



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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July 9, 2014

**BY ECF**

The Honorable William H. Pauley, III  
United States District Judge  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007

Re: *ACLU et al. v. FBI et al.*, 11 Civ. 07562 (WHP)

Dear Judge Pauley:

Yesterday, the United States Department of Justice ("DOJ") released to the ACLU the attached three FISC Primary Orders, which are responsive to the ACLU's Freedom of Information Act ("FOIA") request that is the subject of the above-referenced case. These orders are from FISC Docket No. BR 09-09, dated July 9, 2009; FISC Docket No. BR 09-15, dated October 30, 2009; and FISC Docket No. BR 09-19, dated December 16, 2009. Information has been redacted from these documents pursuant to 5 U.S.C. §§ 552(b)(1) and (b)(3). These documents are also being made available to the public on the Director of National Intelligence's ("DNI") website, "IC on the Record," at <http://icontherecord.tumblr.com/>, as well as at [www.dni.gov](http://www.dni.gov).

We write to ensure that the Court has a full appreciation of the facts with respect to the three Primary Orders described above. The ACLU first raised an issue with respect to these Primary Orders in its reply brief, filed on June 13, 2014. In its reply brief, the ACLU noted that these Primary Orders had not been released in response to the ACLU's FOIA request, and assumed that these Primary Orders were included within the set of Additional FISC Orders that the government has withheld in full. The ACLU argued that the government's omission of these documents from its *Vaughn* index could not be squared with the identification of these documents elsewhere on the public record. *See* ACLU Reply Br. at 9. However, these orders were not deliberately withheld from the ACLU and are not, and were never intended to be, included within the set of Additional FISC Orders that the Government continues to withhold in full. Rather, after the ACLU raised the issue in its reply brief, DOJ determined that it had inadvertently failed to locate these orders in its search for responsive records.<sup>1</sup> In other words, the Government did not "segregate and disclose these orders, or even identify them on its

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<sup>1</sup> The law is clear that "an agency's search need not be perfect, but rather need only be reasonable." *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). The ACLU has never challenged the reasonableness of the government's search for responsive records.

Vaughn index,” ACLU Reply Br. at 10, because it did not realize that it had failed to locate them in its search, and therefore had not submitted them to the declassification review process. Accordingly, it is factually incorrect to state that these Primary Orders are examples of information “the government has already disclosed . . . [but] tells the Court it cannot release here.” *Id.*

Although not required to do so, in a show of good faith and in accordance with its continuing efforts to be as transparent as possible, DOJ nonetheless went back and searched for the three Primary Orders identified in the ACLU’s Reply Brief. Once they were identified, the government conducted an interagency declassification review of the orders, and yesterday released them in redacted form.

The government has made every effort, at every point in this litigation, to be as forthcoming as possible with the ACLU about all of the documents at issue in this case, within the confines of its affirmative duty to protect classified national security information. By phone yesterday, we informed the ACLU that we would bring this supplemental release to the attention of the Court.

We thank the Court for its consideration of this letter.

Sincerely,

PREET BHARARA  
United States Attorney

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