

FISC STILL SITTING ON GOVERNMENT PROPOSAL FOR EFF DATA

When last we checked in with the new-and-improved post USA Freedom Act FISA Court, amicus Preston Burton had helped the Court finish off the Section 215 dragnet with a strong hand, in part by asking a bunch of questions that should have been asked 9 years earlier. And in a reply to the government (the reply was released belatedly), Burton made an argument that led first to a hearing on the issue and then a briefing order for ways the government might stipulate to something in the EFF lawsuits so as to permit the FISC to lift the protection order requiring all Americans' phone records to be kept indefinitely.

Back before it was clear why FISA Judge Michael Mosman appointed him to serve as amicus addressing the issue of retention of phone dragnet data, I suggested it might have been an effort to undermine EFF's lawsuit against the government. After all, EFF plaintiff (in the First Unitarian Church suit challenging the dragnet) CAIR surely has standing to not only sue, but sue because of the way the dragnet chaining process subjected a bunch of CAIR's associates to further NSA analysis solely because of their First Amendment protected affiliation with CAIR. But if the government gets to destroy all the dragnet data without first admitting that fact, then it will be hard to show how CAIR got injured.

In Burton's reply to the government's response to his initial brief on this question, he did the opposite, pressuring the government to find some way to accord the EFF plaintiffs

standing. That led – we as we saw last week – to an order from Mosman for briefing, due on January 8, on whether there’s a way to get rid of the data. That may not end up helping EFF, but it sure has put the government in a bad mood.

That brief would have been due last Friday, but thus far it has not shown up in the FISC docket. And we don’t even know what the process from here would be, such as whether one of the newly appointed amici will be asked to help Michael Mosman determine the outcome of the EFF data, or whether the government will be able to argue whether it should have to accommodate this lawsuit without adversary. EFF did send a letter laying out what they’d like to happen, which the government submitted along with its response.

But since then we’ve heard nothing.