

United States Foreign Intelligence Surveillance Court

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT

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LEEANN FLYNN HALL
CLERK OF COURT

In re Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives)
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Case No. 13 - 0 5

YAHOO!'S MOTION FOR DECLARATORY JUDGEMENT TO DISCLOSE AGGREGATE DATA REGARDING FISA ORDERS AND DIRECTIVES

Yahoo! Inc. ("Yahoo!") and other electronic communications providers have been intensely and publicly scrutinized for their alleged "participation" in surveillance that the Government has conducted under the Foreign Intelligence Surveillance Act ("FISA") and other national security authorities. Yahoo! has been unable to engage fully in the debate about whether the Government has properly used its powers because the Government has placed a prior restraint on Yahoo!'s speech by forbidding Yahoo! and other providers from disclosing aggregate numbers of demands for surveillance they receive (if any) under FISA. At the same time, the Government has released volumes of previously-classified documents confirming the use of FISA surveillance and has promised to report its own aggregate numbers shortly. *See generally* Office of the Director of National Intelligence, IC on the Record, *available at* icontherecord.tumblr.com. Preventing Yahoo! from disclosing similar data is a content-based restriction on Yahoo!'s First Amendment rights that is not narrowly tailored to further national security.

Yahoo! thus moves this Court, under 28 U.S.C. § 2201 and Foreign Intelligence Surveillance Court Rule of Procedure 6(d), for a declaratory judgment or for other appropriate relief, confirming its legal authority to disclose specific statistics that pertain to its receipt of orders of this Court and directives under 50 U.S.C. § 1881a, if any, in six month reporting cycles without violating FISA, the FISC rules of procedure or any court orders.

I. Facts

Yahoo! provides electronic communications services to hundreds of millions of people and businesses worldwide, including through electronic mail and instant messaging services. It is thus subject to orders and directives under FISA and the FAA, which seek data hosted by Yahoo! in the United States. *See* 50 U.S.C. §§ 1805(c)(2)(B); 1881a(h). The public knows that Yahoo! has received directives and orders from this Court. *In re Directives Pursuant to Section 105B of the Foreign Intel. Surv. Act*, 551 F.3d 1004 (For. Intel. Surv. Ct. Rev. 2008); FISC Case No. 105B(g) 07-01, Order, July 15, 2013. Yahoo! also regularly receives legal process seeking user data from U.S. federal, state, and local law enforcement authorities and some authorities in countries in which it has a presence.

In June of this year, Yahoo! was named in intensive media coverage regarding an alleged “PRISM” surveillance program conducted by the National Security Agency. *See, e.g., The Guardian, The NSA Prism Program Taps in to User Data of Apple, Google, and Others* (June 6, 2013),¹ *The Washington Post, U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program* (June 6, 2013).² The media has mistakenly—and repeatedly—reported that this “program” allows the U.S. Government to “tap ... directly into the central servers” of providers to collect information.

Yahoo! tried to correct this false claim and the misimpressions created by such false reports by, among other actions, increasing transparency around the receipt and handling of national security demands. For example, Yahoo! has filed motions in this Court and the Foreign Intelligence Surveillance Court of Review (“FISCR”) seeking to declassify its

¹ Available at <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

² Available at http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11c2-8845-d970ccb04497_story.html

previous challenge to directives issued under 105B of the Protect America Act, the precursor to Section 702. This Court and the FISC essentially granted both motions and the Government has stated that it will release more declassified documents from both cases soon. FISC Case No. 105B(g) 07-01, United States Response to July 15, 2013 Order.

In addition, with the FBI's consent, Yahoo! released the aggregate number of law enforcement and national security requests that it received between December 1, 2012 and May 31, 2013. On September 6, 2013, Yahoo! also released a more detailed transparency report regarding law enforcement process for the period from Jan. 1, 2013 to June 30, 2013. *See* Yahoo! Transparency Report, *available at* <http://info.yahoo.com/transparency-report>. This report did not—and because of the government's prior restraint could not—include individual numbers for national security-related demands.

Despite Yahoo!'s desire not to commingle other law enforcement data with national security demands, the government prohibited Yahoo! from disclosing the number of national security demands that it has received (if any) and the numbers of accounts affected by such demands.³ In addition, based on the government's response to similar requests made by both Google and Microsoft, it appears that the government maintains that publishing aggregate numbers of national security demands received is unlawful.

Yahoo!'s inability to respond to news reports has harmed its reputation and has undermined its business not only in the United States but worldwide. Yahoo! cannot respond to such reports with mere generalities. Specific data about the number of

³ Moreover, the Government refused to allow Yahoo! to disclose the aggregate number of NSLs it had received in bands of 1,000 despite previously allowing Google to disclose that same data. *See* FISC Case No. Misc. 13-02, Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information about FISA Orders, June 18, 2013 at 2.

demands that Yahoo! receives is important to answer the intense, continuing debate about the Government's use of FISA process to obtain information from providers.

II. Right to Relief

Yahoo! is a "communications carrier ... or other specified person" that the Government, through this Court, may compel to provide data under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1881g ("FISA"). Indeed, Yahoo! has, in the past, received compulsory process from this Court. *In re Directives*, 551 F.3d at 1004. Yahoo! requests relief to allow it to publish accurate information about how many disclosures the Government has compelled it to make (if any) under FISA or other national security-related authorities.

Specifically, Yahoo! moves this court to declare that Yahoo! has a First Amendment right to publish, and/or no applicable law or order prohibits the publication, in six-month reporting cycles, of the sum of active requests it received (and the number of accounts specified) under each of the FISA authorities, including:

- (1) FISA orders based on probable cause (Titles I and III of FISA, and sections 703 and 704);
- (2) Section 702 of FISA;
- (3) FISA Section 12 Business Records (Title V of FISA); and
- (4) FISA Pen Register/Trap and Trace (Title IV of FISA).

If the Court finds that disclosure of any single set of specific statistics described here would compromise national security interests, Yahoo! moves for other appropriate relief permitting the publication of the described data in aggregate form.

This Court may enter this declaratory relief because the aggregate data Yahoo! seeks to disclose is not classified or subject to any other limitation on disclosure. FISA and the

FAA do not prohibit providers from disclosing aggregate data. While FISA orders may prohibit disclosure of the orders themselves, those prohibitions exist to prevent targets from becoming aware of surveillance and to protect U.S. assets involved with particular surveillance--not to obscure the government's use of FISA process from the American public. 50 U.S.C. 1805(c)(2)(B) (providers may be ordered to "furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier ... is providing that target of electronic surveillance"); *see also* 50 U.S.C. § 1824(c)(2)(B) (imposing the same obligation in the context of a FISA physical search); § 1881b(h)(1)(A) (same in the context of a § 702 directive).

Similarly, although 50 U.S.C. §§ 1805(c)(2)(C) and 1881a(h)(1)(B) require providers to "maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such electronic communication service provider wishes to maintain," nothing in these provisions expressly prohibits disclosure of aggregate numbers. And any security procedures that act to prohibit Yahoo!'s release of aggregate disclosure under all circumstances must be evaluated in light of the First Amendment. Otherwise, the Government could use these provisions to prevent providers from disclosing anything about the Government's use of FISA process. This would prohibit speech about matters of significant public concern even where no specific justification exists for such secrecy. *See In re Nat'l Sec. Letter*, 2013 WL 1095417 at *10 (N.D. Cal. Mar. 14, 2013) ("here, the concern is the government's unilateral ability to prevent individuals from speaking out about the

government's use of NSLs, a subject that has engendered extensive public and academic debate.")

A. Disclosing Aggregate Data will Not Harm National Security Interests

Disclosing aggregate data, without identifying the targets of that surveillance, does not imperil the secrecy of any particular FISA order or FAA directive. Yahoo! provides electronic communications services to hundreds of millions of users across the world. Given the number of Yahoo! users and the wide variety of uses for Yahoo!'s services, it is difficult to see how disclosing aggregate numbers of demands could possibly harm the secrecy of any particular FISA or FAA surveillance. *See Id.* 2013 WL 1095417 at *11 (N.D. Cal. Mar. 14, 2013) (noting that security concerns related to disclosing NSL data could exist where the provider was a small provider with few users). The risk that disclosure of aggregate numbers will tip off a particular user that or she is under surveillance is minuscule.

B. The First Amendment Prohibits the Government from Placing Such Content-Based Restrictions on Yahoo!'s Speech

The First Amendment protects Yahoo!'s right to report this data and to respond to public criticism. Forbidding Yahoo! from disclosing aggregate numbers would be a content-based restriction on speech that is subject to strict scrutiny. *Doe v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008) (government conceded in a challenge to non-disclosure provisions of NSLs that strict scrutiny is the applicable standard). To survive strict scrutiny, "the Government must demonstrate that the nondisclosure requirement is 'narrowly tailored to promote a compelling Government interest.'" *Id.* (quoting *United States v. Playboy Entertainment*, 529 U.S. 803, 813 (2000)). Though national security interests are compelling and Courts give some degree of deference to the executive branch,

that deference is not absolute. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (no absolute immunity for executive branch officials for decisions made for national security reasons); *Doe v. Mukasey*, 549 F.3d at 882-84 (giving the executive branch total deference in national security matters would be no scrutiny at all). The Government's content-based prohibition on Yahoo!'s speech cannot survive strict scrutiny.

Forbidding all disclosure of aggregate data does not promote the Government's interest in the secrecy of particular surveillance efforts. And even if it did, prohibiting the disclosure of accurate information about the volume of such process on a per provider basis is not narrowly tailored to further that interest. Indeed, FISA already provides that the Attorney General may publish aggregate data. 50 U.S.C. § 1807. The Attorney General has previously released such reports to the public.⁴ More importantly, the government has committed to publish aggregate numbers of orders issued during a 12-month period and the aggregate number of targets affected by these orders across all providers. The Director of National Intelligence (DNI) recently agreed to report each of the following categories of surveillance that the intelligence community has demanded:

- FISA orders based on probable cause (Titles I and III of FISA, and sections 703 and 704).
- Orders under Section 702 of FISA
- FISA Business Records (Title V of FISA).
- FISA Pen Register/Trap and Trace (Title IV of FISA)
- National Security Letters issued under 12 U.S.C. § 3414(a)(5), 15 U.S.C. §§ 1681u(a) and (b), 15 U.S.C. § 1681v, and 18 U.S.C. § 2709.

⁴ See Letter to Majority Leader Harry Reid, United States Senate from Peter J. Kadzik, Principal Deputy Assistant Attorney General (Apr. 30, 2013) *available at* http://www.justice.gov/nsd/foia/foia_library/2012fisa-ltr.pdf (noting that during 2012, the Government made 1,856 applications to the FISC for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes; and (2) the FISC did not deny any applications in whole or in part.)

See generally DNOI Clapper Directs Annual Release of Information Related to Orders Issued Under National Security Authorities (August 29, 2013) *available at* <http://icontherecord.tumblr.com/post/59719173750/dni-clapper-directs-annual-release-of-information>. The government's release will aggregate this information across all providers. *Id.* However, Yahoo! seeks the ability to disclose the portion of these requests it receives. The Government's public release of similar data—which was likely motivated by a desire to inform the public and to correct the misimpressions caused by inaccurate reporting—undermines any argument that prohibiting Yahoo! from publicly disclosing the same data would harm national security.

Finally, any FISA provisions that would allow the Government to prohibit Yahoo! from making the requested disclosures would not survive strict scrutiny because of the strong public interest in this information as part of the national, ongoing debate over the Government's use of surveillance powers under FISA and the Government's own participation in that debate. That the Government engages in such surveillance is now part of the public record—and the government has released and plans to release more data about its programs. To that end, the Director of National Intelligence has also acknowledged that President Obama directed him to “declassify and make public as much information as possible about certain sensitive NSA programs while being mindful of the need to protect sensitive classified intelligence and national security.”⁵ The information that Yahoo! seeks to disclose furthers the Government's avowed interest in transparency, without compromising national security, especially in light of the public knowledge that

⁵ DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA), Aug. 21, 2013, *available at* <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa>

Yahoo! has received intelligence process. Given these statements and extensive public reporting on the issue, completely prohibiting Yahoo!'s speech regarding these issues is not narrowly tailored to serve a compelling interest. The First Amendment does not allow the Government to suppress private speech, while the Government itself speaks extensively about the same subject.

III. Conclusion

Yahoo! requests that this Court issue a declaratory judgment declaring that Yahoo! may lawfully disclose the requested information. Yahoo! also requests that the Court set a briefing schedule for this motion that would allow it an opportunity to respond to any opposition the Government files in response to this petition.⁶

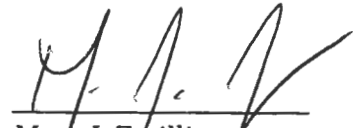
IV. Rule 7 Statement

Pursuant to FISC Rules of Procedure 7(h) & (i), Yahoo! states that its undersigned counsel, Marc J. Zwillinger holds a top secret security clearance, which was granted by the FBI to permit him to advise his clients about classified legal process. He is also a member in good standing of the bars of Illinois and the District of Columbia. He has previously appeared before this Court. Jacob Sommer held a secret security clearance, which is currently being renewed. The FBI originally granted the clearance to allow him to advise his clients concerning classified legal process. He is a member in good standing of the bars of the District of Columbia and South Carolina. He has also previously appeared before this Court.

⁶ Yahoo! would be willing to coordinate such schedule with the schedule to be entered in Case Nos. Misc. 13-03 and 13-04, which cases involve similar, but not identical, requests for relief filed by Google and Microsoft.

Dated: September 9, 2013

Signature:



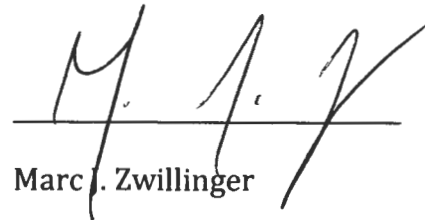
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, I caused copies of the foregoing motion to be served 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.



Marc J. Zwillinger