

U.S. Department of Justice

United States Attorney
Southern District of New York



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March 31, 2009

BY HAND

Honorable Denny Chin
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Bernard L. Madoff
09 Cr. 213 (DC)

Dear Judge Chin:

The Government respectfully submits this letter in connection with the application by WNBC and ABC to unseal and make publicly available all the sealed items on the docket in the above-referenced case. This letter addresses the sealed entries consisting of emails submitted by victims of the fraud in this case. A separate letter will be submitted addressing other categories of sealed entries on the docket.

The correspondence at issue falls into three categories. The first category consists of correspondence from victims who have informed the Government that they consent to the public disclosure of their correspondence. All of these letters have been provided to NBC and ABC in their entirety.¹ The second category consists of correspondence from victims who have informed the Government that they object to the public disclosure of their correspondence. All of these letters have been provided to NBC and ABC in redacted form; specifically, the victims' names, addresses, telephone numbers and email addresses have been redacted. The third category consists of correspondence from victims who have not informed the Government whether they consent or object to the full disclosure of their correspondence. All of these letters have been provided to NBC and ABC in redacted

¹ These letters are attached as Exhibit A.

form.²

Factual Background

In an Order dated March 6, 2009, this Court set forth the procedures by which potential victims of the defendant's crimes would receive notification, and be accorded all of the rights, under Title 18, United States Code, Section 3771 (the "March 6 Order"). Specifically, the Court's order provided, in part:

1. The United States Attorney's Office will post notification about scheduled public proceedings on its Internet website at <http://www.usdoj.gov/usao/nys> on a separate Web page for this case and that page will also provide the following information:

. . .

b. A substantially verbatim listing of the rights provided for in Title 18 United States Code, Section 3771(a); . . .

d. The name and contact information for a United States Attorney's Office official with responsibility for addressing victims rights.

6. The Internet posting by the Government will specify that the Court, in order to conduct orderly proceedings and to maintain a reasonable schedule, requires notice prior to the plea proceeding scheduled for March 12, 2009, from potential victims who wish to be heard during that proceeding. Therefore, any potential victim who wishes to be heard shall send a notice by 10:00 a.m. on March 11, 2009, to the United States Attorney's Office at the following email address: usanys.madoff@usdoj.gov. The Court will rule on whether, and the manner in which victims may be heard at the proceeding.

The Government included on its website the information required by the March 6 Order, including a substantially verbatim

² The redacted letters are attached as Exhibit B. Because of the volume of letters in the second and third categories described above, the Government has provided the Court with a small sample of these redacted letters. If the Court wishes to have copies of all of the redacted letters, the Government will provide them.

Honorable Denny Chin
March 31, 2009
Page 3

listing of the rights provided to crime victims under 18 U.S.C. § 3771. Also, in a press release issued by the United States Attorney's Office on March 10, 2009, the Government stated that any individual who wished to be heard at the anticipated plea hearing scheduled for March 12, 2009, must send notice via e-mail to the U.S. Attorney's Office for the Southern District of New York at the designated email address by 10:00 a.m. on March 11, 2009.

In letters dated March 9 and 11, 2009, the Government provided the Court and counsel to Madoff with all of victims' emails received by the Government in response to the March 6 Order (the "Email Correspondence"). In the March 9 and 11 letters to the Court, the Government requested that the Email Correspondence, which contain identifying information from victims, be filed under seal to protect their privacy interests. The Government's letters to the Court, however, were not filed under seal.

At a hearing in this case on March 10, 2009 (the "March 10 Hearing"), the Court stated that it had reviewed the Email Correspondence that had been provided by the Government on March 9, 2009. Transcript, dated March 10, 2009, at 24:3-7. The Court emphasized that there were only two issues on which victims would be heard at the March 12, 2009 hearing: (1) whether the Court should accept a guilty plea by the defendant should he plead guilty, and (2) whether the defendant should remain out on bail or be remanded. Id. at 24:8-12. The Court indicated that the victims who "want to be heard on sentencing will have to be heard on another day. And only those who want to address [the plea and bail] will be permitted to speak." Id. at 26:9-11.

On March 11, 2009, the Court issued a press release (the "Court's March 11 Press Release") that stated, among other things, that pursuant to the Crime Victims Protection Act, victims would have a reasonable opportunity to be heard at the hearing on March 12, 2009. The Court's March 11 Press Release also provided instructions for how victims were to sign-up on March 12, 2009 to be heard at the hearing on the issues of the acceptance of the plea and bail.

Prior to the hearing on March 12, 2009, approximately six people signed up to be heard on the issue of the Court's acceptance of the defendant's plea, and approximately seven people signed up to be heard on the issue of bail. At the hearing, the Court stated its proposed rulings on each of the

Honorable Denny Chin
March 31, 2009
Page 4

issues and then invited all of those individuals who had signed up to be heard if they disagreed with the Court's proposed rulings. Three individuals spoke concerning the acceptance of the plea and no one spoke concerning bail. Each of the individuals who spoke in Court identified him or herself by name. Any Email Correspondence that these individuals had submitted to the Government was not read.

On March 17, 2009, in response to a request by NBC that the Court unseal the Email Correspondence (and other sealed documents), the Court issued an Order directing the Government, the defendant, and NBC to confer in an effort to agree on what may be unsealed (with or without redactions), and if the parties could not agree, the Court ordered the Government to respond by March 31, 2009 ("the March 17 Order").

The Government has engaged in discussions with counsel for NBC and ABC.³ To that end, on March 20, 2009, and March 31, 2009, the Government provided NBC and ABC with the Email Correspondence, in unredacted form, from all of the victims who informed the Government that they consented to having their emails made public. With respect to the remaining Email Correspondence from victims, the Government provided copies to NBC and ABC in redacted form on March 20, 2009 and on March 27, 2009. The Government redacted only the victims' names, addresses, telephone numbers and email addresses to the extent they were included in the victims' correspondence. In a few instances, the Government also redacted personal information contained in the body of the correspondence that could serve to identify the victim. On March 27, 2009, counsel for NBC and ABC informed the Government that NBC and ABC wanted all of the Email Correspondence in unredacted form and would not agree to the redactions of personal identifying information proposed by the Government.

On March 28, 2009, the Government sent an email to each of the victims who had sent Email Correspondence to the designated email account in connection with the March 12, 2009 plea hearing. The Government inquired as to whether the victims consented to the full disclosure of their correspondence to the press, or whether the victims wished to have their correspondence remain

³ Counsel for the defendant informed the Government that he takes no position on whether the sealed entries on the docket remain sealed or are made publicly available.

sealed for privacy or other reasons. As of March 31, 2009, approximately 41 individuals responded that they wish that their email remains sealed; approximately 32 individuals consented to the unsealing of their email in whole or in part; and approximately 115 individuals have not yet responded.

Applicable Legal Principles

Title 18, United States Code, Section 3771, the Justice for All Act of 2004, confers specific rights on crime victims including, "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8).⁴ Section 3771 directs that "the Court shall ensure that the crime victim is afforded the rights" set out in the statute, including the right to privacy. 18 U.S.C. § 3771(b)(1). Indeed, Section 3771 allows for crime victims and the Government to affirmatively assert the victims rights set out in the statute by moving for relief in district court, and if necessary, by writ of mandamus in the court of appeals. 18 U.S.C. § 3771(d).

Courts have interpreted the rights accorded under Section

⁴The other rights provided by Section 3771 are:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.

18 U.S.C. § 3771(a).

Honorable Denny Chin
March 31, 2009
Page 6

3771 broadly. In United States v. Patkar, No. 06-00250-JMS, 2008 U.S. Dist. LEXIS 6055, at *16 (D. Hawaii Jan. 28, 2008), the Court explained that Section 3771 was "intended to provide meaningful rights, and not a simple laundry list of aspirational goals as to how the government and courts should treat victims" (interpreting 18 U.S.C. § 3771(a)(8)). Similarly, in United States v. Turner, 367 F. Supp. 2d 319, 335 (E.D.N.Y. 2005), the Court stated that the import of 18 U.S.C. § 3771(a)(8) is to "promote a liberal reading of the statute in favor of interpretations that promote victims' interests in fairness, respect, and dignity." See also United States v. Robinson, No. 08-10309-MLW, 2009 WL 137319, at *3 (D. Mass. Jan. 20, 2009); United States v. Kaufman, No. A-04-40141, 2005 WL 2648070, at *4 (D. Kan. Oct. 17, 2005) (finding a "compelling government interest" in "protecting the dignity" of crime victims under Section 3771(a)(8)).

The legislative history of the statute supports this expansive reading. United States Senator Diane Feinstein stated, "[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." See 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) (Statement of Sen. Feinstein). Also, United States Senator John Kyl, one of the sponsors of the statute explained, "the broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness." See 150 Cong. Rec. S10910-01 (daily ed. Oct. 9, 2004) (Statement of Sen. Kyl). Similarly, United States Senator Patrick Leahy stated that the statute entitles, "victims to assert a panoply of rights, regardless of whether the prosecution is already asserting the same rights on their behalf. For example, at the insistence of other sponsors, this bill will enable victims to bring mandamus actions alleging the denial of their statutory right 'to be treated with fairness and with respect for the victim's dignity and privacy.'" See 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) (Statement of Sen. Leahy).

Courts have balanced victims' rights in criminal cases under Section 3771 with victims' privacy interests. For example, in United States v. Turner, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005), the Court required the Government to provide the Court with the names and contact information of victims so that the Court could "fulfill its independent obligation to ensure that

victims are afforded their rights" under Section 3771. However, the Court noted that "individuals covered by [Section 3771] have done nothing that warrants unwanted intrusion into their lives, and they may have good reason either to be concerned about the public listing of their names and contact information" and that it could be an "unwarranted intrusion on a victim's privacy." Id. at 328-29. Therefore, the Court sought to "balance [its] independent obligation to ensure that victims are afforded their rights against the possibility that doing so in a mechanical fashion will do more harm than good." Id. at 329. For those reasons, the Court allowed the Government to withhold victims' names upon "a showing that a victim has reason to fear public disclosure of identifying information, which would justify making the filing under seal and possibly ex parte." Id.

Courts also have upheld the privacy rights of victims under Section 3771(a)(8) in the context of requests by the media under the First Amendment for disclosure of a victim's identity. Although the First Amendment provides a right of public access to judicial documents, that access is qualified. An individual's privacy interest is a countervailing factor to be weighed against public disclosure of a document. United States v. Amodeo, 71 F.3d 1044, 1050-51 (2d Cir. 1995) ("privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation") (citations omitted). Moreover, the "mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." Lugosch v. Pyramid Co., 435 F.3d 110 (2d Cir. 2006) (quoting United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995)). Rather, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." Amodeo, 44 F.3d at 145.

In United States v. Robinson, a newspaper company sought an order compelling the Government to disclose a crime victim's identity in an extortion case and requested that the Court make the document disclosing the identity part of the public record. The Court noted that the First Amendment right of access to documents extends to those documents that are "submitted to a court in the course of litigation." However, the Court held that the "presumption of public access" does not extend to "documents which play no role in the adjudication process." 2009 WL 137319, at *2. The Court further held that "the privacy interests at stake here are important," and cited the victim's right to privacy and dignity under Section 3771(a)(8). Id. at *3 (quoting 18 U.S.C. § 3771(a)(8)). The Court noted that "if the case

proceeded to trial and the victim testified, or his identify became relevant to the adjudicative process in some other way and is revealed to the court, the analysis would be more complicated." Id. at *2.

In another case where a Court rejected the media's request, United States v. Kaufman, the Court denied a television station's motion to allow sketch artists in the courtroom to sketch crime victims during their testimony at trial. 2005 WL 2648070, at *4-5. The Court held that "Section 3771 proscribes all forms of identification of the victims in this case, including, but not limited to sketching for purposes of television." Id. at *5. The Court based its ruling on the "compelling government interest in protecting the dignity" of the crime victims. Id. at *4. Also, in United States v. Patkar, the Court denied a request by the Associated Press for disclosure of documents produced in discovery identifying the victim of an extortion scheme. 2008 WL 233062, at *19-20. The Court found that "the public interest lies in treating a crime victim with fairness and with respect to privacy. . . . [D]isclosure would certainly act as a deterrent to a victim reporting the commission of a crime." Id. at *19.

Even in cases that do not directly implicate the privacy rights of crime victims under Section 3771, Courts routinely have found that documents similar to the documents at issue in this case do not trigger the First Amendment or the common law rights of access, or that such rights are outweighed by countervailing privacy interests. For example, in United States v. Gotti, 322 F. Supp. 2d 230, 249-50 (E.D.N.Y. 2004), the Court found that letters sent to the Court by third parties in connection with sentencing were not subject to the First Amendment right of access. The Court noted that there was "no logic" in "chilling the free flow of information by publicly disclosing letters sent in confidence to the court." Id. at 250. The Gotti Court further concluded that the letters in question were entitled to a common law presumption of access, but that presumption was entitled to little weight because the Court did not rely on the letters. Id. (citing United States v. Amodeo, 71 F.3d 1044, 1051 (2d Cir. 1995)).

Similarly, in United States v. Lawrence, 167 F. Supp. 2d 504, 506-09 (N.D.N.Y. 2001), the Court considered the Albany Times Union's request for access to letters sent to the Court in connection with sentencing. The Court found the First Amendment right of access did not attach to the letters because they were "submitted by private citizens directly to the Court clearly

evinced an expectation of privacy and confidentiality" and that if the letter were made public "it may have a chilling effect and discourage the valuable input . . . that would be garnered." Id. at 508. The Court ruled that the "privacy expectations of citizens and the benefit of honest, uninhibited commentary on sentencing issues far outweigh the need for public access to these letters." Id. The Court also noted that the presumption of access to judicial documents did not compel access to the letters in question because "the Court did not rely on the specific contents of any particular letter" in imposing sentence. Id. at 509.

Discussion

The Government respectfully submits that the Court should not disclose the names, addresses, telephone numbers and email addresses of the victims in this case who have requested that their personal identifying information remain sealed, or of the victims who have not informed the Government whether they object or consent to public disclosure of their correspondence.

With respect to the victims who have informed the Government that they consent to public disclosure, the Government has provided to NBC and ABC, in unredacted form, all of the Email Correspondence received from these victims. (Attached as Exhibit A.)

With respect to the victims who either have informed the Government that they object to the full disclosure of their Email Correspondence, or have not informed the Government whether they consent or object, the Government has provided all of these letters to NBC and ABC in redacted form (with their names, addresses, telephone numbers and email addresses redacted). (A selection of these letters is attached as Exhibit B). The Government submits that the disclosure of these letters in redacted form protects the victims' privacy interests. The media and the public has access to the substance of the victims' Email Correspondence with merely the victims' personal identifying information redacted. The Second Circuit law is clear that an individual's privacy interest is a countervailing factor to be weighed against public disclosure of a document. United States v. Amodeo, 71 F.3d at 1050-51 ("privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation"). For the reasons set forth, the Government respectfully requests that the Court deny the motion by NBC and ABC to unseal the personal information of victims in the Email

Honorable Denny Chin
March 31, 2009
Page 10

Correspondence of the victims who have objected to such disclosure, and of the victims who have not informed the Government whether they object or consent.

First, Section 3771 was enacted to provide greater rights to crime victims. Unsealing the victims' Email Correspondence in its entirety, which would make all of their personal information public, may discourage crime victims from exercising their rights under the statute in the future. To disclose the victims' identities to the press and public, without the victims' consent and prior knowledge, would violate the grant of the rights of dignity and privacy under the statute. The victims in this case were never informed, either by the Court's March 6 Order, or by the Government's notifications on its website, or by any other means, that their Email Correspondence to the Government, containing their names, home addresses, telephone numbers and email addresses, would be made public. The victims were merely informed that they should email the Government if they wished to be heard at the March 12 hearing.

In fact, many victims addressed their Email Correspondence directly to the Government, not the Court, and may not have foreseen that their request to be heard would become a public document. Moreover, the Government's website, which invited victims to notify the Government if they wanted to be heard, contained a substantially verbatim listing of the rights provided under Section 3771, including "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." If the victims had known that their home addresses and telephone numbers would become public, many victims may not have included that information in their correspondence and may not have written to the Government at all. In addition, disclosure of such identifying information may discourage victims from exercising their rights under Section 3771.

In response to the Government's March 28 email asking victims whether they consent to the unsealing of their correspondence, the Government received responses from many victims who state that they are concerned for their safety if their identifying information is released. Many others do not want to be solicited and cite potential additional financial harm and emotional harm that could come to them from the disclosure of their personal information. For example, some of the responses from victims include the following:

* I wish to have my correspondence sealed for

privacy and for safety. Since the publication of my address by the Trustee I have been subjected to strangers coming to my door and receipt of threatening emails and mail. . . . I am 65 years old and live alone, and have found these intrusions terrifying . . . at a time when I am already tremendously vulnerable.

- * I do NOT consent and do NOT want my correspondence or personal information released. That would be a huge invasion of privacy. I have already been through a lot due to the Madoff fraud and the release of this would certainly cause additional duress.
- * I wish to have my correspondence [email] to the Government remained sealed for privacy reasons. I would not have sent that email if I had known it would be made public. I respectfully request that you honor my right to privacy.
- * I don't mind the story getting out [but] why are names important? . . . I should have the right to choose whether I want my name out in public and I choose no.
- * I absolutely wish to have my correspondence remain sealed!!! The letter was sent because I was unable to attend the court proceedings due to financial considerations.
- * This has already cost me and my family dearly and the pain is immeasurable. Having the press contact us will only serve to reopen wounds that will take years to heal.
- * You should not be distributing personal information or data to the media. Home addresses and phone numbers should be protected.
- * I do NOT consent for the safety of my family. More public information is a security issue.

Second, although the Email Correspondence from victims was submitted to the Court, many of the victim letters are not "judicial documents" because they were not "relevant to the

performance of the judicial function" and played no role in the adjudication process at the March 12 hearing. Amodeo, 44 F.3d at 145. Most if not all of the victim letters may not have been relied on by the Court in any way in its rulings to accept the defendant's guilty plea and to remand the defendant. In fact, many of the victims' emails were not relevant to the guilty plea or bail determination at all, but were relevant to sentencing and forfeiture issues. Even if some of the victim letters did play a role in the adjudication process, the victims' names, addresses, telephone numbers and email addresses were not "relevant to the performance of the judicial function." In addition, the overwhelming percentage of the victims who submitted letters did not speak publicly at the March 12 hearing. In fact, only three victims ultimately spoke. And, of the three individuals who spoke, none read his or her Email Correspondence to the Government. Rather, they spoke to the Court and the defendant from their prepared remarks. Therefore, the Email Correspondence is not entitled to a presumption of the right of public access because it is not a judicial document.

Third, the privacy interests of the victims in this case far outweigh the interest of the press and public in the information at issue - which is simply the names, addresses, telephone numbers and email addresses of the victims who do not consent to public disclosure of that information. The redaction of that information, while providing the press and public with the substance of the victims letters, would not have any negative impact on the ability of the media to report on this case. As the Second Circuit has held, countervailing factors to be balanced against the right of access include the "privacy interests of innocent third parties" and these interests "should weigh heavily in a court's balancing equation." Amodeo, 71 F.3d at 1050.

Honorable Denny Chin
March 31, 2009
Page 13

Conclusion

The Government respectfully requests that the motion by NBC and ABC to unseal the correspondence from the victims who request that their personal identifying information remain sealed be denied. The Government also respectfully requests that the Court file this letter with the Clerk of the Court.

Respectfully submitted,

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