



Obama's DOJ Refuses to Confirm Existence of Legally Required Surveillance Reports

Peter Suderman

Sep. 11, 2012

Exactly how open and transparent is the Obama administration? Earlier this summer, Cato Institute researcher (and *Reason* contributing editor) Julian Sanchez decided to find out. In June, he filed a Freedom of Information Act (FOIA) request for the release of the Justice Department's semi-annual reports on how the government is implementing the 2008 Foreign Intelligence Surveillance Act (FISA) Amendments Act surveillance law, which gives the National Security Agency sweeping — and highly secretive — power to conduct warrantless electronic surveillance on Americans.

Those reports, which are delivered to Congress, are required by law. And, following a legal battle with the American Civil Liberties Union (ACLU), redacted versions of those reports issued up through May 2010 have already been made public. With a possible reauthorization of the law set for the end of the year, Sanchez thought it would be helpful to see more recent versions of those reports, even if only in highly redacted form. Yesterday, after waiting for more than two months, he finally got his (non) response: Those reports are classified, so the DOJ's Office of Intelligence (ha-ha) refuses to even confirm or deny that the reports exist.

Here's the relevant text from the response:

The Office of Intelligence (OI) maintains operational files which consist of copies of all FISA applications, as well as requests for approval of various foreign intelligence and counterintelligence collection techniques such as physical searches. We did not search these records in response to your request because **the existence or nonexistence of such records on specific persons or organizations is properly classified** under Executive Order 13526. To confirm or deny the existence of such materials in each case would tend to reveal which persons or organizations are the subjects of such requests. Accordingly, **we can**

neither confirm nor deny the existence of records in these files responsive to your request pursuant to 5 U.S.C. §552(b) (1).

We know these reports exist. They're required by law. We've seen versions of these reports in the past. These reports, even in heavily redacted form, have provided the public with some of the fairly small information the public has on how the government is using its warrantless spying powers.

Which is why this looks less like a useful response and more like an attempt to delay and evade the question. As Sanchez writes, "It's almost impossible for me to see this as a good faith response to my request. Instead, it looks an awful lot like a stalling tactic calculated to drag out the process until it's too late for the documents to be relevant to the debate over the FAA." In other words, the DOJ doesn't want to talk about it.

They're not the only ones. There was a time just a few years ago when Democrats fought the Bush administration over its expansion of warrantless surveillance powers, when presidential hopefuls like Sen. Chris Dodd swore to use every possible trick and tool to oppose the White House's plans, and when a young Obama welcomed his senior staff to the White House with a promise that "transparency and the rule of law will be the touchstones of this presidency." But now, under Obama, who criticized Bush's security state but has also danced carefully around many of the issues raised by warrantless surveillance, the law looks headed toward near-certain reauthorization. Which is exactly what the White House wants. Reauthorizing the FISA Amendments Act is the Obama administration's stated "top intelligence priority."

And it'll likely happen with minimal discussion and widespread, bipartisan support. Indeed, there seems to be an ongoing effort to prevent substantive public discussion of the policy: Sens. Ron Wyden and Mark Udall, both Democrats, have asked the Director of National Intelligence for additional information about various spying activities. The response? "It is not possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA." The DOJ's latest dodge doesn't tell us much that's new, but it does remind us, once again, how open and transparent the administration is willing to be about its warrantless spying activities: Not very.