

CINDY COHN (SBN 145997)
cindy@eff.org
LEE TIEN (SBN 148216)
KURT OPSAHL (SBN 191303)
JAMES S. TYRE (SBN 083117)
MARK RUMOLD (SBN 279060)
ANDREW CROCKER (SBN 291596)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Fax: (415) 436-9993

RACHAEL E. MENY (SBN 178514)
rmeny@kvn.com
PAULA L. BLIZZARD (SBN 207920)
MICHAEL S. KWUN (SBN 198945)
AUDREY WALTON-HADLOCK (SBN 250574)
BENJAMIN W. BERKOWITZ (SBN 244441)
JUSTINA K. SESSIONS (SBN 270914)
KEKER & VAN NEST, LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400
Fax: (415) 397-7188

RICHARD R. WIEBE (SBN 121156)
wiebe@pacbell.net
LAW OFFICE OF RICHARD R. WIEBE
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Fax: (415) 433-6382

THOMAS E. MOORE III (SBN 115107)
tmoore@royselaw.com
ROYSE LAW FIRM, PC
1717 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 813-9700
Fax: (650) 813-9777

ARAM ANTARAMIAN (SBN 239070)
aram@eff.org
LAW OFFICE OF ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 289-1626

Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CAROLYN JEWEL, *et al.*,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

) CASE NO. 08-cv-4373-JSW
) CASE NO. 13-cv-3287-JSW
)

**PLAINTIFFS' OPENING BRIEF RE
EVIDENCE PRESERVATION**

) Date: March 19, 2014
) Time: 2:00 p.m.
) Courtroom 11, 19th Floor
) The Honorable Jeffrey S. White
)

FIRST UNITARIAN CHURCH OF LOS
ANGELES, *et al.*,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. FACTS AND PROCEDURAL BACKGROUND..... 1

 A. The Government Has Been Under Preservation Requirements Since 2006 1

 B. The Government Promised to Preserve Relevant Evidence in *First Unitarian v. NSA* 2

 C. On March 12, 2014, the FISC Granted Temporary Relief Pending this Court’s Ruling. 3

II. ARGUMENT..... 3

 A. The Government Bears The Burden of Preserving Evidence 3

 B. The Preservation Orders in *Jewel v. NSA* and in *In Re NSA Telecommunications Records Litigation* Reach the Telephone Records At Issue 5

 1. The *Jewel* Complaint Includes The NSA Bulk Collection Program. 5

 2. The Government Has Conceded that the NSA Bulk Collection Program is Within the Scope of the Potential Evidence. 7

 3. The Government’s Limited Reading of *Jewel* As Pertaining Only to Pre-FISA Surveillance Must Be Rejected..... 9

 C. A Preservation Order is Needed in *First Unitarian Church v. NSA*. 10

 D. The Government Should Be Required To Disclose What it Has Done to Comply with its Preservation Obligations in *Jewel* and *In Re NSA Telecommunications Records Litigation*, and Whether It Has Destroyed Evidence..... 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

Federal Cases

1

2

3 *Disability Rights Counsel of Greater Washington v. Washington Metro. Transit Authority,*

4 242 F.R.D. 139 (D.D.C. 2007) 4

5 *Doe v. Norwalk Community College,*

6 248 F.R.D. 372, 2007 WL 2066497 (D.Conn. July 16, 2007) 4

7 *Hepting v. AT&T,*

8 No. 06-cv-0672-VRW (N.D. Cal.) *passim*

9 *In Re: National Security Agency Telecommunications Records Litigation,*

10 MDL No. 06-1791-VRW (N.D. Cal.) 1, 4

11 *Leon v. IDX Sys. Corp.,*

12 464 F.3d 951 (9th Cir. 2006) 4

13 *Virginia Shubert, et al., v. George W. Bush, et al.,*

14 No. 07-cv-0603-JSW (N.D. Cal.) 2, 5, 9

15 *W.T. Thompson Co. v. General Nutrition Corp.,*

16 593 F.Supp. 1443 (C.D. Cal. 1984) 4

Federal Rules

17 Fed. R. Civ. P. Rule 26 2

18 Fed. R. Civ. P. Rule 37 4

19 Fed. R. Civ. P. Rule 37(e) 4

20 Fed. R. Civ. P. Rule 37(f) 4

21 Fed. R. Civ. P. Rule 45 2

22 Fed. R. Civ. P. Rule 56(d) 7

23 Fed. R. Civ. P. Rule 56(e) 2

24 Fed. R. Civ. P. Rule 56(f) 7

25

26

27

28

INTRODUCTION

1
2 Plaintiffs hereby seek the following relief from the Court regarding the government
3 defendants' preservation duties in *Jewel v. NSA* and *First Unitarian Church of Los Angeles v. NSA*.
4 Plaintiffs respectfully request that the Court:

5 1. Reaffirm that the Court's November 13, 2009 evidence preservation order in *Jewel*
6 *v. NSA* (ECF No. 51 in No. 08-cv-4373-JSW) and/or the obligation under the common law and the
7 Federal Rules of Civil Procedure to preserve potentially relevant or discoverable evidence require,
8 and have required, the government defendants to preserve the telephone records (also called "call
9 detail records" or "telephone metadata" or "BR metadata") they possess.

10 2. Reaffirm the duty of the government to preserve all potentially relevant or
11 discoverable evidence in *First Unitarian Church of Los Angeles v. NSA*, No. 13-cv-3287-JSW,
12 including the telephone records they possess and, to avoid further confusion, enter a preservation
13 order in *First Unitarian* similar to that in *Jewel*.

14 3. Require the government to disclose the steps it has taken to preserve evidence and to
15 disclose whether it has destroyed telephone records, Internet metadata records, Internet or
16 telephone content data, or any other evidence potentially relevant to these lawsuits.

I. FACTS AND PROCEDURAL BACKGROUND

A. The Government Has Been Under Preservation Requirements Since 2006

17
18
19 Litigation challenging the lawfulness of the government's telephone records (also referred
20 to in various places as "call detail records" or "telephone metadata" or "BR metadata") collection
21 activity, Internet metadata collection activity, and Internet and telephone content collection activity
22 has been pending in the Northern District of California continuously since 2006.

23 The first-filed case was *Hepting v. AT&T*, No. 06-cv-0672-VRW (N.D. Cal.), filed on
24 January 31, 2006 by four of the five plaintiffs who later filed *Jewel v. NSA*. It became the lead case
25 in the MDL proceeding in this district, *In Re: National Security Agency Telecommunications*
26 *Records Litigation*, MDL No. 06-cv-1791-VRW (N.D. Cal.). On November 6, 2007, this Court
27 entered an evidence preservation order in the MDL proceeding. ECF No. 393 in MDL No. 06-cv-
28 1791-VRW. One of the MDL cases, *Virginia Shubert, et al., v. George W. Bush, et al.*, No. 07-cv-

1 0603-JSW (N.D. Cal.), remains in litigation today before this Court, and the MDL preservation
2 order remains in effect today as to that case.¹

3 In 2008, plaintiffs filed *Jewel v. NSA* and this Court related it to *Hepting*. This Court
4 entered an evidence preservation order in *Jewel* on November 13, 2009 that is substantively the
5 same as the MDL order. ECF No. 51. The *Jewel* evidence preservation order also remains in
6 effect today.

7 The *Jewel* and MDL orders require the preservation obligation to be “*interpreted broadly* to
8 accomplish the goal of maintaining the integrity of all documents, data and tangible things
9 *reasonably anticipated to be subject to discovery* under FRCP 26, 45 and 56(e) in this action.” ECF
10 No. 51 in No. 08-cv-4373-JSW, para. C (emphasis added). Thus, the focus of the preservation duty
11 is not on what the party possessing the evidence thinks is relevant, but on what an opposing party
12 may seek in discovery, “interpreted broadly.” The orders further require counsel to inquire about
13 destruction practices of their clients and either “halt” such practices or “arrange for the preservation
14 of complete and accurate duplicates or copies of such material, suitable for later discovery if
15 requested.” *Id.* para. D.

16 **B. The Government Promised to Preserve Relevant Evidence in *First Unitarian v.***
17 ***NSA***

18 The parties in *First Unitarian* reaffirmed their duties to preserve evidence in the initial Case
19 Management Conference Statement filed on October 31, 2013:

20 6. Evidence Preservation

21 The parties are aware of, and are complying with, their respective preservation
22 obligations. The parties have also reviewed the Guidelines Relating to the
23 Discovery of Electronically Stored Information and expect to engage in subsequent
24 meet and confer discussions with respect to this issue as appropriate.

25 *First Unitarian* Joint Case Management Conference Statement, ECF No. 20 in No. 13-cv-3287-
26 JSW.

27 Because of the scope of the preservation order and the scope of the plaintiffs’ claims in
28 *Jewel v. NSA*, which include the ongoing telephone records collection, plaintiffs believed that it

¹ Former President Bush was named in his official capacity, so the case name is now *Shubert v. Obama*.

1 would be duplicative and unnecessary to immediately seek an additional evidence preservation
2 order in *First Unitarian*. Because the parties brought cross-motions as a first step in that case,
3 including the government defendants' motion to dismiss, the government has not yet answered and
4 discovery has not yet opened. But at no time did the *First Unitarian* plaintiffs waive any of their
5 discovery rights, or the government's evidence preservation obligation.

6 **C. On March 12, 2014, the FISC Granted Temporary Relief Pending this Court's**
7 **Ruling.**

8 As this Court is aware, on Friday March 7, 2014, the Foreign Intelligence Surveillance
9 Court ("FISC") ordered the government to begin destroying the call detail records it had collected
10 had held for five years. March 7, 2004 FISC Order in Docket No. BR-14-01. After this Court
11 issued its TRO on Monday, March 10, 2014, and prior to this filing, the FISC entered an additional
12 order providing that, pending resolution by this Court of the preservation issues raised by the
13 plaintiffs in *Jewel* and *First Unitarian*, the government is not required to destroy the call detail
14 records it has collected. March 12, 2014 FISC Order in Docket No. 14-01 at page 6, attached
15 hereto as Exhibit A.

16 The FISC adopted two restrictions the government had proposed on its use of the call detail
17 records to try to reduce the potential for further privacy violations during the pendency of the
18 litigation. Those were to: (1) store the information in a format that precludes any access or use by
19 NSA intelligence analysts for any purpose; (2) permit NSA technical personnel to access the
20 BR metadata, but only for the purpose of ensuring continued preservation and/or storage, as well as
21 the integrity of, the BR metadata. *Id.* Importantly, the FISC also rejected the government's request
22 that any access required by these cases be subject to FISC approval, noting "it appears
23 unnecessary, and ill-advised, to put the FISC in the position of approving or disapproving actions
24 the government, as a civil litigant, proposes to take, e.g. to respond to specific discovery requests
25 or to particular inquiries made by the court before which a civil matter is pending." *Id.* at 5.

26 **II. ARGUMENT**

27 **A. The Government Bears The Burden of Preserving Evidence**

28 Regardless of the fact that two formal preservation orders actually exist that reach the

1 telephone records, the government has the burden to preserve evidence, and thus, the burden to
2 justify the decisions it makes concerning preservation. *W.T. Thompson Co. v. General Nutrition*
3 *Corp.*, 593 F.Supp. 1443, 1455 (C.D. Cal. 1984). “A party’s destruction of evidence qualifies as
4 willful spoliation if the party has ‘some notice that the documents were *potentially* relevant to the
5 litigation before they were destroyed.’ ” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).

6 The duty to preserve evidence arises from the common law and the prohibitions against
7 spoliation of evidence, and was incorporated into the Federal Rules of Civil Procedure. *See* Fed. R.
8 Civ. P. Rule 37(e).

9 A preservation obligation may arise from many sources, including common law,
10 statutes, regulations, or a court order in the case. The good faith requirement of
11 Rule 37(f) [now Rule 37(e)] means that a party is not permitted to exploit the
12 routine operation of an information system to thwart discovery obligations by
13 allowing that operation to continue in order to destroy specific stored information
14 that it is required to preserve. When a party is under a duty to preserve information
15 because of pending or reasonably anticipated litigation, intervention in the routine
16 operation of an information system is one aspect of what is often called a “litigation
17 hold.”

18 Rule 37 Advisory Committee Notes (2006 Amendment); *see Disability Rights Counsel of Greater*
19 *Washington v. Washington Metro. Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007) (compelling
20 production of the defendant's backup tapes containing electronically stored information where the
21 defendant did not suspend its routine e-mail deletion process, leaving only the backup tapes, which
22 the defendant then argued were not reasonably accessible); *Doe v. Norwalk Community College*,
23 248 F.R.D. 372, 2007 WL 2066497 (D.Conn. July 16, 2007) (determining that the defendant's
24 failure to suspend its destruction of electronic documents at any time after receiving notification of
25 the litigation did not satisfy the good faith requirement of Rule 37(f)).

26 There is no serious question that the government has been subject to a preservation
27 obligation with respect to the communications content and communications records it has collected
28 in bulk since January 2006, when *Hepting v. AT&T* was first filed. In 2007, before the Court’s
entry of the first evidence preservation order in the *In Re: NSA Telecommunications Records*
Litigation MDL, the government acknowledged its evidence preservation duty existed apart from
any court order: “The Government and Carrier Defendants recognize that they have legal

1 obligations to preserve potentially discoverable materials.” ECF No. 386 in MDL No. 06-cv-1791-
2 VRW. *Jewel v. NSA* and *Shubert v. Obama* were filed before *Hepting* was dismissed, continuing
3 the government’s preservation duties through the entry of the *Jewel* order in 2009, and to this date.

4 Accordingly, even without the preservation orders the government has had an affirmative
5 duty to preserve relevant evidence and avoid spoliation. The *Jewel* and MDL evidence preservation
6 orders in no way narrow or diminish the evidence preservation obligations that would otherwise
7 exist under the common law and the Federal Rules. To the contrary, the orders make those
8 obligations specific, detailed and concrete.

9 **B. The Preservation Orders in *Jewel v. NSA* and in *In Re NSA***
10 ***Telecommunications Records Litigation* Reach the Telephone Records At Issue**

11 The *Jewel* preservation order’s mandate is a standard one: that the government preserve “all
12 documents, data and tangible things reasonably anticipated to be subject to discovery.” ECF
13 No. 51 in No. 08-cv-4373-JSW, para. C. The *Jewel* order notes that it is “based on the Court’s prior
14 Order of November 6, 2007, in 06-cv-1791-VRW (ECF No. 393),” *i.e.*, the MDL evidence
15 preservation order. In successfully obtaining the MDL preservation order over the government’s
16 strenuous objections, plaintiffs made clear that they sought preservation of, among other things,
17 “information sufficient to establish which call records belonging to which customers were turned
18 over by which carriers at approximately which times”—the very telephone records the government
19 now apparently contends are not within the scope of the *Jewel* preservation order. ECF No. 392 in
20 MDL No. 06-cv-1791-VRW.

21 **1. The *Jewel* Complaint Includes The NSA Bulk Collection Program.**

22 The claims of the *Jewel* Complaint arise from the government’s acts of mass collection of
23 telephone records, Internet metadata, and Internet and telephone content—it is this *conduct* by the
24 government that is at issue. The claims are not dependent on the particular (and until recently,
25 secret) authority or legal arguments that the government believes justifies its mass surveillance. As
26 this Court is aware, the government’s legal justifications for the surveillance have shifted several
27 times over the many years that these cases have been pending. Yet the *Jewel* complaint has never
28 been tied to a specific government rationale and instead sought to “challenge an illegal and

1 unconstitutional program of dragnet communications surveillance conducted by the NSA and other
 2 defendants,” whatever the government’s rationale. *Jewel* Complaint, ECF No. 86-2, para. 2.² For
 3 example, the *Jewel* complaint alleges:

- 4 2. This case challenges an illegal and unconstitutional program of dragnet
 5 telecommunications surveillance conducted by the National Security Agency
 6 (the “NSA”) and other defendants . . .
- 7 3. This program of dragnet surveillance (the “Program”) first authorized by
 8 Executive Order of the President in October of 2001 and first revealed to the
 9 public in December of 2005, continues to this day.
- 10 9. Using this shadow network of surveillance devices, Defendants have
 11 acquired and continue to acquire the content of a significant portion of the
 12 phone calls, emails, instant messages, text messages, web communications
 13 and other communications, both international and domestic, of practically
 14 every American who uses the phone system or the Internet, including
 15 Plaintiffs and class members, in an unprecedented suspicionless general
 16 search through the nations communications networks.
- 17 10. . . . Defendants have unlawfully solicited and obtained from
 18 telecommunications companies such as AT&T the complete and ongoing
 19 disclosure of the private telephone and Internet transactional records of those
 20 companies’ millions of customers (including communications records
 21 pertaining to Plaintiffs and class members), communications records
 22 indicating who the customers communicated with, when and for how long,
 23 among other sensitive information.
- 24 13. . . . Plaintiffs’ communications or activities have been and continue to be
 25 subject to electronic surveillance.
- 26 14. Plaintiffs are suing Defendants to enjoin their unlawful acquisition of the
 27 communications and records of Plaintiffs and class members, to require the
 28 inventory and destruction of those that have already been seized and to
 obtain appropriate statutory, actual and punitive damages to deter future
 illegal surveillance.
82. Defendants have since October 2001 continuously solicited and obtained the
 disclosure of all information in AT&T’s major databases of stored telephone
 and Internet records, including up-to-the-minute updates to the databases
 that are disclosed in or near real-time.

The broad scope of the claims continues through the specific causes of action. The Fourth
 Amendment count is exemplary:

² Note that the *Jewel* Complaint was most recently attached as Exhibit A to the Cohn Declaration
 in Support of the Temporary Restraining Order filed on Monday, March 10, 2014 (ECF No. 86-2).

1 112. At all relevant times, Defendants committed, knew of and/or acquiesced in
2 all of the above-described acts, and failed to respect the Fourth Amendment
rights of Plaintiffs by obtaining judicial or other lawful authorization and
conforming their conduct to the requirements of the Fourth Amendment.

3 113. By the acts alleged herein, Defendants have violated Plaintiffs' and class
4 members' reasonable expectations of privacy and denied Plaintiffs and class
5 members their right to be free from unreasonable searches and seizures as
6 guaranteed by the Fourth Amendment to the Constitution of the United
States.

7 114. By the acts alleged herein, Defendants' conduct has proximately caused
harm to Plaintiffs and class members.

8 Plaintiffs sought, among other relief, an injunction "requiring Defendants to provide to Plaintiffs
9 and the class an inventory of their communications, records, or other information that was seized in
10 violation of the Fourth Amendment." *Jewel* Complaint, Prayer for Relief.

11 **2. The Government Has Conceded that the NSA Bulk Collection Program
12 is Within the Scope of the Potential Evidence.**

13 Even apart from the *Jewel* Complaint, the government has long been on notice that the call
14 detail records are potentially relevant and subject to discovery in *Jewel*, and thus must be
15 preserved. In particular, it has been long been clear that plaintiffs' claims encompass bulk
16 collection of call detail records made under any authority, including FISC orders. In opposing the
17 Government's 2009 motion for summary judgment, plaintiffs filed a Rule 56(f)³ declaration,
18 stating that "Plaintiffs would seek discovery regarding the fact of the carriers' interception and
19 disclosure of the communications and communications records of the telecommunications
20 companies customers." Declaration of Cindy Cohn Pursuant to Fed. R. Civ. P. 56(f) in Opposition
21 to Government Defendants' Motion to Dismiss and For Summary Judgment (ECF No. 30) at ¶ 14.
22 The context was clear: this declaration also attached Plaintiffs' Rule 1006 Summary of Evidence
23 which discussed in detail the 2007 move to seek FISC orders. Cohn Decl. Exhibit A, Summary of
24 Voluminous Evidence (ECF No. 30-1) at 46-49.

25 In the Joint CMC Statement filed in September of 2013, signed by all parties, the *Jewel*
26 plaintiffs included numerous references to the post-FISC transition surveillance. Joint CMC Stmt.,
27 ECF No. 159 at 4-5. In the government's own section, rather than asserting its current, cramped

28 ³ Former Rule 56(f) is now denoted as Rule 56(d).

1 claims about the scope of the *Jewel* claims, the government instead conceded that “Plaintiffs claim
2 this alleged ‘dragnet’ surveillance included collection of the content of telephone and Internet
3 communications as well as communications records.” *Id.* at 33.

4 Nor is this the first time the government has conceded that the scope of the *Jewel*
5 allegations include the call detail records collected under the bulk telephone records program, both
6 before and after the Government relied upon the purported authority of Section 215 of the Foreign
7 Intelligence Surveillance Act and FISC orders issued thereunder. Back in April 3, 2009, many
8 months before the *Jewel* preservation order, the government submitted the Declaration of Director
9 of National Intelligence Dennis Blair, publicly filed in redacted form on December 20, 2013. *Jewel*
10 ECF No. 172-3. Paragraph 4 contends that the allegations include NSA surveillance activities
11 conducted pursuant to the FISA court’s authority. Director Blair specifically references activities
12 “which are now conducted pursuant to the authority of the Foreign Intelligence Surveillance Act
13 (‘FISA’), including ongoing activities conducted under orders approved by the FISC. Director
14 Blair specifically references, in this same paragraph, “plaintiffs’ allegation that the NSA, with the
15 assistance of telecommunications companies including AT&T, has indiscriminately ... obtained
16 the communications records of millions of ordinary Americans.” Thus, at the time it stipulated to
17 the preservation order, the government understood the fruits of the Section 215 orders to be at
18 issue.

19 The government’s concessions continued with the September 11, 2012 Secret Declaration
20 of Director of National Intelligence James Clapper, filed in redacted form on December 20, 2013.
21 ECF No. 172-7. Paragraph 5 discusses plaintiffs’ allegations as including the bulk collection of
22 non-content information (*i.e.*, metadata) about telephone and Internet communications subject to
23 order of the FISA court. Paragraph 57 asserts that plaintiffs’ allegations include the activities
24 authorized by the FISA court, specifically referencing “current surveillance activities” and FISA
25 orders.

26 Finally, in the most recent declarations submitted by the government, it continued to
27 understand that the *Jewel* allegations include the NSA bulk collection program at issue in the
28 Section 215 cases. In Paragraph 8 of the December 20, 2013, Declaration of Director of National

1 Intelligence James Clapper, Director Clapper discusses the transition of the earlier Bush-era
2 program to the Foreign Intelligence Surveillance Court. In Paragraph 19, Director Clapper lists
3 “information concerning the scope and operational details of NSA intelligence activities that may
4 relate to or be necessary to adjudicate plaintiffs' allegations,” including both “information
5 concerning operational details related to the collection of communications under FISA section 702”
6 and call records. In Paragraph 44, Director Clapper references “the identities of any carriers that
7 continue to participate in the program today,” recognizing that the Plaintiffs’ allegations include
8 the ongoing surveillance purportedly authorized by the FISA court.

9 **3. The Government’s Limited Reading of *Jewel* As Pertaining Only to Pre-
10 FISA Surveillance Must Be Rejected**

11 Defendants nevertheless now appear to maintain that the *Jewel* preservation order covered
12 only records collection and other intelligence activities occurring prior to the FISC’s supervision.
13 In a footnote in its Response to the Court’s Order Re: Plaintiffs’ Motion for a Temporary
14 Restraining Order, and in its recent filing in the FISC, the government cryptically says that that
15 “the claims in the *Jewel* and *Shubert* complaints challenge intelligence activities conducted without
16 court approval.” ECF No. 88 at 2:27-28 in No. 13-cv-3287-JSW. The implication seems to be that
17 the *Jewel* plaintiffs do not challenge any surveillance that has been approved by the FISC.

18 There is no basis for limiting the Complaint or preservation order in *Jewel* in that way. The
19 government gives no support for its cramped interpretation of *Jewel*. Moreover, the plaintiffs are
20 masters of their Complaints. The government is not authorized to unilaterally (and secretly) decide
21 to forego preservation of evidence plainly implicated by the Complaints. The call detail records
22 must be preserved, and should have been preserved all along, under the *Jewel* order.

23 This is not the first time the government has made such an unfounded assertion or that
24 plaintiffs have rejected it. In the 2010 appeal of *Jewel v. NSA*, the government made a similar
25 assertion, which the plaintiffs debunked:

26 The government defendants’ assertion that “plaintiffs do not challenge surveillance
27 authorized by the FISA Court” (Govt. Defs. Br. at 7) misconceives both plaintiffs’
28 complaint and the role of the district court under sections 1806(f) and 1806(h).
Plaintiffs allege and challenge an untargeted mass surveillance program that violates
statutory and constitutional limits on electronic surveillance. To the extent that the
Government suggests that there are FISC court orders purporting to authorize the

1 surveillance that plaintiffs allege, no such hypothetical FISC orders could satisfy the
 2 requirements of FISA or the Fourth Amendment. Regardless, it is plainly the role of
 3 the district court under sections 1806(f) and 1806(h) to review any such orders
 4 together with all other materials related to the surveillance and “determine whether
 the surveillance . . . was lawfully authorized and conducted,” § 1806(f). Under
 section 1806(h), any determination that the surveillance is unlawful is binding on
 the FISC.

5 *Jewel v. NSA*, Plaintiff-Appellees’ Ninth Circuit Reply Brief at 24 n.9.

6 If the government defendants ever had any good-faith uncertainty in the past eight years as
 7 to the scope of plaintiffs’ claims, and thus the scope of their evidence preservation obligations, they
 8 could easily have obtained clarification. Simplest and most obviously, they could have done what
 9 thousands of litigants do every day when a discovery issue arises: pick up the phone and call
 10 opposing counsel. They could have written a letter to plaintiffs’ counsel if they wanted a more
 11 formal record of the parties’ positions. They could have sought clarification or modification of the
 12 Court’s evidence preservation orders. Whatever their uncertainty, it was incumbent upon them to
 13 raise their interpretative issues with this Court and with plaintiffs at the earliest opportunity, so the
 14 question could quickly be put to rest.

15 **C. A Preservation Order is Needed in *First Unitarian Church v. NSA*.**

16 The government has acknowledged that destruction of the telephone records would be
 17 inconsistent with its preservation obligations in *First Unitarian Church of Los Angeles v. NSA*. It
 18 informed the FISC:

19 While the Court’s Primary Order requires destruction of the BR metadata no longer
 20 than five years (60 months) after its initial collection, such destruction could be
 21 *inconsistent with the Government’s preservation obligations* in connection with
 22 civil litigation pending against it. Accordingly, to avoid the destruction of the
 23 BR metadata, the Government seeks an amendment to the Court’s Primary Order
 that would allow the NSA to preserve and/or store the BR metadata for non-analytic
 purposes until relieved of its preservation obligations, or until further order of this
 Court under the conditions described below.

24 Government’s Motion for Second Amendment to Primary Order, FISC No. BR 14-01 (February
 25 25, 2014) (emphasis added).⁴

26 ⁴ In initially denying the government’s motion, the FISC relied, in part, upon its erroneous belief
 27 that “no District Court or Circuit Court of Appeals has entered a preservation order applicable to
 28 the BR [for ‘business records’, *i.e.*, telephone records] metadata in question in any of the civil
 matters *cited in the motion*” and that “there is no indication that any of the plaintiffs have sought
 discovery of this information or made any effort to have it preserved,” FISC Order at 8-9

1 To avoid any confusion going forward and to clarify that the government defendants'
 2 obligations are the same in all the related actions pending before the Court, Plaintiffs now request
 3 that an evidence preservation order similar to the one in *Jewel v. NSA* be also formally entered into
 4 in *First Unitarian Church v. NSA*.

5 **D. The Government Should Be Required To Disclose What it Has Done to Comply**
 6 **with its Preservation Obligations in *Jewel* and *In Re NSA Telecommunications***
 7 ***Records Litigation*, and Whether It Has Destroyed Evidence**

8 The government's unduly limited interpretation of its preservation duties in *Jewel* raises the
 9 very concerning specter that the government has not sufficiently preserved telephone records
 10 evidence, and possibly has failed to preserve evidence going to other claims as well, contrary to
 11 this Court's preservation order. This is especially problematic since the government has asserted,
 12 in support of its dismissal motion, that plaintiffs lack sufficient evidence that their specific
 13 communications records were collected. *See, e.g.*, ECF No. 81 at 1-3 in No. 13-cv-3287-JSW.
 14 While plaintiffs disagree, the government cannot on the one hand destroy the evidence of mass
 15 collection, including collection of plaintiffs' telephone records, and on the other hand contend there
 16 is insufficient evidence that plaintiffs have been subject to surveillance.

17 In light of this situation, the government needs to come clean with the court and the
 18 plaintiffs about how it has been carrying out its preservation duties. And this disclosure should
 19 reach further than the telephone records evidence to evidence relating to plaintiffs' other claims as
 20 well. In an order of September 25, 2012, only recently publicly released, the FISC notes:

21 Thereafter, in April 2012, the government orally informed the Court that NSA had
 22 made a 'corporate decision' to purge all data in its repositories that can be identified
 23 as having been acquired through upstream collection before the October 31, 2011
 24 effective date of the amended NSA minimization procedures approved by the Court
 25 in the November 30 [2011] Opinion.

26 FISC Order of September 25, 2012 at 30. Given the government's new assertion of its secret and

27 (emphasis added). The government, however, had failed to inform the FISC of the evidence
 28 preservation orders in *Jewel v. NSA* and *Shubert v. Obama* which, as described above, do indeed
 reach the telephone records collected by the government. Moreover, as noted above, the plaintiffs
 and defendants in *First Unitarian* had affirmatively acknowledged their preservation obligations in
 the Case Management Conference Statement filed on October 31, 2013. As noted above, the FISC
 issued a revised Opinion and Order on March 12, 2014, acknowledging this Court's primary
 oversight role in *Jewel* and *First Unitarian*. Exhibit A.

1 narrow view of the scope of its preservation duties, plaintiffs believe that a full accounting of the
 2 preservation that has occurred to date, and of any evidence that has been destroyed, is necessary.
 3 This includes all evidence potentially discoverable or relevant to the claims in *Jewel v. NSA*,
 4 including, at a minimum, evidence of or relating to the collection of telephone records, Internet
 5 metadata, and Internet and telephone content. We request that the Court require the government, at
 6 the earliest date possible but in no case longer than 15 days, provide the Court and plaintiffs with
 7 this information.

8 **III. CONCLUSION**

9 For the foregoing reasons, plaintiffs respectfully request, as set forth more particularly in
 10 the accompanying proposed order:

11 1. That the Court reaffirm that the Court's November 13, 2009 evidence preservation
 12 order in *Jewel v. NSA* (ECF No. 51 in No. 08-cv-4373-JSW), as well as the obligation under the
 13 common law and the Federal Rules of Civil Procedure to preserve potentially relevant or
 14 discoverable evidence, require the government defendants to preserve the telephone records they
 15 possess, and that the Court enforce the *Jewel* preservation order as stated in the accompanying
 16 proposed order.

17 2. That the Court enter a preservation order in *First Unitarian Church of Los Angeles,*
 18 *et al. v. National Security Agency, et al.*, Case No. 13-cv-3287-JSW (N.D. Cal.) similar to the
 19 Preservation Order in *Jewel* (ECF No. 51).

20 3. That the Court order the government defendants within 15 days to disclose to the
 21 Court and to plaintiffs what it has done to comply with the existing preservation orders, and to
 22 disclose whether they have destroyed telephone records, Internet metadata records, Internet or
 23 telephone content data, or any other evidence potentially relevant to or discoverable in these
 24 lawsuits since the commencement of the related *Hepting* litigation in January 2006.

25 DATE: March 13, 2014

Respectfully submitted,

26 s/ Cindy Cohn

27 CINDY COHN
 28 LEE TIEN
 KURT OPSAHL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JAMES S. TYRE
MARK RUMOLD
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE

THOMAS E. MOORE III
ROYSE LAW FIRM, PC

RACHAEL E. MENY
PAULA L. BLIZZARD
MICHAEL S. KWUN
AUDREY WALTON-HADLOCK
BENJAMIN W. BERKOWITZ
KEKER & VAN NEST LLP

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN

Counsel for Plaintiffs

Exhibit A

Exhibit A

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

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

Docket Number: BR 14-01

OPINION AND ORDER

This matter is before the United States Foreign Intelligence Surveillance Court (“FISC” or “Court”) on the government’s Notice of Entry of Temporary Restraining Order Against the United States and Motion for Temporary Relief from Subparagraph (3)(E) of Primary Order, filed on March 11, 2014 (“March 11 Notice and Motion”). For reasons explained herein, the government’s request for temporary relief is granted, subject to a modification to the conditions proposed by the government.

The Primary Order in the above-captioned docket (“Primary Order”) was issued on January 3, 2014, and amended pursuant to a prior government motion on February 5, 2014. As part of the minimization procedures adopted pursuant to 50 U.S.C. § 1861(c)(1), (g), the Primary Order requires the National Security Agency (NSA) to destroy call detail records or telephony metadata (hereinafter “BR metadata”) produced to NSA by certain telecommunications carriers no later than five years after its initial production. See Primary Order subparagraph (3)(E) at 14.

On February 25, 2014, the government submitted a motion for a second amendment to the Primary Order in the above-captioned docket (“February 25 Motion”). The February 25 Motion sought to amend the minimization procedures in the Primary Order to retain BR metadata

for longer than five years in furtherance of its potential obligation to retain evidence possibly relevant to pending civil litigation, subject to further restrictions on access and use. February 25 Motion at 3-8.

On March 7, 2014, the Court issued an Opinion and Order that denied the February 25 Motion without prejudice (“March 7 Opinion and Order”). The Court rejected the government’s premise that the common law obligation to preserve evidence that is potentially relevant to civil litigation superseded requirements to destroy information under provisions of FISC orders that were adopted pursuant to 50 U.S.C. § 1861(c)(1), (g). March 7 Opinion and Order at 3-4. The Court accordingly analyzed the government’s proposed amendments under those statutory minimization requirements. The Court found that, on the record then before it, the government’s proposal did not satisfy those requirements. Id. at 4-12. The Court concluded that any interests the civil plaintiffs might assert in preserving all of the BR metadata was “unsubstantiated” on that record. Id. at 8. The Court further observed that

no District Court or Circuit Court of Appeals has entered a preservation order applicable to the BR metadata in question in any of the civil matters cited in the motion. Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved, despite it being a matter of public record that BR metadata is routinely destroyed after five years.

Id. at 8-9 (citations omitted). Further, while acknowledging that “questions of relevance are ultimately matters for the courts entertaining the civil litigation to resolve,” id. at 10, the Court was unpersuaded by the government’s assertion that the entire, voluminous set of BR metadata needed to be preserved for the civil litigation, particularly in view of the fact that the plaintiffs in

the civil matters, as described by the government, generally sought destruction of the BR metadata. Id. at 9-10.

As noted above, the Court denied the February 25 Motion without prejudice, stating that the government may bring “another motion providing additional facts or legal analysis, or seeking a modified amendment to the existing minimization procedures.” Id. at 12.

The March 11 Notice and Motion provides such additional facts.¹ On March 7, 2014, subsequent to the issuance of the March 7 Opinion and Order, the government began to notify the plaintiffs in the civil matters identified in the February 25 Motion, as well as the courts in which those matters are pending, of the March 7 Opinion and Order and of the government’s intention “to commence complying with the applicable destruction requirements” on March 11, 2014. March 11 Notice and Motion at 5.² One of those civil matters is First Unitarian Church v. National Security Agency, No. 3:13-cv-2387 (JSW) (N.D. Cal.). On March 10, 2014, the plaintiffs in that matter, and those in a related case also pending before the District Court for the Northern District of California – Jewel v. National Security Agency, No. C 08-04373-JSW (N.D. Cal.) – sought temporary restraining orders from that District Court against the destruction of any

¹ On March 10, 2014, a Motion of Plaintiffs in Jewel v. NSA and in First Unitarian Church v. NSA for Leave to Correct the Record, together with a supporting declaration, was submitted in the above-captioned docket. (The motion is available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-motion-140311.pdf> and the declaration is available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-declaration-140311.pdf>.) Those movants seek to add to the record additional information addressing the need to preserve at least some BR metadata in connection with pending civil matters. The Court will rule on this motion separately.

² This Court’s March 7 Opinion and Order noted that the government could notify the plaintiffs and the district courts of the pending destruction of BR metadata. March 7 Opinion and Order at 11.

BR metadata. March 11 Notice and Motion at 5 and Exhibits A and B thereto. The District Court issued a temporary restraining order (“March 11 TRO”) in both matters on the same date. March 11 Notice and Motion at 6 and Exhibit C thereto. The March 11 TRO prohibits the Government defendants “from destroying any potential evidence relevant to the claims at issue ..., including but not limited to ... any telephone metadata or ‘call detail’ records,” pending further order of that District Court. March 11 Notice and Motion at 6 and March 11 TRO at 2. The March 11 TRO also established a schedule for further consideration of these preservation issues, with briefing by the government and the plaintiffs to be completed by March 18, 2014, and a hearing set for March 19, 2014. March 11 Notice and Motion at 6 and March 11 TRO at 2.

These intervening developments fundamentally alter premises on which the March 7, 2014 Opinion and Order was based.³ It is now apparent that some civil plaintiffs actively seek to preserve the BR metadata as potentially relevant to their claims. What is more, by issuing the March 11 TRO, the District Court has directly prohibited NSA from doing what the FISC has ordered it to do – namely, destroy BR metadata no later than five years from when it was initially produced. These conflicting directives from federal courts put the government in an untenable position and are likely to lead to uncertainty and confusion among all concerned about the status of BR metadata that was acquired more than five years ago.

³ There appears to be a dispute between the government and the plaintiffs in Jewel and First Unitarian Church about whether prior preservation orders issued by the District Court for the Northern District of California encompass call detail records produced to the NSA pursuant to FISC orders under 50 U.S.C. § 1861. See, e.g., Exhibit A to the March 11 Notice and Motion (Jewel v. National Security Agency, No. C 08-04373-JSW (N.D. Cal.), Plaintiffs’ Notice of Ex Parte Motion and Ex Parte Motion for a Temporary Restraining Order to Prevent the Government from Destroying Evidence, filed on March 10, 2014, at 2-3 and Exhibit E thereto (exchange of emails between counsel for the government and the plaintiffs)). That dispute is a matter for the District Court to resolve.

The March 11 TRO also demonstrates that the District Court for the Northern District of California intends to hear more from the parties in Jewel and First Unitarian Church regarding preservation of BR metadata for purposes of that litigation. See March 11 TRO at 1 (“A temporary restraining order is necessary and appropriate in order to allow the Court to decide whether the evidence should be preserved with the benefit of full briefing and participation by all parties.”). As already noted, it is appropriate for that District Court, rather than the FISC, to determine what BR metadata is relevant to that litigation.

For the foregoing reasons, the government’s motion for temporary relief from the five-year destruction rule is granted. In one respect, however, the Court modifies the government’s proposed “conditions” for such relief. See March 11 Notice and Motion at 7-8.

One of the conditions proposed by the government states: “Should any further accesses to the BR metadata be required for civil litigation purposes, such accesses will occur only following prior written notice specifically describing the nature of and reason for the access, and the approval of the Court.” Id. at 8 (emphasis added). The Court declines to adopt the underscored language requiring prior FISC approval. It appears unnecessary, and probably ill-advised, to put the FISC in the position of approving or disapproving actions the government, as a civil litigant, proposes to take, e.g., to respond to specific discovery requests or to particular inquiries made by the court before which a civil matter is pending. While accessing or using the BR metadata for civil litigation purposes can implicate the privacy interests of United States persons, the other interests and considerations likely to be implicated – such as fairness to the civil plaintiffs, relevance of the information sought, and burden placed on the government – are tangential at best

to the purposes of minimization under Section 1861. They are, however, proper considerations for the court before which the civil litigation is pending.⁴

Accordingly, it is HEREBY ORDERED that the government's motion for temporary relief from the five-year destruction requirement is GRANTED AS FOLLOWS:

(1) Pending resolution of the preservation issues raised by the plaintiffs in *Jewel* and *First Unitarian Church* before the United States District Court for the Northern District of California, BR metadata otherwise required to be destroyed under the five-year limitation on retention specified in subparagraph (3)(E) of the Primary Order issued in the above-captioned docket, as amended, may be preserved and/or stored in a format that precludes any access or use by NSA intelligence analysts for any purpose, including to conduct contact chaining queries of the BR metadata approved under the applicable "reasonable, articulable suspicion" standard⁵ for the purpose of obtaining foreign intelligence information, and subject to the following additional conditions:

(a) NSA technical personnel may access the BR metadata subject to this Order only for the purpose of ensuring continued compliance with the government's preservation

⁴ In contrast, having the government merely provide the FISC with written notice of such accesses to the BR metadata does not present the same concerns and may be helpful in keeping the FISC informed of developments that are relevant to its role in determining and enforcing compliance with the minimization procedures, see 50 U.S.C. § 1803(h), and in assessing the continued adequacy of those procedures in the event of a future application to continue bulk production of BR metadata under Section 1861.

⁵ See No. BR 14-01, Order Granting the Government's Motion to Amend the Court's Primary Order Dated January 3, 2014, at 3-9 (FISA Ct. Feb. 5, 2014) (available at: <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-order.pdf>).

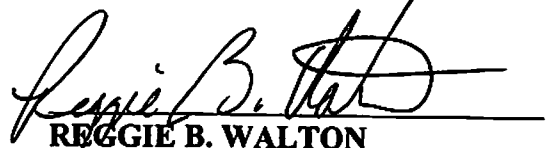
obligations to include taking reasonable steps designed to ensure appropriate continued preservation and/or storage, as well as the continued integrity of the BR metadata; and

(b) Should any further accesses to the BR metadata be required for civil litigation purposes, such accesses shall occur only following prior written notice to the FISC specifically describing the nature of and reason for the access.

(2) The government shall promptly notify the FISC of any additional material developments in civil litigation pertaining to the BR metadata, including upon resolution of the temporary restraining order proceedings in the Northern District of California.

(3) All other provisions of the Primary Order in the above-captioned docket, as amended on February 5, 2014, shall remain in effect.

SO ORDERED, this 12th day of March, 2014, in Docket Number BR 14-01.


REGGIE B. WALTON
Presiding Judge, United States Foreign
Intelligence Surveillance Court