U.S. Department of Justice

United States Attorney
Southern District of New York

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July 8, 2014

BY E-MAIL
Alex Abdo
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Re: *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHP)

Dear Alex and Patrick:

As discussed by phone today, the United States Department of Justice ("DOJ") is releasing today three FISC Primary Orders responsive to the ACLU's Freedom of Information Act ("FOIA") request that is the subject of the above-referenced case. These orders are from Docket No. BR 09-09, dated July 9, 2009; Docket No. BR 09-15, dated October 30, 2009; and Docket No. BR 09-19, dated December 16, 2009. Information has been redacted from these documents pursuant to 5 U.S.C. §§ 552(b)(1) and (b)(3). These documents are also being made available to the public on the Director of National Intelligence's ("DNI") website, "IC on the Record," at http://icontherecord.tumblr.com/, as well as at www.dni.gov.

The ACLU first raised the fact that these three Primary Orders were not released in this case in its reply brief. In its brief, the ACLU assumed that these Primary Orders were included within the set of Additional FISC Orders that the government has withheld in full, and argued that the government's omission of these documents on its *Vaughn* index could not be squared with the identification of these documents elsewhere on the public record. *See* ACLU Reply Br. at 9. However, as we discussed by phone, these orders were not deliberately withheld from the ACLU and are not, and were never intended to be, within the set of Additional FISC Orders that the Government continues to withhold in full. Rather, DOJ has determined that it inadvertently failed to locate these orders in its search for responsive records.[1] In other words, the Government did not "segregate and disclose these orders, or even identify them on its Vaughn index," ACLU Reply Br. at 10, because it did not realize that it had failed to locate them in its search and therefore had not submitted them to the declassification review process. Accordingly, it is factually incorrect to state that these Primary Orders are examples of information "the government has already disclosed . . . [but] tells the Court it cannot release here." *Id.*

1 Of course, "an agency's search need not be perfect, but rather need only be reasonable." *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). The ACLU has not challenged the reasonableness of the government's search for responsive records.

Although not required to do so, in a show of good faith and in accordance with its continuing efforts to be as transparent as possible, DOJ nonetheless went back and searched for the three Primary Orders identified in the ACLU's Reply Brief. *See* ACLU Reply Br. at 9. Once it identified them, the Government conducted an interagency declassification review of the orders, and is now releasing them in redacted form.

The Government has made every effort, at every point in this litigation, to be as forthcoming as possible with the ACLU about all of the documents at issue in this case, within the confines of its affirmative duty to protect classified national security information. We note that had the ACLU inquired about these particular orders at an earlier stage of the litigation, rather than waiting until it filed its reply brief to identify them, DOJ could have submitted them to the declassification review process earlier, and been able to release them to the ACLU at an earlier point in time.

If you have any questions, please do not hesitate to contact us. In order to ensure that the Court has a full appreciation of the facts with respect to these three Primary Orders, we are submitting a similar letter to the Court for its consideration.

Sincerely,

PREET BHARARA
United States Attorney

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