

LEANN FLYNN HALL
CLERK OF COURT

WASHINGTON, D.C.

Docket No.: Misc. 13-02

On October 4, 2013, the Government filed a submission in response to the Court’s September 13, 2013 Opinion and Order, and moved for a stay of further proceedings due to lapsed appropriations. The Government identified, *inter alia*, the Opinion issued in Docket Number BR 13-25 on February 19, 2013, as one that contains “analysis by this Court evaluating the meaning, scope, and/or constitutionality” of Section 215 of the USA PATRIOT Act,

50 U.S.C. § 1861, and that is not at issue in the FOIA litigation in the Southern District of New York. Submission at 2.

On October 8, 2013, the Court granted the Government's motion for a stay of further proceedings. The Court also directed the Government to submit to the Court, within seven days of the restoration of appropriations, a proposed timetable for completing the declassification review of the Opinion issued in Docket Number BR 13-25 on February 19, 2013, and submitting to the Court any proposed redactions for the Opinion. On October 24, 2013, the Government estimated that it would complete the declassification review of the Opinion and submit to the Court any proposed redactions by November 18, 2013.

On November 18, 2013, the Government filed a submission stating that "the Executive Branch ha[d] 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 in Response to the Court's October 8, 2013 Order at 2. On November 20, 2013, this Court ordered that, no later than December 20, 2013, the Government should submit a detailed explanation of its determination that a public version could not be provided. Order at 2.

The reason the Government advised the Court that the 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. Specifically, the Opinion relates to an application for records relevant to an ongoing investigation of a particular individual who is the subject of a Federal Bureau of Investigation counterterrorism investigation. The Opinion includes this Court's analysis of particular information relating to this subject and discusses in detail the activities of the subject and certain

of the subject's associates. The investigation of this individual remains open. Disclosure of information within the Opinion could tip off the subject and/or the subject's associates, which would impair the ongoing counterterrorism investigation in various ways.

For these reasons, the Opinion falls within the law enforcement investigatory privilege, which protects law enforcement information from disclosure where "disclosure of the information would jeopardize on-going investigations by prematurely revealing facts and investigatory materials to potential subjects of those investigations." *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988); *see also In re Dep't of Investigation of City of New York*, 856 F.2d 481, 483-84 (2d Cir. 1988). Such information would also be protected from disclosure under the Freedom of Information Act, which codified the privilege. *See* 5 U.S.C. § 552(b)(7)(A); *see also Juarez v. Department of Justice*, 518 F.3d 54, 58 (D.C. Cir. 2008) (FOIA Exemption 7(A) protects from mandatory disclosure law enforcement records, the disclosure of which "could reasonably be expected to interfere with enforcement proceedings") (quoting 5 U.S.C. § 552(b)(7)(A)). Significantly, the law enforcement investigatory privilege is applied categorically to documents and classes of documents and generally does not require the Government to show that disclosure of each paragraph of the document would cause harm to the investigation. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *Maydak v. United States Dep't of Justice*, 218 F.3d 760, 763 (D.C. Cir. 2000).

However, 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. In that regard, the Government has identified for this Court in the attached declaration and proposed redacted opinion those portions of the Opinion

that are classified and/or the release of which would harm the ongoing investigation. *See* Declaration of Richard McNally, Acting Deputy General Counsel, Federal Bureau of Investigation. Any publication of the Opinion by this Court should not include these portions. *See* FISC Rules of Procedure 3, 62.¹

All of the text that the Government has determined should not be released in the Opinion is contained in text boxes. Should the Court elect, pursuant to Rule 62(a), to publish the Opinion, the Director of National Intelligence will formally declassify the proposed redacted version of the Opinion provided to the Court. The Government will then provide the Court with a redacted version of the Opinion, appropriate for publication, blacking out the information currently contained in the text boxes and striking through any classification markings that are no longer valid.

¹ In addition, the Government has identified the names of certain government employees and non-government individuals that should be redacted if the Opinion is published.

December 20, 2013

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/s/ Nicholas J. Patterson

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Submission of the United States in Response to the Court's November 20, 2013 Order was served by the Government via Federal Express overnight delivery on this 20th day of December, 2013, addressed to:

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