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 No. BR 15-99

REPORT DESCRIBING THE GOVERNMENT'S ASSESSMENT WHETHER THE END OF BULK COLLECTION HAS MOOTED CLAIMS OF CERTAIN PLAINTIFFS

The United States of America submits this assessment whether the end of bulk collection of telephone call detail records (or "telephony metadata") pursuant to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1861, as amended by Section 215 of the USA PATRIOT Act, has mooted claims of plaintiffs in certain cases pending in the United States District Court for the Northern District of California (*Jewel v. NSA*, 08-cv-4373, *Shubert v. Obama*, 06-cv-1791, and *First Unitarian Church of Los Angeles v. NSA*, 13-cv-3287) and provides a basis for seeking to lift preservation orders in such cases with respect to call detail records not associated with the plaintiffs. As described below, the Government assesses that the plaintiffs' challenges to the bulk collection of call detail records pursuant to FISA ("Section 215 Program") have not been mooted by the end of the program on November 28, 2015. The Government further assesses that there is no viable basis for seeking to lift the preservation orders with respect to call

detail records not associated with the plaintiffs and that even if there were such a viable basis technical considerations may make extracting and preserving call detail records associated with the plaintiffs, if any, impractical.

BACKGROUND

In docket number BR 15-99, this Court approved in part the government's request for the production of bulk call detail records to the National Security Agency (NSA) pursuant to the "business records" provision of FISA.[1] *See* 50 U.S.C. § 1861. That authorization expired on November 28, 2015, at 11:59 p.m. Eastern Time, immediately after which the USA FREEDOM Act prohibits the further bulk production of tangible things pursuant to Section 1861. *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, §§ 103 and 109(a), 129 Stat. 268, 272, 276. In compliance with the Court's authorization, the Court-ordered production of call detail records ceased on November 28, 2015.

The Government's application sought authorization to retain and use, after November 28, 2015, previously produced call detail records ("BR metadata") for certain limited technical and litigation preservation purposes. The Court approved the

---

[1] Telephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (*e.g.*, originating and terminating telephone number, International Mobile Subscriber Identity number, International Mobile station Equipment Identity number), trunk identifier, telephone calling card numbers, and time and duration of call. Telephony metadata does not include the substantive content of any communication, as defined by 18 U.S.C. § 2510(8), or the name, address, or financial information of a subscriber or customer. Additionally, telephony metadata does not include cell site location information. Primary Order, docket number BR 15-99 at 3 n. 1.

Government's request in its November 24, 2015, Opinion and Order, subject to the application of certain minimization procedures.

At a hearing on November 20, 2015, regarding the Government's request to retain and use BR metadata after November 28, 2015, the Court directed the Government to submit its assessment regarding the extent to which the end of the Section 215 program provided a basis to lift the preservation orders with respect to BR metadata not associated with the above-described plaintiffs. Specifically:

> 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.

Op. and Order at 8 n.3, docket number BR 15-99 (FISA Ct. Nov. 24, 2015).

DISCUSSION

The Cessation of Bulk Collection of Telephony Metadata Has Not Mooted the Claims of the Plaintiffs in the Northern District of California Litigation Relating to the Section 215 Program.

Plaintiffs' challenges to the Section 215 Program have not been mooted by the cessation of the program on November 28, 2015.

Plaintiffs in each of the three cases pending in the Northern District of California purportedly assert damages claims based on the defendants' alleged violation of

various statutes and constitutional provisions in conducting the Section 215 Program. In *Jewel v. NSA*, the plaintiffs seek damages from the United States, its agencies, and government officials in their official and individual capacities, for claimed violations of the First Amendment, Fourth Amendment, FISA (50 U.S.C. § 1809), the Wiretap Act (18 U.S.C. § 2511), and the Stored Communications Act (18 U.S.C. § 2703). *See Jewel v. NSA*, 08-cv-4373 (N.D. Cal.), Compl., ECF No. 1, Counts II, IV, VI, VIII, IX, XI, XII, XIV, & XV. Likewise, in *Shubert v. Obama*, the plaintiffs seek damages from (some or all) defendants for alleged violations of FISA,[2] the Wiretap Act, the Stored Communications Act, and the Fourth Amendment. *See Shubert v. Obama*, 06-cv-1791 (N.D. Cal.), Second Am. Compl., ECF No. 771, at ¶¶ 103-118. While some of plaintiffs' damages claims are based solely on the alleged unlawful acquisition of communications content, others purport to put at issue the alleged bulk collection of telephony metadata.[3] Finally, the

---

[2] The district court in *Jewel* and in *Shubert* has ruled that the plaintiffs' "claim for damages under FISA against the United States and against the individual federal defendants in their official capacit[ies] is barred" by sovereign immunity, *see Jewel v. NSA*, 965 F. Supp. 2d 1090, 1107 (N.D. Cal. 2013) (citing *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 852 (9th Cir. 2012) (FISA Section 1810 does not waive the sovereign immunity of the United States)). Upon a final judgment in that litigation, plaintiffs may seek further review of that ruling in an appropriate appellate court.

[3] As pertinent to the preservation issue, the Government has argued that the *Jewel* and *Shubert* complaints at most purport to raise claims regarding the presidentially authorized bulk telephony metadata program and not the subsequent FISC-authorized Section 215 Program. *See Jewel v. NSA*, Gov't Defs.' Brief Regarding Compliance with Preservation Orders, ECF No. 229, at 13-26. The plaintiffs, however, maintain that they contest the legality of both presidentially authorized and FISA-authorized programs (and therefore that the Government's destruction, per FISC

plaintiffs in *First Unitarian Church of Los Angeles v. NSA*, No. 13-cv-3287 (N.D. Cal.) seek damages from the United States for alleged violations of the Stored Communications Act. *See First Unitarian*, Second Am. Compl., ECF No. 119, Count V. These damages claims, regardless of their substantive merit, survive the cessation of the Section 215 Program.[4]

The Government is therefore obligated under orders issued by the Northern District of California to preserve information relevant to these damages claims. *See, e.g., First Unitarian*, Preservation Order, ECF No. 103. Relevant information may include BR Metadata to the extent that they may constitute evidence supporting the plaintiffs' standing to assert their damages claims. *See Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). Similarly, to the extent plaintiffs seek damages for each alleged violation of their rights, each call detail record collected under the Section 215 program (if any)

---

orders, of aged-off bulk telephony metadata collected under Section 215 constituted spoliation). *See id., Jewel* Pls.' Brief Re: the Gov't's Non-Compliance with the Court' Evidence Preservation Orders, ECF No. 233, at 10-19; *Shubert v. Obama*, Pls.' Brief Concerning the Gov't's Violation of the Court's Preservation Orders, ECF No. 124. The district court has not decided the issue.

[4] Counsel for the plaintiffs in *Jewel* and *First Unitarian* agrees with this conclusion. In a recent letter sent to the United States Department of Justice, counsel for these plaintiffs asked the Government to "convey to the [FISC] that plaintiffs do not believe that their claims are moot" because they "have claims for damages" that "survive regardless of the changes brought by the USA Freedom Act." *See* Letter from Cindy Cohn to U.S. Department of Justice, dated Dec. 21, 2015 (attached as Exhibit A, hereto) at 2.

pertaining to plaintiffs' telephone calls could be potentially relevant to calculating the quantum of damages recoverable by each plaintiff.[5]

Second, the plaintiffs in the Northern District of California cases have not conceded that even their claims for equitable relief are moot. In each of the three cases, the plaintiffs seek declaratory relief, prospective injunctive relief, and retroactive equitable relief (including, in two cases, an inventory and the destruction of allegedly wrongfully collected call detail records, and in the third case, destruction only). *See Jewel*, Compl., ECF No. 1 (Prayer for Relief); *Shubert*, Second Am. Compl., ECF No. 771 (Prayer for Relief); *First Unitarian*, Second Am. Compl., ECF No. 119 (Prayer for Relief). The *Jewel* and *First Unitarian* plaintiffs have already indicated that they "believe" that their "constitutional claims"—which seek these forms of equitable relief—"are not moot." Exhibit A, at 2.

The Government disagrees that plaintiffs' claims for prospective equitable relief are still live. In short, now that the bulk collection of telephony metadata has ceased, the Government will argue to the district court that the plaintiffs' claims for prospective

---

[5] In several other cases in which preservation orders have not been entered, plaintiffs challenging the Section 215 Program have also asserted damages claims that would survive the end of the program. *See, e.g., Schuchardt v. Obama*, 14-cv-705 (W.D. Pa.), Second Am. Compl., ECF No. 16, Count VI (FISA claim seeking damages per violation); *Klayman v. Obama*, 13-cv-0851 (D.D.C.), Fourth Am. Compl., ECF No. 145-1 at ¶¶ 49-69 (First, Fourth, and Fifth Amendment claims). In these cases, it is the Government's position that a common law preservation obligation exists to preserve metadata to the extent that it is relevant to these purported damages claims as well. *See, e.g., Apple Inc. v. Samsung Elec. Co.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012).

declaratory and injunctive relief against the program are moot. *See, e.g., Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166-67 (9th Cir. 2011) (per curiam).

As for the retroactive equitable relief of destruction (that is, expungement) of BR metadata, plaintiffs' claims seeking that relief are not moot so long as the Government retains the BR Metadata (whether for purposes of technical access, until February 29, 2016, or for preservation purposes thereafter). However, it should not be necessary to preserve BR Metadata solely to litigate the merits of plaintiffs' expungement claims. Destruction of the data would not frustrate plaintiffs' ability to obtain such relief; it would provide the relief they are seeking.

The only equitable claims raised by the plaintiffs that arguably are not moot *and* require retention of the BR Metadata are the demands in two of the cases for an inventory (accounting) of records collected (if any) that pertain to the plaintiffs' telephone calls. To the extent plaintiffs seek this relief either for purposes of calculating their alleged damages, or as a means of ensuring complete destruction of all BR metadata concerning their telephone calls, their requests for an accounting arguably present another reason why *Jewel* and *First Unitarian* are not moot, notwithstanding the cessation of the Section 215 Program.

While the merits of any argument that a claim is moot are for the District Court to decide in the first instance, the Government assesses that not all claims in the

Northern District of California litigation are currently moot even though the Section 215 Program has ended.

There is no viable basis for seeking to lift the preservation orders with regard to BR Metadata not associated with the Northern District of California plaintiffs.

Attempting to limit the Government's preservation of the BR Metadata to records of calls (if any) placed or received by the plaintiffs in the Northern District of California cases would not be feasible, assuming, *arguendo*, they were collected by NSA, due to the numerosity of the named plaintiffs and of the putative classes on whose behalf the plaintiffs purport to sue.[6] In *Jewel*, the putative class includes "all individuals in the United States that are current residential subscribers or customers of AT&T's telephone services or Internet services, or that were residential telephone or Internet subscribers or customers at any time after September 2001."[7] *Jewel*, Compl., ECF No. 1 at ¶ 98. "Plaintiffs estimate that [that] class consists of millions of members." *Id.* at ¶ 103.

---

[6] Issues relating to the technical difficulties involved in extracting and preserving a limited subset of BR Metadata are addressed elsewhere in this filing.

[7] Although the *Jewel* plaintiffs do not seek class certification for purposes of their damages claims, they do seek certification as to their claims for equitable relief, including their claims for injunctive relief based on the First and Fourth Amendments. *See* 08-cv-4373, Compl., ECF No. 1 at ¶ 99. As noted above, plaintiffs have indicated that they believe those claims have not been rendered moot by the cessation of the program. *See supra*, at 6 (quoting Exhibit A, Letter from Counsel for EFF to DOJ, dated Dec. 21, 2015).

Similarly, in *Shubert*, the named plaintiffs allege that they are customers of AT&T and Verizon, *see* 06-md-1791, Second Am. Class Action Compl., ECF No. 771 at ¶¶ 10–13, and seek to represent "a class comprised of all present and future United States persons who have been or will be subject to electronic surveillance by the National Security Agency without a search warrant, court order, or other lawful authorization since September 12, 2001."[8] *Id.* at ¶ 27. Plaintiffs in *Shubert* likewise assess that their putative class would contain millions of members. *See id.* ¶ 32 (arguing that a class action is superior to "the prosecution of millions of separate actions" that would otherwise result).[9]

Finally, although the third Northern District of California case, *First Unitarian*, is not a class action, the plaintiffs in that case are twenty-two organizations, including such large entities as Greenpeace, Human Rights Watch, and People for the American

---

[8] Plaintiffs in *Shubert* seek class certification as to all of their claims, including those for damages. *See* 06-md-1791, Second Am. Class Action Compl., ECF No. 771 at ¶¶ 30, 118(C), (D).

[9] We observe that the *Shubert* definition of the putative class in effect excludes persons as to whose calls the NSA obtained records under the Section 215 program. This is so for two reasons. First, the class definition includes only persons "subject to electronic surveillance," and the collection of business records pursuant to Section 215 is not "electronic surveillance" as defined under FISA. *See* 50 U.S.C. § 1801(f). Second, the class definition covers such surveillance only where it occurred "without court order or other lawful authorization," whereas records collected under the Section 215 Program were obtained with "court order[s]," the Primary and Secondary Orders issued by this Court. Nonetheless, even without the putative *Shubert* class, the segregation of any telephony metadata collected by defendants would be infeasible, and in any event the *Shubert* plaintiffs could seek to modify their proposed class definition to address these issues.

Way, who claim to have as many as 600,000 members. *See First Unitarian*, Second Am. Compl., ECF No. 119 at ¶¶ 18–39. Those organizations bring claims on behalf of themselves, and most also purport to assert claims on behalf of their members and/or staff. *See id.* ¶¶ 1–2, 18–39. Again assuming their records have been collected, any attempt to limit preservation obligations to the records of calls to or from any of the plaintiff organizations, their staffs, and their members would still require the retention of BR Metadata associated with perhaps tens if not hundreds of thousands of telephone numbers, assuming that all of the pertinent telephone numbers could be reliably identified and were provided to the NSA in the first place.

In sum, the sizable number of large organizational plaintiffs in *First Unitarian* asserting claims on behalf of members and/or staff, along with the potentially vast putative classes in *Jewel* and *Shubert* (assuming *arguendo* that the members of those putative classes could be identified and their records were collected by NSA), render it infeasible to limit the Government's preservation obligations to BR Metadata, if any, associated with plaintiffs in those cases.

Furthermore, even if the preservation orders in the three Northern District of California cases were lifted, the Government's common-law preservation obligations with respect to the BR Metadata remain in seven additional cases, including three

putative class actions.[10] The Government recognizes that this Court has previously held that general common-law preservation obligations do not supersede the statutorily based obligation to destroy aged-off telephony metadata embodied in its orders. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things*, docket number BR 14-01 (FISA Ct. Mar. 7, 2014). Previously, when the Court entered its March 7, 2014 order requiring destruction of call detail records notwithstanding the Government's common-law preservation obligations, the Court noted that the Government could notify the plaintiffs and the district court of the pending destruction. *See id.* at 11. If the preservation orders in the three Northern District of California cases were lifted and the BR Metadata therefore became subject to imminent destruction, the Government, as before, would notify the plaintiffs and relevant district courts in the seven other cases "of the government's intention to commence complying with the applicable destruction requirements," *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, docket number BR 14-01 (FISA Ct. Mar. 12, 2014) at 3, to permit the plaintiffs in those cases to "actively seek to preserve the BR metadata as potentially relevant to their claims," *id.* at 4. As the Court observed, this is precisely

[10] *See Klayman v. Obama*, No. 1:14-cv-0092 (D.D.C.) (putative class action); *Paul v. Obama*, No. 1:14-cv-0262 (D.D.C.) (putative class action); *Schuchardt v. Obama*, No. 14-cv-704 (W.D. Pa.) (putative class action); *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C.); No. 14-5016 (D.C. Cir.); *Klayman v. Obama*, No. 1:13-cv-881 (D.D.C.); *Perez v. Clapper*, No. 14-cv-50 (W.D. Tex.); *Smith v. Obama*, No. 13-cv-257 (D. Idaho); *ACLU v. Clapper*, No. 13-3994 (S.D.N.Y.).

what the *First Unitarian* plaintiffs chose to do. *Id.*[11] Indeed, in one of the seven other actions noted above, plaintiffs have recently sought an order prohibiting the Government from "destroy[ing] any records relating to the Plaintiffs until [that] case is tried and all appeals are heard, and only then to purge them from government retention." *See* Proposed Order, Plaintiffs' Renewed Mot. for Preliminary Injunction, *Klayman v. Obama*, Civ. No. 13-851 (D.D.C.), ECF No. 149-3 at 1.[12]

These additional actions, including putative class actions, are yet another reason why it is not feasible to limit the Government's preservation obligations to BR Metadata associated with calls made by or to the plaintiffs in the Northern District of California cases.

---

[11] The Government remains concerned that in these cases, absent relief from district courts or explicit agreement from the plaintiffs, the destruction of the BR Metadata, even pursuant to FISC Order, could lead the plaintiffs to accuse the Government of spoliation. In *Jewel*, the plaintiffs have already moved for spoliation sanctions, including an adverse inference against the Government on the standing issue, based on the destruction of aged-off BR Metadata undertaken in accordance with FISC Orders. *See Jewel* Pls.' Brief Re: the Government's Non-compliance with the Court's Evidence Preservation Orders, ECF No. 233.

[12] The district court ruled on the *Klayman* plaintiffs' preliminary injunction motion without addressing that aspect of the plaintiffs' request, *see* Civ. No. 13-851 (D.D.C.), ECF Nos. 158, 159, and the court's ruling is currently on appeal before the D.C. Circuit. *See* No. 15-5307 (D.C. Cir.). The Government has moved to vacate that injunction, and dismiss the pending appeal, on mootness grounds, although the underlying district court claims are not moot for the reasons explained above.

Plaintiffs have proposed no viable alternative to maintaining all BR Metadata.

Counsel for the *Jewel* and *First Unitarian* plaintiffs has asserted that the necessity to preserve "a broad spectrum of evidence" has arisen because "the government has been unwilling to cease its dispute about the fact of collection," and maintains that plaintiffs "remain willing to discuss alternatives that would facilitate the prompt destruction of the records." *See* Exhibit A at 2. But these plaintiffs have not identified any options that are viable and that they would consider acceptable.[13]

The Constitution itself rules out any suggestion that the Government could stipulate to (or cease to contest) the plaintiffs' standing. Under Article III, "federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Thus, the requirement of standing is an "irreducible constitutional minimum," and cannot be waived or stipulated to by parties in litigation. *Id.*

Moreover, any suggestion that the Government should disclose information that would confirm or refute the plaintiffs' standing, such as actual call detail records (if

---

[13] Moreover, notwithstanding the implications of plaintiffs' letter, standing cannot be assumed to exist in these cases. In *Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. 2015), the D.C. Circuit held that publicly available information regarding the Section 215 bulk collection program was not sufficient to establish the plaintiffs' standing in that case. *See* 800 F.3d at 565 (Williams, J.); *id.* at 569 (Sentelle, J.). *See also Schuchardt v. Obama*, 2015 WL 5732117 (W.D. Pa. Oct. 19, 2015), *appeal pending*, No. 15-3491 (3d Cir.).

any) or the identities of telecommunications carriers that participated in the Section 215 Program, is also untenable. Information of that nature is properly classified, and is subject to protection by the state secrets privilege, as held in *Jewel v. NSA*, 2015 WL 545925 (N.D. Cal. Feb. 10, 2015), *appeal dismissed*, 2015 WL 9244880 (9th Cir. Dec. 18, 2015). *See also Electronic Frontier Foundation v. Department of Justice*, 11-cv-5221, 2014 WL 3945646, at *5–7 (N.D. Cal. Aug. 11, 2014) (holding that identities of participating carriers are protected from disclosure under the Freedom of Information Act because they are properly classified). By definition, the disclosure of such information reasonably could be expected to cause serious or exceptionally grave damage to the national security. And the Government is not required to disclose sensitive national security information to resolve issues such as standing on which the plaintiffs have the burden of proof. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013).

For these reasons, the Government's preservation obligations in the Northern District of California cases, and other cases, continue to require the maintenance of all BR Metadata notwithstanding the cessation of the Section 215 Program.

Technical considerations may make extracting and preserving a subset of BR Metadata impractical.

Assuming that the Government could resolve the above-described issues that prevent it from limiting its preservation obligations, and with the commitment of significant resources and the cooperation and agreement of plaintiffs in all pending civil suits, the Government could in theory develop the technical capability to search the BR

Metadata for a defined scope of records, extract and preserve any records identified by that search, and destroy the rest.[14] This process would involve: (1) restoring back-up media holding BR Metadata for preservation purposes to live databases so that technical personnel may perform searches on the data; (2) coding and testing software that would search the BR Metadata and identify records, if any, that correspond to telephone or calling-card numbers identified by plaintiffs as being in use by them during specified periods; (3) coding and testing software that would extract and store for preservation all identified records in a format that could be restored and accessed for litigation purposes at a future date; and (4) irrevocably deleting all BR Metadata that was not identified for preservation by this process or was duplicative of the data that was searched by this process.

However, the Government's practical ability to successfully identify, extract and preserve BR Metadata associated with the telephone calls of plaintiffs, to the extent that the Government holds any, is limited in several important respects.

- *First*, because the process would irrevocably delete any BR Metadata that is not identified for preservation, the entire scope of records to be preserved must be identified before the process of culling the BR Metadata can begin. This means that the Government's preservation obligations in every pending case must be conclusively determined prior

[14] The process described would require the expenditure of significant resources by the NSA—resources that would otherwise be devoted to the NSA's national security mission. However, it is impossible to provide an accurate estimate of the required resources without first defining the scope of the records that would need to be extracted and preserved.

to beginning the process of culling the BR Metadata. This would require significant coordination among multiple courts and could take significant time.

- *Second*, for each plaintiff (including putative class members) for which BR Metadata must be preserved, the plaintiff would need to provide the Government with all telephone and calling-card numbers the plaintiff was assigned or used at any time during the relevant period, and the specific time period during which the plaintiff was assigned or used each telephone or calling-card number. As referenced above, due to the numerosity of the named plaintiffs and of the putative classes on whose behalf the plaintiffs purport to sue— potentially resulting in hundreds of thousands if not millions of telephone numbers —obtaining this information is likely to be impractical and extremely burdensome.

- *Third*, even if all plaintiffs and class members did provide the information required for the Government to run searches, to the extent that those searches generated hits, this process is unlikely to limit preservation only to records of plaintiffs' calls. The Government has no ability to verify that the information provided by a plaintiff is accurate. If a plaintiff identified an incorrect number or overstated the time period for which the plaintiff was assigned or used the number, this could cause the Government to query and retain telephony metadata associated with calls made or received by a person other than a plaintiff and/or a person who did not consent to a search being performed on records of their calls. Given the numerosity of the named plaintiffs and of the putative classes on whose behalf the plaintiffs purport to sue, there is a significant risk that incorrect information would be provided. To the extent that queries based on this incorrect information generated hits, this process could cause metadata associated with telephone calls wholly between non-parties to be queried and preserved.[15]

---

[15] Even if queries based on accurate information provided by plaintiffs generated hits, this would cause the retrieval and preservation of call detail records containing not only a plaintiff's number, but also the initiating or receiving numbers at the other end of those calls, which could include numbers of individuals not in any way associated with these lawsuits.

CONCLUSION

The Government submits, for the reasons described above, that the end of the Section 215 Program has not mooted plaintiffs' challenges to the Program and that there is no viable basis for seeking to lift the preservation orders with respect to call detail records not associated with the plaintiffs. Further, even if there were such a viable basis technical considerations may make extracting and preserving call detail records associated with the plaintiffs, if any, impractical.

Respectfully submitted,

Dated: January 8, 2016

Stuart J. Evans
Deputy Assistant Attorney General

Robert P. Boyer, Jr.
Deputy Section Chief, Operations
Matthew A. Anzaldi
Deputy Unit Chief, Operations
Michael P. Daly
Attorney
Office of Intelligence

National Security Division
U.S. Department of Justice

Benjamin C. Mizer
Principal Deputy Assistant Attorney General

Joseph H. Hunt
Director

Anthony J. Coppolino
Deputy Director

James J. Gilligan
Special Litigation Counsel
Rodney Patton
Julia A. Berman
Caroline J. Anderson
Trial Attorneys

Civil Division, Federal Programs Branch
U.S. Department of Justice

EXHIBIT A

ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

December 21, 2015

VIA EMAIL AND U.S. MAIL

Benjamin C. Mizer, Principal Deputy Assistant Attorney General
Joseph H. Hunt, Director, Federal Programs Branch
Anthony J. Coppolino, Deputy Branch Director
James J. Gilligan, Special Litigation Counsel
Rodney Patton, Trial Attorney
Julia A. Berman, Trial Attorney
Caroline J. Anderson, Trial Attorney
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).

815 Eddy Street • San Francisco, CA 94109 USA
voice +1 415 436 9333 *fax* +1 415 436 9993 *web* www.eff.org *email* information@eff.org

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,

Cindy Cohn
Executive Director