UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE ORDERS OF THIS COURT
INTERPRETING SECTION 215 **Docket No. Misc. 13-02**
OF THE PATRIOT ACT

OPINION AND ORDER DIRECTING DECLASSIFICATION OF REDACTED OPINION

For the reasons stated herein, the Court is directing the government to prepare and declassify a redacted version of the opinion issued by the Foreign Intelligence Surveillance Court (FISC) in Docket Number BR-25 on February 19, 2013.

I. Background

On June 12, 2013, the American Civil Liberties Union ("ACLU")[1] and the Media Freedom and Information Access Clinic ("MFIAC") jointly submitted a motion for public release of certain opinions of the Foreign Intelligence Surveillance Court ("FISC"). Specifically, the motion sought the release of FISC opinions interpreting Section 215 of the Patriot Act, 50 U.S.C. § 1861[2]—that is, the business records provision of the Foreign Intelligence Surveillance Act ("FISA"), codified as amended at 50 U.S.C. §§ 1801-1885c. The movants asserted that

[1] More precisely, two related entities – the ACLU and the American Civil Liberties Union of the Nation's Capital – joined with MFIAC in bringing the motion for release. For ease of reference, this opinion and order collectively refers to these related entities as "the ACLU."

[2] See Pub. L. No. 107-56, § 215, 115 Stat. 287 (2001), codified as amended at 50 U.S.C. § 1861.

withholding those opinions ("Section 215 Opinions") violates a right of public access under the First Amendment. See In re Orders of this Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064, at *1-2 (FISA Ct. Sep. 13, 2013) ("In re Section 215 Orders").

In an opinion and order issued on September 13, 2013, the Court found that the ACLU had standing to assert that claim under Article III of the United States Constitution, but that MFIAC, based on the information then before the Court, did not. Id. at *2-4. The Court accordingly dismissed the claim of MFIAC for lack of standing under Article III. Id. at *8. The Court rejected an argument advanced by the government that FISC Rule 62(a), regarding publication of opinions, precluded the Court from entertaining the motion for release. In re Section 215 Orders, 2013 WL 5460064, at *4-5. In view, however, of a suit previously filed under the Freedom of Information Act ("FOIA"), codified as amended at 5 U.S.C. § 552,[3] the Court concluded that the principles of comity embodied in the "first-to-file" rule required dismissal of the motion for release to the extent it sought release of the opinions at issue in the FOIA litigation. In re Section 215 Orders, 2013 WL 5460064, at *5-8.[4]

The Court noted that it could not ascertain whether all, or only some, of the Section 215 opinions sought to be released were subject to its order, because "the record [did] not specify

[3] ACLU v. FBI, No. 11 Civ. 7562 (S.D.N.Y. Oct. 26, 2011). For the sake of convenience, the Court will refer to it as "the FOIA litigation."

[4] The Court specified that such dismissal was "without prejudice to reinstatement of a motion for publication with the FISC after resolution of the FOIA litigation . . . and any appeal therefrom." In re Section 215 Orders, 2013 WL 5460064, at *7. The Court further stated that, in the event of such a reinstatement, "the FISC would presumably examine what, if any, preclusive effect the outcome of the FOIA litigation should be afforded." Id. at *7 n.19.

exactly what opinions are at issue in the FOIA litigation." In re Section 215 Orders, 2013 WL 5460064, at *7. On the assumption that some Section 215 opinions were not subject to the FOIA litigation and therefore still subject to the motion for release, the Court noted that

> movants and amici have presented several substantial reasons why the public interest might be served by their publication. The unauthorized disclosure in June 2013 of a Section 215 order, and government statements in response to that disclosure, have engendered considerable public interest and debate about Section 215. Publication of FISC opinions relating to this provision would contribute to an informed debate. Congressional amici[[5]] emphasize the value of public information and debate in representing their constituents and discharging their legislative responsibilities. Publication would also assure citizens of the integrity of this Court's proceedings.
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> In addition, publication with only limited redactions may now be feasible, given the extent of the government's recent public disclosures about how Section 215 is implemented. Indeed, the government advises that a declassification review process is already underway.

Id. at *7-8 (emphasis in original). Taking those considerations into account, and in the exercise of its discretion, the Court determined that it was "appropriate to take steps toward publication of any Section 215 Opinions that are not subject to the ongoing FOIA litigation, without reaching the merits of the asserted right of public access under the First Amendment." Id. at *8.

Accordingly, the Court ordered the government to identify "which Section 215 Opinions are subject to the FOIA litigation" and "which Section 215 Opinions, if any, are not subject to the FOIA litigation (or a separate [declassification or publication] order under Rule 62(a))." Id. For each Section 215 Opinion in the latter category, the Court directed the government to "propose a

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[5] Several members of the United States House of Representatives submitted an amicus curiae brief in support of the motion for release. See id. at *2 n.5.

timetable to complete a declassification review and submit to the Court its proposed redactions, if any." Id.

In response, the government identified a single opinion—the opinion issued by the FISC in Docket Number BR-25 on February 19, 2013 ("February 19, 2013 Opinion")—as neither subject to the FOIA litigation nor the FISC's Rule 62(a) process. Submission of the United States, filed on Oct. 4, 2013, at 2. The government simultaneously moved for a stay of further proceedings due to lapsed appropriations, which the Court granted. See Order issued on Oct. 8, 2013.[6]

After appropriations had been reinstated and a timetable for declassification review had been set, the government advised that, "[a]fter careful review of the [February 19, 2013] Opinion by senior intelligence officials and the U.S. Department of Justice, the Executive Branch has determined that the Opinion should be withheld in full and a public version of the Opinion cannot be provided." Second Submission of the United States, filed on Nov. 18, 2013, at 2. Noting that "the government has provided no explanation of this conclusion," the Court ordered the government to submit "a detailed explanation of its conclusion that the Opinion is classified in full and cannot be made public, even in a redacted form." Order issued on Nov. 20, 2013, at 2. "To the extent that this submission may contain classified information," the Court directed the government to conform the submission to FISC Rule 7(j), which provides: "Except as otherwise

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[6] On October 11, 2013, MFIAC filed a motion seeking reconsideration of its dismissal for lack of Article III standing. The Court has granted reconsideration and reinstated MFIAC as a party in an opinion and order issued simultaneously with this opinion and order.

ordered, if the government files ex parte a submission that contains classified information, the government must file and serve on the non-governmental party an unclassified or redacted version. The unclassified or redacted version, at a minimum, must clearly articulate the government's legal arguments." Id.

The government timely responded to this order on December 20, 2013. In an unclassified document that was served on the ACLU and MFIAC, the government stated that the reason it had advised "that the [February 19, 2013] Opinion should be withheld in full is that the Opinion is not only classified but also pertains to an ongoing law enforcement investigation, and therefore is protected by the law enforcement investigatory privilege." Submission of the United States, filed on Dec. 20, 2013, at 2-3. The investigation in question is an open and ongoing counterterrorism investigation conducted by the Federal Bureau of Investigation of a particular individual. Id. at 2-3. The government submitted that, because the February 19, 2013 Opinion includes "analysis of particular information relating to this subject and discusses in detail the activities of the subject and certain of the subject's associates, . . . [d]isclosure of information within the Opinion could tip off the subject and/or the subject's associates," thereby impairing the investigation." Id. at 2-3.

Nevertheless, the government advised that, "upon review and as a discretionary matter, the government has now determined that it does not object if this Court determines, pursuant to Rule 62(a), that those portions of the Opinion that are not classified and the release of which would not jeopardize the ongoing investigation should be published." Id. at 3. In an accompanying ex parte submission, the government included a copy of the February 19, 2013

Opinion indicating proposed redactions ("the First Redaction Proposal"), as well as a classified Declaration of Richard McNally, Acting Deputy General Counsel, FBI, explaining the bases for the government's determination that the text it proposed to redact contains classified information.

After reviewing these materials, the Court had questions about the scope of some redactions within the First Redaction Proposal and why, in some instances, more narrowly tailored redactions would not adequately protect the classified information at issue. At the direction of the undersigned judge, members of the Court's legal staff met with attorneys of the Department of Justice, National Security Division ("NSD"), on January 23, 2014, to convey those questions. The NSD attorneys stated that they would forward those questions to Executive Branch personnel responsible for the First Redaction Proposal and the underlying classification assessments.[7]

The government responded to those questions on February 6, 2014. See Second Submission of the United States, filed on Feb. 6, 2014. In a pleading that was served on the ACLU and MFIAC, the government advised that, "[i]n response to questions from the Court's staff, and upon further review of the [February 19, 2013] Opinion, the government has determined that certain additional information in the Opinion is not classified and the release of

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[7] The ACLU and MFIAC have requested that a transcript of this ex parte meeting be made available for appellate review and that "reasonably segregable portions . . . be placed on the Court's public docket." Movants' Response to the Second Submission of the United States ("Movants' Response"), filed on Feb. 19, 2014, at 2 n.2. They request the same treatment of any other ex parte oral communications. No recording of the January 23, 2014 meeting was made and therefore no transcript is available, and no other meeting took place. The Court staff reports that the NSD attorneys provided no information or argument at the January 23, 2014 meeting.

that additional information would not jeopardize the ongoing investigation." Id. at 3.[8] In an accompanying ex parte submission, the government provided a copy of the February 19, 2013 Opinion indicating a revised and more limited set of proposed redactions ("the Second Redaction Proposal").

II. Analysis

Under the Second Redaction Proposal, all of the text as to which the Court previously had raised questions would be released. For the reasons stated below, the Court has determined that the February 19, 2013 Opinion should be declassified and published in conformance with the Second Redaction Proposal.

As noted above, this Court ordered the government to perform a declassification review of the February 19, 2013 Opinion as a matter of discretion, without reaching the issue of whether there was a First Amendment right of access to that opinion. See In re Section 215 Orders, 2013 WL 5460064, at *8. On the premise that a qualified First Amendment right of access attaches to that opinion (a premise that is contested by the government, see United States' Opposition to the Motion of the ACLU, et al., for the Release of Court Records, filed on July 5, 2013, at 4-12), the movants contend that the government bears the burden of specifically showing that proposed

[8] The government also suggested that the name of an individual who works for the FISC in its Clerk's Office should be redacted. Id. at 3 n.1. That name does not appear in the opinion itself, but rather in an annotation on the government's copy of the opinion certifying that the copy is true and correct. None of the arguments advanced in support of public access to this Court's opinions encompasses this type of ancillary material or the identities of its clerical personnel. For that reason, and in accordance with the privacy and security interests of this individual, the Court agrees that this name should be redacted from the published form of the opinion.

redactions are justified by a compelling government interest and that they are narrowly tailored to protect that interest. See Motion for Release at 13; Reply Brief in Support of Motion for Release, filed on July 12, 2013, at 13-14.[9]

The movants have elaborated on their contention as to how that standard of review should apply to FISC opinions. They contend that they do not seek "disclosure of intelligence targets or . . . any properly classified information." Motion for Release at 16. They acknowledge that, upon a sufficient, particularized showing, the interest in protecting unrevealed intelligence sources and methods or other properly classified information can be "compelling" and can justify a narrowly tailored redaction. Reply Brief at 14. They argue that the Court should "evaluate whether a particular opinion discusses intelligence sources or methods that have not been previously disclosed, and whether targeted redactions could protect the government's interests while providing public access to the FISC's legal reasoning." Id. They contrast FISC opinions

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[9] Seven months after submitting their motion for release and reply brief, both of which discussed in detail their position regarding when a redacted release would be appropriate, the movants for the first time suggested that a "narrowly tailored" redaction may require providing "meaningful non-classified summaries of redacted material" or annotations of the "nature of the redactions, . . . e.g., '[redacted investigatory method].'" See Movants' Response at 6. The only authority movants cite for this proposition is the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1-16. The CIPA governs use of classified information in criminal prosecutions. See, e.g., § 2 ("pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution"); § 5 (requiring criminal defendant to give notice of intended use of classified information). By its terms, it has no application to this case. Absent any authority that such an approach is appropriate in the context of a claim of a First Amendment right of public access to judicial opinions, the Court sees no reason to require such summaries of redacted information. The bases for the Court's findings that there are compelling government interests in withholding portions of the February 19, 2013 Opinion and that the resulting redactions are narrowly tailored to protecting those interests are stated in this opinion.

with certain other court records, such as "search-warrant affidavits, grand-jury proceedings, and presentence reports," the disclosure of which "would necessarily expose ongoing investigations, confidential sources, or personal information . . . in contexts in which there was no way of protecting this material short of sealing the records" as a whole. Id. at 12. The movants anticipate that, for FISC opinions, "such information can and should be evaluated on a case-by-case basis and protected as appropriate" because, unlike the above-listed types of records, "the FISC's judicial opinions contain legal reasoning that, in many instances, can be segregated from sensitive information." Id.

Without deciding whether, in this case, a qualified right of public access under the First Amendment compels the standard of review sought by the movants, the Court has determined that the Second Redaction Proposal passes muster even under that standard of review.[10] The redacted material

(1) identifies an individual who is the subject of an ongoing counterterrorism investigation and discusses in detail activities of the subject;

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[10] There is substantial reason to doubt whether the Court, in a case in which it was necessary to reach the issue, would find that the public has a qualified right of access to FISC opinions under the First Amendment. In two prior cases, the FISC considered and rejected arguments that the First Amendment created a qualified right of public access to other sets of FISC records. See In re Motion for Release of Court Records, 526 F. Supp.2d 484, 485, 491-97 (FISA Ct. 2007) (seeking release of what the movant identified as "court orders and government pleadings regarding a program of surveillance of suspected international terrorists . . . that had previously been conducted without court authorization"); In re Proceedings Required by Section 702(i), 2008 WL 9487946, at *2-4 (FISA Ct. Aug. 27, 2008) (seeking inter alia "release of records (i.e., any legal briefs filed by the government and legal opinions issued by the [FISC])" in certain proceedings conducted under 50 U.S.C. § 1881a(i)).

(2) describes the records or other tangible things that the government sought to have produced in the related Section 215 application, including the identity of the producing party and how those records relate to the subject;

(3) identifies certain associates of the subject and describes certain relevant activities of those associates; and

(4) describes specific intelligence sources and methods, as well as particular information obtained through those sources and methods.

Upon review of the Second Redaction Proposal and the government's submissions, including the classified ex parte McNally Declaration, the Court finds that there are compelling government interests—specifically, the strong government interest in effectively pursuing an ongoing counterterrorism investigation and protecting undisclosed intelligence sources and methods—supporting the withholding of information in the February 19, 2013 Opinion.[11] The Court further finds that each proposed redaction within the text of that opinion is narrowly tailored to protect those compelling government interests. The Court examined the scope of each

[11] Movants argue that, in order for information to be withheld, there must be a substantial probability of harm that would follow from disclosure, and that the government has failed to demonstrate a substantial probability of harm. See Movants' Response at 5-6. In fact (although the movants through no fault of their own are not in a position to know this), the full record – including the government's ex parte submissions and the February 19, 2013 Opinion itself – readily show that publishing the detailed information protected in the Second Redaction Proposal would, in all probability, harm compelling government interests—for example, by alerting the subject and the subject's associates to the government's investigative interest and relevant intelligence sources and methods and causing them to take steps to evade and frustrate investigative efforts.

redaction in the First Redaction Proposal and called to the government's attention each portion of redacted text as to which the Court questioned the basis for, or scope of, the redaction. Without exception, the government responded by proposing to release those portions in the Second Redaction Proposal.

Finally, the Court notes that releasing the February 19, 2013 Opinion pursuant to the Second Redaction Proposal achieves the basic objective sought by the movants: disclosure of the Court's legal reasoning, to the extent that it can reasonably be segregated from properly classified facts. See Reply Brief at 12, 14.[12] There is an inherent risk that the end product of such an exercise "may confuse or obscure, rather than illuminate, the decision[ ] in question." In re Motion for Release of Court Records, 526 F. Supp.2d at 495. On balance, however, the Court is satisfied that publication of the February 19, 2013 Opinion in conformance with the Second Redaction Proposal would enhance, rather than detract from, public understanding of the Court's reasoning as to the legal issues presented.

* * *

[12] It is unnecessary to reach the issue whether the Court may order publication of information that the Executive Branch contends to be properly classified. See Reply Brief at 16-18. The Executive Branch is prepared to declassify all portions of the February 19, 2013 Opinion that the Court, pursuant to the foregoing analysis, has determined should be published. Similarly, because the Court's approval of the Second Redaction Proposal does not depend in any respect on the government's assertion of a law-enforcement privilege, the Court need not examine whether and how that privilege may apply to this case. See Movants' Response at 3-4 (arguing that there is no law-enforcement privilege for material subject to a qualified right of access under the First Amendment).

The process whereby the FISC, pursuant to FISC Rule 62(a), may designate an opinion for publication has been completed and the Presiding Judge has directed publication of the February 19, 2013 Opinion in a manner that conforms with the Second Redaction Proposal.

Accordingly, and for the reasons explained above, it is HEREBY ORDERED that:

(1) No later than August 29, 2014, the government shall prepare and submit to the Court a formally declassified copy of the February 19, 2013 Opinion that has been redacted in conformance with the Second Redaction Proposal.

(2) Upon verifying that the copy of the February 19, 2013 Opinion submitted in response to paragraph (1) above conforms with the Second Redaction Proposal, the Clerk of the Court shall promptly cause it to be published on the FISC's public website.

(3) Publication as described in paragraph (2) above shall constitute full and final disposition of this matter.

(4) The Motion for Interim Release of Portions of the Court's February 19, 2013 Opinion That the Government Concedes Are Not Classified, filed by the movants on July 25, 2014, is hereby denied as moot.

So ORDERED this 7th day of August, 2014, in Docket No. Misc. 13-02.

/s/ F. Dennis Saylor
F. DENNIS SAYLOR IV
Judge, United States Foreign
Intelligence Surveillance Court