

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT

2014 MAR 10 PM 4:47

KEEANN 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

**MOTION OF PLAINTIFFS IN *JEWEL v. NSA* AND IN *FIRST UNITARIAN CHURCH v. NSA*, BOTH PENDING IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FOR LEAVE TO CORRECT THE RECORD**

Movants seek leave to correct the record in this proceeding because the Court's Order, issued March 7, 2014, relies on the absence of any existing evidence of preservation orders applicable to the data in question. However, there are at least two such orders in place. The Government, despite movants' specific request, failed to inform the Court of the existence of these orders. Movants thus seek leave to Correct the Record by submitting those evidence preservation orders, attached to the Declaration of Kurt Opsahl ("Opsahl Decl.") filed herewith.

Movants are plaintiffs in two pending actions in the United States District Court for the Northern District of California against the NSA and other defendants: *Carolyn Jewel, et al., v. National Security Agency, et al.*, No. 08-cv-4373-JSW (N.D. Cal.), pending since September 2008, and *First Unitarian Church of Los Angeles, et al., v. National Security Agency, et al.*, No. 13-cv-3287-JSW (N.D. Cal.) pending since July 2013.

There has been litigation challenging the lawfulness of the Government's telephony metadata collection activity, Internet metadata collection activity, and upstream collection activity pending in the Northern District of California continuously since 2006. The Government has been under evidence preservation orders in those lawsuits continuously since 2007.

The first-filed case was *Hepting v. AT&T*, No. 06-cv-0672 (N.D. Cal). It became the lead case in an MDL proceeding in the Northern District of California, *In Re: National Security Agency Telecommunications Records Litigation*, MDL No. 06-cv-1791-VRW (N.D. Cal).

On November 6, 2007, the district court entered an evidence preservation order in the MDL proceeding. See Order, Opsahl Decl., Exh. A. One of the MDL cases, *Virginia Shubert, et al., v. Barack Obama, et al.* No. 07-cv-0603-JSW (N.D. Cal.), remains in litigation today, and the MDL preservation order remains in effect today as to that case.

In 2008, movants filed the *Jewel v. NSA* action in the Northern District of California, and the district court made it a related action to the *Hepting* action. Complaint. See Complaint, Opsahl Decl., Exh. B. The district court entered an evidence preservation order in *Jewel* expressly based on the MDL evidence preservation order and incorporating similar operative terms. See Order, Opsahl Decl., Exh. C. The *Jewel* evidence preservation order remains in effect as of today.

In its recent Motion for Second Amendment to Primary Order in this proceeding, the Government did not mention the existing preservation orders in *Jewel* and in *Shubert*, did not inform the Court that it has been under evidence preservation orders continuously since 2007, and did not inform the Court that these orders extend not only to Internet metadata collection and upstream collection but also telephony metadata collection (call-detail records). See Complaint, Exh. B, at ¶ 82, *et seq.*

On February 26, 2014, movants contacted the Government and called to its attention its failure to inform this Court of the existing preservation orders. To movants' knowledge, the Government did not attempt to correct the record before this Court. This Court issued its order

denying the motion on March 7, without prejudice to the Government filing a revised motion providing additional facts.

Later that evening, rather than bring the existing preservation orders to this Court's attention, the Government filed a Notice in *First Unitarian* stating that "as of the morning of Tuesday, March 11, 2014, absent a contrary court order, the United States will commence complying with applicable FISC orders requiring the destruction of call-detail records at this time." See Notice Regarding Order of the FISC, Opsahl Decl., Exh. D.<sup>1</sup>

Movants respectfully request that the Court correct the record in this proceeding. The evidence at issue remains relevant to their cases and subject to the existing evidence preservation orders. As this Court noted, it is "reluctant to take any action that could impeded the proper adjudication of the identified civil suits." March 7 Order at 12. Issues relating to the Government's obligations under the existing evidence preservation orders are properly litigated in the Northern District of California, not in *ex parte* proceedings in the FISC.

DATE: March 8, 2014

Respectfully submitted,



KURT OPSAHL

KURT OPSAHL  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
Telephone: (415) 436-9333

*Counsel for Movants*

---

<sup>1</sup> The Government filed similar notices in several other cases challenging the legality of the call-detail records program. See e.g. *American Civil Liberties Union v. Clapper*, No. 13-cv-3994 (WHP) (S.D.N.Y), Dkt. 79. However, the Government did not file such a notice in *Jewel*.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of the foregoing motion have been served on the following counsel on this 8<sup>th</sup> day of March, 2014, in the manner indicated:

By Overnight Delivery:

CHRISTINE GUNNING  
United States Department of Justice  
Litigation Security Group  
2 Constitution Square  
145 N Street NE  
Suite 2W-115  
Washington, DC 20530  
(202) 514-9016

HON. JEFFREY S. WHITE  
United States District Judge  
Northern District of California  
450 Golden Gate Avenue  
Courtroom 11, 19<sup>th</sup> Floor  
San Francisco, CA 94102  
(415) 522-4173

By Email:

JAMES J. GILLIGAN  
Special Litigation Counsel  
james.gilligan@usdoj.gov  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Rm. 6102  
Washington, D.C. 20001  
Phone: (202) 514-3358

MARCIA BERMAN  
Senior Trial Counsel  
marcia.berman@usdoj.gov  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Rm. 7132  
Washington, D.C. 20001  
Phone: (202) 514-2205

Counsel for Defendants in *Jewel v. NSA*, No. 08-cv-4373-JSW (N.D. Cal.) and *First Unitarian Church, v. NSA*, No. 13-cv-3287-JSW (N.D. Cal.)

Dated: March 8, 2014

  
KURT OPSAHL