



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 29, 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. In the late afternoon on April 28, 2004, the Government learned that the website for plaintiff American Civil Liberties Union ("ACLU") includes information contained in documents that are filed under seal in this case.

On April 26, 2004, the Government submitted a letter, on behalf of the parties, setting forth a proposed briefing schedule for anticipated motions. The letter specifically states that it was "TO BE FILED UNDER SEAL." On April 27, 2004, the Court memo endorsed the Government's letter, stamping the word "SEALED" on it three times.

On April 28, 2004, the parties negotiated the terms of a proposed Order that would govern the seal in this case (the "Sealing Order"). By joint agreement, the proposed Sealing Order specifically provides that all documents filed in this action "shall remain sealed," and that the action is unsealed only to the extent that a redacted complaint and redacted motion to file the complaint under seal will be available on the public docket. This Court signed the Sealing Order in the early afternoon on April 28, 2004.

After this Court signed the Sealing Order, the Government learned that the ACLU's web site includes a press release concerning this case. (A copy of the press release is enclosed.) The press release sets forth the briefing schedule that was submitted by the Government in a letter that was filed under

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seal, and that was memo endorsed by the Court in an Order that was "SEALED."

The Government believes that the ACLU's disclosure of the briefing schedule violates this Court's April 27, 2004 memo endorsement and the Sealing Order, which provide that this case and all documents filed herein are under seal except for the redacted complaint and redacted motion to file the complaint under seal. We recognize that a briefing schedule does not, on its own, contain sensitive information or information whose disclosure is barred by statute. Nonetheless, the briefing schedule should not have been disclosed in light of the seal in this action. The Government respectfully submits that any violation of this Court's orders -- especially this Court's sealing orders -- is improper. It is not for a party to determine, on its own, whether information contained in a "SEALED" document can be disclosed. Rather, the appropriate remedy is to seek an order unsealing the particular information. Indeed, in this instance, had the ACLU sought the Government's consent to a proposed order unsealing the briefing schedule, the Government would not have opposed such a proposed order.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] the Government withdrew its objection to the limited disclosure of a redacted complaint that allows the public to know that 18 U.S.C. § 2709 is being challenged.

[REDACTED] it is essential that the parties adhere to the seal ordered by this Court. On April 28, 2004, we advised the ACLU of our belief that its press release violates the Court's Sealing Order, as described above. Today, we again advised the ACLU that we believe its press release violates the Court's Sealing Order, and requested that the ACLU remove immediately the information that reveals matters under seal in this action. The ACLU advised that it was unwilling to remove the information immediately.

Because the information is in sealed filings not disclosed to the public, we respectfully request that the Court direct the ACLU to remove immediately from its website any mention of the briefing schedule in this case.

[REDACTED]

Respectfully,

DAVID N. KELLEY
United States Attorney

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cc: Jameel Jaffer, Esq.



American Civil Liberties Union

www.aclu.org

URL: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15315&cs=252>

ACLU Discloses Documents In Extraordinary Sealed Challenge to Patriot Act Spying Power
April 28, 2004

NEW YORK – The American Civil Liberties Union and New York Civil Liberties Union today disclosed documents in an extraordinary sealed case in federal court involving the Patriot Act's expanded "National Security Letter" power. The ACLU lawsuit challenges the constitutionality of a provision that allows the Federal Bureau of Investigation to demand sensitive customer records from businesses without judicial oversight.

FOR IMMEDIATE RELEASE

NEW YORK – The American Civil Liberties Union and New York Civil Liberties Union today disclosed documents in an extraordinary sealed case in federal court involving the Patriot Act's expanded "National Security Letter" power. The ACLU lawsuit challenges the constitutionality of a provision that allows the Federal Bureau of Investigation to demand sensitive customer records from businesses without judicial oversight.

The ACLU said it was forced to file the lawsuit about the National Security Letter power under seal to avoid penalties for violating a strict gag provision, which it is also challenging on First Amendment grounds. The case was filed in the Southern District of New York on April 6.

It took nearly three weeks to reach an agreement with the government that allowed the ACLU to disclose anything about the case without fear of penalty. Certain details about the lawsuit remain under seal.

"The National Security Letter provision allows the FBI to demand the sensitive records of innocent people in complete secrecy, without ever appearing before a federal judge," said Jameel Jaffer, an ACLU staff attorney.

"Before the Patriot Act, the FBI could use this invasive authority only against suspected terrorists and spies," Jaffer said. "Now it can issue National Security Letters to obtain information about anyone at all. This should be disturbing to all of us."

The fact that the government agreed only under pressure to allow disclosure of parts of the legal complaint, the ACLU said, demonstrates that the gag order is unnecessarily broad and restrictive.

"It is remarkable that a gag provision in the Patriot Act kept the public in the dark about the mere fact that a constitutional challenge had been filed in court," said Ann Beeson, ACLU Associate Legal Director. "President Bush can talk about extending the life of the Patriot Act, but the ACLU is still gagged from discussing details of our challenge to it."

[REDACTED]

In legal papers, the ACLU argues that the National Security Letter provision violates the First and Fourth Amendments because it authorizes the FBI to force disclosure of sensitive information without adequate

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safeguards. The FBI can issue a National Security Letter without obtaining prior judicial approval, without demonstrating a compelling need to justify the disclosure, and without specifying any mechanism that would allow a recipient to contest the demand.

The lack of such safeguards, the ACLU said, allows the government to unmask anonymous speakers, violating a tradition of anonymous speech that goes back to the Federalist Papers. Protecting this right is especially critical given the large number of Internet users who use pseudonyms to engage in legitimate political speech.

The ACLU first obtained information about the use of National Security Letters last March through a Freedom of Information Act lawsuit. Information about that lawsuit, including some of the records the ACLU obtained from the FBI, are posted at www.aclu.org/patriotfoia.

The ACLU has led opposition to controversial portions of the Patriot Act, filing a challenge to Section 215, another provision that allows the FBI to gain access to sensitive records, and filing briefs before the secret Foreign Intelligence Surveillance Court to oppose expanded wiretaps. With support from a broad right-left coalition, the ACLU has also encouraged passage of approximately 300 local resolutions against anti-civil liberties portions of the law, and has urged Congress to leave in place the "sunsets" for Patriot Act provisions set to expire in 2005.

The defendants in the NSL lawsuit include Attorney General John Ashcroft and FBI Director Robert Mueller.

The parties have agreed to a briefing schedule in the case. The ACLU will file a summary judgment motion on May 17, 2004; the government will respond on June 7, 2004; all briefing will be completed in July 2004. The court is likely to schedule arguments in the case in late summer 2004. The case is assigned to Judge Victor Marrero.

A special feature about the case, including the redacted complaint, is online at <http://www.aclu.org/nsi>.

Attorneys in the case are Jaffer, Beeson and Sharon McGowan of the ACLU, and Arthur Eisenberg of the New York Civil Liberties Union.

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