

UNITED STATES

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

FOREIGN INTELLIGENCE SURVEILLANCE COURT APR 18 PM 4:54

WASHINGTON, D.C.

LEEANN FLYNN HALL
CLERK OF COURT

IN RE APPLICATION OF THE FEDERAL
BUREAU OF INVESTIGATION FOR AN
ORDER REQUIRING THE PRODUCTION
OF TANGIBLE THINGS

Docket No. BR 14-01

**NOTICE REGARDING DOCUMENT FROM PLAINTIFFS IN
*JEWEL V. NSA AND FIRST UNITARIAN CHURCH V. NSA***

For the Court's information, the Government submits the attached document from counsel for the plaintiffs in *First Unitarian Church of Los Angeles v. National Security Agency*, No. C 13-03287-JSW (N.D. Cal.), and *Jewel v. National Security Agency*, No. 08-cv-4373 (N.D. Cal.). See April 15, 2014 email from Cindy Cohn (attached as Exhibit A). As the Government has previously informed this Court, and as this Court has recognized, see, e.g., March 12, 2014 Opinion and Order in Docket No. BR 14-01 at 4 n.3, 6, the topics discussed in the attached document are a matter of dispute pending before the Northern District of California. The Government will promptly notify the Court of any material developments in those district court cases. See *id.* at 7.

Dated: April 18, 2014

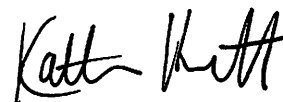
Respectfully submitted,

John P. Carlin
Assistant Attorney General

Stuart F. Delery
Assistant Attorney General



Tashina Gauhar
Deputy Assistant Attorney General



Kathleen R. Hartnett
Deputy Assistant Attorney General

National Security Division
U.S. Department of Justice

Civil Division
U.S. Department of Justice

EXHIBIT A

From: Cindy Cohn
To: Berman, Marcia (CIV); Patton, Rodney (CIV); Dearing, Bryan (CIV); stuart.delery@usdoj.gov; Carlin, John (NSD); Gilligan, Jim (CIV)
Cc: Stephanie Shattuck; Rick Wiebe; Ilann M. Maazel; Thomas E. Moore III
Subject: Government's April 2, 2014 filing with the FISC
Date: Tuesday, April 15, 2014 8:01:07 PM
Attachments: signature.asc

Hi Marcy and her colleagues,

I'm writing concerning the government's April 2, 2014 Response in the FISC to the Court's March 21, 2014 Opinion and Order. We do believe that the government's response to the FISC is insufficient and that additional information should be provided to the FISC as part of the government's duty of candor to the court. I've tried to include Stuart Delery and John Carlin in the addresses above but I'm not sure if I have their correct email addresses. I would appreciate it if you would forward this along to them, since I understand that they are the counsel handling the presentation to the FISC.

First, we were concerned to see that, in discussing the government's preservation responsibilities under the Jewel preservation order, the government did not mention that the preservation obligation in the Order includes preservation of more than just the telephone records, including Internet content and metadata collected from access to the fiberoptic cables at AT&T facilities across the country, as alleged in the Complaint. The filing only mentions telephony metadata. As you know, the Jewel Complaint (like Hepting before it) has always alleged that both of these types of surveillance were occurring.

As a result, we are concerned that the FISC has not been put on notice that the scope of the dispute about the preservation order in Jewel (or at least the scope of plaintiffs' view of the preservation order) reaches beyond telephone records into the Internet content and metadata gathered from the fiberoptic cables of AT&T. This is especially concerning because the FISC may have required (or allowed) destruction of some of that evidence without the knowledge that it was doing so despite the existence a preservation order covering that information issued by the Northern District of California. We do understand that the government disagrees with us about the timeframe of collection at issue in the Jewel v. NSA Complaint, but given the FISC's response to this issue with regard to the telephone records, we think it is appropriate for the government to at least inform the FISC that this same dispute exists with regard to the Internet content and metadata collection from AT&T's fiberoptic cables.

Of course, the proper court to determine the scope of the government's preservation duties is the Northern District of California court, not the FISC. The parties will be briefing this before Judge White soon. Yet nevertheless, the FISC does seem to want to be kept informed about the preservation issues and disputes and we believe the government should ensure that it remains fully informed.

Second, we were dismayed to see that the government's response to the FISC on pages 3-5 repeated its own arguments (plus new ones) about the scope of the Jewel complaint without referencing, much less presenting, plaintiffs' counter-arguments. As you know, especially in our reply papers (doc. 196) in support of the TRO, plaintiffs presented significant argument and evidence that contradicts the government's statement to the FISC that plaintiffs only "recently-expressed views" (pages 2, 7) regarding the scope of the preservation orders. They also also undermines the few paragraphs of the Jewel Complaint and some other documents

that the government has cherry-picked to support its argument. Once again, especially given the ex parte, non-adversarial nature of the proceedings before the FISC, we believe the government has an affirmative duty to inform the FISC that there are two sides to this dispute, and that it is hotly being disputed, rather than to simply restate its own one-sided arguments.

In short, we believe that the government has not sufficiently informed the FISC about the situation here. It has not informed the FISC that the scope of this evidence preservation dispute about what appears to be FISC-approved surveillance includes the Internet content and metadata, not just telephone metadata. It also has not informed the FISC that the government's arguments about the scope of the Jewel complaint are greatly disputed by the plaintiffs--much less provided the FISC with plaintiffs' side of that dispute. We urge you to inform the FISC of these matters so that no future rulings by the FISC concerning either the telephone metadata or the Internet content and metadata are based on a misunderstanding of the facts.

Please let me know by April 20 if you plan to inform the FISC about these matters.

Thank you,

Cindy

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