



February 1, 2006

Directorate for Freedom of Information
And Security Review, Room 2C757
1155 Defense Pentagon
Washington, DC 20301-1155

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Freedom of Information and Privacy Acts Office
TAPC-PDR-PF
7798 Cissna Road, Suite 205
Springfield, VA 22150-3166

Department of the Navy
Commandant of the Marine Corps (ARAD)
Headquarters U.S. Marine Corps
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Washington, DC 20380-1775

Department of the Air Force
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1000 Air Force Pentagon
Washington, DC 20330-1000

Inspector General of Department of Defense
Chief FOIA/PA Office
400 Army Navy Drive, Room 405
Arlington, VA 22202-2884

Defense Intelligence Agency (DIA)
ATTN: SVI-1
Washington, DC 20340-5100

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

Attention:

This letter constitutes a Request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, by the American Civil Liberties Union

and the American Civil Liberties Union Foundation, on their own behalf, and on behalf of the American Friends Service Committee, Greenpeace, United for Peace and Justice, and Veterans for Peace (collectively, “the Requesters”). This Request seeks records related to recent disclosures that the Department of Defense is gathering and retaining information about innocent Americans and their lawful political activities protected by the First Amendment.

I. The Requesters

1. The American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, “ACLU”)¹ 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.

Specifically, ACLU attorneys around the country have provided direct representation to individuals and organizations targeted by federal, state and local police for exercising their First Amendment right to criticize the government. Among those the ACLU has represented include people who participated in rallies and marches to protest the war in Iraq, who were excluded from meaningful participation at public presidential speeches, and who protested at the 2004 Republican and Democratic National Conventions. At the national level, the ACLU has filed FOIA requests seeking to discover the scope and nature of the surveillance activities of the FBI’s Joint Terrorism Task Forces, and of the NSA’s practice of warrantless interception of Americans’ electronic communications. Recently, the ACLU led a group of prominent journalists, scholars, attorneys, and national non-profit organizations in suing to enjoin the NSA’s practice of warrantless electronic surveillance.

The ACLU regularly holds public membership meetings at which a wide range of civil liberties issues are discussed and debated. FBI Director

¹ 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.

Robert Mueller spoke at the ACLU annual membership conference in June 2003. FBI whistleblower Colleen Rowley and former national security advisor Richard Clarke spoke at the ACLU annual membership conference in July 2004. The ACLU also routinely provides information to the public and the media through print and online communications about the erosion of civil rights and civil liberties after September 11, and encourages ACLU members and activists to oppose government anti-terrorism policies that unnecessarily violate civil rights and civil liberties.

2. The American Friends Service Committee (“AFSC”), a co-recipient of the Nobel Peace Prize in 1947, was founded by Quakers in 1917 as an instrument for conscientious objectors to the First World War to contribute to binding up the wounds of war: to build houses for war victims, to feed hungry children, to cloth the displaced. The AFSC has historically felt called to be a witness against war and to work to change the conditions that cause violent conflict.

AFSC’s work, always open and resolutely nonviolent, has been under government surveillance for decades. The FBI kept files on the AFSC that date back to 1921. The CIA intercepted overseas mail and cables in the 1950s, and some AFSC offices (and even the homes of its staff) were infiltrated and burglarized in the late 1960s into the 1970s.

In spite of the peaceful and humanitarian nature of AFSC’s work – assistance to countries torn by war and other disasters, work with groups of people of color during the Civil Rights movement, draft counseling during the Vietnam War era, and peace education and counter-recruitment activities during the current Iraq War – government surveillance of AFSC continues from both federal and local law enforcement. AFSC coordinated or supported four of the events listed on the excerpt from the Pentagon’s database of suspected domestic “threats” that NBC News made available on its website in mid-December 2005. *See* msnbcmedia.msn.com/i/msnbc/sections/news/DODAntiWarProtestDatabaseTracker.pdf. The four AFSC events, which took place between November 2004 and May 2005 in San Francisco, Vermont, Cleveland and Akron, Ohio, all addressed military recruitment. All four of these classified “threats” were deemed to be “not credible.”

3. Greenpeace is an international advocacy organization dedicating to combating the most serious threats to the planet’s biodiversity and environment. Since 1971, Greenpeace has been at the forefront of

environmental activism through non-violent protest, research, and public education.

In the past several years, Greenpeace has repeatedly engaged the Bush administration through public protest and activism. In 2001, Greenpeace held public demonstrations outside the personal residence of President Bush and Vice President Cheney, attacking the administration's environmental and energy policies. Greenpeace has also actively publicized the Bush administration's ties to the oil industry, particularly to ExxonMobil. Seventeen Greenpeace activists were arrested in 2001 in connection with a protest aimed at disrupting a "star wars" missile test at Vandenberg Air Force Base. In 2002, Greenpeace protestors chained themselves to gas pumps at ExxonMobil stations in New York and Los Angeles, carrying banners that called on the Bush administration to stop favoring the oil industry over the environment. During the same year, Greenpeace was highly critical of the Bush administration's refusal to enact legislation protecting U.S. chemical plants in the post-September 11 period. In 2003, there were several European protests against the war in Iraq by Greenpeace activists, including one at Rota Naval Air Base in Spain and others at Marchwood Military port in the United Kingdom. A team of international Greenpeace experts exposed the U.S. military's failure to secure and contain nuclear waste facilities in Iraq as well. In 2005, Greenpeace opposed the proposed construction of a new United States airbase in Okinawa, Japan, which would be built on top of a coral reef that is the habitat for highly endangered marine species. Greenpeace has also objected to the Bush Administration's allowing the Navy to start using its low frequency sonar system, which can cause fatal internal damage to whales.

The Department of Justice has publicly targeted Greenpeace's advocacy efforts. In 2003, Greenpeace protestors who had peacefully boarded a ship to protest illegal logging were criminally charged by the Department of Justice under an obscure 1872 law against "sailormongering" that was designed to prevent 19th century innkeepers from luring sailors to their establishments. A federal district court judge dismissed those charges in May 2004.

4. United for Peace and Justice ("UFPJ") is a coalition of more than 1,300 local and national groups throughout the United States that have joined together to oppose the war in Iraq. Since its founding in October 2002, UFPJ has spurred hundreds of anti-war protests and rallies around the country, and sponsored the four of the largest demonstrations against the Iraq war. On February 15, 2003, UFPJ organized a rally outside the United Nations in New York City that drew more than 500,000 participants as part of a global day of

protest against the war. Two days after the bombing of Iraq began, on March 22, 2003, UFPJ mobilized more than 300,000 people for another protest march in New York City. UFPJ organized the large anti-war march in New York City on the eve (August 29, 2004) of the Republican National Convention, with 500,000 people.

On September 24, 2005, UFPJ organized an anti-war march of 300,000 people in Washington, DC. On the second anniversary of the beginning of the war in Iraq (the weekend of March 18-19, 2005), UFPJ coordinated more than 700 local protests around the country. Many of these were at or near military facilities, including recruitment stations, and the largest demonstration that weekend was in Fayetteville, North Carolina, the home of Fort Bragg. The Fort Bragg demonstration was among the events listed on the Pentagon's "threat" database.

5. Veterans for Peace ("VFP") is a not-for-profit, non-partisan organization of United States veterans who served from World War II through Gulf War I. There are VFP chapters across the nation, from Alaska to Florida. VFP consists of men and women who, having dutifully served their nation, now embrace a greater responsibility to serve the cause of world peace. To this end VFP seeks to: (1) increase public awareness of the costs of war; (2) restrain the United States government from intervening, overtly and covertly, in the internal affairs of other nations; (3) end the arms race and reduce and eventually eliminate nuclear weapons; (4) seek justice for veterans and victims of war; and (5) abolish war as an instrument of national policy.

VFP members conduct truth-in-recruiting presentations to ensure potential military recruits have a full knowledge of military life and the realities of war. VFP members participate on panels, give radio and TV interviews, and organize public events to inform people about the U.S. government's policies around the globe. VFP has been a leading voice in the resistance to the current administration's war in Iraq and militaristic approach to international relationships. VFP has helped plan, participated in, and provided speakers to address the crowds at all the major national peace/anti-war demonstrations and local activities. VFP helped establish the Bring Them Home Now campaign and Iraq Veterans Against the War, and has called for the impeachment of President Bush. VFP members are active across the country and take leadership in planning and executing local protest actions. VFP provides information through its website www.veteransforpeace.org, a quarterly newsletter, and listservs. Several VFP members helped to organize and spoke at the March 19, 2005, demonstration outside Fort Bragg that was included in the Pentagon's "threat" database.

II. The Request for Information

The Requesters² seek disclosure of any record(s),³ document(s), file(s), communications, memorandum(a), order(s), agreement(s) and/or instruction(s), created from January 1, 2001, to the present, that were prepared, received, transmitted, collected and/or maintained by the Department of Defense (“DoD”) or any of its components, including but not limited to the Counterintelligence Field Activity Agency (“CIFA”), its Directorate of Field Activities (“DX”), and their Threat and Local Observation Notice (“TALON”) reports and databases,⁴ relating or referring to the following:

A. Records Pertaining to the Requesters

1. information collected about any of the Requesters or their activities;⁵
2. orders or instructions to collect information about any of the Requesters or their activities;

² The term “Requesters” as used herein is defined as all of the organizations identified in Section I of this letter, as well as their employees, members, and board of directors.

³ 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.

⁴ The term “TALON database” as used herein includes any database in which TALON reports are kept, including the “Cornerstone” database, the Joint Protection Enterprise Network (“JPEN”), all other databases created or controlled by CIFA, and database projects outsourced to private firms – which include, according to an NBC News report, “Person Search” (Northrup contract) and “The Insider Threat Initiative” (Computer Sciences Corp. contract), among others. *See* Lisa Myers et al., “Is the Pentagon Spying on Americans?,” msnbc.com, December 14, 2005.

⁵ The term “activities” as used in Section II.A includes, but is not limited to, any advocacy, provision of services, litigation, lobbying, organizing, fundraising, meetings, marches, rallies, protests, conventions, or campaigns, and any media or communications to, from or about the Requesters in any form (including any oral, written, electronic or online communications, including but not limited to any books, pamphlets, brochures, newsletters, fundraising letters, correspondence, action alerts, e-mail, web communications, discussion groups, or listservs).

3. the inclusion of any of the Requesters or their activities in a TALON database;
4. how, why or when any of the Requesters or any of their activities was selected as a target for DoD information-gathering or for inclusion in a TALON database;
5. the means by which information about any of the Requesters or their activities was or will be collected, including but not limited to any instances in which DoD personnel gathered information via informants, by collecting information from websites, by infiltrating any of the Requesters in an undercover capacity, or by attending rallies, protests, demonstrations, organizational meetings or other gatherings organized by any of the Requesters or in which any of the Requesters participated;
6. how records about any of the Requesters or their activities have been or will be shared with another agency, or disseminated;
7. the retention of records about any of the Requesters or their activities;
8. the destruction of records about any of the Requesters or their activities, including any policies, orders, or directives requiring, permitting or prohibiting the destruction of such records;
9. policies or procedures in place to protect the privacy of records that refer or relate to the employees, members, and/or board of directors of any of the Requesters;
10. how, why or when the collection of information about any of the Requesters or their activities, or the inclusion of any of the Requesters or their activities in a TALON database, was or will be suspended or terminated;

B. Policies, Analyses, Authorizations, and Statistics on Collection and Maintenance of Information

11. the policies, procedures and/or practices governing the collection of information by DoD and its components (including but not limited to CIFA) about individuals, organizations or groups within the United States, including but not limited to records concerning:

- a. the policies, procedures and/or practices by which DoD selects the individuals, organizations or groups about which DoD will collect information, including but not limited to any standards and/or criteria used to select such individuals, organizations or groups;
- b. the names and titles of the government official(s) responsible for selecting the individuals, organizations or groups about which DoD will collect information;
- c. any decision to collect information about individuals wholly or partly on the basis of their political views, political affiliations, organizational membership, or political activities, including but not limited to involvement in protests or demonstrations expressing opposition to the war in Iraq or to military recruitment;
- d. any decision to collect information about organizations or groups wholly or partly on the basis of the political views, political affiliations, or political activities (including but not limited to involvement in protests or demonstrations expressing opposition to the war in Iraq or to military recruitment) of these organizations or groups, or those of their members, staff and/or constituents;
- e. the means by which the DoD collects information about individuals, organizations or groups, including but not limited to any instances in which DoD personnel gathered information via informants, by collecting information from websites, by infiltrating organizations or groups in an undercover capacity, or by attending rallies, protests, demonstrations, organizational meetings or other gatherings organized by or attended by target individuals, organizations or groups;
- f. the policies, procedures, and/or practices under which the collection of information about an individual, organization or group may be suspended or terminated;
- g. any actual or potential violations of, or deviations from, any policy, procedure or practice related to DoD's information-gathering activities, including any investigation, inquiry, or

disciplinary proceeding initiated in response to any such violation or deviation;

12. the policies, procedures and/or practices governing the DoD's handling of the information it collects about individuals, organizations or groups within the United States, including but not limited to records concerning:

- a. the types of information collected;
- b. the policies, procedures, and/or practices of DoD governing the maintenance and/or storage of information collected;
- c. the policies, procedures, and/or practices of DoD governing the analysis and/or use of information collected;
- d. the policies, procedures, and/or practices of DoD governing the sharing and/or disclosure of information collected;
- e. the names of all federal, state, and local government agencies, and all private entities, with whom the information is shared;
- f. the policies, procedures, and/or practices of DoD governing the cross-referencing of information collected with information in any database;
- g. the policies, procedures, and/or practices of DoD governing the retention of information collected, including but not limited to any time limits for such retention;
- h. the policies, procedures, and/or practices of DoD governing the destruction of information collected;
- i. any policies, procedures, and/or practices of DoD designed to safeguard the privacy of the individuals, organizations and groups about whom information is collected; and
- j. any actual or potential violations of, or deviations from, any policy, procedure or practice related to DoD's handling of information collected, including any investigation, inquiry, or

disciplinary proceeding initiated in response to any such violation or deviation;

13. all analyses or opinions addressing the constitutionality, legality, and/or propriety of the DoD's collection of information about individuals, organizations or groups within the United States, including but not limited to any concerns expressed by national security officials, DoD officials, government lawyers, judges or others;

14. the policies, procedures, and/or practices governing all databases in which TALON reports are kept, including but not limited to:

a. the policies, procedures, and/or practices regulating the entry of information into any such database;

b. the policies, procedures, and/or practices regulating the sharing of information in any such database with other agencies or governments;

c. the policies, procedures, and/or practices regulating the retention of information in any such database;

d. the policies, procedures, and/or practices regulating the purging of information from any such database; and

e. any actual or potential violations of, or deviations from, any policy, procedure or practice governing any such database, including any investigation, inquiry, or disciplinary proceeding initiated in response to any such violation or deviation;

15. any authorization of the DoD's collection of information about individuals, organizations or groups within the United States, including any orders, directives, policy statements or memoranda from the President, Vice-President, Secretary of Defense, or any Undersecretary or Deputy Secretary of Defense;

16. the number of individuals, organizations and groups within the United States about which the DoD has collected and retained information; and

17. the number of individuals, organizations and groups within the United States that either have been or are currently listed in any TALON database.

III. Limitation of Processing Fees

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .”) and 32 C.F.R. § 286.28(e)(7) (search and review fees shall be limited to duplication fees for the first 100 pages for “representatives of the news media”). As a “representative of the news media,” the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this Request should, therefore, be limited accordingly.

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 web site, www.aclu.org. The web site 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; 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.

IV. Waiver of all Costs

The ACLU additionally requests 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.”). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“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, the DoD's domestic intelligence-gathering activities and its possible targeting of individuals, organizations and groups for surveillance based on their political viewpoints, affiliations, or activities. This type of government activity concretely affects many individuals and groups and implicates basic privacy, free speech, and associational rights protected by the Constitution.

Moreover, disclosure of the requested information will aid public understanding of policy decisions taken over the past two months in response to public revelations that CIFA, a DoD component whose size and budget remain secret, has been spying on domestic organizations and their peaceful political activities. See Walter Pincus, "Pentagon's Intelligence Authority Widens," *Washington Post*, December 19, 2005. After NBC News obtained and reported on a secret 400-page DoD document that listed dozens of anti-war meetings or protests as "suspicious incidents" in which the Department had apparently taken an investigative interest, see Lisa Myers et al., "Is the Pentagon Spying on Americans?," *msnbc.com*, December 14, 2005, DoD officials ordered a review of the information in its TALON intelligence database to determine whether information on subjects that were determined to pose no threat had been improperly retained in the system. See Walter Pincus, "Pentagon Will Review Database on U.S. Citizens," *Washington Post*, December 15, 2005. The administration subsequently initiated the process of setting standards to govern how its agencies collect and maintain reports of activity they consider suspicious. See Walter Pincus, "Corralling Domestic Intelligence," *Washington Post*, January 13, 2006. And recently, Deputy Secretary of Defense Gordon England directed that DoD intelligence and counterintelligence personnel receive "refresher training" on policies regarding the collection, retention, dissemination and use of intelligence information, and that the TALON database be reviewed to identify reports that should not be in it. See Memorandum from Gordon England, Deputy Sec'y of Defense, to Secretaries of the Military Departments et al., January 13, 2006. Understanding the current scope of the DoD's monitoring of law-abiding individuals, organizations and groups is, therefore, crucial to the public's interest in determining the legality of the Pentagon's domestic intelligence program and in understanding the implications of DoD's recent policy shifts.

As a nonprofit 501(c)(3) organization and "representative of the news media" as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this Request to the general public and to groups that protect constitutional rights. Because the ACLU meets the test for a fee

waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁶

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 will make any information disclosed as a result of this FOIA Request available to the public at no cost.

V. Expedited Processing Request

Expedited processing is warranted because there is an “urgent[] need[]” on the part of an organization “primarily engaged in disseminating information” “to inform the public concerning actual or alleged Federal Government activity.” 32 C.F.R. § 286.4(d)(3)(ii).

The ACLU is “primarily engaged in disseminating information” for the same reasons it is a “representative of the news media,” as discussed in Section III. This Request clearly relates to activity of the federal government, namely, the collection and retention of information by the Department of Defense.

There is an “urgent need” to inform the public about DoD’s extensive monitoring and surveillance of individual citizens, as well as political, religious, and community organizations throughout the nation. Such government activity may infringe upon 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

⁶ 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. The Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request it submitted in August 2004. 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. Finally, 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 it submitted in August 2002.