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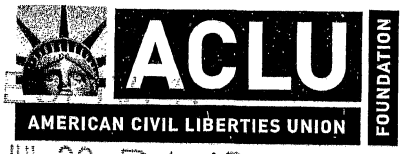

July 29, 2013

BY HAND

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)

Dear Judge Pauley:

Plaintiffs continue to oppose the lengthy delay sought by the government in this case.

The records at issue are critical to a national debate about the appropriate scope of the NSA's surveillance powers. Just last week, 205 U.S. Representatives voted to end the NSA's mass call-tracking ("MCT") program, though the legislative amendment they favored was narrowly defeated. More votes in Congress are expected over the next weeks. *See* Jonathan Weisman, *Momentum Builds Against N.S.A. Surveillance*, N.Y. Times, July 28, 2013, http://nyti.ms/15q6ISj. The disclosure of the withheld records is crucial to this ongoing debate. This is particularly true of the FISC opinions, which explain the scope and specific legal basis of the MCT program and describe the safeguards in place to protect individual privacy. On an issue of such profound significance, the public's knowledge should not be limited to the information revealed by executive officials' selective and self-serving disclosures. The very purpose of the FOIA is to ensure that the public is able to evaluate the lawfulness and wisdom of government policy for itself. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (stating that central purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed").

Importantly, the FOIA guarantees timely access to government records, not just access. *See* H. Rep. No. 876, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6267, 6267 (explaining that 1974 amendments to FOIA

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were meant to "contribute to the fuller and faster release of information, which is the basic objective of the Act"). This guarantee is of special importance where records sought under the FOIA would inform a fast-moving debate that promises to spur legislative action. Courts have underscored the guarantee of "timely access" in many contexts, including in cases concerning matters of national security. *See, e.g.*, *Am. Civil Liberties Union v. Dep't of Defense*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) ("It is the duty of the court to uphold FOIA by striking a proper balance between plaintiffs' right to receive information on government activity in a timely manner and the government's contention that national security concerns prevent timely disclosure or identification.") (citing cases); *cf. Senate of the Commonwealth of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) ("[I]n the FOIA context . . . the statutory goals—efficient, prompt, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request.").

It also bears emphasis that releases under the FOIA are not discretionary, as the government appears to suggest. *See* Decl. of James R. Clapper ¶ 5 (Whether "additional information, if any, can be declassified consistent with the national security . . . is a policy decision."). The very purpose of the FOIA is to make certain disclosures mandatory. *See, e.g.*, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (referring to the FOIA's "mandatory disclosure requirements"). Under the FOIA, it is the judiciary, not the executive, that finally determines whether information must be released. This is as true in the national-security context as in every other. *See, e.g.*, *Int'l Counsel Bureau v. U.S. Dep't of Defense*, 723 F. Supp. 2d 54, 62 (D.D.C. 2010) (reciting the standard by which the courts assess whether the government has properly withheld information in the interest of national defense or foreign policy); *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003) (same).

The Court should be particularly skeptical of the government's request for indefinite delay because the government has been able to quickly declassify details about the FISC opinions when it served its interests to do so. Only days after *The Guardian* revealed the MCT program, government officials issued public statements responding to *The Guardian*'s story and disclosing further details about the program. The declaration of the Director of National Intelligence ("DNI")—attached to the government's recent letter—also includes information that the government has recently declassified. *See* Decl. of James R. Clapper ¶ 3 (characterizing the FISC's legal conclusions and explaining circumstances in which analysts may "query" information obtained through MCT program). The government should not be permitted to unilaterally introduce into the public domain cherry-picked facts and analysis

from the FISC opinions while simultaneously arguing that any declassification review will take weeks or months.[1]

For these reasons, the Court should require the government to conclude its declassification review of the withheld FISC opinions by August 12 and its review of the remainder of the documents by September 12. At the very least, the Court should order the government to review for release by August 12 the FISC opinions concerning the MCT program that the government has already officially acknowledged.

Respectfully submitted,

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[1] The DNI's declaration suggests that one reason for the government's requested delay is the possibility that there will be "further unauthorized disclosures that the government can neither predict nor control." Decl. of James R. Clapper ¶ 8. But the possibility of further unauthorized disclosures will not dissolve on August 12, or September 12, or ever. It will persist as long as the government has secrets.