

DOJ SET TO SHUCK AND JIVE JUDGE WHITE IN EFF FOIA CASE

Just two days ago we were discussing the status of *EFF v. ODNI*, the FOIA case in NDCA where disclosure is being sought of documents evidencing the telecom lobbying on immunity for corporate participation in Bush's surveillance program. As you will recall, Judge White had denied the various stay attempts put forth by the government (and one they had not even made yet) and ordered disclosure on or before 4 pm PST today, October 16.

Josh Gerstein at Politico, who has done an excellent job following this case, has some news of what the government plans to do:

The Obama administration may be on the verge of a major concession in a long-running legal battle over records about so-called telecom immunity.

An email obtained by POLITICO shows that the Obama Administration is preparing for the possible release of some details of the Bush Administration's lobbying for legislation giving telecommunications companies immunity from lawsuits over their involvement in warrantless domestic wiretapping.

But even if they do release those details, the administration may press on with a legal battle to keep secret the identities of the companies involved in the program.

And what will the government be oh so graciously disclosing? A lot of stuff that, while responsive to the FOIA request, is certainly not responsive to the core of the request.

"The Executive Branch will be providing to the Electronic Frontier Foundation in

its FOIA suit a large number of e-mail communications between House staffers and Executive branch employees regarding the legislation involving immunity to telecommunications companies enacted as part of the [revised Foreign Intelligence Surveillance Act] legislation last year,” Nathan wrote.

In short, they are not going to disclose the identities of the telecom companies and their employees which sought immunity. And, predictably, the government relies on the well worn claptrap that:

Disclosure of such information would assist our adversaries in drawing inferences about whether certain telecommunications companies may or may not have assisted the government in intelligence-gathering activities,

But the court has already expressed its position on this argument:

There is a strong public interest in disclosure of the identity of the individuals who contacted the government in an effort to expand the government’s authority to gather intelligence and to protect telecommunications companies from legal liability for their role in governmental surveillance activity.

Given Judge White’s consistent findings and statements in the case to date, it is hard to believe he is going to be particularly impressed with the continued recalcitrance. Gerstein notes that “However, the move could also be a litigating tactic...”. Josh clearly has a gift for the understatement.

Perhaps more interesting than the predictable partial disclosure shuck and jive by the government is the new information on their procedural tactics taken since Wednesday that

Gerstein reports:

Justice Department spokesmen did not respond to a request for comment, but the government did file a motion late Thursday asking the U.S. Court of Appeals for the 9th Circuit to stay a lower judge's order that the materials be turned over by Friday afternoon.

Kagan has authorized an appeal to protect executive branch deliberations and to shield the identities of the telecom companies which sought immunity, as well as their employees.

This is pretty notable information. It implies that Kagan and the government have made the determination to appeal (gee, I guess they didn't need that 60 days to make up their minds after all eh). Secondly, it looks like the government has accepted the legitimacy of White's order denying the government's motion for stay before they formally raised it. They could not go back to the 9th Circuit without a denial of stay ruling by White, so rather than fight him on the propriety of his unusual order, it looks as if they are accepting it at face value and heading to the 9th.

It will be interesting to see how Judge White reacts to this ploy; it is a fair bet that he will have some sharp words aimed at the government.