

ANN BEESON,  
ASSOCIATE LEGAL DIRECTOR



May 6, 2004

By Hand

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

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

**SEALED**

Dear Judge Marrero,

In accordance with the Court's direction at the May 3, 2004 conference, the parties have attempted to reach an agreement regarding the disclosure of information related to this case. The parties have been unable to reach an agreement. Attached to this letter is plaintiffs' proposal on disclosure ("the ACLU disclosure proposal").<sup>1</sup> Plaintiffs offer the following brief comments in support of this proposal and in opposition to the government's counter-proposal.

To protect the rights of the public and press to access judicial documents and proceedings, the First Amendment requires strict scrutiny of any sealing order. *In re The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984). Documents and proceedings may be closed only "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *In re The New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987); see also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986).

<sup>1</sup> The attached proposal is identical to the proposal plaintiffs sent to the government two days ago, with one exception. In the earlier proposal, in an attempt at compromise, plaintiffs offered to define "Specified Information" to include [REDACTED]. Plaintiffs have reconsidered their position on this issue in light of the government's rejection of our proposal and the government's failure to justify suppression of this generic information.

In this case, the only possible justification for any sealing order is the gag provision, 18 U.S.C. 2709(c).<sup>2</sup> Plaintiffs believe that the gag provision violates the First Amendment because it prohibits speech without requiring the government to first show a compelling need for secrecy and to narrowly tailor any gag on a case-by-case basis. The government has not yet offered any evidence to justify the imposition of a gag, or a sealing order, in this case.

At the very least, while the Court considers the merits of the case, any sealing order should restrict only that information that could conceivably implicate the gag provision. Thus, the ACLU disclosure proposal would restrict the filing and disclosure only of pre-defined categories of information. The government has refused, however, to define the scope of the gag provision. Yet the universe of sensitive information the ACLU possesses is in fact quite narrow, in contrast to the universe of non-sensitive information about the case. If the government believes our definition of sensitive information is too narrow, it should simply propose a broader definition.

Instead, the government's counter-proposal assumes that the gag provision justifies a restriction on all filings and disclosures in the case, with the exception of a small category of information that the government may pre-approve for disclosure. In other words, rather than define with specificity the information it insists on suppressing, the government demands that the ACLU define what we want to say in advance so that the government may pre-approve that speech. There is no purer example of an unconstitutional prior restraint. See *Nebraska Press Ass'n v. Stewart*, 427 U.S. 538, 559 (1976).

Notably, the government's counter-proposal and the current sealing order restrict far more than court filings. To avoid inadvertently violating the sealing order, the ACLU is required to clear with the government every discussion about the lawsuit, every response to public inquiries about the case, every press release or phone conversation with a reporter, every letter to ACLU members, and every discussion with members of Congress urging repeal of the statute. We are also required to seek the government's permission before disclosing conversations with opposing counsel and oral arguments at court conferences. The ACLU is engaging in such communications on a daily basis

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<sup>2</sup> Indeed, the ACLU had to file this case originally under seal to avoid the risk of prosecution under the gag provision. In our Motion for Leave to File Case Under Seal, we specifically assured the Court that we would move to unseal the case once we obtained an agreement from the government that it would not prosecute us. After considerable negotiation, we reached an extremely limited written agreement that the government would not prosecute us for disclosing a redacted version of the Complaint and Motion for Leave to File Case Under Seal. Since then, the government has refused our repeated requests to lift the seal on the entire case and restrict only information that implicates the gag.

and should not be required to submit them to the government for prior clearance.

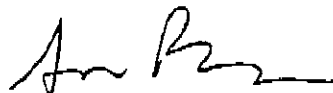
We believe that the government has not justified any sealing order in this case, and has certainly not justified its broad counter-proposal. We nevertheless offer our own disclosure proposal to the Court in order to enable the parties to turn their attention to litigating the merits of this dispute, while providing information about the case to the public as fully and as quickly as possible.

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For the reasons stated above, the ACLU respectfully asks the Court to enter an order amending the sealing order and adopting the ACLU disclosure proposal.

To address one final matter, yesterday the parties jointly submitted to the Court a proposed order to file on the public docket redacted versions of documents previously filed under seal. Plaintiffs believe that some of the redactions demanded by the government cannot be justified by even a broad interpretation of the gag provision. Plaintiffs have attached an unredacted copy of the relevant documents for the Court's review; text highlighted in pink indicates the disputed redactions, while text highlighted in green indicates the undisputed redactions. Plaintiffs have also attached an unredacted copy of the Complaint, with disputed redactions highlighted, for the same purpose. Plaintiffs urge the Court to rule that the government has not met the constitutional test required for sealing of this information, and to allow disclosure of this information to the public. If the Court so rules, plaintiffs will prepare an amended redacted version, consistent with the Court's ruling, for filing on the public docket.

Respectfully,



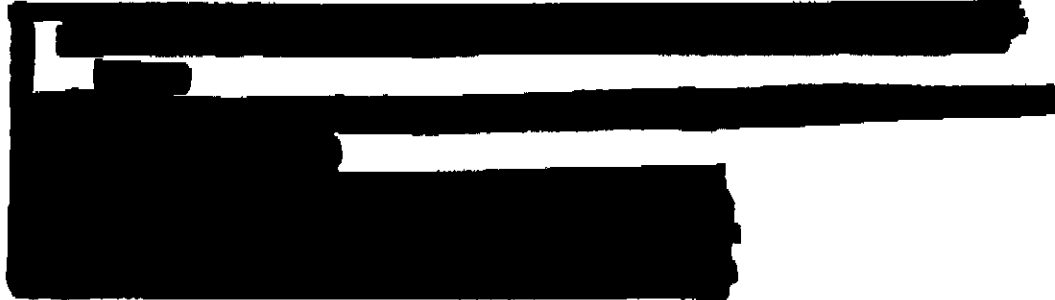
Ann Beeson

cc: Meredith Kotler  
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## ACLU Proposal Regarding Filing and Disclosure

### I. Definition of Specified Information

For the purposes of this agreement, "Specified Information" is defined to mean:



### II. Procedures for Court Submissions and Hearings

- The titles of all submissions to the court will be listed on the public docket provided that the titles do not contain Specified Information.
- All submissions to the court that do not contain Specified Information will be filed publicly without redaction.
- All court hearings will be open to the public, absent a motion for closure by any party.
- Future submissions to the court that contain Specified Information will be handled as follows:
  - 1) The filing party will file the document under seal with the court.
  - 2) On the same day, the filing party will propose to the opposing party a redacted version for public filing;
  - 3) Within two days of the original filing, the parties will submit to the court a proposed redacted version of the document for public filing. The parties will also provide the court with letter briefs addressing any remaining dispute regarding proposed redactions, for a ruling by the court.
- If a party wishes to file a document under seal that contains information other than the Specified Information, the party must first file a motion to seal the document with the court.

### III. Principles Governing Other Disclosures

- The ACLU may disclose any information about this case other than the Specified Information.
- The ACLU agrees not to disclose Specified Information.