



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street, 3rd floor
New York, New York 10007*

July 8, 2011

BY FAX (212) 805-6191

The Honorable Barbara S. Jones
United States District Judge
United States District Court
500 Pearl Street, Suite 1920
New York, NY 10007

Re: *ACLU v. Dep't of Defense et al.*, No. 09 Civ. 8071 (BSJ) (FM)

Dear Judge Jones:

We write on behalf of both parties to the above-referenced Freedom of Information Act ("FOIA") litigation — the Government and the American Civil Liberties Union ("ACLU") — to bring to the Court's attention a development in this case and to ask the Court to set a schedule for the parties to brief the Government's motion for partial summary judgment and other relief to resolve this issue.

In brief, as part of a recent release of hundreds of pages of documents by the Department of Defense ("DoD") to the ACLU pursuant to the "Second Stipulation and Order Regarding Document Searches, Processing, and Production by the U.S. Department of Defense" [Docket No. 44], DoD provided to the ACLU, in error, two copies of a one-page document that is classified at the SECRET level (although some of the classification markings were crossed out on the copies provided). The ACLU promptly brought DoD's disclosure of the document to the Government's attention, and having seen the contents of the document, informed the Government that the ACLU does not believe the document is properly classified, or that its disclosure would pose a threat to national security. The ACLU asked DoD to declassify the document, which DoD has informed the ACLU it would not do.

Although the parties have engaged in discussions in an attempt to resolve this matter without resort to litigation, we have been unable to do so and thus require the Court's assistance in resolving this matter. In particular, the parties disagree as to whether the document in question meets the criteria for classification at the SECRET level: that it falls within one or more of the categories of classifiable information in the applicable executive order, and that its release "reasonably could be expected to cause serious damage to the national security." Exec. Order No. 13,526, §§ 1.4 and 1.2(a)(2) (Dec. 29, 2009). The parties also disagree as to whether the Government has a valid basis to seek an order from this Court to compel the return of the document.

The parties thus propose that the Government file a motion for partial summary judgment (as it has earlier in this case regarding another disputed document), that seeks the Court's determination on whether the document in question is properly classified, and thus could have been legally withheld under FOIA's Exemption (b)(1). The Government's motion would then ask, in the event the Court concludes that the document is indeed properly classified, for the Court to order the ACLU to return all copies of the document to the Government.

Although the parties disagree about the propriety of the document's classification, they have agreed on a number of interim measures designed to protect the security of the document during the pendency of this litigation. In particular, until the Court renders its decision, the ACLU has committed to keeping all copies of the document in a locked cabinet, to restrict access of its staff to the document to those working on or supervising this litigation, and not to discuss the document's contents publicly or outside the group of ACLU staff working on or supervising this litigation. The ACLU further commits to returning all copies of the document to the Government should the Court order it to do so; or, if the ACLU appeals this Court's decision, it will commit to returning all copies if ordered to do so by an appellate court. With these safeguards in place, the Government has agreed not to seek any interim extraordinary or injunctive relief relating to the document.

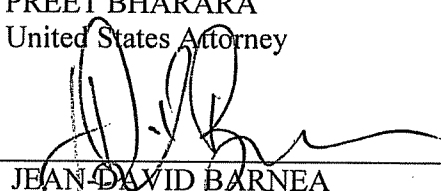
The parties have agreed on a briefing schedule to present to the Court: The Government would file its motion on July 13, 2011; the ACLU would file its opposition on July 29, 2011; and the Government would file its reply on August 12, 2011. We ask that the Court adopt this schedule and thus assist the parties in resolving this matter in an expeditious matter. We also respectfully request oral argument on the motion once briefing is complete.

We thank the Court for its consideration of this matter, and are available to attend a conference at the Court's convenience, should the Court wish to discuss this matter further.

Respectfully submitted,

PREET BHARARA
United States Attorney

By:



JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel. (212) 637-2679
Fax (212) 637-2717
Email: Jean-David.Barnea@usdoj.gov

Countersigned by:

AMERICAN CIVIL LIBERTIES UNION

By: Hina Shamsi
HINA SHAMSI
Director, National Security Project
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 284-7321
Fax (212) 549-2652
Email: HShamsi@aclu.org

Cc: **BY FAX (212) 805-6724**
The Honorable Frank Maas
United States Magistrate Judge
United States Courthouse
500 Pearl Street, Room 740
New York, NY 10007