


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

ALBERTO GONZALES, 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.

**THIRD DECLARATION OF  
ANN BEESON**

04 Civ. 2614 (VM)

**SEALED CASE**

**THIRD 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. As an agent of an entity that has been served with a National Security Letter ("NSL"), the ACLU is subject to a gag imposed by the FBI.
3. As discussed below, the FBI has interpreted the gag provision both arbitrarily and excessively broadly in this case. In many instances, the FBI interpreted the gag provision to require the suppression of innocuous information whose disclosure could not cause harm to national security or any other legitimate government interest. At times, the

FBI has used the gag provision to suppress speech not because it plausibly falls within the scope of the gag provision but because of its political message.

4. Plaintiffs' experience in this case underscores the importance of ensuring that the FBI's authority to suppress speech is subject to meaningful judicial oversight.

#### **Disclosures Prohibited Prior to this Court's September 2004 Ruling**

5. Defendants' overbroad interpretation of the gag provision prevented the public from learning about this action until several weeks after the action was filed. Plaintiffs originally filed this action on April 6, 2004. Plaintiffs filed the Complaint in this case under seal to avoid violating the gag provision then codified in 18 U.S.C. § 2709(c). However, plaintiffs immediately sought the government's permission to lift the seal, at least in part. Defendants initially refused this request, instead taking the position that any public disclosure about the case, including disclosure of the mere fact that the ACLU had challenged the constitutionality of the NSL statute, would violate the gag provision. Defendants reiterated this position at a status conference with the Court on April 23, 2004. It was not until April 26, 2004, almost three weeks after the commencement of the case, that defendants informed the Court that they had reevaluated their "position as to what information can be disclosed without jeopardizing the integrity of the underlying terrorism investigation." April 26, 2004 Letter from Meredith Kotler to Judge Marrero at 1. A redacted version of the complaint was not filed on the public docket until April 28, 2004.

6. After the filing of the redacted Complaint, this Court entered an order setting forth procedures by which documents in the case would be filed. *See Doe v. Ashcroft*, 317 F. Supp. 2d. 488 (S.D.N.Y. 2004). Those procedures allowed the government to

propose redactions to plaintiffs' papers before the papers were filed on the public docket and provided a mechanism through which disputes about redactions could be resolved.

7. 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 a redacted copy of the Amended Complaint on the public docket.

8. After the public filing of the Amended Complaint, the government's construction of the gag provision continued to be overbroad. In reliance on the gag provision, defendants required the redaction of any statement suggesting that the government originally took the position that the entire case had to remain under seal. *See, e.g.*, Exh. 1 (redacting "Defendants initially took the position that the gag provision prohibited *any* public disclosure related to this litigation" from Memorandum in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Pl. Summary Judgment Brief")); Exh. 2 (redacting "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" from Declaration of Ann Beeson).

9. In reliance on the gag provision, defendants also prohibited plaintiffs from disclosing the mere fact that at some unspecified time and place the FBI issued an NSL to some unspecified Internet Service Provider. *See, e.g.*, Exh. 3 (redacting the words "might suggest that an NSL was actually served in this case," the words "the ACLU represents an entity that has been served with an NSL," and the words "actual NSL" from May 14, 2004 Letter from Ann Beeson to Judge Marrero).

10. In reliance on the gag provision, defendants also required the redaction of any statement indicating that the FBI had issued an NSL and sought information under the statute. *See, e.g.*, Exh. 4 (redacting the words “the FBI’s use of” and “further use” of a federal statute from Pl. Summary Judgment Brief); Exh. 3 (redacting the words “sought through the use of an NSL” from Letter from May 14, 2004 Letter from Ann Beeson to Judge Marrero).

11. In reliance on the gag provision, defendants also required the redaction of any statement that “effectively communicate[d] that the plaintiffs [were] challenging a particular NSL that was issued.” Letter from Meredith Kotler to Judge Marrero dated May 12, 2004 at 2; *see also* Exh. 5 (redacting the words “NSL is invalid” from the Amended Complaint). Defendants also insisted on redacting any reference to the fact that this case presented an as-applied challenge to the NSL statute. *See, e.g.*, Exh. 6 (redacting three causes of action in their entirety from the Amended Complaint).

12. In reliance on the gag provision, defendants also required the redaction of statements suggesting that the government had invoked the gag provision. *See, e.g.*, Exh. 7 (redacting the words “relying on the gag provision,” the phrase “In the present case, the government invoked the gag provision,” and the phrase “It has also invoked the gag provision to prohibit” from Memorandum in Support of Plaintiffs’ Motion for Summary Judgment); Exh. 8 (redacting the words “lawyers employed by the ACLUF are subject to Section 2709’s gag provision” from the Amended Complaint).

13. In reliance on the gag provision, defendants also required the redaction of statements indicating the effect of the gag provision in this case. *See, e.g.*, Exh. 9 (redacting the phrase “as evidenced by the provision’s effect in this case,” the sentence

"That the gag provision is exceedingly broad is evident from the effect the provision has had in this case," and the sentence "The facts in the instant case illustrate the problem" from Pl. Summary Judgment Brief). Defendants even maintained that the words "due to the gag provision" had to remain under seal due to the gag provision. *See* Exh. 10 (redacting those words from the Declaration of Ann Beeson).

14. In reliance on the gag provision, defendants required the redaction of 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. *See, e.g.*, Exh. 11 (redacting the fact that [REDACTED] generally may possess "the client's name, address and telephone number; a log tracking visitors to the client's website; the client's customer list; the client's electronic communications; and the client's bank account and credit card numbers" from the Amended Complaint). On May 17, 2004, the Court ruled that this information could be disclosed to the public.

15. In reliance on the gag provision, defendants required redaction of even the most general descriptions of [REDACTED] services. For example, the government insisted on redacting the fact that [REDACTED] provided "space on the Web so that clients can post their own sites and store electronic files." Exh 11 (redacting those words from the Amended Complaint). The government also required redaction of the fact that [REDACTED] provided "clients with e-mail accounts," provided "the ability to access the Internet, and "assure[d] its clients that the security of their information is its first priority." *Id.* On May 17, 2004, the Court ruled that only the words [REDACTED]

could remain sealed, but that other words in the Complaint describing the services [REDACTED] provided to its clients could be disclosed to the public.

16. In reliance on the gag provision, defendants prohibited plaintiffs from publicly characterizing [REDACTED] as a “consulting” business. *See, e.g.* Exh. 11 (redacting the words “consulting business” from the Amended Complaint). On May 17, 2004, the Court ruled that this information could be disclosed to the public.

17. While defendants’ construction of the gag provision was exceedingly broad, their enforcement of the provision was arbitrary. For example, defendants did not seek redaction of certain statements in the first Declarations of Anthony D. Romero and [REDACTED] about the effects of the gag provision in this particular case. *See, e.g.*, Exh. 12 (not redacting the sentence “The gag is preventing us from communicating information that is relevant to the public debate about the Patriot Act” in a pre-ruling, publicly-filed version of the Declaration of Anthony D. Romero); Exh. 13 (not redacting the sentence “Because of the gag provision, I have not disclosed information about [REDACTED] this lawsuit to the press and the public” from a pre-ruling, publicly-filed version of the Declaration of [REDACTED]). Similarly, defendants did not seek the redaction of the words “the gag provision has prevented” from Plaintiffs’ Statement of Undisputed Facts. *See* Exh. 14 (not redacting the sentence “The gag provision has prevented the plaintiffs from disclosing information already available to the public” in a pre-ruling, publicly-filed version of the Statement of Undisputed Facts in Support of Plaintiffs’ Motion for Summary Judgment).

18. In reliance on the gag provision, defendants prohibited the publication even of innocuous information whose disclosure would not have jeopardized national security or

any other legitimate interest. For example, defendants prohibited plaintiffs from disclosing even non-sensitive aspects of the [REDACTED] NSL, requiring it be redacted in its entirety. *See, e.g.*, Exh. 15 (entirely redacted NSL from Exhibit 1 of Declaration of [REDACTED]). Defendants even required the redaction of statements indicating that the NSL was written on FBI letterhead. *See, e.g.*, Exh. 16 (redacting the words “written on FBI letterhead” from Plaintiffs’ Reply in Support of Plaintiffs’ Motion for Summary Judgment and Opposition to the Government’s Cross-Motion to Dismiss the Complaint or for Summary Judgment (hereinafter “Pl. Reply Brief”)).

19. In reliance on the gag provision, defendants required redaction of any reference to the fact that the government believes this case implicates national security must remain under seal due to the gag provision. *See, e.g.*, Exh. 3 (redacting the words “national security” six times and the words “jeopardize national security” from May 14, 2004 Letter from Ann Beeson to Judge Marrero).

20. In reliance on the gag provision, defendants required redaction of any reference to the “sensitive” nature of this case. *See, e.g.*, Exh. 3 (redacting references to the “sensitive nature” of the case and the word “sensitive” three times from May 14, 2004 Letter from Ann Beeson to Judge Marrero); Exh. 17 (redacting the word “sensitive” from the Declaration of Anthony D. Romero).

21. In reliance on the gag provision, defendants insisted on redacting general references to the fact that there was an underlying investigation, without reference to even the *type* of investigation at issue. *See, e.g.*, Exh. 3 (redacting the words “an underlying investigation” from May 14, 2004 Letter from Ann Beeson to Judge Marrero).

22. Similarly, in reliance on the gag provision, defendants sought the redaction of the following sentence: “If a member of Congress knew that an NSL recipient could be jailed for up to five years for merely confirming that an NSL had been served or for disclosing the general categories of information sought . . . .” See Exh. 17 (redacting this language from the Declaration of Anthony D. Romero). On June 9, 2004, the Court ruled that only the words “for merely confirming that an NSL had been served or for disclosing the” should remain under seal, and that the remaining words could be disclosed to the public.

23. In some cases, defendants used the gag provision to attempt to suppress speech not because it plausibly fell within the scope of the gag provision but because of its political message. For example, defendants sought to redact the following words in a letter brief from plaintiffs to the Court: “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.” Exh. 18 (redacting this language from May 14, 2004 Letter from Ann Beeson to Judge Marrero). The quote was taken from *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 314 (1972). Defendants changed their position regarding the redaction after plaintiffs disputed the redaction.

24. In reliance on the gag provision, defendants insisted on redacting the following sentence from one of Plaintiffs’ briefs: “The imposition of a broad and indefinite gag in this case is a classic example of an irresponsible invocation of national

security to justify unnecessary secrecy.” Exh. 19 (redacting sentence from Pl. Reply Brief).

25. In reliance on the gag provision, defendants prohibited disclosure of the following: “My experience as a recipient of an NSL has made me feel even more strongly that the public should be able to monitor how the government is using these new powers so that it can police against possible abuses.” Exh. 20 (redacting language from the Declaration of [REDACTED]).

26. In reliance on the gag provision, defendants required redaction of the words “plaintiffs have been extremely careful when speaking to with the press or the public to say only that the ACLU can neither confirm nor deny.” Exh. 3 (redacting language from May 14, 2004 Letter from Ann Beeson to Judge Marrero).

27. In reliance on the gag provision, defendants insisted on suppressing statements regarding [REDACTED] concern that the subject of the NSL has been impermissibly targeted [REDACTED]. See, e.g., Exh 21 (redacting a sentence expressing [REDACTED] concern that the government might be “investigating [his] client because of [REDACTED]” that his client [REDACTED]

[REDACTED] and that [REDACTED]

[REDACTED] from a pre-ruling, publicly-filed version of the Declaration of

[REDACTED]. Defendants continue to rely on the gag provision to suppress the majority of that information. See Exh. 22 (redacting most of that language in a *post*-ruling, publicly-filed version of the Declaration of [REDACTED]).

### **Information the Government's Interpretation of the Gag Continues to Suppress**

28. At a conference held on September 10, 2004, the Court discussed with the parties the need to disclose certain information that was under seal in order to render a coherent public opinion. The government later informed the Court and plaintiffs that it would not object to a modification of the sealing order, and that the Court could disclose the fact that an NSL had been served on an unnamed Internet Service Provider.

29. Accordingly, the Court's September 2004 opinion for the first time disclosed to the public that there was an anonymous plaintiff in this case who was an Internet Service Provider that received an NSL from the FBI, *see Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475, 478-79 (S.D.N.Y. 2004), as well as certain non-sensitive language contained in the NSL itself, *id.* at 478-79.

30. On January 25, 2005, this Court ordered that the parties could file new, less-redacted versions of documents on the public docket, to the extent that they reflected undisputed redactions. After extensive negotiations, the government agreed to file less-redacted versions of all of the documents on the public docket. Among the things they previously insisted on redacting but now agreed could be disclosed to the public were references to the fact that an NSL had been served, general information about how the NSL was served, that the gag provision had been invoked in this case, and that the case implicated "national security" or that it was "sensitive."

31. Nonetheless, in reliance on the gag provision, defendants continue to suppress, among other things, [REDACTED] and [REDACTED] identity as an NSL recipient, that [REDACTED] is subject to the gag provision, [REDACTED] gender, and the specific kinds of information the FBI demanded through the NSL.

32. In reliance on the gag provision, defendants continue to suppress the fact that the NSL seeks transactional records pertaining to a particular but unspecified [REDACTED] [REDACTED]. See, e.g., Exh. 23 (redacting the fact that NSL sought information [REDACTED] [REDACTED] from the Brief for Defendants-Appellants).

33. In reliance on the gag provision, defendants continue to suppress the fact that the NSL sought to [REDACTED] See, e.g., Exh. 24 (redacting the fact that the NSL demanded [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] [REDACTED] from post-ruling, publicly-filed version of Pl. Reply Brief).

34. The Court's September 2004 decision discussed, in a hypothetical manner, the many types of records the FBI could obtain through an NSL.

35. Nonetheless, defendants, in reliance on the gag provision, continue to require redaction of any reference to the specific types of information that the FBI can demand through an NSL or that the NSL itself described the categories and types of information sought. See, e.g. Exh. 25 (continuing to redact the [REDACTED] the NSL in its entirety from post-ruling, publicly-filed version of from Exhibit 1 of the Declaration of [REDACTED] [REDACTED] Exh. 26 (redacting the kind of information listed in NSL [REDACTED] from the Second Amended Complaint); Exh. 23 (redacting the words [REDACTED] [REDACTED] from the Brief for Defendants-Appellants); Exh. 27 (redacting that the NSL [REDACTED] [REDACTED]).

[REDACTED] from a post-ruling, publicly-filed version of the Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment (hereinafter "Govt. Opposition Brief").

36. However, the government has done so arbitrarily. For example, in a publicly-filed version of Plaintiffs' Brief to the Second Circuit, the government did not redact part of a sentence that noted that the [REDACTED] the NSL "lists, among other records to be produced by the communication provider [REDACTED]." Exh. 28 (failing to redact language in the Brief for Plaintiffs-Appellees in the Second Circuit that is almost identical to redacted language in the district court documents). Similarly, in that same brief, the government did not redact the following; "the [REDACTED] NSL includes, in addition to information about the particular subscriber whose records are sought, generic descriptions of the types of records that Doe is required to disclose." *Id.*

37. In reliance on the gag provision, defendants continue to suppress the fact that the NSL sought [REDACTED] including all [REDACTED] and [REDACTED]. See, e.g., Exh. 26 (redacting information sought from Second Amended Complaint); Exh. 29 (redacting the words [REDACTED] and [REDACTED] from Second Amended Complaint).

38. In reliance on the gag provision, defendants continue to require the redaction of any statement suggesting that there is an underlying [REDACTED] investigation, or that the investigation is generally [REDACTED]. See, e.g., Exh. 30 (redacting the words [REDACTED] from post-ruling, publicly-filed version of first Declaration of Ann Beeson); Exh. 31 (redacting the phrase [REDACTED]).

[REDACTED] from a post-ruling, publicly-filed version of the Govt. Opposition Brief).

39. In reliance on the gag provision, the government continues to suppress the fact that it [REDACTED] for the information sought through the NSL. Exh. 31 (redacting the phrase [REDACTED] from a post-ruling, publicly-filed version of the Govt. Opposition Brief).

40. In reliance on the gag provision, the government continues to require redaction of generic references to [REDACTED] despite that it will now allow disclosure of generic references to the “national security” implications or the “sensitive nature” of this case. *See, e.g.*, Exh. 32 (redacting the word [REDACTED] from post-ruling, publicly-filed version of August 25, 2004 Letter from Meredith Kotler to Judge Marrero).

In reliance on the gag provision, the government continues to require redaction of the fact that [REDACTED] advised [REDACTED] [REDACTED] *See, e.g.*, Exh. 33 (redacting those words from the Second Amended Complaint).

#### **The Government’s Use of the Gag in Another Challenge to the NSL Gag Provision**

41. I am also counsel in another case involving a challenge to the constitutionality of the NSL gag provision. *See Doe v. Gonzales*, 386 F.Supp.2d 66 (D.Conn. 2005).

That case involved an NSL the FBI served on Library Connection, Inc., a consortium of libraries in Connecticut.

42. The government’s excessive use of the gag in that case provides yet another example of the dangers inherent in permitting the government to suppress information in the name of national security without sufficient and meaningful judicial oversight. The

government used the gag to prevent disclosure of a wide-array of non-sensitive and innocuous information, used the gag inconsistently, and used the gag to suppress information that was already in the public domain.

43. For example, in reliance on the gag provision, the government continued to prevent plaintiffs from disclosing Library Connection's identity as an NSL recipient, even though Library Connection's identity was publicly disclosed in news articles. *See* Exh. 34 (Plaintiffs'-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal).

44. In reliance on the gag provision, the government continued to prevent plaintiffs from disclosing Library Connection's identity as an NSL recipient, even though Library Connection's identity was publicly disclosed on court websites. *See id.*

45. In reliance on the gag provision, the government continued to prevent plaintiffs from disclosing Library Connection's identity as an NSL recipient, even though the government itself had failed to redact Library Connection's identity in legal documents that had already resided on the public docket for weeks. *See, e.g., id.*; Exh. 35 (failing to redact references to Library Connection, Inc. and its representative in a publicly-filed version of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction).

46. When the government learned that it had failed to redact Library Connection's identity in various legal documents, it requested that those documents be removed from the public docket and replaced. The district court granted this request. However, when the government attempted to file new versions of the documents on the public docket, not only did the government correct its former mistakes, but it attempted to redact

information that had already been available to the public and that the government had not redacted in the first instance. *See* Exh. 36 (attempting to redact publicly-available information in the Declaration of George Christian); Exh. 37 (attempting to redact publicly-available information in the Declaration of Peter Chase). The district court rejected the government's attempt to redact formerly public information.

47. After Library Connection's identity became public, in reliance on the gag provision, the government required redaction of direct quotes from judicial opinions concerning the government's inability to suppress speech that were already in the public domain. *See, e.g.*, Exh. 34 (redacting quotes from judicial opinions, as well as pin cites and parentheticals, from Plaintiffs-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal).

48. After Library Connection's identity became public, the government insisted on suppressing statements in plaintiffs' briefs such as "the cat is out of the bag" or the "genie is out of the bottle." *See, e.g.*, Exh. 34.

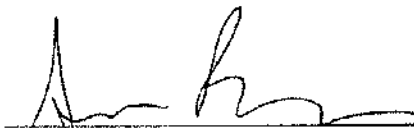
49. After Library Connection's identity became public, the government insisted on redacting an entire published *New York Times* article that correctly reported Library Connection's identity. *See* Exh. 38 (redacting a published *New York Times* article in its entirety).

50. After Library Connection's identity became public, the government insisted on redacting other news articles that reported on Library Connection's identity. *See* Exh. 39 (redacting published news articles in their entirety).

51. In reliance on the gag provision, the government also required redaction of a direct quote from a Connecticut statute requiring the confidentiality of library patron

information. *See, e.g.*, Exh. 40 (redacting the sentence: "The State of Connecticut General Statutes requires that 'personally identifiable information contained in the circulation records of all public libraries shall be confidential.' Conn. Gen Stat. Ann § 11-25 (2002)" from Plaintiffs' Complaint).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this 7 day, of Sept, 2006.

  
Ann Beeson