

# EFF ACCUSES THE GOVERNMENT OF SPOILIATION OF EVIDENCE

I've written about these accusations in the past. EFF got a preservation order in its NSA lawsuits back in 2008. Only after the government asked for permission to destroy phone dragnet data earlier this year did they learn the government has been destroying data relevant to their various suits for years.

But now they've written an aggressive motion asking for sanctions.

There is now no doubt that the government defendants have destroyed evidence relevant to plaintiffs' claims. This case concerns the government's mass seizure of three kinds of information: Internet and telephone content, telephone records and Internet records. The government's own declarations make clear that the government has destroyed three years of the telephone records it seized between 2006 and 2009; five years of the content it seized between 2007 and 2012; and seven years of the Internet records it seized between 2004 and 2011, when it claims to have ended those seizures.

By destroying this evidence, the government has hindered plaintiffs' ability to prove with governmental evidence that their individual communications and records were collected as part of the mass surveillance, something the government has vigorously insisted that they must do, even as a threshold matter. Although plaintiffs dispute that the showing the government seeks is required, the government's destruction of the best

evidence that plaintiffs could use to make such a showing is particularly outrageous.

[snip]

This is spoliation of evidence. A litigant has a clear legal duty to preserve evidence relevant to the facts of a case pending consideration by the court, and that duty requires preservation of all relevant evidence, defined as anything that is likely to lead to the discovery of admissible evidence. This duty is subject only to practical considerations, none of which the government has ever raised. Any private litigant who engaged in this behavior would be rightly sanctioned by the court; indeed many have been severely sanctioned for failure to preserve evidence in far less egregious circumstances.

This court has the power to order a broad range of remedies for spoliation, up to and including terminating sanctions. Plaintiffs here seek more modest relief: that the government be subject to an adverse inference that the destroyed evidence would have shown that the government has collected plaintiffs' communications and communications records. Plaintiffs also request that the Court set a prompt hearing date on this matter in order to halt any ongoing destruction.

My favorite part – being a bit of a timeline wonk – is the timeline showing all the broad claims the government made to ensure state secrets would cover even activities authorized by FISA, interspersed with what data the NSA was destroying when.

Then there's this lesson in warrantless wiretapping.

The government overreaches in trying to limit plaintiffs' complaint. For example, the government tries to use the fact that plaintiffs often characterize the surveillance as "warrantless" as indicating that the complaint doesn't reach surveillance conducted under the FISC. But this characterization is absolutely true even as to the FISC-authorized surveillance. Whatever the legal import of the FISC orders, they are unequivocally not full Fourth Amendment warrants, and the surveillance conducted under them is "warrantless." Thus, this court was exactly correct in July 2013 when it stated that Plaintiffs' claim is "that the federal government . . . conducted widespread warrantless dragnet communications surveillance of United States citizens following the attacks of September 11, 2001."

Given all the things the government destroyed here – such as the US person phone data collected without requisite First Amendment review, the Internet metadata that included content, and the US person communications collected under upstream collection, the EO 12333 collected metadata mingled with the PATRIOT authorized data – they might well rather give EFF standing without all that data.

We shall see. But it does make some nice Friday afternoon reading.