

RECEIVED
INTELLIGENCE SURVEILLANCE COURT

IN THE FOREIGN INTELLIGENCE SURVEILLANCE COURT PM 3:33

In re: Directives Pursuant to Section
105B of the Foreign Intelligence
Surveillance Act

No. 105B(g) 07-01

RECEIVED
INTELLIGENCE SURVEILLANCE COURT

**REPLY IN SUPPORT OF YAHOO! INC.'S
MOTION UNDER FISC RULE 62**

The Government has informed Yahoo! Inc. (“Yahoo!”), through its pleadings and otherwise, that Yahoo!’s name and its counsels’ identities are no longer classified and may be released immediately. The Government has not objected to Yahoo!’s request for a new classification review and release of this Court’s order and the parties’ briefs. Yahoo! therefore asks this Court to enter an order:

- A. Stating the Court does not object to release of all of its orders or the parties’ briefing; and
- B. Directing the government to conduct a classification review of this Court’s orders and briefing this matter for public release.

See Ex. A, In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01, Order (For. Intel. Surv. Ct. of Rev. June 28, 2013).

ARGUMENT

Release of this Court's decision and the parties' briefing is necessary to inform the growing public debate about how this Court considers and examines the Government's use of directives. Courts have long recognized the public has a right to access court records. *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978) (The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state.") "There is a 'strong presumption in favor of public access to judicial proceedings.'" *In re Sealed Case*, 237 F.3d 657, 666 (D.C. Cir. 2001) (*citing Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)). Executive Order 13,526 also recognizes that "the need to protect [classified] information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified."

Following these principles, the Foreign Intelligence Surveillance Court of Review ("FISCR") accepted the need for additional public access to court records in this case. *See Ex. A, In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01, Order (For. Intel. Surv. Ct. of Rev. June 28, 2013). The FISCR recognized that since it decided this case, "more than four years have passed, and recent events suggest that there may have been a change in

the government's position as to what it considers classified in this matter." *Id.* at 2-3. The FISCR thus held that "it is appropriate for this Court to order the requested relief and not to require the Provider to initiate a separate proceeding under the Freedom of Information Act." *Id.* at 3. It ordered the Government, by July 12th, to provide a timeline for declassifying additional portions of its decision and the parties' legal briefs for this case on appeal. *Id.* This Court should do the same with regard to the previously unreleased record in this case, including the decision compelling Yahoo! to comply, the Court's denial of Yahoo!'s request for a stay, and the parties' briefing.

The directives at issue in this case are at the center of a robust national debate represented by countless news articles, a statement from the Director of National Intelligence,¹ and congressional hearings.² Providing more information about the methods the government uses, the arguments this Court considers, and the Court's reasoning would inform this debate and prevent misunderstandings

¹ Ex. B., James Clapper, *DNI Statement on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (June 8, 2013) available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/872-dni-statement-on-the-collection-of-intelligence-pursuant-to-section-702-of-the-foreign-intelligence-surveillance-act>.

² U.S House of Representatives Permanent Select Committee on Intelligence, *How Disclosed NSA Programs Protect Americans, and Why Disclosure Aids our Adversaries* (June 18, 2013), recording available at <http://www.ustream.tv/recorded/34527763>. Ex. C, U.S House of Representatives Permanent Select Committee on Intelligence, *How Disclosed NSA Programs Protect Americans, and Why Disclosure Aids our Adversaries*, Opening Statement of Chairman Rogers' (June 18, 2013) available at <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/ChairOpening06182013.pdf>

based on incomplete information.³ As Representative Rogers, Chairman of the U.S. House of Representatives Permanent Select Committee on Intelligence stated, “One of the more damaging aspects of selectively leaking incomplete information is that it paints an inaccurate picture and fosters distrust in our government.” Ex. D at 1. This Court’s thorough analysis of Yahoo!’s objections, and arguments in the parties’ briefs, would allow the public to observe the process by which this Court oversees directives, and offer more complete information about that process, while still protecting classified information. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (noting that in criminal cases “the appearance of justice can best be provided by allowing people to observe it.”)

Other parties are also demanding information from Yahoo! (and other providers) about their responses to directives. Plaintiffs have already filed lawsuits against providers, including Yahoo!, that news reports have characterized as having responded to directives and/or taken part in the PRISM program. *See, e.g., Klayman v. Obama*, No. 13-cv-00881-RJL (D.D.C. filed June 11, 2013). Yahoo!, like other electronic communications providers, is under public pressure to provide more information about its responses to United States Government demands for user data. Disclosure of the directives and the briefs in this case would also allow

³ *See, e.g.,* Ex. D, Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, The New York Times (July 6, 2013) http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&_r=0 (revealing a lack of clarity arising from incomplete release of court opinions).

Yahoo! to demonstrate that it objected strenuously to the directives that are now the subject of debate, and objected at every stage of the proceeding, but that these objections were overruled and its request for a stay was denied. Most importantly, making this Court's thorough analysis available to the public will provide the public with valuable information about how the parties and the Court vetted the Government's arguments supporting the use of directives. That information will give the public a more complete understanding of the directive process, allowing U.S. citizens to inform their legislative representatives as to their views on the continued use of the directive process, especially as the statutes authorizing directives are up for reauthorization. Pub. L. 112-238, § 2(a)(1) (reauthorizing directives until December 31, 2017). In short, additional disclosures will advance the proper functioning of our representative democracy with regard to the statute that authorizes the use of directives. *See, e.g., Richmond Newspapers*, 448 U.S. at 572; *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (“an informed public is the essence of working democracy.”).

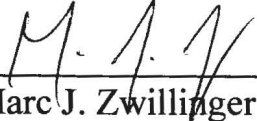
CONCLUSION

Given the Government's decision not to object to the relief Yahoo! has requested, and its declassification of Yahoo!'s identity, Yahoo! asks this Court to enter an order:

1. Stating that the Court does not object to release of all of its orders in this case or the parties' briefing; and
2. Directing the government to conduct a classification review of the orders and briefing in this matter for public release.

Dated: July 9, 2013

Signature: _____


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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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.

A handwritten signature in black ink, appearing to read 'S.T. Moran', written over a horizontal line.

Sean T. Moran