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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. DEPARTMENT OF JUSTICE, Defendant.	Case No. 4:17-cv-03571 JSW PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING RECENT AUTHORITY

In *American Civil Liberties Union of Northern California v. United States Dep't of Justice*, Case No. 14-17339 (9th Cir. Jan. 18, 2018) ("*ACLU-NC*"), the Ninth Circuit recently rejected the Department of Justice's ("DOJ") blanket assertion in a Freedom of Information Act case that surveillance guidelines were protected by the attorney work-product privilege.[1] The decision is relevant in three ways. *First*, the Ninth Circuit made clear that "instructions and guidance to federal investigators and prosecutors" are not necessarily work product—even if litigation concerning those issues "*may* arise." Slip. Op. at 17-18. *Second*, *ACLU-NC* held that to the extent DOJ had "presented the legal positions and arguments contained in [its] internal documents in court filings," any such positions are not exempt from disclosure. *Id.* at 27-28. The decision thus points to the need for further factual development on the extent to which Defendant DOJ has already disclosed in court filings the legal positions reflected in the withheld memoranda. *Third*, *ACLU-NC* ordered the district court on remand to segregate unprotected information, aided by *in camera* review. *Id.* at 22, 25. This Court should do the same.

The Opinion. *ACLU-NC* involved two documents that "[p]rovide[] guidance to federal prosecutors/case agents re[garding] electronic surveillance and tracking devices." *Id.* at 14, 15 (quoting *Vaughn* index). In that case, like this one, DOJ asserted that the guidance discussed legal strategies for prosecutors to consider in litigating surveillance issues in criminal cases. *Compare* Cunningham Decl., *filed in ACLU-NC v. DOJ*, Case No. 12-cv-04008-MEJ, Dkt. No. 23-2 ¶ 16 ("discusses potential legal strategies, defenses, and arguments"), attached as Second Cagle Decl. Ex. 1 (filed herewith), *with* Kim Decl. (Dkt. No. 25-1) ¶ 7 ("overview of relevant legal and strategic considerations for attorneys' use"). But the court did not simply accept these conclusory legal assertions; it instead conducted an *in camera* review and independently determined that the documents contained three categories of information: "(1) technical information about electronic surveillance technologies, (2) considerations related to seeking court authorization for obtaining location information, and (3) legal background and arguments related to motions to suppress location information in later criminal prosecutions." Slip Op. at 15.

The court held that the first category may not be withheld as work product. *See id.* at 16. It

[1] The Ninth Circuit's slip opinion is attached to the Notice of Supp. Authority (Dkt. No. 36).

then divided the second category into two: "[I]nstructions and guidance to federal investigators and prosecutors regarding the type of court authorization they can pursue to obtain particular types of electronic surveillance information" and "legal arguments in support of this authorization." *Id*. at 16. In effect, the court distinguished between principles to guide the conduct of investigators and prosecutors (*e.g.*, when using X surveillance technique, an order under the Pen Register Statute requiring a showing of "relevance" is sufficient, but when using Y technology, a warrant based on probable cause is required), and the legal argument underlying those principles. The latter is presumptively work product, while the former is not. *Id.* at 16-18. The court also divided the third category into two types of information: "[m]aterial that simply lists relevant case law and recites case holdings," which is not work product, and "legal analyses and specific arguments that DOJ attorneys can make in response to suppression motions," which is. *Id*. at 21-22.

Notably, the Ninth Circuit rejected DOJ's argument that simply because surveillance authorizations are commonly litigated in criminal cases, the documents were necessarily prepared in anticipation of litigation in the manner required by the work product doctrine. *Id.* at 17. Instead, the court applied the dual purpose test to conclude that the "instructions and guidance" set forth in the documents are not work product: They "would have been created in 'substantially similar form' regardless of whether those investigations ultimately lead to criminal prosecutions." *Id.* at 16-17. "[T]he fact that litigation *may* arise" concerning these surveillance issues "does not change the fact that the government must instruct its staff about how to conduct criminal investigations regardless of whether those investigations lead to later prosecutions." *Id.* at 17. This was so even though other portions of the document could be withheld because they contained "specific arguments that DOJ attorneys can make in response to suppression motions," created "in anticipation of recurring challenges in litigation." *Id.* at 22.

1. *ACLU-NC* rejected the same blanket assertion DOJ makes here—that because the guidance was prepared to assist prosecutors addressing issues that may arise in criminal prosecutions, the documents are necessarily work product. Instead, the Court must distinguish the different types of information contained in the documents.

DOJ's own declaration acknowledges that the 31-page memorandum "set[s] forth the basic

law and legal frameworks at issue." Kim Decl. ¶ 7. This kind of "legal background" is unprotected. Slip Op. at 21. And if the documents contain any technical information about surveillance techniques, that, too, is not work product. *Id*. at 16.

The remainder of the documents likely resembles the second category of information in *ACLU-NC*: They address considerations related to the use of certain types of surveillance-derived evidence in investigations and prosecutions. Within this broad category, the Court must distinguish between "instructions and guidance," *i.e.*, guiding standards prosecutors use to determine when information is "derived from" surveillance and therefore triggers a duty to provide notice to affected persons, and the "legal arguments in support of" such standards. *Id.* (An example of one standard DOJ has reportedly used is that evidence must "have been *material* or a *critical element*" to "qualify for disclosure.")[2] There is every reason to think that these documents do indeed set forth guiding standards. The 31-page memorandum contains a "summary of conclusions," Kim Decl. ¶ 5, presumably discerned from existing case law. Indeed, the very purpose of these memoranda was to provide "guidance" to assist "federal prosecutors and other DOJ attorneys" in "determin[ing] whether evidence on which they intend to rely was in any respect 'derived from' the electronic surveillance." *Id.* ¶ 6.

This guidance, like the "guidance and instructions" in *ACLU-NC*, is not protectable under the dual purpose test because it serves a distinct non-adversarial purpose—providing guidance for the conduct of criminal investigations. DOJ has previously explained how its notice policy—and its interpretation of the phrase "derived from"—affects its investigations. In 2008, DOJ issued its "Revised Policy on the Use or Disclosure of FISA Information," which requires case agents and prosecutors to "consult[] and coordinat[e]" with DOJ's National Security Division whenever it seeks to use FISA information *in investigations*—including information "derived from FISA collection." *See* Diakun Decl., Ex. 9 at E-4 (Dkt. No. 27-1 at 70). Indeed, the policy identifies DOJ's duty to "notify" affected individuals of surveillance as one essential reason for requiring advance consultation and approval, even at the investigative stage. *Id*. at E-4–5 (Dkt. No. 27-1 at 74-75). Notably, the policy requires advance authorization when agents and prosecutors seek to

[2] *See* Charlie Savage, *Power Wars* 592 (2015), attached as Cagle Decl., Ex. 3 (Dkt No. 33 at 18).

rely on FISA information in certain "[i]nvestigative [p]rocesses," including Rule 41 warrant applications. *Id.* at E-8 (Dkt. No. 27-1 at 74). What qualifies as "FISA information," triggering these requirements to consult and seek advance authorization during an investigation? The policy states that DOJ would issue "guidance regarding what constitutes information 'derived from' FISA collection." (*Id.* at E-4 n.1 (Dkt. No. 27-1 at 70)). That is the very guidance contained in these memoranda, which are titled: "Determining Whether Evidence is 'Derived From' Surveillance Under Title III or FISA."

In short, precisely because the use of FISA-derived surveillance may ultimately trigger notice to the affected individuals, the government's interpretation of what is "derived from" FISA shapes its own rules for conducting and structuring investigations.

To be sure, any "original legal analysis" in support of such guidance would be work product and need not be disclosed, if DOJ has not presented such analysis in court filings. Slip Op. at 3; *see also id.* at 22, 27 & *infra* Part 2. But the guidance itself, like the "guidance and instructions" in *ACLU-NC*, is not protected because of its non-adversarial purpose. The memoranda at issue here, like the documents in *ACLU-NC*, "provide instructions to investigators," because they help determine when and how investigators may use FISA-derived information to build their cases. Slip Op. at 17. Indeed, exactly like the documents in *ACLU-NC*, they provide instructions "regarding obtaining court authorization," *id.*: DOJ's policy requires investigators to obtain advance authorization when obtaining Rule 41 and other types of court authorization if using FISA information, as defined in these documents. As a result, the instructions set forth in these documents about how DOJ determines when information is "derived from" FISA or Title III, and when notice is required, have a dual purpose and are not work product.

2. *ACLU-NC* also held that legal arguments set forth in the surveillance guidelines would fall outside Exemption 5 if DOJ had "presented th[ose] legal positions and arguments contained in those internal documents in court filings," such as "*ex parte* government applications for court authorization and motions to suppress location evidence at trial." Slip Op. at 27 (emphasis added). It then ordered the district court on remand to "determine whether DOJ has officially acknowledged and publicly disclosed the litigation positions reflected in the withheld

[documents].” *Id.* Similarly, DOJ here may have provided legal arguments in motions to suppress or ex parte filings with courts in support of its understanding of when information is “derived from” FISA or Title III surveillance. *See, e.g.*, Answering Br. of the United States at 36-47, *United States v. Moalin*, No. 13-50572 (9th Cir. Apr. 15, 2016) (Dkt. No. 34-1), attached as Second Cagle Decl., Ex. 2. The Court should therefore order DOJ to submit a supplemental declaration identifying all the cases since it adopted its new notice policy in 2013 in which it has taken a position on whether particular information was or was not “derived from” FISA or Title III surveillance.[3] It should attach the relevant filings as exhibits, some under seal if necessary, and permit further briefing after submission of the additional information. *Cf.* Slip Op. at 22, 27-28. If DOJ has presented the same legal arguments and analysis reflected in the withheld memoranda in these court filings, Exemption 5 does not apply.[4]

3. *ACLU-NC* also instructed “the district court to conduct a segregability analysis” aided by “*in camera* review.” Slip Op. at 22. In so doing, it rejected the same blanket argument DOJ makes here, that non-privileged information cannot be segregated. Gov’t Br. 14-16 (Dkt. No. 25 at 19-21). DOJ erroneously assumes that background legal information, instructions and guiding principles, and legal positions that may have been presented elsewhere in court filings are exempt from disclosure. This Court should conduct the same kind of segregability analysis the Ninth Circuit instructed the district court to perform on remand.

In sum, after further factual development and briefing concerning whether DOJ has presented the same legal positions articulated in the withheld memoranda in court filings, the district court should review the memoranda *in camera* and order disclosed any portions that contain (1) legal background information, (2) technical descriptions of surveillance, (3) instructions or guidance for determining whether evidence is “derived from” FISA or Title III surveillance, and (4) legal analysis or arguments that DOJ has presented in court filings.

[3] DOJ adopted its new notice policy in 2013 but did not memorialize it in final form until later. *See* Pl. Br. 13 & n. 23 (Dkt. No. 26 at 20); Pl. Reply 18 (Dkt. No. 32 at 24).

[4] *ACLU-NC* instructed the district court on remand to determine if DOJ had “officially acknowledged and publicly disclosed” certain legal positions, and suggested that Exemption 5 would no longer apply to any arguments DOJ “may have presented . . . in court filings” such as “*ex parte* government applications for court authorization and motions to suppress.” Slip Op. at 27 (emphasis added). Plaintiffs contend that DOJ’s presentation of a legal position in any court filing, whether ex parte or not, takes the information outside the scope of Exemption 5.

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Respectfully submitted,

By: _____*/s/ Linda Lye*____________________

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