



Written by [Michael Tennant](#) on January 22, 2018

NSA Destroys Evidence in Lawsuit Against Surveillance

The National Security Agency (NSA), whose  warrantless surveillance program was just [reauthorized](#) by Congress and President Donald Trump, recently confessed to having destroyed data it had been ordered to retain — and said it was retaining — in connection with lawsuits against the program, reported [Politico](#).

On Thursday, the NSA filed a [request](#) with U.S. District Court Judge Jeffrey White for an extension of its deadline to comply with discovery requests in the longstanding lawsuits. Its reason: Despite the fact that the agency has been under court order to preserve records related to the program since 2007, much of the requested data can no longer be located.

The agency first admitted deleting the data in October, when its deputy director of capabilities, “Elizabeth B.,” filed a [declaration](#) with White, whose court is in Oakland, California. “The NSA sincerely regrets its failure to prevent the deletion of this data,” she wrote. “NSA senior management is fully aware of this failure, and the Agency is committed to taking swift action to respond to the loss of this data.”

The Thursday filing claims the data deletion was unintentional and occurred as part of an effort to make room for new data.

“The NSA’s review to date reveals that this [Presidential Surveillance Program] Internet content data was not specifically targeted for deletion,” “Dr. Mark O.” declared, “but rather the PSP Internet content data matched criteria that were broadly used to delete data of a certain type ... in response to mission requirements to free-up space and improve performance of the [redacted] back-up system.”

The NSA says it is investigating why the relevant data was deleted, particularly in light of the fact that another agency official had previously stated that it was being retained. In 2014, an official known as “Miriam P.” told White that the NSA was “preserving magnetic/digital tapes of the Internet content intercepted under the [PSP] since the inception of the program,” storing them “in the offices of its General Counsel.”

“The latest NSA filing says the ongoing investigation indicates that officials did a ‘physical inspection’ in 2014 to confirm the tapes’ presence in the counsel’s office storage space,” wrote *Politico*. “However, ‘those tapes largely concerned metadata,’ not the content of communications the NSA intercepted.”

“It’s really disappointing,” David Greene, an attorney with the Electronic Frontier Foundation (EFF), the organization leading the litigation, told *Politico*. “The obligation’s been in place for a really long time now.... We had a major dust-up about it just a few years ago. This is definitely something that should’ve been found sooner.”

According to *Politico*, “Defiance of a court order can result in civil or criminal contempt charges, as well as sanctions against the party responsible,” though thus far no punishments have been issued. One doubts that such breaks would be extended to a private entity that destroyed — intentionally or unintentionally — records whose preservation had been court-ordered.

Not everyone is buying the NSA’s assertions of innocence. Upon learning of the news, former NSA



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whistleblower Thomas Drake [tweeted](#) that the agency “obstructs justice. Destroyed criminal evidence against itself. No accident.”

The NSA maintains that the data deletion will have a “limited” impact on the legal proceedings because it has found some detailed data from a few months in 2003 and metadata from 2003 to 2007, which the agency believes will enable it to determine if it intercepted any of the plaintiffs’ communications. Given that, EFF is holding its fire until it sees the data, Greene told *Politico*.

“We don’t know exactly how bad it is,” he said, adding: “Even if you take them at their word that this was just an honest mistake, what it shows is despite your best intention to comply with important restrictions, it can be really difficult to implement.... It shows that with the really tremendous volume of information they’re vacuuming up, it is impossible to be meticulous.”

It also shows — as if more evidence were needed — that Congress and Trump should not have reauthorized the NSA’s surveillance program. In [Drake’s words](#), the reauthorization “promotes extra-legalization of ex post facto secret law, despite known abuses & violations, unreviewable authorities & backdoor loopholes.” And, as with practically everything else the federal government does, it’s unconstitutional.

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