

# Exhibit E

# Exhibit E

Cindy Cohn <Cindy@eff.org>

March 10, 2014 8:35 AM



To: "Berman, Marcia (CIV)" <Marcia.Berman@usdoj.gov>

Cc: "Gilligan, Jim (CIV)" <James.Gilligan@usdoj.gov>, "wiebe@pacbell.net"

<wiebe@pacbell.net>, Stephanie Shattuck <steph@eff.org>, "Thomas E. Moore III

(tmoore@moorelawteam.com)" <tmoore@moorelawteam.com>, "Patton, Rodney (CIV)"

<Rodney.Patton@usdoj.gov>, "Dearinger, Bryan (CIV)" <Bryan.Dearinger@usdoj.gov>, "Ilann M.

Maazel" <imaazel@ecbalaw.com>

Re: Preservation of Evidence in Jewel v. NSA and First Unitarian Church v. NSA

Security: Signed (cindy@eff.org)

Dear Marcy,

I am sorry that we did not hear from you after my message on Saturday asking for further clarification about how the government plans to ensure that it does not spoliage evidence. Unless we hear from you by noon California time today that the government does not intend to destroy evidence that may be likely to lead to the discovery of admissible evidence under the claims raised in Jewel and First Unitarian cases, we intend to seek a TRO from Judge White.

Please call or email me if you'd like to discuss this further. My cellphone is 415-307-2148. We have no desire to elevate this into an emergency matter before the court but believe we have no choice based upon the government's actions and statements so far.

Cindy

On Mar 8, 2014, at 11:43 AM, Cindy Cohn <Cindy@eff.org> wrote:

Dear Marcy,

Your response is confusing and troubling to us, as is your notice to the court in First Unitarian that you intend to begin to destroy call detail records on Tuesday, March 11, which is just two business days from now. To be clear, the only court that can relieve the government of its obligations to preserve evidence in our cases, regardless of the basis for those obligations is the Northern District of California and it has not done so. This is true in Jewel and in First Unitarian.

As you know, both Jewel v. NSA and First Unitarian Church v. NSA arise from the ongoing bulk collection of telephone records, as did Hepting and the other MDL cases before that (along with additional information at issue in Jewel that must also be preserved). Neither the complaints nor the protective order mention the "President's Surveillance Program" so your reference to that program is confusing. The claims arise from the actual activity of bulk collection and state ongoing claims regardless of the legal or executive authority under which the government claims it conducts that activity at any point in time.

Duplicating

Cindy Cohn <Cindy@eff.org>

March 8, 2014 11:43 AM



To: "Berman, Marcia (CIV)" <Marcia.Berman@usdoj.gov>

Cc: "Gilligan, Jim (CIV)" <James.Gilligan@usdoj.gov>, "wiebe@pacbell.net" <wiebe@pacbell.net>, "Stephanie Shattuck" <steph@eff.org>, "Thomas E. Moore III (tmoore@moorelawteam.com)" <tmoore@moorelawteam.com>, "Patton, Rodney (CIV)" <Rodney.Patton@usdoj.gov>, "Dearinger, Bryan (CIV)" <Bryan.Dearinger@usdoj.gov>, "Ilan M. Maazel" <imaazel@ecbalaw.com>

Re: Preservation of Evidence in Jewel v. NSA

Security:  Signed (cindy@eff.org)

Dear Marcy,

Your response is confusing and troubling to us, as is your notice to the court in First Unitarian that you intend to begin to destroy call detail records on Tuesday, March 11, which is just two business days from now. To be clear, the only court that can relieve the government of its obligations to preserve evidence in our cases, regardless of the basis for those obligations, is the Northern District of California and it has not done so. This is true in Jewel and in First Unitarian.

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Moreover, we do not understand how the preservation order in place in Jewel (and Shubert) does not also include the preservation of the records at issue in First Unitarian. We further do not understand why the government failed to inform the FISC of your duties in Jewel and Shubert since they require you to preserve the same records or why it waited until just before the deadline to seek clarity on this issue, resulting in an apparent emergency situation that could easily have been avoided.

We will seek clarification from Judge White on this but we urge you not to destroy any records relevant to our claims in either case until we can do so. Please do provide us with full information so that we can narrow the issues before the court. Frankly, your email to me yesterday and filing in the First Unitarian case yesterday raise more concerns, not less, that the government has not been fulfilling its duties to preserve relevant evidence in either case. Please note that we will seek all available remedies if it turns out that the government has not abided by its duties.

Cindy

On Mar 7, 2014, at 6:14 PM, "Berman, Marcia (CIV)" <[Marcia.Berman@usdoj.gov](mailto:Marcia.Berman@usdoj.gov)> wrote:

Cindy -- In response to your questions regarding the preservation orders in Jewel (and the prior Hepting decision), the Government's motion to the FISC, and the FISC's decision today, addressed the recent litigation challenging the FISC-authorized telephony metadata collection under Section 215 -- litigation as to which there are no preservation orders. As we indicated last week, the Government's motion did not address the pending Jewel (and Shubert) litigation because the district court had previously entered preservation orders applicable to those cases. As we also indicated, since the entry of those orders the Government has complied with our preservation obligations in those cases. At the time the preservation issue was first litigated in the MDL proceedings in 2007, the Government submitted a classified ex parte, in camera declaration addressing in detail the steps taken to meet our preservation obligations. Because the activities undertaken in connection with the President's Surveillance Program (PSP) were not declassified until December 2013, we were not able to consult with you previously about the specific preservation steps that have been taken with respect to the Jewel litigation. However, the Government described for the district court in 2007 how it was meeting its preservation obligations, including with respect to the information concerning the PSP activities declassified last December. We have been working with our clients to prepare an unclassified summary of the preservation steps described to the court in 2007 so that we can address your questions in an orderly fashion with Judge White, if you continue to believe that is necessary.

Thanks -- Marcy

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**From:** Berman, Marcia (CIV)  
**Sent:** Friday, March 07, 2014 6:14 PM  
**To:** Cindy Cohn  
**Cc:** Gilligan, Jim (CIV); [wiebe@pacbell.net](mailto:wiebe@pacbell.net); Stephanie Shattuck; Thomas E. Moore III ([tmoore@moorelawteam.com](mailto:tmoore@moorelawteam.com)); Patton, Rodney (CIV); Dearing, Bryan (CIV); Ilann M. Maazel  
**Subject:** FW: Preservation of Evidence in Jewel v. NSA

Cindy -- we'll get back to you on this today, hopefully within an hour. Thanks -- Marcy

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**From:** Dearing, Bryan (CIV)  
**Sent:** Friday, March 07, 2014 4:39 PM  
**To:** Berman, Marcia (CIV)  
**Subject:** FW: Preservation of Evidence in Jewel v. NSA

FYI ...

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**From:** Cindy Cohn [<mailto:cindy@eff.org>]  
**Sent:** Friday, March 07, 2014 4:37 PM  
**To:** Gilligan, Jim (CIV)  
**Cc:** Rick Wiebe; Stephanie Shattuck; Thomas E. Moore III; Patton, Rodney (CIV); Dearing, Bryan (CIV); Ilann M. Maazel  
**Subject:** Re: Preservation of Evidence in Jewel v. NSA

Hi Jim,

I assume you've seen the FISC Order. Can you please explain how the court could be under the misimpression that there are no preservation orders for the telephone records information in place given the history at *Jewel* and *Hepting* before it? As you might expect, this is quite alarming to us.

We will be filing something shortly and I want to be sure that we correctly state your position.

Cindy

Sent from my phone

On Feb 28, 2014, at 5:17 PM, Cindy Cohn <[cindy@eff.org](mailto:cindy@eff.org)> wrote:

Hi Jim,

We'll wait a bit, assuming this doesn't drag on too long. Thanks for responding.

Cindy

Sent from my phone

On Feb 28, 2014, at 5:26 PM, "Gilligan, Jim (CIV)" <[James.Gilligan@usdoj.gov](mailto:James.Gilligan@usdoj.gov)> wrote:

Cindy,

We did receive your email about preservation, and I wanted to get back to you before the week ended to let you know that we will need a bit more time to prepare a more complete response than we will be able to do by Monday. So I would ask that you forbear from filing anything with the FISC, or Judge White, until we have further opportunity to confer. As you noted, *Jewel* and *Shubert* are not specifically mentioned in the motion we filed with the FISC, but as you also observed, the question of preservation has already been litigated in those cases, and the court issued separate preservation orders that govern there. Many of the details surrounding the intelligence programs in question remain classified, however, and so there remain limitations on our ability to confer with you concerning our compliance with those orders.

At this point I need to consult further with my clients to ascertain how much information I can convey to you about the Government's preservation efforts without revealing classified information. I simply won't be in a position to provide you with a detailed response to your

inquiry by Monday, as you request, in part because of the work that remains on our reply to your brief on the court's four questions, and in part because I will be out of the office on Monday and Tuesday for a family ski trip. (Also, as you observed, Marcy is presently diverted by another matter.) But we will do our best to address your questions by the middle of next week.

JG

James J. Gilligan  
Special Litigation Counsel  
Civil Division, Federal Programs Branch  
U.S. Department of Justice  
P.O. Box 883  
Washington, D.C. 20044

Tel: 202-514-3358

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**From:** Cindy Cohn [<mailto:cindy@eff.org>]  
**Sent:** Friday, February 28, 2014 5:54 PM  
**To:** Gilligan, Jim (CIV)  
**Cc:** Rick Wiebe; Stephanie Shattuck; Thomas E. Moore III; Patton, Rodney (CIV); Dearing, Bryan (CIV); Ilann M. Maazel  
**Subject:** Re: Preservation of Evidence in Jewel v. NSA

Hi Jim, Rodney and Bryan,

I just wanted to confirm that you received this and learn when you will be responding.

We are planning to file something in the FISC and before Judge Walker early next week and I do want to be able to accurately convey your position.

Thanks,

Cindy

On Feb 26, 2014, at 4:08 PM, Cindy Cohn <[Cindy@eff.org](mailto:Cindy@eff.org)> wrote:

Hi Jim,

Rick will write you separately about the scheduling, but I wanted to raise something that has confused us and to seek clarification.

We saw your filing in the FISC asking that the Court's current Primary Order be amended to authorize the preservation and/or storage of call detail records beyond five years based upon your duty to preserve evidence and mentioning the First Unitarian case specifically. We do agree that the government has a duty to preserve all reasonably anticipated to be subject to discovery in this action. We were surprised, however, that you did not approach us to discuss ways that this duty could be met short of the request you made, which we read as allowing you to preserve all of the metadata you have collected.

We also write because, as I think you know, the government has been under an obligation to preserve telephone records it has collected since 2006, when the cases that made up the MDL action In Re NSA were first filed. One of those cases, Shubert v. Obama, has remained ongoing since that time. That obligation was reinforced by an Order issued by Judge Walker in 2007 and order was specifically adopted by the court in Jewel v. NSA in 2009 by a joint request by the government and the plaintiffs (Jewel v. NSA, Doc. 51).

Thus my confusion. I'm not sure why the Jewel (and Shubert) cases were not mentioned or referenced in the request to the FISC since both of those also contain ongoing preservation obligations related to the bulk phone records collection by the NSA. Since they were not, it also raises the question of whether and how the government has been abiding by its obligation to preserve evidence in those two cases, since obviously both have been pending for more than five years.

I would appreciate a prompt response and clarification. I'm confident that the government takes seriously its obligation to preserve evidence that may be relevant to pending litigation, but given the situation, I would like a specific reaffirmation that bulk telephone records collected by the NSA have been preserved in the Jewel case and I suspect Ilann is concerned about the same for Shubert. I would also request some more specific information about how that preservation has occurred -- similar to the plan you suggested to the FISC in your motion.

I hope you can provide us with a thorough response before any additional phone records are destroyed and hopefully by Monday, March 3. While we're hopeful that we will receive a satisfactory response, but if not, we do intend to raise this question with both the FISC and the Judge White.

Thanks,

Cindy

PS: Has Marcy gone? I noticed that she's not on the pleadings you filed last week or on this message.

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