UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE ORDERS OF THIS COURT INTERPRETING SECTION 215 OF THE PATRIOT ACT **Docket No. Misc. 13-02**

OPINION AND ORDER GRANTING MOTION FOR RECONSIDERATION

This Opinion and Order addresses the motion by the Media Freedom and Information Access Clinic ("MFIAC"), filed on October 11, 2013, seeking reconsideration of its dismissal for lack of Article III standing. See In re Orders of this Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064, at *2-4, 8 (FISA Ct. Sep. 13, 2013) ("In re Section 215 Orders"). The government has not opposed the motion. For the reasons stated herein, the motion for reconsideration will be granted and, based on information provided in support of that motion, MFIAC is reinstated as a party to this proceeding.

I. Background

On June 12, 2013, the American Civil Liberties Union ("ACLU")[1] and MFIAC jointly moved for release of opinions of the Foreign Intelligence Surveillance Court interpreting Section 215 of the Patriot Act, 50 U.S.C. § 1861[2]—that is, the business records provision of the Foreign Intelligence Surveillance Act ("FISA"), codified as amended at 50 U.S.C. §§ 1801-1885c. The

[1] More precisely, two related entities – the ACLU and the American Civil Liberties Union of the Nation's Capital – joined with MFIAC in bringing the motion for release. For ease of reference, this Opinion and Order collectively refers to these related entities as "the ACLU."

[2] See Pub. L. No. 107-56, § 215, 115 Stat. 287 (2001), codified as amended at 50 U.S.C. § 1861.

ACLU and MFIAC asserted that withholding those opinions violated a right of public access under the First Amendment. See In re Section 215 Orders, 2013 WL 5460064, at *1-2.

In an opinion and order issued on September 13, 2013, the Court sua sponte examined whether the ACLU and MFIAC had standing under Article III of the United States Constitution to seek such relief. Under applicable precedent, the Court analyzed whether the ACLU and MFIAC had suffered or stood to suffer an injury that was "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Id. at *2 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013)). The Court found that the ACLU and MFIAC had suffered an actual injury (lack of public access to the records sought); that this injury was fairly traceable to government determinations that information in those records is subject to national security classification; and that the remedy sought (publication of those records) would redress the injury. In re Section 215 Orders, 2013 WL 5460064, at *2.

The Court then turned to whether the injury was sufficiently concrete and particularized to support Article III standing. Relying on precedents such as Federal Election Comm'n v. Akins, 524 U.S. 11 (1998), and New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286 (2d Cir. 2012), the Court concluded that, although the ACLU and MFIAC "assert a right of access that is indistinguishable from those of any other interested member of the public," they "could have a concrete and particularized injury in fact if the lack of public access to the [opinions sought] impedes their own activities in a concrete, particular way—or to put the point differently, if public access to [those opinions] would be of concrete, particular assistance to them in their own activities." In re Section 215 Orders, 2013 WL 5460064, at *2. "A sufficient injury in fact may not require great harm to movants' own activities, see New York Civil

Liberties Union, 684 F.3d at 294 ('only a perceptible impairment of an organization's activities is necessary for there to be an injury in fact') (citation and internal quotations omitted), but some harm is necessary." Id. at *4 (footnote omitted). The Court took judicial notice of publicly available information about the ACLU's activities that, on its face, would be impeded by lack of access to judicial opinions interpreting Section 215, and based on that information concluded that the ACLU had Article III standing. Id. The Court found no comparable information in the public record about MFIAC's activities, nor had MFIAC provided any information in support of its having standing. Accordingly, the Court dismissed the claims of MFIAC from the case for lack of Article III standing. Id. at *4 & n.13, *8.[3]

II. Request for Reconsideration

On October 11, 2013, MFIAC submitted a motion for reconsideration of its dismissal for lack of Article III standing.[4]

The Rules of the Foreign Intelligence Surveillance Court do not specifically address motions for reconsideration. The Court therefore may look to the Federal Rules of Civil Procedure, see FISC Rule 1, under which "motions for reconsideration" are commonly handled as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). See 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2013).

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[3] At the same time, the Court dismissed the motion for access to opinions interpreting Section 215 "to the extent that it concerns the opinions that are at issue" in litigation previously commenced under the Freedom of Information Act, codified as amended at 5 U.S.C. § 552, in the United States District Court for the Southern District of New York. In re Section 215 Orders, 2013 WL 5460064, at *7. As a result of that dismissal, access to only one opinion remains at issue in this case. See Docket No. Misc. 13-02, Order (FISA Ct. Oct. 8, 2013).

[4] Because the Court is granting the relief requested in the motion for reconsideration, it is not necessary to discuss in detail all of the arguments advanced in that motion.

Motions under Rule 59(e) are committed to the discretion of the district court. See, e.g., O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992). As a general rule, relief under Rule 59(e) is an extraordinary remedy and granted sparingly. See, e.g., Palmer v. Champion Mtg., 465 F.3d 24, 30 (1st Cir. 2006); Pacific Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Motions under Rule 59(e) may be granted if there has been an intervening change in controlling law, discovery of newly available evidence, clear error, or manifest injustice. E.g., Demahy v. Schwarz Pharma, Inc., 702 F.3d 177, 182 (5th Cir. 2012), cert. denied, 134 S. Ct. 57 (2013); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Indeed, some courts have stated that these are the exclusive grounds for relief under Rule 59(e).[5]

Under those standards, it would be a proper exercise of discretion to deny reconsideration here. There has been no intervening change in controlling law, nor has MFIAC presented newly available (as distinguished from newly submitted, but previously available) evidence. Furthermore, MFIAC's dismissal for lack of standing did not result in a manifest injustice. MFIAC does cite some cases that stand for the proposition that reconsideration is appropriate when a judgment depended on resolution of issues that had not been raised and briefed by the parties.[6] In the circumstances of this case, however, the Court does not regard the lack of prior

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[5] See, e.g., Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) ("'The only grounds for granting [a Rule 59(e) motion] are newly-discovered evidence or manifest errors of law or fact.'") (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)); LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995) ("a Rule 59(e) motion 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence'") (quoting Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)).

[6] Motion for Reconsideration at 2 (citing Neal v. Honeywell, Inc., 958 F. Supp.2d 345, 347 (N.D. Ill. 1997); Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)).

briefing, by itself, as a sufficient basis for reconsideration. MFIAC bore the burden of establishing that it had Article III standing. E.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103-04 (1998). Although the parties did not address the issue of standing under Article III, the Court was nonetheless obliged to address it sua sponte. E.g., Steel Co., 523 U.S. at 88, 94-95; Juidice v. Vail, 430 U.S. 327, 331 (1977).[7] MFIAC cannot credibly claim unfair surprise that the Court reached the standing issue, despite its contention that "neither the ACLU nor MFIAC anticipated that their standing would be questioned." Motion for Reconsideration at 2.

MFIAC also argues that the Court misread precedents such as Federal Election Comm'n v. Akins, 524 U.S. 11 (1998), and New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286 (2d Cir. 2012), and applied too stringent a standard for Article III standing. See Motion for Reconsideration at 3-8, 10-11. It contends that the simple withholding of the opinion in question results in its suffering a concrete and particularized injury for purposes of Article III standing. See id. at 6-10, 11-12. In contrast, the Court had concluded that "movants could have a concrete and particularized injury in fact if the lack of public access to the Section 215 Opinions impedes their own activities in a concrete, particular way," In re Section 215 Orders, 2013 WL 5460064, at *2.

In a Notice of Supplemental Authority filed on April 23, 2014, MFIAC points to the recent opinion of the Fourth Circuit in Company Doe v. Public Citizen, 749 F.3d 246, 2014 WL 1465728 (4th Cir. 2014), as new support for its position. That case involved consumer advocacy

[7] The government did make a different argument that the movants lacked "standing" to seek relief under FISC Rule 62(a). The Court rejected that argument. See In re Section 215 Orders, 2013 WL 5460064, at * 4-5.

organizations who objected to a sealing order sought and obtained by a company in a civil matter in district court.[8] The consumer groups asserted common-law and First Amendment rights of public access to the sealed materials. The Fourth Circuit held that the groups had standing under Article III to assert these claims, and specifically that "[t]heir informational interests, though shared by a large segment of the citizenry, became sufficiently concrete to confer Article III standing when they sought and were denied access to the information that they claimed a right to inspect." Id. at *12.

> Because the public right of access under the First Amendment and common law protects individuals from the very harm suffered by Consumer Groups, their injury transcends a mere abstract injury such as a common concern for obedience to law. Consumer Groups are public interest organizations that advocate directly on the issues to which the underlying litigation and the sealed materials relate. By seeking, and having been denied access to, documents they allege a right to inspect, Consumer Groups have a direct stake in having a concrete injury redressed.

Id. (emphasis added; internal quotation and citation omitted). The emphasized language is consistent with the view that a particularized allegation of harm is required. Nonetheless, the Company Doe decision arguably sets forth a broader view of the criteria for standing than that set forth in Akins and New York Civil Liberties Union.[9]

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[8] Id. at *4. The company had sued to enjoin the Consumer Product Safety Commission from publishing a product safety report that the company alleged to contain misleading information about one of its products. Id. at *2.

[9] Cf. Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1979) (in finding "sufficiently distinct injury to provide standing to sue," the Supreme Court observed both that appellants sought "access to the ABA Committee's meetings, and advance notice of future meetings . . . to monitor [the Committee's] workings and participate more effectively in the judicial selection process," and that "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records").

Exactly how the standing doctrine should be applied to a particular case may not be free from doubt, but certain general principles are clear. In order to have standing under Article III, a party must have a concrete injury that is both actual or imminent and particular to that party;[10] that is, "the injury must affect the plaintiff in a personal and individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992); accord Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013); Arizona Christian School Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011). In this case, all members of the American public can say that they are being denied access to the opinion at issue and assert the same claimed right of public access that MFIAC has. Moreover, before initiating this proceeding jointly with the ACLU, MFIAC had not taken any action that would distinguish itself from the public at large with regard to access to that opinion.[11] Under the circumstances of this case, the principles of Article III standing require examination of whether lack of public access to the opinion in question will actually have a particular negative effect on MFIAC's ongoing or planned activities, or whether in some other way it had suffered (or imminently stood to suffer) a concrete and particularized injury in fact, beyond a simple lack of access to the opinion.[12] At a minimum, the Court is satisfied that its application of standing

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[10] See Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009) (Article III requires a party to have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction") (emphasis in original; internal quotations omitted); Raines v. Byrd, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to him.") (emphasis added).

[11] Cf. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1219 (9th Cir. 2012) ("standing must be established independent of the lawsuit filed by the plaintiff") (internal quotations omitted).

[12] See Akins, 524 U.S. at 21 ("There is no reason to doubt [respondents'] claim that the (continued...)

principles did not involve clear error or manifest injustice.

MFIAC also has submitted a declaration in support of its Motion for Reconsideration. See Declaration of Maxwell S. Mishkin, Student Co-Director of MFIAC. It contends that this declaration establishes that the withholding of the opinion at issue causes a concrete and particular injury in fact to MFIAC, even under the standard previously applied by the Court. Motion for Reconsideration at 15-16. Some courts have found it proper to deny Rule 59(e) motions that seek to introduce evidence that could have been presented previously. See, e.g., Obriecht v. Raemisch, 517 F.3d 489 (7th Cir. 2008); ICEE Distributors, Inc. v. J&J Snack Foods Corp., 445 F.3d 841 (5th Cir. 2006). On the other hand, there is authority that prior availability of evidence is not an absolute bar to its being considered in support of a motion under Rule 59(e). See Texas A&M Research Found. v. Magna Transp., Inc., 338 F.3d 394, 401 (5th Cir. 2003); Ford v. Elsbury, 32 F.3d 931, 937-38 (5th Cir. 1994); Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 174-75 (5th Cir. 1990), abrogated on other grounds by Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994) (en banc). In those cases, courts have looked to four "primary factors" in deciding whether newly submitted evidence should be considered in support of a motion under Rule 59(e): "'(1) the reasons for the plaintiffs' default, (2) the importance of the evidence to the plaintiffs' case, (3) whether the evidence was available to

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[12](...continued)
[withheld] information would help them (and others to whom they would communicate it) to evaluate candidates for public office . . . and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular.") (emphasis added); New York Civil Liberties Union, 684 F.3d at 295 (agency's policy of restricting access to administrative hearings injured "a cognizable interest" to plaintiff because it had "shown that the access policy had impeded, and will continue to impede, the organization's ability" to represent clients before the agency; since the organization "alleged a cognizable interest and both past and imminent injuries to it," the organization had standing).

plaintiffs [prior to the entry of judgment], and (4) the likelihood that the defendants will suffer unfair prejudice if the case is reopened.'" Texas A&M, 338 F.3d at 400-01 (quoting Ford, 32 F.3d at 937-38); accord Hale v. Townley, 45 F.3d 914, 921 (5th Cir. 1995); Lavespere, 910 F.2d at 174. Those factors are intended to guide the court in striking "a proper balance between two competing interests: the need to bring litigation to an end and the need to render just decisions on the basis of all the facts." Ford, 32 F.3d at 937 (internal quotations omitted); accord Lavespere, 910 F.2d at 174. If the evidence is sufficiently important to the party seeking to introduce it and its consideration would not unfairly prejudice the opposing party, it can be an abuse of discretion for the district court to refuse to consider it, even though the movant could readily have presented it at an earlier stage. See Ford, 32 F.3d at 937-38.[13]

This case presents circumstances similar to those in which courts examining those factors have accepted evidence submitted in support of a Rule 59(e) motion. Evidence about MFIAC's own mission and activities clearly could have been presented earlier (factor 3). The only reason provided by MFIAC for not doing so is that the government did not challenge its standing and it did not anticipate standing to be an issue. Motion for Reconsideration at 2. The omission does not appear to have been an effort to gain tactical advantage (factor 1). Moreover, it is difficult to

[13] See also Texas A&M, 338 F.3d at 401 (proper to consider evidence "of critical importance" where defendants "did not suffer any unfair prejudice from the reopening," even though movant had "no substantial explanation" for failure to submit evidence previously and did not claim it had been unavailable); Lavespere, 910 F.2d at 175 (proper to consider evidence "of critical importance" and "highly relevant" to the judgment, when failure to submit it in timely fashion was attributable to attorney negligence, rather than strategic considerations, and opposing party was not prejudiced by its consideration); Dupre v. Chevron USA, Inc., 930 F. Supp. 248, 250 (E.D. La. 1996) (receiving into evidence document first submitted in support of Rule 59(e) motion; although movant had prior access to document and "rationale" for not submitting it previously was "not a particularly strong one," document would allow court "to fully consider all the facts" and opposing party had not claimed prejudice), aff'd, 109 F.3d 230 (5th Cir. 1997).

see how the government would suffer unfair prejudice from reinstating MFIAC as a party, given that the Court has reached the merits of the ACLU's identical request (factor 4).[14]

The remaining factor is the importance of the proffered evidence. The Mishkin Declaration is of substantial significance to the issue of whether MFIAC has standing, because it supports a finding that the lack of public access to the opinion in question "impedes [MFIAC's] activities in a concrete, particular way—or to put the point differently," that public access to the opinion "would be of concrete, particular assistance" to MFIAC in those activities. See In re Section 215 Orders, 2013 WL 5460064, at *2. MFIAC's mission, as described in the Mishkin Declaration, includes "promot[ing] the public's right of access to information," and MFIAC furthers this mission "by requiring prospective clients to agree that any information obtained through litigation . . . will be made available to the general public," in an effort "to further public understanding, and to enable public oversight of government institutions." Id. at 1, 2, 4. In addition, Mishkin contends that MFIAC is "frequently involved in activities that inform the public on topics such as how to balance personal privacy with national security," and participates in "numerous conferences, presentations, and other events aimed at fostering public awareness of and debate over topics including balancing online privacy and national security, and understanding the scope and scale of federal law enforcement surveillance programs." Id. at 5. The Mishkin Declaration therefore provides information that remedies the deficiency – lack of a concrete and particularized injury in fact – that resulted in MFIAC's dismissal for lack of standing. See In re Section 215 Orders, 2013 WL 5460064, at *4 & n.13.

Finally, the Court notes that it would have been appropriate for the Court to decline to

[14] As noted above, the government has not opposed the motion for reconsideration.

reach the question whether MFIAC had standing, once it concluded that the ACLU did have standing.[15] As a general matter, "[w]here coplaintiffs have a shared stake in the litigation—close identity of interests and a joint objective—the finding that one has standing to sue renders it superfluous to adjudicate the other plaintiffs' standing." Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 976 (1st Cir. 1989). Accord, e.g., Horne v. Flores, 557 U.S. 433, 446 (2009) ("Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so."); Secretary of the Interior v. California, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's."). It is by no means clear that the ACLU and MFIAC have different positions with respect to this litigation, or will at any point in the future. Nonetheless, under the unique circumstances presented here, the Court will reach the standing issue on its merits.

After balancing the foregoing considerations, the Court will exercise its discretion to grant the Motion for Reconsideration and accept the Mishkin Declaration. Based on the information in the Mishkin Declaration, the Court finds that MFIAC has standing under Article III.

Accordingly, it is HEREBY ORDERED that MFIAC is reinstated as a party in this matter.

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[15] When dismissing MFIAC as a party, the Court observed that the ACLU was found to "have standing and . . . seek[s] the same relief on identical grounds as MFIAC." In re Section 215 Orders, 2013 WL 5460064, at *4. n.13.

So ORDERED this 7th day of August, 2014, in Docket No. Misc. 13-02.

/s/ F. Dennis Saylor
F. DENNIS SAYLOR IV
Judge, United States Foreign
Intelligence Surveillance Court