IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-0403 (TFH)
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MOTION FOR RECONSIDERATION

At the conclusion of oral argument in this action on July 26, 2007, the Court indicated from the bench that it was granting the motion of defendant Department of Justice for summary judgment and denying the cross-motion of plaintiff Electronic Frontier Foundation for *in camera* inspection of the withheld agency records at issue in this case.[1] By this motion, plaintiff apprises the Court of newly available facts relevant to the parties' motions and respectfully requests reconsideration of the Court's ruling.

Discussion

Plaintiff moves for reconsideration pursuant to Fed. R. Civ. P. 59(e).[2] Such motions are appropriately granted, *inter alia*, where "the district court finds . . . the availability of new evidence . . . ." *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D. C. Cir. 1998) (quoting

[1] The Court further indicated that it would issue a written memorandum disposing of the pending motions, but such memorandum has not to date been issued, nor does the Court's docket reflect its disposition of the case.

[2] "The general rule is that a motion for reconsideration is treated as a '[Rule] 59(e) motion if filed within 10 days of entry of the challenged order and as a Rule 60(b) motion if filed thereafter.'" *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 420-421 (D.D.C. 2005) (citation omitted). While it is not clear whether an order has yet been "entered," plaintiff believes that, in light of the Court's bench ruling, the intent of Rule 59(e) is satisfied in this case.

Firestone v. Firestone, 76 F.3d 1205, 1208 (D. C. Cir. 1996) (*per curium*)); *see also Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006). While "[a] Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled," it is the procedural vehicle by which "the moving party [may] present[] new facts" that warrant reconsideration of the court's earlier ruling. *New York v. United States*, 880 F. Supp. 37, 38-39 (D.D.C. 1995) (three-judge panel). Plaintiff respectfully submits that such new facts are present here.

In today's edition, the *Washington Post* reports in a front-page article that "[a] federal intelligence court judge earlier this year secretly declared a key element of the Bush administration's wiretapping efforts illegal . . . ." Carol D. Leonnig and Ellen Nakashima, *Ruling Limited Spying Efforts; Move to Amend FISA Sparked by Judge's Decision*, Washington Post, Aug. 3, 2007, at A1 (attached hereto as Exhibit A). Significantly, the article indicates that the referenced "intelligence court" declaration of illegality is contained in the Foreign Intelligence Surveillance Court ("FISC") orders at issue in this case. The article states as follows:

> House Minority Leader John A. Boehner (R-Ohio) disclosed elements of the court's decision in remarks Tuesday to Fox News as he was promoting the administration-backed wiretapping legislation. . . .
>
> The judge, whose name could not be learned, concluded early this year that the government had overstepped its authority in attempting to broadly surveil communications between two locations overseas that are passed through routing stations in the United States, according to two other government sources familiar with the decision. . . .
>
> "There's been a ruling, over the last four or five months, that prohibits the ability of our intelligence services and our counterintelligence people from listening in to two terrorists in other parts of the world where the communication could come through the United States," Boehner told Fox News anchor Neil Cavuto in a Tuesday interview. . . .

> [Rep. Boehner's spokesman Kevin] Smith said that Boehner's comments were based on a public, Jan. 17 letter to Congress by Attorney General Alberto R. Gonzales, in which the administration announced that it would allow the NSA program to be reviewed by the intelligence court. That letter said that an intelligence court judge had issued orders "authorizing the Government to target for collection into or out of the United States where there is probable cause to believe" one of the parties is a terrorist.

Id.[3]

These new facts are significant because plaintiff, in support of its motion for *in camera* review of the material at issue in this case, argued that "[i]t is likely that . . . the requested material . . . primarily addresses *legal issues*, as opposed to *operational details*" of the NSA surveillance program. Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for In Camera Review ("Pl. Mem.") at 12 (emphasis in original). If, as the Post article indicates, the withheld material shows that the FISC "concluded . . . that the government had overstepped its authority in attempting to broadly surveil communications between two locations overseas that are passed through routing stations in the United States," plaintiff submits that there is no logical basis for the classification of that legal analysis. Indeed, as plaintiff has noted, previous rulings of both the FISC and the Foreign Intelligence Court of Review containing legal analysis have been publicly released. Pl. Mem. at 11-12.

The newly available facts described herein warrant the Court's reconsideration of its decision to adjudicate the government's motion for summary judgment without first reviewing the withheld material *in camera*. Plaintiff respectfully asks the Court to reassess that determination in light of these new facts.

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[3] Plaintiff's Freedom of Information Act request seeks disclosure of "copies of all Foreign Intelligence Surveillance Court ('FISC') orders referenced by the Attorney General in his [January 17, 2007] letter to Sens. Leahy and Specter." Defendant's Exhibit B (attached to the Declaration of Matthew G. Olsen).

Respectfully submitted,

/s/David L. Sobel

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