefitted significantly from the amici’s contributions.

Two days later, the government submitted another report in the b1, b3 Docket. *See* Second Rpt. in Resp. to Supp. Order, FISC b1, b3 2020) (“Second Report”). It

⁷ The FBI sought from b1, b3 b1, b3 *Id.* at 6-7.

⁸ *See* Order at 1 b1, b3 2021) (b1, b3 Order”); Order Amending the Court’s b1, b3 2021 Order to Reflect That Amy Jeffress was Appointed as an Amicus Curiae b1, b3 2021).

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disclosed that the FBI had omitted from the First Report that, on b1, b3 2020, it received

additional information from b1, b3

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Id. at 3-4. The FBI had “overlooked” this information when preparing the

First Report, but provided it to the DOJ National Security Division Office of Intelligence (OI) on

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b1, b3 2021, a month after the First Report was filed. *Id.* at 4. The FBI and OI initially

assessed that this information “was not inconsistent with the use of b1, b3

b1, b3

and that “a second response to the

Supplemental Order was not required.” *Id.* They nonetheless decided to disclose the information

to the Court in a second report filed six months after the first, “given its potential relevance to the

legal and technical issues” set for briefing in the instant case. *Id.* The Court’s briefing order,

however, merely specified an issue that should have been apparent at the outset: “Whether a

‘specific selection term’ that satisfies the definition at 50 U.S.C. § 1861(k)(4) is ‘to be used as

the basis for the production of the tangible things sought’ in the Application.” *Appt. Order* at 2.

This information should have been included in the Original Application.

On b1, b3 2021, the Court held a hearing to develop and clarify the record before

briefing. Among the questions raised, but not answered, during the hearing was b1, b3

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Primary Order Requiring the Production of Tangible Things at 4,

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FISC [REDACTED] 2020). The government also disclosed for the first time at the hearing

that [REDACTED]
[REDACTED]
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Four days after the hearing, the government moved to suspend the briefing schedule. Citing “information learned and discussed in preparation for, and during, the hearing,” it sought to submit an amended application to “address the concerns . . . raised by the Court and the Amici” and ensure that the requested production will “be more appropriately tailored to result in the production of target information.” Mot. Pursuant to U.S. FISC R. Proc. 6(d) for Order Extending Time Limits at 2 [REDACTED] 2021). The Court granted the motion and directed that the amended application be filed by [REDACTED] 2021. Order [REDACTED] 2021).

Six days before the amended application was due, the government submitted a third report on the prior production. Third Rpt. in Resp. to Supp. Order, FISC [REDACTED] 2021) (“Third Report”). In it, the FBI confirmed that [REDACTED]
[REDACTED]
[REDACTED] in the course of preparing for the [REDACTED] hearing. *Id.* at 3. This report also disclosed for the first time that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 4.

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On b1, b3 2021, the government timely filed the Amended Application, which supersedes the Original Application and is now pending. On b1, b3 2021, the Court established a new briefing schedule, *see* b1, b3 2021 Order at 1, under which the following documents were submitted: Amicus Br. in Resp. to Govt. App. for an Order for Tangible Things b1, b3 2021 (“Amicus Br.”); Govt. Resp. Br. b1, b3 2021 (“Govt. Resp.”);¹² and Amicus Reply to Govt. Resp. b1, b3 2021 (“Amicus Reply”).

III. The Production Sought in the Amended Application

The Amended Application seeks an order requiring b1, b3 to produce the following:

All tangible things associated with the b1, b3

b1, b3

¹² This brief was verified under penalty of perjury by an FBI Special Agent. Govt. Resp. at 13.

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Amend. App. at 4-5 (emphasis in original). b1, b3 is to make a production within thirty days of receipt of the Court's Order and continuing every 30 days thereafter until a total of six productions have been made. *Id.* at 22.¹³

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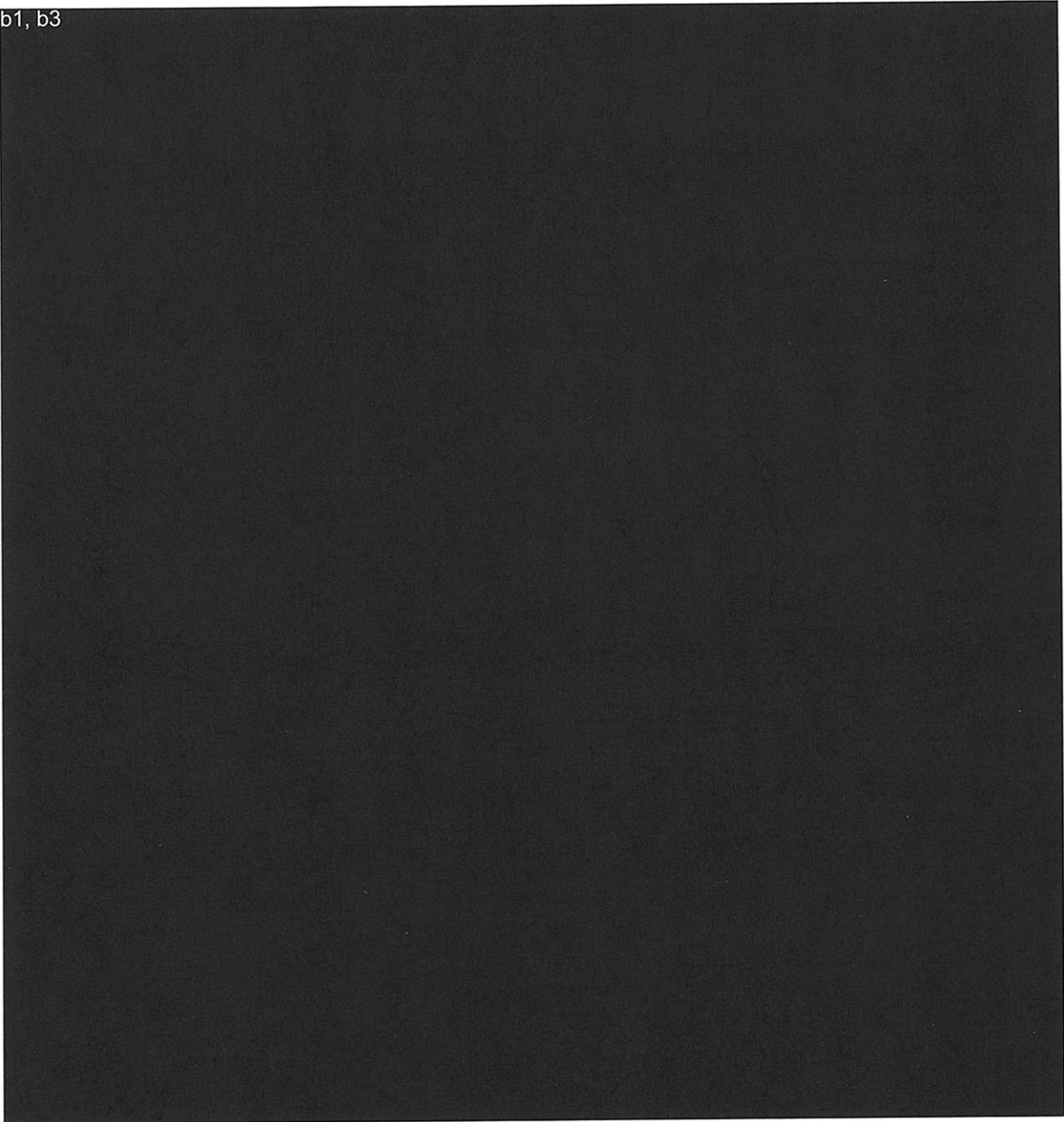
See § 1861(b)(2)(C), (c)(2)(F). Those provisions do not apply to the Amended Application because it seeks a production of business records “for an investigation . . . to protect against . . . clandestine intelligence activities,” § 1861(a)(1), not international terrorism.

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Govt. Resp. at 3 n.3.

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IV. Discussion of Required Findings

The grounds for two of the Court's findings merit discussion: (1) that the requested production meets the applicable standard of relevance and (2) that it is based on an SST that satisfies the applicable statutory definition. *See* § 1861(b)(2)(A)-(B), (k)(4)(A).

A. Relevance

An application under § 1861 must include “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2)”¹⁶

¹⁶ Subsection (a)(2) states that an investigation “shall be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order)” and shall “not be conducted of a United States person solely upon the basis of activities protected by the first amendment.” § 1861(a)(2). The Amended Application represents that these criteria are

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for stated foreign-intelligence purposes, including “to protect against . . . clandestine intelligence activities.” § 1861(b)(2)(B). It is apparent that the FBI’s investigation of b1, b3 is such an investigation and the amici have not suggested otherwise.

The FBI assesses that the requested business records, in combination with other investigative techniques, may help the FBI identify b1, b3

b1, b3 Amend. App. at 21. That assertion rests on the premise that the business records requested will contain information about b1, b3

b1, b3 As discussed below in the context of the SST requirement, there is good reason to believe that the requested production will contain such information. *See infra* pp. 18-21. And, as amici acknowledge, *see* Amicus Br. at 15, records that contain such information are “presumptively relevant” because they “pertain to . . . a foreign power or an agent of a foreign power” or “the activities of a suspected agent of a foreign power who is the subject” of the authorized investigation on which the application is predicated. § 1861(b)(2)(B)(i)-(ii). Accordingly, amici conclude that “the government appears to have met the relatively low bar of relevancy.” Amicus Br. at 16.

Amici nevertheless suggest that the FBI should “explain how the requested b1, b3

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thus potentially creating additional investigative leads for the

FBI.” Govt. Resp. at 3. The FBI can “also serve National Security Letters on U.S.-based

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Amici also suggest that the FBI should “provide more information about how

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Govt. Resp. at 2-3 (footnote omitted).

With the benefit of these explanations, the Court finds that there are reasonable grounds to believe that the tangible things sought are relevant to the FBI's predicated investigation of the

b1, b3

which is an investigation of the type

described in § 1861(a)(2), (b)(2)(B).

B. SST Requirements

An order under § 1861 must describe the business records to be produced "with sufficient particularity to permit them to be fairly identified, including each [SST] to be used as the basis for the production." § 1861(c)(2)(A). An SST is defined as: "(I) a term that specifically identifies a person, account, address, or personal device, or any other specific identifier; and (II) is used to limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking the tangible things." § 1861(k)(4)(A)(i). This definition

does not include an identifier that does not limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking the tangible things, such as an identifier that . . . identifies a broad geographic region, including the United States, a city, a county, a State, a zip code, or an area code, when not used as part of a specific identifier as described in [§ 1861(k)(4)(A)(i)].

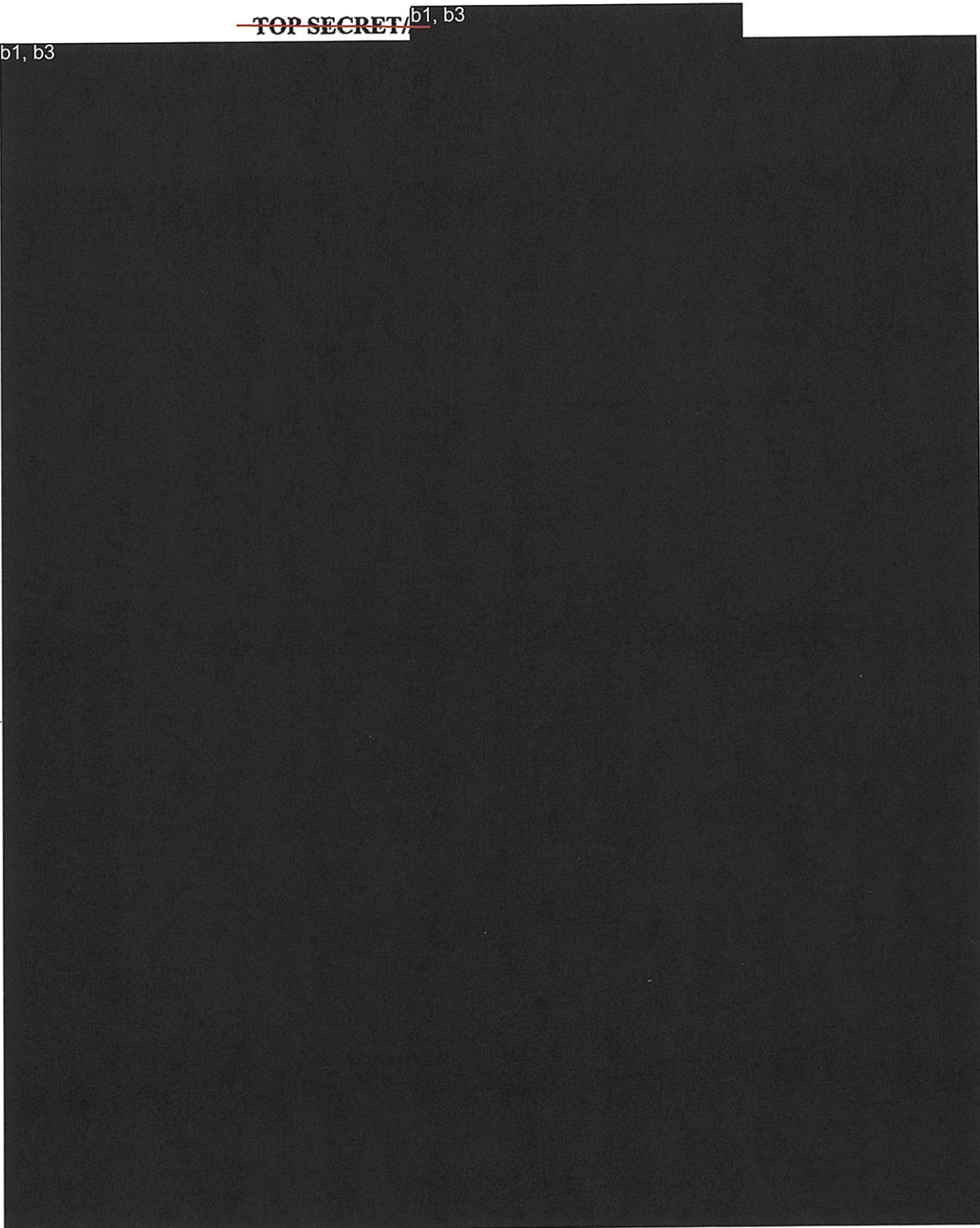
§ 1861(k)(4)(A)(ii)(II). Nothing in this definition "shall be construed to preclude the use of multiple terms or identifiers" to satisfy § 1861(k)(4)(A)(i). § 1861(k)(4)(A)(iii).

The Court will discuss the application of each prong of the SST definition.

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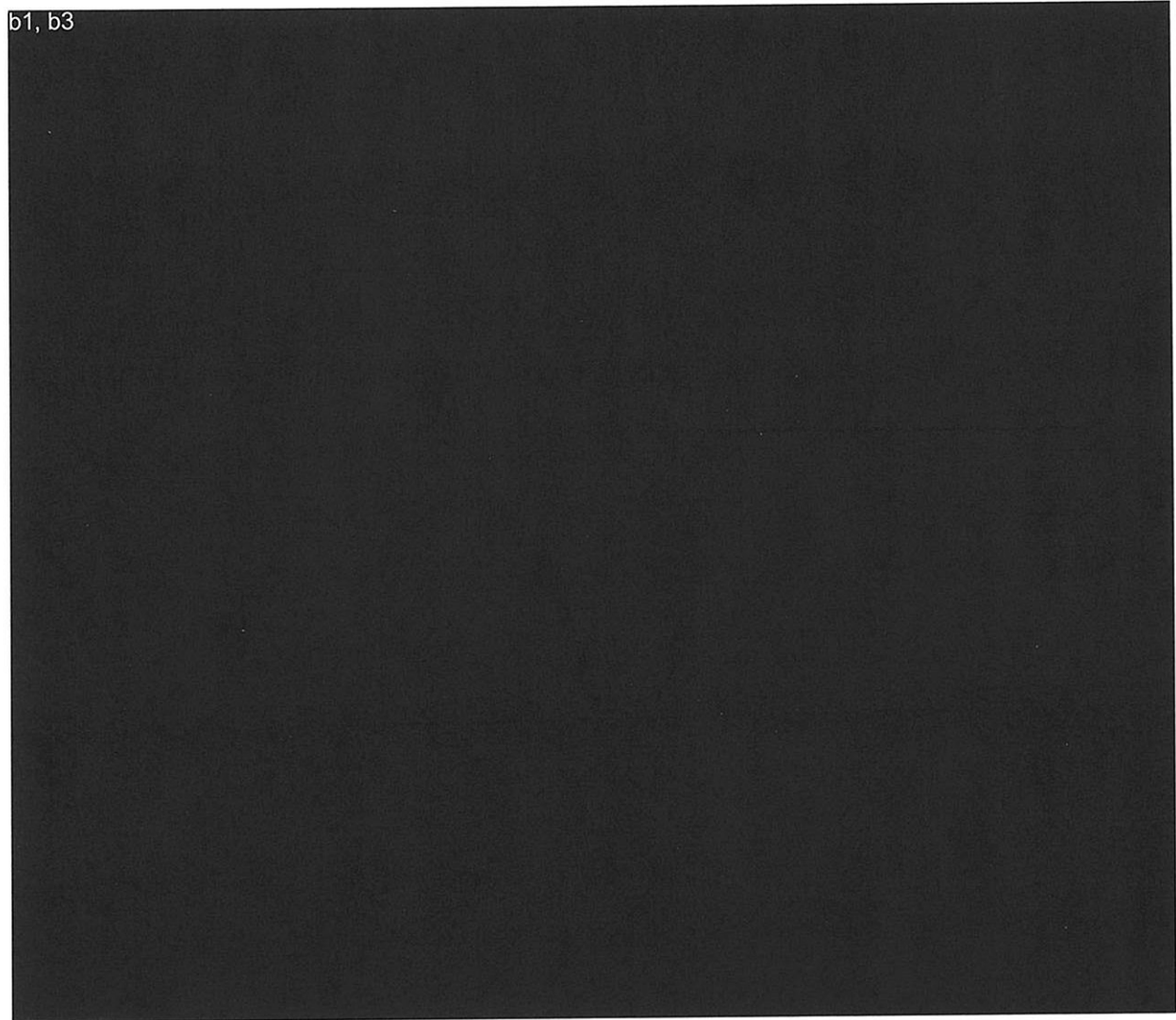
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¹⁸ Amici suggest a similar interpretation that b1, b3

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Amicus Br. at 21 (internal quotation marks and original brackets omitted). In support of that interpretation, amici analogize to how the Foreign Intelligence Surveillance Court of Review (FISCR) interpreted statutory provisions regarding the scope of

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See id. at 19-21 b1, b3

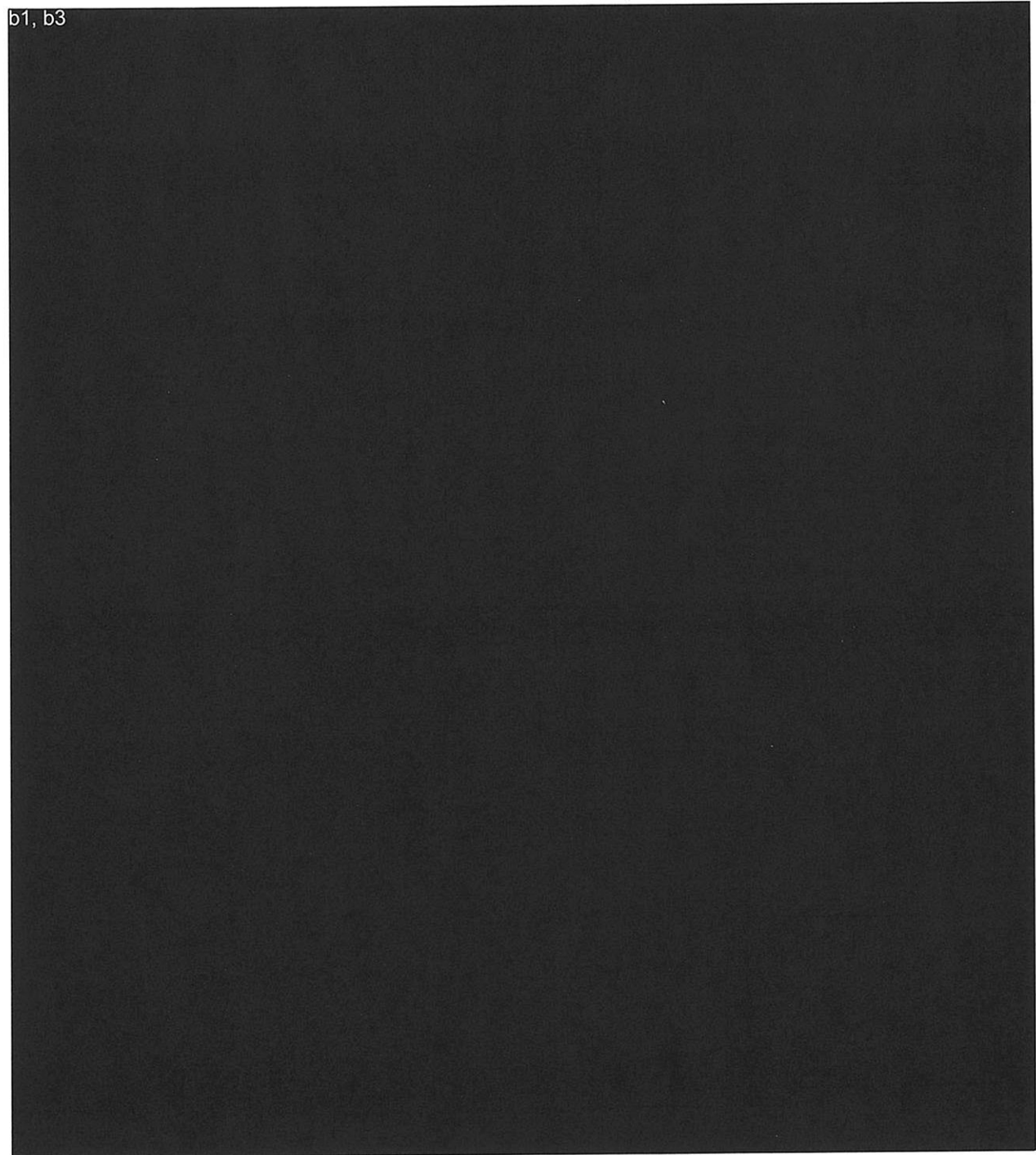
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While this Court's interpretation of the SST definition is consistent with b1, b3 the Court does not place substantial weight on that decision because the statutory language and factual context in this case are different.

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¹⁹ The Amended Application did not provide a citation, but amici located this statistic at
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In sum, amici find these limiting criteria to be “a significant improvement” over the Original Application “that provides much greater protection against the risk of obtaining b1, b3 b1, b3 *Id.* at 25-26. Nonetheless, amici suggest that more information is required regarding the potential production of business records pertaining to b1, b3

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After reviewing

these responses, amici now advise that “the government appears to have met the statutory

¹⁹(...continued)

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Amicus Br. at 24.

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criteria" in view of

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Amicus Reply at 2.

The Court agrees that weigh substantially in favor of finding that the proposed SSTs limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking them. See § 1861(k)(4)(A)(i)(II). In practical terms, it appears very unlikely that

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V. Minimization and Reporting

In addition to the FBI's standard minimization procedures for tangible things obtained under Title V of FISA, the Amended Application proposes that the FBI will destroy any data that it determines to be non-target-related data within 30 days of such determination. Amend. App. at 21-22. No timetable is provided for the FBI to make such determinations. It also proposes that the FBI will report to the Court:

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²⁰ Amici nonetheless identify two issues which, in their assessment, the government still has not fully addressed:

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Id. at 1 (internal quotation marks omitted). The Court has not further pursued those issues because, consistent with amici's position, it finds that the statutory criteria for granting a business records application are satisfied.

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Id. at 21.

The Court finds it necessary to augment these requirements in view of inadequacies in the reports submitted in the b1, b3 Docket. The Court ordered the government to report in that matter, among other things, the extent to which there were anomalous or unexpected results that may be inconsistent with b1, b3. *See supra* p. 4. The First Report in response to that requirement, filed in b1, b3 2020, failed to account for part of the production from b1, b3. *See supra* pp. 4-6. And it was not until the Third Report, submitted in b1, b3 2021, that the government described in that case how the produced business records may be inconsistent with b1, b3. *See supra* p. 7. Accordingly, the Court has revised page

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V. Conclusion

For the foregoing reasons, the Court has found that the Amended Application complies with FISA's requirements that a business records application include (1) a specific selection term to be used as the basis for the production of the business records and (2) a statement of facts

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showing that there are reasonable grounds to believe that the records sought are relevant to an authorized investigation as described in FISA's business records provisions. See 50 U.S.C. § 1861(a)(1)-(2), (b)(2)(B).

ENTERED this b1, b3 [REDACTED] 2022, in Docket No. b1, b3 [REDACTED].



JAMES P. JONES
Judge, United States Foreign
Intelligence Surveillance Court

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

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