

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
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LEAH FLYNN HALL
CLERK OF COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

(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 AND JANUARY 31,
2020 RESPONSES**

(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).¹ This submission also provides updates to aspects of the Government's January 10, 2020 and January 31, 2020, filings that were a response to the Court's December 17, 2019 Order (respectively, the January 10, 2020 Response and January 31, 2020 Response). Specifically, this submission provides the Government's report assessing the extent to which use of the Federal Bureau of Investigation's (FBI) revised Foreign Intelligence Surveillance Act (FISA or the Act) Request and Verification Forms has resulted in the inclusion in FISA applications of material information that might otherwise have been omitted. See March 5, 2020 Order, at 18. In addition, the Government takes the opportunity to update the Court on the Government's assessments of the efficacy of other related FISA reform measures, including

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

the Confidential Human Source (CHS) Checklist and FISA-related training the Government has instituted in response to the findings of the Office of the Inspector General's December 2019 report, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (the OIG Report). The Government does so in recognition of the fact that the revised forms cannot alone effect the changes necessary to the Government's FISA practice. Indeed, no request form or checklist can be perfectly designed to address every circumstance.

(U) The Government's efforts to address the findings of the OIG Report are extensive, multi-faceted, and ongoing. Therefore, while the Court ordered the Government to provide its assessment regarding the effectiveness of these forms, given the limited amount of time that the forms have been in use, this assessment cannot be viewed solely in the context of the forms themselves, but rather must be viewed in the broader context of the Government's efforts to address the concerns first raised in the OIG Report, as reflected in the interim measures, the revised and newly developed forms, the Government's training efforts, and how FBI and Office of Intelligence (OI) attorneys utilize the forms as a part of the iterative process of drafting FISA applications.

(U) As described in greater detail below, the Government assesses that in multiple instances, a combination of the revised FISA Request Form, revised FISA Verification Form, CHS Checklist, and training delivered by the FBI and OI have already resulted in the inclusion in FISA applications of material or relevant information that might otherwise have been omitted.

I. (U) BACKGROUND ON THE GOVERNMENT'S EFFORTS TO IMPLEMENT THE REVISED AND NEW FORMS

A. (U) The Interim Measures

(U) As discussed in prior filings, the FBI's efforts to address the issues identified in the OIG Report predate the implementation of the new forms. Specifically, the FBI put in place certain interim requirements, effective January 13, 2020, that were intended to assist in bridging the gap prior to the implementation of the new FISA Request and Verification Forms. *See* January 10, 2020 Response, Attachment A at 10-14. These measures included a review in each FISA application initiation and renewal of the case file by case agents and field supervisors to ensure that information bearing on the requested probable cause findings was included in initial or renewal applications. *Id.* at 12. This review was supplemented by an FBI attorney-assisted accuracy review of each FISA application that targeted a U.S. person. *Id.* at 13. These interim measures also supplemented existing requirements by obliging CHS handlers to confirm the accuracy of any representations regarding an FBI source's reporting that is included in an application. *Id.* at 12.

B. (U) The Revised FISA Request and FISA Verification Forms

(U) As described in the Government's April 3, 2020 response to the Court's March 5, 2020 Order (the April 3, 2020 Response), the revisions to the FISA Request Form used by FBI personnel to request initial or renewed Court authorization to conduct electronic surveillance or physical search were designed to expand upon, and specify particular categories of, information submitted to OI prior to the drafting process, with an emphasis on identifying information that may tend to undermine the theory of probable cause. April 3, 2020 Response at 23. This form is the initial step in the iterative process between agents and OI attorneys, and proper completion of the form should enable OI to have targeted discussions with agents to elicit any additional

information that is warranted. As described in the Government's April 3, 2020 Response, the revised FISA Request Form includes specific questions designed to capture information of the type that was omitted in the FISA applications at issue in the OIG Report. *Id.* at 22.

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(U) The FBI also revised the FISA Verification Form to specifically include attestations designed to ensure accuracy and completeness in FISA applications and prevent omissions of the type identified by the OIG Report. 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. FISA Verification Form at 2. The form also requires the agent to affirm that 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. *See id.* For renewal applications, the form requires the agent to affirm

that he/she 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. *See id.*

C. (U) The CHS Checklist

(U) FBI and OI developed a checklist to be completed by FBI personnel during the drafting process to ensure that all relevant information regarding a source's reliability, including the bias or motivation of the source, as well as the accuracy or basis of a source's reporting, is provided to OI. *See* April 3, 2020 Response at 5. As the Government noted in its January 10, 2020 Response, OI attorneys work closely with 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. The CHS Checklist reminds 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 to identify for OI attorneys any issues flagged by those agents in the checklist that may require follow-up. *See* April 3, 2020 Response at 5-6. 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. *See id.*

D. (U) FBI and OI Training Efforts

(U) The revised forms are not self-implementing – they depend on the effort of all OI and FBI personnel who are involved in a particular application, throughout the life of that application. As described in prior filings, the Government implemented new and revised training to assist FBI personnel and OI attorneys to understand the issues raised by the OIG Report and utilize the forms effectively.

1. (U) FBI Training Efforts

(U) FBI personnel involved in the FISA process are required to receive training on the revised FISA Request Form and FISA Verification Form, through a training course titled FISA Forms Training. As a sign of its importance, the FBI, in coordination with OI, delivered this training in person at FBI Headquarters and in the six field offices that sponsored the majority of FISA applications in 2018. January 31, 2020 Response at 10. Moreover, for the remainder of required participants, the FBI Deputy Director introduced the training, which was recorded and placed on the FBI's Virtual Academy training platform. *Id.* at 15.

(U) In addition to covering the changes in the request and verification forms, the FISA Forms Training highlights issues identified in the OIG Report, and explains how the revised forms are intended to address those issues. *See* January 10, 2020 Response, Attachment A at 6. For example, beyond highlighting the addition of the aforementioned question explicitly requiring disclosure of facts that arguably undermine probable cause, the training also discusses the new section of the request form that requires agents to provide information about a target's prior reporting status to the FBI, an OGA, or a foreign government. In doing so, the training notes the OIG Report's finding that the Government did not reveal to the Court that a FISA target discussed in the report had a prior reporting relationship with an OGA. Similarly, with respect to the verification form, the training emphasizes the new affirmation in the form, mentioned above, requiring agents to attest that, to the best of their 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." The training underscores this point by drawing on the OIG Report's findings that statements made by a CHS were in conflict with other evidence the FBI had submitted to the

Court. This training is mandatory for all FBI personnel involved in the FISA process, and agents are required to certify, when submitting a FISA request, that they have completed FISA Forms Training. *See id.* at 5-7; FISA Request Form, at 3. In conjunction with this training, the Government initiated implementation of the revised FISA Request Form and FISA Verification Form on February 14, 2020. *See* January 10, 2020 Response, Attachment A at 5, 7.

(U) The FBI's use of the CHS Checklist became required on March 27, 2020, following a brief period of training. *See* January 31, 2020 Response at 5; April 3, 2020 Response at 6. 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. *See* April 3, 2020 Response at 6. As a signal of the importance of the training, the FBI Deputy Director provided introductory remarks, which emphasized not only the significance of the CHS Checklist, but also, more generally, the duty the FBI has to be accurate and complete in all FISA applications. *See id.* at 6-7. The training also highlights lessons learned as a result of the OIG Report.² *See id.* at 7.

(U) In addition, the FBI developed a Case Study and revised FISA Process training for its personnel. Supplemental Response to the Court's Order Dated December 17, 2019; the Court's Scheduling Order Dated January 17, 2020; and the Court's Corrected Opinion and Order

² (U) FBI personnel who are required to take the training were instructed to do so by March 27, 2020, when the Government implemented the initial use of the CHS Checklist. *See* April 3, 2020 Response at 7 n.5. However, due to the coronavirus outbreak and the FBI's related reduction in staffing, the FBI expects that there were personnel who did not complete the classified training by the deadline. *See id.* 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. *See id.* Others were asked to take the training as soon as feasible, and by the deadline if possible. *See id.* Regardless, FBI executive management directed that, after release of the training, anyone who requests a FISA or handles a CHS whose information is used to support an application is required to take the training before a related application is submitted. As of on or about June 29, 2020, approximately 94% of required personnel have completed the training.

Dated March 5, 2020 (Apr. 30, 2020) (April 30, 2020 Response), Attachment A at 2. The Case Study training covers critical lessons learned from the OIG Report, and is applicable to all FBI operational employees regardless of division, program, or position. *Id.* The Case Study training focuses on renewed emphasis on rigor, objectivity, accountability and ownership, and providing reliable representations to courts. *Id.* at 2-3. The training centers on the primary issues identified in the OIG Report, including omissions from the FISA applications and CHS handling issues, and also explains what steps must be taken to avoid these mistakes. Personnel must successfully answer *all* questions in knowledge checks included in the course in order to successfully complete the course. *Id.* at 3.

(U) The FISA Process training is intended for all FBI personnel who work on national security matters, handle FISA applications, and/or may access FISA-acquired information, and is intended to promote accuracy and completeness in all FISA applications, by equipping personnel with knowledge of the historical purpose, rules and regulations, methods, and practices associated with the FISA process. *Id.* at 4. It is organized in four sections (request, drafting, verification, and review phases of the FISA process), and highlights throughout that rigor in the FISA process includes ensuring that OI and the Court are apprised of all information that could undermine a finding of probable cause, including information serialized in a case file or which is otherwise known to the FBI. *See id.* The training includes a final assessment that requires personnel to answer 80% of the questions correctly in order to receive credit.³ *See id.* at 6.

³ (U) The Case Study training and FISA Process training were made available to FBI personnel as of April 30, 2020, and personnel had until June 30, 2020 to complete the training. *See* April 30, 2020 Response, Attachment A at 3 6-7. Staffing reductions caused by the coronavirus outbreak could delay universal completion of these training modules by required personnel by this date. Personnel participating in the FISA process after June 30, 2020 are required to pass both courses prior to working on FISA applications. *See id.* at 3 n.1; 7 n.2. Separately, the Government will report to the Court not later than July 6, 2020, regarding the completion of these training modules. *See* March 5 Order, at 18.

2. (U) OI Training Efforts

(U) Upon entry into OI, all attorneys are provided with robust training regarding, among other topics, FISA, probable cause, accuracy, minimization, and compliance. *See* April 3, 2020 Response at 46. 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 and supervisor meetings at OI, as well as in interactions between attorneys and their supervisors. *See id.*

(U) Since the issuance of the OIG Report, OI attorneys and supervisors received specific, mandatory training on the revised FISA Request Form and FISA Verification Form in January 2020. *See id.* at 25. The training also is mandatory for new attorneys to OI who start after January 2020. *See id.* The training emphasizes the need to use the revised FISA Request Form as a starting point. *See id.* In addition, the training discusses the findings of the OIG Report, and discusses and re-emphasizes, in light of those findings, drafting techniques and practices to help ensure that information which undercuts, or is inconsistent with, the probable cause findings is accurately and completely presented to the Court.⁴ *See id.* In April 2020, OI supplemented its internal training for new attorneys regarding accuracy during the drafting process and OI's oversight function, including by explaining that OI's oversight reviews permit OI to identify and

⁴ (U) OI also provides training to FBI personnel as a part of its minimization reviews conducted at FBI field offices. *See, e.g.,* January 10, 2020 Response at 12. As noted in prior filings, due to the coronavirus outbreak, OI suspended these reviews in mid-March 2020. *See* April 3, 2020 Response at 39. Prior to that suspension, during 2020, OI provided updated training on FISA accuracy and completeness at the FBI's Phoenix, Atlanta, Mobile, and Louisville field offices. OI intends, once travel restrictions are lifted and it can resume its minimization reviews, to continue to deliver this training at FBI field offices. OI attorneys continue to maintain continuous contact with the case agents with whom they are working to prepare applications presented to the Court; however, the Government also anticipates that resumption of travel by OI to field offices throughout the country following coronavirus-related travel restrictions will yield additional information and insight regarding the utility of these revised forms. OI intends to incorporate future lessons learned from such oversight reviews into its ongoing internal training program.

assess trends to allow the office to ensure that appropriate corrective action can be taken, or training can be delivered, to forestall future issues. *See* Supplemental Response to the Court's Order Dated December 17, 2019 and Corrected Opinion and Order Dated March 5, 2020; and Partial Response to the Court's Order Dated April 3, 2020, at 5 (May 22, 2020). This supplemented training was also distributed to all OI attorneys on April 3, 2020. *See id.*

E. (U) The Roles of FBI and OI Attorneys

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II. (U) THE GOVERNMENT'S ASSESSMENT OF THE EFFECTIVENESS OF THE NEW FORMS

(U) Recognizing that no request form or checklist can be perfectly designed to address every circumstance, and given the Government's limited use of the new forms as of the date of this submission (as mentioned above, the Government began use of the revised FISA Request and Verification Forms on February 14, 2020, and the CHS Checklist on March 27, 2020), the Government assesses that use of the forms, in concert with FBI and OI training efforts and collaboration between OI, NSCLB, and FBI field and headquarters agents, has contributed to the identification of information bearing on the Court's probable cause findings being brought to the Court's attention. The Government fully expects that continued collaboration between OI and the FBI toward improving rigor in the FISA process and ongoing evaluation of the effectiveness of the revised forms will continue to provide real time, useful information regarding any additional changes to the process and/or forms that may be warranted.

A. (U) OI's Assessment of the New Forms

(U) OI assesses that the forms, and the additional efforts to enhance the accuracy and completeness of information included in FISA applications, have resulted in the inclusion in FISA applications of material information that might otherwise have been omitted. Some examples are summarized below.

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(U) The information that was disclosed in these dockets was the result of the iterative process between OI and the FBI in preparing these applications.⁸ OI assesses, based on these examples, that the forms, and the additional efforts to enhance the accuracy and completeness of information included in FISA applications, have resulted in the inclusion in FISA applications of information that might otherwise have been omitted. OI intends to continue to monitor the

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effectiveness of all of the remedial measures, and will continue to work with the FBI to improve the forms, as may be necessary.

B. (U) FBI's Assessment of the New Forms

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(U) The FBI believes the aforementioned information demonstrates that the revised forms, in conjunction with training and other reform measures instituted in connection with the FISA process, are having the desired effect of enhancing accuracy and completeness.

III. (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 June 30, 2020, as well as additional information required by the Government's January 10, 2020 Response and January 31, 2020 Response. The Government will provide further responses to the Court's March 5, 2020 Order, according to the deadlines set forth therein. The FBI has reviewed this response and confirmed its accuracy as pertaining to the FBI's information.

Dated: 6/30/20

Respectfully submitted,



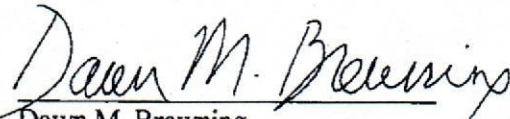
Gabriel Sanz-Rexach
Chief, Operations Section, Office of
Intelligence
National Security Division
U.S. Department of Justice

⁹ (S//NF) [REDACTED]

(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 and January 31, 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 June 30, 2020.



Dawn M. Browning
Deputy General Counsel
Federal Bureau of Investigation