ASSOCIATE LEGAL DIRECTOR

May 14, 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,

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 claims in the case relate to the NSL power, [redacted]

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[redacted]

[redacted]

[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.

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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] 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 implicates [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] *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 of [redacted] For example, the government consented to plaintiffs' description of the anonymous plaintiff as an "Internet

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[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. [redacted]

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.").

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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

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

ATTACHMENT A

Copyright 2004 Copley News Service
Copley News Service

May 12, 2004 Wednesday

SECTION: EDITS; EDITORIAL WEEKLY FEATURE

LENGTH: 278 words

HEADLINE: DAILY EDITORIALS
05,12,04, edit2 ,Daily Editorials Case questions gag orders

BYLINE: the Omaha World-Herald Copley News Service

BODY:

The appropriateness of some parts of the Patriot Act has been under debate since its passage. The law to expand government powers was adopted shortly after the Sept. 11, 2001, terrorist attacks.

The American Civil Liberties Union has filed a lawsuit challenging the constitutionality of those powers. And in a supremely ironic twist, those same powers have suppressed news of the lawsuit for a month. The case, filed April 6 in U.S. District Court in New York, was made public just last week.

The lawsuit challenges a type of national security letter, an order for information that doesn't require a judge's approval in terrorism and espionage cases. 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.

Those who receive the letters are prohibited from disclosing to anyone that they received them, thus preventing recipients from challenging their validity.

It's that legal gag order that is also hindering publicity about the ACLU's lawsuit. Only after the group reached an agreement with the Justice Department was a heavily edited version of the lawsuit unsealed.

FBI agents and others charged with protecting the United States understandably need some degree of latitude and confidentiality in conducting investigations. But our nation's prized freedoms rest on openness in government, as a preventative against abuse of government powers.

That conflict makes the ACLU case worthy of public attention - and rightly puts pressure on the government to be easing its gag on the case.

Reprinted from the Omaha World-Herald.

LOAD-DATE: May 13, 2004

Copyright 2004 The Commercial Appeal, Inc.
The Commercial Appeal (Memphis, TN)

May 2, 2004 Sunday Final Edition

SECTION: VIEWPOINT; Pg. B6

LENGTH: 441 words

HEADLINE: SECRECY GONE AMOK

BODY:

TO NO ONE'S surprise, the American Civil Liberties Union filed suit challenging the constitutionality of parts of the USA Patriot Act, the sweeping security law passed in the immediate aftermath of 9/11.

To what should be everyone's shock, the mere fact of the lawsuit was kept secret under provisions of the act.

The Bush administration insists that the Patriot Act is vital to fighting terrorism, but, aside from Attorney General John Ashcroft's sheltered and uninformative tour before screened audiences, refuses to say precisely how.

One of the disturbing aspects of this administration is that it seems to believe that how it manages the people's business is none of the people's business.

The lawsuit was sealed for more than three weeks while the ACLU and the government haggled over what the ACLU could and could not say publicly about its lawsuit. The lawsuit was filed in New York on April 6, and a heavily edited version was released on April 28.

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.

National Security Letters are a kind of subpoena that doesn't require a judge's approval, only the FBI's say-so, to covertly obtain personal information from banks, telephone companies, Internet providers, libraries, credit bureaus, etc.

Recipients of NSLs are barred by a gag order from disclosing that they have received one. The Patriot Act greatly eased the restrictions on NSLs so that the FBI could act quickly in national security cases.

But the ACLU contends, "As a result of the Patriot Act, the FBI may now use NSLs to obtain sensitive information about innocent individuals who have no connection to espionage or terrorism."

No one wants to tip off the target of a valid investigation, but given the past misuse of the FBI for political purposes this is not an unrealistic fear.

The ACLU argues that the expanded National Security Letter power is unconstitutional because the recipient has no way of challenging the validity of the NSL and the government doesn't have to justify not informing the target of an NSL.

The ACLU also believes the gag order is unconstitutional. And it does seem to raise issues about freedom of speech.

The Bush administration is demanding that the Patriot Act not only be renewed but expanded when it expires next year. Congress rushed initial passage of the Patriot Act; it should be in no rush to renew it. This law demands a hard second look.

NOTES:
Editorial

LOAD-DATE: May 4, 2004

Copyright 2004 Warren Publishing, Inc.
Communications Daily

April 30, 2004, Friday

SECTION: TODAY'S NEWS

LENGTH: 599 words

HEADLINE: ACLU SUES ASHCROFT, FBI ON PATRIOT ACT PROVISION

BODY:

A lawsuit filed by the ACLU to contest part of the USA Patriot Act wasn't made public for 3 weeks because of concerns the release might violate the Act, the civil liberties group says. The suit lists the ACLU and another, redacted, plaintiff v. John Ashcroft, Robert Mueller and Marion Bowman in their official positions at the Dept. of Justice and FBI, and alleges that 2 elements of the Patriot Act that allow the FBI to obtain information from "electronic communication service providers" are unconstitutional. The suit was filed under seal nearly 3 weeks ago, an ACLU lawyer said, and the group didn't announce it until it reached an agreement with the govt. on which sections of the document -- and which components of the case -- could be made public.

The suit alleges that the Patriot Act extends FBI power unconstitutionally with respect to their ability to issue National Security Letters (NSLs). The FBI originally gained the ability to issue NSLs, which require ISPs and telecom carriers to submit the personal information of those suspected of espionage or terrorism without judicial oversight, in 1993. The Patriot Act extended the FBI's ability to issue NSLs to all citizens, which is the crux of the ACLU's challenge. The govt. has compared NSLs to subpoena power, but citizens can challenge subpoenas in court before they disclose information, according to ACLU lawyer Jameel Jaffer. "The government has to go to a judge and explain why there's a compelling need" for the information, Jaffer explained.

NSLs also gag those served from disclosing to any other person that the FBI sought or obtained information from them, and the suit alleges this clause is a fundamental First Amendment violation. The irony that a First Amendment case was held under seal for 3 weeks wasn't lost on the ACLU. "There's a lot of information in the complaint that we think should be disclosed to the public," Jaffer said. "A major provision of the Patriot Act has been under constitutional challenge for weeks, while, during the same time" President Bush and other Administration officials "have been publically campaigning to renew it." Jaffer said alleged FBI abuse of NSLs under the Patriot Act "is not a left-right issue. It's not about what kind of information the FBI can get, it's about how they get it."

"The case demonstrates why it's so difficult to challenge the over-broad powers of the Patriot Act," said Lara Flint, counsel for the Center for Democracy & Technology (CDT). Several of the new govt. powers added or bolstered by the Patriot Act have gag rules similar to those that accompany NSLs, she said, "and we have expressed repeatedly serious concerns about the NSL authority" with respect to ISPs. Under the pre-Patriot Act legislation, Flint said, "the FBI used to have to link an NSL to a specific person," who can demonstrably be shown to have links to foreign govts. or terrorist organizations. Under the Patriot Act, NSL requirements are so vague, and the gag order against ISPs so stringent, that "the person never knows that they're being investigated."

"Reading between the redacted lines, it looks like the ACLU's got the goods," said a spokesman for the Electronic Frontier Foundation (EFF). EFF and the ACLU have worked jointly before, most notably on the Communications Online Decency Case. "If ACLU needs our help we'll be happy to help them," the spokesman said, saying the FBI's expanded use of NSLs violates both the 4th (probable cause) and 5th (due process) Amendments. The Dept. of Justice didn't comment. -- Ian Martinez

LOAD-DATE: April 29, 2004

Copyright 2004 The Washington Post

The Washington Post

May 13, 2004 Thursday
Final Edition

SECTION: A Section; A27

LENGTH: 505 words

HEADLINE: ACLU Was Forced To Revise Release On Patriot Act Suit;
Justice Dept. Cited Secrecy Rules

BYLINE: Dan Eggen, Washington Post Staff Writer

BODY:

When a federal judge ruled two weeks ago that the American Civil Liberties Union could finally reveal the existence of a lawsuit challenging the USA Patriot Act, the group issued a news release.

But the next day, according to new documents released yesterday, the ACLU was forced to remove two paragraphs from the release posted on its Web site, after the Justice Department complained that the group had violated court secrecy rules.

One paragraph described the type of information that FBI agents could request under the law, while another merely listed the briefing schedule in the case, according to court documents and the original news release.

The dispute set off a furious round of court filings in a case that serves as both a challenge to, and an illustration of, the far-reaching power of the Patriot Act. Approved by Congress in the wake of the Sept. 11, 2001, attacks, the law gives the government greater latitude and secrecy in counterterrorism investigations and includes a provision allowing the FBI to secretly demand customer records from Internet providers and other businesses without a court order.

The ACLU first filed its lawsuit challenging the constitutionality of such demands, known as national security letters, on April 6, but the secrecy rules of the Patriot Act required the challenge to be filed under seal. A ruling April 28 allowed the release of a heavily censored version of the complaint, but the ACLU is still forbidden from revealing many details of the case, including the identity of another plaintiff who has joined in the lawsuit. The law forbids targets of national security letters to disclose that they have received one.

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.

The dispute over the ACLU's April 28 news release centered on two paragraphs. The first laid out the court's schedule for receiving legal briefs and noted the name of the New York-based judge in the case, U.S. District Judge Victor Marrero.

The second paragraph read: "The provision under challenge allows an FBI agent to write a letter demanding the disclosure of the name, screen names, addresses, e-mail header information, and other sensitive information held by 'electronic communication service providers.' "

Justice lawyers said that both paragraphs violated a secrecy order and that the ACLU should be required to seek an exemption to publicize the information, court records show. Justice spokesman Charles Miller declined to comment yesterday.

"It simply never occurred to us that this information would be covered by the sealing order, because it's completely non-sensitive, generic information," Beeson said.

The dispute was partly resolved yesterday. Marrero ruled that the briefing schedule could be publicized, along with edited versions of other court filings. But the paragraph describing the information that can be sought remains absent.

LOAD-DATE: May 13, 2004

Copyright 2004 The New York Times Company
The New York Times

May 13, 2004 Thursday
Late Edition - Final

SECTION: Section A; Column 1; National Desk; Pg. 18

LENGTH: 631 words

HEADLINE: Judge Allows Peek Into Challenge to Antiterrorism Law

BYLINE: By JULIA PRESTON

BODY:

In a ruling Wednesday, a federal judge in Manhattan widened the public's glimpse into a lawsuit by the American Civil Liberties Union challenging some terms of the antiterrorism law known as the USA Patriot Act, after the government sought to keep virtually every detail of the case under a court seal, or secrecy order.

The A.C.L.U. is contesting a provision of the law that allows the Federal Bureau of Investigation to require telephone, Internet and other communications companies to provide basic information about their customers, including addresses and call records. The F.B.I. sends a subpoena, known as a national security letter, which includes an order barring the company from informing the customer of the investigation or discussing it with anyone.

The F.B.I. can acquire data on customers even if they are not suspected of terrorist activity.

In a switch that A.C.L.U. lawyers described as an awkward change from their usual practice and philosophy, they filed the suit April 6 under seal, concluding that otherwise they would be in violation of the law the case was devised to contest. The group then quickly asked the judge to lift the seal from the whole case.

The suit is brought by the civil liberties group and another plaintiff described only as a recipient of an antiterrorism letter. The A.C.L.U. said it was barred from providing any other information about the other plaintiff.

"It isn't even clear that a recipient can speak to a lawyer," said Ann Beeson, the associate legal director at the A.C.L.U. who is handling the case.

Justice Department officials have argued that the national security letters are vital in the search for terror suspects, providing information that can help trace their movements and identify where their phone calls and e-mail messages are going. The subpoenas do not allow the government to listen to phone conversations or read e-mail messages.

In his decision, Judge Victor Marrero of Federal District Court in Manhattan declined to unseal the case, but set some guidelines for the two sides to agree on editing the case documents so that "nonsensitive information" could be released. Material in the documents that relates directly to terrorism investigations will be blacked out. Judge Marrero made it clear that his ruling had no bearing on how he might rule later on the larger issues in the case.

In recent days, President Bush and Attorney General John Ashcroft have vigorously defended the antiterrorism law, which was enacted in October 2001.

Almost nothing is known about the F.B.I.'s use of the subpoenas. The bureau has not said how many letters it sent or what the results were.

The A.C.L.U. argues that the F.B.I. letters are unconstitutional because they violate the due process rights of the businesses and people who receive them, and because the order prohibiting discussion of the investigation violates free

expression rights. The group contends that the government should be required to seek approval from a judge before issuing a letter and recipients should have a way to question the order.

One flashpoint came after the A.C.L.U. put out a press release on April 28 describing the case in general terms and including details of the schedule set by the judge for hearing the case. The group was ordered by the government to remove the schedule information from the release on its Web site.

Meredith B. Kotler, an assistant United States attorney, told the judge that even though the scheduling information was not sensitive, it should not be published because the entire case had been officially sealed.

After the judge issued an order releasing some documents on May 7, the A.C.L.U. restored the paragraph to its press release saying that the judge would probably hear the case at the end of the summer.

URL: http://www.nytimes.com

LOAD-DATE: May 14, 2004

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 14, 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

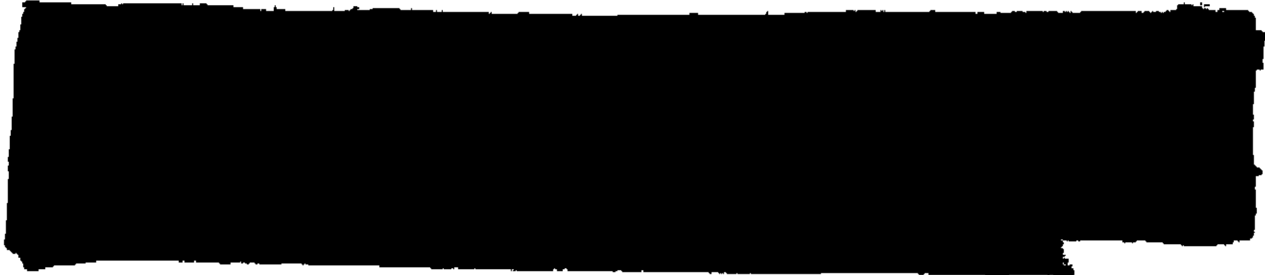
Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

Dear Judge Marrero:

The Government respectfully submits this letter in connection with the above-captioned action, and in further support of the Government's May 12, 2004 letter addressing disputed redactions in various documents that have been filed in this case.

Plaintiffs' pink- and green-highlighted version of the redacted complaint did not reflect that the parties dispute an additional redaction in paragraph 5. Specifically, the redacted complaint redacts the words "and consulting" from paragraph 5, and we understand that Plaintiffs dispute that redaction. The same disputed redaction is found at paragraph 35 of the complaint (paragraph 36 of the amended complaint). Like the disputed redaction in paragraph 35, the disputed redaction in paragraph 5 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 [redacted] may, by process of elimination, be able to determine the plaintiff's identity. Accordingly, we respectfully request that the words "and consulting" remain redacted in paragraph 5 of the complaint.

In their May 14, 2004 letter to the Court opposing particular redactions, Plaintiffs oppose all requested redactions covering [redacted]



Thank you for your consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: [signature]
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

cc: Ann Beeson, Esq.