

# **TO HIDE WHY ITS STATE SECRETS INVOCATION IS BOGUS, GOVERNMENT DECLARES PUBLIC INFORMATION TOP SECRET**

My profuse apologies to Preston Burton.

Back before it was clear why FISA Judge Michael Mosman appointed him to serve as amicus addressing the issue of retention of phone dragnet data, I suggested it might have been an effort to undermine EFF's lawsuit against the government. After all, EFF plaintiff (in the First Unitarian Church suit challenging the dragnet) CAIR surely has standing to not only sue, but sue because of the way the dragnet chaining process subjected a bunch of CAIR's associates to further NSA analysis solely because of their First Amendment protected affiliation with CAIR. But if the government gets to destroy all the dragnet data without first admitting that fact, then it will be hard to show how CAIR got injured.

In Burton's reply to the government's response to his initial brief on this question, he did the opposite, pressuring the government to find some way to accord the EFF plaintiffs standing. That led – we as we saw last week – to an order from Mosman for briefing, due on January 8, on whether there's a way to get rid of the data. That may not end up helping EFF, but it sure has put the government in a bad mood.

Burton spends just a few lines of his reply addressing the foremost question before him: whether the government could keep data past November 28. His points, however, are telling, in that he doesn't seem convinced the government actually has destroyed the data aged off in the past.

[The government response] fails to provide the Court with a clear answer as to whether and how collections that should have been destroyed actually were destroyed.

That's interesting given that, after the NSA "destroyed" the Internet dragnet data, NSA's own Inspector General didn't seem entirely convinced it had gotten destroyed.

As to the EFF data, Burton responds to the government's snippy response, which I laid out here, by first calling out the government's non-response to his own questions. Burton notes that he asked why the government hasn't come to some stipulation that would permit it to destroy the data, after which the government "reinvent[ed] the questions" to pertain to the identity of providers, its pending state secrets invocation, and the potential one of the suits would become a class action. Claiming his "inquiries were not quite the calamities the government conjures to avoid answering the questions," Burton then invited the court to consider whether the government is being obstinate.

The Court can consider the government's litigation tactics and whether it is largely responsible for the duration of the preservation orders in the California cases in deciding whether to permit it in *this* Docket, not the other cases, to continue to retain millions of records. The government's unwillingness to address its various litigation positions, some of which appear to have contributed to the prolonged hold, speaks volumes.

Then Burton focuses specifically on the government's invocation of state secrets (which it has done in *Jewel* but not yet in *First Unitarian*).

For example, its resort to incanting the

state secrets privilege seems rather energetic given the robust public discussion of this program, including the [three lines redacted]. The government also states, without more, that limiting the records it holds to those belonging to plaintiff is “entirely unworkable.” This Court may fairly probe whether that conclusory declaration is sufficient or meaningful. It would perhaps be expensive and time-consuming to segregate the data or otherwise pare the archive but that is a choice the government may be required to make in deciding to continue to burrow in on its standing and procedural challenges.

The entire paragraph was stamped TS//SI/OC/NF, suggesting that the government maintains the redacted information – which contextually must be public!! – is either Top Secret or Originator Controlled.

In other words, when Burton pointed out that the government was claiming state secrets rather more “energetically” than public disclosures merited, they claimed the public reason why that was the case was Top Secret.

I’m half wondering whether the government was even going to release this filing. Remember, when the other three filings on this issue got released, I predicted there was another, missing reply.

In addition to Mosman’s opinion, the FISC released amicus Preston Burton’s memo and the government’s response on December 2; I suspect there may be a Burton reply they have not released.

[snip]

Which leads me to the detail that makes me suspect there’s a second Burton filing the government hasn’t released (I’ve asked NSD but gotten no answer,

and in his opinion Mosman says only “Mr. Burton and the government submitted briefs addressing this question,” leaving open the possibility Burton submitted two): After finding no reason to hold a hearing on the issue of restarting the dragnet during the summer, Mosman did hold a hearing here (though it’s not clear whether Burton attended or not). At the hearing, Mosman ordered the government to try to come up with a way to destroy the dragnets, which it will do by January 8.

Six days later (or sometime in the last six days), voila, the missing reply, showing Burton expressing clear doubt about government’s destruction plans not to mention their invocation of state secrets, but with the already released public explanation for why he had that doubt hidden under an equally dubious invocation of secrecy.

It sure seems like the government is working awfully hard to hide the fact that its state secrets aren’t actually all that secret.