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UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT  
2020 APR -3 PM 4:24  
LEEANN FLYNN HALL  
CLERK OF COURT

(U) IN RE ACCURACY CONCERNS REGARDING FBI  
MATTERS SUBMITTED TO THE FISC.

Docket No. Misc. 19-02

**(U) RESPONSE TO THE COURT'S  
CORRECTED OPINION AND ORDER DATED MARCH 5, 2020  
AND UPDATE TO THE GOVERNMENT'S JANUARY 10, 2020 RESPONSE**

(U) The United States respectfully submits this response to the Corrected Opinion and Order of the Foreign Intelligence Surveillance Court (FISC or the Court) entered on March 5, 2020 (hereinafter March 5, 2020 Order).<sup>1</sup> This submission also provides updates to two aspects of the Government's January 10, 2020 filing that was a response to the Court's December 17, 2019 Order (hereinafter January 10, 2020 Response). The March 5, 2020 Order required the Government to provide certain information by March 27, 2020. In addition, the Government's January 10, 2020 Response committed to providing certain updates to the Court by March 27, 2020. On March 25, 2020, the Court granted the Government a one-week extension of time until April 3, 2020, to provide such information. Order Extending Time To Respond, dated March 25, 2020.

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<sup>1</sup> (U) This Opinion and Order corrected an Opinion and Order that had been issued on March 4, 2020.

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## I. (U) INTRODUCTION

(U) The U.S. Department of Justice's Office of Inspector General (OIG) issued a report on December 9, 2019, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (the OIG Report), which found multiple omissions and misstatements regarding the applications seeking Court authorization to conduct electronic surveillance and physical search of Carter W. Page. Following the publication of the OIG Report, the Government submitted filings to the FISC, describing multiple corrective measures taken by the Federal Bureau of Investigation (FBI) and Office of Intelligence (OI) to ensure the continuing accuracy and completeness of applications submitted to the Court. In particular, in the January 10, 2020 Response, which included a declaration from FBI Director Christopher A. Wray, the Government described multiple corrective measures that the FBI planned to take to help facilitate the accuracy and completeness of FISA applications. The corrective actions enumerated in the January 10, 2020 Response included, for example, the development and implementation of a standard checklist to be completed by FBI personnel regarding the reliability of any confidential human source (CHS) whose reporting is used in a FISA application submitted by the FBI. The use of this checklist was one action to be undertaken to ensure that all information bearing on the reliability of a CHS is provided to OI and the Court; additional planned actions, as discussed in the filing, included updating the forms completed by FBI case agents and supervisory agents to request and verify applications for electronic surveillance and physical search by including a variety of questions and certifications regarding facts that may bear on the reliability of CHS reporting and/or that may undermine the probable cause findings. That filing also described OI's practice during the drafting of applications to determine and

report any errors or omissions, as well as OI's accuracy reviews of a subset of FISA applications during FBI field office audits.

(U) Following that filing, the Court appointed an amicus, who filed a Letter Brief with the Court both evaluating the utility and effectiveness of the Government's proposed corrective actions and providing the Amicus's recommendations for additional changes to the FISA process that might increase the accuracy of applications submitted on behalf of the FBI. The Amicus's proposals included the possibility of using field agents rather than – as is currently the practice – headquarters agents as declarants in FISA applications. At the Court's direction, the Government responded to the Amicus's Letter Brief on January 31, 2020 ("January 31, 2020 Response") and generally agreed with most of the recommendations from the Amicus. For example, the January 31, 2020 Response expressed the joint intent of the FBI and the Department of Justice (DoJ) to change existing practice in order to have field agents serve as declarants on FISA applications.<sup>2</sup>

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<sup>2</sup> (U) In addition to the actions discussed in this response, the Government also adopted the following recommendations made by the Amicus. OI committed to formally document the practice, expressed by OI supervisors during the preparation of the OIG Report, of erring in favor of disclosing information that OI believes is relevant to the Court's probable cause determination, and will do so as part of its revision, in collaboration with the FBI, to the *Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act, Memorandum from Matthew G. Olsen & Valerie Caproni to all Office of Intelligence Attorneys, All National Security Law Branch Attorneys, and All Chief Division Counsels* (Feb. 11, 2009) (the "2009 Memorandum"). January 31, 2020 Response at 7. The Government also committed to including a review of the effectiveness of the FBI's revised request and verification forms, and to provide the Court with an update on this review by June 30, 2020. *Id.* at 8-9. While the FBI will, due to operational necessity, conduct FISA-related training for FBI personnel without OI participation, the FBI and OI committed to coordinate with regard to training modules concerning the FBI's updated forms as well as training focused on rigor in the FISA process, both of which have been or are being developed by the FBI in response to the OIG Report. *Id.* at 10-11. The Government committed to providing the Court with additional information regarding the results of testing on FISA-related training for FBI personnel by April 30, 2020. *Id.* at 11. Additionally, the Government will provide the Court with additional examples of messaging by FBI leaders and leaders within DoJ regarding the importance of accuracy and completeness within the FISA process. *Id.* at 14-15. Finally, to the extent that the Court should adopt the Amicus's proposal to conduct more frequent

(U) Most recently, the Court considered the Government's corrective measures in light of the findings in the OIG Report. The Court found that the Government's proposed remedial measures held promise in addressing the findings of the OIG Report and increasing the accuracy and completeness of applications submitted on behalf of the FBI, and imposed a series of reporting requirements regarding these measures.<sup>3</sup> March 5, 2020 Order at 17-18. The Government hereby respectfully submits the following responses as required by the Court's March 5, 2020 Order.

(U) This filing also includes updates to two aspects of the Government's January 10, 2020 Response. Director Wray's declaration described the corrective actions he had ordered FBI to undertake following the OIG Report. January 10, 2020 Response, Attachment A at 3. One of those corrective actions, Corrective Action #7, required, among other things, the FBI to formalize the role of FBI attorneys in the legal review process for FISA applications. *Id.* at 3, 7. Director Wray's declaration also noted that the FBI would enhance its protocols to ensure the accuracy of applications submitted to the Court pursuant to Title IV or V of FISA. *Id.* at 14.

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hearings regarding applications submitted by the FBI, the Government committed to being available for any such hearings. *Id.* at 16.

<sup>3</sup> (U) Separately, the Court ordered a modification to the attestation made by the FBI declarant and the representation made by the DoJ attorney signing the application for authority to conduct electronic surveillance or physical search, to install and use a pen register or trap-and-trace device, or to target a United States person overseas to acquire foreign intelligence information pursuant to Section 703 or 704 of the Act. March 5, 2020 Order at 18-19. The DoJ attorney representation requires the attorney to certify that the application fairly reflects all material facts known to the attorney. While the representation is restricted to what the attorney knows, the Department's expectation is that the attorney has also conducted due diligence to apprise herself/himself of the material facts.

(U) The Court also ordered modifications to the representation accompanying an application for the production of tangible things pursuant to the Act, prohibited DoJ or FBI personnel under disciplinary or criminal review relating to their work on FISA applications from participating in any way in the preparation of applications to be submitted to the Court, and imposed a reporting requirement regarding any findings of misconduct relating to the handling of FISA applications. *Id.*

## II. (U) UPDATES REGARDING THE VERIFICATION OF CONFIDENTIAL HUMAN SOURCE REPORTING

(U) As described in the January 31, 2020 Response, the FBI was then in the process of developing a checklist for human sources whose reporting would be used in a FISA application. The checklist is designed to capture information about a human source's reliability. As directed by the Court, included with this filing is a copy of the CHS Checklist as Attachment A, which the FBI began using on March 27, 2020. That checklist was generated through a collaborative process involving personnel from OI and FBI, including those in the FBI's Directorate of Intelligence, which strategically manages the FBI's CHS program; the Investigative and Administrative Law Branch; and the National Security and Cyber Law Branch (NSCLB). As the Government noted in its January 10, 2020 Response, OI attorneys work closely with FBI agents submitting a FISA request as part of an iterative process to "elicit, articulate, and provide full factual context for those facts which are relevant to a material element in the application." January 10, 2020 Response at 9. As the Amicus noted, this "iterative process is essential to avoiding errors in the first instance . . . ." Amicus Letter Brief at 8; *see also* March 5, 2020 Order at 11. The CHS Checklist is reflective of this iterative process, in that it serves two purposes: (1) to remind agents of the information needed by the Court to evaluate the credibility of the CHS and the reliability of the information provided by the CHS; and (2) to identify for OI attorneys any issues flagged by those agents in the checklist that may require follow-up. Both OI and the FBI recognize that the checklist is a starting point for eliciting CHS information necessary for a FISA application, and the form will most likely result in follow-on conversations through which the agent will provide additional details about the CHS and his or her reporting. Accordingly, by design, the checklist serves to prompt further discussion between OI and the FBI, as necessary.

(U) As the instructions accompanying the checklist indicate, the form is required to be completed by the handler of any CHS whose information is relied upon in a filing with this Court. Follow-on questions from OI attorneys will be directed to the agent requesting the FISA application, though the expectation is that he or she will frequently need to engage in further coordination with the CHS's handler to resolve any questions or concerns. The FBI believes this approach will help to ensure that all relevant parties remain fully aware of any information that may bear on the CHS's credibility. More specifically, the FBI believes that keeping the requesting agent involved in this collaborative approach, as opposed to having OI attorneys directly contact CHS handlers, best positions the requesting agents to complete their required attestations related to accuracy and completeness on the FISA Verification Form, while also allowing OI attorneys to seek input from CHS handlers when necessary.

(U) In instances in which an application is expected to rely on an FBI CHS's reporting, the CHS Checklist is required to be completed prior to any FISA request being submitted through the FBI's FISA Management System (FISAMS) on or after March 27, 2020, as well as prior to seeking emergency authorization from the Attorney General, Deputy Attorney General, or Assistant Attorney General for National Security.<sup>4</sup> As the Government alluded to in its response to the Amicus's Letter Brief, use of the form would follow a brief period of training. The relevant training module is classified and has been finalized and posted in video form to the FBI's Virtual Academy platform. The training provides instructions on completing the CHS Checklist, including by explicating, with respect to certain questions, the type of information that would be expected to elicit an affirmative response. As a signal of the importance of the training, the FBI Deputy Director provided introductory remarks, which emphasized not only the

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<sup>4</sup> (U) FISAMS is discussed in greater detail, below.

significance of the CHS Checklist, but also, more generally, the duty the FBI has to be accurate and complete in all FISA applications. The training also highlights lessons learned as a result of the OIG Report.<sup>5</sup>

(U) At the conclusion of the drafting process and as part of the revised FISA Verification Form, case agents are required to affirm, for every CHS whose reporting is relied upon in an application, that they have conferred with, and provided a copy of the CHS reliability statement and CHS-originated content contained in the application, to the relevant CHS handler, Confidential Human Source Coordinator, or either individual's immediate supervisor, and received confirmation that the reliability statement and CHS-originated content included in the application are complete and accurate. The case agent is also required by this revised FISA Verification Form to confirm that the necessary supporting documentation (*i.e.*, the document(s) evidencing that the CHS handler, CHS Coordinator, or either's immediate supervisor has confirmed the reliability statement and CHS-originated content in the application) has been included in the accuracy sub-file.

### **III. (U) THE CURRENT RESPONSIBILITIES OF FBI OFFICE OF GENERAL COUNSEL ATTORNEYS THROUGHOUT THE FISA PROCESS AND UPDATE TO CORRECTIVE ACTION #7**

(U) In the January 10, 2020 Response, FBI Director Wray advised the Court of the FBI's commitment to "the formalization of the role of FBI attorneys in the legal review process for

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<sup>5</sup> (U) FBI personnel who are required to take the training were instructed to do so by March 27, 2020. However, due to the coronavirus outbreak and the FBI's related reduction in staffing, the FBI expects that there will be many personnel who did not complete the classified training by the deadline. FBI agents and attorneys who are actively working on FISA applications containing CHS information were directed to take the classified training by the March 27, 2020, deadline. Others were asked to take the training as soon as feasible, and by the deadline if possible, but to prevent the spread of the coronavirus, the FBI has not recalled personnel to the office to take the training if they are otherwise on leave or teleworking.

FISA applications, to include identification of the point at which SES-level FBI OGC personnel will be involved, which positions may serve as the supervisory legal reviewer, and establishing the documentation required for the legal reviewer.” *Id.*, Attachment A at 7. As explained in that filing, the Director committed to this undertaking in response to the OIG’s narrower recommendations that the FBI revise the FISA Verification Form “to specify what steps must be taken and documented during the legal review performed by an FBI Office of General Counsel (OGC) line attorney and SES-level supervisor before submitting the FISA application package to the FBI Director for certification[.]” and “to clarify which positions may serve as the supervisory legal reviewer for OGC[.]” *Id.* at 7 (quoting OIG Report at 415) (alteration in original). After noting the anticipated timeline for completion of the FISA Verification Form, the FBI proposed to update the Court on its implementation of these actions in a filing made with the Court by March 27, 2020. *Id.* Relatedly, in the March 5, 2020 Order, the Court directed the government to provide “a description of the current responsibilities FBI OGC lawyers have throughout the FISA process.”<sup>6</sup> March 5, 2020 Order at 17. This section includes the FBI’s update to the January 10, 2020 Response, as well as the FBI’s response to the Court’s directive contained in the March 5, 2020 Order, beginning with the latter.

**A. (U) Description of the Current Responsibilities FBI OGC Attorneys Have Throughout the FISA Process**

(U//FOUO) [REDACTED]

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<sup>6</sup> (U) For the sake of brevity, this filing largely does not address the responsibilities of FBI OGC attorneys in connection with Section VII. To the extent the Court wishes further information on that subject, the FBI stands ready to provide it.

<sup>7</sup> (U//FOUO) [REDACTED]



[REDACTED]

(U//FOUO)

[REDACTED]

[REDACTED]

(U//FOUO)

[REDACTED]

[REDACTED]

[REDACTED]

i. (U) Initiating a FISA Request

(U//FOUO) [REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

(S//NF) [REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

ii. (U) Review of the FISA Application

(U//FOUO) [REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

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[REDACTED]

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[REDACTED]

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<sup>8</sup> (U) *See also* 28 CFR 28 § 0.72(b)(5) (assigning the Assistant Attorney General for National Security the function of “[r]ecommend[ing] action by the Department of Justice with regard to applications under the Foreign Intelligence Surveillance Act of 1978, as amended, as well as with regard to other investigative activities by executive branch agencies”).

<sup>9</sup> (U//FOUO) [REDACTED]

(U//FOUO)

[REDACTED]

(U//FOUO)

[REDACTED]

[REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

iii. (U) Implementation and Continued Oversight of FISA Authorities

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

(S//NF)

[REDACTED]



(U//FOUO)

[REDACTED]

iv. (U) Use and Protection of FISA Collection in Proceedings

(U//FOUO)

[REDACTED]

[REDACTED]

[REDACTED]

**B. (U) Formalization of OGC's Legal Review Prior to Certification**

(U) As the Court is aware based on its receipt and review of the revised FISA Verification Form, that form—which has been in use since February 14, 2020—now includes a portion devoted to formally documenting the review conducted by both line- and supervisory-level NSCLB attorneys prior to the certification process (“NSCLB Review”). A more fulsome description of those reviews is described above, as are the explanations for their relatively limited scope. The NSCLB Review portion of the revised FISA Verification Form is not intended to detail all aspects of the reviews, but rather is simply meant to distill those responsibilities into a summarized checklist that NSCLB attorneys must complete as they perform those reviews. The FBI believes that requiring completion of these forms adds some degree of enhanced rigor to the reviews conducted by NSCLB attorneys.

(U//FOUO) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**IV. (U) TECHNOLOGICAL IMPROVEMENTS TO THE PROCESS OF PREPARING, OR VERIFYING THE INFORMATION CONTAINED IN, FISA APPLICATIONS**

(U) The FBI views its technological improvements as supplementary to, rather than independent of, its efforts on other fronts to enhance accuracy and completeness. In other words, the FBI believes that technology alone cannot resolve the issues uncovered by the OIG, but also that, in conjunction with other measures, technological improvements can enhance the FISA process. The FBI's FISA-related technological efforts, some of which are in the development phase, are described below.

(U//FOUO)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U//FOUO)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U//FOUO) [REDACTED]

[REDACTED]

**V. (U) REPORT IN RESPONSE TO PART IV.1(d) OF THE COURT'S MARCH 5, 2020 ORDER**

(U) In its March 5, 2020 Order, the Court ordered that DoJ submit a report on: (A) whether formalized guidance should be provided to OI attorneys to ensure their diligence in soliciting the types of information the OIG Report revealed to have been omitted from the Carter Page (Page) FISA applications and, if so, how and when such guidance would be provided; and (B) the viability of participation by OI attorneys in visits to FBI field offices to assist in the preparation of FISA applications. March 5, 2020 Order at 18.

**A. (U) Formalized Guidance Regarding the Types of Information Identified in the OIG Report That Had Been Omitted from the Page FISA Applications**

(U) The OIG Report identified material facts that had been omitted from the Page FISA applications. For example, information about Page's prior relationship with another U.S. government agency was not disclosed to the Court. OIG Report, redacted for public release, at 157-60. In addition, the Page FISA applications relied on information from reports prepared by

FBI CHS Christopher Steele (Steele), but the FBI did not advise OI or the Court of inconsistencies between sections of Steele's reporting that had been used in the applications and statements Steele's primary sub-source had made to the FBI. *Id.* at 241-43. Further, FBI did not advise OI or the Court of certain information about Steele's credibility, personal bias, and professional judgment. *Id.* at 234-35, 238-40, 257-58. And, the information about Steele's credibility that had been included in the FISA applications had not been provided to and approved by the handling agent. *Id.* at 261. Finally, the applications omitted statements Page made to a CHS that contradicted the FBI's theory of the case. *Id.* at xii, 170, 264. As the OIG stated, "the failure to update OI on all significant case developments relevant to the FISA applications led us to conclude that the agents and supervisors did not give appropriate attention or treatment to the facts that cut against probable cause, or reassess the information supporting probable cause as the investigation progressed." *Id.* at xiii.

(U) In light of the findings of the OIG Report, the Government has taken multiple steps, as detailed herein, to improve the FISA process to facilitate the accuracy and completeness of FISA applications. And, as further detailed below, OI has taken steps to ensure the continued proactive approach of its attorneys during the iterative FISA application drafting process.

(U) As background, given the *ex parte* nature of FISC proceedings, OI attorneys play a vital role in ensuring that FBI FISA applications submitted to the Court fully and accurately provide all relevant information in FBI's possession that is material to whether probable cause exists in a particular case. At a programmatic level, OI attorneys work extensively with the FBI in providing training and guidance to case agents and other participants in the FISA process on the requirements of the statute, the critical importance of duty of candor to the Court, and the need to ensure that all relevant information bearing on probable cause is fully and accurately

presented to the Court. With respect to specific cases, OI attorneys work closely with their FBI counterparts to elicit information necessary to ensure that the declarations submitted to the Court are accurate and complete and that the Government has satisfied its duty of candor to the Court.

(U) In addition to ongoing training opportunities for all OI attorneys and supervisors, upon entry into OI, all attorneys are provided with robust training regarding, among other topics, FISA, probable cause, accuracy, minimization, and compliance. NSD assesses that this training provides new attorneys with a solid understanding of the heightened duty of candor required in FISA practice. Furthermore, specific aspects of the duty of candor are regularly discussed in unit meetings<sup>10</sup> and supervisor meetings at OI, as well as in interactions between attorneys and their supervisors.

(U) In all cases, OI attorneys are expected to consistently provide correct and appropriate guidance to the FBI agents with whom they are working regarding the requirements of the Act as well as requirements imposed by Orders of this Court. This process begins at the time OI receives a request from the FBI, and NSD anticipates that the additional detail that will be provided to OI as a result of the FBI's implementation of its revised FISA Request Form will assist greatly in identifying relevant issues earlier in the drafting process. Indeed, the revised FISA Request Form that the FBI modified in collaboration with OI includes specific questions designed to capture information that was omitted in the Page applications. This form is the initial step in the iterative process between FBI agents and OI attorneys, and proper completion of the form should enable OI to have targeted discussions with FBI agents to elicit any additional information that is warranted.

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<sup>10</sup> (U) The Operations Section in OI is comprised of three units: the Counterterrorism Unit, the Counterintelligence Unit, and the Special Operations Unit.

(S//NF//LES) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(U) As noted above, the OIG Report identified information that had been omitted from the FISA applications that undermined the FBI's theory of the case. The revised FISA Request Form includes questions designed to address that issue and specifically directs the agent to "[d]escribe all material facts and circumstances regarding probable cause to believe the target is a foreign power or an agent of a foreign power," any "information that might raise doubts about the requested probable cause finding," and, for instances in which a target has been interviewed, "any information that is potentially inconsistent with any information in this request." [REDACTED]

[REDACTED] The revised FISA Request Form includes a question as to whether the agent intends to use information from an FBI CHS, and, if so, directs the agent to have the appropriate handling agent for the FBI CHS complete the CHS Checklist, described above. The revised FISA Request Form also includes questions designed to prompt the agent to provide information about the reliability of sources, assets, or contacts operated by other U.S. government agencies or foreign governments whose reporting is relied upon in a FISA application request, including whether the reporting individuals relied on sub-sources. In this regard, agents will be answering

questions about human source reliability in the FISA Request Form and in the new CHS Checklist, described above. As noted above, that checklist, which is to be completed by the CHS handler, is designed to be a starting point for the agents to identify for OI attorneys any issues flagged by the agents that may require follow-up by OI. This checklist will aid OI attorneys' proactive approach in eliciting all material information about CHS reliability, bias, and motivation from the FBI agent. In addition to revising the FISA Request Form and issuing the CHS Checklist, the FBI also revised the FISA Verification Form to specifically include questions designed to ensure accuracy and completeness in FISA applications and prevent the omissions identified by the OIG Report. For example, the form requires the agent to affirm that to the best of his/her knowledge, "OI has been apprised of all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the assessment that the target is a foreign power, or agent thereof"; for every CHS referenced in the FISA application, the agent has provided a copy of the CHS reliability statement and CHS-originated content contained in the FISA application to the CHS handler, the CHS Coordinator, or either individual's immediate supervisor, and received confirmation that the reliability statement and CHS-originated content included in the FISA application are complete and accurate; and for renewal applications, the agent has confirmed every factual assertion in the application that is from the prior application on the target and relayed any changes or clarifying facts to OI. FBI personnel involved in the FISA process were required to receive training on the revised FISA Request Form and Verification Form, as described in prior filings. In addition, OI participated in some of these training sessions at FBI field offices with NSCLB.



(U) Since the issuance of the OIG Report, OI attorneys have received specific training on the revised FISA Request Form. The training sessions occurred in January 2020 and were mandatory. The training will also be mandatory for new attorneys to OI who start after January 2020. The training that NSD provided to all OI attorneys and supervisors emphasized the need to use the revised FISA Request Form as a starting point. No request form or checklist can be perfectly designed to address every circumstance; however, NSD assesses that the revised FISA Request Form developed with FBI is well-designed to prompt FBI agents in the first instance to provide significant initial information, which, upon review and analysis by OI attorneys, is designed to prompt appropriate case specific follow-up. In short, DoJ assesses that this redesigned FISA Request Form and OI's case specific follow-up as part of the iterative process that flows from the answers to the questions on the form will aid in continuing to ensure that the Government fully and accurately provides the Court relevant information in its possession that is material to whether probable cause exists, including any information that may raise doubts about the requested probable cause finding. In addition, these training sessions that were held in January 2020 discussed the findings of the OIG Report and discussed and re-emphasized, in light of those findings, drafting techniques and practices that will ensure that information which undercuts, or is inconsistent with, the probable cause findings is accurately and completely presented to the Court.

(U) Further, the OIG Report identified multiple errors or omissions related to CHS information that had not been brought to the attention of OI. In connection with this training, and also in January 2020, OI provided its attorneys with a document containing numerous questions designed to elicit all relevant information regarding the reliability, bias, and motivation of a CHS whose information may be included in a FISA application. These questions were

compiled by a group of experienced attorneys within OI and NSD leadership and were designed to provide OI attorneys a single, useful set of questions that could be asked of the FBI CHS handler or applicable agent to ensure completeness and accuracy regarding CHS information included in FISA applications. This list of questions regarding CHS reliability was prepared in order to provide drafting OI attorneys with a comprehensive document identifying issues that might arise in connection with CHS reporting and is intended to prompt a more detailed discussion of both a CHS's reliability and the substance of the reporting presented in an application. With regard to CHS reporting, OI attorneys will continue to apply their judgment in deciding which of these questions will apply and warrant further inquiry in a particular case. This list of questions regarding CHS reliability will complement the FBI CHS Checklist described above. Together, these documents serve as useful tools to help ensure that all relevant information about the reliability of a CHS has been provided to OI and the Court.

(U) In addition to encouraging every OI attorney to carefully read the OIG Report, NSD has also been taking the opportunity presented by the report's findings to further educate its attorneys about the complexities that can arise during the FISA drafting process, including the levels of due diligence necessary to extract all relevant information from the FBI. Further, NSD has discussed issues that have been identified through FBI's interim corrective measures with OI attorneys responsible for handling FISA applications. This has provided a roadmap for topics and issues that require a particularly high level of inquiry to ensure the accuracy and completeness of FISA applications.

(U) NSD assesses that its attorneys have an appropriate understanding of the level of diligence that is required in order to draft FISA applications that fairly and completely represent the facts and circumstances of each particular case. Accordingly, rather than issuing formalized

checklists, as alluded to by the Court,<sup>11</sup> NSD assesses that the better approach is to continue providing training to OI attorneys on duty of candor and FISA accuracy and completeness. By taking into account the nature of the particular FISA request they are working on, such an approach will allow each individual OI attorney – with assistance from her or his supervisors – the flexibility to appropriately engage with the FBI to ensure that the FBI is providing to OI (and, in turn, FBI and OI are submitting to the Court) relevant information that is material to whether probable cause exists, including any information that calls into question probable cause, the credibility of sources, or the reasonableness of any FBI assessments. NSD assesses that the revised FISA Request Form; the guidance provided to OI attorneys on questions related to CHS reliability, motivation, and bias; and the mandatory OI training on these topics and the findings of the OIG Report will assist in reinforcing OI attorneys' continued diligence in drafting FISA applications. In short, DoJ attorneys who prepare and review FISA applications for submission to the Court endeavor to practice law to the highest ethical standards and in so doing recognize the heightened duty of candor imposed upon them due, in particular, to the *ex parte* nature of proceedings in the FISC. NSD believes that OI attorneys are skilled at analyzing information provided by the FBI and following up as necessary in order to better understand the completeness of such information.

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<sup>11</sup> (U) Every FISA application is different. The nature and scope of the information necessary to establish probable cause that a non-U.S. person is an agent of a foreign power under 50 U.S.C. § 1801(b)(1)(A) is very different from that necessary to establish probable cause that a U.S. person is an agent of a foreign power under 50 U.S.C. § 1801(b)(2)(E). Thus, it would be nearly impossible to craft a comprehensive checklist that would ensure that any particular FISA application is accurate, complete, and transparent. A drawback to creating formalized guidance is that it could be, in practice, too limiting (*i.e.*, no matter how robust the guidance, it could not possibly cover or account for every complication, development, and nuance in a particular case). Such formalized guidance could have the unintended consequence of actually undercutting the iterative process that usually occurs between OI and the FBI when drafting FISA applications. Specifically, the checklist may over time be viewed as being the exhaustive list of topics or areas that are open for OI questions, not a starting point.

**B. (U) Travel by OI Attorneys to FBI Field Offices To Assist in the Preparation of FISA Applications**

(U) In its March 5, 2020 Order, the Court stated that, “[c]onsideration should also be given to the potential benefits of DOJ attorney visits to field offices to meet with case agents and review investigative files themselves . . . .” March 5, 2020 Order at 12. The Court premised this recommendation on the proposition that increasing the interaction between OI attorneys and the FBI agents in the field conducting the relevant national security investigation during the drafting process would aid in further ensuring accuracy in FISA applications, as well as a shared understanding of the Government’s heightened duty of candor in *ex parte* proceedings before the Court. *Id.*

(U) As an initial matter, NSD assesses that the multiple corrective measures and steps taken by FBI and OI as detailed above and in prior filings on this topic will aid in ensuring accuracy and completeness in FISA applications. Of particular note, the revised FISA Request Form; the affirmations required in the revised FISA Verification Form; the new CHS Checklist; the guidance provided to OI attorneys on a list of questions designed to elicit information regarding CHS reliability, bias, and motivation; and the training provided to OI and FBI on the revised forms and findings of the OIG Report are steps that will aid in helping to facilitate accuracy and completeness in FISA applications. Collectively, these measures supplement the already robust interaction between OI attorneys and FBI case agents and enhance the accuracy and completeness of applications. As part of the FISA drafting process, OI attorneys work closely with the appropriate FBI field office or offices to identify specific facts that are relevant to the theory of the case, the target’s actions on behalf of a foreign power, use of targeted facilities, and other aspects of the application. OI also seeks to identify all potentially exculpatory statements or other information that undercuts probable cause. The various new

mechanisms currently being deployed to enhance accuracy and completeness, discussed in this and other submissions to this Court, will further solidify the effectiveness of this process.

(U) In addition, NSD believes that there would be potential benefits in OI attorneys conducting in-person visits at FBI field offices prior to the filing of a FISA application in certain circumstances. NSD assesses that once the current situation brought by the coronavirus outbreak is overcome, an in-person visit by an OI attorney at an FBI field office may be useful in the context of FISA initiations targeting U.S. persons, if practicable and feasible under the circumstances. Such a visit could be used by the FBI agent to provide a general briefing of the case or investigation to the OI attorney and for OI and the FBI to discuss expectations during the drafting process, including the types of information that must be provided to OI. Such a meeting could be used for OI and the FBI to discuss any potential legal issues presented by the FISA request and whether additional information may need to be gathered by the agent in support of the request. Of course, if travel by the OI attorney is not feasible or practicable in the circumstances, OI and the FBI would use existing means of communication, including secure video conferencing (SVTC). OI anticipates such travel would be distinct from, and serve a different purpose than, the completeness reviews that will occur following approval of an application and which are discussed in Section VII.C below.

(U) For the reasons detailed below, OI does not assess there should be a requirement in all cases for in-person field office visits by OI prior to a FISA application going to Court, as such a default requirement would have a detrimental impact on the Government's ability to respond to national security threats in a timely and effective manner. As a general proposition, OI believes that it is well positioned to effectively elicit, evaluate, and review information relevant to the probable cause determinations presented for the Court's decision without traveling to the field.

office submitting the request in all cases. The Government has extensive secure communications capability available. This capability allows OI attorneys and supervisors to review relevant classified and unclassified information, communicate directly with field offices and other government agencies, and exchange questions and drafts throughout evenings, weekends and holidays and regardless of the time zone in which the field office or relevant individual is located. Both NSD and FBI have invested heavily in this capability, and will continue to seek to improve and advance this capability, to ensure that critical operations, including the most time-sensitive national security investigations, are not encumbered by geographic separation.

(U) It is the particular nature of the FISA practice which has shaped DoJ's processes for handling FISA requests. First, because of the classified nature of the investigations and certain specific requirements of the statute (*e.g.*, certification by the FBI Director or other senior officials and approval by the Attorney General), the FISA practice since 1978 has largely been centered in the Washington, D.C. area, where DoJ Headquarters, NSD, FBI Headquarters, and the FISC are located. As a result, OI attorneys work remotely with counterparts in FBI Headquarters, pertinent FBI field offices (in some instances multiple field offices), and IC partners in preparing applications for submission to the Court. The Government seeks FISA orders in large part to prevent acts of terrorism or espionage from taking place. It is not unusual, for example, for OI attorneys to receive requests for emergency authorizations with only hours to evaluate the request, seek additional information, and obtain Attorney General approval. Even where no imminent threat to life or property is involved, the FBI may seek coverage within days of submitting the request because of a variety of factors, such as a terrorism target's involvement in an incipient plot, a counterintelligence target's imminent travel or meeting with a co-conspirator, or foreign adversaries' preliminary preparations for cyber-attacks against American

persons and entities. Thus, although there may not be an imminent threat triggering the emergency provisions of the FISA statute, a delay in the FBI's ability to conduct electronic surveillance or effectuate physical searches could result in the irreplaceable loss of opportunities to obtain critical foreign intelligence information. It is precisely for this reason that DoJ's historical practice has been to rely on properly trained FBI agents in the first instance to marshal the relevant information to be included in FISA declarations, to rely on the proactive approach, judgment and around-the-clock availability of OI attorneys, and to invest heavily in the infrastructure required to securely connect all relevant parties.<sup>12</sup>

(U) In addition, the very requirement of travel by necessity introduces an element of delay ill-suited for critical and often fast-moving national security investigations. It also places national security requirements at the mercy of external events, such as disruptions in air travel because of weather, accidents, acts of terrorism, global pandemics, or other unanticipated contingencies. Indeed, had a requirement for in-person field office visits prior to the initiation of a FISA coverage been in place in the aftermath of the terrorist attacks of September 11, 2001, when air travel was severely disrupted, the FBI's ability to obtain FISA coverages would have been stymied at the very moment when speed and agility were most needed. The current circumstances surrounding the coronavirus outbreak, which has impacted the Government's

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<sup>12</sup> (U) *See also* OIG Report, redacted for public release, at 129 ("NSD officials told us that the nature of FISA practice requires that OI rely on the FBI agents who are familiar with the investigation to provide accurate and complete information. Unlike federal prosecutors, OI attorneys are usually not involved in an investigation, or even aware of a case's existence, unless and until OI receives a request to initiate a FISA application. Once they receive a request, OI attorneys generally interact with field offices remotely and do not have broad access to FBI case files or sensitive source files. According to NSD officials, even if OI received broader access to FBI case files, the number of FISA requests that OI attorneys are responsible for handling makes it impracticable for an OI attorney to become intimately familiar with an FBI case file, particular[ly] one about which they have had little to no prior awareness. In addition, NSD told us that OI attorneys are not in the best position to sift through a voluminous FBI case file because they do not have the background knowledge and context to meaningfully assess all the information" (footnote omitted)).

ability to travel, as well as the availability of individual attorneys who may be impacted by school closures or illness, serve as another example of why a requirement of physical travel to field offices for all FISA applications as a default rule is impracticable.

(U) While the Court's March 5, 2020 Order directed DoJ to respond specifically regarding the viability of visits to field offices, elsewhere the Court considered the potential benefits of reviewing investigative files as one purpose of these visits. *Id.* at 12. NSD therefore takes this opportunity to respond to the possibility of such a file review prior to an application being submitted to the Court. Investigative case files can be voluminous, particularly in complex cases and in long-term investigations, which may make meaningful in-person review by a traveling attorney impractical. A thorough review of those case files by an NSD attorney could require not a day or two, but weeks. To cite just one example, in connection with one application, the FBI recently conducted a review of case files that contained approximately 20,000 serials, an effort which required the involvement of multiple FBI personnel across several field offices for approximately six weeks. Such an effort is not something that, realistically speaking, an OI attorney or even a team of attorneys could reasonable conduct in a timely fashion. The OI attorney, moreover, will not be as familiar with the context of the investigation as the FBI case agents who have been involved in those investigations for extensive periods of time (sometimes since the investigation's inception) and who are best-positioned to identify the significance of any given piece of information from the investigation.

(U) A thorough review of the case file by an OI attorney, in fact, would require not only a review of documents, but interviews of agents, analysts, source handlers, and other personnel, potentially across multiple field offices. The collective effect of such a requirement, thus, would be a dramatic expansion in the time needed to process FISA requests and to submit FISA



applications to the Court. This would make FISA a significantly less nimble and useful tool and, potentially, render it off-limits for all practical purposes.

(U) In light of the Court's March 5, 2020 Order, OI has further considered whether providing OI attorneys with greater remote access to the case file would yield benefits in addressing the findings of the OIG Report. Compared to current practice, OI believes that increasing such access would not necessarily lead to more complete and accurate applications. OI attorneys would continue to rely on the context that only the case agent and other FBI personnel can provide to determine whether any specific piece of information is relevant to a probable cause determination. More specifically, a "data dump" of potentially thousands of pages on an OI attorney who is not familiar with the context, the co-conspirators, the human sources, and all other aspects of the investigation will not necessarily result in more complete and accurate applications. Moreover, the OI attorney would have no knowledge of whatever information or documentation has not been placed in the file for one reason or another. In sum, guidance provided by OI to case agents when writing FISA applications and information and details elicited through questions by the drafting OI attorney must be combined with the FBI case agent's knowledge of her or his investigation to ensure that the information in FISA applications is accurate and complete. To be clear, OI attorneys will continue to apply their judgment regarding the details, context, and inferences with regard to specific facts that may be relevant to the probable cause determinations required by the elements of the Act and which are presented to the Court for decision. OI believes that in the majority of cases, the most efficient and, more importantly, effective way to ensure accuracy and completeness and fulfill the Government's duty of candor to the Court will be through receipt by OI of the fully completed revised FISA Request Form and CHS Checklist, targeted questions based on the facts contained

therein during a drafting process that occurs in Washington, D.C., and close and continuous communication between OI and FBI field and headquarters personnel during the verification process.

**VI. (U) FBI SPECIAL AGENTS LOCATED IN FIELD OFFICES SERVING AS THE FEDERAL OFFICER MAKING THE APPLICATION**

(U) In his Letter Brief, the Amicus set forth reasons for the Government and Court to consider an admittedly “major change in practice,” in the form of using FBI agents located in field offices rather than agents located at headquarters as the federal officials serving as the declarants for applications submitted to the Court. Amicus Letter Brief at 8. In considering this recommendation, the Court’s March 5, 2020 Order noted that agents located in the field and with direct knowledge of the investigation are in the best position to affirm the veracity of the proffered information.<sup>13</sup> March 5, 2020 Order at 12.

(U) The Government’s January 31, 2020 Response recognized the value of this recommendation and stated the Government’s intent to have agents located in the field serve as declarants for FISA applications. In that filing, the Government noted that it “still needs to resolve complex operational, legal, technical, and logistical issues.” January 31, 2020 Response at 9. These issues have included identifying and addressing legal obligations regarding subsequent criminal discovery and other issues created as a result of this change, as well as logistical and technological issues such as enabling the remote, secure testimony of agents

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<sup>13</sup> (U) The Government agrees that agents located in the field are typically in the best position to do so with regard to target-specific information contained in the FISA application. However, FBI Supervisory Special Agents located at FBI Headquarters often serve an important function in obtaining information from, or coordinating between FBI field offices or with the IC or foreign partners, among others. In addition, given their programmatic focus, such agents also are often better postured to understand how a particular target’s activities may advance a foreign power’s broad efforts to harm U.S. national security.

located in the field in cases in which the Court requires, or the Government requests, to hold a hearing. NSD has met with the FBI and representatives from other DoJ divisions, including the Criminal Division, Office of the Attorney General, and Office of the Deputy Attorney General, to discuss these and other legal and operational issues or consequences, as well as the training of FBI personnel that will need to occur to implement this.

(U//LES)

[REDACTED]

(U) The FBI similarly is considering how best to address additional changes that may be required by the transition. To do so, the FBI has formed a working group that is operating under the direction of the FBI Deputy Director. The group's mission is to coordinate across the Bureau's Headquarters and field offices to address the operational, legal, and policy aspect of the transition. This includes, for example, considering what role Headquarters program managers, who currently serve as declarants, will continue to have in the FISA process; how workflow processes will be managed and documented; what policies and forms may require revisions, including, for instance, the FISA Verification Form; and how best to address the logistical issues

presented by having field agents available to appear before the Court, either in person or remotely.

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**VII. (U) OI'S OVERSIGHT OF THE ACCURACY AND COMPLETENESS OF FISA APPLICATIONS SUBMITTED TO THE COURT**

**A. (U) Background**

(U) As noted in the Government's January 10, 2020 Response, NSD conducts oversight reviews at approximately 25-30 FBI field offices annually. During those reviews, NSD assesses compliance with Court-approved minimization and querying procedures, as well as the Court's orders. NSD also conducts accuracy reviews of a limited number of cases at FBI field offices where NSD conducts a review to ensure compliance with the FBI's accuracy procedures and to ensure the accuracy of the facts in the applicable FISA application. NSD's accuracy reviews are governed by the 2009 Memorandum.

(U) In his Letter Brief, the Amicus stated that the FBI and DoJ have "vast resources" and that "[t]he Court should require the government to conduct more accuracy reviews." Amicus Letter Brief at 12. In its March 5, 2020 Order, the Court indicated that the Government did not address the recommendation from the Amicus that the Government increase the number of accuracy reviews. March 5, 2020 Order at 16. NSD takes this opportunity to explain in detail NSD's existing accuracy review process, which is merely one aspect of the robust oversight NSD conducts of the IC's implementation of various FISA authorities. In addition, although OI's Oversight Section, which is responsible for conducting such oversight, has limited resources, in recognition of the increase in oversight and compliance work, NSD has recently shifted attorney positions to OI's Oversight Section and increased the attorney resources for the Oversight Section by 50%. In addition, OI has decided to expand its accuracy reviews, as detailed below. In addition to expanding the existing accuracy reviews, OI intends to conduct completeness reviews after an application is approved by the Court of a subset of FISA applications. The goal of these completeness reviews is to identify whether any material facts

were omitted from the FISA applications subject to review. A description of the planned completeness reviews is included below.

(U) OI's Oversight Section, which is responsible for oversight and compliance relating to the IC's implementation of FISA authorities, currently has approximately 20 attorneys and must rely on assistance from the Operations Section of OI to staff the existing accuracy reviews. Moreover, OI's Oversight Section conducts oversight of other FISA authorities, including at other IC agencies, and conducts oversight of FBI's implementation of its Attorney General's Guidelines for Domestic FBI Operations. The latter involves conducting onsite National Security Reviews at approximately 15 FBI field offices annually. In addition, OI's oversight and compliance responsibilities with respect to the IC's implementation of Section 702 consumes substantial OI resources.<sup>14</sup> Furthermore, the Oversight Section fulfils statutorily-required reporting obligations to Congress on behalf of the Department. These reports, which describe, in detail, the Government's use of FISA authorities and all identified compliance incidents, run hundreds of pages in the aggregate and most must be completed twice a year. As the Court is aware, the Oversight Section also investigates and reports to the Court all FISA compliance incidents involving IC agencies. Additionally, among other responsibilities, the Oversight Section prepares quarterly reports for the Court to inform the Court about certain Section 702 compliance incidents and provide updates on previously reported Section 702 compliance incidents. The Oversight Section also conducts onsite reviews at multiple IC agencies.

(U) As noted above, OI has committed to expanding its accuracy reviews to include an additional element and to conduct completeness reviews of some applications subsequent to their

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<sup>14</sup> (S//NF) [REDACTED]  
[REDACTED]  
[REDACTED]

approval by the Court. In the below section, the Government first provides a description of the accuracy review process that has been implemented by OI's Oversight Section and then discusses the additional element that will be added to those reviews. The next section discusses the methodology that has been developed thus far in consultation with the FBI in order to conduct completeness reviews. This initial scope and methodology balances the need to devote increased resources within OI to conducting such reviews in a manner that does not compromise either the Oversight Section's ability to monitor other aspects of the FBI's FISA process and oversee other authorities implemented by the IC, or the Government's overall ability to fully and lawfully utilize FISA in response to national security threats. OI's Oversight Section relies on the involvement and support, including travel throughout the United States, of attorneys primarily responsible for drafting applications to be submitted to the Court in counterterrorism, counterintelligence, and other national security cases. The Government must maintain its overall ability to continuously respond, often in response to exigent deadlines, to national security threats posed that may quickly expand in scope. The Government believes that the following methodology balances these requirements in a manner that also maximizes OI's ability to review the completeness of applications approved by the Court.

(U) In March 2020, NSD suspended its oversight reviews, including accuracy reviews, at FBI field offices due to the coronavirus outbreak. Within 30 days of the lifting of staffing, travel, and operational restrictions in response to the coronavirus outbreak, the Government will begin to conduct completeness reviews. However, at this time, we are unable to determine how frequently they will occur.

**B. (U) NSD's Existing Accuracy Review Process**

(U) Approximately two to three months prior to a scheduled oversight review, one of the attorneys who manages NSD's minimization review program provides to all supervisors in OI's Litigation, Operations, and Oversight sections a list of FISA authorizations that have been active within that particular field office during the designated review period. If a FISA application may be related to a pending or forthcoming request to use in litigation information acquired through that FISA and a scheduled review is timely, OI will typically use that scheduled oversight review to conduct an accuracy review of such FISA application.

(U) Apart from that litigation-related purpose, chiefs in the Counterterrorism, Counterintelligence, and Special Operations Units of the Operations Section will review the list of active FISAs. These OI supervisors will identify and prioritize applications for review based on a variety of factors. These factors include the posture of the FBI's national security investigation, the target's possible association with other targets of Court-authorized electronic surveillance, the sensitivity or complexity of the reporting or information on which the application is predicated, and other issues identified by OI attorneys during the drafting process. These reasons may relate either to the predication of the target as an agent of a foreign power or issues identified regarding targeted facilities. An application may be selected for an accuracy review during a scheduled oversight review due to a notice of material omission or misstatement having been previously filed with the Court. Applications may also be selected in order to confirm that nonmaterial accuracy issues of which OI is aware have been identified and disclosed completely, or to give OI attorneys the opportunity to speak directly with field personnel where OI believes there is a need to confirm that all relevant information has been disclosed during the drafting process. Because this review will also include a review of the



FBI's compliance with its SMPs for the review and retention of FISA-acquired information, cases may also be selected where a need is believed to exist to review the application of those procedures in a particular case. OI may conduct more than one accuracy review at a particular field office, including cases from one or more units, depending on the number of FISA applications submitted by the office and factors, such as cases in which errors have previously been reported or in which there is potential for use of FISA information in a criminal prosecution.

(S//NF) [REDACTED]  
[REDACTED]  
[REDACTED]

(U) Instead, OI's general practice is to review applications that are presently active, and for which renewed authority may subsequently be sought. NSD takes this approach as such applications involve matters actively before the Court. If OI selects an application for an accuracy review for which the authority has expired, OI still follows its obligations to the Court pursuant to Rule 13 of the Court's Rules of Procedure.

(U) Once an application is selected for an accuracy review, OI notifies the relevant FBI field office of the target name, FBI case number, and docket number, for the application. The OI attorney assigned to conduct the accuracy review subsequently reviews the application and numbers the particular facts that must be supported. The attorney then sends a copy of the marked-up docket to the case agent, copying the attorneys who coordinate the minimization review program, the FBI NSCLB review team lead, and the CDC (or her or his designee) for the

relevant field office.<sup>15</sup> The reviewing attorney also explains, in the transmittal e-mail, how the accuracy review process will work, and attaches a copy of the 2009 Memorandum. The reviewing attorney and the case agent often will discuss the application before the review, in order to answer any questions the case agent has about the accuracy review process, or the particular factual assertions that must be supported.

(U) As set out in the 2009 Memorandum, the following information is verified during NSD's accuracy reviews: a) facts establishing probable cause to believe that the target is a foreign power or an agent of a foreign power; b) the fact and manner of FBI's verification that the target uses or is about to use each targeted facility and that the property subject to search is or is about to be owned, used, possessed by, or in transit to or from the target; c) the basis for the asserted U.S. person status of the target(s) and the means of verification; and d) the factual accuracy of the related criminal matters section, such as types of criminal investigative techniques used (e.g., subpoenas) and dates of pertinent actions in the criminal case. 2009 Memorandum at 3. During these reviews, OI attorneys verify that every factual statement in the above categories of review is supported by a copy of the most authoritative document that exists

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<sup>15</sup> (U) The attorney generally will send the copy of the marked-up application approximately four weeks prior to the scheduled review. This timeline will vary depending on particular circumstances, including whether an application for renewed authority for a particular target is scheduled for Court between the time the case is selected for an accuracy review and the scheduled date for the review. In certain circumstances, the OI attorney may rely on a copy of the application that has been numbered by the case agent. This is generally done in situations where reorganizing the agent's accuracy sub-file to match the numbering done by the OI attorney would result in an undue burden on the case agent to reorganize their accuracy sub-file. Further, OI only relies on an agent's numbering system if he or she is able to use that system to correspond to all facts that were identified by the OI attorney through review of the application.

(U) OI attorneys who conduct accuracy reviews in connection with cases which may involve use of FISA in criminal proceedings follow this same process when conducting accuracy reviews for that purpose.

or, in enumerated exceptions, by an appropriate alternate document.<sup>16</sup> The type of document that is authoritative for a particular fact depends upon the category of information at issue and may include FBI-generated information, information received from other agencies, foreign governments or the IC, or information obtained through Court-authorized electronic surveillance and physical search of related targets. With regard specifically to human source reporting included in an application, the 2009 Memorandum requires that the accuracy sub-file include the reporting that is referenced in the application. The 2009 Memorandum further requires that, for purposes of an accuracy review, the FBI must provide the reviewing attorney with redacted documentation from the CHS sub-file substantiating all factual assertions regarding the source's reliability and background.<sup>17</sup>

(U) Consistent with Rule 13(a) of this Court's Rules of Procedure, the 2009 Memorandum requires that any material misstatement or omission of fact that is discovered during an NSD accuracy review be reported to the Court immediately. Further, the 2009

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<sup>16</sup> (U) If the accuracy sub-file is incomplete, NSD will request that the agent locate the required supporting documentation. The accuracy sub-file should contain the authoritative documentation which is used to determine the accuracy of the factual submissions contained in an application. During the OIG review of the FBI's Crossfire Hurricane investigation, for example, violations of the FBI's accuracy procedures were identified by comparing the statements contained in the verified application against the supporting document or documents located in the sub-accuracy file. Similarly, during reviews at FBI field offices conducted by CDCs or NSD, the accuracy of factual submissions to the Court are determined by comparing an application with the supporting documentation contained in this accuracy sub-file.

(U) Exceptions to the authoritative document requirement may arise when large amounts of information have been compiled or analyzed, when the FBI does not possess the original source documentation, or in rapidly developing or exigent circumstances. Under such circumstances, information must be memorialized in the accuracy sub-file through an electronic communication or other documentation prepared by a case agent.

<sup>17</sup> (U) If production of redacted documents from the CHS sub-file would be unduly burdensome, compromise the identity of the source, or otherwise violate the Attorney General Guidelines for CHSs or the FBI's CHS Policy Guide, FBI personnel may request that the attorney use a human source sub-file request form. Upon receipt of that form, the relevant FBI CHS coordinator will verify the accuracy of the source's reliability and background that was used in the application, and transmit the results of that review to the reviewing OI attorney.

Memorandum requires that the Government clarify or correct any non-material misstatement or omission that is identified through an NSD accuracy review in any subsequent application to the Court for renewed authority for that target. If the Government does not seek to renew authority for that target, the 2009 Memorandum requires that the Government should still notify the Court of any identified non-material misstatements or omissions, unless NSD management determines that they do not need to be reported. Similarly, if an NSD accuracy review reveals that a case agent lacks documentation to support a particular factual assertion, and cannot obtain that documentation, the Government is required to notify the Court. The 2009 Memorandum requires that if there is a lack of documentation, any undocumented material facts should be removed from the application, and notice of the lack of documentation should be brought to the Court's attention in any renewal application.

(U) For example, in 2018, NSD conducted 40 accuracy reviews at 29 FBI field offices. Those reviews revealed approximately 329 errors,<sup>18</sup> including errors such as date errors, mistakes in direct quotations that did not change the meaning of the quotations, facts that differed from the supporting documentation, facts where the source of the fact was misidentified, and FBI assessments that were reported as facts, as well as instances where the facts lacked documentation. NSD determined that none of these errors were material, as they would not tend to influence the Court's probable cause determination. Thus, NSD's accuracy reviews in 2018 did not reveal any material errors or omissions in the applications reviewed. Regardless, if the cases were renewed, the non-material errors and/or non-material unsupported facts were

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<sup>18</sup> (U) In determining whether an error identified in an accuracy review is material, NSD and FBI follow the requirements of the 2009 Memorandum, which provides that material facts are those facts relevant to the outcome of the probable cause determination. In addition, it is the practice of OI to consider a fact or omission material if the information is capable of influencing the Court's probable cause determination. *See* January 10, 2020 Response at 10; OIG Report, redacted for public release, at 230.

identified to the Court in the renewal in which they were corrected. If the case was not renewed, NSD recommended to the FBI that the FBI maintain a list of the corrections in the case file, in the event that the FBI would later seek to reinitiate Court-authorized electronic surveillance or physical search of those targets.

(U) In 2019, NSD conducted 30 accuracy reviews. NSD is still in the process of compiling the final results of those field office accuracy reviews. However, those reviews have revealed material errors or omissions that were identified through accuracy reviews of two applications in two FBI field offices. In one application, an accuracy review revealed two material errors.<sup>19</sup> In the other application, an accuracy review and subsequent follow-up discussions while preparing a renewal application revealed some material omissions.<sup>20</sup> In both of these cases, the Government reported these errors and omissions to the Court and assessed that, notwithstanding these errors or omissions, probable cause existed to find that the targets were acting as an agent of a foreign power.

(U) After an accuracy review is conducted, OI briefs relevant field office management and operational personnel (to include the case agent), the CDC, and NSCLB, on its findings from the review. If the review findings are unresolved at the conclusion of OI's time at the field office (for example, because personnel have not located documentation for certain facts), case personnel are provided with a list of the remaining items to be resolved. Once the review is closed, the reviewing OI attorney informs the OI attorney who drafted the FISA application, and the supervisor who reviewed that application, of the review findings and obtains their input. The

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<sup>19</sup> (S//NF) [REDACTED]

<sup>20</sup> (S//NF) [REDACTED]

OI attorney who conducted the review then sends an e-mail message summarizing the findings to the case agent, CDC, NSCLB review team lead, and the OI attorneys who coordinate NSD's minimization reviews. Once all other minimization-related issues are resolved for a particular review, OI summarizes its findings (including the accuracy review findings) in a report that is sent to the Assistant Director or Special Agent in Charge of the field office, the CDC for the field office, FBI's General Counsel, the Deputy General Counsel for NSCLB, and the Assistant Director for FBI's Office of Integrity and Compliance.

(U) NSD makes use of findings from individual accuracy reviews on an individual and programmatic basis. On an individual basis, results of each accuracy review are provided to both the drafting attorney and supervisor for that application, which allows for the attorney and the supervisor to address the issues identified for that particular target and to address similar issues in other cases that they subsequently work on. Supervisors also will address lessons learned from accuracy reviews at meetings of the operational units, allowing for wider dissemination of commonly found issues.

(U) In addition, attorneys joining OI undergo an extensive training program upon joining the office. Within their first month in OI, all attorneys receive training on accuracy. That training is informed by findings from NSD's accuracy reviews, highlighting common accuracy pitfalls (such as direct quotations, date errors, and other sourcing issues), and has been updated most recently as of January 2020, to account for lessons learned from the OIG Report. As discussed above, the results of the OIG Report, and of NSD's accuracy reviews, formed the basis for OI-wide mandatory training on accuracy and completeness in January 2020. Other training modules that new attorneys go through in the onboarding process, such as those on probable

cause, also reinforce issues of accuracy and completeness and are informed by the office's overall experience with accuracy issues.

(U) In addition to memorializing the results of individual accuracy reviews in reports that are sent to the relevant FBI offices, NSD has completed trends reports for minimization and accuracy reviews for calendar years 2013, 2014, and 2016-2017. NSD is working on a trends report for calendar years 2018-2019. These reports compiled the results of NSD's minimization and accuracy reviews for those years and have made recommendations based on those findings. These reports have been provided to FBI and have been shared internally at NSD. The individual accuracy review findings and the trends reports have allowed NSD to continue to apply lessons learned from its reviews on a prospective basis.

**C. (U) Anticipated Changes to OI's Accuracy Reviews**

(U) NSD assesses that its existing accuracy review process has resulted in identifying issues involving accuracy and completeness with respect to the content of FISA applications, allowing it to notify the Court as required. NSD, however, has reviewed its existing process and determined that it can make enhancements to its process that can increase the overall attention that all FBI personnel pay to the accuracy procedures, particularly as related to policies and procedures regarding the maintenance of accuracy sub-files. These enhancements will consist of assessing individual agent's compliance with the FBI's accuracy procedures at the time NSD conducts its accuracy reviews, as detailed below.

(U) In its March 5, 2020 Order, the Court stated that it "sees value in more comprehensive completeness reviews, and random selection of cases to be reviewed should increase that value." *Id.* at 16. NSD has determined that commencing with accuracy reviews starting after September 30, 2020, it will not inform the FBI field offices undergoing NSD

oversight reviews which applications will be subjected to accuracy reviews in advance of those reviews. This date is subject to current operational limitations the coronavirus outbreak is imposing. NSD would not apply this change in practice to accuracy reviews conducted in response to a request to use FISA information in a criminal proceeding, given the need to identify particular information from particular collections that is subject to use. NSD also would not apply this change in practice to completeness reviews (discussed further below), because of the pre-review coordination that is contemplated for those reviews.

(U) NSD will expect that the relevant FBI field offices have ready, upon NSD's arrival, the accuracy sub-files for the most recent applications for all FISAs seeking electronic surveillance or physical search. NSD will then, on its arrival, inform the FBI field office of the application(s) that will be subject to an accuracy review. If the case will also be subject to a completeness review, pre-coordination, as detailed below, will be necessary. The Government assesses that implementing this change in practice will encourage case agents in all FISA matters to be more vigilant about applying the accuracy procedures in their day-to-day work.

(U) In addition, although NSD's accuracy reviews allow NSD to assess individual compliance with the accuracy procedures, NSD's historical practice has been to allow agents to obtain documentation during a review that may be missing from the accuracy sub-file. NSD only assesses the errors or omissions identified once the agent has been given the opportunity to gather any additional required documentation. While the Government believes that, in order to appropriately assess the accuracy of an application's content, it should continue to allow agents to gather additional documentation during the accuracy review, it assesses that this historical practice has not allowed for the evaluation of how effective agents have been at complying with the requirement to maintain an accuracy sub-file, complete with all required documentation.



(U) As a result, NSD will tally and report as a part of its accuracy review process all facts for which any documentation, or appropriate documentation, was not a part of the accuracy sub-file at the time the accuracy review commenced. Agents will still be given the opportunity to gather such documentation during or after the accuracy review, so that NSD can assess if the application contains any inaccuracies with respect to the application's content. NSD will include these additional findings in its summaries of accuracy reviews (discussed herein) and also will include such findings in its biannual reports to the Court regarding its accuracy and completeness review findings. NSD assesses that by implementing this additional metric, it will encourage case agents to be more vigilant about adhering to the FBI's accuracy procedures.

**D. (U) Anticipated Completeness Reviews**

(U) NSD had been prepared to begin completeness reviews in March 2020, but was not able to start those reviews due to the coronavirus outbreak. In addition, NSD expects that the methodology for conducting such reviews will evolve over time as NSD gains experience in conducting such reviews. That experience, and staffing availability, will also inform how many completeness reviews can be conducted on an annual basis. NSD expects that its future completeness reviews, which would occur after an application is approved by the Court, may focus on a subset of U.S. person FISA applications. In general, the Government anticipates that such reviews would follow a phased process. For example, in advance of such a completeness review, NSD and FBI personnel (to include FBI attorney(s)<sup>21</sup> and field office case personnel) will review the relevant FISA application(s), and identify the following information:

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<sup>21</sup> (U) The term "FBI attorney" includes attorneys from NSCLB and/or the CDC's office for the Division undergoing an oversight review. Where possible, NSD will utilize two attorneys to conduct a completeness review and include an attorney who has worked on the applications or target that are the subject of the completeness review. NSD will coordinate with the FBI if remote access may be needed to

- The portions of the applications that will be reviewed for completeness;
- The case file(s) that should be reviewed, including whether portions of related applications will need to be examined;
- Any search term(s) that should be run in FBI databases or other searches needed to identify potentially relevant information in other case files; and
- Any FBI personnel, besides the case agent, who should be made available remotely or in person to discuss the investigation.

(U) FBI will also provide OI with serial lists and sub-file lists for all relevant case files as soon as practicable. In addition, the case agent will be present, or at least available, to answer any questions about the case file and provide any additional information reasonably necessary to conduct a proper completeness review. Any other personnel identified on the review list shall be present, or at least available, to answer questions about the investigation that are material to the issue of completeness of the FISA application(s).

(S//NF) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

permit a drafting attorney to participate in the review. Where the NSD attorney(s) who drafted the applications are not available to conduct the completeness review, the reviewing attorney should, if possible, include the drafting attorney throughout the process.

[REDACTED]

[REDACTED]

(U) All material omissions or misstatements identified from a completeness review will be reported to the FISC consistent with Rule 13(a) of the Court's Rules of Procedure, and non-material omissions or misstatements shall be addressed consistent with the 2009 Memorandum, or successor document.

(U) Consistent with existing practice (described above), NSD will provide an end of review summary of the completeness review to the agent, field office management, the CDC, and NSCLB. Post-review, NSD will draft a formal summary of the completeness review, which will include a description of all omissions or other identified errors. This summary will be documented by NSD through an email containing this information that is provided to the members of the review team. NSD will incorporate these findings in its biannual reporting to the Court in accordance with the March 5, 2020 Order. NSD will also incorporate these findings in its future trends reports.

**VIII. (U) UPDATE ON ENHANCING PROTOCOLS TO ENSURE THE ACCURACY OF APPLICATIONS SUBMITTED UNDER TITLE IV OR V OF FISA**

(U) In the January 10, 2020 Response, FBI Director Wray committed to enhancing the FBI's "protocols to ensure the accuracy of applications brought under Titles IV (relating to pen register and trap and trace surveillance) and V (relating to the acquisition of business records) of FISA." January 10, 2020 Response, Attachment A at 14. As explained in that filing, "[t]his effort will require changes to workflow processes, and the development of accuracy procedures and FISA accuracy forms that are specific to pen register and trap and trace and business records applications." *Id.* at 14-15. The FBI stated that it would update the Court on its progress by March 27, 2020. *Id.* at 15. The following is the FBI's update on these protocols.

(U) After the January 10, 2020 Response, the FBI prioritized other efforts designed to improve its Title I/III FISA processes; because those more intrusive techniques have more of an impact on Fourth Amendment protected activities. In particular, the FBI devoted significant time to training on the revised FISA Request and Verification Forms (where that training incorporated lessons learned from the Carter Page FISA applications), developed substantive training modules on FISA process rigor and a case study based on the OIG Report's findings, and completed (in coordination with OI) the CHS Checklist and developed training on that form. The FBI assesses that each of these efforts will have a meaningful impact on improving the accuracy and completeness of Title I (relating to electronic surveillance) and III (relating to physical search) applications, where those authorities are far more intrusive and sought with greater frequency than Title IV and V authorities. Moreover, the FBI also believes these developments in the Title I and III processes will naturally have a carryover effect to applications filed under Titles IV and V.

(U) Having completed the aforementioned efforts, NSCLB more recently formed a working group to begin developing the new protocols for Title IV and V applications. The group already has undertaken efforts to revise the pen register and trap and trace (PR/TT) and business records (BR) FISA request forms, with the goal of ensuring the accuracy of applications brought under Titles IV and V. The group also has drafted a proposed verification form for PR/TT and BR applications, which previously did not exist. NSCLB also has begun to consider the best approach for developing accuracy procedures for such applications.

(U) Once the working group completes drafts of the necessary protocols, forms, and procedures, the FBI General Counsel will need to approve them, after which they will be implemented through the FBI's formal policy collaboration process. The FBI's Internal Policy

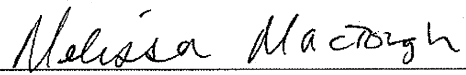
Office conducts this collaboration and approval process by circulating the proposed forms and policy changes to relevant stakeholders FBI-wide to solicit feedback and provide opportunity for comment. The FBI will also coordinate with OI on these forms and procedures. The FBI proposes to provide an update on further progress related to these efforts by May 22, 2020.

**IX. (U) CONCLUSION**

(U) The above includes the Government's response to the Court's March 5, 2020 Order that required the Government to provide certain information by March 27, 2020, as well as additional information required by the Government's January 10, 2020 Response. The Government will provide further responses to the Court's March 5, 2020 Order, according to the deadlines set forth therein, or as discussed in this filing. The FBI has reviewed this response and confirmed its accuracy.

Dated: 4/3/20

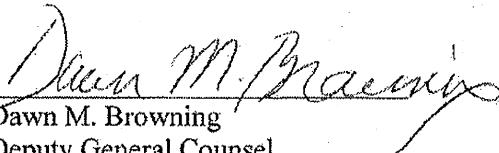
Respectfully submitted,

  
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Melissa MacTough  
Deputy Assistant Attorney General  
National Security Division  
U.S. Department of Justice

(U) VERIFICATION

(U) I declare under penalty of perjury that the foregoing response to the Court's March 5, 2020 Order and update to the Government's January 10, 2020 Response is true and correct with regard to the Federal Bureau of Investigation's policies and practices based upon my best information, knowledge, and belief.

(U) Executed pursuant to 28 U.S.C. § 1746 on April 3, 2020.

  
Dawn M. Browning  
Deputy General Counsel  
Federal Bureau of Investigation