

YAHOO TO CLAPPER: GLOBAL, GLOBAL, BEYOND OUR BORDERS, GLOBAL

I joked when Yahoo first released its letter to James Clapper the other day, asking that he release details about the 2015 scan first revealed by Reuters. It has the tone of a young woman who is justifiably upset because, after sleeping with her, some jerk is pretending he doesn't even know her.

But as it happens, I'm in Europe, trying to learn more about Privacy Shield and related issues. So I thought I would call attention to the emphasis Yahoo lawyer Ronald Bell (who was the guy who decided not to challenge this) puts on the international impact of Clapper's decision, thus far, to remain silent.

As you know, Yahoo consistently campaigns for government transparency about national security requests and for the right to share the number and nature of the requests we receive from all governments. We apply a principled approach to handling government requests for user data, including in the national security context, articulated in our publicly-available Global Principles for Responding to Government Requests and regular transparency reports. Our company not only embraces its privacy and human rights responsibilities, we do so enthusiastically, passionately, and with a deep sense of global and moral responsibility. But transparency is not merely a Yahoo issue: Transparency underpins the ability of any company in the information and communications technology sector to earn and preserve the trust of its customers. Erosion of that trust online implicates the safety

and security of people around the world and diminishes confidence and trust in U.S. businesses at home and beyond our borders.

Recent new stories have provoked broad speculation about Yahoo's approach and about the activities and representations of the U.S. government, including those made by the Government in connection with negotiating Privacy Shield with the European Union. That speculation results in part from lack of transparency and because U.S. law significantly constrain—and severely punish—companies' ability to speak for themselves about national security related orders even in ways that do not compromise U.S. government investigations.

We trust that the U.S. government recognizes the importance of clarifying the record in this case. On behalf of Yahoo and our global community of users, I respectfully request that the Office of the Director of National Intelligence expeditiously clarify this matter. [bold emphasis mine]

Folks here definitely followed the Yahoo story. Their understanding of what happened leads them to believe the scan violates European prohibitions on mass surveillance. Importantly, they're not aware that this was done with an "individual" FISA order rather than under Section 702. As I've written, "individual" orders have been used for bulk scans since 2007, but in this case, an "individual" order would also mean that a judge had reviewed the scan and found it proportional, which would make a big difference here (at least to authorities; a number of other people are raring to challenge such judgements on whether it is an adequate court or not).

So yeah, by disclosing details of this scan, Yahoo may be in much better position vis a vis

European authorities, if not consumers.

But there's another reason why Clapper's office – or rather ODNI General Counsel Bob Litt – may be so quiet.

Litt is the one who made many of the representations about US spying to authorities here. Someone – Litt, if he's still around for a hearing that may take place under President Hillary – may also need to go testify under oath in an Irish court in conjunction with a lawsuit there. Whoever testifies will be asked about the kinds of surveillance implicating European users the government makes US companies do.

In other words, Bob Litt is the one who made certain representations to the European authorities. And now some of those same people are asking questions about how this scan complies with the terms Litt laid out.

Which makes his silence all the more instructive.