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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

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

Docket Number: 105B(g) 07-01

**RESPONSE TO EX PARTE ORDER TO GOVERNMENT AND
MOTION FOR LEAVE TO FILE CLASSIFIED APPENDIX
FOR THE COURT'S EX PARTE AND IN CAMERA REVIEW (U)**

The United States of America, through the undersigned Department of Justice attorney, hereby files this response to the Ex Parte Order to the Government dated February 15, 2008 ("Order"). In addition, the United States hereby moves this Court for leave to file the attached classified appendix pursuant to Section 105B(k) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act). The grounds for the motion are as follows: ~~(S)~~

1. On November 21, 2007, the government filed a motion pursuant to Section 105B(g) to compel Yahoo's compliance with [REDACTED] directives issued to Yahoo Inc. ("Yahoo") by the Director of National Intelligence and the Attorney General pursuant to Section 105B(e) of the Act. ~~(S)~~

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Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 20 February 2033

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2. On December 11, 2007, the government submitted for the Court's ex parte and in camera review a classified appendix to the government's Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General. The government styled this request as a motion for leave to file a classified appendix, although Section 105B(K) speaks in mandatory terms, providing that "the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information." On January 31, 2008, the Court granted the government's motion to file the classified appendix for the Court's ex parte and in camera review. ~~(S)~~

3. On February 15, 2008, the Court issued an Order requiring the government to address "[w]hether the classified appendix that was provided to the Court in December 2007 constitutes the complete and up-to-date set of certifications and supporting documents (to include affidavits, procedures concerning the location of targets, and minimizations procedures) that are applicable to the directives at issue in this proceeding." The answer to the Court's question is "no." The Order further required, in relevant part, as follows:

If the answer to question number one is "no," the Government shall state what additional documents it believes are currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. The government shall file copies of any such documents with the Court concurrent with filing its brief. The government shall serve copies of this Order, its brief, and additional documents upon Yahoo, unless the

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government moves this Court for leave to file its submission ex parte, either in whole or in part. If the government files such a motion with the Court, it shall serve a copy of its motion upon Yahoo. The government shall also serve a copy of this Order upon Yahoo, unless the government establishes good cause for not doing so within the submission it seeks to file ex parte.

The documents the government believes are currently in effect and applicable to the directives issued to Yahoo that are at issue in this proceeding are listed in the table of contents to the attached classified appendix (discussed below in paragraph 5). ~~(S)~~

4. This motion constitutes the government's request under Section 105B(k) that the Court review ex parte and in camera the attached classified appendix of materials.¹ These materials are the complete and up-to-date sets of certifications and supporting documents (including affidavits, procedures concerning the location of targets, and minimizations procedures) currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. These materials, some of which have been previously filed with the Court, contain classified information, including top secret and compartmented information. ~~(S)~~

¹ The government recognizes that portions of the Protect America Act recently ceased to have effect. This fact does not affect this litigation or this motion, however, because Section 6(d) of the Protect America Act (which is not subject to the sunset contained in Section 6(c) of the Protect America Act) provides that "[a]uthorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration." Further, this Court's authority to enforce such directives under Section 105B(g), as well as the government's ability to file the attached classified appendix under Section 105B(k), are unaffected because Section 6(d) provides, in relevant part, that "[s]uch acquisitions shall be governed by the applicable provisions of such amendments." ~~(S)~~

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5. The attached classified appendix contains a table of contents identifying the documents therein. The government has included in the attached classified appendix the documents contained in the December 2007 appendix and has identified them as such in the table of contents. Thus, the attached classified appendix replaces in its entirety the December 2007 appendix. ~~(S)~~

6. On February 20, 2008, counsel for the United States informed counsel for Yahoo that the government would be requesting the Court's ex parte and in camera review of a classified appendix. Counsel for Yahoo requested copies of both the attached classified appendix and the December 2007 classified appendix, with redactions to the compartmented classified information, to determine whether Yahoo would oppose or agree to the relief sought in the government's request. Yahoo's request for a copy of the classified appendices is without merit. As discussed above, the Act gives the government the unqualified right to file documents in a proceeding to compel compliance with a directive for the Court's ex parte and in camera review. ~~(S)~~

7. In accordance with the Order, attached hereto is a certificate of service indicating that the government served upon Yahoo's counsel a copy of the Order and a copy of this response and motion without the attached classified appendix. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court review the attached classified appendix ex parte and in camera. A proposed Order is attached hereto. (~~S~~)

Respectfully submitted,



Office of Intelligence Policy and Review
National Security Division
United States Department of Justice

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