UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE MOTION FOR CONSENT TO DISCLOSURE OF COURT RECORDS OR, IN THE ALTERNATIVE, A DETERMINATION OF THE EFFECT OF THE COURT'S RULES ON STATUTORY ACCESS RIGHTS	)	Docket No.: Misc. 13-01

THE UNITED STATES' OPPOSITION TO THE MOTION OF THE ELECTRONIC FRONTIER FOUNDATION

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Movant seeks to obtain from the Government copies of an opinion of this Court which is currently subject to seal pursuant to this Court's rules. This Court should deny the instant Motion both because it is outside this Court's jurisdiction and because there is good reason not to vacate the seal on the opinion.

BACKGROUND

Movant Electronic Frontier Foundation brings the instant Motion seeking this Court's intervention in support of Movant's ongoing Freedom of Information Act ("FOIA") lawsuit currently pending before Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia in which Movant contends that the U.S. Department of Justice has unlawfully withheld records responsive to its FOIA request. *See Electronic Frontier Found. v. Dep't of Justice*, No. 12-CV-1441-ABJ (D.D.C. filed Aug. 30, 2012). In response to Movant's FOIA request, the Department of Justice located five documents. Only two of these documents are relevant here, and they are two copies of the same document. One is an unredacted version of an opinion of this Court, and the other is a partially redacted version of the same opinion. *See Electronic Frontier Found.*, No. 12-CV-1441, Doc. No. 11-2.

The Department of Justice moved for summary judgment in the FOIA case. *See Electronic Frontier Found.*, No. 12-CV-1441, Doc. No. 11-1. With regard to the two versions of the responsive opinion of this Court, the Government contended that the Department had no discretion to release the opinion under the FISC's Rules of Procedure. *See id.* at 11-15. The Department also argued that this opinion, as well as the other material withheld in that case, is properly classified and therefore exempt from release pursuant to Exemptions 1 and 3 of FOIA. *Id.* at 15-25.

Rather than respond to the Department's motion for summary judgment, Movant sought and received a stay of that litigation and came to this Court. Movant styles its request as one "for entry of an order consenting to the disclosure of certain Court records." Motion at 2. In fact, the "certain Court records" consist of a single opinion of this Court, the relevant copies of which are in the possession of the Department of Justice. And, "consenting to the disclosure" would require issuance of an order vacating this Court's seal over its opinion, which would not result in the release of the Court's opinion in its entirety but might ultimately lead to disclosure of portions of the Court's opinion at a later stage in the FOIA case.

ARGUMENT

The Motion at issue is outside the jurisdiction of this Court. This is not, as Movant suggests, a case about whether Movant has a legal right to this Court's files; it is an action in aid of Movant's FOIA suit against the Department of Justice seeking records from the Department's files. This action is outside the inherent jurisdiction previously recognized by this Court with respect to its supervisory power over its own records and files. Moreover, even if this Court had jurisdiction over this Motion, it should deny it, rather than allow another court to determine whether any portions of its opinion should be released under FOIA. Any such release would be incomplete and quite possibly misleading to the public about the role of this Court and the issues discussed in the opinion.

I. This Court Does Not Have Jurisdiction Over This Motion

The Foreign Intelligence Surveillance Court ("FISC"), like other Article III courts, is a "court[ ] of limited jurisdiction marked out by Congress.'" *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326 (Fed. Cir. 2006) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). Thus, this Court's jurisdiction is limited to that which Congress explicitly conferred on

it plus those limited areas in which a court possesses inherent jurisdiction. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.'"). Neither this Court's statutory jurisdiction nor its inherent jurisdiction extends to this Motion.

This Court's statutory jurisdiction is limited to certain applications and certifications that may be filed by the Government, *see* 50 U.S.C. §§ 1804, 1823, 1842, 1861, 1881(b), 1881(c), and 1881(d), and two types of petitions that a private party may file, neither of which is applicable here. *See* 50 U.S.C. § 1861(f) (permitting a person receiving a production order to file a petition to challenge that order); 50 U.S.C. § 1881(a) (permitting an electronic service provider that receives a Section 1881(a) directive to file a petition to challenge that directive). Indeed, Movant does not claim that this Court's statutory jurisdiction encompasses the instant Motion. *See* Motion at 4-5.

Instead, Movant relies entirely on this Court's earlier holding that it has inherent jurisdiction "'to adjudicate a claim of right to the court's very own records and files.'" *Id.* at 5 (quoting *In re Release of Court Records*, 526 F. Supp. 2d 484, 487 (Foreign Intel. Surv. Ct. 2007)). But, unlike the movant in *In re Release* who claimed that the First Amendment and the common law required this Court to open its files and make documents available to the public, Movant here does not claim a right "to the court's very own records and files." Movant is not asking this Court to release any documents, nor to open up its files. Indeed, Movant does not cite any "claim of right" against this Court at all. Rather, Movant is functionally asking this Court to vacate in part the seal on a FISC proceeding to which it is not a party so that another court can order *the Government* to release an opinion of this Court from the Government's files. Movant provides no authority to support the contention that this Court has inherent jurisdiction

over such an action or that the Court's inherent jurisdiction may extend to cases where the "claim of right" is not against this Court, but rather is a FOIA claim against the Government being adjudicated by another court.

Because this Motion does not fall within the Court's statutory or inherent jurisdiction, it should be dismissed.[1]

II. The Opinion at Issue Is Sealed Pursuant to This Court's Rules

The opinion Movant seeks cannot be released by the Government not only because it is classified but also because it is under this Court's seal. As Judge Bates has explained, "[t]he FISC is a unique court," whereas "[o]ther courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception." *In re Release*, 526 F. Supp. 2d at 487-88. The FISC maintains this operational secrecy because, unlike any other court, its "entire docket relates to the collection of foreign intelligence by the federal government." *Id.* at 487.

The FISC's operations are governed "by FISA, by Court rule, and by statutorily mandated security procedures issued by the Chief Justice of the United States [which] [t]ogether represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *Id.* at 488. In this scheme, the first line of defense for the protection of the FISC's records, including opinions, is the FISC's Rules of Procedure.

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[1] This does not mean, however, that the Court is without the power to unseal its opinions. As discussed below, Rule 62(a) of this Court's rules provides that a judge of this Court may, on motion by a party or *sua sponte*, after consultation with the other judges of the Court and with review and redaction by the Executive Branch for classification, direct that an opinion that he or she authored be published. *See* U.S. Foreign Intelligence Surveillance Court, Rule of Procedure 62(a) (2010). This procedure, which allows for input from all judges on the Court and the Executive Branch, and which is not required in response to a motion from a non-party otherwise not involved in the case, is the proper mechanism by which this Court considers whether or not its opinions should be unsealed and made available to the public.

A plain reading of the FISC's Rules of Procedure, as well as the longstanding practice of the FISC and the Government implementing these rules, makes clear that FISC opinions, including the instant opinion, are sealed and, with one exception that is not applicable here, the Government cannot release copies of FISC opinions in its possession without permission from the FISC. Under FISC Rule 62(a), FISC opinions can only be made public if the "Judge who authored an order, opinion, or other decision . . . *sua sponte* or on motion by a party request[s] that it be published." *See* U.S. Foreign Intelligence Court, Rule of Procedure 62(a) (2010). When such a request is made, "the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published." *Id.*

The FISC Rule provides a critical role for the Executive Branch before publication but makes clear that the FISC is the decisionmaker regarding unsealing: "Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." *Id.*

Furthermore, FISC Rule 62's next subsection reinforces the FISC's limits on the unsealing of orders. In what is essentially a catchall clause, FISC Rule 62(b) states that "[e]xcept when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order." *See* U.S. Foreign Intelligence Surveillance Court, Rule of Procedure 62(b) (2010).

The Rule provides one exception under which the Government may release a FISC order without Court approval, but even then, places a tight constraint on such action. Under FISC Rule 62(c)(1), the Government "may provide copies of Court orders, opinions, decisions, or other Court records, to Congress, pursuant to 50 U.S.C. §§ 1871(a)(5), 1871(c), or 1881f(b)(1)(D), or

any other statutory requirement, without prior motion to and order by the Court." *See* U.S. Foreign Intelligence Surveillance Court, Rule of Procedure 62(c)(1) (2010). The Government, however, "must contemporaneously notify the Court in writing whenever it provides copies of Court records to Congress and must include in the notice a list of the documents provided." *See id.*

This language makes clear that the Government's right to provide copies of opinions to Congress (albeit with contemporaneous notice to this Court) is an explicit exception to the otherwise applicable rule that the Government may not disclose copies of FISC opinions without an order from the Court. Indeed, it would make little sense for FISC Rule 62 explicitly to articulate this limited exception for disclosures to Congress if the Government had the ability to unseal and publish FISC opinions without Court approval in other circumstances.

Longstanding practice also supports this reading of the FISC Rules of Procedure. As this Court is aware, prior to the 2010 FISC Rules of Procedure, the Government had, when it needed to disclose an order, opinion, decision, or other record of this Court to Congress, filed an *in camera* motion asking this Court to unseal the records for that purpose, a step that was necessary only because this Court's orders, opinions, and other records are viewed as being under seal. That practice would have been unnecessary, and the Court's prior orders in this regard would be of no operative consequence, if the rules did not serve as a seal barring the release of FISC opinions and orders without Court approval. The 2010 revisions to the FISC Rules of Procedure, while relaxing the procedure to allow provision of materials to Congress with notice rather than Court approval, did not purport to alter the underlying principle that FISC orders and opinions are under seal. Since that time, under the current FISC Rules of Procedure, when the Government has needed to provide FISC orders and related records to other courts in connection

with criminal cases in which FISA information is to be used against a criminal defendant, the Government has filed motions with this Court to unseal the records for this purpose, and the Court has granted such motions. Again, these unsealing orders would be unnecessary were there no seal in effect. This consistent practice demonstrates that FISC orders, opinions, and related records are under seal, that both the Government and this Court have treated them as such, and that the Government does not have discretion to disclose such records without the approval of this Court.

Thus, when read together and in light of longstanding practice, the different sections of FISC Rule 62 reveal that the Court places tight controls on the unsealing of orders, retaining authority to determine whether opinions should be disclosed in almost all instances. The instant opinion, because it has not been unsealed by this Court, is still under seal, and the Government cannot release it to Movant.

III. This Court Should Not Vacate the Seal on the Opinion

Even assuming this Court has jurisdiction over this Motion, it should deny the Motion. If this Court grants Movant the relief sought, the consequence would be that the Government could release the opinion or any portion of it in its discretion, and that another court, not as familiar as this Court with the equities at issue, could order the release of the opinion or some portion of it. If this Court were to find that its Rules of Procedure do not operate to seal its opinions at all, the consequences would be even more dramatic: the Government would be free to release *any* opinion or portion thereof without Court approval, and other courts could likewise order the release of *any* FISC opinion.

Of course, the Government could continue to assert classification of FISC opinions as grounds for non-disclosure under FOIA. As a practical matter, if any release were to occur, it is

likely that it would be only unclassified portions of an opinion not intertwined with or tending to reveal classified information. This Court has no way to judge *ex ante* whether such a selective release of material would provide a misleading view of this Court's opinion or otherwise undermine important interests in the Court's oversight of the Government's activities. Moreover, whatever the outcome of this particular case, granting the relief sought by Movant here will set a precedent that could lead to many more requests for releases of this Court's opinions.

A release involving the disclosure of some parts of a FISC opinion while concealing other parts creates a substantial risk of public misunderstanding or confusion regarding this Court's decision or reasoning. Because the facts presented in applications to the FISC typically involve classified intelligence activities, the disclosure of which could be harmful to the nation's security, and the facts and the legal analysis of FISC opinions are so inextricably intertwined, excising the classified information from the FISC's analysis would result in a remnant void of much or any useful meaning.[2]

While classification decisions regarding national security information are within the exclusive purview of the Executive Branch, this Court has an independent equity in ensuring that its opinions are not presented to the public in a highly incomplete or misleading manner. The Court's sealing rules protect this equity, as well as protecting classified information. Granting Movant's request at a time when the Court does not know what portions of its opinion might ultimately be released would vitiate that equity in this case and set a precedent for future cases in which third parties will seek releases of this Court's sealed opinions.

[2] The Court, of course, has a means of providing public access to its opinions in those cases where it determines that meaningful access to the opinion is possible and desirable. *See* U.S. Foreign Intelligence Surveillance Court, Rule of Procedure 62(a) (2010). That the Court did not consider the opinion at issue here a good candidate for public release is unsurprising given the fact-intensive nature of FISC opinions.

IV. The Fact That Movant May Be Unsuccessful in the District Court in Compelling the Department of Justice to Release a Classified, Sealed FISC Opinion Does Not Mean That Plaintiff Faces a "Catch-22"

Movant misinterprets FISC Rule 62(a) and its relation to FOIA, positing a "Catch-22" where none exists. In fact, it is well-established that requesters cannot receive records either from a district court or the Executive Branch when the records are under seal. The fact that there are two separate reasons why Movant cannot obtain the FISC opinion it seeks—because it is properly classified by the Executive Branch and because it is under this Court's seal—does not imply a "Catch-22."

Indeed, the D.C. Circuit has held that the Government may withhold materials in a FOIA case if the materials are under seal and the sealing court intended to prevent the Government from disclosing the materials. In *Morgan v. U.S. Dep't of Justice*, 923 F.2d 195 (D.C. Cir. 1991), which involved a FOIA request where the requestor sought documents in the Government's possession that had been sealed by a district court, the D.C. Circuit held that "the proper test for determining whether an agency improperly withholds records under seal is whether the seal, like an injunction, *prohibits* the agency from disclosing the records." *Id.* at 197 (citing *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386-87 (1980) (holding that (1) an agency does not abuse its discretion under the FOIA by honoring a court order enjoining the agency from releasing records because in such a case there "simply [is] no discretion for the agency to exercise," and (2) respect for the judicial process requires the agency to honor the injunction)). The D.C. Circuit held that if the seal prohibits disclosure, "the FOIA does not compel the agency to release the information." *Id.* *Morgan*'s logic has particular force in the context of an opinion of this "uniquely nonpublic" court, *In re Release,* 526 F. Supp.

2d at 491 n.18, which "operates primarily in secret, with public access the exception," *id.* at 488.[3] *See also Gerstein v. U.S. Dep't of Justice,* No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276, at *17-*21 (N.D. Cal. Sept. 30, 2005) (finding that the Department of Justice properly withheld under FOIA sealed search warrants where disclosure to third parties would eliminate the courts' ability to keep the warrants confidential); *Nguyen v. FBI,* No. 04-0018 RWR, 2006 U.S.Dist. LEXIS 75943, at *1-*2 (Oct. 19, 2006) (finding that the Federal Bureau of Investigation properly withheld under FOIA a sealed court order concerning third party informant).

But in any event, the United States has not asked this Court to hold that the Government may withhold the opinion pursuant to FOIA. That is a decision for Judge Jackson to make in the FOIA litigation pending before her. The United States is arguing here that this Court should, absent a dismissal on jurisdictional grounds, recognize that its opinion is under seal and decline to vacate the seal for the reasons stated above. In this regard, Movant appears to misconstrue this Court's opinion regarding FISC records and FOIA in *In re Motion for Release of Court Records.* In that case, the movant had not filed a FOIA request but had instead requested that the FISC release orders and other materials. *In re Release*, 526 F. Supp. 2d at 485. In rejecting the movant's request, the FISC stated that a party could "submit[] a FOIA request," *id.* at 496 n.32,

[3] In *Morgan,* the D.C. Circuit gave the D.C. district court handling the FOIA case leave to stay proceedings pending a clarification from the Maryland district court that had issued the seal that prohibited the Department of Justice from releasing the materials. *Morgan,* 923 F.2d at 198. (The Government has not sought such a clarification in this case because there has never been any doubt that under the FISC rules—based on the language of the rules and the longstanding practice thereunder—the Government cannot release a FISC opinion without Court approval.) In subsequent litigation, the Maryland district court that had sealed the materials issued a Memorandum and Order granting a motion of the United States for clarification and denying Morgan's motion to remove the seal. *United States v. Morgan,* No. H-83-00351 (D. Md. July 3, 1991). Specifically, the court clarified the issue of its intent by holding that the "sealing Order, which was affirmed when the Fourth Circuit declined to unseal the notes, was intended to operate as the functional equivalent of an injunction prohibiting disclosure of the matters under seal." *Id.* at 5. The Fourth Circuit then affirmed the district court's decision clarifying the intent of the order sealing the documents and denying the motion to remove the seal. *U.S. v. Morgan,* 962 F.2d 8 (4th Cir. 1992) (Table).

for such records and pursue "whatever remedies may be available to it in a district court." *Id.* at 497. In so doing, the FISC did not state that such records would necessarily be released or could be released in the absence of a FISC order unsealing the materials. *Id.*

The United States agrees that a FOIA request and subsequent suit in the district court is the proper method for Movant to test whether it has a legal right to obtain the opinion. The Government has argued in the district court that Movant has no such right to obtain a classified, sealed FISC opinion. The fact that Movant lacks a legal right to obtain the document it seeks does not imply a "Catch-22." Rather, as in *Morgan* and the other cases cited above, it indicates that neither this Court nor the Executive Branch is obliged under FOIA to release the opinion.

CONCLUSION

For the reasons stated above, the Court should deny the Motion.[4]

June 7, 2013

Respectfully submitted,

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[4] Even if this Court were to grant the relief sought in the Motion, the opinion at issue would remain classified and could not be given to Movant absent a decision to declassify it, in whole or in part, by the Executive Branch, whether on its own initiative or by Order of a court reviewing a FOIA request.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States of America's Opposition to the Motion of the Electronic Frontier Foundation was served via Federal Express and email on this 7th day of June, 2013, addressed to:

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