



May 14, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

The government originally gagged the ACLU from disclosing the text that appears below in white on black background, arguing that its disclosure would pose a threat to national security. After the ACLU objected, the Court lifted the gag order on that text. The ACLU remains gagged from disclosing the blacked out text below.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2601
F/212.549.2651
ABEESON@ACLU.ORG
WWW.ACLU.ORG

Re: *ACLU et ano. v. Ashcroft*, 04-CV-2614 (VM)

SEALED

Dear Judge Marrero,

Plaintiffs submit this letter in response to the government's letter of May 12, 2004, which presents the government's justifications for the disputed redactions in the six documents filed with the Court on May 6, 2004.¹ Rather than addressing the documents seriatim, plaintiffs will respond to the government's objections by category.

First, the government has proposed to redact all information that, in its view, [REDACTED].² Its arguments in support of these redactions, however, are unsupportable in light of the fact that the redacted complaint filed on the public docket makes clear

¹ Plaintiffs filed an amended complaint on Thursday, May 13, 2004. In a joint letter to the Court also submitted today, the parties note that their arguments supporting and opposing the disputed redactions in the original complaint also fully address the dispute regarding redactions in the amended complaint. Included with the joint letter was a highlighted version of the amended complaint, showing the disputed and undisputed redactions. The only difference between the two highlighted versions is that the original complaint inadvertently omitted to note the dispute over the use of the language "and consulting" in paragraph 35. The disputed language also appears in paragraph 5, and was addressed by the government in its May 12, 2004 letter.

² The government raises this objection with regard to disputed redactions in the government's letters from April 26th, April 29th and April 30th, and in the complaint.

that [REDACTED] First of all, the redacted caption reveals that there is another plaintiff. Second, paragraphs 5 and 35 of the redacted complaint describe the anonymous plaintiff as "an Internet access [redacted] business." Third, paragraphs 36 - 40 and paragraph 42 generally describe the anonymous plaintiff's business. Finally, only attorneys for the ACLU are listed on the filings for the plaintiffs. Since all of the clients in the case relate to the NSL power, [REDACTED]

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

[REDACTED]

[REDACTED]

In order

3. See, e.g., *Editorial, Copley News Service*, May 12, 2004 ("In the case in question, the FBI used the national security letter to demand that an Internet service provider turn over customer records, which can be highly personal."); *Secrecy Gone Amok*, *The Commercial Appeal* (Memphis, Tenn.), May 2, 2004 ("One of the secrets is the other plaintiff in the case, identified only as an "Internet access business." The FBI, through a National Security Letter, apparently was seeking from an Internet service provider a client's billing information, online purchases and E-mail addresses."); *ACLU Sues Ashcroft, FBI on Patriot Act Provision*, *Communications Daily*, April 30, 2004 ("Reading between the redacted lines, it looks like the ACLU's got the goods," said a spokesman for the Electronic Frontier Foundation."). See also Dan Eggen, *ACLU Was Forced to Revise Release on Patriot Act Suit*, *Washington Post*, at A27 (May 13, 2004) ("ACLU Lawyer Ann Beeson said the court order also means that she cannot 'confirm or deny' whether the ACLU is representing the second plaintiff. The group is the only counsel listed in court documents."); Julia Preston, *Judge Allows Peek into Challenge to Antiterrorism Law*, *New York Times*, at A18 (May 13, 2004) ("The suit is brought by the civil liberties group and another plaintiff described only as a recipient of an antiterrorism letter."). Copies of these articles have been included with this letter as Attachment A.

to comply with the sealing order in this case, plaintiffs have been extremely careful when speaking with the press or the public to say only that the ACLU can neither confirm nor deny that [REDACTED]

It is both ineffective and unconstitutional to prohibit the ACLU from discussing information that is already in the public domain. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). The Court should remedy this situation by lifting the seal on this information.

Second, the government seeks to redact any reference to the fact that it believes this case is of a [REDACTED] or that, in its view, this case raises questions of [REDACTED]⁴ [REDACTED]

[REDACTED] both the unredacted information in the complaint and the government's actions over the course of this litigation make clear that the government believes this case is [REDACTED] and that it [REDACTED]

[REDACTED] Again, there is no justification for keeping these words from public view.

Third, the government objects to the ACLU's disclosure of the generic categories of information [REDACTED]⁵. Plaintiffs respectfully suggest that these objections are also without merit and should be rejected by the Court. [REDACTED]

[REDACTED] See 18 U.S.C. § 2709(b) (requiring disclosure of "the name, address, length of service, and toll billing records" of target). There is no reason why this information must be concealed from the public.

Fourth, the government objects to the disclosure of wholly innocuous language without specifying how it could conceivably implicate the gag provision or [REDACTED]. For example, the government consented to plaintiffs' description of the anonymous plaintiff as an "Internet

⁴ The government raises this objection with regard to disputed redactions in the government's letters from April 26th and April 30th, and in the complaint.

⁵ The government raises this objection with regard to disputed redactions in the government's letters from April 29th and April 30th, in plaintiffs' April 30th letter, in plaintiffs' motion to unseal the case, and in the complaint.

access" business in the redacted complaint, but objects to the inclusion of the words "and consulting."⁶ Similarly, as discussed previously, the government has objected to the use of the terms [REDACTED] or [REDACTED]

Finally, none of the government's redactions can be justified by the government's mere mention of [REDACTED]. The First Amendment clearly requires something more than these sweeping and unsupported assertions in order to justify any curtailment of the public's right of access to judicial documents. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (holding that before "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"). The government must articulate its [REDACTED] concerns in a precise manner, and explain how each disputed redaction addresses those concerns. *See also United States v. United States District Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.");

For all of these reasons, Plaintiffs respectfully request that this Court adopt the redactions noted in green, which have been agreed upon by the parties, and reject the additional redactions sought by the government.

Respectfully,



Ann Beeson

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

⁶ The government raises this objection with regard to disputed redactions in the complaint.