



June 26, 2006

Transmitted Via Facsimile, First Class Mail and Electronic Mail

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AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Re: Freedom of Information Act Request

Attention:

This is a request pursuant to the Freedom of Information Act (5 U.S.C. § 552) for all agency records<sup>1</sup> held by the Department of Defense<sup>2</sup>, the National Security Agency, the Central Intelligence Agency, the Federal Bureau of Investigation and the Department of Homeland Security on the use of functional magnetic resonance imaging (fMRI), electroencephalography (EEG), infrared spectroscopy, or other scanning or measurement technologies of the brain that seek to detect truth, deception, guilty knowledge, accurate recollections or recognition, or to otherwise assist in or support interrogation or to identify individuals for follow-up questioning. Specifically, we seek all records including but not limited to the study, development or use of such technologies for foreign or domestic use and all records of the agency's efforts to contract with any other entity to study, develop or use such technologies for foreign or domestic use. Individual requests have been sent to each of the agencies addressed above.

Requester American Civil Liberties Union is a non-profit, non-partisan, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of such legislation, and lobbies legislators directly and through its members concerning such legislation. Requester American Civil Liberties Union Foundation is a separate 501(c)(3) organization that provides legal representation free of charge to

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<sup>1</sup> The term records includes but is not limited to letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, or any other materials.

<sup>2</sup> This request includes all subdivisions of these enumerated agencies.

individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues.

## I. LIMITATION OF PROCESSING FEES

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“fees 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 ...”).

The ACLU is a “representative of the news media” within the meaning of the statute 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); *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 news media”); *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 “primarily engaged in disseminating information”).

Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. The ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials. Through the ACLU’s public education department, such material is made available to everyone, including to individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited web site: <http://www.aclu.org>. The web site addresses civil rights and civil liberties issues in depth and contains many thousands of documents relating to these issues. The website includes features on information obtained through the FOIA. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail.

In addition to the national ACLU offices in New York and Washington, D.C., there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material through a variety of means including their own websites, publications, and newsletters. In addition, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University.

The ACLU intends to disseminate the information gathered by this Request through these channels.<sup>3</sup>

## II. WAIVER OF PROCESSING FEES

The ACLU additionally requests a waiver of processing fees 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.’”). Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.<sup>4</sup>

Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of government conduct. fMRI lie detection is potentially a very powerful and invasive technology that attempts to detect a subject’s decision to lie. It could be used to affirmatively extract information from a person whether they actively provide an answer to a question or not. Similarly, studies have shown that fMRI could be used to decipher whether a subject recognizes an image that is shown to them – in effect, identifying “guilty knowledge.” In this sense, fMRI goes well beyond lie detection, and presents us with something far closer to the concept of “mind reading.” All of these applications make fMRI of immense interest to government agencies interested in determining the accuracy of an individual’s statements. Several government entities including the Department of Defense Polygraph Institute, the Department of Homeland Security and the Defense Advanced Research Projects Agency, are already funding research in this area. Malcolm Ritter, *Brain Scans May Be Used As Lie*

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<sup>3</sup> The ACLU does not seek disclosure to further a 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 will be available to the public at no cost.

<sup>4</sup> For example, three separate components of DOJ – 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 fees for a FOIA request submitted in August 2002 for records concerning the FBI’s use of the Patriot Act’s surveillance provisions. Neither the DOJ nor DOS charged fees for FOIA requests submitted in October 2003 and June 2004 for records concerning the treatment of detainees held by the U.S. in Iraq, Afghanistan, and at Guantanamo Naval Base.

*Detectors*, ASSOCIATED PRESS, Jan 29, 2006; Robin Marantz Henig, *Looking for the Lie*, NEW YORK TIMES, February 5, 2006.

As a nonprofit 501(c)(3) organization and “representative of the news media”, the ACLU is well-situated to disseminate information it gains from this Request. As discussed in Section I, the ACLU has played an active role in educating the public about civil liberties issues by disseminating the information it obtains through the FOIA. The ACLU, has also played a pivotal role in disseminating information about the civil liberties implications of post-September 11<sup>th</sup> policies.<sup>5</sup>

Please furnish all applicable records to:

Christopher Calabrese  
Counsel, Technology & Liberty Program  
American Civil Liberties Union  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
[Ccalabrese@aclu.org](mailto:Ccalabrese@aclu.org)

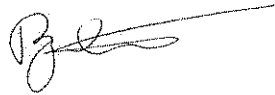
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Thank you for your prompt attention to this matter.

Sincerely,



Christopher Calabrese  
Counsel, Technology and Liberty Program



Barry Steinhardt  
Director, Technology and Liberty Program

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<sup>5</sup> As discussed in footnote 3, 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 II. Once again, the ACLU will make any information disclosed as a result of this FOIA available to the public at no cost.