

AT&T SAYS ITS VOLUNTARY SHARING OF CUSTOMER DATA IS CLASSIFIED

Back in October, I wondered whether companies would be able to claim they had chosen not to participate in CISA's voluntary data sharing in their transparency reports. While CISA prohibits the involuntary disclosure of such participation, I don't know that anything prohibits the voluntary disclosure, particularly of non-participation.

A related question is playing out right now over a shareholder resolution filed by Arjuna Capital asking AT&T to reveal its voluntary sharing with law enforcement and intelligence agencies.

The resolution asks only for a report on sharing that is not legally mandated, and exempts any information that is legally protected.

Resolved, shareholders request that the Company issue a report, at reasonable expense and excluding proprietary or legally protected information, clarifying the Company's policies regarding providing information to law enforcement and intelligence agencies, domestically and internationally, above and beyond what is legally required by court order or other legally mandated process, whether and how the policies have changed since 2013, and assessing risks to the Company's finances and operations arising from current and past policies and practices.

AT&T has asked the SEC for permission to ignore this resolution based, in part, on the claim that its voluntary cooperation would be a state

secret that requires AT&T to effectively Glomar its own shareholders.

Although the “Resolved” clause provides that the requested report may be prepared by the Company in a manner that excludes “proprietary or legally protected information,” given the focus of the Proposal, AT&T does not believe that it could implement the Proposal in a manner consistent with shareholders’ expectations without, at minimum, either confirming or denying whether it provides information to the NSA “above and beyond what is legally required by court order or other legally mandated process.” AT&T has obtained a legal opinion from the law firm of Sidley Austin LLP (the “Sidley Opinion”)¹ that opines that it would be impossible for AT&T to produce the report called for by the Proposal without providing information that the United States has deemed classified and over which it has asserted its state secrets privilege. Therefore, according to the Sidley Opinion, implementing the Proposal would cause AT&T to violate federal laws intended to protect the intelligence-gathering activities of the United States,

¹ The Sidley Opinion is attached to this letter as [Exhibit B](#).

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including 18 U.S.C. § 798(a), which specifically prohibits knowingly and willfully divulging to an unauthorized person classified information regarding the communications intelligence activities of the United States. As this analysis is discussed in the Sidley Opinion, such discussion is incorporated in this letter and will not be repeated here. It is important to note that AT&T has neither confirmed nor denied the existence of any of the activities that are the basis of the Proposal nor does AT&T now confirm or deny that it has participated in any such activities.

The Sidley Austin opinion cites the Espionage Act for its claim that this information is a state secret. It also pretends this is all about the NSA, when FBI and DEA play a critical role in some of the surveillance AT&T is believed to willingly participate in.

The resolution doesn’t seem to include any question specifically addressing OmniCISA participation, though it was written before final passage of OmniCISA last month.

The response from AT&T raises interesting questions about whether a telecom (or other electronic communications service provider) can be obligated for voluntary activity.