



U.S. Department of Justice

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July 21, 2014

BY ECF

The Honorable William H. Pauley, III
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Re: *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHP)

Dear Judge Pauley:

As directed by the Court on Friday, July 18, 2014, at oral argument in the above-referenced case, we write to provide the Court with a copy of an order of the Foreign Intelligence Surveillance Court ("FISC") that was discussed at oral argument. In the attached opinion, issued on June 12, 2013, *In re Motion for Consent to Disclosure of Court Records or, in the Alternative, a Determination of the Effect of the Court's Rules on Statutory Access Rights*, No. Misc. 13-01 (FISC June 12, 2013) (the "June 2013 FISC Opinion"), the FISC clarified that its rules do not independently prevent the government from releasing any portion of a FISC record. The June 2013 FISC Opinion is also available on the FISC website. *See* <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf>.

As the Court is aware, the government had previously withheld records—including records that are no longer at issue in this case—based in part on its understanding that the FISC's rules barred it from releasing FISC orders absent an order of the FISC. *See* Second Supplemental Bradley Declaration, dated April 26, 2013, ¶ 12 (Dkt. No. 55). Subsequently, in the attached June 2013 FISC Opinion, the FISC clarified that its rules do not bar the government from releasing orders pursuant to the FOIA. Thereafter, the FISC issued another order, on September 13, 2013, which further clarified this same point. *See In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISC Sept. 13, 2013) (the "September 2013 FISC Opinion"), available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-2.pdf>.

The ACLU raised the fact that the FISC had clarified its rules in the ACLU's brief in support of its renewed motion for summary judgment in this case. *See* ACLU Opening Br. at 4 n. 2. In doing so, however, the ACLU cited not to the attached June 2013 FISC Opinion, but to the September 2013 FISC Opinion. *See id.* (citing the September 2013 FISC Opinion). In responding to the ACLU's argument, the government failed to notice that the opinion cited in the ACLU's brief was not the attached opinion, and the government repeated the error, citing the ACLU's brief and its citation to the September 2013 FISC Opinion, rather than citing, as it

should have, the attached June 2013 FISC Opinion. *See* Gov. Opp. Br. at 19. In its reply brief, the ACLU argued that the government's previous invocation of the FISC's rules must have been made in bad faith because the government had released FISC orders to the public prior to the FISC's September 13, 2013, order. *See* ACLU Reply Br. at 8.

In preparing for oral argument, government belatedly recognized, the evening before oral argument, that the parties had been citing the incorrect FISC order, and that the timing of the correct order was relevant to the arguments presented to the Court. On Friday morning, prior to oral argument, we informed Mr. Abdo and Mr. Toomey, counsel for the ACLU, of the error, and provided them with a copy of the attached FISC order. As discussed during oral argument, the ACLU's argument—that the government's reliance on its understanding of the FISC's rules is not credible in light of the timing of the release of a Primary Order on July 31, 2013—is refuted by the fact that the relevant FISC opinion clarifying its rules occurred on June 12, 2013, rather than September 13, 2013.

We apologize to the Court for not earlier noticing this error, and we thank the Court for its consideration of this letter.

Sincerely,

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