

UNITED STATES FOREIGN INTELLIGENCE
SURVEILLANCE COURT

2013 JUL 23 PM 1:05

IN RE MOTION FOR CONSENT TO DISCLOSURE)
OF COURT RECORDS OR, IN THE ALTERNATIVE,)
A DETERMINATION OF THE EFFECT OF THE)
COURT'S RULES ON STATUTORY ACCESS RIGHTS)
)

Docket No. MISC.

13-01A

**MOTION OF THE ELECTRONIC FRONTIER FOUNDATION
FOR CONSENT TO DISCLOSURE OF COURT RECORDS OR, IN
THE ALTERNATIVE, A DETERMINATION OF THE EFFECT OF
THE COURT'S RULES ON STATUTORY ACCESS RIGHTS**

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Introduction

Pursuant to Rule 6(d) of the Foreign Intelligence Surveillance Court's Rules of Procedure ("FISC Rules"), the Electronic Frontier Foundation ("EFF") respectfully moves this Court for entry of an order consenting to the disclosure of certain Court records, subject to appropriate security procedures or, in the alternative, a determination that the FISC Rules do not constitute a bar to disclosure of records otherwise subject to release under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. While EFF recognizes that such a request to this Court is unusual, EFF's need for the requested relief results from a position the U.S. Department of Justice ("DOJ") has advanced in pending FOIA litigation in the United States District Court for the District of Columbia. The circumstances giving rise to this motion are set forth below.

Background

In July 2012, EFF filed a FOIA request with DOJ requesting, among other records, any "written opinion or order" of this Court in which the Court held government surveillance conducted under the FISA Amendments Act, Pub. L. 110-261, 122 Stat. 2436 (2008), "was unreasonable under the Fourth Amendment" or had "circumvented the spirit of the law." Complaint ¶ 12 (Dkt. No. 1).¹ After DOJ failed to release the requested records within the statutorily-mandated timeframe, EFF filed suit in the United States District Court for the District of Columbia on August 30, 2012.

By letter dated January 3, 2013, DOJ initially informed EFF that it had located records, including a FISC opinion, responsive to EFF's request. Memorandum of Points

¹ In this motion, all citations to docket entries are to *EFF v. Dep't of Justice*, No. 12-1441-ABJ (D.D.C. filed Aug. 30, 2012).

and Authorities in Support of the Dep't of Justice's Motion for Summary Judgment ("DOJ Mem.") (Dkt. No. 11-1) (attached hereto as Exhibit 1) at 8-9. The agency indicated that the records were being withheld in full under Exemptions 1 and 3 of the FOIA. *Id.*

On April 1, 2013, DOJ moved for summary judgment in the district court. The agency again acknowledged that it was withholding a FISC opinion responsive to EFF's request – an 86-page opinion issued on October 3, 2011.² Declaration of Mark Bradley ("Bradley Decl."), ¶ 5 (Dkt. No. 11-3) (attached hereto as Exhibit 2). DOJ claimed in its motion that, independent of any exemption to FOIA, the FISC Rules bar the agency from disclosing any part of the responsive opinion in response to a FOIA request. *See* DOJ Mem. at 11-15. Specifically, DOJ asserted that

FISC opinions and orders are subject to strict security procedures set forth in the FISC Rules of Procedure. *See* 50 U.S.C. § 1803(c) (providing that "record[s] of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence"). Notwithstanding that, by statute, the Attorney General as part of his reporting obligations to Congress is authorized to provide copies of FISC opinions to Congress, (see 50 U.S.C. § 1871(c)(1)), the FISC Rules of Procedure require that the government "contemporaneously notify the Court in writing whenever it provides copies of Court records to Congress and must include in the notice a list of the documents provided." FISC R. P. 62(c)(1). Otherwise, *the FISC Rules of Procedure do not authorize the release of court opinions by the Department. See* FISC R. P. 62. Rather, *opinions may be released publicly only if ordered published sua sponte by the authoring judge or upon motion by a party requesting publication[.]*

Id. at 14 (citations omitted; emphasis added). DOJ flatly asserted that "[p]ursuant to the FISC Rules of Procedure, the Department is prohibited from disclosing [the requested

² A second, redacted version of the FISC Opinion, which was produced for Congress, was also determined to be responsive to EFF's request.

material] publicly,” and that “the Department has no discretion over the release of FISC orders and accordingly is not ‘improperly’ withholding [them].” *Id.* at 15 (citations and footnote omitted). The agency’s declarant stated unequivocally that “FISC rules do not permit the Government to release FISC opinions to a FOIA requester or any other member of the public without a FISC order.” Bradley Decl. ¶ 8, n.2.

On April 24, 2013, EFF filed a motion in the district court to stay proceedings in the pending FOIA matter on the ground that such a stay was warranted “to definitively resolve the interplay between the FISC’s procedural rules, FOIA, and the release of the FISC opinions at issue in [the district court] case,” Plaintiff’s Unopposed Motion to Stay Proceedings (Dkt. No. 12) at 1-2, and noted that “[t]he FISC is uniquely able to opine on the application of its own rules, and should clearly be afforded an opportunity to do so before this [the district court] proceeds,” *id.* at 3. DOJ indicated that it did not oppose EFF’s motion, and the district court granted the motion in a minute order issued later that day.

Argument

1. The Court has jurisdiction to entertain this motion. On one previous occasion, this Court was called upon to consider its authority to render a determination concerning the potential disclosure of its orders and opinions. In 2007, the American Civil Liberties Union (“ACLU”) filed a motion with the Court seeking release of certain FISC records, including orders issued by the Court. *In re Release of Court Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007). The government opposed the ACLU’s motion, asserting, *inter alia*, that “the Court lacks jurisdiction over the motion.” *Id.* at 485. The Court disagreed, noting that “it would be quite odd if the FISC did not have jurisdiction

in the first instance to adjudicate a claim of right to the court's very own records and files." *Id.* at 487 (footnote omitted). The Court held that "the FISC rules do not preclude the filing of [the] motion by the ACLU," and that "[f]urthermore, this Court's inherent power over its records supplies the authority to consider a claim of legal right to release of those records" *Id.*

2. The FISC Rules do not bar disclosure under FOIA. Contrary to DOJ's assertion in the district court, the FISC Rules, in and of themselves, in no way prohibit disclosure of the records EFF seeks through its FOIA request. As an initial matter, the circumstances present here are clearly distinguishable from those the Court confronted when it considered the ACLU's motion in 2007. The ACLU asserted that "under the First Amendment and the common law, the public has a qualified right of access to the records in question," and sought entry of an order releasing the material on those grounds. *In re Release of Court Records*, 526 F. Supp. at 485. The Court rejected that argument for reasons not pertinent here, but noted that, "[o]f course, nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *Id.* at 497. While the Court acknowledged the option of "making its own release decisions about classified documents . . . [by] conduct[ing] a review under the same standards as a district court would in FOIA litigation," it concluded "there would be no point in this Court's merely duplicating the judicial review that the ACLU, and anyone else, can obtain by

submitting a FOIA request to the Department of Justice for these same records.” *Id.* at 496 n.32.³

Here, EFF simply seeks to pursue its statutory right of access under FOIA in the manner this Court previously described. Rather than ask the Court to “mak[e] its own release decisions about classified documents,” EFF requested access to copies of the Court’s opinions in the possession of the Executive Branch. In response, DOJ has represented to the district court that “[p]ursuant to the FISC Rules of Procedure, the Department is prohibited from disclosing [the requested material] publicly,” and that “the Department has no discretion over the release of FISC orders and accordingly is not ‘improperly’ withholding [them].” Def. Mem. at 15 (citations and footnote omitted).

DOJ specifically cites FISC Rule 62(a), which provides:

Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other

³ In its opposition to the ACLU’s motion, the government agreed that FOIA provided the appropriate vehicle through which to seek disclosure of this Court’s records:

Under FOIA, the ACLU cannot ask this Court for its orders because FOIA applies only to Executive Branch agency records. The ACLU can use FOIA, however, to seek access to FISC orders and Government briefs in the Executive Branch’s possession. The FOIA process, which combines an initial review and decision by the Executive Branch on the release and withholding of information with Judicial Branch review in an adversary and public proceeding, is the proper means for the ACLU to seek records of this Court’s proceedings from the Executive Branch. Moreover, FOIA’s judicial remedies must be sought only in district court, not in this Court. Instead of following the FOIA process that Congress carefully laid out, the ACLU has improperly attempted an end run around FOIA by filing this motion.

Opposition to the American Civil Liberties Union’s Motion for Release of Court Records, *In re Motion for Release of Court Records* (Foreign Intel. Surv. Ct. Misc. 07-01), at 5 (citation omitted).

decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

EFF respectfully submits that while FISC Rule 62(a) provides one means of seeking disclosure of FISC records, it in no way purports to be the *exclusive* means of doing so. Indeed, this Court has explicitly recognized that “anyone” can obtain judicial review of a government decision to withhold copies of this Court’s records “by submitting a FOIA request to the Department of Justice for these same records.” *In re Release of Court Records*, 526 F. Supp. at 496 n.32.

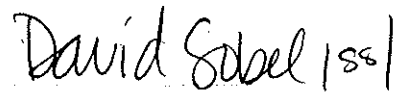
When the ACLU sought an order from this Court seeking the release of FISC records, the government complained that the request amounted to an attempted “end run around FOIA.” Now, in the face of EFF’s effort to seek disclosure of FISC material in the government’s possession under FOIA (following this Court’s explicit guidance), DOJ asserts that this Court’s rules somehow bar release and, in effect, divest the district court of its jurisdiction to consider the matter. EFF submits that the government cannot have it both ways. The argument DOJ seeks to advance in the district court would, if accepted, impose a “Catch-22” preventing *any* judicial review of access rights to this Court’s materials. To avoid that result, EFF respectfully requests entry of an order in which this Court notes its consent (or lack of opposition) to the disclosure of the material EFF seeks should such material be found to be non-exempt under the provisions of FOIA, subject to any security procedures the Court deems appropriate. In the alternative, EFF requests a determination that the FISC rules do not prohibit disclosure of the requested material in a

manner that would supersede a judicial determination that such material is subject to disclosure under FOIA.

Conclusion

For the foregoing reasons, EFF's motion should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing motion have been served on the following counsel this 21st day of May, 2013, in the manner indicated:


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