



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 7, 2004

BY HAND

LETTER TO BE FILED UNDER SEAL

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
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 response to Plaintiffs' May 6, 2004 letter (the "May 6, 2004 Letter") to the Court. The Government regrets that the instant dispute has arisen, and believes that the Court's comments on Monday resolved many of these matters. We understood the Court to have directed the parties to work together to carve out categories of disclosures that the parties can agree, in advance, can be made publicly available in the first instance (such as briefing schedules, as described by the Court). We also understood the Court to have expressed the view that the Government cannot know, in advance, whether any particular disclosure in a document will violate 18 U.S.C. § 2709 or will raise [REDACTED] concerns until we have seen the document. If a document containing objectionable disclosures is already filed publicly, it will be too late for the Government to object to its disclosure.

The Government has attempted to carve out certain categories of disclosures that would not be objectionable to the Government and has invited Plaintiffs to propose additional such categories. Despite our repeated requests, Plaintiffs have not provided the Government with any additional categories of disclosures that can be carved out, in advance, as not objectionable to the Government.

The Government respectfully submits that the enclosed proposal (as described in a proposed Order and in correspondence to the ACLU) should govern future disclosures in this case. Under our proposal, except for merits briefing, certain defined categories of disclosures can be filed publicly in the first instance. Those categories are: the briefing schedule (and any amendment thereto); the ACLU's facial constitutional challenge to

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18 U.S.C. § 2709; pro hac vice motions; and any other ministerial, scheduling matters (such as requests to extend the page limits of briefing). Merits briefing and all other documents would be filed under seal, and there would be a procedure for having redacted copies placed on the public docket in the following manner. On the day of filing (under seal), the filing party will provide the opposing party with a proposed redacted version of the document for public filing. Within two business days, the opposing party will advise the filing party of those portions of the document that it agrees may be filed, in redacted form, on the public docket. Before filing the redacted document, the filing party shall provide the opposing party with a complete copy of the redacted document that is to be filed per agreement, so that the opposing party may verify its agreement to the public filing. Once verified, the filing party may file the redacted document on the public docket.¹ If any party wishes to dispute a particular redaction remaining in any document, that party may write to the Court to seek removal of the redaction, and the opposing party would have seven days to respond (or any further amount of time as ordered by the Court, depending on the party's ability to brief this separate matter at the same time that it is briefing the merits).

Plaintiffs' proposal for disclosures in this case -- which shifts to the Government the burden of identifying all possible categories of disclosures that should not be made publicly, and permits any other disclosure to be filed on the public docket right away -- is unworkable for several reasons.

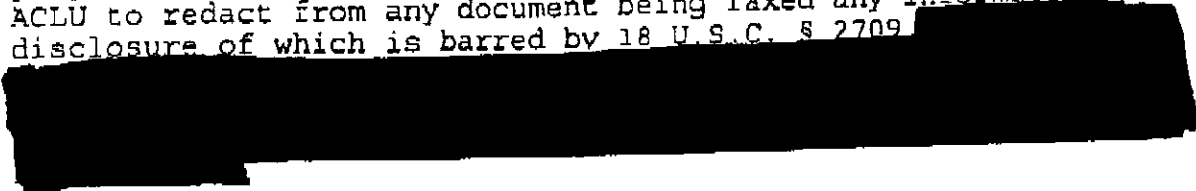
First, the Government simply cannot define, in advance, all possible types of disclosures that may be objectionable. Likewise, the Government would be unable to prevent inadvertent disclosures in documents filed publicly in the first instance. Indeed, there was an inadvertent disclosure of sensitive information by the ACLU while the parties were exchanging their

¹ This verification process is critical, as necessary redactions may inadvertently be omitted. When the parties discussed redactions to the documents that were submitted to the Court on May 5, 2004 along with a proposed Order placing them on the public docket, Plaintiffs initially proposed redactions and sent redacted versions of the documents to the Government. The Government then advised Plaintiffs of certain additional redactions that needed to be made, and asked to see a new version of the documents, with a complete set of redactions. The new version, however, inadvertently left off one set of redactions requested by the Government. In addition, the new version included two new documents that had not been reviewed by the Government for purposes of filing redacted versions on the public docket.

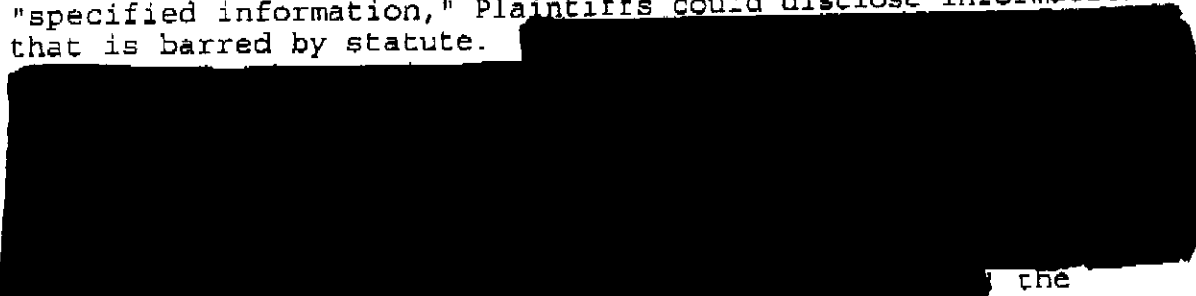
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proposals for disclosure. The Government expressly asked the ACLU to redact from any document being faxed any information the disclosure of which is barred by 18 U.S.C. § 2709



Second, under Plaintiffs' proposal and their definition of "specified information," Plaintiffs could disclose information that is barred by statute.



the parties already agreed to the unsealing of a redacted complaint that was limited to a facial challenge to the statute by the ACLU.

Third, Plaintiffs' proposal and May 6, 2004 letter to the Court make clear the true rub of their newfound opposition to the sealing order that was jointly proposed by the parties: they believe that the non-disclosure provision in 18 U.S.C. § 2709(c) is unconstitutional. See May 6, 2004 Letter at 2 ("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 the gag on a case-by-case basis."). Plaintiffs improperly put the cart before the horse, attempting to litigate the merits of one of the allegations in their complaint before the parties have even begun merits briefing. In the course of merits briefing, the Government will provide the Court with a full demonstration of why 18 U.S.C. § 2709(c) -- a statute that has been in force since 1986 -- is consistent with First Amendment strictures. In the meantime, the statute must be presumed constitutional and enforceable. Otherwise, Plaintiffs will have obtained, in effect, the relief they seek (i.e., striking down a statutory provision) without giving the Government an opportunity to demonstrate why Plaintiffs' First Amendment claim is meritless.

Plaintiffs also incorrectly assert that, under the Government's proposal, they are "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." May 6, 2004 Letter at 2. As early as April 26, 2004,

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the Government agreed that plaintiff ACLU could disclose "in any form" its facial challenge to 18 U.S.C. § 2709. Pursuant to Plaintiffs' request, the Government memorialized that agreement in writing. Thus, the ACLU is free, in any forum, to discuss and answer questions about its facial challenge to the statute, and any other categories of disclosure to which the parties are able to agree or the Court so orders.

Finally, the conflict between the parties may very well be illusory: Plaintiffs still have not identified any particular kind of substantive disclosure (other than merits briefing) that is left to be made in this case. Again, the Government's proposal would allow Plaintiffs to disclose information about their facial challenge to 18 U.S.C. § 2709.

Contrary to Plaintiffs' suggestion, there simply is no absolute right of public access to any and all documents related to judicial proceedings. See generally Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) ("In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. . . . It does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery."). Indeed, there are many types of proceedings that routinely proceed under seal initially or in their entirety (e.g., qui tam actions and grand jury proceedings). In this case, there is a compelling public interest in [REDACTED]

Given these two considerations, the Government respectfully submits that the proper and reasonable course is to define certain categories of disclosures that can be made available publicly in the first instance, and to require that all other disclosures be made under seal, with the above-outlined procedure for negotiating redacted versions that can be filed on the public docket and for resolving disputes as to particular redactions.

Thank you for your consideration of this submission.

Respectfully,

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Encls.
cc: Ann Beeson, Esq.