

NATIONAL SECURITY PROJECT



USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 11/23/11

November 11, 2011

BY FAX: (212) 805-6191

Hon. Barbara Jones United States District Judge United States Courthouse 500 Pearl Street, Room 1920 New York, NY 10007

Re: Am. Civil Liberties Union v. Dep't of Def., No. 09-Civ.-8071 (BSJ)(FM)

Dear Judge Jones,

Plaintiffs respectfully write to set forth briefly their response and strong objection to the government's request that the Court permanently maintain under seal portions of plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Partial Summary Judgment (the "Brief"), filed under seal on October 31, 2011, in the above-referenced FOIA litigation. The government's position is stated in its letter of November 10, 2011 ("Gov't Ltr"), filed under seal. For the reasons discussed below, plaintiffs also respectfully request that: (a) the undisputed portions of their Brief be unsealed and placed on the public docket immediately; (b) this letter be filed on the public docket so that the public is informed of the reasons for continued sealing of portions of plaintiffs' Brief; and (c) the parties' fuller arguments on the disputed portions of the Brief proceed as part of the remaining summary judgment briefing schedule, with plaintiffs' reply due on December 2, 2011.

Plaintiffs' Brief argues that the Enduring Security Threat ("EST") criteria, which the Department of Defense inadvertently disclosed to plaintiffs, are not properly classified and may not be withheld under Exemption 1 of FOIA. On October 12, 2011, this Court ruled from the bench that plaintiffs may rely on their knowledge of the EST criteria in drafting their Brief, but may not cite or make "direct comparison" to the criteria. Tr. at 33. The Court also ruled that plaintiffs' Brief should initially be filed under seal, and that the parties should then attempt to resolve any concerns with a view to filing a public version of the Brief. Tr. at 34-35.

On November 7, 2011, the government informed plaintiffs of its position that portions of plaintiffs' Brief should be redacted. The

Handwritten note: The Clerk of the Court is directed to docket this letter. So ordered: Barbara Jones

11/22/11

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government's November 10 letter specifies that it seeks to permanently redact all of Section II.C (except the first and last paragraphs) and Section II.D (except the first, second, and last paragraphs) of the Brief. Those sections contain plaintiffs' arguments that public release of the EST criteria would not harm national security and that the contents of the EST criteria have already been officially disclosed by the government.

Plaintiffs object to the government's deeply problematic position on several grounds. First, Plaintiffs have abided in good faith with the letter and spirit of the Court's October 12 order, and the government does not argue—nor could it—that plaintiffs' Brief violates that order. The government states only that, in its view, plaintiffs' Brief comes "very close to the line." Gov't Ltr at 2. Even if that were the case (and plaintiffs do not believe it is), given the government's acknowledgement that plaintiffs have complied with the Court's order and that "the line" has *not* been crossed, it has no basis for the redactions it proposes.

The government's two justifications for its position show how illogical and unjustified that position is. According to the government, plaintiffs' citation to material *from the public record*, combined with the public's knowledge that plaintiffs know the EST criteria, "appears to suggest" that publicly available information coincides or overlaps with the EST criteria. Gov't Ltr at 2. The government's concern seems to be that plaintiffs' knowledge of the EST criteria makes their arguments and citations more persuasive. But that concern is no basis for the redactions that the government seeks, and no harm to national security can result from discussion in a court filing of information already in the public domain. Indeed, this justification effectively concedes that the contents of the EST criteria have in fact been officially disclosed. The government's second justification fares no better. It contends that plaintiffs' citations to what the government characterizes as "unrelated public sources" suggests the contents of the EST criteria. *Id.* The government cannot have it both ways. If the government believes plaintiffs are citing to public information that does not reference or relate to the EST criteria, it cannot at the same time argue that plaintiffs' Brief containing those citations should be redacted.

Second, the government improperly seeks to relitigate issues already resolved by this Court at the October 12 hearing, and further seeks to apply an unjustifiably expansive interpretation of the Court's order. The government accuses plaintiffs of making "comparisons between public information and the Document." Gov't Ltr at 2. But the Court prohibited "*direct* comparison," Tr. at 33 (emphasis added), perhaps recognizing that comparison is always implicit when any FOIA litigant argues that the government has made official public disclosures of information it seeks to withhold. Consistent with the Court's order,

plaintiffs make no direct comparisons. Plaintiffs carefully cite to publicly available material, just like any FOIA litigator, with the only difference being that plaintiffs' citations are informed by plaintiffs' unavoidable knowledge of the EST criteria—precisely the type of arguments and language considered and sanctioned by this Court. Moreover, the government's unjustified accusation is inconsistent with the position the government itself took at the October 12 hearing. At the hearing, the government acknowledged that plaintiffs' Brief would be “pointed in the right direction because they know which public disclosures they might want to focus on and which ones might fall by the wayside.” Tr. at 31. It cannot now object that plaintiffs cite to “material that Plaintiffs were able to connect to these criteria only because of their access to the Document.” Gov't Ltr at 2. In short, the government is free to disagree on the merits with plaintiffs' citations to public information, but it should not succeed in censoring those citations based on an expansive position already rejected by the Court and conceded by the government.

Finally, the government's position is inconsistent with the public's First Amendment and common-law right of access to judicial documents. See *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 121 (2d Cir. 2006) (“[D]ocuments submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.”).

Plaintiffs—and the public—have a strong interest in unsealing the Brief as quickly as possible. To this end, plaintiffs join the government in requesting that the portions of plaintiffs' Brief not in dispute should be unsealed and placed on the public docket immediately. Plaintiffs also respectfully request that this letter be filed on the public docket in order to inform the public of the reasons for the continued maintenance of portions of plaintiffs' Brief under seal pending the Court's resolution of the parties' dispute. This letter contains no references to the specific contents of the disputed portions of plaintiffs' Brief, and describes only the disagreement between the parties.

Because briefing on the underlying motions for summary judgment is proceeding at a relatively fast pace, plaintiffs also agree with the government that the parties' positions on the sealing issue should proceed in accordance with the summary judgment briefing schedule. Should the Court prefer more expeditious briefing on the sealing issue, however, plaintiffs would be glad to comply. Finally, as the government notes, the parties respectfully request that plaintiffs' reply be filed on December 2, 2011.

We are copying Judge Maas's chambers on this letter because he has been responsible for other briefing issues and scheduling in this litigation.

Thank you for your consideration of this matter.

Respectfully,



Hina Shamsi
Counsel for Plaintiffs

CC: BY FAX

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