



December 21, 2015

VIA EMAIL AND U.S. MAIL

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U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, NW, Rm. 6102
Washington, D.C. 20001

Re: FISC Order BR-15-99

Dear Counsel:

We write with regard to the order of the Foreign Intelligence Surveillance Court in BR-15-99 dated November 24, 2015, publicly released on December 7, 2015. We request that you correctly convey plaintiffs' position to the court on issues implicated by this request. We think the most straightforward way for you to do so is to submit this letter to the Court.

As you know, in footnote 3, the Court states:

During the hearing held on November 20, 2015, the Court directed the government to submit its assessment of whether the cessation of bulk collection on November 28, 2015, will moot the claims of the plaintiffs in the Northern District of California litigation relating to the BR Metadata program and thus provide a basis for moving to lift the preservation orders. The Court further directed the government to address whether, even if the California plaintiffs' claims are not moot, there might be a basis for seeking to lift the preservation orders with respect to the BR Metadata that is not associated with the plaintiffs. The government intends to make its submission on these issues by January 8, 2016.

First, we assume that, as the Court directed, you will be merely providing an "assessment" of whether the claims are moot for the Court's information—not seeking an adjudication of that issue from the FISC. I think we agree that only Judge White can adjudicate that issue, and I do want that made clear. This is consistent with not only the FISC order of March 12, 2014, but also the preservation orders in both *Jewel* (Exhibit A) and *First Unitarian* (Exhibit B).

Second, we ask that you convey to the Court that plaintiffs do not believe that their claims are moot. For instance, we have claims for damages in both *Jewel* and *First Unitarian* reaching back to collection that occurred in 2001, and those claims—which have been properly raised in accordance with the Federal Tort Claims Act process in both cases—survive regardless of the changes brought by the USA Freedom Act. We also believe our constitutional claims are not moot.

Third, in response to the Court's request for information about whether "there might be a basis for seeking to lift the preservation orders with respect to the BR Metadata that is not associated with the plaintiffs," please convey to the Court that plaintiffs do not now, and have not ever, maintained that the records themselves must be preserved, even as to our clients. Instead, we have reluctantly asserted that the government must maintain a broad spectrum of evidence because of the government's broad assertions about standing. So far, the government has been unwilling to cease its dispute about the fact of collection and has instead, on multiple occasions, argued that plaintiffs' inability to prove collection should be the basis for dismissal of the cases. Regardless, we remain willing to discuss alternatives that would facilitate the prompt destruction of the records while not prejudicing our clients' ongoing claims. We believe there are several possible ways forward to that end, including several referenced during the hearing with Judge White on March 19, 2014.

We appreciate your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cindy Cohn', with a long horizontal line extending to the right.

Cindy Cohn
Executive Director

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CAROLYN JEWEL *et al.*,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY *et al.*,

Defendants

Case No. C:08-cv-4373-VRW

Chief Judge Vaughn R. Walker

~~PROPOSED~~ ORDER

Upon consideration of the parties' joint motion for entry of an order regarding the preservation of evidence and good cause appearing, the Court hereby ENTERS the following order based on the Court's prior Order of November 6, 2007, in 06-cv-1791-VRW (Dkt. 393).

A. The Court reminds all parties of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data and tangible things in the possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers, bailees or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. Counsel are under an obligation to exercise efforts to identify and notify such non-parties, including employees of corporate or institutional parties.

B. "Documents, data and tangible things" is to be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voicemail, e-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, disks and cards, printouts, document image files, web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, checks, statements, worksheets,

1 summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films,
2 digital or chemical process photographs, video, phonographic, tape or digital recordings or
3 transcripts thereof, drafts, jottings and notes. Information that serves to identify, locate, or link
4 such material, such as file inventories, file folders, indices and metadata, is also included
5 in this definition.

6 C. "Preservation" is to be interpreted broadly to accomplish the goal of maintaining the
7 integrity of all documents, data and tangible things reasonably anticipated to be subject to
8 discovery under FRCP 26, 45 and 56(e) in this action. Preservation includes taking reasonable
9 steps to prevent the partial or full destruction, alteration, testing, deletion, shredding,
10 incineration, wiping, relocation, migration, theft, or mutation of such material, as well as
11 negligent or intentional handling that would make material incomplete or inaccessible.

12 D. Counsel are directed to inquire of their respective clients if the business or
13 government practices of any party involve the routine destruction, recycling, relocation, or
14 mutation of such materials and, if so, direct the party, to the extent practicable for the pendency
15 of this order, either to

- 16 (1) halt such business or government practices;
 - 17 (2) sequester or remove such material from the business or government practices; or
 - 18 (3) arrange for the preservation of complete and accurate duplicates or copies of such
- 19 material, suitable for later discovery if requested.

20 Counsel representing each party shall, not later than December 15, 2009, submit to the
21 Court under seal and pursuant to FRCP 11, a statement that the directive in paragraph D, above,
22 has been carried out.

23 IT IS SO ORDERED.

24 Dated: Nov. 13, 2009.

25
26 The Honorable
United States District Judge

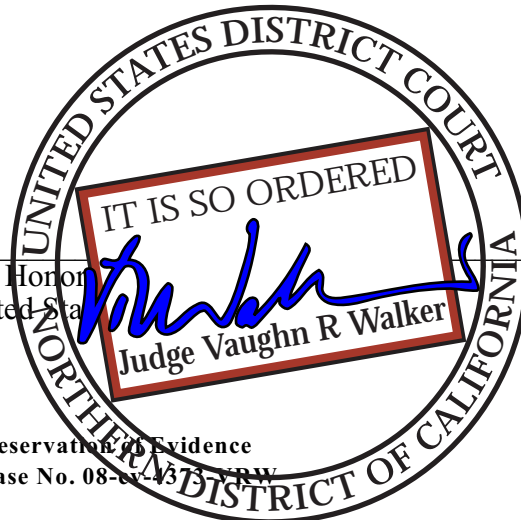


Exhibit B

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

FIRST UNITARIAN CHURCH OF LOS ANGELES, ET AL.,

No. C 13-03287 JSW

Plaintiffs,

v.

ORDER

NATIONAL SECURITY AGENCY, ET AL.,

Defendants.

_____ /

Upon consideration of the parties' submissions and good cause appearing, the Court hereby orders as follows:

A. The Court reminds all parties of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data and tangible things in the possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers, bailees or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. Counsel are under an obligation to exercise efforts to identify and notify such non-parties, including employees of corporation or institutional parties.

B. "Documents, data and tangible things: is to be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voicemail, e-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as

1 tapes, disks and cards, printouts, document image files, web pages, databases, spreadsheets,
2 software, books, ledgers, journals, orders, invoices, bills, vouchers, checks, statements,
3 worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations,
4 drawings, films, digital or chemical process photographs, video, phonographic, tape or digital
5 recordings or transcripts thereof, drafts, jottings and notes. Information that serves to identify,
6 locate, or link such materials, such as file inventories, file folders, indicies and metadata, is also
7 included un this definition.

8 C. "Preservation" is to be interpreted broadly to accomplish the goal of maintaining
9 the integrity of all documents, data and tangible things reasonably anticipates to be subject to
10 discovery under Federal Rule of Civil Procedure 26, 45 and 56(e) in this action. Preservation
11 includes taking steps to prevent the partial or full destruction, alteration, testing, deletion,
12 shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as
13 well as negligent or intentional handling that would make material incomplete or inaccessible.

14 D. This order extends to information relevant to the subject matter involved in this
15 action or reasonably calculated to lead to the discovery of admissible evidence under the
16 currently operative Complaint in this case. The key allegations of the Complaint with regard to
17 evidence preservation are:

- 18 3. This lawsuit challenges an illegal and unconstitutional program of
19 dragnet
20 electronic surveillance, specifically the bulk acquisition, collection,
21 storage, retention, and searching of telephone communications
22 information (the "Associational Tracking Program") conducted by the
23 National Security Agency (NSA) and the other defendants (collectively,
24 "Defendants").
- 25 5. The communications information that Defendants collect in the
26 Associational Tracking Program is retained and stored by Defendants in
27 one or more databases. The Program collects information concerning all
28 calls wholly within the United States, including local telephone calls, as
well as all calls between the United States and abroad, regardless of a
connection to international terrorism, reasonable suspicion of criminality,
or any other form of wrongdoing. This information is stored for at least
five years. Defendants have indiscriminately obtained, and stored the
telephone communications information of millions of ordinary
Americans as part of the Associational Tracking Program.

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53. The telephone communications information Defendants collect and acquire in bulk as part of the Associational Tracking Program is retained and stored by Defendants in one or more databases. These databases contain call information for all, or the vast majority, of calls wholly within the United States, including local telephone calls, and calls between the United States and abroad, for a period of at least five years. Defendants have indiscriminately obtained and stored the telephone communications information of millions of ordinary Americans, including Plaintiffs, their members, and staffs, as part of the Associational Tracking Program.
55. Through the Associational Tracking Program, Defendants have collected, acquired, and retained, and continue to collect, acquire, and retain, bulk communications information of telephone calls made and received by Plaintiffs, their members, and their staffs. This information is otherwise private.
60. Defendants' bulk collection, acquisition, and retention of the telephone communications information of Plaintiffs, their members, and their staffs is done (a) without probable cause or reasonable suspicion to believe that Plaintiffs, their members, and their staffs have committed or are about to commit any crime or engage in any international terrorist activity; (b) without probable cause or reasonable suspicion to believe that Plaintiffs, their members, or their staffs are foreign powers or agents of foreign powers; and (c) without probable cause or reasonable suspicion to believe that the communications of Plaintiffs, their members, and their staffs contain or pertain to foreign intelligence information, or relate to an investigation to obtain foreign intelligence information.
64. Defendants' searching of the telephone communications information of Plaintiffs is done without lawful authorization, probable cause, and/or individualized suspicion. It is done in violation of statutory and constitutional limitations and in excess of statutory and constitutional authority. Any judicial, administrative, or executive authorization (including any business records order issued pursuant to 50 U.S.C. § 1861) of the Associational Tracking Program or of the searching of the communications information of Plaintiffs is unlawful and invalid.
66. Defendants, and each of them, have authorized, approved, supervised, performed, caused, participated in, aided, abetted, counseled, commanded, induced, procured, enabled, contributed to, facilitated, directed, controlled, assisted in, or conspired in the Associational Tracking Program and in the search or use of the telephone communications information of Plaintiffs, their members, and their staff. Defendants have committed these acts willfully, knowingly, and intentionally. Defendants continue to commit these acts and will continue to do so absent an order of this Court enjoining and restraining them from doing so.

1 E. Counsel are directed to inquire of their respective clients if the business or
2 government practices of any party involve the routine destruction, recycling, relocation, or
3 mutation of such materials and, if so, direct the party, to the extent practicable for pendency of
4 this order, either to

- 5 (1) halt such business or government practices;
6 (2) sequester or remove such material from the business or government practices; or
7 (3) arrange for the preservation of complete and accurate duplicates or copies of
8 such material, suitable for later discovery if requested.

9 Counsel representing each party shall, not later than April 21, 2014, submit to the Court
10 under seal and pursuant to Federal Rule of Civil Procedure 11, a statement that the directive in
11 Paragraph E has been carried out.

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13 **IT IS SO ORDERED.**

14 Dated: March 21, 2014



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

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