UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE ORDERS OF THIS COURT INTERPRETING SECTION 215 OF THE PATRIOT ACT	Docket No. Misc. 13-02

MOVANTS' RESPONSE TO THE SECOND SUBMISSION OF THE UNITED STATES IN RESPONSE TO THE COURT'S ORDER OF NOVEMBER 20, 2013

PRELIMINARY STATEMENT

The government has submitted proposed redactions before the public release of an Opinion of this Court subject to the motion for access previously filed by the ACLU and the Media Freedom and Information Access Clinic.[1] While Movants have not seen the proposed redactions, they respectfully submit this Response to the government's assertion that material may be withheld from the public under a law enforcement exception or because it is classified. Because the Opinion is subject to the First Amendment right of access, information may only be redacted if the Court independently determines that the government has made the showings required by *Press-Enterprise Co. v. Superior Court* (*Press Enterprise II*), 478 U.S. 1 (1986).

PROCEDURAL HISTORY

On September 13, 2013, this Court directed the government to identify any opinions of the FISC that evaluate the meaning, scope, and constitutionality of Section 215 of the Patriot Act, and that are not at issue in ongoing Freedom of Information Act ("FOIA") litigation in the

[1] This Court previously found that the Media Freedom and Information Access Clinic ("MFIAC") lacked standing to assert a constitutional right of access to the Section 215 opinions. *In re Section 215 Orders*, No. Misc. 13-02, 2013 WL 5460064, at *4 (FISA Ct. Sept. 13, 2013). MFIAC has filed a motion for reconsideration, which is pending. *See* MFIAC Mot. for Recons., *In re Section 215 Orders*, No. Misc 13-02 (FISA Ct. Oct. 11, 2013), http://1.usa.gov/1aTGGa4.

U.S. District Court for the Southern District of New York or already subject to the Court's publication process pursuant to FISC Rule 62(a). The Court further directed the government to propose a timetable to complete declassification review of any such opinions. On October 4, 2013, the government identified one opinion of this Court ("the Opinion") fitting these criteria, and on November 18, 2013, the government informed the Court that "the Opinion should be withheld in full and a public version of the Opinion cannot be provided." On November 20, 2013, the Court ordered the government to submit "a detailed explanation" of how it had reached that conclusion.

On December 20, 2013, the government explained to the Court that "the Opinion is not only classified but also pertains to an ongoing law enforcement investigation, and therefore is protected by the law enforcement investigatory privilege." At the same time, the government "upon review and as a discretionary matter" determined that it would "not object" if the Court were to publish the Opinion in redacted form; the government also provided the Court with proposed redactions. On February 6, 2014, the government disclosed that it had subsequently "met with Court staff regarding the Government's proposed redactions to the Opinion" and "upon further review" determined that "certain additional information in the Opinion is not classified and the release of that additional information would not jeopardize the ongoing investigation."[2] The government again provided the Court with a set of proposed redactions.

[2] The February 6 filing provided the first public notice that Court staff has held at least one *ex parte* meeting with the government on issues relating to Movants' motion for access. Movants recognize that the FISC generally operates in a non-adversarial manner and appreciate that if classified information was discussed, Movants' counsel may not have been permitted to participate in this meeting. But Movants urge that "any *ex parte* oral communications made to the court should be recorded and made available for appellate review." *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir. 1983). Movants further request that reasonably segregable portions of such transcripts—including any record of the January 23, 2014 meeting—be placed on the Court's

ARGUMENT

I. The First Amendment Right of Access Has No Law Enforcement Exception.

In asserting that the Opinion "is protected by the law enforcement investigatory privilege" and therefore must be withheld or released only in redacted form, the government misapprehends both the law enforcement privilege and the First Amendment right of access. As the very cases cited by the government make clear, the law enforcement privilege is a limited-purpose shield that can be used by parties responding to discovery demands, orders to produce documents, and other analogous requests. In other words, it is a common law evidentiary privilege. *See In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988); *In re Dep't of Investigation of City of New York*, 856 F.2d 481 (2d Cir. 1988). This privilege is a qualified one, under which the "public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *In re Sealed Case*, 856 F.2d at 272.

It is true, as the government notes, that Congress "codified the privilege" as the basis of FOIA Exemption 7(A), Submission of the U.S. in Resp. to the Court's Nov. 20, 2013 Order ("Gov. Br.") at 3, but Movants' right of access to the Opinion arises from the First Amendment, not FOIA. The government's assertion that the law enforcement privilege "applie[s] categorically to documents and classes of documents" likewise rests solely on FOIA doctrine and is inapposite here. *See* Gov. Br. at 3 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (FOIA request for witness statements); *Maydak v. Dep't of Justice*, 218 F.3d 760 (D.C. Cir. 2000) (FOIA request for criminal records)).

The government offers no caselaw to support the notion that an asserted law enforcement

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public docket, as is consistent with the First Amendment right of access. *See, e.g.*, Transcript of Ex Parte Session, *ACLU v. Dep't of Defense*, 10-4290 (Dkt. No. 140) (2d Cir. Apr. 17, 2012).

privilege can exempt entire documents—let alone entire classes of documents—from the public's First Amendment right of access. Nor could they do so: in a variety of contexts, courts have found that the First Amendment provides a right of access to government records, or portions thereof, even where the concerns that motivate the law enforcement privilege are present. In *Vasquez v. City of New York*, 10-cv-6277 (LBS), 2012 WL 4377774 (S.D.N.Y. Sept. 24, 2012), for example, the court considered a request for access to the transcript of the *ex parte*, *in camera* testimony of a witness in a state court murder trial. The court balanced the presumption of access under the First Amendment against the city's concerns over witness safety and found that, in the absence of "specific, on-the-record findings to justify sealing the entire document[]," the First Amendment access right prevailed. *Id.* at *3; *see also In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 91 (D.D.C. 2008) (finding a qualified First Amendment right of access to redacted search warrant records even though "the government has demonstrated a compelling interest—promoting effective law enforcement—in keeping the identity of informants secret"); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that, to overcome a qualified First Amendment right of access claim, "it is not enough simply to assert th[e] general principle" that "a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation").

In sum, the government cannot short-circuit the findings required under the First Amendment right of access simply by asserting that the requested materials fall under a law enforcement privilege.

II. The Government's Proposed Withholdings Must Survive Strict Scrutiny.

Instead, the government must satisfy the constitutional standards articulated in *Press-Enterprise II*. In that case, the Supreme Court held that "[s]ince a qualified First Amendment

right of access attaches to preliminary hearings [in a California state criminal trial] . . . the proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 478 U.S. 1, 13–14 (1986) (internal quotation marks omitted). In *Press-Enterprise II*, the interest in secrecy asserted was the defendant's right to a fair trial free from prejudice by publicity. Though it found the government's interest legitimate, the Court held that "this risk of prejudice does not automatically justify refusing public access to hearings." *Id.* at 15. Instead, the government was required to demonstrate on the basis of specific facts, first, a "substantial probability" that the defendant's right to a fair trial would be prejudiced by publicity that secrecy would prevent, second, that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights," and third, that any restriction on access is narrowly tailored. *Id.* at 14 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980)).

This is a heavy burden: in *Press-Enterprise II*, the Supreme Court rejected sealing founded only on a "reasonable likelihood" of harm, insisting that strict scrutiny was required to overcome the First Amendment right of access and that such scrutiny is satisfied only by a substantial probability of harm. *Id.*; *see also Presley v. Georgia*, 558 U.S. 209, 214 (2010).

Here, the government has made no attempt to demonstrate on the basis of specific facts that the withholding of the requested Opinion survives the strict scrutiny required by *Press-Enterprise II*. The government suggests only that "[d]isclosure of information within the Opinion *could* tip off the subject and/or the subject's associates" and that such a tip-off "would impair the ongoing counterterrorism investigation in various ways." Gov. Br. at 3 (emphasis added). Under *Press-Enterprise II*, the government must demonstrate a substantial likelihood that disclosure of the Opinion *would* tip off the subject or his associates. The "conclusory assertion" offered here is

not sufficient to meet even the first prong of the *Press-Enterprise II* test. *See Presley v. Georgia*, 558 U.S. at 215 (holding that government's assertion of a "generic risk" of prejudice through disclosure to the public is not enough to justify excluding the public from trial, for "[i]f broad concerns . . . were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public . . . almost as a matter of course").

The government must also show that there are no reasonable alternatives to withholding the redacted sections of the Opinion that would adequately protect its investigation, and that the redactions it has proposed, Gov. Br. at 3, are narrowly tailored.[3] More narrow options may well exist. For example, the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 ("CIPA"), permits the government in litigation to provide "a summary of the specific classified information" when classified information itself is found to be properly withheld. *Id.* at § 6(c)(1)(B). In a similar fashion, meaningful non-classified summaries of redacted material may be available, or the nature of the redactions could be noted, *e.g.*, "[redacted name of target of investigation]" or "[redacted investigatory method]." In failing to consider any such alternative measures, and in failing to show that its proposed redactions are narrowly tailored, the government has made no apparent effort to carry its burdens.

III. This Court Has Final Say Over Any Redactions In Its Opinion.

Should the government claim a compelling interest in redacting portions of the Opinion, this Court must still independently assess the appropriateness of each of those proposed redactions. Declassification review by the Executive fails to satisfy public's First Amendment right "to be heard on the question of their exclusion." *Globe Newspaper Co. v. Superior Court*

[3] Again, the subsequent Second Submission in Response to the Court's November 20, 2013 Order offers the most recent of three different positions that the government has taken on the extent to which the Opinion may be released: not at all (as of November 18, 2013), only if redacted (as of December 20, 2013), and only if less redacted (as of February 6, 2014).

for Norfolk Cnty., 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). Instead, the Court must "independently examine the Government's redactions" to make sure that they "are no greater than necessary." *United States v. Moussaoui*, 65 F. App'x 881, 888 (4th Cir. 2003). Thus, when the government asserts that the Court should publish only those portions of the Opinion that the Executive deems appropriate, Gov. Br. at 3–4, the government improperly attempts to restrict public access to court records. *In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) ("A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.").

Although some measure of deference to the government may be appropriate in this context, the judiciary's "independent judgment concerning redactions" must also be exercised. *Moussaoui*, 65 F. App'x at 888. Indeed, even if the government's interest in protecting portions of the Opinion is "a qualifying compelling and overriding" one, the First Amendment "require[s] a *judicial* inquiry into the legitimacy of the asserted . . . interest, and specific findings, sealed if necessary, about the harm . . . that would ensue" if the redactions were not upheld. *United States v. Rosen*, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) (emphasis added). The overwhelming public interest in understanding this Court's analysis and application of the nation's surveillance laws underscores this requirement. Movants therefore urge the Court to "make its own redactions [if any], supported by specific findings, after a careful review of all claims for and against access." *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995).

CONCLUSION

For the foregoing reasons and the reasons given in Movants' previous filings, Movants respectfully request that this Court unseal the Opinion. Movants request that the Opinion be released as soon as possible and with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing. Movants also urge the Court to memorialize its conclusions with specific findings on the record.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alex Abdo, certify that on this day, February 18, 2014, a copy of the foregoing brief was served on the following persons by the methods indicated:

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