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

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

UNDER SEAL

(S) 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(g)(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]

[redacted]

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

~~Classified by:~~ ~~Chief, Operations Section, OI, NSD, DOJ~~
~~Reason:~~ ~~Multiple Sources~~
~~Declassify on:~~ ~~20400715~~

These certifications reauthorize [redacted] (hereinafter "the 2014 Certifications"), all of which expire on August 28, 2015. Attached as Exhibits A, B, C, D, E, and G to [redacted] are the targeting and minimization procedures to be used under these certifications.[1]

(~~S//OC/NF~~) In addition, [redacted] also include amendments to the certifications being reauthorized, [redacted] as well as to their predecessors.[2] Specifically, these amendments authorize the use of the minimization procedures submitted herewith as Exhibits B, D, and E to [redacted], [redacted] in connection with foreign intelligence information acquired in [redacted]

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[1] (~~S//OC/NF~~) 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 FBI targeting procedures attached as Exhibit C and the NCTC minimization procedures attached as Exhibit G were submitted in connection wit[redacted] on July 28, 2014, and were approved by the Court on August 26, 2014. The remaining targeting and minimization procedures are being submitted with [redacted] or approval by the Court.

[redacted]

accordance with [redacted]

~~(S//OC/NF)~~ With the exception of the FBI targeting procedures attached as Exhibit C and the NCTC minimization procedures attached as Exhibit G, the targeting and minimization procedures being submitted with [redacted] contain a number of changes from the targeting and minimization procedures approved for use under the 2014 Certifications. To aid the Court in its review of the targeting and minimization procedures, below is a discussion of the key changes made to NSA's targeting procedures and NSA's, FBI's, and CIA's minimization procedures. While, as detailed below, a number of changes have been made to these procedures, they generally involve either clarifying existing obligations or incorporating existing practices or policy restrictions. For the reasons described

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[3] ~~(S//OC/NF)~~ The NCTC minimization procedures submitted herewith as Exhibit G are identical to the NCTC minimization procedures that already have been approved for use by this Court in connection with foreign intelligence information acquired in accordance with [redacted] Thus, with respect to those procedures, no amendments are necessary.

below, the government believes that this submission of the above-described reauthorization DNI/AG 702(g) certifications and amended DNI/AG 702(g) certifications does not present any novel or significant interpretations of the law.

~~(S//OC/NF)~~ In addition, included below is a discussion of certain dissemination provisions in the FBI and CIA minimization procedures, as well as a description of two documents submitted herewith: an unclassified summary of the Department of Justice's (DOJ) and the Office of the Director of National Intelligence's (ODNI) oversight of the Intelligence Community's implementation of section 702 and a summary of notable section 702 requirements, which are being submitted to the Court in accordance with recommendations by the Privacy and Civil Liberties Oversight Board (PCLOB).[4]

~~(S)~~ NSA's Targeting Procedures

~~(TS//SI//NF)~~ NSA is required under its current targeting procedures to assess whether the section 702 target possesses, is expected to receive, and/or is likely to

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[4] (U) This filing does not address the provisions of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, enacted on June 2, 2015, that amended 50 U.S.C. § 1805(f), which now states, in part, that "the lawfully authorized targeting of a non-United States person previously believed to be located outside the United States for the acquisition of foreign intelligence information may continue for a period not to exceed 72 hours from the time that the non-United States person is reasonably believed to be located inside the United States." The government has analyzed this provision and submits that collection pursuant to 50 U.S.C. § 1805(f) is distinct from collection pursuant to section 702 of the Act. The government will submit a filing to the Court addressing this issue in greater detail in the near future.

communicate foreign intelligence information. *See, e.g.*, Procedures Used by the National Security Agency 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 Intelligence Surveillance Act of 1978, as Amended, [redacted] submitted July 28, 2014, at 4. In practice, the government has interpreted this requirement to require a totality of the circumstances analysis that is particularized and fact-based, informed by the experience and specialized training of the analyst and the nature of the foreign intelligence information to be obtained.

~~(S)~~ The proposed NSA targeting procedures submitted herewith as Exhibit A to [redacted] contain an expanded provision reflecting the government's existing practice. Specifically, the NSA targeting procedures submitted to the Court state, in part, that NSA must reasonably assess, "based on the totality of the circumstances, that the target is expected to possess, receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory. This assessment must be particularized and fact-based, informed by analytic judgment, the specialized training and experience of the analyst, as well as the nature of the foreign intelligence information expected to be obtained." Ex. A at 4. The government does not view this modified language as creating any new

or additional requirements, but as clarifying the language contained in the current procedures and documenting the government's current practice.

~~(S)~~ The NSA targeting procedures submitted as Exhibit A t[redacted] also now require that NSA analysts provide a written explanation of the basis for their assessment that the target possesses, is expected to receive, and/or is likely to communicate foreign intelligence information concerning that foreign power or foreign territory in every section 702 targeting decision. *See* Ex. A at 8. This modification does not expand the government's targeting authority, but instead merely adds a documentation component to the clarifying language concerning the criteria for determining the foreign intelligence purpose of any targeting as described on page 4 of Exhibit A.

~~(S)~~ The government has made both of the above-described changes in response to the recommendation of the PCLOB that the NSA's section 702 targeting procedures be "revised to (a) specify criteria for determining the expected foreign intelligence value of a particular target, and (b) require a written explanation of the basis for that determination sufficient to demonstrate that the targeting of each selector is likely to return foreign intelligence information relevant to the subject of one of the certifications approved by the FISA court." PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* at 134 (Recommendation

1) (July 2, 2014) (hereinafter "PCLOB Report"). Both of these changes to the NSA targeting procedures have been supplemented by appropriate written guidance and training, and will be the subject of continued oversight by DOJ and ODNI.

~~(S)~~ FBI's Minimization Procedures

~~(S//NF)~~ The proposed FBI minimization procedures submitted herewith as Exhibit D to [redacted] contain several changes from the FBI's current section 702 minimization procedures, as described in more detail below.

A. ~~(S//NF)~~ Database Queries

~~(S//NF)~~ The proposed FBI minimization procedures contain new language to more clearly reflect the FBI's actual practice of querying databases containing raw FISA-acquired information and to more clearly describe which queries are exempt from otherwise applicable minimization requirements because of the type of information received or type of query conducted. Specifically, the FBI minimization procedures submitted to the Court include language in section III.D stating that "[i]t is a routine and encouraged practice for the FBI to query databases containing lawfully acquired information, including FISA-acquired information, in furtherance of the FBI's authorized intelligence and law enforcement activities, such as assessments, investigations and intelligence collection." Ex. D at 11 n.3. Similar clarifying language, including examples of permissible queries of raw FISA-acquired information, was

added to section IV.D of the procedures, which pertains to ad hoc systems. *See id.* at 28 n.8. The government added this language to more clearly reflect the FBI's existing practice for conducting United States person queries, rather than for the purpose of altering the standards governing such queries.

~~(S//NF)~~ The added language also clarifies what actions an agent or analyst without FISA minimization training may take if he or she receives a positive hit indicating the existence of (but not the content or metadata related to) FISA-acquired information in FBI systems. The language includes a new requirement that both a criminal and a national security supervisor approve the non-FISA-trained user's review of query results, and that this review be for the purpose of assisting in the determination of whether the information in the query results constitutes evidence of a crime, is foreign intelligence information, or reasonably appears to be foreign intelligence information. *See* Ex. D at 12 n.4. This requirement also provides that an individual who does not otherwise have access to FISA-acquired information may view the query results solely for the purpose of assisting in the determination of whether information contained within the results meets the standards for retention or dissemination. The added language thus imposes a restriction in addition to the FBI's current minimization procedures with regard to the FBI's use and dissemination of section 702 data in connection with non-foreign intelligence criminal matters.

~~(S//NF)~~ The government has made these changes in response to the recommendation of the PCLOB that the FBI minimization procedures "should be updated to more clearly reflect the actual practice for conducting U.S. person queries, including the frequency with which Section 702 data may be searched when making routine queries as part of FBI assessments and investigations. Further, some additional limits should be placed on the FBI's use and dissemination of Section 702 data in connection with non-foreign intelligence criminal matters." PCLOB Report at 137 (Recommendation 2). Each of these changes to the FBI minimization procedures will be subject to appropriate written guidance and training, and will further be the subject of continued oversight by DOJ and ODNI.

~~(S//NF)~~ The proposed FBI minimization procedures also contain new language, as mentioned above, that more clearly describes which queries are exempt from the otherwise applicable minimization requirements. Specifically, the new language clarifies that the term "query" does not include a search of an FBI electronic and data storage system containing raw FISA-acquired information if: (a) the user does not have access to the raw FISA-acquired information; or (b) the search was limited such that it cannot return raw FISA-acquired information. *See* Ex. D at 11-12. The government also added this definition of a "query" to section IV.D of the FBI minimization procedures regarding ad hoc databases. *See id.* at 29. The revisions made to this provision in the

minimization procedures reflect a clarification of that language and do not alter the meaning of the existing language in the FBI minimization procedures.

B. ~~(S//NF)~~ Modified Provisions Concerning Attorney-Client Communications

~~(S//NF)~~ The proposed FBI minimization procedures also contain three modifications to provisions related to attorney-client communications. The changes in each case are limited to either minor changes involving access to information by technical personnel or impose greater restrictions than those imposed by the current FBI minimization procedures. First, the procedures submitted to the Court include new access restriction exceptions for technical personnel who may have access to attorney-client privileged communications in a backup or original evidence system before the communications are destroyed. *See* Ex. D at 13-14, 16. Section III.E of the proposed FBI minimization procedures states that electronic versions of privileged communications that are [redacted]

~~(S//NF)~~ Second, the provisions of the proposed FBI minimization procedures concerning attorney-client communications have been changed to require the FBI Office of General Counsel (OGC) or FBI Division Counsel to approve disseminations of

attorney-client privileged communications. *See id.* at 17. In making a determination whether to approve dissemination of attorney-client privileged communications, the minimization procedures require that FBI OGC or FBI Division Counsel, working with FBI personnel, "make reasonable efforts to: (1) use other non-privileged sources, including communications previously reviewed by FBI personnel, for any information in the privileged communication, if available; and (2) tailor the dissemination to minimize or eliminate the disclosure of attorney-client privileged communication." *Id.* at 17-18. Even if proper approvals are obtained, new language also limits disseminations of attorney-client privileged communications outside the United States Intelligence Community [redacted]

~~(S//NF)~~ Third, the proposed FBI minimization procedures contain additional information that must be included on disseminations of attorney-client communications to ensure that any dissemination is properly handled. Specifically, new language requires that all disseminations of privileged communications include language advising that "(1) the report contains information that is subject to the attorney-client privilege, (2) the information is provided solely for intelligence or lead purposes, and (3) the information may not be disseminated further or used in any trial, hearing, or other proceedings without express approval by the FBI." *Id.* The government submits that

the addition of these explicit advisories will provide further protections for attorney-client privileged communications and help limit use of any such disseminations.

C. (S//NF) Retention of FISA-acquired Information in Original Evidence and Backup Systems

(S//NF) Changes to the proposed FBI minimization procedures also provide for the FBI's retention of section 702-acquired data in two additional types of systems: emergency backup systems and systems containing original evidence copies. As the Department of Justice's National Security Division (NSD) explained in a letter filed with the Court on January 6, 2014 ("January 2014 Letter"), the retention provisions of the FBI minimization procedures do not expressly contemplate the maintenance of emergency backup copies of lawfully acquired FISA data. The January 2014 Letter described [redacted] FBI systems, [redacted] that maintain copies on servers for the "non-analytical" purposes of preserving original evidence and emergency backup copies. *See* January 2014 Letter at 1.

(S//NF) Raw section 702-acquired data generally resides [redacted]

[redacted]

[redacted]

~~(S//NF)~~ As reported to the Court in multiple Section 702 Quarterly Reports, the

[redacted]

[redacted]

[redacted]

~~(S//NF)~~ Section III.G.3 of the proposed FBI section 702 minimization procedures codifies the data retention practices that have been previously reported to the Court in the January 2014 filing and numerous quarterly reports, and sets out requirements for restrictions on access to the retained data. More specifically, section III.G.3 expressly permits the FBI to retain on its systems backup and original evidence copies "provided that only system administrators or other technical personnel have access" to this material. Ex. D at 24. The data contained within an emergency backup or original evidence system may not be accessed for the purpose of performing intelligence analysis, and "[n]o intelligence analysis may be performed in such systems." *Id.* Section III.G.3 permits FBI to use information from an emergency backup or original evidence system "to restore lost, destroyed, or inaccessible data, or to provide an original evidence copy"; however, in such cases, any other applicable provisions of the FBI's revised section 702 minimization procedures submitted herewith as Exhibit D — including retention time limits—will apply to the transferred data [redacted]

~~(S//NF)~~ Although the data in systems used as emergency backups or to preserve original evidence copies is inaccessible to agents and analysts and is not used for either intelligence analysis or to discover evidence of a crime, the FBI's ability to maintain emergency backup and original evidence copies of FISA-acquired information serves various operational and litigation needs. Foremost, in the event that data is lost, it is critical that the FBI be able to repopulate that information accurately and efficiently using emergency backup copies. [redacted] As a result, there is little risk that the information stored in these systems would be used improperly for analytical purposes, which section III.G.3 expressly prohibits. [redacted]

~~(S//NF)~~ With regard to emergency backup systems, the proposed FBI minimization procedures are consistent with the FBI's historical use of temporary, emergency backup systems. Moreover, NSA and CIA both use backup systems that have been described to the Court, *see, e.g.*, Ex. E at 4, including in regular updates to the Court concerning each agencies' practice with respect to compliance-related purges from such systems.[8]

~~(S//NF)~~ With regard to the FBI's separate retention of original evidence copies, the FBI's need as a law enforcement agency to retain unadulterated and original evidence copies is well-established. This need derives from the government's extensive maintenance and production responsibilities in criminal cases, the execution of which can often involve difficult legal and factual questions that cannot be resolved in the abstract in advance of a particular prosecution. The FBI's retention of all section 702-acquired communications in systems with strictly limited access for the purpose of ensuring compliance, in the event of a prosecution, with its obligations to properly preserve evidence and ensure that defendants will have access to any evidence to which

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[8] ~~(S//NF)~~ *See, e.g.*, June 2015 Quarterly Report Regarding Section 702 Matters at 3-5 (describing NSA's, CIA's, and FBI's use of backup systems).

they are constitutionally or statutorily entitled is consistent with long-established law.[9] *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) (obligating the government to provide the defense with any evidence favorable to the accused and material to guilt or punishment); and *Giglio v. United States*, 405 U.S. 150 (1972) (extending *Brady* principles to evidence affecting the credibility of government witnesses). *See also* 18 U.S.C. § 3500 (Jencks Act) (requiring the government to produce statements of government witnesses to the defense after a witness has testified at trial).

D. ~~(S//NF)~~ Retention of FISA-Acquired Information for Cryptanalytic-Related Reasons

~~(S//NF)~~ The proposed FBI minimization procedures also modify section III.G's destruction requirements to address the government's need to retain certain section 702-acquired information that reasonably appears to be encrypted or to contain secret meaning. *See* Ex. D at 25. This provision gives the FBI the flexibility to maintain the encrypted raw FISA-acquired information for as long as needed for cryptanalysis or otherwise deciphering secret meaning, while also protecting any such information that may implicate United States persons. Pursuant to this provision, the applicable

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[9] ~~(S//OC/NF)~~ The NSA and CIA practices for satisfying these constitutional and statutory obligations in criminal matters are different than the FBI's in part because those agencies are not law enforcement agencies. The procedures for satisfying the NSA and CIA's preservation obligations involving data that otherwise should be aged-off or destroyed are discussed in more detail below.

retention time periods in the minimization procedures would be tolled while the cryptanalysis and other activities undertaken to decipher the secret meaning are conducted. During this period, access to the information is restricted to those engaged in the cryptanalysis and deciphering efforts, and the information retained under this provision—to the extent it may implicate United States persons—may only be used for these specific purposes unless its retention is permitted under a different provision of these procedures. [redacted]

[redacted] submitted July 28, 2014, at 11, § 6(a)(1) (hereinafter "2014 NSA Minimization Procedures"); Standard Minimization Procedures for Electronic Surveillance Conducted by the National Security Agency § 5(b)(2).

E. (~~S//NF~~) Reporting Requirement for Disseminations to Private Entities or Individuals

(~~S//NF~~) Section V.I of the proposed FBI minimization procedures submitted herewith permits the FBI to disseminate to private entities and individuals FISA-acquired information in limited circumstances where the FBI determines that the private entity or individual "is capable of providing assistance in mitigating or preventing serious economic harm or serious physical harm to life or property." Ex. D at 37. This provision is included in the FBI's currently applicable section 702 minimization procedures, which were reviewed and approved by the Court last year. The proposed FBI minimization procedures include one new addition to this provision: a requirement that, once the FBI reports a dissemination pursuant to this section to NSD, that NSD subsequently report such a dissemination to this Court. *See* Ex. D at 37. This new provision gives the Court more insight into the FBI's application of its procedures, and otherwise does not change the substance of this section of the FBI minimization procedures.

~~(S)~~ NSA and CIA's Minimization Procedures

A. ~~(S//NF)~~ United States Person Queries

~~(S//NF)~~ The proposed NSA and CIA section 702 minimization procedures, submitted herewith as Exhibits B and E, respectively, contain a new query provision reflecting the government's current practice. Specifically, these proposed procedures require content queries using United States person identifiers to be accompanied by a written statement of facts showing that the use of any such identity as a query term is reasonably likely to return foreign intelligence information, as defined in FISA.[10] *See* Ex. B at 7, Ex. E at 3.

~~(S//NF)~~ The government has made these changes in response to the recommendation of the PCLOB that "[t]he NSA and CIA minimization procedures should permit the agencies to query collected Section 702 data for foreign intelligence purposes using U.S. person identifiers only if it is based upon a statement of facts showing that the query is reasonably likely to return foreign intelligence information as defined in FISA." PCLOB Report at 139 (Recommendation 3). These changes to the

[redacted]

NSA and CIA minimization procedures have been the subject of written guidance and training, and will be the subject of continued DOJ and ODNI oversight.

B. ~~(S//NF)~~ Retention of Information to Satisfy Government Preservation Obligations

~~(S//NF)~~ Pursuant to their current section 702 minimization procedures, NSA and CIA are allowed to retain specific section 702-acquired information otherwise subject to age-off if DOJ has advised either agency in writing that such information is subject to a preservation obligation in pending or anticipated administrative, civil, or criminal litigation. *See, e.g.*, 2014 NSA Minimization Procedures at 8, § 3(c)(4). For information both subject to a destruction requirement other than age-off and subject to a litigation preservation obligation, the currently applicable NSA and CIA minimization procedures require the government to notify the Court and seek permission to retain the identified information. *See id.* In its 2014 Memorandum Opinion, this Court suggested that these provisions in the NSA and CIA minimization procedures should be modified to account for circumstances where section 702-acquired information is subject to a destruction requirement other than age-off and may need to be preserved to satisfy the government's preservation obligations without requiring the government to seek approval from this Court. *See In re DNI/AG Certifications* [redacted] Mem. Op. at pp.23-24, 42 (FISA Ct. Aug. 26, 2014) (hereinafter "2014 Memorandum Opinion").

~~(S//NF)~~ To address the issues raised in the Court's opinion, the government has modified the language in the proposed NSA and CIA minimization procedures to permit the retention of section 702-acquired information otherwise subject to age-off or certain other destruction requirements in the NSA and CIA minimization procedures if DOJ advises the relevant agency in writing that such information is subject to a preservation obligation in pending or anticipated administrative, civil, or criminal litigation. *See* Ex. B at 8-9, Ex. E at 10-11. Although the proposed procedures allow the agencies to retain information subject to a broader range of destruction requirements to satisfy the government's preservation obligations, the procedures do not allow the government to retain, without the Court's permission, information that may be subject to destruction requirements that are not specified in the procedures. When information is subject to a destruction requirement other than those specified in the procedures, these modifications specify when and how DOJ will notify or request permission of this Court to continue to retain section 702-acquired information to satisfy the government's preservation obligations.[11]

[redacted]

~~(S//NF)~~ In its 2014 Memorandum Opinion, this Court also ordered the government to submit an annual report identifying matters in which the agencies were retaining information otherwise subject to the age-off requirement in order to comply with the government's preservation obligations, as permitted under the NSA, FBI, and CIA minimization procedures. *See id.* at 42. Under the modified provisions concerning preservation obligations and litigation holds, NSA and CIA are obligated to annually provide NSD a summary of all litigation matters requiring preservation of section 702-acquired information, a description of the section 702-acquired information being retained, and, if possible based on the information available to the agencies, the status of each such litigation matter. *See* Ex. B at 8-9; Ex. E at 10-11. If NSA or CIA is preserving section 702-acquired information that is subject to a destruction requirement other than age-off but specified in certain other sections of the NSA and CIA minimization procedures, NSD will promptly notify the Court. *See id.* In addition, if DOJ advises either CIA or NSA to retain specific section 702-acquired information that is subject to a destruction requirement other than those currently enumerated in the modified minimization procedures because the information is subject to a pending or anticipated litigation preservation obligation, NSD will promptly notify and

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[redacted] 2014 Mem. Op. at 25.

subsequently request authorization from the Court. *See* Ex. B at 9; Ex. E at 11. Each agency shall restrict access to such information until either the Court denies the request for authorization or DOJ provides notification that preservation is no longer necessary for such litigation matters. *See id.* To the extent that access to such information is restricted, access will be limited to those agency personnel who access such information only for the purpose of ensuring continued compliance with the government's preservation obligations, to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of such information. *See id.*

~~(S//NF)~~ In addition to the notice provisions described above, for all of the litigation-retention provisions in the proposed NSA and CIA section 702 minimization procedures, NSD will submit a report to the Court on or before December 31 of each calendar year detailing the information being retained pursuant to these provisions. *Cf.* 2014 Mem. Op. at 42.

~~(S//NF)~~ The government submits that each of these modifications concerning litigation matters are consistent with provisions previously approved by the Court, as well as the Court's 2014 Memorandum Opinion.[12]

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[12] ~~(S//NF)~~ *See* 2014 Mem. Op. at 22-25.

C. ~~(S//NF)~~ Requirements Related to Attorney-Client Privileged Communications

~~(S//NF)~~ Finally, the government added language to the proposed NSA and CIA minimization procedures modifying the provisions governing NSA's and CIA's retention, dissemination, and use of attorney-client communications acquired pursuant to section 702. The modified language requires, *inter alia*, the destruction of attorney-client communications that are affirmatively determined not to contain foreign intelligence information or evidence of a crime. *See* Ex. B at 10; Ex. E at 5. [redacted] *See* Ex. B at 10-11; Ex. E at 5-6. Communications containing privileged information will be segregated where the information pertains to a criminal charge in the United States; [redacted] *See* Ex. B at 11-12; Ex. E at 7. [redacted]

[redacted] *See* Ex. B at 11; Ex. E at 6. These provisions are similar to provisions previously approved by the Court in the FBI section 702 minimization procedures, and the government submits that the addition of these provisions will provide further protections for attorney-client privileged communications and help limit use of any such disseminations.

(S) Discussion of Certain Disseminations Pursuant to the FBI's and CIA's Section 702 Minimization Procedures

(S//NF) The Court has requested further information concerning dissemination provisions in the FBI's and CIA's section 702 minimization procedures. Specifically, the Court has requested additional information on the FBI's use of section V.I. of its current and proposed section 702 minimization procedures, which permits disseminations to certain private entities and individuals, as well as a discussion regarding a provision of

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[13] (S//NF) Subparagraph 4(f) of the proposed NSA minimization procedures, and subparagraph 7.a.(6) of the proposed CIA minimization procedures, provide that "[p]rivileged information [redacted] shall not be disseminated without the approval of the Office of General Counsel." Ex. B at 11; Ex. E at 6. Similarly, subparagraph 4(h) of the proposed NSA minimization procedures, and subparagraph 7.a.(8) of the proposed CIA minimization procedures, provide that [redacted] *Id.* For each of these provisions in the proposed NSA and CIA minimization procedures, the approvals by [redacted] will be made in accordance with policies that are being developed by NSA and CIA in coordination with NSD.

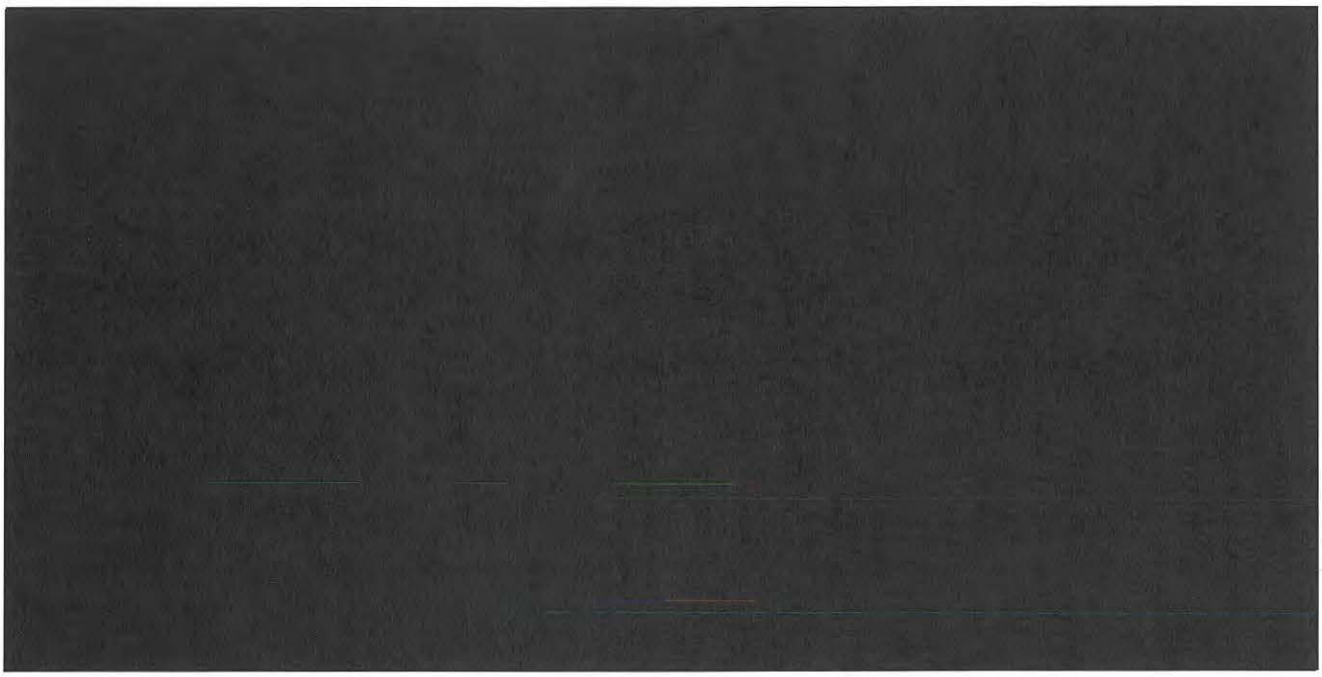
CIA's current and proposed section 702 minimization procedures permitting disseminations to "otherwise authorized recipients outside of CIA." Ex. E at 4.

(U) FBI's Procedures

~~(S//NF)~~ Section V.I of the proposed FBI minimization procedures, submitted herewith as Exhibit D, permits the FBI to disseminate to private entities and individuals FISA-acquired information in limited circumstances where the FBI determines that the private entity or individual "is capable of providing assistance in mitigating serious economic harm or serious physical harm to life or property." Ex. D at 37. Except as noted below, this provision is unchanged from the currently applicable version of the FBI minimization procedures reviewed and approved by the Court. Under this provision, the FBI is permitted to disseminate only information that the FBI believes reasonably appears to be foreign intelligence information, is necessary to understand foreign intelligence information or assess its importance, or is evidence of a crime. To protect United States person information, the provision further requires that whenever reasonably practicable the dissemination not include personally identifying information about United States persons unless the FBI "reasonably believes it is necessary to enable the recipient" to help mitigate or prevent harm. *Id.* at 37.

~~(S//NF)~~ This provision expands on section V.H of the minimization procedures, which permits the dissemination of certain FISA-acquired information to private

entities where that information may assist in mitigating or preventing computer intrusions and cyber-attacks. *Id.* at 36. Section V.I of the FBI section 702 minimization procedures, which addresses serious economic harm or serious physical harm to life or property, was added to permit the FBI to disseminate information to private entities in



~~(S//NF)~~ The government submits that section V.I of the minimization procedures is consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information and comports with the definitions of minimization procedures set forth in 50 U.S.C. §§ 1801(h) and 1821(4). This Court previously has found that minimization procedures allowing for the dissemination of information to

non-governmental entities is allowed under FISA.[14] The statutory definitions of "minimization procedures" do not limit the types of recipients who may receive disseminated foreign intelligence information; the definitions only require that minimization procedures should be "reasonably designed" to prohibit the dissemination of United States person information, consistent with the need to "disseminate foreign intelligence information." 50 U.S.C. §§ 1801(h)(1) and 1821(4)(A). The statute in turn defines "foreign intelligence information," in part, by reference to potential threats by foreign powers and those working on their behalf such as, for example, "grave hostile acts" or "international terrorism," and does not limit the definition to any category of entities or individuals who may be able to make use of the information. *See id.* § 1801(e). The government submits that, as the Court found in its 2014 Memorandum Opinion, these statutory definitions support the conclusion that foreign intelligence information may be disseminated to private entities that are positioned to mitigate or prevent serious harms, and that United States person

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[14] (~~TS//SI//NF~~) As the Court acknowledged in its 2014 Memorandum Opinion, disseminations of evidence of crime to private entities for the purpose of mitigating or preventing serious harm would further a law enforcement purpose, and thus would be consistent with 50 U.S.C. § 1801(h)(3). *See* 2014 Memorandum Opinion, at 20 n.20; 50 U.S.C. § 1801(h)(3) (defining minimization procedures as those that "allow for the retention and dissemination of information that is evidence of a crime…that is to be retained or disseminated for law enforcement purposes").

information may be included in those disseminations when necessary to mitigate or prevent those harms. Moreover, the legislative history of FISA supports the information sharing in the types of circumstances that this provision permits, noting that where "[f]ederal agents ... learn of a terrorist plot to kidnap a business executive....[c]ertainly...they should be permitted to disclose such information to the executive and his company to provide for the executive's security." *See* 2014 Mem. Op. at 20 n.21 (quoting H.R. Rep. 95-1283, pt. 1, at 88 (1978)).

~~(S//NF)~~ Finally, this provision contains a mechanism for meaningful oversight of any resulting disseminations to private entities. Specifically, this provision requires the FBI to report to NSD all disseminations made pursuant to this provision within ten business days of making those disseminations.[15] Moreover, as described above, a new addition to section V.I in the proposed FBI minimization procedures now also requires that NSD subsequently report these disseminations to the Court. *See* Ex. D at 37.

(U) CIA's Procedures

~~(S//NF)~~ Paragraph 5 of the proposed CIA minimization procedures, submitted herewith as Exhibit E, concerns disseminations of information concerning United States persons. Specifically, paragraph 5 states, in part, that "[a]ny information retained

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[15] ~~(S)~~ To date, the FBI has not reported any such disseminations to NSD.

pursuant to paragraph 3 above may be disseminated to otherwise authorized recipients outside of CIA if the identity of the United States person and all personally identifiable information regarding the United States person are deleted or otherwise sanitized to prevent the search, retrieval or review of the identifying information."[16] Ex. E at 4. This provision is unchanged from prior versions of the CIA minimization procedures reviewed and approved by the Court.[17] The Court, however, has requested further clarification regarding the meaning and scope of "otherwise authorized recipients outside of CIA."

~~(S//NF)~~ Beginning with the minimization procedures that were approved by the Court in 2008, CIA's section 702 minimization procedures have included a provision regarding disseminations to "otherwise authorized recipients" similar to paragraph 5 of the proposed minimization procedures attached as Exhibit E. *See, e.g.*, Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of

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[16] (~~S//NF~~) Dissemination "outside of CIA" does not include a disclosure by CIA to a recipient who is a CIA employee, contractor, agent, or asset.

[17] (~~S//NF~~) The government notes that NSA's current and proposed minimization procedures also allow for disseminations similar to those permissible under the CIA's procedures and described below. *See, e.g.*, Ex. B at 14 ("Otherwise, dissemination of intelligence based on communications of or concerning a United States person may only be made to a recipient requiring the identity of such person for the performance of official duties but only if at least one of the following criteria is also met.") and 16 ("Foreign communications of or concerning a non-United States person may be retained, used, and disseminated in any form in accordance with other applicable law, regulation, and policy.").

Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended, [redacted], submitted August 5, 2008, at 1 ("Information about a United States person may be retained within CIA and disseminated to authorized recipients outside of CIA if the identity of the United States person and all personally identifiable information are deleted."). This same reference to "authorized recipients" was approved by this Court as early as 2002 for Title I and Title III collection, when the Court approved CIA Minimization Procedures for Information from FISA Electronic Surveillance and Physical Search Conducted by the FBI and provided to CIA in accordance with docket number [redacted] and is also included in the Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information in Accordance with [redacted] f the Foreign Intelligence Surveillance Act, as Amended (paragraph 3).

~~(S//NF)~~ The phrase "otherwise authorized recipients" encompasses those recipients, whether another government agency, a cooperating foreign intelligence service, or a private person, who have a need to receive information from CIA consistent with CIA's foreign intelligence mission as set forth in the National Security

Act of 1947 and Executive Order 12333 and its implementing procedures.[18] The language in paragraph 5 of the proposed CIA minimization procedures, which is the same or similar to all prior versions of CIA's section 702 minimization procedures, is adapted from the Attorney General procedures implementing Executive Order 12333 governing CIA's dissemination of information acquired from non-FISA electronic surveillance.[19] Those Attorney General-approved Executive Order 12333 procedures have been in effect in their current form since 1987. Under CIA's customary practice for disseminations pursuant to Executive Order 12333 and its implementing procedures, CIA will generally sanitize United States person identities by using a generic substitution. However, where the United States person identity is believed to be necessary to understand, assess, or act on the foreign intelligence information (for example, that an identified United States person may be an agent of a foreign power), the identity may be disseminated. For example, if the CIA should learn that a particular United States person employee of a United States company overseas is the target of a terrorist group, the CIA, with appropriate approvals, will inform responsible officers of

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[18] (U) *See* National Security Act of 1947, § 104A, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458.

[19] ~~(S//NF)~~ Although the scope of recipients is the same, the categories of information that may be retained and disseminated under CIA's FISA minimization procedures have been narrowed from those provided in CIA's Attorney General-approved Executive Order 12333 procedures.

that company so they can take preventative action. Or, the CIA may learn that a particular United States person is part of a weapons-related procurement network. CIA may provide the identifying United States person information to an international organization or company that is unknowingly supporting such a weapons-related procurement network.

~~(S)~~ Such disseminations of foreign intelligence information are consistent with both the scope of the FISA statute (which, as described above, does not require minimization procedures to limit or identify potential recipients of FISA information) and the legislative history. The FISA statute originally contemplated that the minimization procedures must be "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information."[20] Congress specifically intended that "[t]here is no specific restriction in the bill regarding to whom Federal officers may disclose information concerning U.S. persons acquired pursuant to this title although specific minimization procedures might require specific restrictions in particular cases."[21] CIA's dissemination practices strike that proper balance. CIA's disseminations of United States person information acquired pursuant to section 702 are

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[20] (U) H.R. Rep. 95-1283, pt. 1, at 58 (1978).

[21] (U) *Id.* at 88.

reviewed every 60 days by DOJ and ODNI to ensure that CIA is meeting the dissemination standard found in its minimization procedures, and any improper disseminations would be reported to the Court. As just one example, in the last year covered by the 2014 Certifications, there have been no such incidents.

(U) **Unclassified Oversight Summary**

(U) In its report regarding the government's implementation of section 702 of FISA, the PCLOB recommended that the government provide the Court with a sample of tasking sheets and query terms to assist in the Court's consideration of these certifications. The government adopted this recommendation and in January 2015, NSD provided the Court, through its legal advisors, sample tasking sheets and query terms along with an extensive briefing regarding the tasking sheets and query terms and the oversight conducted by the government. For the Court's consideration, the government further proposed various methodologies under which additional tasking sheets and query terms could be made available to the Court. The Court subsequently requested, and NSD provided, a May 2015 presentation for all of the judges of this Court regarding the oversight of the section 702 program, including a review of sample tasking sheets. NSD has also prepared a written summary of the oversight program, attached here at Tab 1. Consistent with the PCLOB's recommendation, the government stands ready to make available additional tasking sheets, query terms, or other relevant information

should the Court determine it would assist it during its consideration of these certifications.

(U) **Summary of Notable Section 702 Requirements**

(U) The PCLOB recommended that the government submit to the Court, "[a]s part of the periodic certification process," a document containing "the rules for operation of the Section 702 program that have not already been included in certification orders by the FISA court, and that at present are contained in separate orders and opinions, affidavits, compliance and other letters, hearing transcripts, and mandatory reports filed by the government." PCLOB Report at 142 (Recommendation 5). In accordance with that recommendation, the government submits a summary containing references to Court opinions, agency targeting and minimization procedures, hearing transcripts, or other relevant documents regarding the operation of certain aspects of the section 702 program. *See* Tab 2. The document does not, nor is it intended to, create any new rules or obligations regarding the operation of the section 702 program. This summary document is not inclusive of all currently applicable rules and requirements for the operation of the section 702 program, but is intended as a reference guide to prominent concepts governing the program.

(U) **Conclusion**

~~(S//OC/NF)~~ [redacted] contain all of the elements required by the Act, and the targeting and minimization 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 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(i)(3)(A) of the Act approving: [redacted] the use of the targeting and minimization procedures attached thereto as Exhibits A, B, C, D, E, and G in connection with acquisitions of foreign intelligence information in accordance with those certifications; and the use of the minimization procedures attached as Exhibits B, D, and E to [redacted] in connection with foreign intelligence information acquired in accordance with [redacted]

[redacted]

Respectfully submitted,

John P. Carlin
Assistant Attorney General

Stuart J. Evans
Deputy Assistant Attorney General

By: _____
(b)(6); (b)(7)(C) [redacted]

Office of Intelligence
National Security Division
U.S. Department of Justice

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

~~Derived From:~~ ~~Submission to the USFISC in Docket Number captioned above~~

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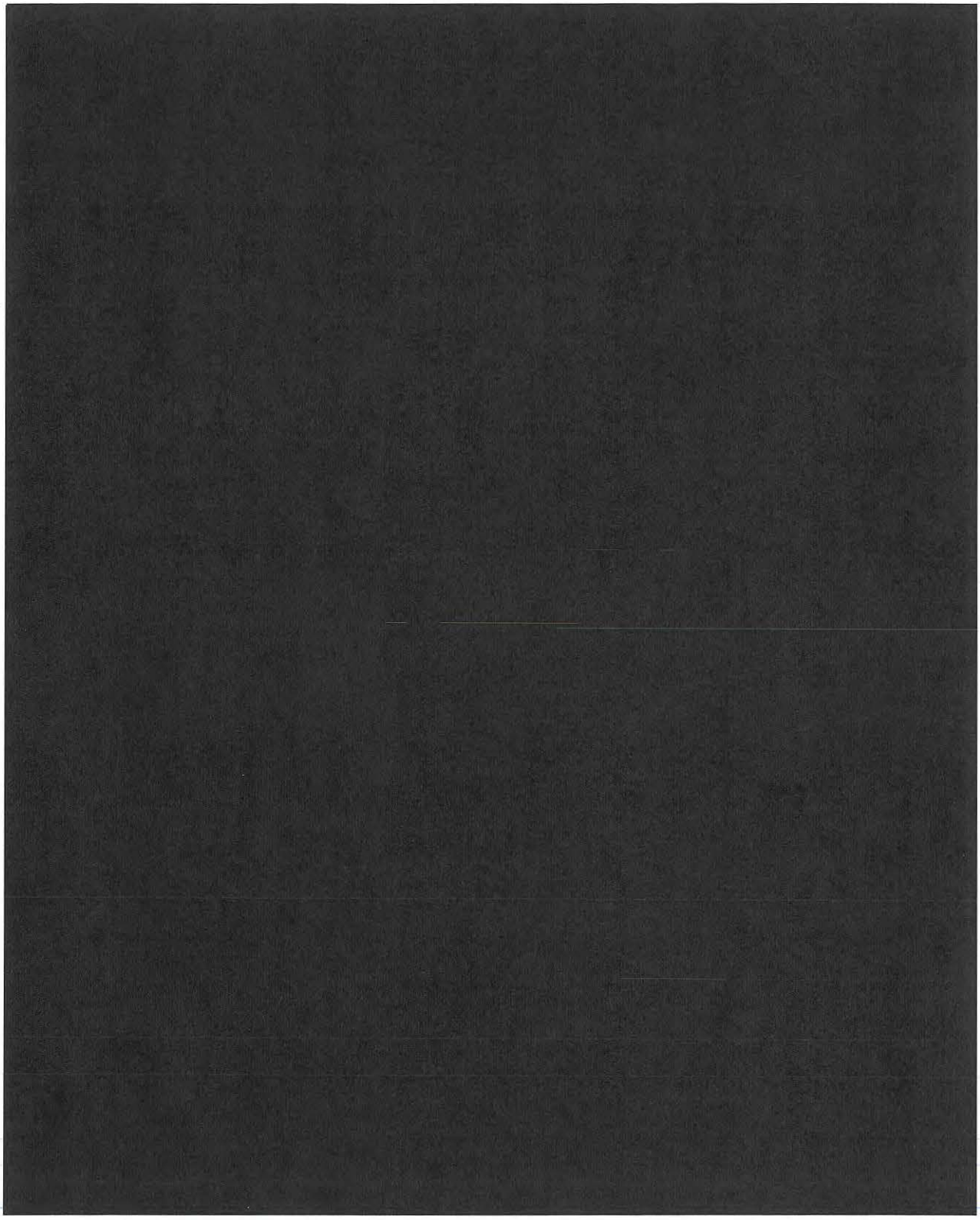

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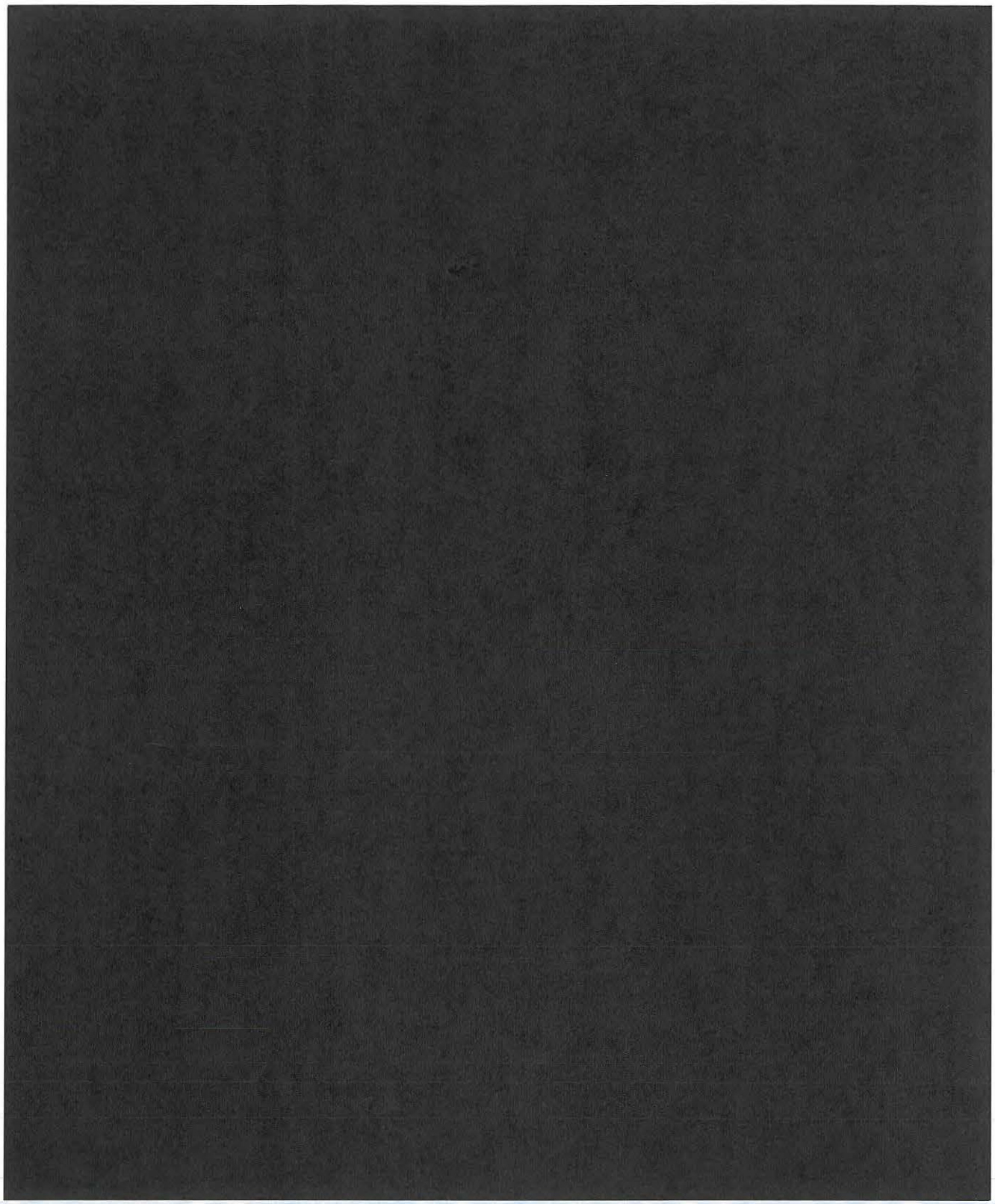

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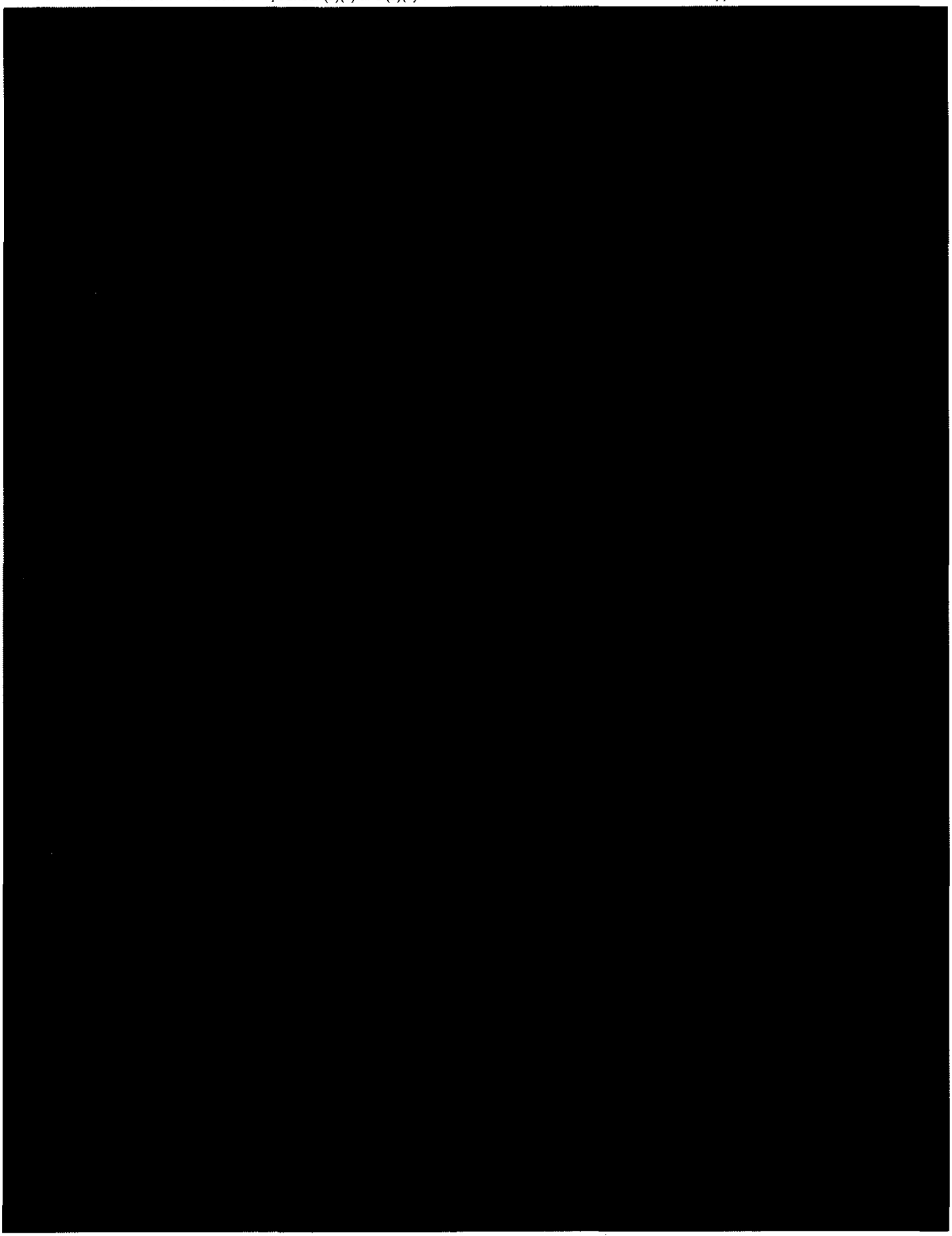

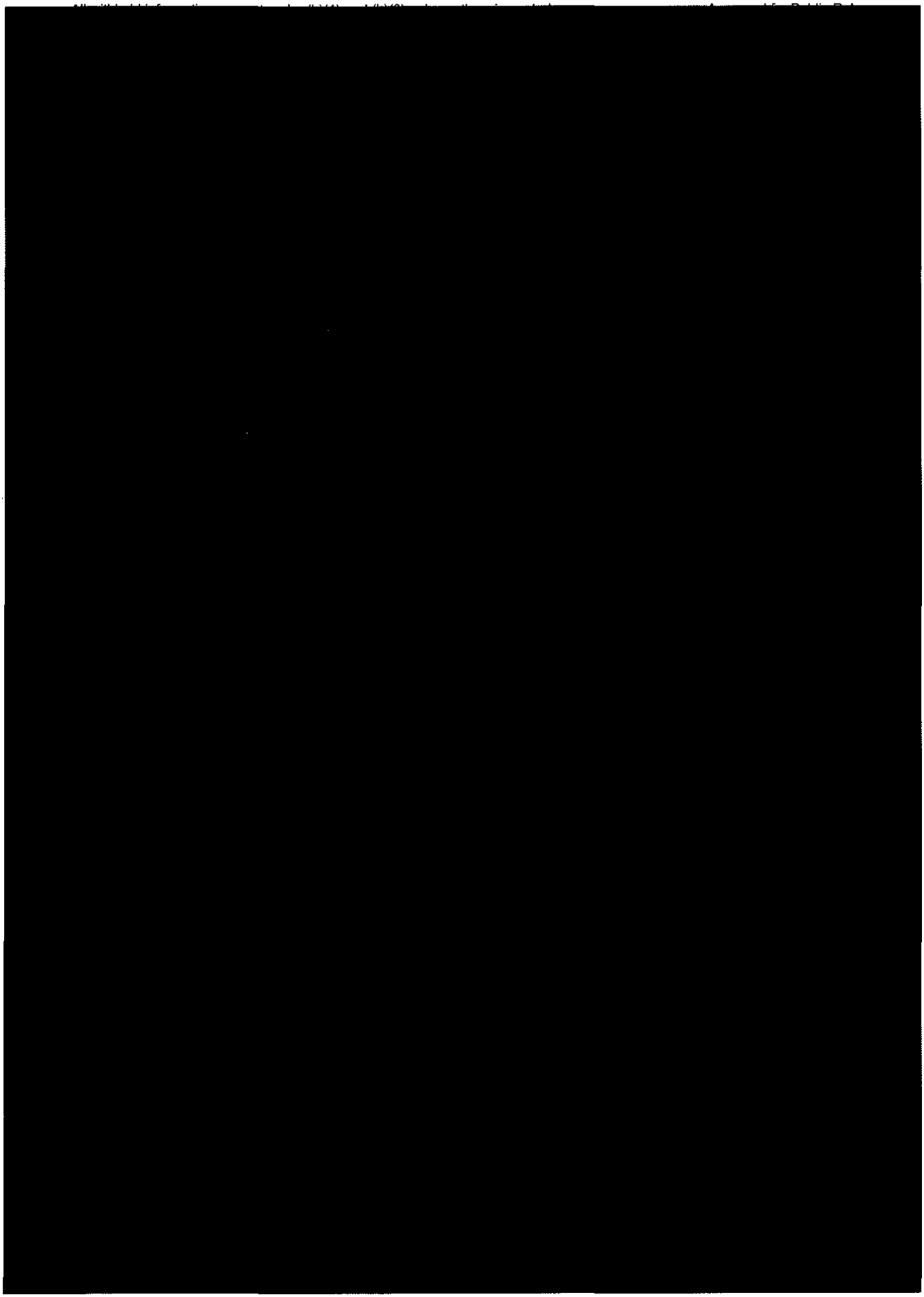

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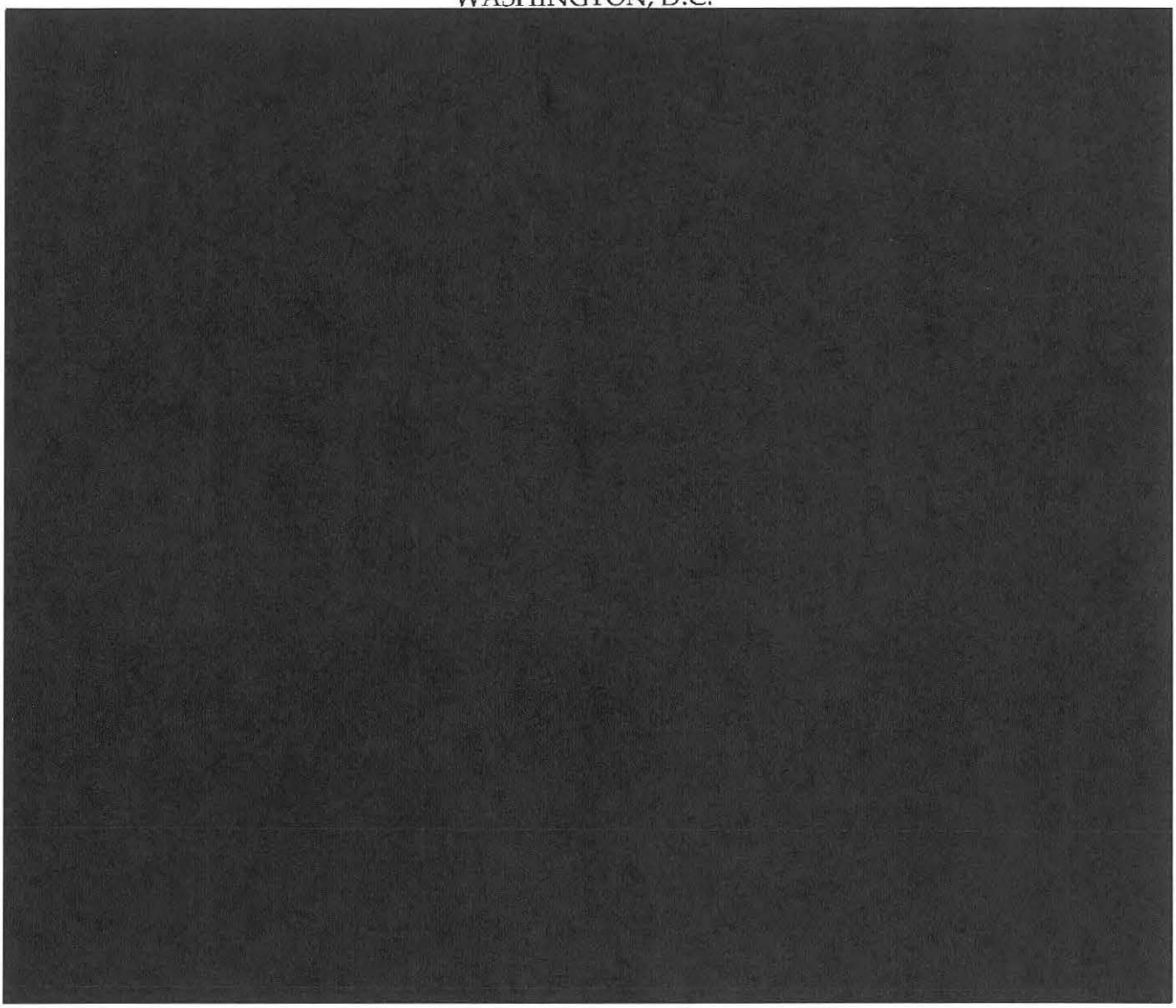
UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



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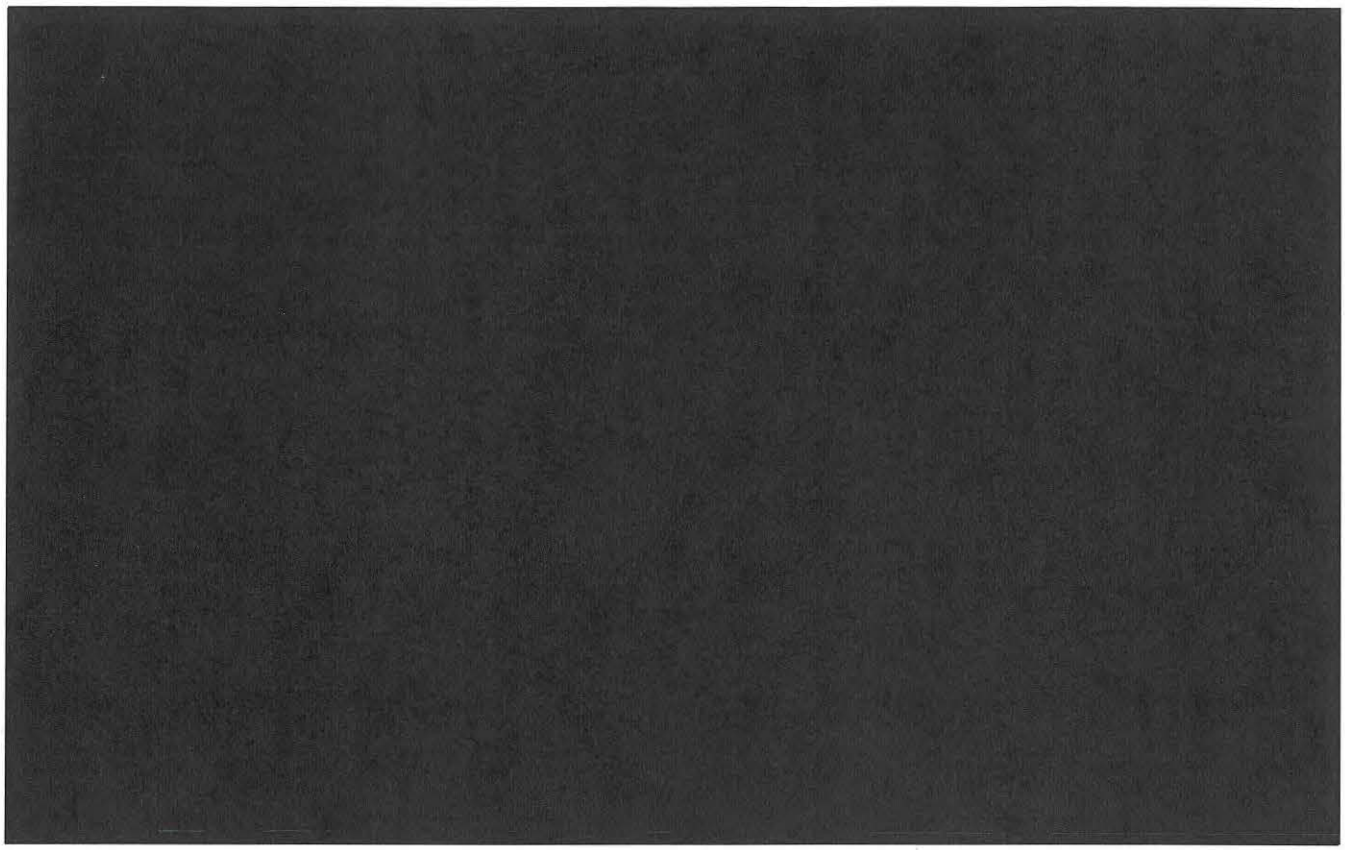

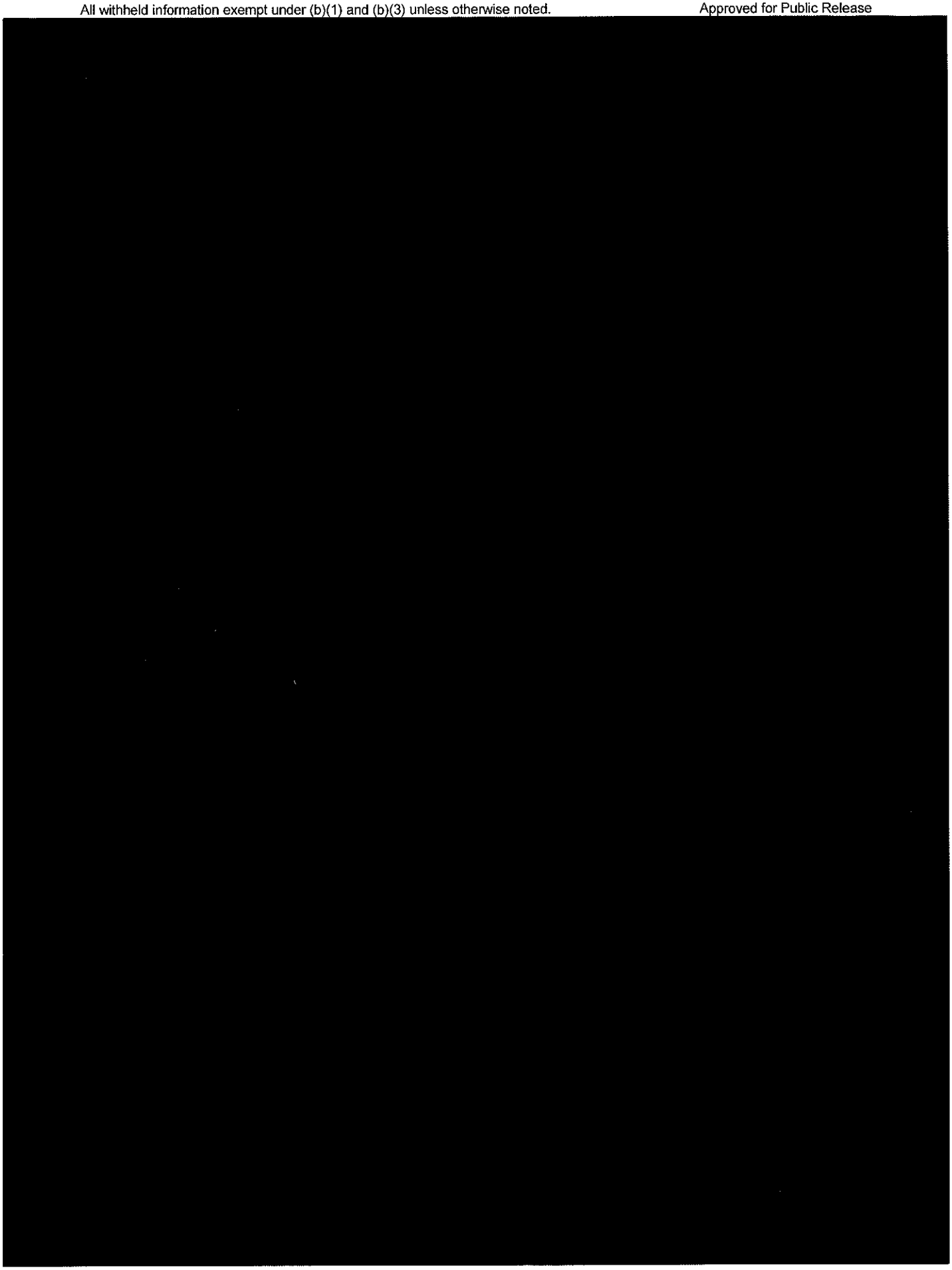

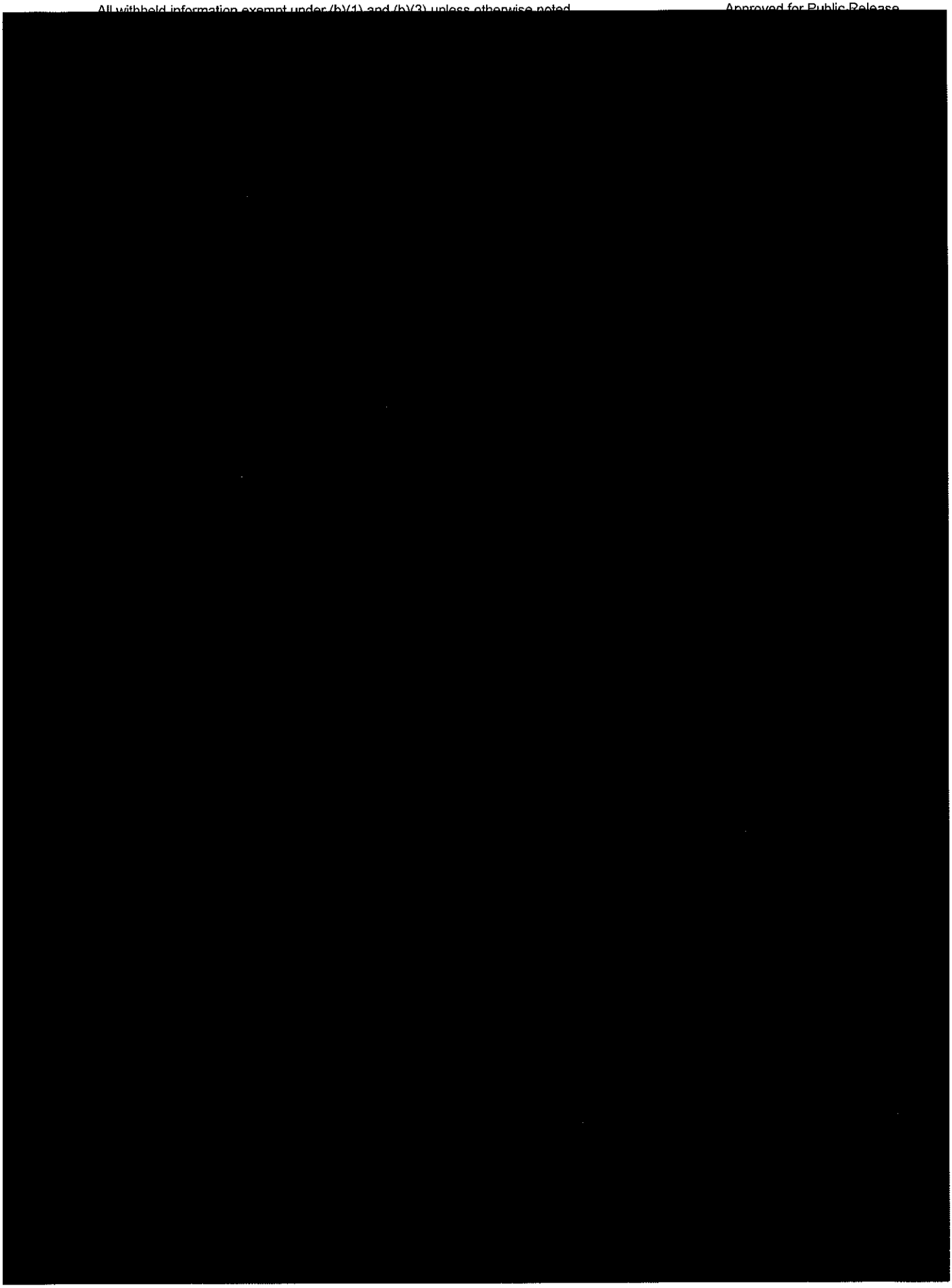

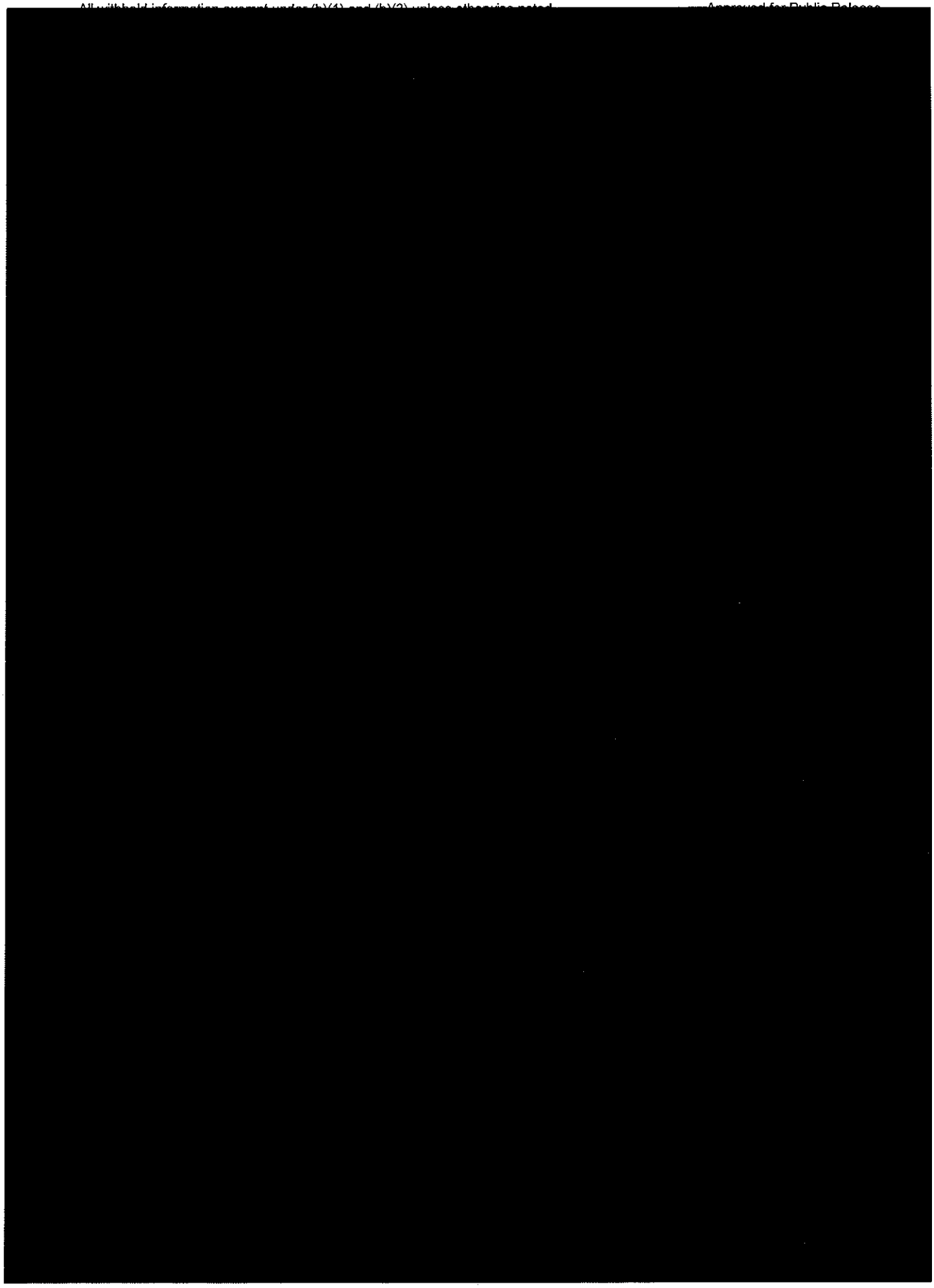

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