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U.S. Department of Justice

National Security Division

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
2012 AUG 28 PM 2:59

LEEANN FLYNN HALL
CLERK OF COURT

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Office of the Assistant Attorney General

Washington, D.C. 20530

August 28, 2012

The Honorable John D. Bates
Presiding Judge
United States Foreign Intelligence Surveillance Court
Washington, D.C. 20001

Dear Judge Bates:

~~(TS//SI//NF)~~ In response to your request, I am pleased to enclose a memorandum by the National Security Agency (NSA), memorializing representations made by the Department of Justice (DOJ) and NSA to the Court on July 24, 2012, regarding a compliance incident related to NSA's implementation of Section 5 (waiver provision) of its minimization procedures governing data acquired pursuant to section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA).

~~(TS//SI//NF)~~ Specifically, the memorandum describes the facts and circumstances under which the incident occurred and confirms NSA's appropriate use and implementation of the waiver provision in other cases in which it was invoked. The memorandum also describes steps being taken by NSA, in coordination with DOJ, to ensure that NSA's interpretation and implementation of its authorities conducted pursuant to FISA are consistent with the statute, Court orders, and Court-approved procedures.

~~(TS//SI)~~ In addition to the steps being taken by NSA, DOJ reviewed its internal processes for reporting this incident. As described to the Court on July 24, 2012, DOJ recognizes that in light of related filings being presented to the Court at the same time this incident was discovered and the significance of the incident, DOJ should have reported this incident under our immediate notification process rather than in our Quarterly Report to the Court.

~~(TS//SI//NF)~~ The reviews conducted by NSA and DOJ into this particular incident have provided a valuable opportunity to identify areas in which the organizations can work together to enhance current processes with greater transparency and coordination. The initiatives described

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Classified by: ~~Lisa O. Monaco, Assistant Attorney General,
National Security Division, Department of Justice~~

Reason: ~~1.4(c)~~

Declassify on: ~~28 August 2037~~

ACLU 16-CV-8936 (RMB) 000754

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in the attached memorandum reflect lessons learned from past compliance issues and are designed to strengthen NSA's compliance processes from a structural, managerial, and training perspective. Specifically, these initiatives are intended to help prevent systemic compliance issues, improve processes to identify and correct issues that may arise as early as possible, and create a framework to review existing practices, policies and training going forward.

(U) Let me thank you and your staff for your attention to these matters, and the opportunity to discuss them with you. We look forward to additional opportunities to brief the Court on our continued progress in this area. Should the Court have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,



Lisa O. Monaco
Assistant Attorney General for
National Security

Enclosure

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NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

28 August 2012

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY,
UNITED STATES DEPARTMENT OF JUSTICE

SUBJECT: ~~(S//NF)~~ Discussion with the Foreign Intelligence Surveillance Court on 24 July 2012 regarding the waiver provisions of NSA's minimization procedures governing data acquired pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended.

~~(S//NF)~~ This memorandum memorializes the discussion between the Department of Justice (DOJ), the National Security Agency (NSA), and the Foreign Intelligence Surveillance Court (Court) on 24 July 2012 describing the facts and circumstances behind NSA's issuance of [redacted] waiver determination pursuant to Section 5 of NSA's minimization procedures relating to Section 702 of the Foreign Intelligence Surveillance Act, as amended,¹ confirming NSA's appropriate use and implementation of that provision in other cases, and detailing additional steps being taken by NSA, in coordination with DOJ, to ensure that NSA's interpretation and implementation of its authorities conducted pursuant to the Foreign Intelligence Surveillance Act (FISA) are consistent with the statute, Court orders, and Court-approved procedures.

~~(S//NF)~~ Background Facts and Circumstances Regarding [redacted] Waiver Determination

~~(TS//SI//NF)~~ Since August 2008, Section 5 of NSA's FISA Amendments Act (FAA) 702 Minimization Procedures has permitted the Director of NSA (DIRNSA) to waive destruction of certain FAA 702 data, the destruction of which is otherwise required by the procedures, if DIRNSA "specifically determines, in writing" that one of the waiver criteria listed in the minimization procedures applies. One such criterion applies when a communication is "reasonably believed to contain significant foreign intelligence information."²

~~(TS//SI//NF)~~ Destruction waivers are most frequently sought when [redacted], [redacted] [redacted] has traveled to the United States, and NSA has acquired the target's communications before realizing the target entered the U.S. Even without a waiver, under these circumstances a separate provision of Section 5 of the minimization procedures provides that "if

¹ ~~(S)~~ See Section 5(1)-(4), Exhibit B, In re DNI/AG [redacted] "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 (hereinafter "NSA's FAA 702 Minimization Procedures" or "minimization procedures").

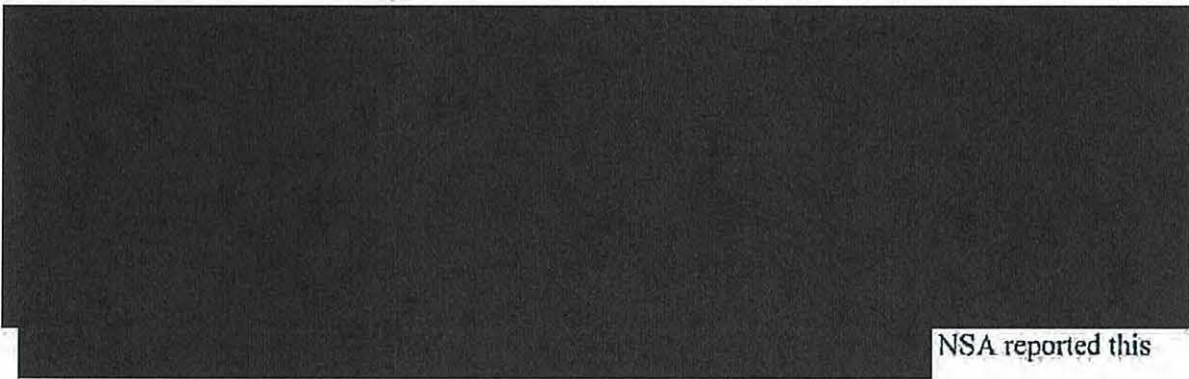
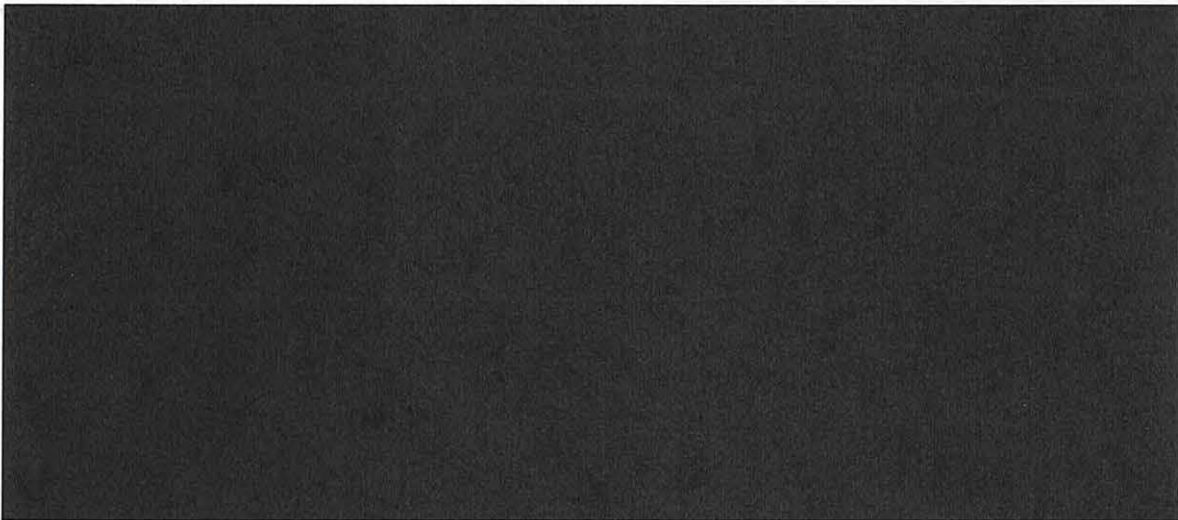
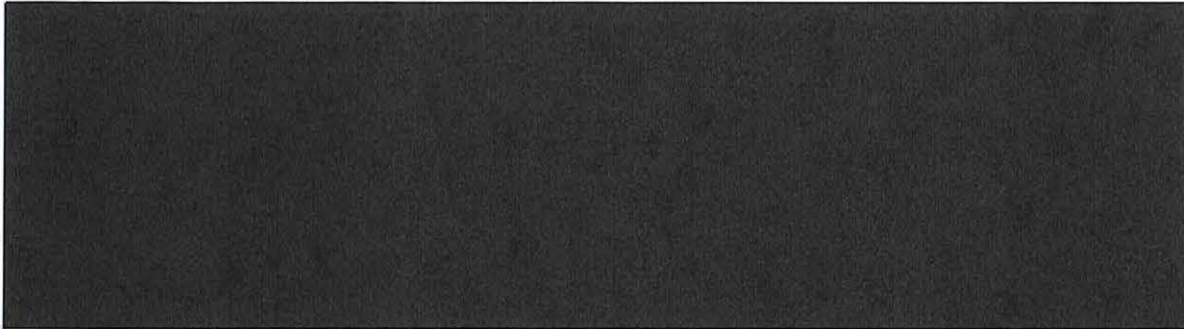
² ~~(S)~~ See Section 5(1), NSA's FAA 702 Minimization Procedures.

Derived From: NSA/CSSM 1-52
Dated: 20070108
Declassify On: 2037 [redacted]

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a domestic communication indicates that a target has entered the United States, NSA may advise FBI of that fact."³



NSA reported this

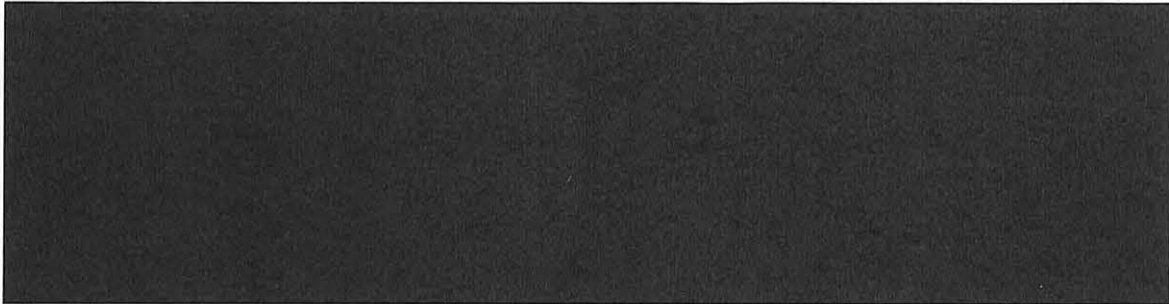
³ (U//FOUO) See Section 5, NSA's FAA 702 Minimization Procedures.

⁴ (U//FOUO) Although the focus of this correspondence is NSA's consultation with DOJ, both the Office of the Director of National Intelligence and the Department of Defense have important oversight roles with respect to NSA's intelligence activities.

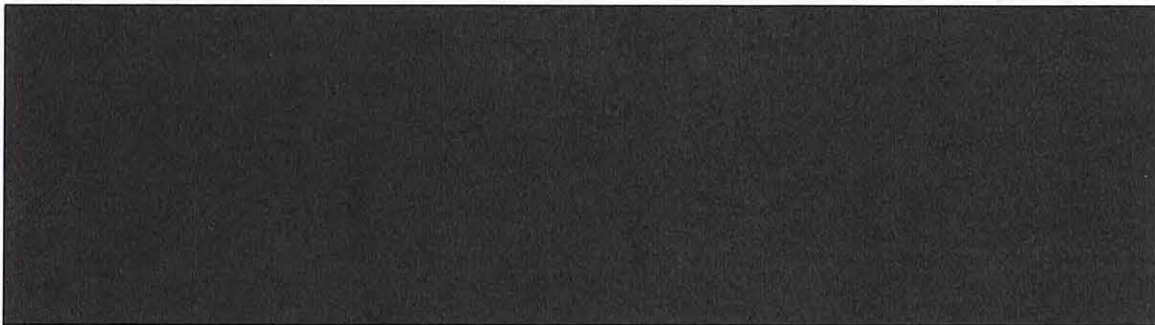
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incident and the results of the investigation to the Court in the December 2011 and March 2012 Quarterly Reports of FAA 702 compliance matters.



~~(S//NF)~~ Additional Waivers Issued Pursuant to Section 5 of NSA's Minimization Procedures



~~(TS//SI//NF)~~ Steps to Ensure that NSA's Interpretation and Implementation of its FISA Authorities are Consistent with the Statute, Court Orders, and Court-Approved Procedures

~~(S//NF)~~ NSA, in coordination with DOJ, has taken a number of steps to improve overall coordination of guidance involving significant interpretations of the FISA and to ensure a common understanding of the implementation requirements arising from such interpretations. Additionally, NSA continues to move forward with several internal initiatives to enhance the compliance infrastructure and strengthen NSA's visibility across its components from a programmatic level.

1. (U) Coordination between NSA and DOJ in advance of significant FISA interpretations

~~(TS//SI//NF)~~ NSA is committed to working with DOJ in advance of any decision that involves a significant interpretation of the FISA, a Court order, or Court-approved procedures. This advance coordination applies across all of NSA's activities executed pursuant to FISA, not

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just those activities conducted pursuant to Section 702. NSA has a number of efforts underway to implement this enhanced coordination. For example, NSA has invited DOJ to participate in pre- and post-order reviews that NSA's Office of General Counsel hosts with NSA's operational, technical, and compliance personnel to ensure that there is a shared understanding of the collection activities conducted pursuant to Title I of the FISA; what is required by the applicable Court order; what is required by NSA's minimization procedures; and other requirements.⁵ DOJ has participated in a number of these reviews already and anticipates participating in additional reviews on an ongoing basis. This builds on the experience NSA and DOJ have gained in participating in joint sessions to discuss and review complex collection activities, such as the bulk business record and pen register applications, and, more recently, drafting and implementing amendments to NSA's Section 702 minimization procedures to allow [REDACTED]

[REDACTED] These joint sessions create a formalized process to discuss new issues that may arise as well as ensure a common understanding of existing collection and implementation activities.

~~(TS//SI//NF)~~ NSA has seen the benefit of advanced coordination in its operational environment. [REDACTED]

~~(S//NF)~~ NSA and DOJ also conduct management coordination teleconferences to monitor pending FISA matters as well as to discuss progress on outstanding legal issues. These efforts help coordinate priorities and projects that advance mission and compliance objectives.

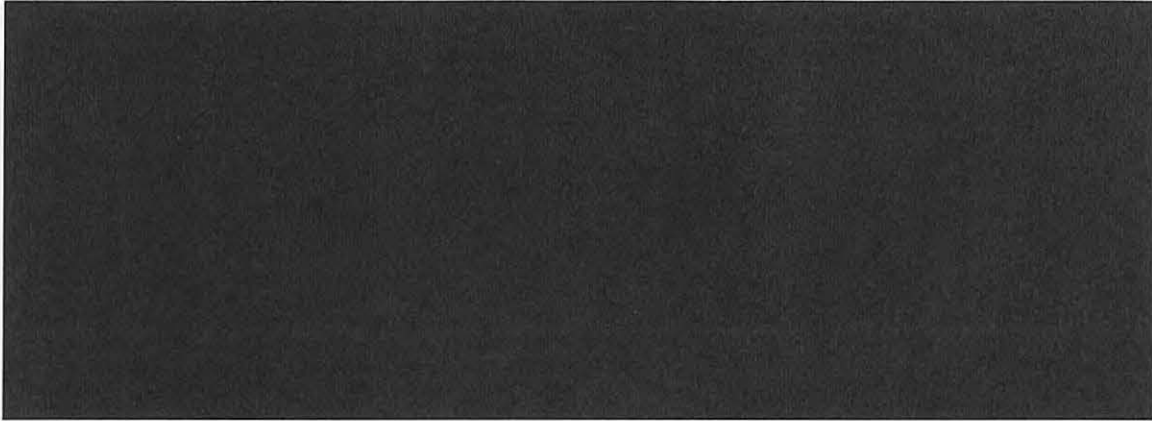
2. *(U) Coordination between NSA and DOJ to ensure a common understanding of implementation requirements*

~~(S//NF)~~ NSA and DOJ continue to work together to develop a process to coordinate official guidance and training materials on an ongoing basis. For example, although DOJ has [REDACTED]

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previously reviewed some of NSA's existing FAA 702 training materials, NSA has been identifying additional internal training and employee guidance related to its implementation of Section 702 of the FISA and sharing it with DOJ. In addition, NSA and DOJ personnel are increasing participation in each others' internal training, including training on general operational matters in addition to FISA-related training.



~~(S//NF)~~ NSA, in coordination with DOJ, is also working to develop processes to more effectively memorialize and track substantive representations to the Court that may not be expressly captured in the Government's written filings or the Court's resulting orders.⁷

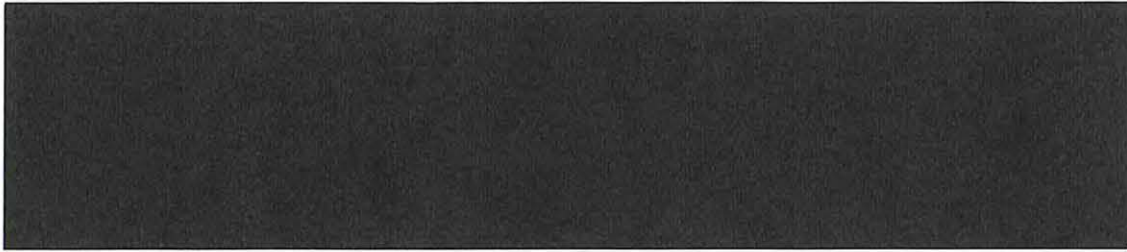


3. (U) Ongoing NSA Initiatives and Programmatic Improvements

~~(S//NF)~~ NSA has taken several steps to improve its management and understanding of the rules and interpretations of the FISA statute, FISC orders, and FISC-approved procedures. [redacted] efforts are intended to provide NSA's attorneys, policy officers, and compliance officers with a common set of searchable documents that will provide the basis to ensure shared understanding and interpretations of the applicable law, Court orders, and Court-approved minimization procedures, develop internal policies, and further build NSA's compliance program. NSA's Office of the Director of Compliance is spearheading an effort to manage, organize, and maintain the authorities, policies, and compliance requirements that govern NSA mission activities. [redacted]



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~~(S//NF)~~ Additionally, NSA has established an Authorities Integration Group, which is accountable to the DIRNSA for managing authority-related changes/additions/deletions across NSA in a holistic manner that integrates mission operations, technology, legal, policy, and compliance elements. The Authorities Integration Group includes individuals designated as Authority Leads to manage the activities within a particular authority, e.g., a Title I FISA Authority Lead, a Section 702 Authority Lead, etc. The Chair of the Authorities Integration Group reports to NSA's Deputy Director.

(U) Conclusion

~~(S//NF)~~ In sum, these efforts are intended to strengthen NSA's overlapping compliance safeguards from a structural, managerial, and training perspective. NSA is a large organization with many diverse components serving specialized and complex functions. The intent of the steps described herein is to ensure representations made to the Court reflect an accurate and shared understanding of how NSA's FISA-related authorities are being interpreted and implemented, both within NSA as well as with DOJ and NSA's other external partners. NSA has always viewed DOJ as a critical partner, and both organizations are working closely together to enhance current processes with greater transparency. Although mistakes can never be entirely avoided in a complex operational environment, the steps described herein will help prevent systemic problems, create mechanisms to expeditiously identify and correct mistakes that may occur, and create a framework to review existing practices and policies. NSA will continue to inform both DOJ and the Court of the status of NSA's efforts to improve its overall compliance posture.


JOHN C. INGLIS
Deputy Director

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