

U.S. Department of Justice



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March 1, 2010

*The Clerk should enter
this letter on the
docket - 3-3-10
Alvin Hellerstein*

BY FACSIMILE

Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007-1312

Re: ACLU, et al., v. Department of Defense, et al., No. 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

We write respectfully to inform the Court that we have filed today with Court Security Officer Michael Macisso a classified declaration from Wendy Hilton, CIA Associate Information Review Officer for the Central Intelligence Agency ("CIA") dated March 1, 2010, which describes new factual developments that took place this calendar year that are relevant to the CIA's basis for withholding the classified intelligence method contained in two memoranda of the Department of Justice Office of Legal Counsel ("OLC"). This information was the subject of the parties' fourth motion for summary judgment. Ms. Hilton's declaration provides a factual update to the declarations previously submitted by herself and Assistant to the President for National Security and National Security Advisor James L. Jones in support of the Government's withholding. In light of these new factual developments, we write to request that, pursuant to Federal Rule of Civil Procedure 54(b), the Court consider this additional evidence.

On December 29, 2009, the Court issued an order with respect to the fourth motion for summary judgment and the Government's obligation to disclose the intelligence method in the two OLC memoranda. On January 15, 2010, plaintiffs filed a motion for reconsideration of the December 29, 2009 order which sought, *inter alia*, the disclosure of other information withheld from the same two OLC memoranda. By order dated January 26, 2010, the Court ordered briefing on plaintiff's reconsideration motion. The Government's opposition to plaintiff's motion for reconsideration is being filed today, and plaintiff's reply memorandum will be filed on March 12, 2010.

In light of plaintiffs' pending motion for reconsideration of the December 29, 2009 order, and because this Court has not certified the order as a final judgment subject to appeal pursuant to Rule 54(b), the Court has full authority to revise the December 29, 2009 order "as justice requires." See Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 123 (D.D.C. 2006). The Court is granted "a great deal of room" in which to exercise its discretion pursuant to Rule 54(b), and one circumstance in which revision of a prior order is appropriate is a situation

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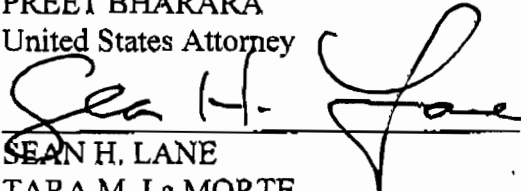
such as the one presented here, "where a controlling or significant change in the ... facts [has occurred] since the submission of the issue to the court." Id. (citing Cobell v. Norton, 224 F.R.D. 266 (D.D.C. 2004)). See Billington v. Dep't of Justice, 258 Fed. Appx. 348, 349 (D.C. Cir. 2007) ("The District court did not abuse its discretion in granting the Rule 60(b) motion or in considering the additional in camera information that was filed by the Government."); cf. Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897 (D.C. Cir. 1996) (granting reconsideration pursuant to Fed. R. Civ. P. 60(b)(6) where the Government presented by in camera declaration new facts "so central to the litigation" that if the Court had known it earlier it "would have affected the outcome").

We thank the Court for its consideration of this letter, which we respectfully request be docketed by the Court.

Respectfully submitted,

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