



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 30, 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 filed under seal, and in response to the April 30, 2004 letter to the Court (the "April 30 Letter") filed by plaintiff American Civil Liberties Union ("ACLU"). Notwithstanding its rhetoric, the ACLU ignores the fundamental point that, through its press release posted on its website, it violated the seal in this case. Accordingly, the material in question must be removed from the website until the ACLU obtains an appropriate unsealing order from the Court. In addition, the Government respectfully submits that it is both unnecessary and inappropriate for the ACLU to move at this time to generally unseal the case.

The ACLU asserts that the court-approved briefing schedule does not fall within the scope of this Court's sealing orders because it is "wholly non-sensitive and entirely tangential to the substance of this litigation." April 30 Letter at 2. The ACLU is incorrect, and misses the point. Pursuant to the Order signed by Judge Greisa on April 6, 2004, the entire case was under seal. Thus, there could be no public mention of the case in any way. On April 28, 2004, this Court signed an Order -- which was reviewed by the ACLU and jointly proposed with them¹ -- that unsealed the case only to the extent that two documents could be filed in redacted form on the docket, allowing the ACLU

¹ Counsel for the ACLU was invited to deliver the proposed Order to Chambers along with the Government, but declined the invitation.

Hon. Victor Marrero
Page -2-

to advise the public of its allegations with respect to a facial constitutional challenge to 18 U.S.C. § 2709. This Court's April 28, 2004 Order also expressly provided that the remainder of documents filed in the action (including the Government's April 26, 2004 letter proposing the briefing schedule and this Court's April 27, 2004 memo endorsement of it) "shall remain under seal." By disclosing the court-approved briefing schedule in its press release, the ACLU violated this Court's sealing orders.

The Government again acknowledges that a briefing schedule does not constitute sensitive information. The salient point, however, is that the court-ordered briefing schedule is under seal by virtue of this Court's orders. If the ACLU wanted to disclose such "non-sensitive" and "tangential" information, the ACLU needed to seek a lifting of the seal to do so. The Government would certainly have agreed to a proposed Order lifting the seal to allow the ACLU to disclose such information.

In their complaint, plaintiffs chose to bring [REDACTED] a facial challenge to 18 U.S.C. § 2709 [REDACTED]

[REDACTED]

For that reason, it is imperative that the Court's seal be respected vigilantly.

With respect to the additional problematic information posted on the ACLU's web site, the ACLU is again incorrect. The Government does not seek to "prohibit a party from publishing a description of a federal statute." April 30 Letter at 2. Indeed, the Government withdrew its objection to the ACLU's disclosure of its facial challenge to 18 U.S.C. § 2709, and agreed that the ACLU can disclose "in any form" the allegations in its redacted complaint.

[REDACTED]

The Government also respectfully submits that it is both unnecessary and inappropriate for the ACLU to move at this time

Hon. Victor Marrero
Page -3-

to lift the seal in this case -- particularly after the ACLU, less than 48 hours earlier, jointly proposed an Order expressly mandating that all documents (save the redacted complaint and redacted motion to file the complaint under seal) "shall remain under seal" or "shall be filed under seal, unless otherwise ordered by the Court." The ACLU wrongly asserts that "the government is committed to keeping even non-sensitive information from the public domain." See Memorandum in Support of Plaintiffs' Motion to Unseal Case at 4. The Government's objection to the press release on the ACLU's web site is that it violates this Court's sealing orders. As the Government has stated several times, if the ACLU wishes to disclose information beyond that contained in its redacted complaint, the ACLU is free to seek that particular unsealing from the Court, and the Government naturally will act in good faith to consent to the unsealing of non-sensitive information.

[REDACTED]

[REDACTED], it is critical that the parties proceed cautiously, and seek unsealing only with respect to defined sets of information.

Pursuant to this Court's April 28, 2004 Order and as discussed extensively by the parties, the ACLU is free to speak to the public about its allegations in the redacted complaint. Indeed, pursuant to the ACLU's request, the Government provided written assurance that it would not seek to impose any sanction on the ACLU (or its attorneys) for disclosing "in any form" the allegations in the redacted complaint. Pursuant to this Court's orders, plaintiffs' opening brief is to be filed on May 17, 2004, under seal. Thereafter, the parties can negotiate the public filing of a redacted brief from plaintiffs; if plaintiffs believe that there is additional information in their briefing that should be filed publicly, they can then seek relief from the Court with respect to that particular information. The same process would apply to the remainder of the briefing in the case.

Notwithstanding the nature of their allegations, the ACLU essentially seeks a presumption that all information in this case shall be publicly available.

[REDACTED]

[REDACTED] it is critical that the opposite presumption prevail, and that the case remain under seal subject to the parties' right to negotiate the unsealing of any particular information and to apply to the Court for relief from the sealing order for that particular information.

In sum, the Government respectfully submits that the ACLU's motion to generally lift the seal in this case at this time is inappropriate. If the Court will entertain the ACLU's motion to unseal, the Government respectfully requests that it be given ten

Hon. Victor Marrero
Page -4-

business days, until May 14, 2004, to respond to the motion, as provided by Local Civil Rule 6.1(b).

We thank the Court for its consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Meredith E. Kotler
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

cc: Jameel Jaffer, Esq.