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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

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CLERK

IN RE DIRECTIVES TO YAHOO INC.
PURSUANT TO SECTION 105B OF
THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT. ~~(S)~~

Docket Number: 105B(g)
07-01

MOTION TO COMPEL COMPLIANCE WITH DIRECTIVES OF THE
DIRECTOR OF NATIONAL INTELLIGENCE AND ATTORNEY GENERAL

The United States of America, through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to Section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), for an order compelling Yahoo Inc. to comply with directives issued by the Director of National Intelligence and Attorney General pursuant to Section 105B(e) of the Act. This Court should order Yahoo Inc. to comply with the directives because they were issued in accordance with Section 105B(e) and are otherwise lawful. ~~(S)~~

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Classified by: Margaret A. Skelly-Nolen, Acting Counsel
for Intelligence Policy, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 21 November 2032

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1. On August 4, 2007, Congress amended FISA by enacting the Protect America Act of 2007. Under Section 2 of the Protect America Act of 2007, codified at 50 U.S.C. §§ 1805A and 1805B, the Director of National Intelligence and Attorney General may authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be located outside the United States. 50 U.S.C. § 1805B(a). Section 2 also authorizes the Director of National Intelligence and Attorney General to issue directives to persons requiring them to "immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition." 50 U.S.C. § 1805B(e). In the case of a failure to comply with a directive, Section 2 authorizes the Attorney General to invoke the aid of this Court for an order compelling compliance with the directive. 50 U.S.C. § 1805B(g). (U)

2. Pursuant to Section 105B(a) of the Act, the Director of National Intelligence and Attorney General have, as of this date, executed [REDACTED] certifications authorizing the acquisition of foreign intelligence information concerning certain persons reasonably believed to be outside the United States. Each of these certifications was made in writing and under oath, and was based on a supporting affidavit. [REDACTED]

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[REDACTED]

[REDACTED] A copy of each certification subsequently was filed with this Court.¹ ~~(S)~~

3. Pursuant to Section 105B(e) of the Act and the [REDACTED] certifications discussed above, the Director of National Intelligence and the Attorney General have issued [REDACTED] directives to Yahoo Inc., each of which requires Yahoo Inc. "to immediately provide the Government with all information, facilities, and assistance necessary to accomplish this acquisition" of foreign intelligence information concerning the certain persons reasonably believed to be outside the United States. All [REDACTED] directives to Yahoo Inc. were executed by the Attorney General on [REDACTED] and by the Director of National Intelligence on [REDACTED]. The directives were served on Yahoo Inc. on [REDACTED]. A copy of each directive is annexed hereto as Exhibit

1. ~~(S)~~

4. By letter dated [REDACTED] Yahoo Inc. informed the Government that it did not intend to comply with the directives. ~~(S)~~

5. This Court should order Yahoo Inc. to comply with each of the [REDACTED] directives issued pursuant to the certifications discussed above. Under Section 105B(g) of the Act, upon motion by the Attorney General, the Court "shall issue an order

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requiring the person to comply with the directive if it finds that the directive was issued in accordance with subsection (e) and is otherwise lawful." 50 U.S.C. § 1805B(g). As explained below, the directives were issued in accordance with Section 105B(e) and are otherwise lawful. ~~(S)~~

6. First, each directive was issued in accordance with specific statutory requirements of Section 105B(e), which provides that:

the Director of National Intelligence and Attorney General may direct a person to -- (1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that such person is providing to the target; and (2) 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 person wishes to maintain.

50 U.S.C. § 1805B(e). In each of the directives, the Director of National Intelligence and the Attorney General directed Yahoo Inc. "to immediately provide the Government with all information, facilities, and assistance necessary to accomplish this acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that Yahoo provides" and "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 Yahoo wishes to

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maintain." See Ex. 1. Thus, these directives were issued in accordance with 50 U.S.C. § 1805B(e). ~~(S)~~

7. Second, each directive is "otherwise lawful" because it is based upon a written certification of the Director of National Intelligence and the Attorney General that meets the requirements of 105B(a), and because each is consistent with the Fourth Amendment. Specifically, in each of the certifications discussed above, the Director of National Intelligence and the Attorney General determined, in writing, under oath, and based on a supporting affidavit, that:

- There are reasonable procedures in place for determining that the acquisition of foreign intelligence information under section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"), concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Foreign Intelligence Surveillance Court pursuant to section 105C of the Act. ~~(S)~~
- The acquisition does not constitute electronic surveillance as defined in section 101(f) of the Act. The acquisition does not constitute electronic surveillance because, based on the procedures identified above, the surveillance will be directed to persons reasonably believed to be located outside the United States. ~~(S)~~
- The acquisition involves obtaining the foreign intelligence information from or with the assistance of communications service providers, custodians, or other persons (including any officer, employee, agent, or other specified person of such service providers, custodians, or other persons) who have access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications. ~~(S)~~
- A significant purpose of the acquisition is to obtain foreign intelligence information. ~~(S)~~

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- The minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) of the Act. ~~(S)~~

See Ex. 1; see also 50 U.S.C. § 1805B(a)(1)-(5). Each authorization expires within the one-year period provided for in Section 105B(a).² See 50 U.S.C. § 1805B(a). ~~(S)~~

8. In addition, the directives are consistent with the Fourth Amendment.

The acquisition of foreign intelligence information concerning non-U.S. persons located outside the United States pursuant to the directives does not implicate the Fourth Amendment because the Fourth Amendment affords no protection to those non-U.S. persons. See United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (holding that the Fourth Amendment extends only to those persons who "have come within the territory of the United States and developed substantial connections" to the country); United States v. Bravo, 489 F.3d 1, 9 (1st Cir. 2007) ("The Supreme Court's holding in Verdugo-Urquidez is clear that the actions of the United States directed against aliens in foreign territory . . . are not constrained by the Fourth Amendment"). To the extent the directives authorize the acquisition of foreign intelligence information concerning U.S. persons located outside the United States, the acquisition is consistent with any Fourth Amendment rights of those U.S. persons. The Fourth Amendment does not require that

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the Government obtain a warrant to acquire foreign intelligence information concerning those U.S. persons. See, e.g., In re Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (noting that all courts to “have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information”). The directives, moreover, satisfy the Fourth Amendment’s central requirement of reasonableness. They advance a compelling government interest, are limited in scope and duration, and, as discussed above, are accompanied by appropriate safeguards that protect the privacy interests of the U.S. persons. See, e.g., id. at 736-42, 746 (noting that FISA procedures for electronic surveillance, such as minimization procedures and certification requirements, bear on FISA’s reasonableness under the Fourth Amendment). ~~(S)~~

9. The directives and the supporting authorizations comply with each of the requirements of Section 105B of the Act and, to the extent the Fourth Amendment applies to the acquisition, the requirements of the Fourth Amendment. Because the directives and underlying certifications were issued in accordance with Section 105B and, along with the supporting authorizations, are “otherwise lawful,” this Court should issue an order requiring Yahoo Inc. to comply with the directives. ~~(S)~~

10. The Government has consulted with counsel for Yahoo Inc., who has indicated that Yahoo Inc. is not filing a petition challenging the legality of the directives under Section 105B(h). Counsel for Yahoo Inc. has articulated Yahoo Inc.’s legal

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grounds for non-compliance, and Yahoo Inc. is requesting an opportunity to file a brief setting forth such grounds in response to this motion. In the event that the Court schedules further proceedings, see Rule 15 of the Foreign Intelligence Surveillance Court Rules of Procedure, the Government and Yahoo Inc. would propose the following briefing schedule: Yahoo Inc.'s response to the motion to compel shall be due on or before November 29, 2007, and the United States' reply shall be due on or before December 10, 2007. In view of the fact that Yahoo Inc. has not challenged the directives by filing a petition, which would trigger the procedures for resolving this matter set forth in Section 105B(h)(1)(B), the Government requests that the Court give this matter expedited consideration. (S)

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WHEREFORE the United States of America, by counsel, moves this Court for an order compelling Yahoo Inc.'s compliance with the directives of the Director of National Intelligence and Attorney General, as requested herein. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
U.S. Department of Justice



Associate Counsel
U.S. Department of Justice



Attorney Advisor
U.S. Department of Justice

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DIRECTIVE OF THE DIRECTOR OF NATIONAL INTELLIGENCE AND THE
ATTORNEY GENERAL PURSUANT TO SECTION 105B OF THE FOREIGN
INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED

TO: Yahoo Inc.
RE: DNI/AG 105B Certification [REDACTED]

The Director of National Intelligence and the Attorney General executed in writing and under oath, based on a supporting affidavit, the above-referenced Certification pursuant to section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"), thereby authorizing the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States. The Certification was executed by the Attorney General on [REDACTED] 2007, and by the Director of National Intelligence on [REDACTED] 2007. Specifically, the Director of National Intelligence and the Attorney General certified that:

- (1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under section 105B of the Act concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Foreign Intelligence Surveillance Court pursuant to section 105C of the Act;
- (2) the acquisition does not constitute electronic surveillance as defined in section 101(f) of the Act;
- (3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of communications service providers, custodians, or other persons (including any officer, employee, agent, or other specified person of such service providers, custodians, or other persons) who have access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;
- (4) a significant purpose of the acquisition is to obtain foreign intelligence information; and
- (5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) of the Act.

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~~Classified by: The Attorney General
Reason: 1.4(c)
Declassify on: 6 November 2032~~

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The acquisition of such information pursuant to the above-referenced Certification was authorized for a period of one year from the date that Certification was executed. This authority will expire on [REDACTED]

The Government will [REDACTED]

[REDACTED] Yahoo Inc., including its affiliates, subsidiaries, assigns and successors, and including any officer, employee, agent, or other specified person thereof (hereinafter referred to collectively as Yahoo), is hereby directed, pursuant to section 105B(e)(1) of the Act, to immediately provide the Government with all information, facilities, and assistance necessary to accomplish this acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that Yahoo provides.

Yahoo is further directed, pursuant to section 105B(e)(2) of the Act, 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 Yahoo wishes to maintain.

The Government shall compensate Yahoo at the prevailing rate for providing information, facilities, or assistance pursuant to this Directive.



Peter D. Keisler
Acting Attorney General of the United States

Signed: [REDACTED] 2007



J.M. McConnell
Director of National Intelligence

Signed: [REDACTED] 2007

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