



U.S. Department of Justice

*United States Attorney
Southern District of New York*

The Silvio J. Mollo Building

*One Saint Andrew's Plaza
New York, New York 10007*

December 18, 2006

BY HAND DELIVERY

The Honorable Jed S. Rakoff
United States District Court
Southern District of New York
500 Pearl Street
Room 1340
New York, New York 10007

In Re: Motion To Quash A Grand Jury Subpoena To The ACLU

Dear Judge Rakoff:

The Government respectfully submits this letter in connection with the above-referenced matter involving a grand jury subpoena that was served upon ACLU counsel Joshua Dratel, Esq., on November 20, 2006 (the "subpoena"). From the inception of its dealings with the ACLU, as explained in more detail below, the Government has attempted to pursue its investigation and its request for the document at issue in as amicable, cooperative, and unobtrusive a manner as possible. In fact, the Government issued the subpoena based on both the investigatory needs of its ongoing grand jury investigation and what it believed to be the ACLU's representation, through counsel, that the ACLU was requesting a subpoena in lieu of voluntary cooperation with the Government concerning the return of what was, at that time, a classified document. Consistent with this cooperative approach, we hereby withdraw the subpoena in light of changed circumstances, and because we believe that the grand jury can obtain the evidence necessary to its investigation from other independent sources.

We do not seek to file this letter under seal pursuant to Federal Rule of Criminal Procedure 6(e) or otherwise, because, in view of the Court's prior ruling in this matter and the nature of this response, we do not believe it discloses matters occurring before the grand jury. Similarly, the Government does not object to the Court's unsealing of the December 11, 2006 transcript and the December 12, 2006 letter briefs of the parties.

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As the Court is aware, the United States Attorney's Office for the Southern District of New York and a grand jury in this District have been conducting a criminal investigation concerning the improper dissemination of classified and sensitive documents from a Government agency. From the outset of this inquiry, the Government sought confirmation from the classifying agency that the disseminated documents in fact contained classified information. Our confirmation process for the voluminous documents at issue in the grand jury investigation started several weeks ago, and continues to the present. The specific document that is the subject of the subpoena was one of the documents undergoing classification review by the classifying agency.

On November 20, 2006, upon learning that the ACLU likely had unauthorized possession of at least one of the documents related to the investigation -- which document was stamped "secret" and therefore on its face appeared to be classified, and about which the classifying authority had not yet provided updated information -- the Assistant United States Attorney in charge of this case contacted a lawyer at the ACLU. The AUSA explained to the lawyer, Terrence Dougherty, Esq., in sum and substance, that the Government believed the ACLU was in possession of classified material, identified for the ACLU lawyer the date transmission was believed to have occurred in order to assist the ACLU in identifying and locating the document, and requested that the ACLU return to the Government all copies of the document in its possession. At the time of this conversation, the AUSA had no way to confirm whether the ACLU indeed had the document in its possession, and, if so, whether numerous copies of the document had been made. Both of these considerations were relevant to the ongoing criminal grand jury investigation. Mr. Dougherty asked the AUSA whether it was the Government's view that the ACLU's possession of the document was illegal; the AUSA responded that the ACLU's possession of the document may be illegal. When Mr. Dougherty then asked for a citation to the statute under which the AUSA believed the ACLU's possession of the document may be illegal, he was referred to 18 U.S.C. §§ 793 and 798. Mr. Dougherty indicated that he would look into the matter and that someone would be back in touch with the AUSA.

After the conversation between Mr. Dougherty and the AUSA, the AUSA received a call from Mr. Dratel, who indicated that he was representing the ACLU in connection with this matter.

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The AUSA again explained, in sum and substance, that it was the Government's belief that the ACLU was in possession of a classified document, and that the Government requested the return of the ACLU's copies of that document. In response to an inquiry from Mr. Dratel, the AUSA informed Mr. Dratel that the ACLU was not a target of the grand jury investigation. Mr. Dratel responded that "this is the ACLU," and explained that because the ACLU is essentially in the business of litigating with the Government, it could not just comply voluntarily with the Government's request for the document, but would need some sort of "process" in order to do so. When the AUSA asked what kind of process Mr. Dratel had in mind and whether a subpoena would suffice, Mr. Dratel responded that a subpoena would be "fine" and said that the AUSA should send him a subpoena by facsimile. At the time of this conversation, while it appeared that the ACLU was indeed in possession of the document at issue, whether and to what extent the document had been copied and who may have received copies of the document were still relevant inquiries of the grand jury investigation. The subpoena was then served on Mr. Dratel on behalf of the ACLU.

A few days after the subpoena was issued, the AUSA and Mr. Dratel spoke on the telephone. The AUSA learned for the first time that the ACLU was contemplating challenging the subpoena. According to Mr. Dratel, there were differing views within the ACLU as to what it should do about the Government's subpoena. At Mr. Dratel's request, the AUSA agreed to extend the return date by one week so that the ACLU could continue its consultations with him. The AUSA also asked Mr. Dratel to contact her in advance of any filing the ACLU might make, so that the ACLU could voice any objections it might have, and the Government could consider them before involving the Court. As Your Honor knows, this type of pre-filing discussion is commonplace in this District, and elsewhere.

On Friday, December 8, 2006, at approximately 5:30 p.m., the AUSA received a voicemail message from Mr. Dratel, in which he informed her that the ACLU would be moving to quash the subpoena the following Monday. After multiple attempts over the weekend to reach Mr. Dratel by cellular telephone, the AUSA was able to reach Mr. Dratel on Sunday. During that conversation, the AUSA asked Mr. Dratel for the bases of the motion, explaining that depending on the grounds, the matter might be something the parties could negotiate without litigation, which always remained the Government's strong preference. The AUSA also asked whether the ACLU would be willing to postpone its motion for one day (and

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offered to extend the return date of the subpoena by one day as well), so that the parties would have an opportunity during a business day to try to work through whatever issues the ACLU had with respect to the document. Mr. Dratel provided a brief explanation of the bases of the motion, and declined the invitation to resolve the matter without a motion to quash. After making inquiry of his client, Mr. Dratel also declined to wait one additional day to file the papers so that the parties could attempt to negotiate a solution. At 9:01 a.m. on Monday morning, the ACLU filed its motion to quash and immediately sought to file its papers publicly.

As indicated above, throughout this investigation, the Government has been in contact with the classifying agency to determine the continued viability of the classification of the document at issue in the subpoena, as well as other documents. On Friday, December 15, the classifying agency determined that the document sought by the subpoena was properly declassified. The Government received confirmation of that declassification on Friday afternoon.

In sum, the Government issued the subpoena based on the needs of its ongoing grand jury investigation and what it believed to be the ACLU's request for a subpoena in lieu of voluntarily returning the then-classified document. The document is now declassified and there exist alternate sources for the evidence necessary to the grand jury investigation. Accordingly, the Government withdraws the subpoena at issue in this matter. For the reasons set forth above, the Government respectfully requests that the Court deny the ACLU's motion to quash as moot,

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or alternatively order that it be withdrawn. In addition, as noted above, we request that this letter be filed as part of the unsealed Court record in this matter.

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney

By:

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Assistant U.S. Attorney
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cc: Joshua Dratel, Esq.

SO ORDERED:

The Honorable Jed S. Rakoff
United States District Judge
Part I