

JAMES RISEN'S COMMUNITY OF INTEREST

I'll probably have several things to say about the James Risen filings of the past week. But for the moment, I wanted to focus on his assertions about the government's access of his phone records.

Remember, these assertions are not new: Josh Gerstein reported them in February.

Risen said the government never notified him that they were seeking his phone records. But he said he got an inkling in 2008 that investigators had collected some information about his calls.

"We heard from several people who had been forced to testify to the grand jury that prosecutors had shown them phone records between me and those people—not the content of calls but the records of calls," he said. "As a result of what they told us, my lawyers filed a motion with the court as asking how the Justice Department got these phone records and whether or not they had gotten my phone records."

"We wanted the court to help us decide whether they had abided by the attorney general's guidelines," Risen said. "We never got an answer from the court or the government."

But Risen's affidavit discussion of the government accessing his phone records includes a few interesting new details. First, the earliest chronological mention he makes of the government accessing his phone records—he makes it very clear he's talking about records, not content—dates to 2006.

Around the same time that the Government was making public statements about potentially prosecuting journalists, Brian Ross and Richard Esposito of ABC News reported on May 15, 2006, that senior federal law enforcement officials had informed them that the government was tracking the phone numbers of journalists without the journalists' knowledge as part of an effort to root out the journalists' confidential sources. According to the article, the journalists' phones were not being "tapped," but the government was tracking the incoming and outgoing numbers called and received on the journalists' phones. The story stated that the government was examining the phone calls and contacts of journalists from ABC News, The New York Times, and the Washington Post as part of a "widespread CIA leak investigation." I was mentioned by name as one of the reporters whose work the government was looking into.

More interesting, Risen notes that someone who testified before the warrantless wiretapping grand jury—not the Sterling grand jury—was shown copies of his phone records.

I have reason to believe that the story by Brian Ross and Richard Esposito is true. Since that story was published, I have learned from an individual who testified before a grand jury in this District that was examining my reporting about the domestic wiretapping program that the Government had shown this individual copies of telephone records relating to calls made to and from me.

Which ties in with Risen's claim that this subpoena (and the other two) is about persecuting—and possibly imprisoning—him in retaliation for the warrantless wiretap story

(again, not the MERLIN story Sterling allegedly served as a source for).

I believe that the investigation that led to this prosecution started because of my reporting on the National Security Agency's warrantless wiretapping program. The Bush White House was furious over that story. I believe that this investigation started as part of an effort by the Bush Administration to punish me and silence me, following the publication of the NSA wiretapping story.

So to sum up, Risen asserts his phone records were collected around 2006 in retaliation for the warrantless wiretap story. And he says he first learned that definitively when he learned warrantless wiretap grand jury witnesses had been shown his phone records. He says this Sterling investigation is just retaliation for that the wiretap story.

Recall that I made a wildarsed guess back in February that James Risen was the reporter whose phone contacts had been picked up using a community of interest grand jury subpoena (a subpoena that picks up all a person's phone contacts, as well as all the contacts of his contacts). As DOJ's Inspector General reported, an FBI case agent had worked with onsite telecom analysts to make the first subpoena in a leak case "as encompassing as possible." There are contradictory stories about whether the case agent would have known that such a subpoena would have picked up a known reporter's contacts. But when the prosecutor learned that such a subpoena would include the reporter's contacts, the FBI sealed the reporter's records in the case agent's case files. But it appears DOJ did nothing about the records on the telecom side. Plus, a great deal of the discussion on what they did with the records in the FBI database is redacted. In the last days before Obama came into office, DOJ got an OLC opinion and interpreted it very liberally to claim they

did not have to inform the reporter that his or her records had been collected. So we—and more importantly, the reporter—still don't know whose records were collected improperly.

My suggestion Risen might be the journalist in question was a wild guess. But here are two of the reasons I thought it was possible that Risen was the journalist in question.

- The subpoena would have had to have been issued between early 2002, when DOJ first contracted to have the telecom involved onsite, and January 2008, when the telecoms moved out of CAU. If it were indeed a community of interest subpoena, then it would have had to have been issued before early 2007, when the FBI discontinued the program. While we don't know whether the Sterling investigation began after Risen first tried to report the story in April 2003 or after he published his book in January 2006, both would fall in the time frame during which CAU was active.
- The investigative team was clearly focused on one target, which would be the case in the Sterling investigation but not—for example—in the warrantless wiretap investigation. In

addition, the investigative team knew of at least one reporter who had had contact with the target; given both a 2000 article Risen had written about Sterling and the unsuccessful attempt to publish [the MERLIN story] in 2003 would have alerted the CIA that Risen was in contact with Sterling.

I'll add one more timing detail. If Risen were the reporter whose records had been collected, then the OLC opinion would have come after the time in 2008 when Risen's lawyers asked the government whether it had complied with guidelines about reporters' phone contacts—a question the government has never answered.

Now, none of this means Risen was the reporter in question. By the same token, this use of a community of interest subpoena was only discovered because the prosecutor discovered the implications of its use—as an exigent letter—in another case he was working; there may well be other instances where agents got community of interest subpoenas in leak cases knowing they'd pick up reporters' contacts that, for a variety of reasons, never got reported.

Furthermore, Risen was in a rather unique position in 2006: his reporting was the target of two leak investigations. This one, in which the government had a good idea of at least one of his sources. And the warrantless wiretap one, in which the government presumably had much less of an idea of his sources. A community of interest subpoena on Jeff Sterling—which would pull up Risen's calls with Sterling but also his calls with warrantless wiretap sources—would serve both investigations. And the unredacted IG language seems to address sealing his records only in the Sterling case.

With that in mind, look at what the government claimed about Risen's phone records in this case.

In addition, as a point of clarification, the government has not subpoenaed the telephone records of any reporter in this particular investigation.

Note two parts of this denial: first, the government says it hasn't subpoenaed the phone records of any reporter. Presumably they mean no reporter has been the target of a subpoena. But with a community of interest subpoena, of course, the government would get Risen's call data without subpoenaing him directly.

Furthermore, the government makes this claim only about the Sterling investigation. It says nothing about any other investigation of leaks to Risen.

Risen may or may not have been this reporter whose records were accessed via a community of interest subpoena. But his discussion of how the two investigations—the wiretap investigation and the MERLIN investigation—relate, as well as the detail that witnesses in the wiretap grand jury were the ones questioned about his call records, suggest one possible explanation: that using a community of interest subpoena in the Sterling investigation served as an investigative boost for the wiretap investigation.