



U.S. Department of Justice

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February 11, 2015

By ECF & Facsimile

Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *ACLU v. Department of Defense et al.*, No. 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

I am the Assistant United States Attorney representing the Department of Defense (the "Government" or "DoD") in the above-referenced Freedom of Information Act ("FOIA") lawsuit. I write in connection with the February 4, 2015, conference (the "February 4 conference") concerning DoD's withholding of photographs pursuant to the Protected National Security Documents Act of 2009 ("PNSDA"), in conjunction with a certification issued by former Secretary of Defense Leon Panetta on November 9, 2012 (the "Panetta Certification"). During the February 4 conference, the Court indicated that it would not sustain DoD's withholding of the photographs based on the Panetta Certification, even considered together with the record proffered by the Government in response to the Court's Order dated August 27, 2014 (the "August 27 Order"). The Court directed the Government to submit a letter indicating how it wishes to proceed in light of the Court's ruling.

The Government appreciates the opportunity to further consider its position in light of the Court's remarks at the February 4 conference. (Feb. 4. Tr. at 20, 21). As the Government has examined the August 27 Order and the Court's remarks during the February 4 conference for that purpose, however, it remains unclear to us what, in the Court's view, are the legal requirements for effecting and demonstrating a valid certification under the PNSDA. We respectfully request further clarification from the Court, so that DoD can ascertain whether it could satisfy the Court's understanding of what is required by the PNSDA, or alternatively seek an authorization from the Solicitor General to appeal the Court's ruling. For example, although the Court's August 27 Order states that "[n]othing in the [PNSDA] . . . prevents the Secretary of Defense from issuing one certification to cover more than one photograph[]," and that what is "important" is that the Government show that the Secretary of Defense "considered each photograph individually" (Aug. 27 Order at 19), the Court stated during the February 4 conference that "the law requires individualized certifications" (Feb. 4 Tr. at 9; *see also id.* at 10 ("[A] certification of individual photographs would have been easy to count."); *id.* at 17). Similarly, while neither the August 27 Order nor the Court's ruling on the parties' sixth motions for summary judgment required that the Government provide a separate harms analysis concerning each photograph (*see* Aug. 27 Order at 4-6, 10-11, 17, 20; *see also* Tr. dated July 20,

2011), the Court's remarks during the February 4 conference appeared to suggest that such a showing would be necessary under the Court's interpretation of the PNSDA (Feb. 4 Tr. at 25-26).

Finally, the Government seeks guidance and clarity as to the Court's view of whether the certification process or any portion thereof may be lawfully delegated by the Secretary of Defense. In particular, it is unclear whether the Court believes that the PNSDA "specifically prohibit[s]," 10 U.S.C. § 113(d), the Secretary of Defense from delegating any aspect of the certification process to subordinate officials, such that the Secretary must separately review and certify each photograph personally.

Accordingly, the Government respectfully requests that the Court issue an order clarifying its opinion concerning what DoD must do to demonstrate compliance with the PNSDA, as interpreted by the Court. The Government does not wish to unnecessarily burden the Court. Rather, we respectfully submit that further clarification will enable DoD to reach an informed decision regarding how to proceed, whether by making a further submission to this Court, or by seeking authorization to appeal.

Importantly, further clarification will also be helpful to DoD as it begins planning the process for determining which photographs, if any, to recertify later this year. As the Court may be aware, the Panetta Certification will expire on November 9, 2015. Accordingly, DoD is currently considering the process that will be employed for determining which photographs, if any, should be subject to a renewed recertification. Although DoD remains of the view that it employed a valid process in effecting the 2009 and 2012 certifications, in developing a process for any renewal, DoD would of course appreciate the Court's views concerning what the PNSDA requires to effect and demonstrate a valid certification. Depending on the process employed, the Government anticipates, based on past practice, that it would take approximately three months to complete the 2015 certification process.

Finally, the Government wishes to reiterate to the Court that its litigation positions regarding these photographs are not intended to cause delay, and have been taken in good faith. (Feb. 4 Tr. at 23). As explained at the February 4 conference, the process that led to the Panetta Certification was undertaken by DoD in 2012, independent of this litigation, and informed by DoD's understanding of the Court's earlier ruling upholding the prior certification by former Secretary of Defense Robert Gates. Following the August 27 Order, DoD undertook to provide additional information to the Court, to describe the process that led to the Panetta Certification. DoD takes very seriously its obligations to this Court as well as its obligation to protect the safety of U.S. persons operating abroad.

I thank the Court for its consideration of this matter.

Respectfully,

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