NATIONAL SECURITY
PROJECT

July 22, 2014

By ECF
Honorable William H. Pauley III
United States District Court for the
Southern District of New York
500 Pearl Street, Room 2210
New York, NY 10007

Re: *American Civil Liberties Union et al. v. FBI et al.*
Case No. 11 Civ 7562 (WHP)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH
FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Dear Judge Pauley:

Plaintiffs write in response to the government's July 21, 2014 letter (ECF No. 103), which now points to a June 2013 FISC opinion as the moment the government first understood that the FISC Rules did not bar release of FISC opinions under FOIA. This argument is too little, too late. The record continues to show that the government understood for years that the FISC Rules were no obstacle, yet relied on those rules as a pretext for withholding opinions that should have been segregated and disclosed to the public. This finding is implicit in the district court's Order re: Production of Documents for *In Camera* Review in *Elec. Frontier Found. v. DOJ*, No. 11-cv-05221-YGR (N.D. Cal. June 13, 2014) (Suppl. Sims Decl., Ex. 8), and nothing the government now offers alters that conclusion.

The government has long recognized that the FISC Rules do not prevent release under FOIA. As early as 2007, when the ACLU sought access to FISC opinions in that court, the government insisted that FOIA was "the only appropriate avenue" for obtaining FISC opinions. Gov't Opp. at 5–7, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), http://bit.ly/1naXYtD. And, in response to those arguments, the FISC held that "nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 497 (FISA Ct. 2007). Thus, years before this litigation, both the government and the FISC agreed that the court's opinions could and should be sought through FOIA.

Indeed, subsequent modifications to the FISC Rules made clear that the FISC Rules did not bar disclosures mandated by statute. *See* June 2013 FISC Opinion at 4 (describing modification of FISC Rule 62(c) to "stop the Government's practice of filing what the Court viewed as unnecessary motions for unsealing before fulfilling its statutory obligation to submit certain FISC records to Congress"). That logic plainly reaches disclosures mandated by FOIA—otherwise, the FISC could amend the statute to create new exceptions simply through its judicial rulemaking.

The government's own filings in this case confirm that the FISC Rules did not bear the weight that the government tries to give them now. When the government filed its previous motion for summary judgment on February 8, 2013, ECF No. 41, it nowhere identified the FISC Rules as a basis for withholding. *See also* Bradley Decl. (ECF No. 43). Instead, that theory appears to have been an afterthought. It was not until more than two months later—in a single paragraph in the Supplemental Bradley Declaration—that the government pointed to the FISC Rules for the first time to justify its withholdings here. *See* Suppl. Bradley Decl. ¶ 12 (ECF No. 55).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

In any event, before the government represented to this Court that the FISC Rules barred release, it was incumbent on the government to ensure that its representation was in fact true. The government has routine, direct access to the FISC and, in the past, it had a practice of filing unsealing motions in order to comply with its other statutory obligations. *See* June 2013 FISC Opinion at 4. It could easily have done the same in the course of processing Plaintiffs' FOIA request—rather than standing on the FISC Rules as a pretext for withholding segregable legal analysis and non-sensitive information about repeated compliance violations from the public. All it had to do was ask.[1]

That the government failed to attach any significance to the June 2013 FISC Opinion until the evening before oral argument shows how little these rulings actually mattered to its view of the FISC Rules. For all the reasons above, the opinion is no defense to the government's overbroad withholdings in this case, either past or present.

---

[1] For instance, it is now clear that the government's *only* basis for withholding in full a FISC opinion concerning the collection of financial records under Section 215 (Sims Decl., Ex. 5) was the FISC Rules. *See* Gov't Opp. at 19 n.3 (ECF No. 95). Nothing in that opinion related to bulk collection, telephony metadata, or the NSA; and, as we now know, the opinion was almost entirely comprised of segregable legal analysis. Yet nothing in the government's previous Vaughn index, its declarations, or its other filings alerted either Plaintiffs or the Court to the fact that the government's entire justification for withholding this opinion in full turned on an argument the government did not even address in its briefs. *See* Gov't Br. (ECF No. 41); Gov't Suppl. Mem. (ECF No. 56).

Respectfully submitted,

/s/ Patrick Toomey

Beth Haroules
Arthur Eisenberg
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Phone: 212.607.3300
Fax: 212.607.3318
bharoules@nyclu.org
aeisenberg@nyclu.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Patrick Toomey
Alex Abdo
Brett Max Kaufman
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: 212.549.2500
Fax: 212.549.2654
ptoomey@aclu.org

Charles S. Sims
Proskauer Rose LLP
11 Times Square
New York, NY 10036
Phone: 212.969.3000
Fax: 212.969.2900
csims@proskauer.com

Counsel for Plaintiffs

cc: Emily Daughtry (emily.daughtry@usdoj.gov)
John D. Clopper (john.clopper@usdoj.gov)