



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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March 17, 2015

BY ECF

Hon. Alvin K. Hellerstein
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *ACLU v. DOD*, 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

I write respectfully on behalf of defendant the Department of Defense (“DOD” or the “Government”) in the above-named matter to advise the Court that DOD has elected not to make a further submission in response to the Court’s Order Clarifying Instructions for Defendants’ Submissions, filed February 18, 2015 (the “February 18 Order”). As explained below, DOD has commenced the process of evaluating the possible recertification of some or all of the photographs under the Protected National Security Documents Act (“PNSDA”), and the Court may wish stay the proceedings in this matter to allow DOD to complete that process. If the Court does not stay proceedings pending the conclusion of this process, we respectfully request that the Court stay any forthcoming disclosure order for 60 days to allow the Solicitor General of the United States to consider whether to authorize appeal in this matter.

The Court indicated in the February 18 Order that the PNSDA certification made by former Secretary of Defense Leon Panetta on November 9, 2012 (the “2012 Certification”) did not satisfy the requirements of the statute. The February 18 Order identified further information that, in the Court’s view, would bring the 2012 Certification into compliance with the PNSDA. The Court indicated that if DOD did not make a submission meeting the Court’s criteria by March 17, 2015, judgment would be entered against the Government.

DOD has elected not to make any further submission in response to the February 18 Order with regard to the 2012 Certification. However, as the 2012 Certification will expire on November 9, 2015, DOD has commenced the process of evaluating the possible recertification of some or all of the photographs. As we advised the Court in our letter dated February 11, 2015, we anticipate that the recertification process will take three months. We expect it will conclude no later than June 17, 2015, and will inform the Court of any unanticipated delays.

For purposes of judicial economy and efficiency, the Court may wish to stay the proceedings in this matter until the recertification process is concluded. If the Court enters judgment with regard to the 2012 Certification, any appeal would have to be authorized by the

Solicitor General of the United States. *See* 28 C.F.R. § 0.20(b). If authorized, any appeal likely would take several months, and it is possible that the Second Circuit would not issue a decision before the 2012 Certification expires on November 9, 2015. It is also possible that any appeal may be mooted if, as a result of the ongoing process, some or all of the photographs are recertified.

In light of these considerations, we respectfully suggest that it may be more efficient to await the conclusion of the ongoing recertification process than to pursue an appeal with regard to the 2012 Certification. We thank the Court for providing further information on its views of the applicable legal standard and the procedural requirements for effecting and demonstrating a valid recertification. DOD is taking consideration of the Court's views as it undertakes the process of evaluating the possible recertification of some or all of the photographs pursuant to the PNSDA (although DOD cannot commit that the recertification process will necessarily satisfy all aspects of the Court's February 18 Order). To the extent certain photographs are recertified under the PNSDA, the Government will file a copy of the new certification with the Court. At that time, the Court may wish entertain expedited briefing from the parties regarding whether it complies with the PNSDA as interpreted by the Court.

If the Court is not inclined to stay proceedings, we respectfully request that the Court stay any forthcoming disclosure order for 60 days to allow the Solicitor General to make a determination regarding appeal. *See* Fed. R. App. P. 4(a)(1)(B). If the Solicitor General authorizes appeal, the Government will request an expedited briefing schedule whereby the Government's brief would be filed 45 days after the appeal is docketed, rather than requesting the full 91-day briefing period permitted under the Second Circuit's rules.

We have conferred with plaintiffs' counsel concerning this request, and plaintiffs are still considering their position.

We thank the Court for its consideration of this request.

Respectfully submitted,

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Southern District of New York

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cc: Counsel of Record (via ECF)