

FBI DECIDED FOUR MONTHS AFTER THEY ARRESTED MALWARETECH THAT HE TOLD THEM HE HADN'T BEEN DRINKING BEFORE THE ARREST

Marcus Hutchins' (AKA MalwareTech) defense team has replied to the government's response to their motion to compel discovery; they are seeking evidence pertaining to his arrest and about the people (his co-defendant, Tran, and an informant, "Randy") on whom Hutchins was incidentally collected. Here's my post on the original defense motion, and the one on the government response showing that this case is all about incidental collection.

FBI's discussions about what to do about a drunken MalwareTech

As I laid out, the defense claims that Hutchins was intoxicated and exhausted when he was arrested awaiting a transatlantic flight after a week of partying at hacker conferences in Las Vegas. The government claims they asked Hutchins if he had been drinking, and (they claim) he said no.

This latest filing shows that the FBI was concerned about just that. FBI Agents had an email discussion the day Hutchins was arrested discussing what they should do if he was drinking.

That production included one e-mail, dated August 2, 2017 (the day of Mr. Hutchins' arrest), discussing what the

agents should do if Mr. Hutchins started drinking at the airport (the plan: “pull him out of terminal”). This shows the agents’ contemporaneous awareness of, and concern about, the possibility of Mr. Hutchins being impaired. There surely might be other communications, including e-mails and text messages on agents’ phones, touching on the voluntariness of Mr. Hutchins’ supposed proper waiver of his Miranda rights, as well as the voluntariness of the resulting statement.

The government claims that the Agents asked Hutchins if he had been drinking as part of their interview (only part of which was recorded). Except they didn’t memorialize that contemporaneously. They wrote it up into a 302 “over four months after the arrest” – so sometime after December 2.

The government makes much of the fact that Mr. Hutchins was asked by FBI agents if he had been drinking. But even if the FBI 302 (which was written over four months after the arrest) is accurate, it does not mention exhaustion or other possible forms of intoxication (it only mentions drinking).

Consider how this looks, given another detail from the defense reply: that the FBI didn’t turn over that 302 (or the email showing the FBI was concerned that Hutchins might be drinking) until the day they submitted their response on January 19.

The government’s response neglects to mention that these records that the government references as being disclosed “recently” were produced to the defense earlier on the same day the response was filed.

Incorporating the details provided in this

status report produces this timeline:

November 21: Defense and prosecution lawyers try to resolve these issues *including questions about whether Hutchins was intoxicated*, and conclude they weren't going to be able to resolve them.

[C]ounsel for the government and counsel for Mr. Hutchins participated in a conference call in an attempt to resolve open issues related those discovery requests. Despite our best efforts, we have been unable to resolve those issues.

After December 2: FBI creates 302 memorializing claim that they asked Hutchins whether he had been drinking.

December 7: Hutchins' lawyers tell the government they're going to file a motion compelling this discovery.

[C]ounsel for Mr. Hutchins informed the government they intend to file a motion for an order that compels the government to produce certain materials to the defense.

January 5: Defense files motion to compel.

January 19: Government turns over 302 claiming they asked if Hutchins had been drinking when they arrested him and response to motion to compel.

In spite of the fact that FBI itself was worried on the day they arrested him about whether Hutchins would be sober enough for an interrogation, they never got around to claiming that they had made sure he was until after some time, potentially months, of discussions about that question and after they had decided they couldn't get the defense to stop asking for it.

I'd say that's pretty sketchy.

Government didn't get around to surveilling Hutchins until July 26

In my post on the government response, I wondered why there would be a surveillance report from July 26, but not one from when Hutchins first arrived in Las Vegas on July 21.

The filing also reveals that there are,

two reports detailing limited surveillance of the defendant on July 26, 2017, and August 2, 2017.

Note, while August 2 is the day Hutchins left Las Vegas, the 26th was not the day he arrived; that was July 21. So they conducted surveillance of him on at least one day while he was in the US hanging out with other hackers at Black Hat, but won't tell him if they conducted surveillance on the other days.

The defense reply explains it: for whatever reason, Agents in Wisconsin didn't get around to asking Las Vegas FBI to start surveillance on Hutchins until July 26.

Since the agents started surveillance on July 26, 2017 and it ran through August 2, 2017, it is inconceivable that the agents actively surveilling him exchanged nothing but a single e-mail right before Mr. Hutchins' arrest.¹

¹ The only other e-mail disclosed by the government appears to have been sent from an FBI agent in Milwaukee on July 26, 2017, and requests FBI Las Vegas assistance to conduct surveillance of Mr. Hutchins.

For some reason, the FBI either didn't realize the guy they had just indicted on July 11 was coming to the US until well after he got here in spite of the fact that 1) he had been to Black Hat the year before 2) he was talking about coming again on Twitter 3) he tracked his flight into the country on Twitter, or they didn't decide they were going to arrest him until after he had been here for a while.

So arresting Hutchins was so urgent they had to do it before he left the country (to avoid extradition), even if he had been drinking (and interviewing him while he was still confused and without counsel was such a priority they couldn't let him just catch up on his sleep in jail).

But not so urgent they had prepared enough for his well-advertised arrival in the weeks before he arrived to have Las Vegas' FBI ready to surveil him.