October 25, 2016

Mr. James R. Clapper, Director of National Intelligence
Office of the Director of National Intelligence
Washington, DC 20511

Dear Mr. Clapper:

The undersigned civil society groups write to express our concerns about recent reports of an order issued under the Foreign Intelligence Surveillance Act (FISA) that compelled Yahoo! to scan the emails of all of its users, in real time, for a “signature” associated with a foreign power. We believe such a massive scan of the emails of millions of people, particularly if it involves the scanning of email content, could violate FISA, the Fourth Amendment, and international human rights law, and has grave implications for privacy.

According to reports, the order was issued under Title I of FISA, which requires the government to demonstrate probable cause that its target is a foreign power or an agent of a foreign power (such as a spy or a terrorist), and probable cause that the “facility” at which the surveillance is conducted will carry the target’s communications. If reports are true, this authority to conduct a particularized search has apparently been secretly construed to authorize a mass scan. Observing the press reports, Senator Wyden warned, as he did prior to the Snowden disclosures, that the government has secretly interpreted the law to permit surveillance that would surprise and concern the public.

We call on you to:

• Honor the pledge your office made to “provide timely transparency on matters of public interest” by disclosing publicly the interpretation of law and of the Fourth Amendment that was relied upon to justify this surveillance;
• Release as quickly as possible the FISA Court opinion and order that compelled the surveillance to occur, as is required in the USA FREEDOM Act and as is consistent with the ODNI Principles of Intelligence Transparency Implementation Plan;
• Disclose whether the reported practice involved the scanning of email content;
• Disclose the types of selectors that the government believes are permissible under the authority it used;
• Provide any legal interpretations of FISA that reflect the government’s view of the scope of technical assistance it can compel providers to afford it; and
• Indicate the total number of times such an order has been issued to a provider compelling a scan of all incoming email (or a search of comparable scope), as well as the year in which such a surveillance order was first issued.
These disclosures can and should be made without compromising sources and methods of surveillance, and many are consistent with the types of disclosures called for in the USA FREEDOM Act.

We would welcome the opportunity to meet with you to discuss these matters further.

Sincerely,

Access Now
Advocacy for Principled Action In Government
American-Arab Anti-Discrimination Committee
American Association of Law Libraries
American Civil Liberties Union
American Library Association
Amnesty International
Arab American Institute
Association of Research Libraries
Bill of Rights Defense Committee/Defending Dissent Foundation
Brennan Center
Center for Media and Democracy
Center for Democracy & Technology
Council on American-Islamic Relations
Constitution Project
Constitutional Alliance
Demand Progress
DownsizeDC.org, Inc.
Electronic Frontier Foundation
Free Press
Fight for the Future
FreedomWorks
Human Rights Watch
Liberty Coalition
National Association of Criminal Defense Lawyers
New America’s Open Technology Institute
OpenTheGovernment.org
PEN America
R Street Institute
Reporter’s Committee for Freedom of the Press
Restore the Fourth
Sunlight Foundation
TechFreedom