



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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New York, New York 10007

May 4, 2012

By Electronic Case Filing

Hon. Catherine O'Hagan Wolfe

Clerk of Court

United States Court of Appeals for the Second Circuit

500 Pearl Street, Room 370

New York, NY 10007

Re: *American Civil Liberties Union v. CIA*
Nos. 10-4290(L); 10-4289(CON); 10-4647(XAP); 10-4668(XAP)

Dear Ms. Wolfe:

The Government writes respectfully in response to plaintiffs' letter dated April 24, 2012, pursuant to Fed. R. App. P. 28(j). We request that copies of this letter be circulated to the judges who heard argument in this matter on March 9, 2012.

In their letter, plaintiffs speculate as to the content of the classified information redacted from the Office of Legal Counsel ("OLC") memoranda at issue in the Government's appeal, on the basis of unspecified "suggest[ions]" from the unclassified portions of the transcript of the *ex parte, in camera* session on March 9, and media speculation. Specifically, plaintiff speculate that the Government has already disclosed this information earlier in this litigation, citing the Eighth Declaration of Marilyn Dorn (Dkt. No. 226). Contrary to plaintiffs' speculation, the Government has not, through the Dorn declaration or otherwise, made any official public disclosure of the classified information at issue in the Government's appeal.

This Court applies "[a] strict test" to claims of official disclosure. *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). "Classified information . . . is . . . officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). With regard to the requirement of "official and documented disclosure," the Court has made clear that "the law will not infer official disclosure . . . from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress." *Id.* at 186-87 (citations omitted).

Plaintiffs' suppositions and media speculation plainly do not satisfy this strict test. *See also, e.g., Wolf*, 473 U.S. at 378 ("An agency's official acknowledgment of information by prior disclosure . . . cannot be based on mere public speculation, no matter how widespread."). For the reasons set forth in the Government's classified filings, the disclosures identified in plaintiffs' letter, including the information provided in the Dorn declaration, do not constitute an official disclosure of the information redacted from the OLC memoranda.

PREET BHARARA
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