



January 22, 2007

John F. Hackett  
Office of the Director of National Intelligence (ODNI)  
Washington, DC 20511

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT /  
Expedited Processing Requested**

Attention:

This letter constitutes a request by the American Civil Liberties Union and the American Civil Liberties Union Foundation ("ACLU"),<sup>1</sup> and the Center for National Security Studies ("CNSS") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and 32 C.F.R. § 1900.

**I. The Requesters**

1. The ACLU is a national organization that works to protect civil rights and civil liberties. As the leading defender of freedom, equality, privacy, and due process rights in the United States, the ACLU has challenged the United States government's broad targeting and surveillance of innocent people as part of the war on terrorism, the government's crackdown on criticism and dissent, and the secret and unchecked surveillance powers of the USA PATRIOT Act.

2. CNSS is a nonpartisan civil liberties organization that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The CNSS seeks to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government. For more than thirty years, the CNSS has worked to protect the Fourth Amendment rights of individuals to be free of unreasonable searches and seizures, especially when conducted in the name of national security.

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<sup>1</sup> The American Civil Liberties Union Foundation is a 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues. The American Civil Liberties Union is a separate non-profit, non-partisan, 501(c)(4) membership organization that educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

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TREASURER

## II. What is Requested

The ACLU and CNSS seek any rules, regulations, policies, procedures, practices, or guidance created from January 1, 2001, to the present concerning warrantless searches of mail of domestic origin that has been sealed against inspection.<sup>2</sup>

In addition, the requesters seek disclosure of any record(s)<sup>3</sup> created from January 1, 2001, to the present, relating or referring to:

1. whether the government has authorized warrantless searches of mail of domestic origin;
2. any statistical data and/or statistical reports on warrantless searches of mail of domestic origin<sup>4</sup>, including but not limited to the number of:
  - a. times mail has been searched without a warrant since January 1, 2001;
  - b. individuals who have been subjected to warrantless searches of their mail since January 1, 2001;
  - c. individuals who have been subjected to warrantless searches of their mail who are United States citizens or lawful permanent residents, respectively, since January 1, 2001;

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<sup>2</sup> This request does not include searches authorized by the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. or by 39 C.F.R. § 233.11.

<sup>3</sup> The term “records” as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

<sup>4</sup> This request does not seek information concerning the details of particular instances of warrantless mail opening.

- d. organizations or entities that have been subjected to warrantless mail searches since January 1, 2001;
3. the names and titles of the government officials responsible for selecting, opening, inspecting, and recording the contents of mail of domestic origin searched without a warrant;
4. the names and titles of other government agencies or officials with whom the information derived from warrantless mail opening may be shared pursuant to existing policies;
5. all analyses or opinions addressing the constitutionality, legality, and/or propriety of warrantless searches of mail of domestic origin, including but not limited to any concerns expressed by national security officials, government lawyers, judges or others;
6. any actual or potential violations of, or deviations from, any policy, procedure or practice related to warrantless searches of mail of domestic origin;
7. any investigation, inquiry, or disciplinary proceeding initiated in response to any actual or potential violations of, or deviations from, any policy, procedure or practice related to warrantless searches of mail of domestic origin.

### **III. Limitation of Processing Fees**

The requesters qualify as “representatives of the news media” and fees associated with the processing of this request should therefore be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 32 C.F.R. § 1900.13(i)(2) (search and review fees shall not be charged to representatives of the news media).

1. The ACLU meets the definition of a “representative of the news media” because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee through the ACLU's public education department. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes features on information obtained through the FOIA. *See, e.g.,* [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU produces an in-depth television series on civil liberties.

In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library. ACLU publications are often disseminated to relevant groups across the country, which then further distribute them to their members or to other parties.

Depending on the results of the request, the ACLU plans to disseminate the information gathered by this request to the public through these kinds of publications in these kinds of channels. The ACLU is therefore a "representative of the news media." *Cf. Electronic Privacy Information Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

Finally, disclosure is not in the ACLU's commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization." *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). Any

information disclosed by the ACLU as a result of this FOIA request will be available to the public at no cost.

2. The CNSS meets the definition of a “representative of the news media” because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); cf. *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”).

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The CNSS was founded to ensure that civil liberties are not eroded in the name of national security. Dissemination of information to the public is a critical and substantial component of CNSS’ mission. CNSS gathers information about governmental activities that may have implications for civil liberties from public sources and FOIA requests and provides legal analysis on these activities, including amicus briefs and congressional testimony. CNSS disseminates information obtained from FOIA requests and legal analysis of governmental activities through several means, including through [www.cnss.org](http://www.cnss.org).

Finally, disclosure is not in the CNSS’s commercial interest. The CNSS is a “non-profit, non-partisan, public interest organization.” See *Judicial Watch Inc.*, 326 F.3d at 1310. Any information disclosed by the CNSS as a result of this FOIA request will be available to the public at no cost.

#### **IV. Waiver of all Costs**

The requesters additionally seek a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”) and 32 C.F.R. § 1900.13(b)(2) (same). Disclosure in this case meets the statutory and regulatory criteria, and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. See *Judicial Watch, Inc.*, 326 F.3d at 1312 (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation omitted)).

Disclosure of the requested information is in the public interest. This request will further public understanding of government conduct; specifically, warrantless searches of mail of domestic origin in the United States. This type of government activity concretely affects many individuals and implicates basic privacy, free speech, and associational rights protected by the Constitution.

In addition, disclosure of the requested information will aid public understanding of the implications of any program authorizing the federal government to engage in warrantless searches of mail of domestic origin. Such a program may violate existing law and regulations, as well as circumvent the judicial oversight required by the Foreign Intelligence Surveillance Act of 1978 ("FISA").<sup>5</sup> See James Gordon Meek, "W Pushes Envelope On U.S. Spying," *New York Daily News*, Jan. 4, 2007; "Reaffirming the Constitutional and Statutory Protections Accorded Sealed Domestic Mail, and For Other Purposes," S. Res. 22, 110th Cong. (2007), Cong. Rec. S394-5 (daily ed. Jan. 11, 2007). Congress passed FISA in response to scandalous revelations about widespread political surveillance by the FBI under the leadership of J. Edgar Hoover. Following those revelations, Congress convened hearings and established a commission to investigate the government's abuses and explore how best to prevent future excesses. The hearings, chaired by Idaho Senator Frank Church, revealed that the FBI had operated a surreptitious mail opening program to supplement the overt censorship of international mail authorized by statute during World War II.<sup>6</sup> This program continued after the war, without explicit authorization, until 1966, at which point the FBI began to submit names of "domestic political radicals and black militants" to the CIA for inclusion in its own mail opening "Watch List."<sup>7</sup> Moreover, the questions about a possible warrantless mail opening program arise only one year after the President revealed the existence of a secret NSA domestic electronic surveillance program; a program that was later found unconstitutional. See *American Civil Liberties Union, et al., v. National Security Agency, et al.*, 438 F.Supp.2d. 734 (E.D. Mich. 2006). Understanding the current scope of any program authorizing the warrantless

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<sup>5</sup> 50 U.S.C. § 1801 *et seq.*

<sup>6</sup> INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II: FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES. UNITED STATES SENATE. APRIL 26, 1976. Available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm>.

<sup>7</sup> *Id.*

search of mail of domestic origin is, therefore, crucial to the public's interest in understanding the legality and consequences of current surveillance practices.

As nonprofit 501(c)(3) organizations and "representatives of the news media," the requesters are well-situated to disseminate information obtained from this request to the general public and to groups that protect constitutional rights. Because the ACLU and CNSS meet the test for a fee waiver, fees associated with responding to FOIA requests should be waived.<sup>8</sup>

The records requested are not sought for commercial use, and the requesters plan to disseminate the information disclosed as a result of this FOIA request through the channels described in Section III. As also stated in Section III, the ACLU and CNSS will make any information disclosed as a result of this FOIA available to the public at no cost.

#### **V. Expedited Processing Request**

Expedited processing is warranted because there is a "compelling need" to obtain information "relevant to a subject of public urgency concerning an actual or alleged Federal government activity" by organizations "primarily engaged in disseminating information." 32 C.F.R. § 1900.34(c).

The requesters are "primarily engaged in disseminating information" for the same reasons they are "representatives of the news media," as discussed in Section III.

This request implicates an urgent matter of public concern; namely, the federal government's potentially extensive warrantless searches of mail of domestic origin in the United States. Such government activity may infringe

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<sup>8</sup> Fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. In addition, three separate agencies – the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice – did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

upon the public's free speech, free association, and privacy rights, which are guaranteed by the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Requests for information bearing upon potential Constitutional violations require an immediate response so that any violations cease and future violations are prevented.

The instant request clearly meets the urgency requirement. Lawmakers, including the co-sponsors of the Postal Accountability and Enhancement Act of 2006, have already disputed the President's statement that the power to open mail of domestic origin, in exigent circumstances and for the purposes of foreign intelligence collection, is authorized by existing law. *See* Meek, "W pushes envelope on U.S. spying,"; "We've got mail," *Kennebec Journal, Morning Sentinel*, Jan. 9, 2007 (editorial). In fact, just one week after the first report that the President's signing statement conflicted with the Act, Senator Susan Collins introduced a resolution to "reaffirm the fundamental constitutional and statutory protections accorded sealed mail of domestic origin." S. Res. 22, 110th Cong. (2007). The extensive and sustained media coverage of this issue also underscores the urgency of this request. Numerous news reports have expressed serious concerns that the President's statement reflected the existence of a warrantless mail opening program that is at odds with constitutional and statutory protections. *See e.g.*, Randolph Schmid, "Bush Signing Statement May Allow Mail Opening Without Warrants," *boston.com*, Jan. 4, 2007 (Associated Press writer posted on site that hosts the Boston Globe); Dan Froomkin, "Bush Claims Right to Open Mail," *Washingtonpost.com*, Jan. 4, 2007; Mark Benjamin, "The Government Is Reading Your Mail," *Salon*, Jan. 5, 2007; Tom Teepen, "Bush Plays Christmas Grinch With The Nation's Mail," *Lufkin Daily News*, Jan. 9, 2007; David McNaughton, "Follow Letter of Law: Bush Opens Way for Attack on Privacy of Personal Correspondence by Taking Exception to Mail Safeguard," *Atlanta Journal-Constitution*, Jan. 9, 2007 at A10. Moreover, over twenty newspaper editorials from across the country have questioned whether the President has claimed new powers to open mail without a warrant. *See, e.g.*, John Nichols, "Will New Congress Use Its Power?" *Wisconsin State Journal*, Jan. 7, 2007 at B2; "Mail Opening Raises Fears," *Charlottesville Daily Progress*, Jan. 8, 2007; "Telling Statements," *The News and Observer*, Jan. 8, 2007; "Protect Postal Privacy," *Cincinnati Post*, Jan. 8, 2007 at A10; "George Bush, Snooper In Chief," *Seattle Times*, Jan. 8, 2007 at B6; "Government: Out of Our Mail," *San Francisco Chronicle*, Jan. 8, 2007 at B6; "He's Got Your Mail," *Baltimore Sun*, Jan. 8, 2007 at A8; "First Wiretapping, Now Letter-Opening?" *Los Angeles Times*, Jan. 8, 2007; "Presidential Powers: Give It A Rest," *Seattle Post-Intelligencer*, Jan. 8, 2007; Mickey Alam Khan, "First Class mess," *DM News*, Jan. 8, 2007; "Mail

Privacy,” *Winston Salem Journal*, Jan. 9, 2007; “Keep Our Mail Inviolable,” *York Dispatch*, Jan. 9, 2007; “Bush’s Law Trumps Congress,” *Virginian-Pilot*, Jan. 9, 2007; Marie Cocco, “What We Learn Might Scare Us,” *Albany Times Union*, Jan. 9, 2007 at A11; “We’ve Got Mail,” supra; “Guess Who is Opening, Reading Your Mail,” *Miami Herald*, Jan. 2007 at A14; “President Bush claims new authority to conduct searches without warrants,” *Albany Times-Union*, Jan. 12, 2007 at A14; “Who’s reading your mail? Letters shouldn’t be open to Presidential scrutiny,” *Sarasota Herald-Tribune*, Jan. 13, 2007 at A18; “They’ve got mail: it might be yours,” *Washington Post*, Jan. 13, 2007; “Pushing the Envelope,” *Milwaukee Journal Sentinel*, Jan. 15, 2007; “Postal inspector Bush?” *Cleveland Plain Dealer*, Jan. 15, 2007 at B7; “Privacy and national security,” *Denver Post*, Jan. 15, 2007 at B6; “Don’t Open Personal Mail,” *Hartford Courant*, Jan. 17, 2007 at A8.

As these reports illustrate, the possibility that the federal government has opened and may continue to open mail of domestic origin without a warrant constitutes a breaking and unfolding news story. The requested information is needed to provide the public with a full picture of the nature and scope of any such program.

Finally, pursuant to applicable regulations and statute, the requesters expect the determination of this request for expedited processing within 10 calendar days and the determination of this request for documents within 20 days. *See* 32 C.F.R. § 1900.21(d); 5 U.S.C. § 552(a)(6)(A)(i).

If this request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. The requesters expect the release of all segregable portions of otherwise exempt material. The requesters reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Ben Wizner  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

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