



U.S. Department of Justice

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February 23, 2009

BY HAND

The Honorable John G. Koeltl
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street, Room 1030
New York, New York 10007

Re: *Amnesty Int'l USA, et al. v. McConnell, et al.*, 08 Civ. 6259 (JGK)

Dear Judge Koeltl:

We represent defendants (collectively, “the Government”) in the above-referenced action. On January 27, 2009, the Government wrote to the Court to call its attention to a recently released unclassified version of an opinion by the FISA Court of Review – *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Review Ct. 2008). On February 4, 2009, plaintiffs moved this Court to order the Government to “state in a public filing whether there have been subsequent developments in *In re Directives*” since the classified version of the opinion was released on August 22, 2008, and, if so, to “describe those developments in its public filing in as much detail as possible” and to “make available to the public” any orders, opinions, and briefing associated with those subsequent developments. We write on behalf of both parties at this time to jointly request that the Court stay consideration of plaintiffs’ motion, pending a decision by the FISA Court of Review on whether to disclose whether there have been any applications for further review in *In re Directives* since the original release of its opinion on August 22, 2008.

Plaintiffs’ motion in essence asks for this Court to order the Government to disclose portions of proceedings before the FISA Court of Review that remain under seal. As a general matter, all proceedings before the Foreign Intelligence Surveillance Court and the FISA Court of Review are presumptively sealed. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 488 (FISA Ct. 2007) (“[T]he FISC operates primarily in secret, with public access the exception.”).¹ Moreover, in its order unsealing

¹ *See also* FISC Rule of Procedure 7(b)(ii), available at http://www.uscourts.gov/rules/FISC_Final_Rules_Feb_2006.pdf (“Except when Orders or Opinions are provided to the government when issued, no Court records or other materials may be released without prior motion to and Order by the Court.”).

its opinion in *In re Directives*, the FISA Court of Review specifically restricted any further disclosure of records from the case without its permission. *See In re Directives*, 551 F.3d at 1017 (order following opinion) (“All court records in this case . . . that contain classified information . . . shall not be disclosed publicly or to any unauthorized person or persons without the express permission of this Court first had and obtained No other documents containing classified information pertaining to this case, such as declarations, correspondence, [and] memoranda, shall be disclosed publicly or to any unauthorized person or persons without the express permission of the Court first had and obtained.”). Accordingly, the Government is not at liberty to make the disclosures sought by plaintiffs without the permission of the FISA Court of Review.

However, the Government has informed the plaintiffs that, within three days of this letter, it intends to take appropriate steps to seek the FISA Court of Review’s permission to disclose whether any requests for further review have been made by any party in *In re Directives* since August 22, 2008. The Government is taking this action based on its own, case-specific determination that this particular disclosure would be in the public interest and would pose no risk of harm to national security. The Government does not intend to suggest that plaintiffs are in any way entitled to such disclosure or that any similar disclosure would necessarily be appropriate in other circumstances.

In light of these developments, the parties jointly request that this Court stay consideration of plaintiffs’ motion pending the FISA Court of Review’s decision whether to authorize the requested disclosure. The Government will advise plaintiffs and this Court promptly of that decision once rendered and will make the disclosure to the extent authorized. In the event that these steps do not resolve the issues raised in plaintiffs’ motion, any remaining issues can be addressed by the parties and, if need be, by the Court, at a future date.

We thank the Court for its consideration of this submission.

Respectfully,

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