

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants.

11 Civ. 7562 (WHP)

ECF CASE

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
SUPPLEMENTAL MEMORANDUM OF LAW**

Plaintiffs respectfully submit this response to the government's Supplemental Memorandum of Law, dated October 24, 2014 (ECF No. 113).

The government's submission is an attempt to relitigate issues addressed extensively in the parties' prior briefing and letters—issues that, as the government acknowledges, the Court has already decided. *See* Gov't Supp. Mem. at 1. The filing abuses the opportunity the Court offered the government to review its segregability determinations, and the extension of time the Court granted for that purpose.¹ The government states that its submission was “[a]t the Court's invitation,” *id.*, but that is misleading. The Court's Order provided that “The Government is invited to make a further submission either reconsidering its determinations and proposing redactions or providing further support as to why these documents should be withheld in full.” Order at 17 (ECF No. 110). The government has not altered its position on the documents at issue nor has it proposed the release of additional information. Instead, it uses its unclassified

¹ Indeed, the government failed to mention the nature of its intended filing when it requested additional time, even though it was explaining to another court—the very same day—that it planned to dispute this Court's findings. *Compare* Gov't Letter dated Oct. 16, 2014, at 1 (ECF No. 111), *with* Gov't Letter dated Oct. 16, 2014, at 2, *ACLU v. DOJ*, No. 13-07347-GHW (S.D.N.Y.) (ECF No. 32).

filing to put before the Court an extended recapitulation of its previous arguments, spending fourteen pages (out of fifteen) disputing the Court's findings. *See* Gov't Supp. Mem. at 2–15.

The government's submission is made more problematic by the fact that, though ostensibly meant to show that the government has always acted with candor and good faith in this case, its filing instead doubles down on a series of overstatements and inaccuracies previously highlighted by both Plaintiffs and the Court. For example, the government says that it “consistently asserted” that the FISC Rules barred disclosure under FOIA, in both the federal district courts “and before the FISC itself.” Gov't Supp. Mem. at 13. But the record in those courts, including this one, is to the contrary. *See, e.g.*, Pls.' Letter dated July 22, 2014 (ECF No. 104). The government also says that it was forced to withhold FISC opinions in full, in order to conceal the NSA's role, because DOJ “would not *ordinarily*” have redacted its classification markings. Janosek Decl. ¶ 33 (ECF No. 97) (emphasis added). But that is a strategic overgeneralization—one that has never borne the weight the government places on it, and one that the court in *EFF v. DOJ* did not credit.² *See* Pls.' Reply at 7–8 (ECF No. 98). And finally, the government continues to minimize its failure to locate three FISC orders concerning bulk collection, after repeatedly assuring the Court that its “extraordinary and intensive multiagency” review had been comprehensive. *See* Pls.' Letter dated July 11, 2014 (ECF No. 102).

Because the government largely repeats its previous arguments, and because the Court did not invite that additional briefing, Plaintiffs urge the Court simply to disregard the government's filing. To the extent the Court chooses to address the arguments presented there at all, Plaintiffs respectfully request an opportunity to respond in kind.

² In fact, a recently released opinion suggests that DOJ does periodically redact classification markings in comparable circumstances. *See* Supp. Classified Op., *United States v. Daoud*, No. 14-1284 (7th Cir. July 14, 2014), <http://1.usa.gov/1wG2ORv> (applying redactions to classification markings).

Dated: October 29, 2014
New York, New York

Respectfully submitted,

/s/ Patrick Toomey

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