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U.S. Foreign Intelligence
Surveillance Court

IN THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

In re: Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act	**No. 105B(g) 07-01**

YAHOO! INC.'S UNCLASSIFIED MOTION UNDER FISC RULE 62 TO ALLOW PRE-PUBLICATION REVIEW OF DOCUMENTS PRODUCED IN RESPONSE TO THIS COURT'S JULY 15, 2013 ORDER

Pursuant to this Court's order of July 15, 2013, the Government has begun conducting a declassification review of the Court records associated with this case. It provided the first portion of those records to the Court on September 12, 2013, provided the second portion on September 27, 2013, and intends to make further submissions on a rolling basis. Counsel for Yahoo has previously had access to classified versions of these documents—many of which Yahoo itself filed. While the Executive Branch retains some discretion over declassification decisions, Yahoo respectfully requests permission to review the Government's submissions to ensure that its redactions are well-founded and do not unintentionally create a risk that the documents will be misunderstood. Likewise, because this Court ultimately retains control over its own records, Yahoo seeks permission to review the documents in order to state any objections to further redactions the Court may make. Yahoo asks this Court to enter an order permitting Yahoo, through its counsel holding an appropriate security clearance, to review all documents already

provided and to be provided by the Government in response to this Court's July 15, 2013 Order prior to ordering publication of such documents in redacted form.

Facts

In response to this Court's July 15, 2013 Order, the Government conducted a declassification review of the Court's Memorandum Opinion of April 25, 2008 and an accompanying order. Gov't's Second Response at 1-2. At the conclusion of that review, it provided proposed redactions to the Court for the Court's own review on September 12, 2013. The Government completed its declassification review of briefs and materials cited in the Memorandum Opinion on September 27, 2013, and submitted those documents to the Court with proposed redactions. The Government has stated that going forward it will complete its declassification reviews on a rolling basis. Gov't's First Response at 1. Among the briefs and materials the Government has submitted or will submit to the Court are eleven briefs and one set of declarations filed by Yahoo. *Id.* app. at 1-3. Yet, the government's proposed course of action—awaiting Court review on the declassification by the DNI—avoids any review or input by Yahoo. *Id.* at 2.

Argument

Yahoo respectfully requests that the Court permit Yahoo, through its counsel holding appropriate security clearance as required by FISC Rule 63, to review all documents already provided and to be provided by the Government in response to

this Court's July 15, 2013 Order prior to the publication of such documents in redacted form. Counsel for Yahoo in this case presently has access to "classified information pertaining to this case in accordance with applicable security requirements and regulations and applicable orders issued by [FISCR] or the FISC." *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1017 (Foreign Int. Surv. Ct. Rev. 2008). In addition, twelve of the documents the Government has or expects to provide to the Court will be Yahoo's own motions and declarations. As such, permitting counsel for Yahoo to review the documents provided by the Government will not result in any additional disclosure of classified information.[1]

Furthermore, this Court retains control over its own records, and thus the Government has argued that publication of court records requires additional action by this Court after the Government has concluded its classification review. Rule 62(a); *See* Gov't Response to Provider's Motion at 1, 1 n. 1; *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (Foreign Int. Surv. Ct. 2007) (FISC "has supervisory power over its own records and files") (citations omitted).

Permitting Yahoo, by its counsel, to review the documents provided by the Government in response to this Court's July 15, 2013 Order will assist the Court in determining whether the documents are suitable for publication. In determining

[1] Through this motion, Yahoo does not request access to any documents or portions of documents that were previously filed with this court *ex parte*.

whether an order is suitable for publication, the Foreign Intelligence Surveillance Court of Review has considered whether redactions "distort[ ] the content of the discussion of the statutory and constitutional issues." *In re Directives*, 551 F.3d at 1016. As a party to this litigation—and as the author of twelve of the documents concerned—Yahoo has a unique understanding of "the content of the discussion of the statutory and constitutional issues" involved in this case. In addition, as discussed in Yahoo's Reply, Yahoo is currently facing litigation alleging statutory and constitutional violations in connection with United States Government demands for user data, which give Yahoo a unique interest in ensuring that the orders, as redacted, are suitable for publication and accurately reflect the discussion of statutory and constitutional issues. Yahoo Reply at 4-5. Therefore, the Court should permit Yahoo to review the documents as redacted before the Court orders publication.

Conclusion

For the foregoing reasons, Yahoo asks this Court to enter an order permitting Yahoo, by its counsel holding appropriate security clearance, to review all documents already provided and to be provided by the Government in response to this Court's July 15, 2013 Order prior to ordering publication of such documents in redacted form.

Dated: September 30, 2013

Signature: /s/ Marc J. Zwillinger

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I served copies of the foregoing motion on:

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pursuant to FISC Rule 8 and procedures established by the Security and Emergency Planning Staff, United States Department of Justice.

/s/Jacob A. Sommer

Jacob A. Sommer