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 9

*Attorneys for the United States*

10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN FRANCISCO DIVISION**

14	IN RE NATIONAL SECURITY AGENCY	)	<b>No. M:06-cv-01791-VRW</b>
15	TELECOMMUNICATIONS RECORDS	)	<b>DECLARATION OF ANTHONY J.</b>
16	LITIGATION	)	<b>COPPOLINO SUBMITTED WITH</b>
17	<u>This Document Relates To:</u>	)	<b>UNITED STATES' OPPOSITION TO</b>
18	ALL CASES except <i>Al-Haramain v. Bush</i> (07-	)	<b>PLAINTIFFS' MOTION FOR AN</b>
19	109); <i>CCR v. Bush</i> (07-1115); <i>United States v.</i>	)	<b>ORDER TO PRESERVE EVIDENCE</b>
20	<i>Farber</i> (07-1324); <i>United States v. Adams</i>	)	Judge: Hon. Vaughn R. Walker
21	(07-1323); <i>United States v. Palermino</i>	)	Date: November 15, 2007
22	(07-1326); <i>United States v. Volz</i> (07-1396)	)	Time: 2 p.m.
23		)	Courtroom: 6 - 17 <sup>th</sup> Floor

20 I, ANTHONY J. COPPOLINO, do hereby state and declare as follows:

21 1. I am Special Litigation Counsel for the United States Department of Justice, Civil  
 22 Division, Federal Programs Branch, and one of the counsel of record for the United States in this  
 23 action. I make this declaration in support of the United States' Response to the Plaintiffs'  
 24 Motion for an Order to Preserve Evidence. The statements made herein are based on my  
 25 personal knowledge and information provided to me in the course of my official duties. I set  
 26 forth herein a summary of the conferrals that took place between the parties and the United States  
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28 **Coppolino Declaration re: Opposition of United States to  
 Plaintiffs' Motion for an Order to Preserve Evidence  
 MDL No. 06-1791-VRW**

1 in connection with the preservation of any relevant evidence in these proceedings, including true  
2 and correct copies of electronic mail communications referred to below.

3 2. Plaintiffs' counsel first raised the issue of a preservation order at hearing on  
4 November 17, 2006. *See* Exhibit 1, *Transcript* at 99-102 (11/7/06). Counsel for AT&T and the  
5 Government advised that the parties had not yet conferred on the matter and could not discuss it  
6 further without considering the impact of the state secrets privilege. *See id.* at 100, 101. The  
7 Plaintiffs agreed to confer on the matter. *See id.* at 102.

8 3. I next heard from Plaintiffs on the matter on December 19, 2006, when one of  
9 their counsel (Mr. Haefele) conferred with me and counsel for AT&T (Mr. Ericson). In this  
10 conversation, I advised Plaintiffs of the Government's concern that, because the allegations in the  
11 cases concern alleged intelligence activities that have not been confirmed or denied, including  
12 any alleged role of carrier Defendants, the parties would be unable to discuss specific facts set  
13 forth in the Manual for Complex Litigation required to develop a preservation order.  
14 Nonetheless, the parties agreed to continue conferring and Plaintiffs' counsel agreed to circulate  
15 a proposed preservation order.

16 4. By electronic mail dated January 8, 2007, Plaintiffs' counsel transmitted to the  
17 Government and the counsel for the carriers, a copy of a proposed preservation order. *See*  
18 Exhibit 2.

19 5. By electronic mail dated February 8, 2007, I responded to the Plaintiff's proposed  
20 order. *See* Exhibit 3. In this email, I again expressed the Government's concern that the factual  
21 discussion needed to develop a preservation order, as outlined in the Manual for Complex  
22 Litigation, was not possible in light of the Government's state secrets privilege assertion in this  
23 case. I made clear that the Government was not suggesting that any relevant evidence in this case  
24 need not be preserved, but, because of the information protected by the Government's state  
25 secrets privilege assertion, the parties are unable to discuss "whether and to what extent  
26 information that may be relevant exists, where any such information may reside, how it may be  
27 preserved, and whether there are any practical burdens arising from Plaintiffs' proposed

1 preservation steps—all of which should be undertaken before a preservation order is entered.”

2 *See id.* I also indicated that if the Plaintiffs sought a preservation order, the prudent course  
3 would be for the Government to address the matter with the Court through an *in camera, ex parte*  
4 submission. *See id.*

5 6. By electronic mail dated April 30, 2007, Plaintiffs’ counsel (Ms. Cohn) sent a  
6 further email to the Government again seeking confirmation of the Government’s and Carrier  
7 Defendants’ preservation obligations. *See Exhibit 4.*

8 7. I responded to Ms. Cohn by electronic mail dated June 29, 2007.<sup>1/</sup> *See Exhibit 4.*  
9 I reiterated the Government’s concern at attempting to reach an understanding on this matter in a  
10 vacuum since the parties could not discuss with Plaintiffs the existence, nature, or scope of any  
11 information that might be at issue and preservation steps that might be applicable. I again also  
12 noted the Government’s understanding that parties to litigation have obligations to take steps to  
13 preserve their relevant evidence and indicated a willingness to discuss the issue further. *See id.*

14 8. By electronic mail dated July 13, 2007, Plaintiffs’ counsel (Ms. Cohn) responded  
15 to my email of June 29, 2007, *see Exhibit 5*, directing renewed questions at both the Government  
16 and carrier defendants concerning their preservation obligations.

17 9. By electronic mail dated August 2, 2007, I again responded to Plaintiffs’ renewed  
18 questions, *see Exhibit 6*. In this communication, I proposed that, without the need for any  
19 motion by the Plaintiffs, and without confirming or denying any allegation or whether relevant  
20 documents even exist, the Government would file with the Court for its *in camera, ex parte*  
21 review facts concerning the preservation of information (if any) that may be relevant in these  
22 lawsuits. I proposed that Plaintiffs would then file their position on document preservation  
23 issues with the Court and suggested further that the parties develop a scheduling stipulation for  
24 these submissions. *See id.*

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25 <sup>1</sup> The timing of the parties’ communications on this issue resulted from the fact that  
26 extensive briefing was occurring in several cases, including in the *CCR, Shubert, Verizon* and  
27 *State PUC* cases before this Court, and the *Hepting* and *Al-Haramain* cases before the Court of  
Appeals.

1 10. By electronic mail dated August 6, 2007, Plaintiffs counsel appeared to agree to  
2 this proposal. *See* Exhibit 7.

3 11. In subsequent conversations and emails (dated August 24, 2007 and September 6,  
4 2007), Plaintiffs' counsel indicated they would file a motion seeking a preservation order and to  
5 notice a hearing on the issue. *See* Exhibits 8 and 9 (indicating that Plaintiffs would file a motion  
6 on the issue).

7 12. By electronic mail dated September 10, 2007, I proposed to Plaintiffs a stipulation  
8 setting forth the background of the issue and proposing a schedule for briefing the Plaintiffs'  
9 motion, but leaving the question of whether a hearing on the matter was necessary to the Court.  
10 *See* Exhibit 10.

11 13. By electronic mail dated September 10, 2007, Plaintiffs declined to enter into this  
12 stipulation, *see* Exhibit 11, and on that same date filed their Motion for an Order to Preserve  
13 evidence.

14 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
15 knowledge, information, and belief, this 25<sup>th</sup> day of October, in the City of Washington, District  
16 of Columbia.

17 /s/ Anthony J. Coppolino  
18 ANTHONY J. COPPOLINO  
19 Special Litigation Counsel  
20 U.S. Department of Justice  
21 Civil Division, Federal Programs Branch  
22 20 Massachusetts Avenue, NW  
23 Washington, D.C. 20001  
24 Phone: (202) 514-4782  
25 Fax: (202) 616-8470  
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**EXHIBIT 1**

COPY

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE, CHIEF

IN RE: NATIONAL SECURITY )  
AGENCY TELECOMMUNICATIONS ) MDL C 06-1791 (VRW)  
RECORDS LITIGATION )

San Francisco, California  
Friday, November 17, 2006

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff Hepting, et al.: Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, California 94110  
BY: CINDY ANN COHN, Legal Director  
LEE TIEN, Sr. Staff Attorney

For Plaintiffs: ACLU - Northern California  
39 Drumm Street  
San Francisco, California 94111  
BY: ANN BRICK, Staff Counsel

For Plaintiffs: ACLU - Illinois  
180 North Michigan Avenue  
Suite 2300  
Chicago, Illinois 60601-1287  
BY: HARVEY M. GROSSMAN, Legal Director

For Plaintiffs Riordan/Campbell: Fenwick & West LLP  
275 Battery Street  
San Francisco, California 94111  
BY: LAURENCE F. PULGRAM

For Plaintiffs: Gainsburgh, Benjamin, David,  
Meunier & Warshauer, L.L.C.  
2800 Energy Centre  
1100 Poydras  
New Orleans, Louisiana 70163-2800  
BY: JUSTIN I. WOODS

1 THE COURT: Is there opposition to that?

2 MR. ERICSON: I wanted -- we join completely in the  
3 ECT. We agreed with that. And we said so in our statement.

4 The second part about filings under seal, we aren't  
5 opposed in principle, but we haven't actually seen a concrete  
6 proposal, so we suggest that counsel prepare a proposed form of  
7 order, show it to us. It may well be that we can agree on  
8 that, but we simply, as we said in the joint case management  
9 statement, haven't seen a concrete proposal, so we're not quite  
10 sure what they have in mind. I think we can work it out, but  
11 we'd like --

12 THE COURT: Why don't you see if you can work it out.  
13 If you cannot, let's take the matter up on the 21st of  
14 December.

15 MS. COHN: That sounds perfect, your Honor.

16 MR. ERICSON: What was the third one you were raising?

17 MS. COHN: To amend the order in Hepting so we can  
18 show our cocounsel the Klein evidence.

19 MR. ERICSON: I think, again, send us a proposed  
20 amendment and let us look at it. We can probably work it out,  
21 but we'd like to see it before we sign.

22 MS. COHN: That's fine, your Honor. I'm happy to do  
23 that. That can wait until December.

24 There's also -- we would like the defendants -- as you  
25 know, there's a lot of evidence here about the network

1 structure and other evidence. We'd like them to be subject to  
2 an order to preserve evidence, and we actually -- as you may  
3 know, the judicial conference is coming out with a new rule on  
4 preservation of electronic evidence and it goes into effect on  
5 December 1st, but we'd like them to be subject to it now. It  
6 puts an affirmative obligation on them to go out and figure out  
7 what responsive evidence they may have and preserve it so that  
8 when the time comes that we get discovery -- I'm very hopeful  
9 we will -- there will be information left to discover.

10 MR. ERICSON: I need to speak to that one for a  
11 moment. Again, the devil's in the details here. Certainly if  
12 what we're being asked to do is, if our attention is being  
13 drawn to Rule 26 and to the upcoming changes to Rule 26, we are  
14 familiar with it and we're pleased to abide by it. But there's  
15 a lot in there. For example, the new rules contemplate a meet  
16 and confer in which we'd sit down and discuss electronic  
17 architecture and things like that. We're not in a position to  
18 discuss electronic architecture relevant to this case with  
19 plaintiffs' counsel for state secrets reasons. I think it's  
20 obvious. So if it's -- if we're just being told to please  
21 follow the preservation aspects of Rule 26, yes, we understand  
22 that. We obviously will do it. But beyond that, I think we  
23 need to take smaller steps and look at the various aspects of  
24 the rules because there's simply some parts of them we can't  
25 do. We can't discuss these things.



1 THE COURT: Mr. Nichols.

2 MR. NICHOLS: I would echo what Mr. Ericson just said,  
3 and frankly, I think this is premature. We don't have anything  
4 approaching a proposal from the plaintiffs on this. Typically  
5 what you do is you meet and confer, as Mr. Ericson said, about  
6 preservation orders. Miss Cohn is free to contact us to talk  
7 about preservation orders. At that point, we can assess  
8 whether, as Mr. Ericson says, there are state secrets-related  
9 issues we can or can't discuss, what would be appropriate, what  
10 wouldn't be appropriate, but frankly, doing this on the fly is  
11 not consistent with the rule and doesn't make good sense to us.

12 MS. COHN: I don't think we're doing it is on the fly.  
13 I have raised the question of preservation of evidence with  
14 Mr. Ericson from our very first conversation. Obviously, we  
15 took a little detour in the motion to dismiss, but he has  
16 assured me that his client is going to preserve things. I  
17 don't think there's any harm in doing a meet and confer about  
18 that, and the questions, you know, that are raised in the  
19 context of the rule are, you know, big categories of  
20 information. Where they are and whether you're going to hold  
21 them, I don't think there's any state secrets privileges issues  
22 raised by that. Do they have e-mails? Are they going to  
23 preserve them?

24 THE COURT: I'm not sure what I'm being asked to do.

25 MR. ERICSON: That's part of the problem, I think..

1 THE COURT: That makes me reluctant to do anything.

2 MS. COHN: Fair enough. I think that what you need to  
3 do is just order them to abide by the incoming rule and that  
4 would be sufficient. If they want to meet and confer, I'm  
5 always happy to talk to Mr. Ericson.

6 THE COURT: I'm always happy to advise people to abide  
7 by the law.

8 MS. COHN: It just hasn't come into effect yet. We're  
9 a couple of weeks early.

10 THE COURT: Well, I don't know whether that's a real  
11 issue or not, Miss Cohn. If you think it is, let's take it up  
12 on the 21st of December.

13 MS. COHN: Okay.

14 THE COURT: And in any event, by that time, the new  
15 rule is going to be in effect, so....

16 MS. COHN: Okay.

17 THE COURT: All right. Anything further?

18 MR. NICHOLS: Just one clarification, your Honor.  
19 Counsel requested I ask -- we wanted to just make sure that the  
20 21st -- December 21st, the hearing on December 21st is limited  
21 to remand removal issues. Media intervenors' motion to unseal,  
22 all the other issues we talked about, propriety of answers,  
23 etc., etc., everything else --

24 THE COURT: The 1st of February. Now, with the  
25 exception of anything along these housekeeping details that

**EXHIBIT 2**

## Coppolino, Tony (CIV)

---

**From:** Haefele, Robert [rhaefele@motleyrice.com]  
**Sent:** Monday, January 08, 2007 4:49 PM  
**To:** Coppolino, Tony (CIV); bruce.ericson@pillsburylaw.com  
**Cc:** Flowers, Jodi; Hodkin, Michelle D.; Scott, Marvetta D.  
**Subject:** Draft Spoliation Order

**Attachments:** ORDER PRESERVATION OF RECORDS - MH - RTH DRAFT.pdf



ORDER  
RVATION OF RECOI

Tony and Bruce - Further to our discussions during our telephone conference on December 19, 2006, I am attaching a draft of a proposed order regarding the preservation of records (spoliation order).

Inasmuch as you both articulated that you were willing to consider a proposed agreement and work with us on the language, I am attaching such a proposal. I believe that you will see that the proposal satisfies the parties' concerns that evidence that may exist will remain protected from spoliation while satisfying the concerns you both expressed regarding the defendants' position that they cannot recognize the existence of the program as alleged in plaintiffs' complaints.

I do not believe the agreement, as proposed, would have the defendants acknowledge that the documents exists -- only that they will take steps to ensure that IF such documents exist, they will take reasonable steps to preserve them.

I would reiterate once again what I expressed during our telephone discussion, that while we are considering and negotiating the language of this agreement, we would ask that you make certain that -- as to whatever evidence that may exist -- your clients ensure that it is maintained and not destroyed, whether actively or passively, and that any destruction, even if done passively pursuant to a "document retention/destruction plan" would be considered spoliation by the plaintiffs.

After you have had an opportunity to review, let's schedule a call to discuss. Perhaps Thursday or Friday would work?

Robert T. Haefele  
Motley Rice LLC  
28 Bridgeside Blvd.  
P.O. Box 1792 (29465)  
Mount Pleasant, SC 29464  
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Confidential & Privileged

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## ORDER PRESERVATION OF RECORDS

The Court has considered the proposed orders and/or stipulations submitted by the parties and the Manual for Complex Litigation, Fourth, §§ 11.442 and 40.25, and now ORDERS AS FOLLOWS:

1. **PRESERVATION.** (a) During the pendency of this litigation, and until a final order is entered by the Court closing this case, each of the parties herein and their respective officers, agents, servants, employees, contractors, carriers, bailees, and attorneys, and all persons in active concert or participation with them as well as all non-parties who possess materials reasonably anticipated to be subject to discovery in this action, who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from, and must take reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, mutation, interlining, or in any other fashion changing any and all documents, electronically stored information, and tangible things that are in the actual or constructive care, possession, custody, or control of such person, wherever such materials and documents are physically or electronically located. Such persons are also enjoined from changing the location of any such materials to a location outside of the jurisdiction of the United States.

(b) To ensure the preservation of relevant documents and data, each of the parties herein are further enjoined from engaging in routine document retention/destruction policies that may destroy or have any other affect on the preservation of potential evidence as set forth in the preceding paragraph, such as server back-up tape rotation, electronic data shredding, drive re-imaging, the

sale/gift/destruction of computer systems, disk defragmentation, data compression, data deletion, or routine computer maintenance.

(c) Counsel must exercise reasonable efforts to identify and notify the following persons of these data retention obligations: Each of the parties herein, their respective officers, agents, servants, employees, contractors, carriers, bailees, and attorneys, and all persons in active concert or participation with them, as well as all non-parties who possess materials reasonably anticipated to be subject to discovery in this action. Any Information Technology ("IT") personnel or employees with access to electronic and computer systems must be specifically instructed to suspend the recycling of backup tapes or other procedures that may overwrite or otherwise destroy relevant data. Copies of email accounts, voicemails, computers, and servers that contain data belonging to key custodians, departments, and systems must be preserved via tape backups, forensic images, or utilities for file copying.

2. **SCOPE.** (a) "Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other tangible or electronic data, metadata, legacy data, backup media, non-apparent and ancillary electronically stored information, or electronic compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or discs, books, journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks,

diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, telegram messages, telephone bills and logs, resumes, summaries, tangible or electronic data, metadata, legacy data, backup media, non-apparent and ancillary electronically stored information, or electronic compilation compilations, computations, and other formal and informal writings or tangible preservations of information.

(b) This Order pertains only to documents containing information that may be relevant to, or may lead to the discovery of information relevant to electronic surveillance. This Order pertains only to documents which are now in or come into the actual or constructive possession of the parties, and documents which have been written or generated after [date], which includes newly generated data, and until a final order is entered by the Court closing this case. Any document described or referred to in any discovery request made during this litigation shall, from the time of the request, be treated for purposes of this Order as containing such information unless and until the Court rules such information to be irrelevant.

(c) Counsel are directed to confer to resolve questions as to what documents are outside the scope of this order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Order upon reasonable notice. A party which, within 30 days after receiving written notice from another party that specified documents will be destroyed, lost, or otherwise altered pursuant to routine policies and programs, fails to indicate in writing its objection shall be deemed to have agreed to such destruction.

3. **IMPLEMENTATION.** Each party will, within 10 days after receiving this Order, designate an individual who shall be responsible for ensuring that the party carries out the requirements of this Order.

[City, State], this \_\_\_\_\_ day of \_\_\_\_\_, 1994.

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**EXHIBIT 3**

**From:** Coppolino, Tony (CIV)

**Sent:** Thursday, February 08, 2007 12:30 PM

**To:** 'Val P. Exnicios'; 'Haefele, Robert'; 'Cindy Cohn'; Hodkin, Michelle D.; Flowers, Jodi

**Cc:** 'Ericson, Bruce A.'; 'Axelbaum, Marc H.'; 'Berenson, Bradford'; 'McNicholas, Edward R.'; Jain, Samir; 'Rogovin, John'; jkester@wc.com; Nichols, Carl (CIV); Coppolino, Tony (CIV)

**Subject:** NSA MDL-1791 - Spoliation Order Issue

First, my apologies for the delay in responding on this topic but, as you may gather, Government counsel have been involved in numerous filings in recent weeks not only in this case (on the stay motion and order to show cause), but also in connection with the Sixth Circuit appeal heard Jan. 31 and, unexpectedly, a TRO motion being heard today in Maine. But I wanted to get back to you on this topic before tomorrow's hearing.

The Government has reviewed the draft preservation order that plaintiffs proposed and have given it careful consideration. As I have indicated previously, the central problem with discussing such an order is that the claims raised in the MDL cases concern alleged classified activities that cannot be confirmed or denied, including whether relationships exist between telecommunication carriers and the Government, and whether the activities alleged are in fact occurring. Under these circumstances, the Government believes that agreement on an appropriate spoliation order is not possible.

The Manual for Complex Litigation makes clear that the specific facts underlying a spoliation order should be discussed before an order is entered, including the identification of the types of materials to be preserved. See Manual for Complex Litigation, Fourth § 40.25 (2). The Manual notes that "a preservation order will likely be ineffective if it is formulated without reliable information from the responding party regarding what data-management systems are already in place, the volume of data affected, and the costs and technical feasibility of implementation." *See id.*, § 11.442. Among the points to consider in formulating an effective preservation order are whether the order might disrupt the operation of computers and computer networks in the routine course of business. *See id.* The Manual states further that "[s]uch an order requires the parties to define the scope of the contemplated discovery as narrowly as possible, identify the particular computers or network servers affected, and agree on a method for data preservation . . ." *Id.* The Manual also observes that "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations." *Id.*

Because the allegations in the MDL cases implicate alleged classified activities and the need for a state secrets privilege assertion, the Government believes that the specific discussions necessary to craft an appropriate preservation order are not possible. Plaintiffs' draft order does not describe the type of records they believe the order should cover, except for a general reference to "information relevant to electronic surveillance." It is not clear, nor could it be confirmed, whether that term would cover the claims raised in the various MDL cases. Likewise, plaintiffs' draft order does not address the potential disruption of computer networks, and that issue could not be resolved without confirmation or denial of the allegations raised in the MDL cases and the identification of any systems that may be at issue. Because we are unable to discuss the implications of a preservation order in specific terms, the parties would be left to speculate whether relevant information exists that should be covered by the order and whether any such information could be preserved as plaintiffs propose without undue disruption. The Government is unwilling to agree to a hypothetical order, covering an unidentified scope of hypothetical records, where the potential impact of that order is not clear and cannot be addressed prior to its entry.

In sum, we are not suggesting that relevant evidence in this case, if any, need not be preserved. However, we are unable to discuss with plaintiffs whether and to what extent information that may be relevant exists, where any such information may reside, how it may be preserved, and whether there are any practical burdens arising from plaintiffs' proposed preservation steps—all of which should be undertaken before a preservation order is entered.

If plaintiffs continue to seek a preservation order (and we do not believe you have or could make the showing necessary for one), the prudent course would be for the Government to address the matter with the Court through an *ex parte*, *in camera* submission. If plaintiffs wish, the parties can discuss this issue with the Court at

the hearing tomorrow.

Tony Coppelino, Department of Justice (202) 514-4782

**EXHIBIT 4**

From: Coppolino, Tony (CIV)  
Sent: Friday, June 29, 2007 5:42 PM  
To: Cindy Cohn; Bruce A. Ericson; Axelbaum, Marc H.; John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.  
Cc: Coppolino, Tony (CIV)  
Subject: RE: NSA MDL-1791 - Spoliation Order Issue

Cindy -

Sorry for the delay in responding to your email on this topic(as you know we've had many other matters to address in the MDL). We don't agree with your description of specific document preservation obligations and, as indicated in my February 8 email (below), remain concerned at attempting to reach an understanding on this matter in a vacuum since we cannot discuss with plaintiffs the existence, nature, or scope of any information that might be at issue and preservation steps that might be applicable. We do understand that parties to litigation have obligations to take steps to preserve their relevant evidence. But I reiterate that any specific understanding between the parties on the matter does not seem possible in the unique circumstances of this case. I am willing to talk with you about the issue further if you would like.

Tony Coppolino  
Special Litigation Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
(202) 514-4782

-----Original Message -----

From: Cindy Cohn [mailto:cindy@eff.org]  
Sent: Monday, April 30, 2007 8:45 PM  
To: Coppolino, Tony (CIV); Bruce A. Ericson; Axelbaum, Marc H.; Nichols, Carl (CIV); John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.  
Cc: Lee Tien; Harvey Grossman; Kurt Opsahl  
Subject: NSA MDL-1791 - Spoliation Order Issue

Dear Counsel,

I write to ensure that Plaintiffs' understanding of the Government's position concerning evidence preservation is correct, and also to ensure that the Carriers share this position concerning their own, separate duties to preserve evidence in this case. I hope I have included all of the necessary parties for both the government and the carriers as recipients of this email, but please let me know if there are others I should include.

This email is prompted, in part, by the recent statements that the FBI planned to destroy telephone records and other information improperly collected pursuant to NSL letters, as well as

the statement in the White House Privacy and Civil Liberties Board Report to Congress that any NSA surveillance must be conducted with a "reviewable audit trail."

In his February 8, 2007, email Mr. Coppolino stated: "In sum, we are not suggesting that relevant evidence in this case, if any, need not be preserved." We understand this statement as an acknowledgment of the government's duty to preserve what you know or reasonably should know will be relevant evidence in these pending lawsuits, including any evidence the destruction of which would prejudice plaintiffs. We expect that you understand that this duty includes the institution of a "litigation hold" on any document retention/destruction policies in effect. In re Napster, Inc. Copyright Litigation 462 F.Supp.2d 1060 (N.D. Cal. 2006). The information that must be preserved is any that would tend to support (or disprove) plaintiffs claims. Zublake v. UBS Warburg LLC, 220 FRD 212, 217-8 (S.D.N.Y. 2003).

We understand that the Government and the Carriers may have arguments that some or even all of this information is not properly discoverable, including due to the application of the state secrets privilege. We do not seek any waiver or other limitation of those arguments or privileges now.

We also recognize the government's stated concerns that the sort of detailed, technical consultation concerning evidence preservation envisioned by FRCP 26 may not be appropriate for this case, or at least at this time. In light of this, we do not seek a detailed technical presentation about how such information is stored and the precise methods by which it will be retained now.

We simply seek to confirm that both the Government and the Carriers will abide by their duties to ensure that information that is likely to lead to the discovery of admissible evidence in this case is preserved, so that those arguments and discussions are not rendered moot due to spoliation.

Accordingly, if it is not the understanding of either the Government or the Carriers that you remain under the litigation obligation to preserve potentially discoverable evidence, please contact me immediately so that we can continue our discussions and, if necessary, present any disputes to the Court. Otherwise, we will trust that both the Government and the Carriers intend to abide by their evidence preservation obligations and we will not raise the issue with the Court at this time.

Cindy

On Feb 8, 2007, at 9:30 AM, Coppolino, Tony ((CIV)) wrote:

- > First, my apologies for the delay in responding on this topic but, as
- > you may gather, Government counsel have been involved in numerous
- > filings in recent weeks not only in this case (on the stay motion and
- > order to show cause), but also in connection with the Sixth Circuit
- > appeal heard Jan. 31 and, unexpectedly, a TRO motion being heard today

> in Maine. But I wanted to get back to you on this topic before  
> tomorrow's hearing.  
> The Government has reviewed the draft preservation order that  
> plaintiffs proposed and have given it careful consideration. As I  
> have indicated previously, the central problem with discussing such an  
> order is that the claims raised in the MDL cases concern alleged  
> classified activities that cannot be confirmed or denied, including  
> whether relationships exist between telecommunication carriers and the  
> Government, and whether the activities alleged are in fact occurring.  
> Under these circumstances, the Government believes that agreement on  
> an appropriate spoliation order is not possible.

>  
> The Manual for Complex Litigation makes clear that the specific facts  
> underlying a spoliation order should be discussed before an order is  
> entered, including the identification of the types of materials to be  
> preserved. See Manual for Complex Litigation, Fourth § 40.25 (2). The  
> Manual notes that "a preservation order will likely be ineffective if  
> it is formulated without reliable information from the responding  
> party regarding what data- management systems are already in place,  
> the volume of data affected, and the costs and technical feasibility  
> of implementation." See *id.*, § 11.442. Among the points to consider in  
> formulating an effective preservation order are whether the order  
> might disrupt the operation of computers and computer networks in the  
> routine course of business. See *id.* The Manual states further that  
> "[s]uch an order requires the parties to define the scope of the  
> contemplated discovery as narrowly as possible, identify the  
> particular computers or network servers affected, and agree on a  
> method for data preservation . . . ." *Id.* The Manual also observes  
> that "[a] blanket preservation order may be prohibitively expensive  
> and unduly burdensome for parties dependent on computer systems for  
> their day-to-day operations." *Id.*

>  
> Because the allegations in the MDL cases implicate alleged classified  
> activities and the need for a state secrets privilege assertion, the  
> Government believes that the specific discussions necessary to craft  
> an appropriate preservation order are not possible. Plaintiffs' draft  
> order does not describe the type of records they believe the order  
> should cover, except for a general reference to "information relevant  
> to electronic surveillance." It is not clear, nor could it be  
> confirmed, whether that term would cover the claims raised in the  
> various MDL cases. Likewise, plaintiffs' draft order does not address  
> the potential disruption of computer networks, and that issue could  
> not be resolved without confirmation or denial of the allegations  
> raised in the MDL cases and the identification of any systems that may  
> be at issue.

> Because we are unable to discuss the implications of a preservation  
> order in specific terms, the parties would be left to speculate  
> whether relevant information exists that should be covered by the  
> order and whether any such information could be preserved as  
> plaintiffs propose without undue disruption. The Government is  
> unwilling to agree to a hypothetical order, covering an unidentified  
> scope of hypothetical records, where the potential impact of that  
> order is not clear and cannot be addressed prior to its entry.

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> In sum, we are not suggesting that relevant evidence in this case, if  
> any, need not be preserved. However, we are unable to discuss with  
> plaintiffs whether and to what extent information that may be relevant  
> exists, where any such information may reside, how it may be  
> preserved, and whether there are any practical burdens arising from  
> plaintiffs' proposed preservation steps---all of which should be  
> undertaken before a preservation order is entered.

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> If plaintiffs continue to seek a preservation order (and we do not  
> believe you have or could make the showing necessary for one), the  
> prudent course would be for the Government to address the matter with  
> the Court through an ex parte, in camera submission. If plaintiffs  
> wish, the parties can discuss this issue with the Court at the hearing  
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>

> Tony Coppolino, Department of Justice (202) 514-4782

>

>

>

\*\*\*\*\*

Cindy Cohn                                --- Cindy@eff.org  
Legal Director                            --- www.eff.org  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110  
(415) 436-9333 x108  
(415) 436-9993 (fax)



**EXHIBIT 5**

## Coppolino, Tony (CIV)

---

**From:** Cindy Cohn [cindy@eff.org]  
**Sent:** Friday, July 13, 2007 2:27 PM  
**To:** Coppolino, Tony (CIV); Bruce A. Ericson; Axelbaum, Marc H.; John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.  
**Cc:** Lee Tien; Barry R. Himmelstein; Robert Haefele; Harvey Grossman; Kurt Opsahl; Ann Brick  
**Subject:** re: NSA MDL-1791 - Spoliation Order Issue

Dear Counsel,

I write because plaintiffs find the government's June 29, 2007 response to my April 30, 2007 correspondence confusing. Plaintiffs would like to put this matter to rest, and avoid seeking the Court's assistance on what should be a straightforward matter, but we still do not understand the government's position about its duties to preserve evidence and we seek to confirm our understanding of the carriers' positions. To that end, our questions and requests are:

1) Mr. Coppolino states that he does not agree with our description of specific document preservation obligations, but does says that he understands that the parties have obligations to preserve relevant evidence. Our description was of those duties was simply through reference to two relevant cases. My previous email said: "We expect that you understand that this duty includes the institution of a "litigation hold" on any document retention/destruction policies in effect. In re Napster, Inc. Copyright Litigation 462 F.Supp.2d 1060 (N.D. Cal. 2006). The information that must be preserved is any that would tend to support (or disprove) plaintiffs claims. Zublake v. UBS Warburg LLC, 220 FRD 212, 217-8 (S.D.N.Y. 2003)."

What aspects of those two citations does the government disagree with? Or perhaps more simply, what does the government understand its obligations to include?

As we've said several times now, we are not asking for the government or the carriers to admit, even by implication, that any relevant documents exist. But plaintiffs do need to know whether we disagree about the basic legal requirements to preserve relevant documents, and if we do disagree, to bring those disagreements to the attention of the court before any relevant information is destroyed.

2) The government's position acknowledges obligations to preserve relevant evidence but does not state that the government intends to abide by those obligations. Since that was our specific question, it seems reasonable to expect a specific answer. Does the government intend to abide by its obligations to preserve relevant evidence?

3) Plaintiffs' original message was sent to all of the carriers as well as the Government, and asked for a prompt response only if the carriers and/or the government did not intend to abide by their duties of preservation. We stated: "Accordingly, if it is not the understanding of either the Government or the Carriers that you remain under the litigation obligation to preserve potentially discoverable evidence, please contact me immediately so that we can continue our discussions and, if necessary, present any disputes to the Court."

We have now heard from the government only, not from the carriers. This leaves us to conclude that the carriers do agree both that they remain under the litigation obligation to preserve potentially discoverable evidence and about the scope of that obligation as outlined in the two case citations discussed above. Given the close relationship between the government's position and the carriers' positions on other matters, however, we wanted to double check this. We ask that lead counsel for each carrier please provide an affirmative confirmation that they will abide by their duties to ensure that information that is likely to lead to the discovery of admissible evidence in this case is preserved.

I understand that most of us are occupied with other portions of the litigation. However, given that the issue concerns preservation of relevant evidence, we do not want it to go too long without resolution. Because of this, please respond by August 1, 2007, so that we can prepare a motion to Judge Walker if necessary and can correctly include the

positions of all of the parties in that motion.

Sincerely,

Cindy

On Jun 29, 2007, at 2:41 PM, Coppolino, Tony ((CIV)) wrote:

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> issue further if you would like.

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> Tony Coppolino  
> Special Litigation Counsel  
> United States Department of Justice  
> Civil Division, Federal Programs Branch  
> (202) 514-4782

>  
>  
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>  
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>  
> -----Original Message-----

> From: Cindy Cohn [mailto:cindy@eff.org]  
> Sent: Monday, April 30, 2007 8:45 PM  
> To: Coppolino, Tony (CIV); Bruce A. Ericson; Axelbaum, Marc H.;  
> Nichols, Carl (CIV); John Rogovin; Samir Jain; Bradford Berenson;  
> McNicholas, Edward R.  
> Cc: Lee Tien; Harvey Grossman; Kurt Opsahl  
> Subject: NSA MDL-1791 - Spoliation Order Issue

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> Dear Counsel,

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> I write to ensure that Plaintiffs' understanding of the Government's  
> position concerning evidence preservation is correct, and also to  
> ensure that the Carriers share this position concerning their own,  
> separate duties to preserve evidence in this case. I hope I have  
> included all of the necessary parties for both the government and the  
> carriers as recipients of this email, but please let me know if there  
> are others I should include.

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> This email is prompted, in part, by the recent statements that the FBI  
> planned to destroy telephone records and other information improperly  
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> preserved, so that those arguments and discussions are not rendered  
> moot due to spoliation.

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>> Under these circumstances, the Government believes that agreement on  
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>> The Manual for Complex Litigation makes clear that the specific facts  
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>> it is formulated without reliable information from the responding

>> party regarding what data- management systems are already in place,  
>> the volume of data affected, and the costs and technical feasibility  
>> of implementation." See id., § 11.442. Among the points to consider  
>> in formulating an effective preservation order are whether the order  
>> might disrupt the operation of computers and computer networks in the  
>> routine course of business. See id. The Manual states further that  
>> "[s]uch an order requires the parties to define the scope of the  
>> contemplated discovery as narrowly as possible, identify the  
>> particular computers or network servers affected, and agree on a  
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>> that "[a] blanket preservation order may be prohibitively expensive  
>> and unduly burdensome for parties dependent on computer systems for  
>> their day-to-day operations." Id.

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>> order does not describe the type of records they believe the order  
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>> allegations raised in the MDL cases and the identification of any  
>> systems that may be at issue.

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>> any, need not be preserved. However, we are unable to discuss with  
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>> If plaintiffs continue to seek a preservation order (and we do not  
>> believe you have or could make the showing necessary for one), the  
>> prudent course would be for the Government to address the matter with  
>> the Court through an ex parte, in camera submission. If plaintiffs  
>> wish, the parties can discuss this issue with the Court at the  
>> hearing tomorrow.

>>  
>> Tony Coppelino, Department of Justice (202) 514-4782

>>  
>>  
>>

\*\*\*\*\*

Cindy Cohn ----- Cindy@eff.org  
Legal Director ----- www.eff.org  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110  
(415) 436-9333 x108  
(415) 436-9993 (fax)

**EXHIBIT 6**

## Coppolino, Tony (CIV)

**From:** Coppolino, Tony (CIV)  
**Sent:** Thursday, August 02, 2007 10:36 AM  
**To:** Cindy Cohn; Bruce A. Ericson; Axelbaum, Marc H.; John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.; Nichols, Carl (CIV); Tannenbaum, Andrew (CIV); Coppolino, Tony (CIV); Moss, Randolph  
**Cc:** Lee Tien; Barry R. Himmelstein; Robert Haefele; Harvey Grossman; Kurt Opsahl; Ann Brick  
**Subject:** RE: NSA MDL-1791 - Spoliation Order Issue

Cindy -

I am responding to your email on behalf of the Government and carrier defendants. As I have indicated previously, where the Government has asserted privilege over whether or not the carriers' alleged involvement in the alleged intelligence activities can be confirmed or denied, and as to other allegations in the MDL complaints, it is not possible for the parties to have the kind of discussion that normally occurs concerning preservation issues. We do not believe it would be appropriate to rely on general understandings of what the law provides where there can be no confirmation of any allegation and no meeting of the minds as to how legal requirements may apply in these particular cases. For this reason, we do not believe the Government or carriers can state what they understand preservation obligations "to include" as you have requested, since that is among the issues that cannot be addressed between the parties. Rather than having more back and forth on this issue, we propose the following to address the matter:

1. Without confirming or denying any allegation or whether relevant documents exist, the Government is willing, without the need for any motion, to file with the court for its ex parte, in camera review, facts concerning the preservation of information that may be relevant in these lawsuits. That is, again without confirming or denying anything, we would provide the court with a record concerning whether and, if so, what Government and carrier documents exist that may be relevant, if any, and how they are being preserved.
2. At that point, if plaintiffs believe it is necessary, they could file a memorandum stating their position on the legal requirements concerning preservation, which the Court could then consider in connection with the Government's classified submission, and the Government and carriers would reply if necessary.

I would like to work with you on a scheduling stipulation for such filings. As you know, we are quite busy this month and thus propose that the Government would file such a submission in September. If you still feel the need to file a motion at this time, I hope you would work with us on the schedule for that as well.

Tony Coppolino  
Special Litigation Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
(202) 514-4782

-----Original Message-----

**From:** Cindy Cohn [mailto:cindy@eff.org]  
**Sent:** Friday, July 13, 2007 2:27 PM  
**To:** Coppolino, Tony (CIV); Bruce A. Ericson; Axelbaum, Marc H.; John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.  
**Cc:** Lee Tien; Barry R. Himmelstein; Robert Haefele; Harvey Grossman; Kurt Opsahl; Ann Brick  
**Subject:** re: NSA MDL-1791 - Spoliation Order Issue

Dear Counsel,

I write because plaintiffs find the government's June 29, 2007 response to my April 30, 2007 correspondence confusing. Plaintiffs would like to put this matter to rest, and avoid seeking the Court's assistance on what should be a straightforward matter, but we still do

not understand the government's position about its duties to preserve evidence and we seek to confirm our understanding of the carriers' positions. To that end, our questions and requests are:

1) Mr. Coppolino states that he does not agree with our description of specific document preservation obligations, but does say that he understands that the parties have obligations to preserve relevant evidence. Our description was of those duties was simply through reference to two relevant cases. My previous email said: "We expect that you understand that this duty includes the institution of a "litigation hold" on any document retention/destruction policies in effect. In re Napster, Inc. Copyright Litigation 462 F.Supp.2d 1060 (N.D. Cal. 2006). The information that must be preserved is any that would tend to support (or disprove) plaintiffs claims. Zublake v. UBS Warburg LLC, 220 FRD 212, 217-8 (S.D.N.Y. 2003)."

What aspects of those two citations does the government disagree with? Or perhaps more simply, what does the government understand its obligations to include?

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I understand that most of us are occupied with other portions of the litigation. However, given that the issue concerns preservation of relevant evidence, we do not want it to go too long without resolution. Because of this, please respond by August 1, 2007, so that we can prepare a motion to Judge Walker if necessary and can correctly include the positions of all of the parties in that motion.

Sincerely,

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> To: Coppelino, Tony (CIV); Bruce A. Ericson; Axelbaum, Marc H.;  
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>> plaintiffs proposed and have given it careful consideration. As I  
>> have indicated previously, the central problem with discussing such  
>> an order is that the claims raised in the MDL cases concern alleged  
>> classified activities that cannot be confirmed or denied, including  
>> whether relationships exist between telecommunication carriers and  
>> the Government, and whether the activities alleged are in fact  
>> occurring.

>> Under these circumstances, the Government believes that agreement on  
>> an appropriate spoliation order is not possible.

>>  
>> The Manual for Complex Litigation makes clear that the specific facts  
>> underlying a spoliation order should be discussed before an order is  
>> entered, including the identification of the types of materials to be  
>> preserved. See Manual for Complex Litigation, Fourth § 40.25 (2).

>> The  
>> Manual notes that "a preservation order will likely be ineffective if  
>> it is formulated without reliable information from the responding  
>> party regarding what data- management systems are already in place,  
>> the volume of data affected, and the costs and technical feasibility  
>> of implementation." See *id.*, § 11.442. Among the points to consider  
>> in formulating an effective preservation order are whether the order  
>> might disrupt the operation of computers and computer networks in the  
>> routine course of business. See *id.* The Manual states further that  
>> "[s]uch an order requires the parties to define the scope of the  
>> contemplated discovery as narrowly as possible, identify the  
>> particular computers or network servers affected, and agree on a  
>> method for data preservation . . . ." *Id.* The Manual also observes  
>> that "[a] blanket preservation order may be prohibitively expensive  
>> and unduly burdensome for parties dependent on computer systems for  
>> their day-to-day operations." *Id.*

>>  
>> Because the allegations in the MDL cases implicate alleged classified  
>> activities and the need for a state secrets privilege assertion, the  
>> Government believes that the specific discussions necessary to craft

>> an appropriate preservation order are not possible. Plaintiffs'  
>> draft  
>> order does not describe the type of records they believe the order  
>> should cover, except for a general reference to "information relevant  
>> to electronic surveillance." It is not clear, nor could it be  
>> confirmed, whether that term would cover the claims raised in the  
>> various MDL cases. Likewise, plaintiffs' draft order does not  
>> address the potential disruption of computer networks, and that issue  
>> could not be resolved without confirmation or denial of the  
>> allegations raised in the MDL cases and the identification of any  
>> systems that may be at issue.  
>> Because we are unable to discuss the implications of a preservation  
>> order in specific terms, the parties would be left to speculate  
>> whether relevant information exists that should be covered by the  
>> order and whether any such information could be preserved as  
>> plaintiffs propose without undue disruption. The Government is  
>> unwilling to agree to a hypothetical order, covering an unidentified  
>> scope of hypothetical records, where the potential impact of that  
>> order is not clear and cannot be addressed prior to its entry.  
>>  
>> In sum, we are not suggesting that relevant evidence in this case, if  
>> any, need not be preserved. However, we are unable to discuss with  
>> plaintiffs whether and to what extent information that may be  
>> relevant exists, where any such information may reside, how it may be  
>> preserved, and whether there are any practical burdens arising from  
>> plaintiffs' proposed preservation steps---all of which should be  
>> undertaken before a preservation order is entered.  
>>  
>> If plaintiffs continue to seek a preservation order (and we do not  
>> believe you have or could make the showing necessary for one), the  
>> prudent course would be for the Government to address the matter with  
>> the Court through an ex parte, in camera submission. If plaintiffs  
>> wish, the parties can discuss this issue with the Court at the  
>> hearing tomorrow.  
>>  
>> Tony Coppelino, Department of Justice (202) 514-4782  
>>  
>>  
>>

\*\*\*\*\*

Cindy Cohn                               ---- Cindy@eff.org  
Legal Director                           ---- www.eff.org  
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**EXHIBIT 7**

## Coppolino, Tony (CIV)

---

**From:** Cindy Cohn [cindy@eff.org]  
**Sent:** Monday, August 06, 2007 5:02 PM  
**To:** Bruce A. Ericson; Axelbaum, Marc H.; Samir Jain; John Rogovin; Bradford Berenson; McNicholas, Edward R.; Nichols, Carl (CIV); Tannenbaum, Andrew (CIV); Coppolino, Tony (CIV); Moss, Randolph  
**Cc:** Lee Tien; Kurt Opsahl; Barry R. Himmelstein; Robert Haefele; Harvey Grossman; Ann Brick  
**Subject:** NSA MDL-1791 - Spoliation Order Issue - Response from Plaintiffs

Dear Tony,

While we continue to disagree with your position that it is not possible to have any substantive discussions whatsoever about evidence preservation, we do agree that it is time to present this issue to Judge Walker. Your proposal for doing so is generally acceptable to us, although we definitely will be filing a memorandum. Are you suggesting an in camera joint submission from the Government and the Carriers or something else?

Why don't you draft a stipulation with suggested dates to get this rolling? Given the heavy court schedule in August, and our good faith belief that neither the government nor the carriers will destroy any evidence in the meantime, we're willing present this to the Court in September, as you suggest, but we would ask that it be in the earlier part of the month.

Cindy

On Aug 2, 2007, at 7:36 AM, Coppolino, Tony (CIV) wrote:

> Cindy -

>

> I am responding to your email on behalf of the Government and carrier  
> defendants. As I have indicated previously, where the Government has  
> asserted privilege over whether or not the carriers'  
> alleged involvement in the alleged intelligence activities can be  
> confirmed or denied, and as to other allegations in the MDL  
> complaints, it is not possible for the parties to have the kind of  
> discussion that normally occurs concerning preservation issues. We do  
> not believe it would be appropriate to rely on general understandings  
> of what the law provides where there can be no confirmation of any  
> allegation and no meeting of the minds as to how legal requirements  
> may apply in these particular cases. For this reason, we do not  
> believe the Government or carriers can state what they understand  
> preservation obligations "to include" as you have requested, since  
> that is among the issues that cannot be addressed between the parties.  
> Rather than having more back and forth on this issue, we propose the  
> following to address the matter:

>

> 1. Without confirming or denying any allegation or whether relevant  
> documents exist, the Government is willing, without the need for any  
> motion, to file with the court for its ex parte, in camera review,  
> facts concerning the preservation of information that may be relevant  
> in these lawsuits. That is, again without confirming or denying  
> anything, we would provide the court with a record concerning whether  
> and, if so, what Government and carrier documents exist that may be  
> relevant, if any, and how they are being preserved.

>

> 2. At that point, if plaintiffs believe it is necessary, they could  
> file a memorandum stating their position on the legal requirements  
> concerning preservation, which the Court could then consider in  
> connection with the Government's classified submission, and the  
> Government and carriers would reply if necessary.

>

> I would like to work with you on a scheduling stipulation for such

> filings. As you know, we are quite busy this month and thus propose  
> that the Government would file such a submission in September. If you  
> still feel the need to file a motion at this time, I hope you would  
> work with us on the schedule for that as well.

>  
> Tony Coppolino  
> Special Litigation Counsel  
> United States Department of Justice  
> Civil Division, Federal Programs Branch  
> (202) 514-4782  
>

**EXHIBIT 8**

**Coppolino, Tony (CIV)**

---

**From:** Cindy Cohn [cindy@eff.org]  
**Sent:** Friday, August 24, 2007 7:12 PM  
**To:** Coppolino, Tony (CIV)  
**Cc:** Bruce A. Ericson; Axelbaum, Marc H.; John Rogovin; Samir Jain; Bradford Berenson; McNicholas, Edward R.  
**Subject:** NSA MDL -1791 - Spoliation Order Scheduling

Dear Tony,

As I recall, based on our conversation at the hearing on August 9, you were going to be sending me a proposal for a schedule for the spoliation briefing on August 20. Did you send something and I missed it?

In the meantime, I took a look at Judge Walker's schedule and he is unavailable on September 27 and October 4. Based on that, and our discussion about procedure, the government's intention to make a fully secret filing with only a basic description of the dispute publicly, and the government's desire to respond to what we file, I would suggest that we schedule this like a regular motion. Plaintiffs can file an opening brief on September 6, the government and carriers file a response on September 20, which can both respond to our legal arguments and present information in camera to the court, as you've indicated, and plaintiffs file a reply on September 27, with a hearing date of October 11. That should give you sufficient time, given the staffing issues you mentioned.

Again, we are agreeable to this delayed schedule because we would like to be courteous in this matter and because we trust that both the government and the carriers are undertaking to preserve potentially discoverable evidence in accordance with the ordinary rules of litigation in the meantime. If that is not the case, please let me know right away.

Cindy

\*\*\*\*\*

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**EXHIBIT 9**

## Coppolino, Tony (CIV)

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**From:** Cindy Cohn [cindy@eff.org]  
**Sent:** Thursday, September 06, 2007 2:04 PM  
**To:** Coppolino, Tony (CIV)  
**Cc:** Bruce A. Ericson; Samir Jain; John Rogovin; Bradford Berenson; Lee Tien; McNicholas, Edward R.; Barry R. Himmelstein; Kurt Opsahl; Ann Brick; Harvey Grossman; Robert Haefele; Axelbaum, Marc H.; Aram Antaramian; Vince Parrett  
**Subject:** Spoliation/preservation motion schedule

Hi Tony,

It looks like Judge Walker isn't going to require you to fly out for the CCR motion. Are you going to oppose the supplement?

I'd like to get the spoliation/preservation motion scheduled. October 25 works for us. I do think it makes sense to treat this as plaintiffs' motion for a preservation order. This gives us a simple procedure that doesn't require any stipulations or court approvals, since the dates for oppositions, etc. all count back from the hearing date under the Northern District Local Rules.

Also, I do think it may make sense to have a hearing, although it's not really easy to tell until we see what each other has to say in the briefs. You can of course suggest to the court that you don't think a hearing is necessary and I'm sure Judge Walker will make his own decision about that, as he did for CCR.

If we set the hearing for October 25, our opening brief would be due September 27, opposition from the carriers and the government would be due October 4 and our Reply on October 11.

Please let me know if this works for you by the end of the week so that we can reserve the date with Cora. Judge Walker's schedule does fill up quickly.

Cindy

\*\*\*\*\*  
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Legal Director                                    ---- www.eff.org  
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(415) 436-9993 (fax)

**EXHIBIT 10**

## Coppolino, Tony (CIV)

---

**From:** Coppolino, Tony (CIV)  
**Sent:** Monday, September 10, 2007 9:21 AM  
**To:** Cindy Cohn  
**Cc:** Bruce A. Ericson; Samir Jain; John Rogovin; Bradford Berenson; Lee Tien; McNicholas, Edward R.; Barry R. Himmelstein; Kurt Opsahl; Ann Brick; Harvey Grossman; Robert Haefele; Axelbaum, Marc H.; Aram Antaramian; Vince Parrett; Nichols, Carl (CIV); Tannenbaum, Andrew (CIV); Coppolino, Tony (CIV)  
**Subject:** RE: Spoliation/preservation motion schedule

**Attachments:** Stipulation on Schedule for Preservation 091007.wpd; Stipulation on Schedule for Preservation 091007.pdf; Stipulation on Schedule for Preservation 091007.doc



Stipulation on  
Schedule for Pr...



Stipulation on  
Schedule for Pr...



Stipulation on  
Schedule for Pr...

Cindy

Attached (in Word, PDF, and Wordperfect) is a draft stipulation along the lines of the proposal I offered on Friday. Let me know if you agree in principle, any changes you would propose, and which plaintiffs' counsel to add.

If you do not intend to stipulate along these lines, let me know when you intend to file your motion. Also, I think you should advise the Court's Deputy when you call to schedule a hearing date that we have not agreed on a hearing date and expect to file a motion on the matter.

I will be at the Georgetown Law conference today on FISA legislation (I see Kevin will be there as well), but will be checking my blackberry and back at the office at some point.

Tony Coppolino  
(202) 514-4782

-----Original Message-----

**From:** Cindy Cohn [mailto:cindy@eff.org]  
**Sent:** Thursday, September 06, 2007 2:04 PM  
**To:** Coppolino, Tony (CIV)  
**Cc:** Bruce A. Ericson; Samir Jain; John Rogovin; Bradford Berenson; Lee Tien; McNicholas, Edward R.; Barry R. Himmelstein; Kurt Opsahl; Ann Brick; Harvey Grossman; Robert Haefele; Axelbaum, Marc H.; Aram Antaramian; Vince Parrett  
**Subject:** Spoliation/preservation motion schedule

Hi Tony,

It looks like Judge Walker isn't going to require you to fly out for the CCR motion. Are you going to oppose the supplement?

I'd like to get the spoliation/preservation motion scheduled. October 25 works for us. I do think it makes sense to treat this as plaintiffs' motion for a preservation order. This gives us a simple procedure that doesn't require any stipulations or court approvals, since the dates for oppositions, etc. all count back from the hearing date under the Northern District Local Rules.

Also, I do think it may make sense to have a hearing, although it's not really easy to tell until we see what each other has to say in the briefs. You can of course suggest to the court that you don't think a hearing is necessary and I'm sure Judge Walker will make his own decision about that, as he did for CCR.

If we set the hearing for October 25, our opening brief would be due September 27, opposition from the carriers and the government would be due October 4 and our Reply on October 11.

Please let me know if this works for you by the end of the week so that we can reserve the date with Cora. Judge Walker's schedule does fill up quickly.

Cindy

\*\*\*\*\*

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Legal Director ----- www.eff.org

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DRAFT - 9/10/07

[INSERT GOVERNMENT COUNSEL]  
[INSERT PLAINTIFFS COUNSEL]

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY	)	No. M:06-cv-01791-VRW
TELECOMMUNICATIONS RECORDS	)	STIPULATION AND
LITIGATION	)	PROPOSED ORDER TO SET
	)	SCHEDULE ON DOCUMENT
	)	PRESERVATION ISSUE
	)	
This Document Relates Only To:	)	Courtroom: 6, 17th Floor
	)	Judge: Hon. Vaughn R. Walker
ALL CASES	)	
	)	

**RECITALS**

A. Whereas the United States and the Plaintiffs and the Defendants in actions brought against various telecommunication carriers in this MDL proceeding have been conferring through their undersigned counsel on whether an order should be entered in this proceeding that addresses the preservation of potentially relevant discoverable documents; and

B. Whereas the United States has advised the parties of its position that (i) where the Government has asserted the state secrets privilege over whether or not alleged intelligence activities at issue in these proceedings can be confirmed or denied, including alleged carrier involvement in any alleged activity, a full and necessary discussion of the terms of a preservation order is not possible; but (ii) recognizing a party's obligation to preserve relevant evidence, the

United State has also offered, without confirming or denying any allegation, to provide the Court, *in camera, ex parte*, with facts concerning the preservation of documents that may be relevant in these actions, if any, without the need for a motion; and

C. Whereas Plaintiffs in these actions, through their undersigned counsel (hereafter “the Plaintiffs”) intend to file a motion requesting that the Court set forth a preservation order; and

D. Whereas the Plaintiffs, the Defendants, and the United States, through their undersigned counsel, have agreed on a schedule for making their respective submissions on this issue but disagree as to whether a hearing should be held on the matter.

#### **STIPULATION ON SUBMISSIONS**

The Plaintiffs, the Defendants, and the United States, through their undersigned counsel, hereby stipulate to the following schedule for their respective submissions concerning the preservation of relevant documents in their respective cases:

1. The Plaintiffs, through their undersigned counsel, shall file any motion concerning the preservation of documents by September 20, 2007.
2. The United States and/or Defendants, through their undersigned counsel, shall file any response to the Plaintiffs’ motion, including any *in camera, ex parte* submission by the United States, by October 4, 2007.
3. The Plaintiffs shall file any reply by October 11, 2007.

#### **THE PARTIES’ RESPECTIVE POSITIONS ON HEARING DATE**

The undersigned Plaintiffs propose that a hearing on the document preservation issue be set for October 25, 2007 at 2 p.m.

The United States and the Defendants, through their undersigned counsel, believe that the

Court should review the parties' respective submissions before scheduling a hearing on the matter because the Court may find that such a hearing is unnecessary, and because the issue of document preservation in the cases at issue in this proceeding, which concern alleged intelligence activities and the alleged assistance of telecommunication carriers in those activities, cannot be addressed in an appropriate fashion at a hearing where critical underlying facts, including the very existence of potentially relevant documents, cannot be discussed.

Alternatively, the United States and Defendants, through their undersigned counsel, propose that any such hearing be deferred until after any ruling by the Court of Appeals in *Hepting v. AT&T*, 06-672 (VRW).

DATED: \_\_\_\_\_ Respectfully Submitted,

**INSERT GOVERNMENT/PLAINTIFFS' COUNSEL**



**[PROPOSED] ORDER**

Pursuant to the foregoing stipulation, and good cause appearing, it is hereby ORDERED

that:

**I. Briefing Schedule**

1. The Plaintiffs shall file any motion concerning the preservation of documents by September 20, 2007.
2. The United States and/or any defendant in this action shall file any response to the Plaintiffs' motion and/or other submission, including any *in camera*, *ex parte* submission by the Government, by October 4, 2007.
3. The Plaintiffs shall file any reply by October 11, 2007.

**II. Hearing Date [ALTERNATIVES]**

- A. [*Plaintiffs' Proposal*]: The matter shall be set for a hearing on October 25, 2007 at 2 p.m.

OR

- B. [*Government/Defendants' Proposal*]: The Court shall take the matter under submission and will schedule a hearing when and if it determines one is necessary.

IT IS SO ORDERED.

Dated: \_\_\_\_\_, 2007.

---

Hon. Vaughn R. Walker  
United States District Chief Judge

## **EXHIBIT 11**

## Coppolino, Tony (CIV)

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**From:** Cindy Cohn [cindy@eff.org]  
**Sent:** Monday, September 10, 2007 3:29 PM  
**To:** Coppolino, Tony (CIV)  
**Cc:** Bruce A. Ericson; Samir Jain; John Rogovin; Bradford Berenson; Lee Tien; McNicholas, Edward R.; Barry R. Himmelstein; Kurt Opsahl; Ann Brick; Harvey Grossman; Robert Haefele; Axelbaum, Marc H.; Aram Antaramian; Vince Parrett; Nichols, Carl (CIV); Tannenbaum, Andrew (CIV)  
**Subject:** Re: Spoliation/preservation motion schedule

Tony,

We have reviewed the stipulation and we still don't see any need for it.

Plaintiffs are willing to file their motion in accordance with the schedule (Sept. 20), giving the government and the defendants an extra week to prepare their oppositions. No stipulation is needed for this.

If the government and the carriers want to argue that no hearing is appropriate, they can certainly do that in its opposition. There is no need for a stipulation for this purpose. Also, the opposition is the correct time for the government to explain its desire to make an ex parte, in camera presentation to the court. Plaintiffs will not sign a stipulation that could be interpreted as agreeing that the government has the freestanding authority to make such presentations outside the context and protections of 1806(f) or some similar process.

Finally, any such stipulation would have to include plaintiffs view of the dispute, not just the governments' view as the current stipulation does, and I believe that the time that will likely be needed to reach agreement on that language is not going to be well spent and could result in us losing the October 25 hearing date. As you know, this issue has been dragging on now for well over a year and we accommodated your requests for additional time in August and September.

We will go ahead and notice the motion for October 25 and, except for voluntarily filing our supporting papers early, we believe that the Northern District's ordinary rules for motions are appropriate here and will give both the government and the carriers ample opportunity to present their positions to the Court.

Cindy

On Sep 10, 2007, at 6:20 AM, Coppolino, Tony (CIV) wrote:

> Cindy  
>  
> Attached (in Word, PDF, and Wordperfect) is a draft stipulation along  
> the lines of the proposal I offered on Friday. Let me know if you  
> agree in principle, any changes you would propose, and which  
> plaintiffs'  
> counsel to add.  
>  
> If you do not intend to stipulate along these lines, let me know when  
> you intend to file your motion. Also, I think you should advise the  
> Court's Deputy when you call to schedule a hearing date that we have  
> not agreed on a hearing date and expect to file a motion on the  
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> I will be at the Georgetown Law conference today on FISA legislation  
> (I see Kevin will be there as well), but will be checking my  
> blackberry and back at the office at some point.  
>  
> Tony Coppolino  
> (202) 514-4782  
>

> -----Original Message-----  
> From: Cindy Cohn [mailto:cindy@eff.org]  
> Sent: Thursday, September 06, 2007 2:04 PM  
> To: Coppelino, Tony (CIV)  
> Cc: Bruce A. Ericson; Samir Jain; John Rogovin; Bradford Berenson; Lee  
> Tien; McNicholas, Edward R.; Barry R. Himmelstein; Kurt Opsahl; Ann  
> Brick; Harvey Grossman; Robert Haefele; Axelbaum, Marc H.; Aram  
> Antaramian; Vince Parrett  
> Subject: Spoliation/preservation motion schedule

> Hi Tony,

> It looks like Judge Walker isn't going to require you to fly out for  
> the CCR motion. Are you going to oppose the supplement?

> I'd like to get the spoliation/preservation motion scheduled.  
> October 25 works for us. I do think it makes sense to treat this as  
> plaintiffs' motion for a preservation order. This gives us a simple  
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> hearing is necessary and I'm sure Judge Walker will make his own  
> decision about that, as he did for CCR.

> If we set the hearing for October 25, our opening brief would be due  
> September 27, opposition from the carriers and the government would be  
> due October 4 and our Reply on October 11.

> Please let me know if this works for you by the end of the week so  
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> fill up quickly.

> Cindy

> \*\*\*\*\*  
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> <Stipulation on Schedule for Preservation 091007.wpd> <Stipulation on  
> Schedule for Preservation 091007.pdf> <Stipulation on Schedule for  
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