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March 11, 2014

## **VIA ELECTRONIC FILING**

Honorable Analisa Torres  
United States District Judge  
United States District Court  
500 Pearl Street  
New York, New York 10007

**Re: ACLU, et al. v. National Security Agency, et al.,  
Case No. 13 Civ. 09198 (AT) (MHD)**

Dear Judge Torres:

The parties to the above-referenced Freedom of Information Act (“FOIA”) litigation submit this joint letter to inform the Court about the status of the above-referenced case, as required by the Court’s Orders dated January 10, 2014, and February 7, 2014. Counsel for Plaintiffs have conferred with counsel for Defendants, who join in this letter. An initial pretrial conference for this case is set for 4:00 p.m. on **March 31, 2014**.

Pursuant to the Court’s January 10 Order, this letter addresses in separate paragraphs: (1) a brief description of the case, including the factual and legal bases for the claims and defenses; (2) any contemplated motions; and (3) the prospect for settlement.

### (1) A brief description of the case, including claims and defenses

This is an action under FOIA, in which Plaintiffs seek the release of records relating to the government’s surveillance authority under Executive Order 12,333 (“EO 12,333”) and to the rules that regulate the treatment of any communications of U.S. persons acquired under the executive order. Plaintiffs’ Complaint alleges that EO 12,333—signed by President Reagan on December 4, 1981 and modified numerous times since—is the primary source of authority for foreign-intelligence surveillance conducted by the U.S. government that is not governed by the Foreign Intelligence Surveillance Act (“FISA”). *See* First Am. Compl. at 1-2. Plaintiffs contend that FISA applies primarily to surveillance conducted on American soil or to surveillance abroad that targets Americans, while EO 12,333 applies to government surveillance abroad that targets foreigners but which may lead to the acquisition of communications of U.S. persons. *Id.* at 2.

In May 2013, Plaintiffs filed FOIA requests with a number of federal agencies, including the Defendants here, requesting records related to the agencies’ authority and

procedures under Executive Order 12,333. *Id.* at 5. After certain administrative proceedings, *see id.* at 6-8, Plaintiffs filed this suit. Plaintiffs allege that Defendants' failure to produce responsive records violates FOIA. *Id.* at 8.

Defendants claim that some or all of the requested documents are exempt from disclosure under 5 U.S.C. § 552(b). *See Answer* at 7. Defendants also claim that the Court lacks subject matter jurisdiction over Plaintiffs' requests for relief that exceed that authorized by FOIA; that Plaintiffs have failed to exhaust all administrative remedies for each Defendant; that Plaintiffs do not reasonably describe the records sought; and that Plaintiffs' requests are not enforceable to the extent a reasonable search cannot be undertaken. *See id.*

### (2) Contemplated motions

The legal issues to be ultimately resolved in this FOIA lawsuit will concern whether the Defendant federal agencies properly withheld information requested by Plaintiffs under various FOIA exemptions. Such FOIA disputes are typically resolved without discovery on cross-motions for summary judgment, and the parties at this time do not anticipate the need for discovery in this case. As such, the parties have not submitted a proposed case management order, because the types of litigation events described in such orders are generally inapplicable to FOIA cases.

Since filing the complaint, the parties have begun discussions regarding narrowing the FOIA requests at issue in an effort to simplify the agencies' searches and expedite a resolution of this litigation. Once these discussions conclude, each Defendant will provide an estimate as to when it can complete its searches for documents responsive to the narrowed requests. The parties will attempt to reach agreement on deadlines to complete the searches and will ask the court to resolve any dispute about the deadline for completion. After the searches are complete and the volume of responsive documents is known, each agency will further provide an estimate of the time it will need to review any such documents and produce any material that it considers to be non-exempt from FOIA disclosure. Again, the parties will attempt to reach agreement on deadlines for review and production and will ask the court to resolve any dispute about the deadline for completion. Once any such production(s) conclude, the parties plan to meet and confer in an effort to resolve or narrow their disputes over any responsive information withheld by Defendants.

The parties will attempt to provide proposed deadlines for the agencies' searches to the Court at the March 31, 2014 pretrial conference. The parties will also propose that a timeline for periodic status reports to the Court be established at the pretrial conference.

### (3) Prospect for settlement

Although the parties expect to agree on the timeline and scope of searches for documents responsive to the FOIA requests, the parties do not anticipate reaching a comprehensive settlement on whether information sought may properly be withheld.

However, a final determination as to the scope of any dispute between the parties will have to wait until the Defendant agencies have made their final responses to the requests and the parties have had an opportunity to meet and confer regarding these responses, with the goal of attempting in good faith to consensually narrow if not eliminate their areas of dispute.

Respectfully submitted,

/s/Jonathan M. Manes

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