U.S. Department of Justice

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Southern District of New York

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April 27, 2018

BY ECF
Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *ACLU et al. v. Department of Defense et al.*, No. 15 Civ. 9317 (AKH)

Dear Judge Hellerstein:

I write respectfully on behalf of defendants (the "government") in response to the Court's Order dated April 17, 2018 (ECF No. 92, "April 17 Order"), which overruled certain of the government's objections to public disclosure of information in the January 18, 2018 *in camera* transcript, and directed the government to prepare and file a redacted transcript consistent with the April 17 Order within 10 days. The government respectfully requests that the Court stay the government's disclosure obligations under the April 17 Order pending consideration of appeal, permit the government to file on the public docket the version of the redacted transcript provided to the Court on April 11, 2018 (*see* ECF No. 91), and issue an amended final judgment. I have conferred with plaintiffs' counsel concerning this request, who advised me that plaintiffs wish to review the government's letter motion before taking a position on the relief requested.

The government makes this request because the Central Intelligence Agency ("CIA") has determined the redacted version of the transcript that the Court has ordered docketed pursuant to the April 17 Order would reveal classified and statutorily protected information. The government respectfully requests that the Court stay any disclosure obligation under that Order to allow the government to consider whether to appeal the rulings in the April 17 Order.

The government further requests that the Court enter an amended final judgment, to ensure that any appeal of the Court's rulings in the April 17 Order could proceed together with any appeals from the Court's final judgment. Once final judgment is entered, the parties will have sixty days to consider appeal. Fed. R. App. P. 4(a)(B). If the Court enters final judgment now, the government can consider appeal of all the Court's disclosure rulings at the same time, thereby avoiding potential piecemeal appeals. In another FOIA case in this district, the district court permitted the government to redact information from its decision that the government believed should be redacted, but the court believed should be released, pending appeal to the Second Circuit. *See New York Times Co. v. U.S. DOJ*, 806 F.3d 682, 687-89 (2d Cir. 2015) (holding that three disputed paragraphs in district court's decision could be released, but ordering more limited redactions to accommodate the government's concerns about disclosure).

At a minimum, however, the government respectfully requests that the Court stay the government's disclosure obligations under the April 17 Order to allow the government to consider seeking relief from the Second Circuit. *See Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1161, 1163 (9th Cir. 2011) (where district court had directed unsealing of a sealed court order containing sensitive national security and law enforcement information that the government had provided to the court *in camera*, district court afforded government two weeks to seek appellate review of the unsealing order; the government appealed, and the court of appeals granted a writ of mandamus vacating the unsealing order, agreeing with the government that "the Sealed Order contains information that should not become public").

Courts consider four factors when determining whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig*., 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted). "[T]he degree to which a factor must be present varies with the strength of the other factors"; "more of one factor excuses less of the other." *Id*. (quotation marks, alterations omitted).

The government respectfully submits that it is likely to succeed on the merits of any appeal, for the reasons set forth in the government's *ex parte* submission (ECF No. 91). The Court has ordered disclosure in the transcript of classified and statutorily protected information that the government sought to withhold under FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1),(3). Indeed, the Court has ordered the government to disclose in the transcript information that is substantially similar to information contained in Document 66 that the Court ruled during the *in camera* proceeding is exempt from disclosure under FOIA and thus properly withheld.

Moreover, the balance of equities—the last three factors above—strongly favors the government, as disclosure in this case prior to appeal will cause irreparable harm to the government but essentially no harm to plaintiffs. "[O]nce there is disclosure" of information withheld under FOIA, "the information belongs to the general public," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), and any protections the government has are irretrievably lost and its appeal is moot. "Disclosure followed by appeal after final judgment is obviously not adequate in such cases—the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Thus, in FOIA cases, courts routinely grant stays of disclosure, for "denial of a stay will utterly destroy the status quo . . . but the granting of a stay will cause relatively slight harm to appellee." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *accord People for Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) ("[p]articularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal"); *see HHS v. Alley*, 129 S. Ct. 1667 (2009) (Thomas, J., in chambers) (staying FOIA disclosure pending disposition of appeal); *John Doe Agency v. John Doe Corp*., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (denial of stay of FOIA order would cause mootness and thus irreparable injury); *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 n.3 (2d Cir. 2005) (noting court granted a stay of FOIA disclosure order). The analysis is no different if exempt information is ordered released in the

transcript of an *ex parte*, *in camera* proceeding, rather than in documents requested under FOIA. *See Islamic Shura Council*, 635 F.3d at 1169 (vacating district court's unsealing order because the court's sealed order, "while not disclosing any documents [sought under FOIA], does itself contain information that the FOIA authorizes the government to withhold from plaintiffs and that was disclosed only *in camera*).

Here, release of a transcript with only the redactions permitted by the Court in the April 17 Order would destroy the status quo and eliminate the Government's ability to seek appellate review. That in itself is a powerful—and in the government's view dispositive—reason to grant a stay. But in addition, the absence of a stay also harms the public interest, by disclosing information the release of which could reasonably be expected to harm national security.

We thank the Court for its consideration of this request.

Respectfully,

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