

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE  
COURT OF REVIEW  
WASHINGTON, D.C.

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

No. 08-01

**YAHOO! INC.'S UNCLASSIFIED MOTION UNDER FISC RULE 62 TO  
ALLOW PRE-PUBLICATION REVIEW OF DOCUMENTS PRODUCED  
IN RESPONSE TO THIS COURT'S JUNE 28, 2013 ORDER**

Pursuant to this Court's order of June 28, 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 10, 2013, and the second portion September 24, 2013. 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 June 28, 2013 Order prior to ordering publication of such documents in redacted form.

### **Facts**

In response to this Court's June 28, 2013 Order, the Government conducted a declassification review of this Court's opinion and the parties' briefs. Gov't's Third Resp. at 1-2. At the conclusion of that review, it provided proposed redactions to the Court for the Court's own review on September 10, 2013. On September 24, 2013, the Government provided two other documents to the Court with proposed redactions. *Id.* While the documents the Government has submitted include documents Yahoo authored, the government's proposed course of action—awaiting Court review on the declassification by the DNI—completely 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 June 28, 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, at least one of documents the Government has or expects to provide to the Court is Yahoo’s own brief. As such, permitting Yahoo’s counsel to review the documents provided by the Government will not result in any additional disclosure of classified information.<sup>1</sup>

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 June 28, 2013 Order will assist the Court in determining whether the documents are suitable for publication. In determining whether an order is suitable for publication, this Court has considered whether redactions “distort[ ] the content of the discussion of the statutory and

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

constitutional issues.” *In re Directives*, 551 F.3d at 1016. As a party to this litigation—and as the author of at least one 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. Yahoo is also 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. The Court should permit Yahoo to review the documents as redacted before ordering 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 June 28, 2013 Order prior to ordering publication of such documents in redacted form.

Dated: September 30, 2013

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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

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