[ORAL ARGUMENT SCHEDULED FOR MARCH 10, 2011]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE SEALED*EX PARTE* SUPPLEMENTAL APPENDIX OR, IN THE ALTERNATIVE, REQUEST THAT RESPONDENT FILE SEALED NON-*EX PARTE* SUPPLEMENTAL APPENDIX

1. On January 28, 2011, Respondent filed a motion seeking leave to file a sealed *ex parte* supplemental appendix in the case.

2. The agency seeks to make available to the Court, but not to Petitioners, in unredacted form Amended Certified Index of Records items 38, 49, 50, 51, 53, 54, 57, 61, 88, and 122.

3. The information that Respondents seek to withhold is designated by Respondents as "Sensitive Security Information (SSI)." 49 C.F.R. § 1520.3.

4. Respondents represent that all of these materials are Security Directives issued by TSA but has not indicated the specific designation within the C.F.R. for each item which establishes that the items are in fact SSI. 49 C.F.R. § 1520.5(b)(2)(i) (identifying four distinct categories for the issuance of Security Directives by the TSA).

5. The items that Respondents seek to withhold are not classified information.

6. Respondents also seek to withhold several "copyrighted" items. These are Amended Certified Index of Records items 1, 4, 46, and 67.

7. Regarding the material designated "SSI," Respondents have made no showing that such information is properly designated, nor have they provided an opportunity for Petitioners to contest this determination.

8. Regarding the "copyrighted materials," Respondents have presented no authority for the proposition that they may enter such information into the record and simultaneously withhold such information from Petitioners.

9. D.C. Cir. R. 47.1 presumes that both parties will have access to sealed materials and that "parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed." (a).

10. D.C. Cir. R. 47.1 further anticipates that matters will be filed under seal only "in the district court or before an agency . . . ." *Id.*

11. According to the rule, "each party" must be served with "2 copies of the public brief and 2 copies of the brief under seal, if the party is entitled to receive the material under seal." D.C. Cir. R. 47.1(d)(2).

12. Fed. R. Crim. P. 6(e), which is identified in Rule 47.1 as a basis for withholding materials from one of the parties, concerns the recording and disclosing of grand jury proceedings.

13. D.C. Cir. R. 47.1 does not provide a basis to file a sealed *ex parte* supplemental appendix in this matter.

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' motion for leave to file a sealed *ex parte* supplemental appendix containing items designated "SSI" and items designated "copyrighted." In the alternative, Petitioners respectfully ask the Court to order Respondents to file a sealed supplemental appendix that is available to both parties.

Respectfully submitted,

/s/ John Verdi

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Dated: February 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2011, I caused the foregoing PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE SEALED *EX PARTE* SUPPLEMENTAL APPENDIX OR, IN THE ALTERNATIVE, REQUEST THAT RESPONDENT FILE SEALED NON-*EX PARTE* SUPPLEMENTAL APPENDIX to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by first-class mail within two business days. On that same date, service will be made automatically upon the following CM/ECF participants identified below:

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