

# DOJ'S IDEA OF AN APPROPRIATE PASSIVE-AGGRESSIVE RESPONSE TO ACCUSATIONS THEY DESTROYED EVIDENCE: DESTROY MORE EVIDENCE

On Friday May 30, as I reported, EFF filed a motion accusing the government of destroying evidence it was obligated to keep in EFF's NSA lawsuits.

Later that day, EFF Legal Director Cindy Cohn emailed her contact at DOJ, Marcia (Marcy) Berman, saying,

Jewel plaintiffs are okay with [a deadline extension] if the government can assure us that no additional information will be destroyed in the meantime.

As you can see, we went ahead and filed [the motion on spoliation].

The following Monday, after Cohn asked Berman, "Does that mean no additional information will be destroyed in the meantime?" Berman answered,

What it means is that we have already explained in our opening brief that we are in compliance with our preservation obligations and do not feel that we should have to make any further assurances or undertakings to accommodate plaintiffs' need for additional time.

Later that day, Cohn reminded Berman that the Temporary Restraining Order covering destruction

of information “including but not limited to ... telephone metadata” remained in place. Cohn continued,

You appear to be saying that routine destruction of post-FISC material is continuing to occur regardless of the TR0; please confirm whether this is correct.

Berman responded, obliquely, yes.

The Court is presently considering whether the Government must preserve material obtained under Section 702 of FISA in the context of the Jewel/Shubert litigation. In the meantime, pending resolution of the preservation issues in this case, we have been examining with our clients how to address the preservation of data acquired under the Section 702 program in light of FISC imposed data retention limits (even though we disagree that the program is at issue in Jewel and Shubert).

Hoffman wrote a bunch more about “technical” “classified” blah blah blah, which I’ll return to, because I think it’s probably significant.

But for now, EFF filed for an emergency order to enforce the TR0 issued back in March. Judge Jeffrey White has demanded a response from the government by noon tomorrow (they had wanted a week).

I can’t think of a more relevant NSA practice to a suit that relies significantly on Mark Klein’s whistle-blowing about the room where AT&T diverted and copied large amounts of telecom traffic than upstream 702 collection, in which AT&T and other telecom providers divert and copy large amounts of telecom traffic. While I’m not certain this evidence pertains to upstream – and not PRISM – EFF suggests that is included.

In communications with the government

this week, plaintiffs learned to their surprise that the government is continuing to destroy evidence relating to the mass interception of Internet communications it is conducting under section 702 of the Foreign Intelligence Surveillance Act. This would include evidence relating to its use of “splitters” to conduct bulk interceptions of the content of Internet communications from the Internet “backbone” network of AT&T, as described in multiple FISC opinions and in the evidence of Mark Klein and J. Scott Marcus, ECF Nos. 84, 85, 89, 174 at Ex. 1

If it is, then it seems all the more damning, given that upstream collection is the practice that most obviously violates the ban on wiretapping Americans in the US.

EFF filed a motion accusing the government of illegally destroying evidence. And the government’s response was to destroy more evidence.

Update: The government has asked for an emergency stay of the Court’s June 5 order (which is actually a March 10 order, but the government doesn’t admit that) because NSA says so.

Undersigned counsel have been advised by the National Security Agency that compliance with the June 5, 2014 Order would cause severe operational consequences for the National Security Agency (NSA’s) national security mission, including the possible suspension of the Section 702 program and potential loss of access to lawfully collected signals intelligence information on foreign intelligence targets that is vital to NSA’s foreign intelligence mission

There's something funky here – perhaps that some of this actually belongs to GCHQ? I dunno – which is leading the government to be so obstinate. Let's hope we learn what it is.

Update: And EFF objected to DOJ's request for a stay, pointing out what I did: that what they're really asking for is blessing for ignoring the March 10 order.