

WHY IS DOJ HIDING THREE PHONE DRAGNET ORDERS IN PLAIN SIGHT?

The ACLU and EFF FOIAs for Section 215 documents are drawing to a head. Later this week, EFF will have a court hearing in their suit. And last Friday, the government renewed its bid for summary judgment in the ACLU case.

Both suits pivot on whether the government's past withholdings on Section 215 were in good faith. Both NGOs are arguing they weren't, and therefore the government's current claims – that none of the remaining information may be released – cannot be treated in good faith. (Indeed, the government likely released the previously sealed NSA declaration to substantiate its claim that it had to treat all documents tying NSA to the phone dragnet with a Glomar because of the way NSA and DOJ respectively redact classification mark ... or something like that.)

But the government insists it is operating in good faith.

Instead, the ACLU speculates, despite the government's declarations to the contrary, that there must be some non-exempt information contained in these documents that could be segregated and released. In an attempt to avoid well-established law requiring courts to defer to the government's declarations, especially in the area of national security, the ACLU accuses the government of bad faith and baldly asserts that the government's past assertions regarding segregability—made before the government's discretionary declassification of substantial amounts of information regarding its activities

pursuant to Section 215– “strip the government’s present justifications of the deference due to them in ordinary FOIA cases.” ACLU Br. at 25. The ACLU’s allegations are utterly unfounded. For the reasons set forth below, the government’s justifications for withholding the remaining documents are “logical and plausible,”

EFF and ACLU have focused closely on a August 20, 2008 FISC order describing a method to conduct queries; I have argued it probably describes how NSA makes correlations to track correlations.

The government is refusing to identify 3 orders it has already identified

But – unless I am badly mistaken, or unless the government mistakenly believes it has turned over some of these orders, which is possible! – I think there are three other documents being withheld (ones the government hasn’t even formally disclosed to EFF, even while pretending they’ve disclosed everything to EFF) that raise questions about the government’s good faith even more readily: the three remaining phone dragnet Primary Orders from 2009. All three have been publicly identified, yet the government is pretending they haven’t been. They are:

BR 09-09, issued on July 8, 2009. Not only was this Primary Order identified in paragraph 3 of the next Primary Order, but it was discussed extensively in the government’s filing accompanying the end-to-end report. In addition, the non-approval of one providers’ metadata (I increasingly suspect Sprint is the provider) for that period is reflected in paragraph 1(a) of that next Primary Order.

BR 09-15, issued on October 30, 2009. The docket number and date are both identified on the first page of

this supplemental order.

BR 09-19, issued on December 16, 2009.

It is mentioned in paragraph 3 of the next Primary Order. The docket number and the date are also referred to in the documents pertaining to Sprint's challenge recently released. (See paragraph 1 and paragraph 5 for the date.)

Thus, the existence of all three Primary Orders has been declassified, even while the government maintains it can't identify them in the context of the FOIAs where they've already been declassified.

The government has segregated a great deal of the content of BR 09-09

The government's withholding of BR 09-09 is particularly ridiculous, given how extensively the end-to-end motion details it. From that document, we learn:

- Pages 5-7 approve a new group for querying. (see footnote 2)
- Pages 9-10 require those accessing the dragnet be briefed on minimization procedures tied to the dragnet (see PDF 22); this is likely the language that appears in paragraph G of the subsequent order. This specifically includes technical personnel. (see PDF 49)
- Pages 10-11 require weekly reporting on disseminations. (see PDF 23) This is likely the information that appears

in paragraph H in the subsequent order.

- Page 12 affirmatively authorizes the data integrity search to find “certain non user specific numbers and [redacted] identifiers for purposes of metadata reduction and management” (see footnote 19 and PDF 55)
- Page 8 and 13-14 lay out new oversight roles, especially for DOJ’s National Security Division (see PDF 22); these are likely the requirements laid out in paragraphs M through R in subsequent orders. Those same pages also require DOJ to share the details of NSD’s meeting with NSA in new FISC applications. (see PDF 23)
- BR 09-09 included the same reporting requirements as laid out in BR 09-01 and BR 09-06 (see PDF 5)
- Pages 16 -17 also included these new reporting requirements: (see PDFs 6 and 29 – 30)
 - a full explanation of why the government has permitted dissemination outside NSA of U.S. person information in violation of the

Court's Orders in this matter;

- a full explanation of the extent to which NSA has acquired call detail records of foreign-to-foreign communications from [redacted] pursuant to orders of the FISC, and whether the NSA's storage, handling, and dissemination of information in those records, or derived therefrom, complied with the Court's orders; and
- either (i) a certification that any overproduced information, as described in footnote 11 of the government's application [i.e. credit card information), has been destroyed, and that any such information acquired pursuant to this Order is being destroyed upon recognition; or (ii) a full explanation as to why it is not possible or otherwise feasible to destroy such

information.

- BR 09-09 specifically mentioned that NSA had generally been disseminating BR FISA data according to USSID 18 and not the more restrictive dissemination provisions of the Court's Orders. (see footnote 12)
- BF 09-09 approved Chief, Information Sharing Services, the Senior Operations Officer, the Signals Intelligence Directorate (So) Director, the Deputy Director of NSA, and the Director of NSA to authorize US person disseminations.
(see footnote 22 and PDF 28)

Significant parts of at least 13 pages of the Primary Order (the next Primary Order is 19 pages long) have already been deemed segregable and released. Yet the government now appears to be arguing, while claiming it is operating in good faith, that none of these items would be segregable if released with the order itself!

Wildarse speculation about why the government is withholding these orders

Which raises the question of why. Why did the government withhold these 3 orders, alone among all the known regular Primary Orders from the period of EFF and ACLU's FOIAs? (See this page for a summary of the known orders and the changes implemented in each.)

The reason may not be the same for all three orders. BR 09-09 deals with two sensitive issues – the purging of credit card information and tech personnel access – that seem to have been

resolved with that order (at least until the credit card problems returned in March 2011).

But there are two things that all three orders might have in common.

First, BR 09-09 deals closely with dissemination problems – the ability of CIA and FBI to access NSA results directly, and the unfettered sharing of information within NSA. BR 09-15 lays out new dissemination rules, with the supplement in November showing NSA to still be in violation. So it's likely all 3 orders deal with dissemination violations (and therefore with poison fruit of inappropriate dissemination that may still be in the legal system), and that the government is hiding one of the more significant aspects of the dragnet violations by withholding those orders.

I also think it's possible the later two (potentially all three, but more likely the later two) orders combine the phone and Internet dragnets. That's largely because of timing: A June 22, 2009 order – the first one to deal with the dissemination problems formally addressed in BR 09-09 – dealt with both dragnets. There is evidence the Internet dragnet data got shut down (or severely restricted) on October 30, 2009, the date of BR 09-15. And according to the 2010 John Bates Internet dragnet opinion, NSA applied to restart the dragnet in late 2009 (so around the time of BR 09-19). So I think it possible the later orders, especially, deal with both programs, thereby revealing details about the legal problems with PRTT the government would like to keep suppressed. (Note, if BR 09-15 and BR 09-19 are being withheld because they shut down Internet production, it would mean all three orders shut down some production, as BR 09-09 shut down one provider's telephone production.)

Another possibility has to do with the co-mingling of EO 12333 and Section 215 data. These three orders all deal with the fact that providers (at least Verizon, but potentially the other two as well) had included foreign-to-

foreign phone records along with the production of their domestic ones. That's the reason production from one provider got shut down in BR 09-09. And immediately after the other withheld records, the Primary Orders always included a footnote on what to do with E.O. 12333 data turned over pursuant to BR FISA orders (see footnote 7 and footnote 10 for examples). Also, starting in March 2009, the Orders all contain language specifically addressing Verizon. So we know the FISC was struggling to come up with a solution for the fact that NSA had co-mingled data obtainable under E.O. 12333 and data the telecoms received PATRIOT Act orders from. (I suspect this is why Sprint insisted on legal cover, ultimately demanding the legal authorization of the program with the December order.) So it may be that all these orders reveal too much about the E.O. 12333 dragnet – and potential additional violations – to be released.

Whatever the reason, there is already so much data in the public domain, especially on BR 09-09, it's hard to believe withholding it is entirely good faith.