U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 6, 2014

BY ECF
Hon. Edgardo Ramos
United States District Judge
United States District Court
500 Pearl Street
New York, New York 10007

Re: ***Restis et al. v. American Coalition Against Nuclear Iran, et al.*,**
No. 13 Civ. 5032 (ER) (KNF)

Dear Judge Ramos:

This Office represents the United States of America (the "Government"). I write in response to Your Honor's order to respond to plaintiffs' letter dated April 14, 2014 (the "April 14 letter"), "with analysis supporting [the Government's] request for an *ex parte* submission." Dkt. item 119.

The Government notes as an initial matter that it has not yet determined whether it will be asserting privilege in this case, and thus has not yet formally sought to make any *ex parte* submission. Rather, it has sought, and the Court has granted, a stay of the proceedings in order to determine whether it will assert a claim of privilege.

To address the Court's inquiry, however, plaintiffs are incorrect when they assert that *ex parte* submissions in support of a claim of privilege cannot be made unless the party claiming the privilege first makes a public threshold showing that the privilege applies. To the contrary, it is well established, as to the assertion of a privilege generally, that *ex parte* and *in camera* proceedings are the appropriate procedure to follow when "the underlying facts demonstrating the existence of [a] privilege may be presented only by revealing the very information sought to be protected by the privilege." *Matter of Walsh*, 623 F.2d 489, 494 n.5 (7th Cir. 1980) (attorney-client privilege). "The Supreme Court has repeatedly looked with favor upon the practice of *in camera* review of various privileges against disclosure." *Estate of Fisher v. Commissioner*, 905 F.2d 645, 650-51 (2d Cir. 1990) (holding that trial court had erred by not allowing witness to substantiate his claim of Fifth Amendment privilege *in camera*).

As the Supreme Court explained in *United States v. Reynolds*, when presented with a

> formal claim of privilege, . . . [t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so *without forcing a disclosure of the very thing the privilege is designed to protect*.

345 U.S. 1, 7-8 (1953) (footnotes omitted; emphasis added).

Numerous federal courts within and outside this Circuit have approved the Government's submission of *ex parte* materials when the disclosure of such *ex parte* affidavits would itself reveal privileged or protected information. *See, e.g.*, *Doe v. CIA*, 576 F.3d 95, 105-06 (2d Cir. 2009) (noting that *ex parte* procedures are required under *Reynolds* if public disclosure would reveal privileged information); *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (approving district court's *ex parte* review of affidavit where "disclosure of the affidavit might jeopardize the grand jury investigation"); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (noting Second Circuit's prior ruling that district court had abused its discretion by refusing to consider *ex parte* affidavit explaining Government's national security interest in documents withheld under FOIA); *United States v. Sixty-one Thousand Nine Hundred Dollars and No Cents*, No. 10 Civ. 1866 (BMC), 2010 WL 4689442, at *1 (E.D.N.Y. Nov. 10, 2010) (reviewing *ex parte* submission in case where Government asserted law enforcement privilege over documents, as the disclosure of the Government's grounds for asserting the privilege "would itself defeat the privilege"); *see also Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) ("*ex parte* consideration is common in criminal cases . . . and in litigation under the Freedom of Information Act[,] where public disclosure would divulge the very information that the case is about . . . ."); *In re Grand Jury Subpoena*, 223 F.3d 213, 217-19 (3d Cir. 2000) (approving court's review of *ex parte* FBI affidavit submitted to overcome claim of attorney-client privilege, as affidavit contained protected grand jury information).[1] Moreover, as established by this long line of cases, the justification for the *ex parte* filing can itself be made *ex parte*. *See, e.g.*, *In re John Doe, Inc.*, 13 F.3d at 635-36.

Notably, in not one of these cases did any of these courts, including the Second Circuit, ever mandate that the Government make a threshold showing on the public record to establish the existence of a privilege before it was allowed to proceed *ex parte*.

Plaintiffs, ignoring the numerous cases authorizing the filing of *ex parte* affidavits in support of privilege assertions, suggest that a different standard applies when claims of law enforcement privilege are at issue. Plaintiffs derive their proposed standard from three cases that they claim stand for the proposition that the Government cannot submit an *ex parte* filing in support of a privilege claim unless it first makes a public showing demonstrating the existence of the privilege. *See* April 14 letter at 3 (citing *Dinler v. City of New York*, 607 F.3d 923 (2d Cir. 2010); *Aguilar v. U.S. Dep't of Homeland Sec.*, 259 F.R.D. 51 (S.D.N.Y. 2009); *United States v. Painting Known as "Le Marche"*, No. 06 Civ. 12994 (RJS) (KNF), 2008 WL 2600659 (S.D.N.Y. June 25, 2008)).

Plaintiffs' reading of these cases is incorrect. While these cases address the nature of the threshold showing that the Government must make to establish the applicability of the law enforcement privilege, none of these cases involved the separate and independent issue of whether the Government can make this threshold evidentiary showing *ex parte*. Accordingly,

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[1] The Second Circuit also has endorsed the so-called "*Glomar* doctrine" in FOIA cases, under which "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009).

these cases cannot be read as even suggesting that a threshold showing must be made on the public record prior to the filing of an *ex parte* submission, let alone mandating such a procedure in the face of the serious governmental and public interests at stake in circumstances where disclosure of such information could itself compromise the claimed privilege. In sum, the cases cited in the April 14 letter do not disturb the long-standing principle, established by both Supreme Court and Second Circuit precedent, that the Government may make an *ex parte* submission to the Court to establish the applicability of a privilege where necessary to prevent the disclosure of privileged information.

We thank the Court for its consideration.

Respectfully submitted,

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