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U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT AUG 26 PM 3:53

WASHINGTON, D.C.

KAREN SUTTON  
CLERK

IN RE DNI/AG 702(g) CERTIFICATION

(b)(1); (b)(3); (b)  
(7)(E)

(S)

~~UNDER SEAL~~

Docket No. 702(i)-08-01

GOVERNMENT'S PRELIMINARY RESPONSES TO  
CERTAIN QUESTIONS POSED BY THE COURT (S)

THE UNITED STATES OF AMERICA, through the undersigned Department of Justice attorney, respectfully submits its preliminary responses (attached hereto at Tab 1) to certain of the questions previously posed by this Court regarding DNI/AG 702(g) Certification [REDACTED] and the targeting and minimization procedures submitted therewith. The Government reserves the right to supplement and/or modify these responses as appropriate during the hearing scheduled in the above-captioned matter on August 27, 2008.

(b)(6)



National Security Division  
United States Department of Justice

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Classified by:

Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ

Reason:

1.4(c)

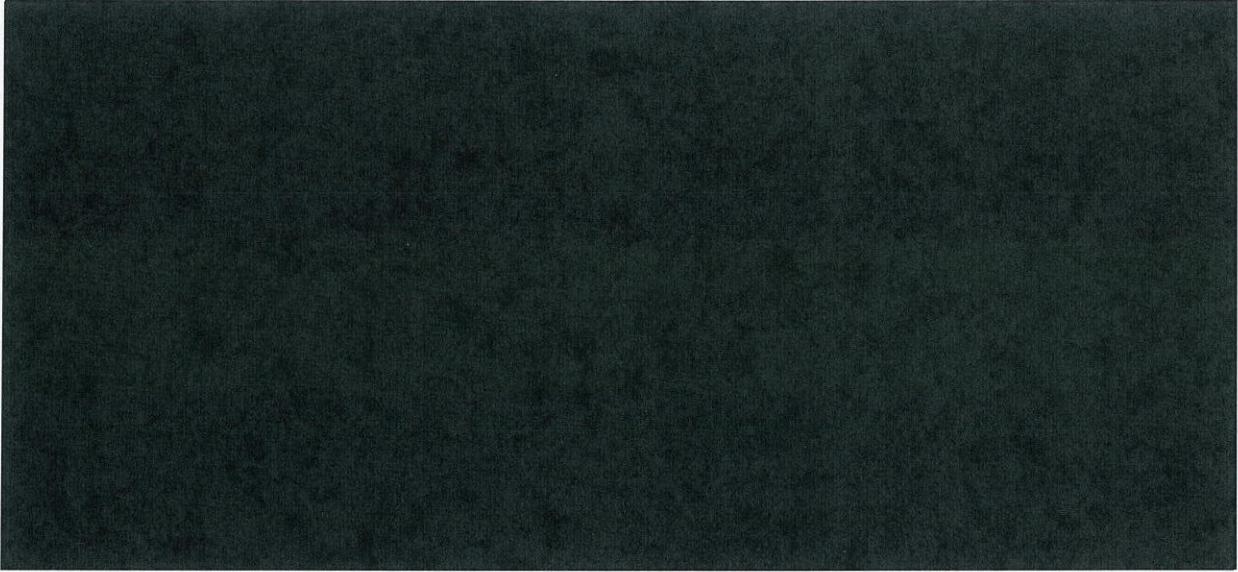
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**1. How is the mechanism permitting National Security Agency (NSA) to target additional foreign powers not listed in Exhibit F consistent with the statutory requirement that the Director of National Intelligence and Attorney General certify that a significant purpose of the acquisition is to acquire foreign intelligence information? (S)**

- In [REDACTED] the Attorney General and Director of National Intelligence authorized the acquisition of foreign intelligence information concerning all foreign powers that meet the statutory definitions in: (S)



- There are a number of constraints that operate in concert to ensure, as certified by the Attorney General and Director of National Intelligence, that a significant purpose of the acquisition is to acquire foreign intelligence information. (S)
  - First, NSA cannot target "consistent with this certification non-United States persons reasonably believed to be located outside the United States" unless NSA determines that the target "possesses and/or is likely to communicate foreign intelligence information" as defined by 50 U.S.C. § 1801(e). (S)
  - Second, the "foreign intelligence information" to be acquired by such targeting must concern a group that is a "foreign power" as defined by 50 U.S.C. § 1801(a) [REDACTED]<sup>1</sup> (S)

<sup>1</sup> Indeed, the concept of "foreign power" is itself integral to the "foreign intelligence information" definitions in 50 U.S.C. § 1801(e). See, e.g., 50 U.S.C. § 1801(e)(1)(A) ("Foreign intelligence information" means information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect

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- NSA targeting procedures require that the foreign intelligence purpose of each tasking be documented. (S)
- One aspect of the oversight reviews conducted by the Office of the Director of National Intelligence and the Department of Justice is to check that such documentation exists. (S)

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against . . . actual or potential attack or other grave hostile acts of a *foreign power* or an agent of a *foreign power*.").  
(emphasis added.) (S)

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- In doing those checks, [REDACTED] for which notice had not been given would be discovered and subject to review. (S)

**2. The Court had several questions concerning the "abouts" collection and the IP filters used to effect that collection. (TS//SI)**

First, which person is being "targeted" in the abouts collection? Is it still the user of the selector? Or is it one or both of the communicants of the message containing the reference to the selector? (TS//SI)

- In cases where NSA seeks to acquire communications that refer to a selector used by a target that are not to and from the selector used by the target, the person being "targeted" is the user of the selector. (TS//SI)
- Viewing the "target" of the abouts collection as the user of the tasked selector is most consistent with the statutory language: (TS//SI)
  - Under 702(a), the AG and DNI can authorize "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." (TS//SI)
    - ◆ A person is "targeted" by tasking an electronic communications [REDACTED] ("selector") that he uses. (TS//SI)
    - ◆ By virtue of operation of the targeting procedures, the tasked selector is believed to be used by a non-United States person reasonably believed to be located outside the United States. (TS//SI)
  - The purpose of acquiring a communication containing a reference to a selector used by a target is to acquire foreign intelligence information about the target -- regardless of whether the communication was sent to or from a selector used by the target. (TS//SI)
    - ◆ This is reflected in the NSA targeting procedures: namely, the "abouts" collection involves "cases where NSA seeks to acquire communications about the target that are not to or from the target." (TS//SI)
    - ◆ So, the focus of the abouts collection remains "the target," even though communications that are not sent to or from "the target" are acquired. (TS//SI)
  - Further, the operation of the Internet Protocol (IP) address filters [REDACTED] prevents the intentional acquisition of communications "about" the target as to which the senders and all intended recipients are known at the time of acquisition to be located in the United States. (TS//SI)

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- Thus, operation of the targeting procedures ensures that the abouts collection targets non-US persons reasonably believed to be located outside the United States and prevents the intentional acquisition of communications about the target as to which the senders and all intended recipients are known at the time of acquisition to be located in the United States. ~~(TS//SI)~~
- Furthermore, any United States person information that is incidentally acquired through the abouts collection will be treated in accordance with the minimization procedures adopted for the certification. ~~(TS//SI)~~
- It is also possible to conceptualize that the foreign-based, non-US person sender or recipient of the abouts communication may also be a "target." ~~(TS//SI)~~
  - The Government previously took a similar position with respect to the certifications executed under the Protect America Act of 2007 (PAA): "The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside the United States." However, that position was in many respects a function of the statutory language of the PAA: ~~(TS//SI)~~
    - ◆ 105B(a) -- the abouts collection was for the purpose of acquiring "foreign intelligence information concerning a person reasonably believed to be located outside the United States" (i.e., the user of the tasked selector). ~~(TS//SI)~~
    - ◆ 105A -- the abouts collection was not "electronic surveillance" because it was "directed at a person reasonably believed to be located outside the United States." ~~(TS//SI)~~
  - However, this interpretation is less satisfactory under the new statute, which contains no requirement that the acquisition be "directed at" a person reasonably believed to be located outside the United States. ~~(TS//SI)~~
    - ◆ To the extent that the targeting procedures retain the "directed at" language, it is for the purpose of making clear that the "target" is in no event a person located in the United States. ~~(TS//SI)~~

**Second, what has NSA's experience been with the IP filters? Have they been effective in limiting the collection to communications with at least one communicant located outside the United States? ~~(TS//SI)~~**

- Yes, they have been effective in limiting the collection to communications with at least one communicant located outside the United States. NSA is not aware of a case where an about collection resulted in the acquisition of a communication where both ends were inside the United States. ~~(TS//SI)~~

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3. The Court wants to know why the presumption reflected in the third paragraph of the subsection dealing with the assessment of the non-US person status of the target is reasonable as a general matter and in particular when the location of the individual is unknown. The Court also wants to know what measures are taken to locate information that could otherwise undermine the presumption.

- It is important to note that the use of the presumption is only one aspect of a broader range of information upon which a targeting determination is made. Targeting decisions under the targeting procedures are made "in light of the totality of the circumstances based on information available with respect to [the new target]." ~~(S)~~
- Thus, although the actual location of the target may be unknown.

~~(S)~~

- In such an instance, the actual location of the recipient/new target is unknown. ~~(S)~~
- As this Court has recognized, it is reasonable to presume that a non-US person located overseas communicates most frequently with other, non-United States persons overseas. ~~(S)~~
  - "This Court sees no reason to question the presumption that the vast majority of persons who are located overseas are not United States persons and that most of their communications are with other, non-United States persons, who are also

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located overseas." Mem. Op. and Order, In re DNI/AG Certification [REDACTED] at 87 (FISA Ct. Jan. 15, 2008). (S)

- "This *common sense presumption* is embodied in the Department of Defense procedures governing the collection of information about United States persons, which state, 'a person known to be currently outside the United States, or whose location is not known, will not be treated as a United States person unless the nature of the person's communications or other available information concerning the person give rise to a reasonable belief that such person is a United States citizen or permanent resident alien.'" *Id.* at 87 n.81 (emphasis added). (S)
- ◆ The presumption contained in the NSA targeting procedures is roughly the same as the "common sense presumption" quoted by the Court. [REDACTED] (S)
- ◆ The presumption is also contained in the NSA FISA Standard Minimization Procedures, which were adopted by Attorney General Reno in 1997 and which have been used in numerous NSA FISA applications approved by the Court since that time. (S)
- Thus, although the actual location of the new target may unknown in a particular instance, NSA may reasonably believe, based on the totality of the circumstances, that the new target is located overseas and, therefore, may be presumed to be a non-United States person. (S)
- NSA takes several steps designed to locate any information in its possession that would undermine the presumption: (S)

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4. Section I. of the targeting procedures lists [REDACTED] types of information that NSA analysts examine when making a foreignness determination --

[REDACTED]  
(S)

- In addition, a second level of review takes place prior to tasking, which includes a review of the tasking analyst's basis for reasonably believing the target is located outside the United States and the source document(s) supporting that reasonable belief. (S)

5. The discussion of the post-targeting analysis done by NSA describes the [REDACTED] checks as being done "routinely." Are those checks done for each targeted selector? How often are those checks done? What criteria does NSA employ to determine if and/or how often such checks should be done? (S)

- The checks are done for each selector. (S)

• [REDACTED]

(S)

• [REDACTED]

(S)

6. The discussion of the post-targeting analysis done by NSA says that

[REDACTED]  
The Court wants to know, in practice, how often such analysis is done. (S)

• [REDACTED]

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- In all cases, analysts remain responsible for following their target's locations and for the validity of continued acquisition of information regarding that target. (S)

**7. In the Documentation section, there's no requirement that NSA document the source(s) of the information containing the information upon which NSA determined that the target is a non-US person. Was that inadvertent or intentional? (S)**

- The omission of this requirement was intentional, for the following three reasons: (S)
  - First, the cited source of the information upon which the foreignness determination for the target was based may also contain information bearing on the non-US-person status of the target, making a separate citation unnecessary. (S)
  - Second, oftentimes the basis for NSA's determination that a target is a non-US person rests on the reasonable presumption, discussed above, that [REDACTED]  
[REDACTED] Inasmuch as the targeting procedures already require citations to the sources of information upon which a foreignness determination is based, a separate citation to those same sources would be unnecessary. (S)
  - Third, checks to determine whether a selector has been used from the United States are required in all cases; thus, requiring a notation that a check was done in each case would be unnecessary. (S)

**8. The noncompliance reporting requirement doesn't include a requirement that the intentional targeting of a US person be reported (though information acquired as a result of such targeting is required to be purged). The Court wants to know why. The reporting requirement also focuses more narrowly on noncompliance incidents involving improper tasking decisions rather than all types of noncompliance incidents. The Court wants to know why. (S)**

- The failure to include the reporting of intentional targeting of U.S. person was an oversight. (S)
- Intentional tasking of a U. S. person is an incident of noncompliance and will be reported to DOJ, ODNI OGC and ODNI CLPO within 7 days of NSA learning of such an incident. (S)
- The reporting requirement focuses on improper tasking decisions, rather than all types of noncompliance incidents, because there are types of purely "technical" incidents of noncompliance that do not result in a tasking decision that is inconsistent with the statute. These "technical" incidents of noncompliance are often discovered during

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routine oversight visits. Further, as these "technical" incidents are identified, corrective action is taken (e.g., a previously omitted source citation is added to the tasking documentation). ~~(S)~~

- NSA fully intends to discuss all issues of noncompliance with its procedures with DOJ and DNI representatives during routine oversight visits, which are intended to take place at least every 60 days. ~~(S)~~

**9. With respect to Section 3(b)(4) of the NSA minimization procedures, the first sentence is written in the passive voice. The Court wants to know who makes the determination discussed in that sentence. The Court also wants to know what the "such communications" in the second sentence refers to. ~~(S)~~**

- The intelligence analyst makes the determination. ~~(S)~~
- "Such communications" refers to communications containing foreign intelligence or evidence of a crime. ~~(S)~~

**10. Generally, why is the five years retention period in the NSA minimization procedures reasonable? ~~(S)~~**

- The nature of NSA's foreign intelligence targets, particularly regarding its counterterrorism targets, is such that it can take data gathered over an extended period of time may be required to understand its foreign intelligence value and to connect seemingly unconnected things. ~~(S)~~
- This retention period has appeared in other minimization procedures approved by the Court (e.g., docket numbers [REDACTED] and [REDACTED]). ~~(S)~~

**11. With respect to Section 5 of the NSA minimization procedures, can the Director of NSA delegate the decision making required by this provision? ~~(S)~~**

- The decision may be made by the Director of NSA or the acting Director of NSA only. ~~(S)~~

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12. The penultimate sentence of the Federal Bureau of Investigation (FBI) minimization procedures included as Exhibit D to the certification states: "The FBI will implement these non-U.S. Person Standard Minimization Procedures, as modified above, in accordance with FBI Policy Directive No. 0100N (effective June 30, 2008) *as appropriate.*" (emphasis added.) What is the meaning of "as appropriate" in this sentence? Will the "case ownership" model reflected in the policy generally (through the designation of "case coordinators"), and the provisions of the policy directive applicable to (b)(1); (b)(3); (b)(7)(E) cases in particular, be applied to unminimized communications obtained by the FBI? (S)

- The addition of "as appropriate" to the end of the sentence above is intended to reflect that only certain provisions of FBI Policy Directive No. 0100N may be applicable to information acquired pursuant to section 702 of the Act. (S)

- Specifically, the most pertinent provision of the policy directive is Section 10, which concerns information acquired (b)(1); (b)(3); (b)(7)(E)

(S)

- If read narrowly, Section 10 could be interpreted not to apply here, because acquisitions under section 702 of the Act are not, strictly speaking,

(b)(1); (b)(3); (b)(7)(E)

- However, because acquisitions conducted under section 702 of the Act are similar to (b)(1); (b)(3); (b)(7)(E)

it is "appropriate" that Section 10 apply to information acquired under section 702 of the Act. Section 10 expressly requires the designation of case coordinators who shall be responsible for such information. (S)

- Furthermore, Section 10 itself expressly exempts (b)(1); (b)(3); (b)(7)(E) from a number of other provisions of the policy directive. Those same exemptions would apply to acquisitions conducted under section 702 of the Act. (S)

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13. The NSA minimization procedures included as Exhibit B to the certification require that a determination by the Director of NSA to retain certain types of information must be made in writing. The CIA minimization procedures included as Exhibit E to the certification likewise require the Director of the CIA to make such a determination in writing. However, although the FBI minimization procedures attached as Exhibit D to the certification require that such a determination must be made by the Director of the FBI, that determination is not required to be in writing. Was the omission of that requirement from the FBI minimization procedures intentional and, if so, for what purpose was that requirement omitted? (S)

- The omission of an express requirement that the FBI Director must determine in writing that certain types of information may be retained was not intended to suggest that the process by which the FBI Director reaches that determination would be any less rigorous than that of the Director of NSA or the Director of the CIA. (S)
- The FBI has represented that any such determination by the Director would be made in writing, even if not expressly required by the minimization procedures. (S)

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