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VIA ELECTRONIC FILING

March 18, 2011

Mr. Mark J. Langer
Clerk of the United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

RE: *American Civil Liberties Union, et al. v. U.S. Dep't of Justice,*
Nos. 10-5159 & 10-5167 (argued on Feb. 8, 2011, before
Ginsburg, Garland and Williams, JJ.)

Dear Mr. Langer:

Pursuant to Fed. R. App. P. 28(j), defendant-appellee/cross-appellant United States Department of Justice ("DOJ") hereby responds to the 28(j) letter filed on this date by plaintiffs-appellants/cross-appellees American Civil Liberties Union, *et al.*

Contrary to plaintiffs' suggestion, *Milner v. U.S. Dep't of the Navy*, No. 09-1163, 2011 WL 767699 (Mar. 7, 2011), concerned only Freedom of Information Act ("FOIA") Exemption 2, 5 U.S.C. § 552(b)(2) -- not the FOIA "personal privacy" exemptions, Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6) & (b)(7)(C), which are at issue in the instant cross-appeals. *Milner* did not overrule, either expressly or *sub silentio*, the Supreme Court's holding in *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982), that Congress intended the phrase "similar files" in Exemption 6 "to have a broad, rather than a narrow, meaning," encompassing "information which applies to a particular individual" without regard to "the label of the file which

contains” it. *See id.* at 600-02; *accord, Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170-71 (2004); *New York Times Co. v. NASA*, 920 F.2d 1002, 1006, 1009 (D.C. Cir. 1990) (en banc).

Moreover, the instant case also involves the “personal privacy” prong of FOIA’s “law enforcement records” exemption, 5 U.S.C. § 552(b)(7)(C), which sets an even lower threshold for withholding and “is more protective of privacy than Exemption 6[.]” *U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487, 496 n.6 (1994); *see also* DOJ Corrected and Consolidated Opening and Responsive Brief 14-16, and cases cited therein (*e.g., Favish*, 541 U.S. at 165-66; *Judicial Watch v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1124 (D.C. Cir. 2004)). Plaintiffs have conceded that the records at issue qualify as “law enforcement records” under FOIA Exemption 7. *See* DOJ Br. 16 (citing Mem. 3 n.2). Thus, quite apart from Exemption 6, Exemption 7(C) is dispositive here, and defendants-appellees/cross-appellants should prevail under either exemption.

Please provide copies of this letter to the panel. Thank you very much for your assistance.

Sincerely,

/s/ John S. Koppel

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2011, I caused a copy of the foregoing letter to be filed electronically with the Court using the Court's CM/ECF system, and also caused hard copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made automatically upon the following CM/ECF participants:

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