



U.S. Department of Justice

United States Attorney
Southern District of New York

85 Chambers Street
New York, New York 10007

May 27, 2004

BY HAND

LETTER TO BE FILED UNDER SEAL

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

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. On Wednesday, May 19, 2004, the Government provided Plaintiffs with a redacted version of papers in support of Plaintiffs' motion for summary judgment that could be filed on the public docket, pursuant to the Court's May 12, 2004 Order. On Friday, May 21, 2004, Plaintiffs advised the Government of redactions in the briefing papers that they dispute. The Government now writes in support of the disputed redactions sought. For the Court's convenience, the Government encloses those pages of Plaintiffs' papers that include disputed redactions, with disputed redactions marked in pink highlighter and undisputed redactions marked in green highlighter. Also for the Court's convenience, the Government encloses a complete copy of Plaintiffs' redacted papers, as made publicly available last week.

As an initial matter, the Government notes that this letter intentionally provides only brief discussion and argument, in order to avoid what we fear will be an endlessly perpetuating cycle of disputes over redactions -- including disputed redactions in letters addressing other disputed redactions. The Government stands ready to provide the Court with any further argument or information that the Court believes is necessary to decide the issues raised by these particular disputed redactions.

The Government also notes that the redactions sought comprise only a small portion of Plaintiffs' brief and supporting papers. The redacted papers that are publicly available make clear the scope of and bases for Plaintiffs' facial challenge to 18 U.S.C. § 2709.

Hon. Victor Marrero

Page - 2 -

Disputed Redactions in Plaintiffs' Memorandum of Law

Page 2, ¶ 1, Lines 2-3 -- By its terms, the non-disclosure provision in 18 U.S.C. § 2709 (c) prohibits an electronic communications service provider (or its agent) from disclosing that the Federal Bureau of Investigation ("FBI") has sought or obtained access to information under the statute. When Plaintiffs state that § 2709 (c) has applied or has had an effect in this case (here they state that the provision "forced" them to file the complaint under seal), they communicate that § 2709 (c) has applicability in this case, and thus that the FBI has sought or obtained access to information under the statute from one of the Plaintiffs.

Page 2, ¶ 1, Lines 5-6 -- The two phrases at issue are problematic because, as drafted in Plaintiffs' papers, they are tied by Plaintiffs to the effect and application of § 2709 (c) in this case. If the disputed words in lines 2-3 of this paragraph remain redacted, the Government would not oppose removing the disputed redaction highlighted in pink from these two phrases in lines 5-6.

Page 5, ¶ 3 (second full paragraph), Line 2 -- Redaction is sought for the reasons set forth above with respect to the wording on page 2, ¶ 1, lines 2-3.

Page 9, ¶ 2 (first full paragraph), Lines 1-3 -- Redaction is sought for the reasons set forth above with respect to the wording on page 2, ¶ 1, lines 2-3. If the first full sentence and first clause of the second sentence (the first five words) remain redacted, the Government would not oppose removing the redaction of the remaining eleven words highlighted in pink in the second sentence.

Page 14, ¶ 3 (second full paragraph), Lines 2-3 -- As an initial matter, the sentence is inaccurate. The Government did not object to the public disclosure of "categories of information" generally sought by "an NSL." Rather, the Government objected to the public disclosure of two particular categories of information that were sought through the challenged NSL, that are not described in 18 U.S.C. § 2709, and that therefore disclose law enforcement techniques.

In any event, redaction is sought for the reasons set forth above with respect to the wording on page 2, ¶ 1, lines 2-3. Plaintiffs' statements are particularly problematic because they tie applicability of § 2709 (c) to the Government's purported position in this case (i.e., that the Government sought a particular redaction under § 2709 (c)).