



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 12, 2004

BY HAND

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 314
New York, New York 10007

LETTER TO BE FILED UNDER SEAL

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.

Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

Dear Judge Marrero:

The Government respectfully submits this letter in connection with the above-captioned action, and in response to Plaintiffs' request, at the end of their May 6, 2004 letter to the Court, that the Court unseal additional portions of documents that are available on the public docket in redacted form. Plaintiffs dispute particular redactions, outlined by them in pink marker, that have been made in six documents. The disputed redactions cover only a small fraction of the documents, and represent the Government's attempt to carefully balance (a) the public's right to access documents filed in this action, (b) the need to ensure that

[Redacted]

and (c) the Government's need to ensure that certain information related to this case is not made public.

We address each of the disputed redactions seriatim.

Redactions in the Government's April 26, 2004 Letter to the Court

The two areas of disputed redactions in this letter are the Government's statements that this case in particular raises concerns and

[Redacted]

The Government generally does not acknowledge, for public consumption, or that any particular case raises The rationale for the Government's practice is obvious and compelling:

[REDACTED]

In addition, any reference to [REDACTED] or to particular [REDACTED] concerns raised by this case [REDACTED] the redacted complaint is limited to a facial challenge to 18 U.S.C. § 2709

Thus, if it is disclosed that the Government believes that this case in particular raises concerns [REDACTED]

The Government's April 26, 2004 letter to the Court included acknowledgments that this case raises [REDACTED] concerns [REDACTED] only because we believed that our letter would remain under seal. We would not have included such references if we understood that these portions of the letter would be unsealed. For these reasons, the disputed redactions should remain.

Redactions in the Government's April 29, 2004 Letter to the Court

The two areas of disputed redactions in this letter (one in the body of the letter, one in the press release attached to the letter) are the references to the FBI's ability to request the disclosure of [REDACTED] and [REDACTED] in NSLs. When Plaintiffs described that the FBI can request the disclosure of [REDACTED] and [REDACTED] in an NSL, [REDACTED]

[REDACTED] the statute, 18 U.S.C. § 2709, nowhere delineates those two categories of information that can be [REDACTED] requested by the FBI in NSLs. [REDACTED]

Moreover, any disclosure that the FBI can [REDACTED] request and [REDACTED] in the NSLs is a disclosure that reveals law enforcement techniques. The FBI has a strong interest in keeping its techniques -- including the particular kinds of information it requests -- confidential. Otherwise, targets of investigations can tailor their actions to [REDACTED]

avoid detection by the FBI's inquiries.

As we previously advised Plaintiffs, if the [redacted] words [redacted] and [redacted] remain redacted from the April 29, 2004 letter and press release attachment, the Government does not object to the removal of the remainder of the redactions outlined in pink. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

Redactions in Plaintiffs' April 30, 2004 Letter to the Court

The two areas of disputed redactions in this letter again relate to references to the FBI's ability to request the disclosure of [redacted] and [redacted] in NSLs. As described above, if the five words [redacted] and [redacted] remain redacted, the Government does not object to the removal of the remainder of the redactions outlined in pink. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

Redactions in Memorandum in Support of Plaintiffs' Motion to Unseal Case and to File the Attached Redacted Documents on the Public Docket

The first disputed redaction in this document, found on its first page, involves a disclosure that is barred by 18 U.S.C. § 2709(c). By stating that their complaint [redacted] might be construed to fall within the non-disclosure provision, [redacted]

While Plaintiffs allege that 18 U.S.C. § 2709(c) is unconstitutional, that is a matter for merits briefing; the Government has not yet had an opportunity to demonstrate why the restriction in the statute is both proper and reasonable, and why Plaintiffs' First Amendment challenge is devoid of merit. While the Court decides the merits of Plaintiffs' constitutional challenge, the statute must be complied with, [redacted]

The second disputed redaction, found on page two of the memorandum, again relates to references to the FBI's ability to request the disclosure of [redacted] and [redacted] in NSLs. As described above, if the [redacted] words [redacted] and [redacted] remain redacted out of the other documents, the Government does not object to the

removal of this redaction.

Redactions in the Government's April 30, 2004 Letter to the Court

The first disputed redaction in the Government's April 30, 2004 letter to the Court, found in the second full paragraph on page two of the letter, covers the Government's acknowledgment that [redacted] concerns [redacted]

[redacted] For the reasons set forth with respect to the disputed redactions in the Government's April 26, 2004 letter to the Court, these statements by the Government should remain confidential and non-public. Indeed, they were included in the letter with the understanding that they would remain sealed.

The second disputed redaction, found in the third full paragraph on page two of the letter, again relates to references to the FBI's ability to request the disclosure of [redacted] and [redacted] in NSLs. As described above, if the [redacted] words [redacted] and [redacted] remain redacted, the Government does not object to the removal of the remainder of the redactions outlined in pink in this paragraph. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

The last two sets of disputed redactions again cover the Government's acknowledgment that there is [redacted] information that underlies this case in particular. The redactions cover information that, in effect, communicates that [redacted]

[redacted] For the reasons set forth with respect to the disputed redactions in the Government's April 26, 2004 letter to the Court, these statements by the Government should remain confidential and non-public. Again, the statements were only included in the letter based on the understanding that they would remain sealed.

Redactions in Plaintiffs' Complaint

Plaintiffs' challenges to certain redactions in their complaint are most disturbing. The Government expended considerable effort and time in negotiating with Plaintiffs the lifting of the seal to allow a redacted complaint, limited to a facial challenge to 18 U.S.C. § 2709 by the ACLU, to be available on the public docket. In addition, Plaintiffs jointly proposed the order that lifted the seal only to the extent that the agreed-upon redacted complaint would be available. It is improper for Plaintiffs to now shift direction and relitigate issues that had been settled. For this reason alone, Plaintiffs' newfound challenge to the redacted complaint should be rejected.

The redactions were drawn along a line that is both reasonable and easy for all parties to follow: plaintiff ACLU's facial challenge to 18 U.S.C. § 2709 is disclosed in its entirety,

Again, while Plaintiffs allege that 18 U.S.C. § 2709(c) is unconstitutional, merits briefing has not yet begun and the Government has not yet had an opportunity to demonstrate why Plaintiffs' arguments lack merit.

Turning to the specific disputes, the disputed redactions in paragraphs 2 and 3 of the complaint cover

Likewise, the disputed redactions in paragraphs 5, 6, and 7 of the complaint cover

The disputed redaction in paragraph 35 is critical to ensuring that the identity of the non-ACLU plaintiff is not disclosed. By describing that the plaintiff is both an Internet access and consulting business, persons

may, by process of elimination, be able determine the plaintiff's identity. Likewise, the disputed redactions in paragraphs 36 and 38 cover information from which the identity of the non-ACLU plaintiff can be discerned, and thus are necessary to ensure the confidentiality of the non-ACLU Plaintiff's identity.

The disputed redactions in paragraphs 45 through 50 again cover Plaintiffs' express references to

The remainder of the disputed redactions in paragraphs 54 through 59 and 67 through 69 again cover

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In sum, the disputed redactions -- which comprise only a small fraction of the documents available on the public docket -- represent a careful and appropriate balancing of the various interests at issue in this case. We therefore respectfully request that the redactions remain, except as proposed above. Thank you for your consideration of this submission.

Respectfully,

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