UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS AND ORDERS OF THIS COURT CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW	)	Docket No. Misc. 16-01

THE UNITED STATES' OPPOSITION TO THE MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR THE RELEASE OF COURT RECORDS

In this motion, the same movant asserts the same flawed argument in the same court for a *sixth* time. As this Court made clear in multiple opinions from 2007 to 2017, there is no First Amendment public right of access to "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by" the Foreign Intelligence Surveillance Act ("FISA"). *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *19 (FISA Ct. Jan. 25, 2017). The American Civil Liberties Union ("ACLU") has repeatedly resisted this holding, and does so again here. The ACLU's argument should be rejected again by this Court.

BACKGROUND

This Court was established by Congress in 1978 and vested with jurisdiction to rule on certain government requests for authority to collect foreign intelligence pursuant to FISA. After this Court had been operating for nearly thirty years, beginning in 2007, the ACLU has repeatedly sought to acquire broad public access to this Court's proceedings and rulings by repeatedly asserting the same argument.

A. The ACLU's First Motion

In August 2007, the ACLU, through a motion to this court, asserted for the first time that the public had a First Amendment right of access to this Court's proceedings and rulings. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007) (Bates, J.) ("*Motion for Release I*"). At that time, the FISC had been operating for 29 years and had issued thousands of classified, non-public rulings and only two publicly available opinions. *Id.* at 492. Nevertheless, the ACLU argued that the FISC had a constitutional obligation to make public certain orders issued in January 2007 as well as related materials. *Id.* at 485 & n.2.

In an exhaustively reasoned, published opinion, this Court rejected the contention that there is a First Amendment right of access to FISC proceedings and rulings, including rulings that "'include legal analysis and legal rulings concerning the meaning of FISA.'" *Id.* at 493 (quoting brief of ACLU). The Court applied the test set forth by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), for determining whether a First Amendment right of access attaches to a particular judicial place and process. *Motion for Release I*, 526 F. Supp. 2d at 492. The Court observed that the right of access only applies where both the "'experience and logic' tests" are satisfied. *Id.*

The Court first addressed the experience test, which asks "'whether the place and process have historically been open to the press and general public.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). The Court observed that neither the "place" – the FISC – nor the "process" – surveillance proceedings under FISA – have historically been open to the public. *Id.* at 492-93. Thus, the Court held that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders." *Id.* at 493.

Because the ACLU's claim failed to meet the "experience" test, its argument for access failed "regardless of whether it passe[d] the 'logic' test." *Id.* The Court nevertheless addressed that test and found an additional basis on which to reject the ACLU's First Amendment claim. *See id.* at 493-97. The Court observed that, as with "any type of [judicial] proceeding," some benefit could be expected from public access to foreign intelligence authority proceedings. *Id.* at 494. But the Court observed that a number of "detrimental consequences" that would follow from public access to FISC proceedings "would greatly outweigh any such benefits." *Id.* The Court found that harms to national security, such as assisting adversaries in avoiding surveillance, seriously harming those targeted by surveillance, chilling cooperation, and damaging relations with foreign governments, "are real and significant, and, quite frankly, beyond debate." *Id.* The Court further found that applying the ACLU's proposed strict scrutiny standard of independent review of Executive Branch classification decisions could lead to errors that would damage national security. *Id.* at 495. It would also "chill the government's interactions with the court," create an incentive to avoid judicial review where the legal need for FISC approval is unclear, and threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id.* at 496.

B. The ACLU's Second Motion

In December 2007, the ACLU presented its First Amendment access argument to the Court a second time in a "Motion for Reconsideration or Reconsideration *En Banc*." *See* Memorandum Opinion, *In re Motion for Release of Court Records*, Misc. 07-01, at 2 (FISA Ct. Feb. 8, 2008) ("*Motion for Release II*"). Two months later, the Court once again rejected the ACLU's First Amendment argument. In a footnote agreed to by all of the judges of the Court, the Court held that "the decision in this matter simply does not warrant reconsideration en banc."

Id. at 2 n.2. In the remainder of the opinion, the Court, through Judge Bates, rejected the arguments for reconsideration.

With regard to the "experience" test, the ACLU argued that "the appropriate inquiry is whether there is a tradition of public access to decisions of Article III courts." *Id.* at 6. The Court found this to be "an incorrect framing of the question," given that "*Press-Enterprise II* requires that the tests of experience and logic be applied to the '*particular* proceeding *in question*.'" *Id.* at 6 (quoting *Press-Enterprise II*, 478 U.S. at 9) (emphasis in original). The Court similarly rejected the ACLU's fallback suggestion "that the amorphous and ill-defined category of 'decisions of broad legal significance' constitutes the proper frame of reference under *Press-Enterprise II*." *Motion for Release II*, at 6 n.9 (quoting brief of ACLU). The Court again found that the "experience" test was not satisfied. *Id.* at 6.

With regard to the "logic" test, the Court reiterated its earlier finding that the non-deferential judicial review of executive classification decisions that the ACLU sought "would result in harmful consequences that outweigh any likely public benefits." *Id.* at 7. The Court further observed that the ACLU had not even addressed at least two of the Court's concerns regarding harms that would result from acceptance of the ACLU's arguments. *Id.* at 9.

C. The ACLU's Third Motion

In July 2008, the ACLU filed a motion to access classified FISC filings and to participate in FISC proceedings, which advanced its First Amendment access argument for a third time. *See In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008) (McLaughlin, J.) ("*In re Proceedings*"). The Court once again rejected the ACLU's argument, "find[ing] no reason to reach a different conclusion" than the one reached in *Motion for Release I* and *Motion for Release II*. 2008 WL 9487946, at *3. The Court

found that "the 'experience' test is not satisfied because neither the 'place' nor the 'process' has 'historically been open to the press and general public.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8). The Court found that the 'logic' test was not satisfied because any benefits to public access "would be outweighed by the risks to national security." *Id.* at *4.

D. The ACLU's Fourth Motion

In June 2013, the ACLU advanced its First Amendment argument for the fourth time. *See In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058 (FISA Ct. Aug. 7, 2014) (Saylor, J.) ("*In re Orders*"). This time, the Court found it unnecessary to rule on the argument, but it nevertheless observed that "[t]here is substantial reason to doubt whether the Court, in a case in which it was necessary to reach the issue, would find that the public has a qualified right of access to FISC opinions under the First Amendment." *Id.* at *4 n.10 (citing *Motion for Release I* and *In re Proceedings*).

E. The ACLU's Fifth Motion

In November 2013, the ACLU, joined by two co-movants, advanced, for the fifth time, "in essence, the same type of legal claim," namely, "that the First Amendment guarantees a qualified right of public access" to FISC proceedings and rulings. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *5-6 (FISA Ct. Jan. 25, 2017) (Collyer, P.J.) ("*In re Opinions I*"). The Court noted that it had decided this issue as long ago as 2007. *Id.* at *17-19 (summarizing *Motion for Release I*). The Court found that the ACLU's two arguments for disregarding or reconsidering the Court's previous decisions were unavailing. *Id.* at *19-21.

The Court observed that the ACLU's objection to the Court's earlier application of the "experience" test was "premised on a misreading of the Court's analysis and an overly broad

framing of the legal question." *Id.* at *19. The Court held that the correct framing of the "experience" test was whether "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA" have "historically been open to the press and general public." *Id.* The Court found that they have not. *Id.* (finding that the record "reflected a tradition of no public access").

With regard to the "logic" test, the Court found that the ACLU and the other movants had failed "to explain why they believe [the Court's earlier] conclusion was flawed" and had failed to "refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access." *Id.* at *20 (citing *Motion for Release I*, 526 F. Supp. 2d at 494-96). The Court noted that the ACLU and the other movants offered only "a generalized assertion that they disagree with" the Court. *Id.* Noting that disagreement, the Court held that its prior analysis "retains its force and relevance." *Id.* at *21.

Given that there is no First Amendment right of access to FISC proceedings, the Court held that the ACLU and its co-movants "have no legally protected interest and cannot show that they suffered an injury in fact for the purpose of meeting their burden to establish standing under Article III," and the Court thus lacked jurisdiction over their motion. *Id.* The Court further observed that "public access to opinions arising from classified, ex parte FISC proceedings is best committed to the political process," as evidenced by the USA FREEDOM Act amendment to FISA providing that the executive branch, rather than the Court, should conduct declassification reviews of certain FISC opinions in order to "'make publicly available to the greatest extent practicable each such decision, order, or opinion.'" *Id.* at *22 (quoting 50 U.S.C. § 1872(a)).

F. The ACLU's Latest Motion

In October 2016, the ACLU filed the instant motion, advancing its First Amendment right of access argument for the sixth time.[1] In this motion, the ACLU seeks an "amorphous" category of records, *Motion for Release II*, at 6 n.9, namely, "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001 and . . . June 2, 2015." Motion 1.

ARGUMENT

This Court lacks jurisdiction over the ACLU's latest motion because the ACLU cannot establish Article III standing. While the ACLU asserts standing on the basis that "denial of access to court opinions" is a "concrete and particularized" injury, Motion 9, this alleged injury is insufficient because it is not an injury to a "'legally protected interest.'" *In re Opinions I*, 2017 WL 427591, at *7-15 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).[2] As this Court has repeatedly held, there is no First Amendment or other legal right of access to FISC proceedings. The ACLU's motion is thus without merit and should be dismissed or denied.

[1] Notably, the title of this motion, "Motion of the American Civil Liberties Union for the Release of Court Records," is identical to the title of the motion the ACLU filed in 2007, except for the addition of "the," *see Motion for Release I*, 526 F. Supp. 2d at 485, and is materially similar to the titles of the motions filed in 2013, *see In re Opinions I*, 2017 WL 427591, at *1.

[2] The jurisdictional holding in *In re Opinions I* is currently being reviewed by the en banc Court, but the holding that there is no First Amendment right of access to FISC proceedings and rulings is not. Thus, however the en banc Court rules in that case, the motion in this case should be denied. The only question is whether it should be denied for lack of jurisdiction or for lack of legal merit.

I. There Is No First Amendment Right of Access to FISC Proceedings

Assuming that the First Amendment right of access to judicial proceedings applies outside the criminal context, it attaches only to proceedings that satisfy both the "'experience'" and "'logic'" tests set forth by the Supreme Court. *See id.* at *17 (quoting *Press-Enterprise II*, 478 U.S. at 8). The FISC's unique and sensitive national security proceedings do not satisfy either test. Thus, for two independent reasons, the First Amendment right of access does not apply to the FISC.

A. The Experience Test

The experience test asks "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. There is, of course, no tradition or history of public access to either the place – the FISC – or the process – "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA." *In re Opinions I*, 2017 WL 427591, at *19; *see also Motion for Release I*, 526 F. Supp. 2d at 493 (observing that "the FISC is not a court whose place or process has historically been open to the public").

The ACLU argues that Section 402 of the USA FREEDOM Act, 50 U.S.C. § 1872(a), supports its claim, but as this Court has observed, the opposite is true. *In re Opinions I*, 2017 WL 427591, at *22. Section 402 directs the executive branch to conduct a declassification review of certain FISC opinions and to release either a redacted version or a summary "consistent with national security." 50 U.S.C. § 1872(a), (c). But neither Section 402 nor any other section of the USA FREEDOM Act altered the non-public nature of FISC proceedings, which continue, by statutory mandate, to be *ex parte* and subject to strict security measures. *In re Opinions I*, 2017 WL 427591, at *22. Moreover, in giving the executive branch responsibility

for conducting declassification reviews, Congress chose not to establish a procedure for obtaining FISC records "from the Court." *Id.*

An additional reason why Section 402 does not signal a "long tradition" of public access to FISC proceedings, Motion 13, is that that provision applies only prospectively, and not to the 37 years of opinions that predated its enactment. A statute does not apply retroactively unless there is a "clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *accord Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (holding that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"). The text of Section 402 contains no such indication, in contrast to another, similar provision of FISA. *See* 50 U.S.C. § 1871(c) (requiring submission to Congress of certain FISA materials prospectively *and* retroactively "during the 5-year period" ending on the date of the provision's enactment). Given that Congress clearly "knows how to" add such a provision "[w]here [it] intends to," the "absence of this language" in Section 402 "instructs . . . that Congress did not intend" that Section 402 be retroactive. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003).

Unable to dispute the FISC's unbroken history as a non-public forum, the ACLU seeks to reframe the question as one about "judicial rulings and opinions interpreting the Constitution and our laws." Motion 11. But this is an "incorrect framing of the question," *Motion for Release II*, at 6, as rulings interpreting law constitute neither a "place" nor a "process." *Press-Enterprise II*, 478 U.S. at 8. The experience test is applied "to narrower classes that permit a meaningful assessment of the effects of public access on a *particular type* of judicial process—for example, district court proceedings (and related records) that are ancillary to grand jury operations." *Motion for Release II*, at 6 (citing *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-03

(D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 148-50 (3d Cir. 1997)) (emphasis in original).[3] The ACLU's "overly broad framing" would "encompass grand jury opinions, which often interpret the meaning and constitutionality of public statutes," but which are a "'paradigmatic example' of proceedings to which no right of public access applies." *In re Opinions I*, 2017 WL 427591, at *19 (quoting *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003)).

Even accepting the ACLU's flawed framing would not assist its ultimate argument as, even in court proceedings that are otherwise open to the public, there is no First Amendment right to access properly classified information contained in court filings or rulings. *Dhiab v. Trump*, 852 F.3d 1087, 1094 (D.C. Cir. 2017) (Op. of Randolph, J.) (observing that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite"); *NCRI v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001). Indeed, courts routinely provide for classified material in otherwise public proceedings to be withheld from the public. *E.g.*, *Bismullah v. Gates*, 501 F.3d 178, 194-204 (D.C. Cir. 2007) (providing for non-public filing of classified information through the Court Security Officer and prohibiting disclosure of classified information to unauthorized person), *vacated on other grounds*, 554 U.S. 913 (2008); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401

[3] A number of other cases also demonstrate the specificity with which courts define the process at issue in considering whether there is a history of public access. *See In re Application of New York Times Co. To Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410-11 (2d Cir. 2009) (no right of access to sealed wiretap applications); *United States v. El-Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997) (no First Amendment right of access to unconsummated plea agreements); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989) (no history of public access to search warrant proceedings and materials); *In re Washington Post*, 807 F.2d 383, 389 (4th Cir. 1986) (the experience and logic tests apply to "a particular kind of hearing").

(D.C. Cir. 1984) (entering protective order sealing classified information); *United States v. Poindexter*, 732 F. Supp. 165, 167 (D.D.C. 1990) (holding that the right of access does not extend to classified proceedings in a criminal case). Sometimes the content of classified proceedings and filings are withheld even from the opposing party. *E.g.*, *United States v. Sedaghaty*, 728 F.3d 885, 908 (9th Cir. 2013); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). When court opinions contain classified information, that information is redacted from any public release, or the opinion is withheld in full. *E.g.*, *United States v. Daoud*, 761 F.3d 678 (7th Cir. 2014) (redacted opinion); *Sedaghaty*, 728 F.3d at 891 ("we are filing concurrently, under appropriate seal, a classified opinion"); *United States v. Mohamud*, 2014 WL 2866749, at *2 (D. Or. June 24, 2014) ("I am also filing an accompanying classified opinion to explain some of my reasoning."), *aff'd*, 843 F.3d 420 (9th Cir. 2016).

Moreover, apart from the deferential standard applied in cases such as those brought pursuant to the Freedom of Information Act ("FOIA"),[4] *see, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007), courts have long recognized that classification decisions are committed to the executive branch. *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible.") (citation, quotation marks, and alteration omitted); *Bismullah*, 501 F.3d at 187-88 ("[I]t is within the role of the executive to acquire and exercise the expertise of protecting national security [and] [i]t is not within the role

[4] Notably, all of the cases that the ACLU cites for the proposition that "courts routinely scrutinize executive-branch classifications," Motion 27, are FOIA cases. *See Center for Int'l Environmental Law v. Office of the U.S. Trade Rep.*, 718 F.3d 899 (D.C. Cir. 2013); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20 (D.C. Cir. 1999); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71 (D.C. Cir. 1987).

of the courts to second-guess executive judgments made in furtherance of that branch's proper role."); *McGehee v. Casey*, 718 F.2d 1137, 1147-50 (D.C. Cir. 1983) (holding, in a case implicating "a strong first amendment interest," that the court's role was limited to "merely . . . determin[ing] that the CIA properly classified the deleted items" and that the court "cannot second-guess [the executive branch's] judgments on matters in which the judiciary lacks the requisite expertise"); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. . . . A court cannot question it."). In this way, judicial deference to executive classification decisions is the same in other courts as it is in this Court. *See Motion for Release I*, 526 F. Supp. 2d at 491 (holding that "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions").

Because there is no history or tradition of access to FISC proceedings or records, the ACLU's argument fails the experience test. Moreover, even under the ACLU's erroneous framing, the argument fails because there is no First Amendment right of access to properly classified material, and courts may not usurp the executive branch's authority to make classification decisions.

B. The Logic Test

Public access to FISC proceedings also fails the "logic" test. The FISC's "entire docket relates to the collection of foreign intelligence by the federal government." *Motion for Release I*, 526 F. Supp. 2d at 487. Its operations are governed "by FISA, by Court rule, and by statutorily mandated security procedures issued by the Chief Justice of the United States," which together "represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *Id.* at 488. As this Court has previously found, "the detrimental consequences of broad

public access to FISC proceedings or records would greatly outweigh any" benefits, and these harms "are real and significant, and, quite frankly, beyond debate." *Id.* at 494. In short, given the national security sensitivities attendant to foreign intelligence collection, FISC proceedings are precisely the type of court process "that would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 8-9.

Once again, the ACLU seeks to reframe the question, arguing not for public access to FISC proceedings but for a supposed constitutional right to court-imposed declassification using a standard that, as the ACLU would apply it, would not justify withholding any conceivable FISC opinion. *See* Motion 22 (asserting, without knowledge of how many classified opinions exist or what they contain, that "the government cannot satisfy these strict standards in order to justify withholding" any opinion sought). But the Court-imposed declassification of 14 years of FISC opinions would similarly undermine the collection of foreign intelligence authorized by FISA.

Were the FISC to engage in the review of executive branch classification decisions in the manner suggested by the ACLU, the court "might err by releasing information that in fact should remain classified," resulting in "damage to the national security." *Motion for Release I*, 526 F. Supp. 2d at 495. Such error, by any court undertaking the type of review suggested by the ACLU, is likely given that even judges with expertise in national security matters cannot "equal [the expertise] of the Executive Branch." *Id.* at 495 n.31; *see also Egan*, 484 U.S. at 529 (holding that predictive judgments related to national security risks "must be made by those with the necessary expertise in protecting classified information"); *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) ("the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of

sensitive information"). Additionally, the risk of disclosure "would chill the government's interactions with the Court," potentially leading to forgone surveillance of national security threats. *Motion for Release I*, 526 F. Supp. 2d at 496 (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). It could also incentivize government officials to conduct surveillance without FISC approval where the need for such approval is unclear. *Id.* And, in cases that were brought, "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight could also be threatened." *Id.*

In short, the Court "could not engage in a classification review more searching than that of a district court [in a FOIA case] without undue risk to the national security and the FISA process." *Id.* Of course, "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," *id.* at 496 n.32, and this Court would lack jurisdiction over such a claim in any event, *see* 5 U.S.C. § 552(a)(4)(B).

It has been a decade since this Court first explained the significant harm that could result from the ACLU's suggested review, and the ACLU is still unable "to explain why [it] believe[s] this conclusion was flawed" or to "otherwise refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access." *In re Opinions I*, 2017 WL 427591, at *20. That is because there is no way that the non-deferential judicial review of executive branch classification determinations requested by the ACLU can be squared with the need to protect national security. For that reason, among others, the ACLU's proposal fails the logic test.

II. The ACLU Cannot Assert Rights under FISC Rule 62

Just as the First Amendment provides the ACLU with no "legally protected interest," *Raines*, 521 U.S. at 819, in access to FISC proceedings and rulings, the ACLU can assert no right of access pursuant to FISC Rule 62. That rule provides that the process for publishing FISC opinions can begin *sua sponte* by the authoring judge "or on motion by a party." FISC, Rule of Procedure 62(a) (2010). As the ACLU is neither an authoring judge of any opinion nor a party to any of the underlying cases at issue, Rule 62 gives it no rights. Because the ACLU possesses no legally protected interest in access to FISC opinions, whether derived from the First Amendment, Rule 62, or any other source, this Court lacks jurisdiction over the ACLU's motion, and "the Court may not consider any other legal arguments or requests for relief" from the ACLU.[5] *In re Opinions I*, 2017 WL 427591, at *21 n.17.

Additionally, Rule 62 is a rule of procedure for litigation pending before the Court, not a substantive right for the general public. As such, it provides no cause of action that could support a claim. For this reason as well, the ACLU's Rule 62 claim should be dismissed.

III. The ACLU Has an Adequate Remedy in District Court

That this Court lacks jurisdiction over the instant motion should not obscure the fact that the ACLU, and any citizen, has a route to seek access to those FISC opinions and portions of opinions that it believes are not properly classified. As this Court informed the ACLU long ago,

---

[5] Even if the ACLU had standing to assert a First Amendment claim, it would still lack standing to assert a claim based on Rule 62. Because "standing is not dispensed in gross," *Town of Chester v. Laroe Estates, Inc.*, __ U.S. __, 2017 WL 2407473, at *5 (June 5, 2017) (quotation marks omitted), "a plaintiff must demonstrate standing for each claim [it] seeks to press" and "for each form of relief" it seeks. *Id.* (quotation marks omitted); *accord DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotation marks omitted). To the extent that this Court previously suggested otherwise in *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064, at *5 (FISA Ct. Sept. 13, 2013), it was in error. This Court's more recent opinion in *In re Opinions I* provides the correct analysis.

that process is the one set forth by the Freedom of Information Act. *See Motion for Release I*, 526 F. Supp. 2d at 497.

In fact, another organization is currently pursuing a similar category of FISC opinions through the FOIA process. *See Electronic Frontier Found. v. U.S. Dep't of Justice*, No. 3:16-cv-2041-HSG (N.D. Cal.). The Department of Justice has begun processing for potential release those currently non-public FISC decisions, orders, and opinions that were submitted to Congress from July 1, 2003 to June 1, 2015 pursuant to the government's obligation to provide Congress with all FISC rulings "that include significant construction or interpretation" of FISA. *See id.*, ECF No. 39 (stipulation); 50 U.S.C. § 1871(a)(5). To the extent that the Department of Justice withholds material on the basis of classification, *see* 5 U.S.C. § 552(b)(1), the plaintiff will have the option of seeking review of that determination by a district court applying a deferential standard of review that, unlike the standard of review advanced here by the ACLU, will not pose undue risk of harm to national security.[6]

[6] Of course, in the event that the government asserts any other FOIA exemptions in that case, those too would be subject to district court review.

CONCLUSION

For the reasons stated above, the ACLU's motion should be dismissed for lack of jurisdiction.

June 8, 2017

Respectfully submitted,

DANA J. BOENTE
Acting Assistant Attorney General
for National Security

STUART EVANS
Deputy Assistant Attorney General
National Security Division

/s/ Jeffrey M. Smith
JEFFREY M. SMITH
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Opposition to the Motion of the American Civil Liberties Union for the Release of Court Records was served by the Government via Federal Express overnight delivery on this 8th day of June 2017, addressed to:

Patrick Toomey
ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004

Counsel for Movant ACLU

/s/ Jeffrey M. Smith