U.S. Department of Justice

United States Attorney
Southern District of New York

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December 8, 2016

BY ECF & HAND DELIVERY
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 et al. v. Department of Defense et al.*, No. 15 Civ. 9317 (AKH)

Dear Judge Hellerstein:

The parties in this Freedom of Information Act ("FOIA") case respectfully submit this letter setting forth their respective positions with regard to the proposed procedures set forth in the Court's Order dated November 28, 2016. (Dkt. No. 59). To the extent that the Court requires a hearing on this matter, please be advised that one of Plaintiffs' attorneys (Lawrence S. Lustberg, Esq.) is unavailable on December 13, 2016, because of a previously scheduled state court appellate argument, and one of the Government's attorneys (Assistant U.S. Attorney Tara LaMorte) is unavailable from December 13-15, and possibly the morning of December 16, because she will be trying a case before Judge Broderick. The parties accordingly request that any such proceeding be scheduled for a date convenient to the Court during the following week.

The Government's Position

The Government objects to certain of the procedures proposed in the Order of November 28, 2016. Specifically, the Government objects to (1) the proposed sealing of the courtroom and any suggestion that exempt information may be disclosed to Plaintiffs or their counsel, either intentionally or inadvertently, during the course of the sealed proceeding, and (2) the proposal to allow Plaintiffs to select the sample of documents to be reviewed by the Court *in camera*. The Government proposes an alternative procedure, as set forth below.

First, the Government objects to the proposed procedures because they appear to suggest that classified, statutorily protected and/or privileged information over which the Government has claimed a FOIA exemption may be disclosed to Plaintiffs and their counsel during the course of the January 23, 2017 proceeding. Any disclosure of exempt information to Plaintiffs or their counsel would be manifestly improper, as it "would involve disclosing the very material sought to be kept secret." *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1471 (D.C. Cir. 1983); *see also Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (affirming exclusion of plaintiff's counsel from *in camera* review, since "[t]he risk presented by participation of counsel . . . outweighs the utility of counsel, or adversary process, in construing a supplement to the record"); *Wolfe v. HHS*, 839 F.2d 768, 771 n.3 (D.C. Cir. 1988) ("Where the [*Vaughn*] index itself would reveal significant

aspects of the deliberative process, this court has not hesitated to limit consideration of the Vaughn index to in camera inspection."); *Mobley v. DOJ*, 870 F. Supp. 2d 61, 69 (D.D.C. 2012) (holding that no portion of government's *ex parte* submission could be revealed to plaintiff, noting well-settled law that the "interests of the adversary process are outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure," and observing that "to hold otherwise would disregard the underlying purpose of the FOIA exemptions" (citation and internal quotation marks omitted)).

While the proposed procedures state that "Plaintiffs shall not have the right to see any of the documents claimed to be exempt," they nonetheless call for the courtroom to be sealed throughout the January 23, 2017 proceeding "to avoid compromise of government secrets." The Order also states that "Defendants shall have ten days to request redactions to the transcript to the extent necessary to prevent disclosure of the materials defendants assert should be withheld or redacted."

It is unclear whether the Court intends to discuss exempt information in the presence of Plaintiffs or their counsel, or whether the Court has proposed sealing of the courtroom in the event of inadvertent disclosure of exempt information during the proceeding. To the extent the Court intends to disclose exempt information to Plaintiffs or their counsel during the sealed proceeding, the Government strongly objects. For the same reason that Plaintiffs may not have access to the documents withheld as exempt, they may not have access to exempt information contained within those documents.

To the extent the Court proposes sealing as a prophylactic measure, the Government objects because it is possible for the Court to hold argument on the Government's motion in open court, based entirely on the publicly filed record. If the Court is concerned about potential inadvertent disclosure, we appreciate the Court's caution, and respectfully suggest that the Court hold oral argument before reviewing any documents *ex parte* and *in camera*. Sealing and redaction of transcripts are not an answer to the problem of potential inadvertent disclosure. While they may prevent an inadvertent disclosure from being made public, they would improperly permit disclosure of exempt information to Plaintiffs and their counsel.

In this case, moreover, many of the withheld documents contain classified national security information. The Executive Branch has the constitutional responsibility to protect classified information, and the decision to grant or deny access to such information rests exclusively within the discretion of the Executive. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). In keeping with this rule, numerous courts have denied requests from civil litigants, in a variety of contexts, for their counsel to have access to classified material presented to the court *ex parte* and *in camera*, even in circumstances where counsel possessed security clearances. *See, e.g.*, *Doe v. CIA*, 576 F.3d 95, 106 (2d Cir. 2009); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238, 1242-44 (D.C. Cir. 2003); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978); *see also Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975) ("It is not to slight judges, lawyers or anyone else to suggest that any . . . disclosure [of classified information] carries with it serious risk that highly sensitive information may be compromised."). There is no authority for the Court to grant a FOIA plaintiff access to classified documents or information for the purpose of

determining whether they are exempt from public disclosure under FOIA Exemption 1. Indeed, the Second Circuit has rejected such an approach. *See Weberman*, 668 F.2d at 678.

Second, the Government objects to the proposed procedures to the extent they call for the Court to review a sample of the withheld documents chosen exclusively by Plaintiffs. We note that only 22 documents remain at issue in this case, and accordingly it may not be necessary for the Court to utilize a sample or determine an appropriate sampling methodology. If the Court prefers to review a sample of the documents, however, the sample should not be chosen exclusively by Plaintiffs. The ACLU represents two former detainees and the estate of a third detainee who have brought a lawsuit in the Eastern District of Washington regarding their treatment while in detention. *See Salim et al. v. Mitchell et. al.*, No. 2:15-CV-286-JLQ (E.D. Wash.). Some of the documents at issue in this FOIA case may be relevant to the litigation pending in Washington. Accordingly, Plaintiffs likely would have an incentive to select documents for *in camera* review that they believe may be useful to that litigation.[1] The Government respectfully submits that any sample should be either chosen equally by both sides or randomly selected. The parties are in the process of meeting and conferring to determine if they can agree on a representative sample.

As an alternative to the proposed procedures, the Government respectfully proposes that the Court hold oral argument on January 23, 2017 in open court and based upon the public filings made by the parties. The Government believes that the record before the Court, which includes both public declarations and memoranda and a classified declaration submitted for the Court's *ex parte*, *in camera* review, will be sufficient to sustain the FOIA exemptions claimed by the Government. *See Halpern v. FBI*, 181 F.3d 279, 292 (2d Cir. 1999) (where government's affidavits are "sufficiently detailed to place the documents within the claimed exemptions," and there is no showing of bad faith, "the district court should restrain its discretion to order *in camera* review"); *accord Wilner v. NSA*, 592, 592 F.3d 60, 75-76 (2d Cir. 2009). To the extent the Court determines that *in camera* review is required in order to make a determination as to the applicability of any exemptions, that review should take place entirely *ex parte* and *in camera*. There should be no discussion in the presence of Plaintiffs or their counsel of the contents of the withheld documents beyond the information in the parties' public filings. To the extent the Court elects to review a sample of the documents in dispute, the sample should not be chosen exclusively by Plaintiffs, but should be chosen equally by both sides or randomly selected. If the Court determines, before or after *in camera* review, that it requires additional explanation from the Government, the Government can provide a further classified declaration on an *ex parte* basis.[2] This is the procedure typically followed by courts in FOIA cases, and the Government respectfully submits that it should be employed in this case as well.

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[1] The Government does not suggest that Plaintiffs or their counsel would act in bad faith, only that their role as counsel in the separate litigation is likely to inform their choices. The Government disputes Plaintiffs' contention that it has misapplied Exemption 5 to Document 66 or any other document at issue in this case, and will respond to Plaintiffs' arguments in its reply brief to be filed on December 19, 2016.

[2] The Government does not seek to present *ex parte* argument.

Plaintiffs' Position

The ACLU generally agrees with the Court's proposed procedures, although, as a matter of policy, the ACLU believes in open courtrooms except in circumstances that absolutely require closure. As sets forth by the government above, it does not seek closure of the courtroom for these proceedings; the ACLU believes the January 23 hearing can be public. The ACLU does wish to briefly respond to the government's argument that the ACLU's counsel should not be permitted to participate in discussion of nonpublic portions of the withheld documents. If true, then this constraint should apply to both parties to preserve the integrity of the proceedings. Specifically, while courts have emphasized that certain documents may be appropriately reviewed *in camera*, the ACLU and the government should be permitted to participate equally in argument: it is neither fair nor productive of a fair result for only one party to be able to participate in certain aspects of the proceedings. For example, the government repeatedly cites *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982), in support of its claim that ACLU counsel must be excluded from seeing documents the government asserts are classified. For purposes of this matter, the ACLU accepts that they may not, but notes that in *Weberman*, the Second Circuit did not approve of *ex parte* argument by the government. Instead, it allowed only the *in camera* review of an affidavit where the Court "read the Tillie affidavit alone, without argument from the United States Attorney." *Weberman*, 668 F.2d at 678. The ACLU would be satisfied with that process here, as well.

The ACLU agrees with the Court's proposal that we identify a representative sample of documents "selected as best as possible to provide a sample of defendants' grounds for exemption," and strongly disagrees with the government's suggestion that the ACLU would not act in good faith in discharging this obligation. The government argues that the ACLU might not select a representative sample of documents based on the fact that certain counsel for the ACLU also represent the plaintiffs in *Salim v. Mitchell*. This argument is without basis: in *Salim*, the plaintiffs are well into the civil discovery process and have no need to rely on this FOIA action as a substitute for the discovery to which they are already entitled in that litigation. Indeed, it is only because certain pages responsive to the *Salim* litigation have already been disclosed in the context of that litigation that the extent of the government's sweeping and unjustifiable misapplication of Exemption 5 has been laid bare with respect to Document No. 66. The government has conceded that these pages were disclosed only as a result of the discovery process in *Salim v. Mitchell. See* Shiner Dec., ECF No. 48 at 4 n.2. In any event, the government has no basis to suggest that Plaintiffs would abuse this Court's proposed procedures for purposes of another case. We would not do that.

Thank you for your consideration of this matter.

Respectfully,

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