



September 12, 2014

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**Re: Request Under Freedom of Information Act
(Expedited Processing Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request for records concerning the legal authority of the President of the United States to use military force against the Islamic State in Iraq and Syria (“ISIS”)² including any Department of Justice Office of Legal Counsel memorandum or other written legal opinions (the “Request”).³

I. Background

On September 10, 2014, President Barack Obama addressed the nation and described a four-part “counterterrorism strategy” to “degrade” and “ultimately destroy” ISIS, including a “systematic campaign of airstrikes” in Iraq and Syria.⁴ The President asserted that he has the authority to use military force against ISIS without prior Congressional authorization.⁵

¹ The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators.

² The group referred to as ISIS is also sometimes called the Islamic State in the Levant (“ISIL”) and the Islamic State. In this Request “ISIS” should be construed to mean this group, however labeled.

³ The ACLU submits this request pursuant to FOIA, 5 U.S.C § 552, et. seq. the Department of Defense implementing regulations, 32 C.F.R. § 286.1 et seq., the Department of Justice implementing regulations, 28 C.F.R. § 16.1 et seq., the Department of State implementing regulations, 22 C.F.R. § 171.1 et seq., the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 et seq., and the President’s Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General’s Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sep. 29, 2009).

⁴ President Barack Obama, Statement by the President on ISIL, Sept. 10, 2014, <http://1.usa.gov/1tzaOBX>.

⁵ See *id.*

According to Obama administration officials,⁶ a basis for that assertion is the Authorization for Use of Military Force of 2001 (“AUMF”).⁷ This assertion of authority is the subject of widespread public controversy, debate, and media attention.⁸

II. Requested Records

The ACLU seeks the release of the following records:

1. Any and all records pertaining to the legal authority of the President of the United States to use military force in Iraq and Syria against ISIS, including any Department of Justice Office of Legal Counsel memorandum or other written legal opinions.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 32 C.F.R. § 1900.34(c); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); 22 C.F.R. § 171.12(b). There is a “compelling need” for these records, as defined in the statute and regulations, because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 32 C.F.R. § 1900.34(c)(2) (providing for expedited processing when “the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity”);

⁶ David Nakamura and Sari Horwitz, *White House’s Legal Rationale for Airstrikes in Syria Comes Under Legal Scrutiny*, WASH. POST, Sept. 11, 2014, <http://wapo.st/ZiB8HT>.

⁷ Authorization for Use of Military Force (AUMF), Pub.L. No. 107-40, 115 Stat. 224 (2001).

⁸ Eli Lake, *Obama’s New War on ISIS May Be Illegal*, THE DAILY BEAST, Sept. 10, 2014, <http://thebea.st/1up9B2Z>; Harriet Torry; Dan Lamothe, *Legal Argument: Does Obama Have the Authority to Strike in Syria?*, WASH. POST, Sept. 10, 2014; Spencer Ackerman, *Obama’s Legal Rationale for ISIS Strikes: Shoot First, Ask Congress Later*, THE GUARDIAN, Sept. 11, 2014, <http://bit.ly/ZhuoKb>.

see also 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2)(i).

A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and relevant regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2); see *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” (citation omitted)); see also *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is “to serve as the site of record for relevant and up-to-the-minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws”—to be “primarily engaged in the dissemination of information”).

Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU’s regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog; heavily visited websites; and a video series.

The ACLU also regularly issues press releases to call attention to documents released through FOIA and other breaking news.⁹ ACLU attorneys

⁹ See, e.g., Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), *available at* <http://www.aclu.org/node/36742>; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Using “Mosque Outreach” for Intelligence Gathering (Mar. 27, 2012), *available at* <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of “Community Outreach” (Dec. 1, 2011), *available at* <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>; Press Release, American Civil Liberties Union, FOIA Documents from FBI Show Unconstitutional Racial Profiling (Oct. 20, 2011), *available at* <http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling>; Press Release, American Civil Liberties Union,

are frequently interviewed for news stories about documents released through ACLU FOIA requests.¹⁰

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA.¹¹ For example, the ACLU maintains an online “Torture Database,” a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.¹² The ACLU also maintains a “Torture FOIA” webpage containing commentary about the ACLU’s FOIA requests, press releases, and analysis of the FOIA documents.¹³ In addition to websites, the ACLU has in collaboration with Columbia University Press, published a book about the documents obtained through FOIA.¹⁴ It has also produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem (Oct. 19, 2011), *available at* <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>; Press Release, American Civil Liberties Union, New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU (June 24, 2009), *available at* <http://www.aclu.org/national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu>.

¹⁰ See, e.g., Carrie Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dept. Wants More Time to Review IG’s Findings on Detainee Treatment*, WASH. POST, June 20, 2009 (quoting ACLU staff attorney Amrit Singh); Peter Finn & Julie Tate, *CIA Mistaken on ‘High-Value’ Detainee, Document Shows*, WASH. POST, June 16, 2009 (quoting ACLU staff attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. TIMES, June 10, 2009 (quoting ACLU National Security Project director Jameel Jaffer); Joby Warrick, *Like FBI, CIA Has Used Secret ‘Letters,’* WASH. POST, Jan. 25, 2008 (quoting ACLU staff attorney Melissa Goodman).

¹¹ See, e.g., <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; <http://www.aclu.org/mappingthefbi>; <http://www.aclu.org/national-security/bagram-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; <http://www.aclu.org/patriotfoia>; <http://www.aclu.org/spyfiles>; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; and <http://www.aclu.org/exclusion>.

¹² <http://www.torturedatabase.org/>.

¹³ <http://www.aclu.org/national-security/aclu-v-department-defense>.

¹⁴ See JAMEEL JAFFER & AMRIT SINGH, *ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND* (Columbia Univ. Press 2007).

The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use, and the ACLU plans to disseminate the information disclosed as a result of this Request to the public at no cost.¹⁵

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity; moreover, the records sought relate to a breaking news story of general public interest. *See* 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2).

As indicated above, the Obama administration's assertion that the President does not need advance authorization from Congress to order military operations against ISIS is subject to controversy and debate.¹⁶

The release of the records sought through this Request would contribute to the public's understanding of the administration's position concerning the President's authority to engage in military operations against ISIS and enable the American public to participate meaningfully in the debate over the decision of whether to go to war. For this reason, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

Given the foregoing, expedited processing should be granted for this request.

IV. Application for Waiver or Limitation of Fees

A. Release of records is in the public interest.

The ACLU requests a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the United States government's operations or activities and is not primarily in the Requester's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. §

¹⁵ In addition to the national ACLU offices, there are fifty-three 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 materials available at the American Civil Liberties Union Archives at Princeton University Library.

¹⁶ *See* sources cited *supra* notes 6, 8.

1900.13(b)(2); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17.

The legal memoranda and other records sought through this Request which contain legal justifications for the President's authority to use military force against ISIS without first seeking advance authorization from Congress will significantly contribute to the public's understanding of the legality of that use of force. Moreover, disclosure is not in the ACLU's commercial interest. Any information obtained by the ACLU as a result of this FOIA Request will be made available to the public at no cost. *See* 32 C.F.R. § 1900.13(b)(2); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17.

Thus, a fee waiver would fulfill Congress' legislative intent in amending FOIA and is warranted here. *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)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act").

B. The ACLU qualifies as a representative of the news media.

A waiver of search and review fees is warranted because the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. Accordingly, fees associated with the processing of this request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii); *see also* 32 C.F.R. §§ 1900.02(h)(3), 1900.13(i); 28 C.F.R. § 16.11(d), (k); 32 C.F.R. § 286.28(e)(7); 22 C.F.R. § 171.17.

The ACLU meets the statutory and regulatory definitions 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 the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Elec. Privacy Info. 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 the FOIA); *cf. Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information").

The ACLU meets the statutory and regulatory definitions 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 the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”).

The ACLU is a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 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” for FOIA purposes).¹⁷ The ACLU disseminates information through many channels, including its websites, blogs, press releases, books, reports, newsletters, news briefings, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. *See supra* part III(A). As Senator Leahy said during a debate about FOIA’s fee-waiving provisions: “[A]ny person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of

¹⁷ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In October 2013, the Department of State granted a fee waiver to the ACLU with respect to a request for records relating to the United States’ targeted killing program including the legal and factual bases. In April 2013, the National Security Division of the Department of Justice granted a fee waiver to the ACLU in response to a request for records pertaining to the federal government’s legal interpretation of its authority to force the disclosure of some private electronic communication records using national security letters issued under the Electronic Communications Privacy Act of 1986. In August 2013, the Federal Bureau of Investigation granted a fee waiver to the ACLU for the same request. In April 2013, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for records relating to the government’s use in legal proceedings of evidence obtained or derived from surveillance conducted under the Foreign Intelligence Surveillance Act Amendments of 2008. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. 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.

the news media.” 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986). Indeed, the ACLU recently was held to be a “representative of the news media.” *Serv. Women’s Action Network v. Dep’t of Def.*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at *3 (D. Conn. May 14, 2012); *accord Am. Civil Liberties Union of Wash. v. U.S. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 1900.21(d); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 22 C.F.R. § 171.12(b).

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If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

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

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I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,



Marcellene E. Hearn
American Civil Liberties Union Foundation