



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

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New York, New York 10007*

May 6, 2016

**BY ECF AND EMAIL**

The Honorable Katherine B. Forrest  
United States District Judge  
United States Courthouse  
500 Pearl Street  
New York, New York 10007

Re: *Pollard v. United States Parole Commission, et al.*, No. 15  
Civ. 9131 (KBF)

Dear Judge Forrest:

This Office represents the Respondents (the "Government") in the above-captioned habeas litigation. We write respectfully to request an extension of the Government's deadline to file a written response to the renewed Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, from May 10, 2016, to June 10, 2016. The renewed Petition was filed on April 8, 2016 (Dkt. Nos. 36-38), and the Government's response is currently due on May 10, 2016 (Dkt. No. 41). This is the Government's first request for an extension of this deadline. We also wish to advise the Court of Respondents' intention to support their response to the renewed Petition with a classified submission for the Court's *ex parte* and *in camera* review, as suggested by the Court in its Order dated April 12, 2016 (the "April 12 Order") (Dkt. No. 40).

The April 12 Order suggested, among other things, that Respondents "may deem it appropriate to address whether information at issue remains "Secret" or "Top Secret," and should consider "whether [R]espondents should/must support their position on this motion with reference—*in camera*—to specific examples of "Secret" or "Top Secret" information deemed to be at risk." In response to this suggestion, Respondents have determined that they will support their response to the renewed Petition with a classified submission, for the Court's *ex parte* and *in camera* review. Respondents respectfully request a thirty-day extension of their deadline to respond to the renewed Petition so that they can complete the necessary inter-agency consultations and coordination necessary to prepare such a classified submission.

We have conferred with Petitioner's counsel regarding this request, and Petitioner does not consent. Petitioner's counsel provided two grounds for not consenting. First, Petitioner's counsel, who represent that they have obtained Top Secret security

clearances in connection with their representation of Petitioner, contend that they should be given access to classified information that the Government intends to reference in its anticipated *ex parte* submission to the Court. Second, they contend that the Government has had sufficient time to prepare a response to the renewed Petition, and that Petitioner has been out of work for six months. Petitioner's counsel stated that Petitioner would not object to the additional thirty days if Respondents did not intend to provide the Court with an *ex parte, in camera* submission in support of their response to the renewed Petition. We understand that Petitioner's counsel may file a separate response to this letter on Monday morning.

An order directing that Petitioner's counsel be given access to classified information that the Government intends to reference in its anticipated *ex parte, in camera* submission to the Court. Such an order would be unwarranted by the circumstances of this case and contrary to the relevant case law regarding the Executive Branch's authority to protect and control access to classified information.

As a threshold matter, we note that the April 12 Order does not in any way require the Government to provide Petitioner's counsel access to classified information. Rather, the April 12 Order suggests that the parties confer "as to whether (1) the Court can or should resolve [any factual dispute regarding whether the information at issue remains classified]; (2) the standard that would apply; and (3) whether respondents should/must support their position on this motion with reference—*in camera*—to specific examples of "Secret" or "Top Secret" information deemed to be at risk." Dkt. No. 40.

With respect to the first element of the April 12 Order, the authority to classify and control access to national security information is committed to the President and the Executive Branch under Article II of the Constitution. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."). The current standard for classification is set forth in Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), which requires, among other things, that an "original classification authority" must classify the information. E.O. 13526 § 1.1(a)(1)-(4). No authority or precedent affords Petitioner or any other litigant a role in threshold executive classification decisions.

With respect to the rest of the April 12 Order, the Government, as described above, intends to follow the approach suggested by the Court and make an *ex parte* and *in camera* submission in support of its response to the renewed Petition. The Government will address in its public response to the renewed Petition the relevant standards applicable to the Court's review of that submission.<sup>1</sup> This approach is used in,

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<sup>1</sup> As the Government will discuss at more length in its response to the renewed Petition, judicial review of classification decision "is necessarily deferential because the designation and protection of classified information 'must be committed to the broad

for example, the FOIA, state secrets, and prepublication review contexts, where necessary. *See, e.g., Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 164-65 (2d Cir. 2014); *Doe v. CIA*, 576 F.3d 95, 98-99 (2d Cir. 2009); *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003).

Moreover, an order directing the Government to provide Petitioner's counsel with access to classified information would conflict with clear law that the authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive Branch," which enjoys exclusive responsibility for the protection and control of national security information. *Egan*, 484 U.S. at 527; *see also, e.g., CIA v. Sims*, 471 U.S. 159, 180 (1985); *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992). Numerous courts have denied litigants' requests for access to classified information in a variety of contexts, even where their counsel has obtained clearances. *See, e.g., Doe*, 576 F.3d at 106; *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983); *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); *Salisbury v. United States*, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); *see also, e.g., Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917-18 (N.D. Ill. 2006); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D.Va. 2000); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975) ("It is not to slight judges, lawyers or anyone else to suggest that any . . . disclosure [of sensitive information in a classified document] carries with it serious risk that highly sensitive information may be compromised.").

Consistent with the approach taken in these cases, the Court will be able to review and evaluate the Government's classified submission *ex parte* and *in camera* in aid of the Court's decision-making regarding the renewed Petition. There is no basis for the Court to order the Government to provide Petitioner's counsel with access to the *ex parte*, *in camera* submission or the classified information discussed therein, and any such order would be contrary to law.

We thank the Court for its consideration of this matter.

Hon. Katherine B. Forrest  
May 6, 2016  
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Respectfully,  
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cc (via ECF and email): All counsel of record