


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK


AMERICAN CIVIL LIBERTIES UNION,
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION;

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States;
ROBERT MUELLER, in his official
capacity as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

04 Civ. 2614 (VM)

SEALED

DECLARATION OF ANN BEESON

I, Ann Beeson, of Montclair, New Jersey, do declare:

1. I am the Associate Legal Director of the American Civil Liberties Union Foundation ("ACLU"), and I represent the plaintiffs in this case.
2. Plaintiffs filed the complaint in this case under seal to avoid violating the gag provision in 18 U.S.C. § 2709(c) (hereinafter "gag provision"). *See* Exh. 1; Rec. Doc. 10.
3. Defendants originally took the position that any public disclosure about the case, including the fact that the ACLU had challenged the constitutionality of 18 U.S.C. § 2709, would violate the gag provision. Defendants reiterated this position at a status conference with the Court on April 23, 2004.

4. After the status conference, in a joint letter dated April 26, 2004, defendants informed the Court that they had reevaluated their "position as to what information can be disclosed [REDACTED]"

See Exh. 2.

5. In the April 26th joint letter, defendants agreed to the public filing of a redacted complaint. *See id.*

6. In the April 26th joint letter, defendants "agreed that neither they nor their agents will seek to impose any legal sanction or penalty on the ACLU (or its attorneys) for filing publicly the . . . redacted complaint and motion to file the complaint under seal." *See id.*

7. On April 28, 2004, a redacted version of the complaint was filed on the public docket. *See* Complaint (Rec. Doc. 9).

8. On May 13, 2004, plaintiffs filed with the Court an amended complaint, which added the ACLU Foundation as a plaintiff. Through a joint letter submitted on May 14, 2004, the parties informed the Court that they had agreed to file on the public docket a redacted copy of the amended complaint. *See* Exh. 3.

9. Since the filing of the original redacted complaint on the public docket, the parties have disagreed about what information must be redacted in court documents in this case. *See id.*; *see also* Exhs. 4 - 8.

10. Defendants have told plaintiffs and the Court that they cannot specify in advance what disclosures might violate the gag provision. *See, e.g.*, Exh. 5.

11. Defendants have told plaintiffs' counsel by telephone that the gag provision prohibits plaintiffs from disclosing to the public that the ACLU Foundation represents a plaintiff other than the ACLU in this lawsuit.

12. The publicly available versions of the original and the amended complaint indicate that there is another plaintiff in the lawsuit, whose name has been redacted. *See* Complaint (Rec. Doc. 9); Exh. 3.
13. Defendants have taken the position that any reference to the fact that “the FBI has issued an NSL and sought information under the statute” must remain under seal due to the gag provision. *See* Exh. 6.
14. Since the filing of the redacted complaint on the public docket, numerous news stories written by reporters who are not privy to any information under seal in this case have reported that the anonymous plaintiff in the lawsuit received an NSL. *See* Exh. 7.
15. Defendants have sought redactions in court documents that plaintiffs have opposed. *See* Exhs. 6 - 8.
16. Defendants have maintained that the redactions are required by the gag provision. *See* Exhs. 6, 8.
17. Defendants have maintained that any disclosure that “effectively communicates that the plaintiffs are challenging a particular NSL that was issued” must remain under seal due to the gag provision. Exh. 6; *see also* Exh. 8.
18. Defendants have maintained that any statement suggesting that there is an underlying terrorism investigation must remain under seal due to the gag provision. *See* Exh. 6.
19. Defendants have maintained that any reference to the fact that the government believes this case implicates national security must remain under seal due to the gag provision. *See id.*

20. Defendants have maintained that any reference to the "sensitive" nature of this case must remain under seal due to the gag provision. *See id.*

21. Defendants have maintained that any reference to the categories of information demanded by the NSL must remain under seal due to the gag provision. *See id.*

22. Defendants have maintained that the phrases [REDACTED] and [REDACTED] [REDACTED] which appeared in an ACLU press release, must remain under seal due to the gag provision. *See Exh. 13.*

23. Defendants have maintained that the identity of [REDACTED] must remain under seal due to the gag provision. *See Exh. 2; see also Exhs. 6, 8.*

24. Defendants have maintained that any characterization of [REDACTED] as a "consulting" business must remain under seal due to the gag provision. *See id.*

25. Defendants have maintained that any general description of [REDACTED] services, such as providing storage space for electronic files and encryption advice, must remain under seal due to the gag provision. *See id.*

26. Defendants have maintained that any general description of the kinds of information that [REDACTED] possesses about its clients, such as client customer lists and the client's electronic communications, must remain under seal due to the gag provision. *See id.*

27. [REDACTED]
[REDACTED]
[REDACTED]

28. [REDACTED]
[REDACTED]

29.

30.


31. The ACLU obtained documents from the Department of Justice in response to a Freedom of Information Act request. One document is entitled "Transactional Records NSLs Since 10/26/2001," and appears to be a list of National Security Letters issued by the FBI between October 26, 2001 and January 21, 2003. *See* Exh. 9.

32. Another document that the ACLU obtained is entitled "New Legislation / Revisions to FC/IT Legal Authorities / National Security Letters," and appears to be an October 26, 2001 memorandum discussing the FBI's power to issue National Security Letters. *See* Exh. 10.

33. Another document that the ACLU obtained is entitled "National Security Letter Matters," and appears to be a November 28, 2001 memorandum discussing the FBI's power to issue National Security Letters. *See* Exh. 11.

34. On May 15, 2004, I visited the web site of the U.S. House of Representatives Committee on the Judiciary. I printed out a letter from that web site, which was sent by the Justice Department on July 26, 2002, in response to questions submitted by the House Judiciary Committee on USA Patriot Act Implementation. *See* Exh. 12 (<<http://www.house.gov/judiciary/patriotresponses101702.pdf>>) (relevant excerpts of letter and responses). The Justice Department letter states that the FBI may use NSLs to obtain information from public libraries, bookstores, or newspapers. *See id.* at 4.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this day, May 15, 2004.


Ann Beeson

Beeson
Declaration
Exhibit 1

[REDACTED] and
AMERICAN CIVIL LIBERTIES UNION,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States;
ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in her official capacity as Senior Counsel to
the Federal Bureau of Investigation;

Defendants.

MOTION FOR LEAVE TO FILE
CASE UNDER SEAL

04 CV 02614
04 Civ.

JUDGE MARRERO

MOTION FOR LEAVE TO FILE CASE UNDER SEAL

Plaintiffs [REDACTED] and American Civil Liberties

Union (ACLU) hereby move for leave to file the above-captioned case under seal.

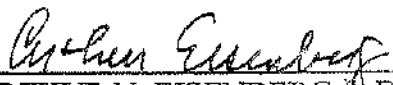
The case involves a challenge to a National Security Letter issued pursuant to 18 U.S.C. § 2709 and served on [REDACTED] (NSL"). The case also involves a constitutional challenge to 18 U.S.C. § 2709. Section 2709 includes a provision that prohibits any entity served with a National Security Letter from "disclos[ing] to any person that the Federal Bureau of Investigation has sought or obtained information or records under this section." *Id.* § 2709(c). Plaintiffs' Complaint alleges that Section 2709(c) is unconstitutional under the First and Fifth Amendments.

The Complaint includes numerous allegations indicating that the Federal Bureau of Investigation has sought information under Section 2709. It appears, therefore, that the publication of the Complaint would violate Section 2709(c). To avoid penalties for violating Section 2709(c), plaintiffs feel obligated to file this suit under seal. Upon filing

the Complaint, plaintiffs intend to ask the government for a stipulation that plaintiffs can disclose certain information about the [REDACTED] NSL and this case without violating Section 2709(c). If the government agrees to the stipulation, plaintiffs will move immediately to unseal the case. If the government does not agree to the stipulation, plaintiffs may seek preliminary relief in order to unseal the case.

Respectfully submitted,

JAMEEL JAFFER (JJ-4653)
ANN BEESON (AB-2082)
SHARON MCGOWAN (SM-5846)
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500


ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 344-3005

April 6, 2004

[REDACTED]; and
AMERICAN CIVIL LIBERTIES UNION,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States;
ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in her official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

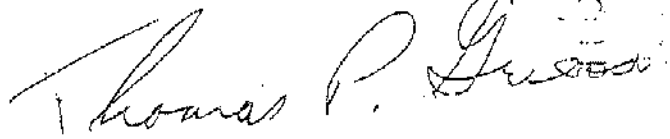
04 CV 02614
04 Civ.

JUDGE MARRERO

ORDER

UPON CONSIDERATION of plaintiffs' motion for leave to file the above-
captioned case under seal, it is this 6th day of April, 2004,

ORDERED that plaintiffs' motion be GRANTED.



Thomas P. Greisa
United State District Judge

MICROFILM

APR - 7 2004

APR - 7 2004

Beeson
Declaration
Exhibit 2



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 26, 2004

BY HAND

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, New York 10007

Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

COMPLAINT FILED UNDER SEAL

LETTER TO BE FILED UNDER SEAL

Dear Judge Marrero:

On behalf of the parties, the Government respectfully submits this letter in connection with the above-captioned action filed under seal, and pursuant to the Court's directive at the initial pre-trial conference held on April 23, 2004.

As stated by the Government at the conference, the Government believes that the filing of the complaint in this action raises serious national security concerns. In an effort to allow the public to know that 18 U.S.C. § 2709 is being challenged, however, the Federal Bureau of Investigation ("FBI") has reevaluated its position as to what information can be disclosed [REDACTED]

Accordingly, the Government has withdrawn its objection to the public filing of the enclosed redacted complaint, which discloses solely a facial challenge to the constitutionality of 18 U.S.C. § 2709 by plaintiff American Civil Liberties Union ("ACLU"). The redacted complaint does not disclose the identity of plaintiff [REDACTED]

[REDACTED] or the issuance of any National Security Letter ("NSL") under 18 U.S.C. § 2709.

The Government has also withdrawn its objection to the public filing of the enclosed redacted motion to file the complaint under seal. Again, the redacted motion does not

disclose the identity of plaintiff [REDACTED]
[REDACTED] or the issuance of any NSL.

The Government does not believe that disclosure by the ACLU of its allegations in the enclosed redacted complaint and motion would constitute a violation of 18 U.S.C. § 2709(c). Defendants have agreed that neither they nor their agents will seek to impose any legal sanction or penalty on the ACLU (or its attorneys) for filing publicly the enclosed redacted complaint and motion to file the complaint under seal, or for otherwise disclosing in any form the allegations in these two redacted documents.

The parties will continue to file papers under seal in this action, but will attempt to negotiate a procedure for the public filing of redacted papers that disclose solely a facial challenge to the constitutionality of 18 U.S.C. § 2709 by plaintiff ACLU.

The parties respectfully propose the following briefing schedule for their respective motions concerning the complaint: plaintiffs' summary judgment motion to be filed by May 17, 2004; the Government's opposition to plaintiffs' motion and its cross-motion to dismiss the complaint or for summary judgment to be filed on June 7, 2004; plaintiffs' reply papers in support of their motion and opposition to the Government's cross-motion to be filed on June 28, 2004; and the Government's reply papers in support of its motion to be filed on July 19, 2004.

Thank you for your consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Meredith E. Kotler
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

cc: Jameel Jaffer, Esq.

Beeson
Declaration
Exhibit 3



May 14, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

Re: *ACLU et ano. v. Ashcroft*, 04-CV-2614 (VM)

SEALED

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2601
F/212.549.2651
ABEESON@ACLU.ORG
WWW.ACLU.ORG

Dear Judge Marrero,

Enclosed please find a redacted copy of plaintiffs' amended complaint. The redactions in this document mirror those in the original complaint filed on the public docket on April 28, 2004. As these redactions reflect the status quo with regard to disclosures in this case, the government has agreed that this redacted amended complaint can be filed directly on the public docket.

On May 6, plaintiffs submitted to the Court a copy of the original complaint with pink highlighting to reflect the proposed redactions that are disputed and green highlighting to reflect the proposed redactions that are undisputed. The government submitted a letter brief on Wednesday, May 12, in support of the contested redactions. Consistent with the Court's May 12th Order, plaintiffs shall file a letter brief concerning the contested redactions in the original complaint with the Court in response by Friday, May 14.

With the exception of the addition of the ACLU Foundation as a plaintiff, the amended complaint filed with the Court on May 12, 2004, is virtually identical to the original complaint. Among other things, the text of paragraph 6 has been amended and a new paragraph 7 has been added. Consequently, after paragraph 7, the numbering of paragraphs is off by one in comparison to the original.

As a result of the fact that the amended complaint is very similar to the original complaint, the parties have agreed to rest on the letter briefs submitted with respect to the disputed redactions in the original complaint, rather than resubmit letter briefs concerning contested redactions in the amended complaint that simply reiterate arguments already presented to the Court. The letters' references to paragraphs after number 6 are off by one due to the additional paragraph in the amended complaint. To facilitate the Court's consideration of this matter, the parties have also submitted a copy of the amended complaint with disputed redactions marked in pink and undisputed redactions marked in green. After the Court resolves the dispute over the contested redactions, plaintiffs are willing to prepare a redacted version of the amended complaint consistent with the Court's order.

Meredith Kotler, counsel for the government, has consented to our filing this joint letter on behalf of the parties.

Respectfully,

A handwritten signature in black ink, appearing to read "Ann Beeson". To the right of the signature is a small circular stamp containing the initials "LM".

Ann Beeson

Encls.

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

Beeson
Declaration
Exhibit 4



May 6, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

Re: *ACLU et ano. v. Ashcroft*, 04-CV-2614 (VM)

SEALED

Dear Judge Marrero,

In accordance with the Court's direction at the May 3, 2004 conference, the parties have attempted to reach an agreement regarding the disclosure of information related to this case. The parties have been unable to reach an agreement. Attached to this letter is plaintiffs' proposal on disclosure ("the ACLU disclosure proposal").¹ Plaintiffs offer the following brief comments in support of this proposal and in opposition to the government's counter-proposal.

To protect the rights of the public and press to access judicial documents and proceedings, the First Amendment requires strict scrutiny of any sealing order. *In re The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984). Documents and proceedings may be closed only "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *In re The New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987); see also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986).

¹ The attached proposal is identical to the proposal plaintiffs sent to the government two days ago, with one exception. In the earlier proposal, in an attempt at compromise, plaintiffs offered to define "Specified Information" to include the specific categories of information sought by the NSL. Plaintiffs have reconsidered their position on this issue in light of the government's rejection of our proposal and the government's failure to justify suppression of this generic information.

In this case, the only possible justification for any sealing order is the gag provision, 18 U.S.C. 2709(c).² Plaintiffs believe that the gag provision violates the First Amendment because it prohibits speech without requiring the government to first show a compelling need for secrecy and to narrowly tailor any gag on a case-by-case basis. The government has not yet offered any evidence to justify the imposition of a gag, or a sealing order, in this case.

At the very least, while the Court considers the merits of the case, any sealing order should restrict only that information that could conceivably implicate the gag provision. Thus, the ACLU disclosure proposal would restrict the filing and disclosure only of pre-defined categories of information. The government has refused, however, to define the scope of the gag provision. Yet the universe of sensitive information the ACLU possesses is in fact quite narrow, in contrast to the universe of non-sensitive information about the case. If the government believes our definition of sensitive information is too narrow, it should simply propose a broader definition.

Instead, the government's counter-proposal assumes that the gag provision justifies a restriction on all filings and disclosures in the case, with the exception of a small category of information that the government may pre-approve for disclosure. In other words, rather than define with specificity the information it insists on suppressing, the government demands that the ACLU define what we want to say in advance so that the government may pre-approve that speech. There is no purer example of an unconstitutional prior restraint. See *Nebraska Press Ass'n v. Stewart*, 427 U.S. 538, 559 (1976).

Notably, the government's counter-proposal and the current sealing order restrict far more than court filings. To avoid inadvertently violating the sealing order, the ACLU is required to clear with the government every discussion about the lawsuit, every response to public inquiries about the case, every press release or phone conversation with a reporter, every letter to ACLU members, and every discussion with members of Congress urging repeal of the statute. We are also required to seek the government's permission before disclosing conversations with opposing counsel and oral arguments at court conferences. The ACLU is engaging in such communications on a daily basis

² Indeed, the ACLU had to file this case originally under seal to avoid the risk of prosecution under the gag provision. In our Motion for Leave to File Case Under Seal, we specifically assured the Court that we would move to unseal the case once we obtained an agreement from the government that it would not prosecute us. After considerable negotiation, we reached an extremely limited written agreement that the government would not prosecute us for disclosing a redacted version of the Complaint and Motion for Leave to File Case Under Seal. Since then, the government has refused our repeated requests to lift the seal on the entire case and restrict only information that implicates the gag.

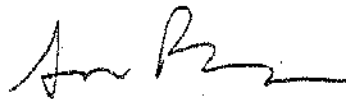
and should not be required to submit them to the government for prior clearance.

We believe that the government has not justified any sealing order in this case, and has certainly not justified its broad counter-proposal. We nevertheless offer our own disclosure proposal to the Court in order to enable the parties to turn their attention to litigating the merits of this dispute, while providing information about the case to the public as fully and as quickly as possible.

For the reasons stated above, the ACLU respectfully asks the Court to enter an order amending the sealing order and adopting the ACLU disclosure proposal.

To address one final matter, yesterday the parties jointly submitted to the Court a proposed order to file on the public docket redacted versions of documents previously filed under seal. Plaintiffs believe that some of the redactions demanded by the government cannot be justified by even a broad interpretation of the gag provision. Plaintiffs have attached an unredacted copy of the relevant documents for the Court's review; text highlighted in pink indicates the disputed redactions, while text highlighted in green indicates the undisputed redactions. Plaintiffs have also attached an unredacted copy of the Complaint, with disputed redactions highlighted, for the same purpose. Plaintiffs urge the Court to rule that the government has not met the constitutional test required for sealing of this information, and to allow disclosure of this information to the public. If the Court so rules, plaintiffs will prepare an amended redacted version, consistent with the Court's ruling, for filing on the public docket.

Respectfully,



Ann Beeson

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

ACLU Proposal Regarding Filing and Disclosure

I. Definition of Specified Information

For the purposes of this agreement, "Specified Information" is defined to mean:

- The [REDACTED] referenced in the [REDACTED] National Security Letter (NSL).
- The name(s) or address(es) of the person(s) associated with the [REDACTED] in the NSL.
- The name and address of the recipient of the NSL.
- The dates on which the NSL was issued and served.
- The name of the agent who served the NSL.

II. Procedures for Court Submissions and Hearings

- The titles of all submissions to the court will be listed on the public docket provided that the titles do not contain Specified Information.
- All submissions to the court that do not contain Specified Information will be filed publicly without redaction.
- All court hearings will be open to the public, absent a motion for closure by any party.
- Future submissions to the court that contain Specified Information will be handled as follows:
 - 1) The filing party will file the document under seal with the court.
 - 2) On the same day, the filing party will propose to the opposing party a redacted version for public filing;
 - 3) Within two days of the original filing, the parties will submit to the court a proposed redacted version of the document for public filing. The parties will also provide the court with letter briefs addressing any remaining dispute regarding proposed redactions, for a ruling by the court.
- If a party wishes to file a document under seal that contains information other than the Specified Information, the party must first file a motion to seal the document with the court.

III. Principles Governing Other Disclosures

- The ACLU may disclose any information about this case other than the Specified Information.
- The ACLU agrees not to disclose Specified Information.

Beeson
Declaration
Exhibit 5



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 7, 2004

BY HAND

LETTER TO BE FILED UNDER SEAL

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, New York 10007

Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

Dear Judge Marrero:

The Government respectfully submits this letter in connection with the above-captioned action and in response to Plaintiffs' May 6, 2004 letter (the "May 6, 2004 Letter") to the Court. The Government regrets that the instant dispute has arisen, and believes that the Court's comments on Monday resolved many of these matters. We understood the Court to have directed the parties to work together to carve out categories of disclosures that the parties can agree, in advance, can be made publicly available in the first instance (such as briefing schedules, as described by the Court). We also understood the Court to have expressed the view that the Government cannot know, in advance, whether any particular disclosure in a document will violate 18 U.S.C. § 2709 or will raise national security concerns until we have seen the document. If a document containing objectionable disclosures is already filed publicly, it will be too late for the Government to object to its disclosure.

The Government has attempted to carve out certain categories of disclosures that would not be objectionable to the Government and has invited Plaintiffs to propose additional such categories. Despite our repeated requests, Plaintiffs have not provided the Government with any additional categories of disclosures that can be carved out, in advance, as not objectionable to the Government.

The Government respectfully submits that the enclosed proposal (as described in a proposed Order and in correspondence to the ACLU) should govern future disclosures in this case. Under our proposal, except for merits briefing, certain defined categories of disclosures can be filed publicly in the first instance. Those categories are: the briefing schedule (and any amendment thereto); the ACLU's facial constitutional challenge to

18 U.S.C. § 2709; pro hac vice motions; and any other ministerial, scheduling matters (such as requests to extend the page limits of briefing). Merits briefing and all other documents would be filed under seal, and there would be a procedure for having redacted copies placed on the public docket in the following manner. On the day of filing (under seal), the filing party will provide the opposing party with a proposed redacted version of the document for public filing. Within two business days, the opposing party will advise the filing party of those portions of the document that it agrees may be filed, in redacted form, on the public docket. Before filing the redacted document, the filing party shall provide the opposing party with a complete copy of the redacted document that is to be filed per agreement, so that the opposing party may verify its agreement to the public filing. Once verified, the filing party may file the redacted document on the public docket.¹ If any party wishes to dispute a particular redaction remaining in any document, that party may write to the Court to seek removal of the redaction, and the opposing party would have seven days to respond (or any further amount of time as ordered by the Court, depending on the party's ability to brief this separate matter at the same time that it is briefing the merits).

Plaintiffs' proposal for disclosures in this case -- which shifts to the Government the burden of identifying all possible categories of disclosures that should not be made publicly, and permits any other disclosure to be filed on the public docket right away -- ~~is unworkable for several reasons.~~

First, the Government simply cannot define, in advance, all possible types of disclosures that may be objectionable. Likewise, the Government would be unable to prevent inadvertent disclosures in documents filed publicly in the first instance. Indeed, there was an inadvertent disclosure of sensitive information by the ACLU while the parties were exchanging their

¹ This verification process is critical, as necessary redactions may inadvertently be omitted. When the parties discussed redactions to the documents that were submitted to the Court on May 5, 2004 along with a proposed Order placing them on the public docket, Plaintiffs initially proposed redactions and sent redacted versions of the documents to the Government. The Government then advised Plaintiffs of certain additional redactions that needed to be made, and asked to see a new version of the documents, with a complete set of redactions. The new version, however, inadvertently left off one set of redactions requested by the Government. In addition, the new version included two new documents that had not been reviewed by the Government for purposes of filing redacted versions on the public docket.

proposals for disclosure. The Government expressly asked the ACLU to redact from any document being faxed any information the disclosure of which is barred by 18 U.S.C. § 2709 (including references to any particular National Security Letter ("NSL") that may have been issued). The ACLU's letter, however, contained several references to the NSL that is being challenged in this case.

Second, under Plaintiffs' proposal and their definition of "specified information," Plaintiffs could disclose information that is barred by statute. Specifically, Plaintiffs' proposal would permit the parties to make references to a particular NSL that has been issued, so long as certain details about it are redacted. The statute, however, bars disclosure of the fact that the Federal Bureau of Investigation ("FBI") "has sought or obtained access to information or records under this section." 18 U.S.C. § 2709(c). Even putting aside that the statute requires non-disclosure of the fact that the FBI has issued a specific NSL and therefore any "as applied" challenge, the parties already agreed to the unsealing of a redacted complaint that was limited to a facial challenge to the statute by the ACLU.

Third, Plaintiffs' proposal and May 6, 2004 letter to the Court make clear the true rub of their newfound opposition to the sealing order that was jointly proposed by the parties: they believe that the non-disclosure provision in 18 U.S.C. § 2709(c) ~~is unconstitutional. See May 6, 2004 Letter at 2 ("Plaintiffs~~ believe that the gag provision violates the First Amendment because it prohibits speech without requiring the government to first show a compelling need for secrecy and to narrowly tailor the gag on a case-by-case basis."). Plaintiffs improperly put the cart before the horse, attempting to litigate the merits of one of the allegations in their complaint before the parties have even begun merits briefing. In the course of merits briefing, the Government will provide the Court with a full demonstration of why 18 U.S.C. § 2709(c) -- a statute that has been in force since 1986 -- is consistent with First Amendment strictures. In the meantime, the statute must be presumed constitutional and enforceable. Otherwise, Plaintiffs will have obtained, in effect, the relief they seek (i.e., striking down a statutory provision) without giving the Government an opportunity to demonstrate why Plaintiffs' First Amendment claim is meritless.

Plaintiffs also incorrectly assert that, under the Government's proposal, they are "required to clear with the government every discussion about the lawsuit, every response to public inquiries about the case, every press release or phone conversation with a reporter, every letter to ACLU members, and every discussion with members of Congress urging repeal of the statute." May 6, 2004 Letter at 2. As early as April 26, 2004,

the Government agreed that plaintiff ACLU could disclose "in any form" its facial challenge to 18 U.S.C. § 2709. Pursuant to Plaintiffs' request, the Government memorialized that agreement in writing. Thus, the ACLU is free, in any forum, to discuss and answer questions about its facial challenge to the statute, and any other categories of disclosure to which the parties are able to agree or the Court so orders.

Finally, the conflict between the parties may very well be illusory: Plaintiffs still have not identified any particular kind of substantive disclosure (other than merits briefing) that is left to be made in this case. Again, the Government's proposal would allow Plaintiffs to disclose information about their facial challenge to 18 U.S.C. § 2709.

Contrary to Plaintiffs' suggestion, there simply is no absolute right of public access to any and all documents related to judicial proceedings. See generally Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) ("In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. . . . It does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery."). Indeed, there are many types of proceedings that routinely proceed under seal initially or in their entirety (e.g., qui tam actions and grand jury proceedings). In this case, there is a compelling public interest in ensuring the integrity of [REDACTED]. ~~In addition, Plaintiffs' complaint includes~~ numerous allegations the disclosure of which is barred by statute. Given these two considerations, the Government respectfully submits that the proper and reasonable course is to define certain categories of disclosures that can be made available publicly in the first instance, and to require that all other disclosures be made under seal, with the above-outlined procedure for negotiating redacted versions that can be filed on the public docket and for resolving disputes as to particular redactions.

Thank you for your consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Meredith E. Kotler
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

Hon. Victor Marrero

Page -5-

Encls.

cc: Ann Beeson, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
JOHN DOE and AMERICAN CIVIL LIBERTIES :
UNION, :

Plaintiffs, :

- v. - :

JOHN ASHCROFT, in his official capacity as :
Attorney General of the United States; ROBERT :
MUELLER, in his official capacity as Director :
of the Federal Bureau of Investigation; and :
MARION BOWMAN, in his official capacity :
as Senior Counsel to the Federal Bureau of :
Investigation, :

Defendant. :
----- X

ORDER

04 Civ. 2614 (VM)

IT IS HEREBY ORDERED that the following principles and procedures shall govern future filings and disclosures in this action:

I. DOCUMENTS ALREADY FILED IN THIS ACTION

- A. If any party disputes a particular redaction in a document that has been filed on the public docket to date, that party may write to the Court to seek removal of the redaction. Such submission shall be filed under seal.
- B. The opposing party will have five business days, or such further time as the Court orders, to respond. Such response shall be filed under seal.

II. DOCUMENTS, OTHER THAN MERITS BRIEFING, THAT MAY BE FILED PUBLICLY

- A. All documents (other than merits briefing) whose content is limited to the following issues may be filed publicly:
 - 1. the briefing schedule for the underlying merits briefing and adjustments thereto
 - 2. plaintiff ACLU's facial constitutional challenge to 18 U.S.C. § 2709

3. other ministerial, scheduling matters (including requests to extend the page limitations for briefing)
 4. pro hac vice motions
- B. If a document contains information beyond the issues outlined in this section, the procedures outlined in Section III for merits briefing and all other documents must be followed.

III. MERITS BRIEFING AND ALL OTHER DOCUMENTS TO BE FILED

- A. Merits briefing and all other documents to be filed, beyond those described in Section II above, shall be filed under seal.
- B. On the date of filing, the filing party shall provide the opposing party with a proposed redacted version of the document to be filed on the public docket.
- C. Within two business days, the opposing party shall advise the filing party of those portions of the document that it agrees may be filed, in redacted form, on the public docket. Before filing the redacted document, the filing party shall provide the opposing party with a complete copy of the redacted document that is to be filed per agreement, so that the opposing party may verify its agreement to the public filing. Once verified, the filing party may file the redacted document on the public docket, in redacted form.
- D. ~~If any party disputes a particular redaction remaining in any document, that party may write to the Court to seek removal of the redaction. This submission shall be filed under seal.~~
- E. The opposing party will have seven business days, or such further time as the Court orders, to respond. Such response shall be filed under seal.

IT IS FURTHER ORDERED that this Order shall be filed on the public docket.

SO ORDERED:

VICTOR MARRERO
UNITED STATES DISTRICT JUDGE

Beeson
Declaration
Exhibit 6



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 12, 2004

BY HAND

LETTER TO BE FILED UNDER SEAL

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 314
New York, New York 10007

Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

Dear Judge Marrero:

The Government respectfully submits this letter in connection with the above-captioned action, and in response to Plaintiffs' request, at the end of their May 6, 2004 letter to the Court, that the Court unseal additional portions of documents that are available on the public docket in redacted form. Plaintiffs dispute particular redactions, outlined by them in pink marker, that have been made in six documents. The disputed redactions cover only a small fraction of the documents, and represent the Government's attempt to carefully balance (a) the public's right to access documents filed in this action, (b) the need to ensure that information is not disclosed in violation of 18 U.S.C. § 2709(c), which bars disclosure of the fact that the Federal Bureau of Investigation ("FBI") has sought information through a National Security Letter ("NSL") under 18 U.S.C. § 2709, and (c) the Government's need to ensure that certain sensitive information related to this case is not made public. We address each of the disputed redactions seriatim.

Redactions in the Government's April 26, 2004 Letter to the Court

The two areas of disputed redactions in this letter are the Government's statements that this case in particular raises national security concerns and that [REDACTED]

[REDACTED] The Government generally does not acknowledge, for public consumption, that any particular [REDACTED] or that any particular case raises national security concerns. The rationale for the Government's practice is obvious and compelling: confidentiality is necessary to protect the integrity of an

[REDACTED]

In addition, any reference to [REDACTED] or to particular national security concerns raised by this case effectively communicates that the Plaintiffs are challenging a particular NSL that was issued. In contrast, the redacted complaint is limited to a facial challenge to 18 U.S.C. § 2709; there is no reference to any particular NSL that was issued. A purely facial challenge to a statute does not raise national security concerns or implicate any particular [REDACTED]. Thus, if it is disclosed that the Government believes that this case in particular raises national security concerns or that there is [REDACTED] that will effectively disclose that an NSL was issued to one of the Plaintiffs.

The Government's April 26, 2004 letter to the Court included acknowledgments that this case raises national security concerns and that there is [REDACTED] related to it only because we believed that our letter would remain under seal. We would not have included such references if we understood that these portions of the letter would be unsealed. For these reasons, the disputed redactions should remain.

Redactions in the Government's April 29, 2004 Letter to the Court

The two areas of disputed redactions in this letter (one in the body of the letter, one in the press release attached to the letter) are the references to the FBI's ability to request the disclosure of [REDACTED] and [REDACTED] in NSLs. When Plaintiffs described that the FBI can request the disclosure of [REDACTED] and [REDACTED] in an NSL, they described information that they could only have learned from a particular NSL. Indeed, those two categories of information are found in the particular NSL that they challenge, and are mentioned in a portion of their complaint that is under seal. In contrast, the statute, 18 U.S.C. § 2709, nowhere delineates those two categories of information that can be and actually are requested by the FBI in NSLs. By disclosing information that can only have come from a particular NSL, Plaintiffs are in effect disclosing that the FBI has sought information under the statute, which is barred by 18 U.S.C. § 2709 (c).

Moreover, any disclosure that the FBI can and does request [REDACTED] and [REDACTED] in NSLs is a disclosure that reveals law enforcement techniques. The FBI has a strong interest in keeping its techniques -- including the particular kinds of information it requests -- confidential. Otherwise, targets of investigations can tailor their actions to

avoid detection by the FBI's inquiries.

As we previously advised Plaintiffs, if the [redacted] words [redacted] and [redacted] remain redacted from the April 29, 2004 letter and press release attachment, the Government does not object to the removal of the remainder of the redactions outlined in pink. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

Redactions in Plaintiffs' April 30, 2004 Letter to the Court

The two areas of disputed redactions in this letter again relate to references to the FBI's ability to request the disclosure of [redacted] and [redacted] in NSLs. As described above, if the [redacted] words [redacted] and [redacted] remain redacted, the Government does not object to the removal of the remainder of the redactions outlined in pink. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

Redactions in Memorandum in Support of Plaintiffs' Motion to Unseal Case and to File the Attached Redacted Documents on the Public Docket

The first disputed redaction in this document, found on its first page, involves a disclosure that is barred by 18 U.S.C. § 2709(c). By stating that their complaint includes allegations that might be construed to fall within the non-disclosure provision, and by thereafter repeating the text of the statute, Plaintiffs are effectively communicating that their complaint includes allegations that the FBI "has sought or obtained access to information or records under this section" -- *i.e.*, that their complaint includes an "as applied" challenge to a particular NSL. While Plaintiffs allege that 18 U.S.C. § 2709(c) is unconstitutional, that is a matter for merits briefing; the Government has not yet had an opportunity to demonstrate why the restriction in the statute is both proper and reasonable, and why Plaintiffs' First Amendment challenge is devoid of merit. While the Court decides the merits of Plaintiffs' constitutional challenge, the statute must be complied with, and Plaintiffs are barred from disclosing that the FBI has sought information through an NSL.

The second disputed redaction, found on page two of the memorandum, again relates to references to the FBI's ability to request the disclosure of [redacted] and [redacted] in NSLs. As described above, if the [redacted] words [redacted] and [redacted] remain redacted out of the other documents, the Government does not object to the

removal of this redaction.

Redactions in the Government's April 30, 2004 Letter to the Court

The first disputed redaction in the Government's April 30, 2004 letter to the Court, found in the second full paragraph on page two of the letter, covers the Government's acknowledgment that this case in particular raises national security concerns and that there is [REDACTED] to it. For the reasons set forth with respect to the disputed redactions in the Government's April 26, 2004 letter to the Court, these statements by the Government should remain confidential and non-public. Indeed, they were included in the letter with the understanding that they would remain sealed.

The second disputed redaction, found in the third full paragraph on page two of the letter, again relates to references to the FBI's ability to request the disclosure of [REDACTED] and [REDACTED] in NSLs. As described above, if the [REDACTED] words [REDACTED] and [REDACTED] remain redacted, the Government does not object to the removal of the remainder of the redactions outlined in pink in this paragraph. (The redactions outlined in green, however, would remain; those redactions are not disputed by Plaintiffs).

The last two sets of disputed redactions again cover the Government's acknowledgment that there is sensitive, national security related information that underlies this case in particular. The redactions cover information that, in effect, communicates that there is [REDACTED] related to this case. For the reasons set forth with respect to the disputed redactions in the Government's April 26, 2004 letter to the Court, these statements by the Government should remain confidential and non-public. Again, the statements were only included in the letter based on the understanding that they would remain sealed.

Redactions in Plaintiffs' Complaint

Plaintiffs' challenges to certain redactions in their complaint are most disturbing. The Government expended considerable effort and time in negotiating with Plaintiffs the lifting of the seal to allow a redacted complaint, limited to a facial challenge to 18 U.S.C. § 2709 by the ACLU, to be available on the public docket. In addition, Plaintiffs jointly proposed the order that lifted the seal only to the extent that the agreed-upon redacted complaint would be available. It is improper for Plaintiffs to now shift direction and re-litigate issues that had been settled. For this reason alone, Plaintiffs' newfound challenge to the redacted complaint should be rejected.

In any event, most of the disputed redactions are necessary under 18 U.S.C. § 2709(c), because the information redacted would otherwise disclose that the FBI has issued an NSL and sought information under the statute. The redactions were drawn along a line that is both reasonable and easy for all parties to follow: Plaintiff ACLU's facial challenge to 18 U.S.C. § 2709 is disclosed in its entirety, while Plaintiffs' "as applied" challenge to a particular NSL is redacted. Again, while Plaintiffs allege that 18 U.S.C. § 2709(c) is unconstitutional, merits briefing has not yet begun and the Government has not yet had an opportunity to demonstrate why Plaintiffs' arguments lack merit.

Turning to the specific disputes, the disputed redactions in paragraphs 2 and 3 of the complaint cover Plaintiffs' express references to the fact that the FBI has issued a particular NSL and that Plaintiffs challenge the particular NSL as well as the statute itself. Such disclosures are squarely barred by 18 U.S.C. § 2709(c). Likewise, the disputed redactions in paragraphs 5, 6, and 7 of the complaint cover express references to the fact that a particular NSL has been issued (or was signed).

The disputed redaction in paragraph 35 is critical to ensuring that the identity of the non-ACLU plaintiff is not disclosed. By describing that the plaintiff is both an Internet access and consulting business, persons -- including the target of the challenged NSL -- may, by process of elimination, be able to determine the plaintiff's identity. Likewise, the disputed redactions in paragraphs 36 and 38 cover information from which the identity of the non-ACLU plaintiff can be discerned, and thus are necessary to ensure the confidentiality of the non-ACLU Plaintiff's identity.

The disputed redactions in paragraphs 45 through 50 again cover Plaintiffs' express references to the fact that the FBI has issued a particular NSL; indeed, Plaintiffs' complaint quotes extensively from the challenged NSL. Thus, the redactions are necessary under 18 U.S.C. § 2709(c), to ensure that Plaintiffs do not disclose the fact that the FBI has sought information under the statute through an NSL. In addition, many of these paragraphs disclose the kinds of inquiries that the FBI makes in NSLs; this information should not be made public to ensure the confidentiality of law enforcement techniques.

The remainder of the disputed redactions in paragraphs 54 through 59 and 67 through 69 again cover Plaintiffs' express references to a particular NSL and thus the fact that the FBI has sought information under the statute. Again, such redactions are required in light of 18 U.S.C. § 2709(c).

Hon. Victor Marrero

Page - 6 -

In sum, the disputed redactions -- which comprise only a small fraction of the documents available on the public docket -- represent a careful and appropriate balancing of the various interests at issue in this case. We therefore respectfully request that the redactions remain, except as proposed above. Thank you for your consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Meredith E. Kotler
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

cc: Ann Beeson, Esq.

Beeson
Declaration
Exhibit 7



May 14, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

Re: *ACLU et ano. v. Ashcroft*, 04-CV-2614 (VM)

SEALED

Dear Judge Marrero,

Plaintiffs submit this letter in response to the government's letter of May 12, 2004, which presents the government's justifications for the disputed redactions in the six documents filed with the Court on May 6, 2004.¹ Rather than addressing the documents seriatim, plaintiffs will respond to the government's objections by category.

First, the government has proposed to redact all information that, in its view, might suggest that an NSL was actually served in this case.² Its arguments in support of these redactions, however, are unsupportable in light of the fact that the redacted complaint filed on the public docket makes clear

¹ Plaintiffs filed an amended complaint on Thursday, May 13, 2004. In a joint letter to the Court also submitted today, the parties note that their arguments supporting and opposing the disputed redactions in the original complaint also fully address the dispute regarding redactions in the amended complaint. Included with the joint letter was a highlighted version of the amended complaint, showing the disputed and undisputed redactions. The only difference between the two highlighted versions is that the original complaint inadvertently omitted to note the dispute over the use of the language "and consulting" in paragraph 35. The disputed language also appears in paragraph 5, and was addressed by the government in its May 12, 2004 letter.

² The government raises this objection with regard to disputed redactions in the government's letters from April 26th, April 29th and April 30th, and in the complaint.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LEGAL DEPARTMENT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
NADINE STROBSEN
PRESIDENT

THOMAS D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

that the ACLU represents an entity that has been served with an NSL. First of all, the redacted caption reveals that there is another plaintiff. Second, paragraphs 5 and 35 of the redacted complaint describe the anonymous plaintiff as "an Internet access [redacted] business." Third, paragraphs 36 - 40 and paragraph 42 generally describe the anonymous plaintiff's business. Finally, only attorneys for the ACLU are listed on the filings for the plaintiffs. Since all of the claims in the case relate to the NSL power, there is no doubt that the ACLU represents an Internet Service Provider that was served with an NSL.

Furthermore, the statute itself makes clear that the gag provision covers only those that have been served with NSLs, and their agents. If no NSL had been served in this case, the gag provision in Section 2709 would not be implicated at all. The mere fact that the ACLU and the anonymous plaintiff are gagged demonstrates that an NSL has been issued in this case and that there is an underlying terrorism investigation to which the NSL is presumably connected.

Because this information is so obvious, numerous news agencies correctly discerned and accurately reported that this case involves a plaintiff that was served with an NSL.³ The sealing order in this case, however, currently prevents plaintiffs from revealing precisely this information. In order

³ See, e.g., *Editorial*, Copley News Service, May 12, 2004 ("In the case in question, the FBI used the national security letter to demand that an Internet service provider turn over customer records, which can be highly personal."); *Secrecy Gone Amok*, The Commercial Appeal (Memphis, Tenn.), May 2, 2004 ("One of the secrets is the other plaintiff in the case, identified only as an 'Internet access business.' The FBI, through a National Security Letter, apparently was seeking from an Internet service provider a client's billing information, online purchases and E-mail addresses."); *ACLU Sues Ashcroft, FBI on Patriot Act Provision*, Communications Daily, April 30, 2004 ("Reading between the redacted lines, it looks like the ACLU's got the goods," said a spokesman for the Electronic Frontier Foundation."). See also Dan Eggen, *ACLU Was Forced to Revise Release on Patriot Act Suit*, Washington Post, at A27 (May 13, 2004) ("ACLU Lawyer Ann Beeson said the court order also means that she cannot 'confirm or deny' whether the ACLU is representing the second plaintiff. The group is the only counsel listed in court documents."); Julia Preston, *Judge Allows Peek into Challenge to Antiterrorism Law*, New York Times, at A18 (May 13, 2004) ("The suit is brought by the civil liberties group and another plaintiff described only as a recipient of an antiterrorism letter."). Copies of these articles have been included with this letter as Attachment A.

to comply with the sealing order in this case, plaintiffs have been extremely careful when speaking with the press or the public to say only that the ACLU can neither confirm nor deny that we represent an entity that was served with an NSL. It is both ineffective and unconstitutional to prohibit the ACLU from discussing information that is already in the public domain. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). The Court should remedy this situation by lifting the seal on this information.

Second, the government seeks to redact any reference to the fact that it believes this case is of a "sensitive nature" or that, in its view, this case raises questions of "national security."⁴ Just as it is patently obvious that an NSL has been served in this case, both the unredacted information in the complaint and the government's actions over the course of this litigation make clear that the government believes this case is "sensitive" and that it implicates "national security." Again, there is no justification for keeping these words from public view.

Third, the government objects to the ACLU's disclosure of the generic categories of information sought through the use of an NSL.⁵ Plaintiffs respectfully suggest that these objections are also without merit and should be rejected by the Court. The NSL itself provides no indication as to how the requested categories of information may be relevant to an underlying FBI investigation. In fact, the generic language in the NSL does not disclose sensitive law enforcement information any more than do the categories of information set forth in the statute itself. *See* 18 U.S.C. § 2709(b) (requiring disclosure of "the name, address, length of service, and toll billing records" of target). There is no reason why this information must be concealed from the public.

Fourth, the government objects to the disclosure of wholly innocuous language without specifying how it could conceivably implicate the gag provision or jeopardize national security. For example, the government consented to plaintiffs' description of the anonymous plaintiff as an "Internet

⁴ The government raises this objection with regard to disputed redactions in the government's letters from April 26th and April 30th, and in the complaint.


⁵ The government raises this objection with regard to disputed redactions in the government's letters from April 29th and April 30th, in plaintiffs' April 30th letter, in plaintiffs' motion to unseal the case, and in the complaint. Plaintiffs attached the actual NSL to its complaint, but have not sought to lift the seal with regard to this attachment.

access" business in the redacted complaint, but objects to the inclusion of the words "and consulting."⁶ Similarly, as discussed previously, the government has objected to the use of the terms "sensitive nature" or "national security."

Finally, none of the government's redactions can be justified by the government's mere mention of "national security" or an underlying investigation. The First Amendment clearly requires something more than these sweeping and unsupported assertions in order to justify any curtailment of the public's right of access to judicial documents. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (holding that before "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"). The government must articulate its national security concerns in a precise manner, and explain how each disputed redaction addresses those concerns. *See also United States v. United States District Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.").

For all of these reasons, Plaintiffs respectfully request that this Court adopt the redactions noted in green, which have been agreed upon by the parties, and reject the additional redactions sought by the government.

Respectfully,



Ann Beeson

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

⁶ The government raises this objection with regard to disputed redactions in the complaint.

Beeson
Declaration
Exhibit 8



May 14, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 14TH FL.
NEW YORK, NY 10004-2400
T/212.549.2601
F/212.549.2651
ABEESON@ACLU.ORG
WWW.ACLU.ORG

Re: *ACLU et ano. v. Ashcroft*, 04-CV-2614 (VM)

SEALED

Dear Judge Marrero,

Plaintiffs submit this letter in response to the government's letter of May 12, 2004, which presents the government's justifications for the disputed redactions in the six documents filed with the Court on May 6, 2004.¹ Rather than addressing the documents seriatim, plaintiffs will respond to the government's objections by category.

First, the government has proposed to redact all information that, in its view, might suggest that an NSL was actually served in this case.² Its arguments in support of these redactions, however, are unsupported in light of the fact that the redacted complaint filed on the public docket makes clear

¹ Plaintiffs filed an amended complaint on Thursday, May 13, 2004. In a joint letter to the Court also submitted today, the parties note that their arguments supporting and opposing the disputed redactions in the original complaint also fully address the dispute regarding redactions in the amended complaint. Included with the joint letter was a highlighted version of the amended complaint, showing the disputed and undisputed redactions. The only difference between the two highlighted versions is that the original complaint inadvertently omitted to note the dispute over the use of the language "and consulting" in paragraph 35. The disputed language also appears in paragraph 5, and was addressed by the government in its May 12, 2004 letter.

² The government raises this objection with regard to disputed redactions in the government's letters from April 26th, April 29th and April 30th, and in the complaint.

that the ACLU represents an entity that has been served with an NSL. First of all, the redacted caption reveals that there is another plaintiff. Second, paragraphs 5 and 35 of the redacted complaint describe the anonymous plaintiff as "an Internet access [redacted] business." Third, paragraphs 36 – 40 and paragraph 42 generally describe the anonymous plaintiff's business. Finally, only attorneys for the ACLU are listed on the filings for the plaintiffs. Since all of the claims in the case relate to the NSL power, there is no doubt that the ACLU represents an Internet Service Provider that was served with an NSL.

Furthermore, the statute itself makes clear that the gag provision covers only those that have been served with NSLs, and their agents. If no NSL had been served in this case, the gag provision in Section 2709 would not be implicated at all. The mere fact that the ACLU and the anonymous plaintiff are gagged demonstrates that an NSL has been issued in this case and that there is an

Because this information is so obvious, numerous news agencies correctly discerned and accurately reported that this case involves a plaintiff that was served with an NSL.³ The sealing order in this case, however, currently prevents plaintiffs from revealing precisely this information. In order

³ See, e.g., *Editorial*, Copley News Service, May 12, 2004 ("In the case in question, the FBI used the national security letter to demand that an Internet service provider turn over customer records, which can be highly personal."); *Secrecy Gone Amok*, The Commercial Appeal (Memphis, Tenn.), May 2, 2004 ("One of the secrets is the other plaintiff in the case, identified only as an "Internet access business." The FBI, through a National Security Letter, apparently was seeking from an Internet service provider a client's billing information, online purchases and E-mail addresses."); *ACLU Sues Ashcroft, FBI on Patriot Act Provision*, Communications Daily, April 30, 2004 ("Reading between the redacted lines, it looks like the ACLU's got the goods," said a spokesman for the Electronic Frontier Foundation."). See also Dan Eggen, *ACLU Was Forced to Revise Release on Patriot Act Suit*, Washington Post, at A27 (May 13, 2004) ("ACLU Lawyer Ann Beeson said the court order also means that she cannot 'confirm or deny' whether the ACLU is representing the second plaintiff. The group is the only counsel listed in court documents."); Julia Preston, *Judge Allows Peek into Challenge to Antiterrorism Law*, New York Times, at A18 (May 13, 2004) ("The suit is brought by the civil liberties group and another plaintiff described only as a recipient of an antiterrorism letter."). Copies of these articles have been included with this letter as Attachment A.

to comply with the sealing order in this case, plaintiffs have been extremely careful when speaking with the press or the public to say only that the ACLU can neither confirm nor deny that we represent an entity that was served with an NSL. It is both ineffective and unconstitutional to prohibit the ACLU from discussing information that is already in the public domain. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). The Court should remedy this situation by lifting the seal on this information.

Second, the government seeks to redact any reference to the fact that it believes this case is of a "sensitive nature" or that, in its view, this case raises questions of "national security."⁴ Just as it is patently obvious that an NSL has been served in this case, both the unredacted information in the complaint and the government's actions over the course of this litigation make clear that the government believes this case is "sensitive" and that it implicates "national security." Again, there is no justification for keeping these words from public view.

Third, the government objects to the ACLU's disclosure of the generic categories of information sought through the use of an NSL.⁵ Plaintiffs respectfully suggest that these objections are also without merit and should be rejected by the Court. The NSL itself provides no indication as to how the requested categories of information may be relevant to an underlying FBI investigation. In fact, the generic language in the NSL does not disclose sensitive law enforcement information any more than do the categories of information set forth in the statute itself. *See* 18 U.S.C. § 2709(b) (requiring disclosure of "the name, address, length of service, and toll billing records" of target). There is no reason why this information must be concealed from the public.

Fourth, the government objects to the disclosure of wholly innocuous language without specifying how it could conceivably implicate the gag provision or jeopardize national security. For example, the government consented to plaintiffs' description of the anonymous plaintiff as an "Internet

⁴ The government raises this objection with regard to disputed redactions in the government's letters from April 26th and April 30th, and in the complaint.

⁵ The government raises this objection with regard to disputed redactions in the government's letters from April 29th and April 30th, in plaintiffs' April 30th letter, in plaintiffs' motion to unseal the case, and in the complaint. Plaintiffs attached the actual NSL to its complaint, but have not sought to lift the seal with regard to this attachment.

access” business in the redacted complaint, but objects to the inclusion of the words “and consulting.”⁶ Similarly, as discussed previously, the government has objected to the use of the terms “sensitive nature” or “national security.”

Finally, none of the government’s redactions can be justified by the government’s mere mention of “national security” or an underlying investigation. The First Amendment clearly require something more than these sweeping and unsupported assertions in order to justify any curtailment of the public’s right of access to judicial documents. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (holding that before “the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest”). The government must articulate its national security concerns in a precise manner, and explain how each disputed redaction addresses those concerns. See also *United States v. United States District Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972) (“The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’ Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.”).

For all of these reasons, Plaintiffs respectfully request that this Court adopt the redactions noted in green, which have been agreed upon by the parties, and reject the additional redactions sought by the government.

Respectfully,



Ann Beeson

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007

⁶ The government raises this objection with regard to disputed redactions in the complaint.



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 14, 2004

BY HAND

LETTER TO BE FILED UNDER SEAL

Honorable Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 314
New York, New York 10007

Re: ACLU et ano. v. Ashcroft
04 Civ. 2614 (VM)

Dear Judge Marrero:

The Government respectfully submits this letter in connection with the above-captioned action, and in further support of the Government's May 12, 2004 letter addressing disputed redactions in various documents that have been filed in this case.

Plaintiffs' pink- and green-highlighted version of the redacted complaint did not reflect that the parties dispute an additional redaction in paragraph 5. Specifically, the redacted complaint redacts the words "and consulting" from paragraph 5, and we understand that Plaintiffs dispute that redaction. The same disputed redaction is found at paragraph 35 of the complaint (paragraph 36 of the amended complaint). Like the disputed redaction in paragraph 35, the disputed redaction in paragraph 5 is critical to ensuring that the identity of the non-ACLU plaintiff is not disclosed. By describing that the plaintiff is both an Internet access and consulting business, persons -- including the target of the challenged National Security Letter -- may, by process of elimination, be able to determine the plaintiff's identity. Accordingly, we respectfully request that the words "and consulting" remain redacted in paragraph 5 of the complaint.

In their May 14, 2004 letter to the Court opposing particular redactions, Plaintiffs oppose all requested redactions covering references to the fact that a National Security Letter ("NSL") was issued in this case. Putting aside the fact that such redactions are required by 18 U.S.C. § 2709(c), Plaintiffs engage in pure speculation in stating that "there is no doubt" that the

non-ACLU plaintiff is an Internet Service Provider ("ISP") that was served with an NSL. Letter at 2. The complaint was carefully redacted to ensure that there is no mention of service of any particular NSL on either plaintiff, or indeed of any particular NSL at all. The fact that the redacted complaint describes that the other plaintiff is an ISP in no way indicates that it received an NSL; the plaintiff could be an ISP who simply wishes to challenge the statute in advance of its application.

Plaintiffs' reference to various news articles, some of which report that the non-ACLU plaintiff is a service provider that received an NSL, is unavailing. First, the press' speculation is an entirely separate matter from what the Plaintiffs may disclose, which is governed by 18 U.S.C. § 2709(c). Indeed, the article from The Commercial Appeal merely speculates that an NSL "apparently" was issued. In any event, two of the articles, from The Washington Post and Communications Daily, nowhere state or suggest that the non-ACLU plaintiff actually received an NSL. While a fourth article, from The New York Times, reported that the non-ACLU plaintiff "is described only as a recipient of an antiterrorism letter" (emphasis added), it continued: "The A.C.L.U. said it was barred from providing any other information about the other plaintiff" (emphasis added). Given the context of the statement, and the fact that the redacted complaint nowhere describes that an NSL has been issued or that the non-ACLU plaintiff received an NSL, it appears that the report that the non-ACLU plaintiff is the recipient of an NSL was the result of either reporter error or inadvertent disclosure by Plaintiffs.

Thank you for your consideration of this submission.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Meredith E. Kotler
MEREDITH E. KOTLER
Assistant United States Attorney
Telephone: (212) 637-2724

cc: Ann Beeson, Esq.