

June 13, 2019

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-0208
Fax: (202) 261-8579

**Re: Department of State's Commission on Unalienable Rights to be
Established Under the Federal Advisory Committee Act**



**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2644
Fax: (212) 549-2644
aclu.org

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 (the "Request") for records pertaining to the Department of State's Commission on Unalienable Rights ("the Commission"), to be established under the Federal Advisory Committee Act ("FACA").

I. Background

On May 30, 2019, the Federal Register published notice of the Department of State's intent to establish the Commission on Unalienable Rights, under the Federal Advisory Committee Act. The stated purpose of the Commission is to provide "fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights."² The notice further details that the Commission will meet once per month and will report to the Secretary of State with advice concerning "international human rights matters."³ In an interview with Politico, Secretary of State Mike Pompeo stated that the Commission would serve the purpose of establishing "a solid definition of human rights upon which to tell all [U.S.] diplomats around the world how to engage on those important issues."⁴

¹ The American Civil Liberties Union Foundation is a 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. The American Civil Liberties Union is a separate 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.

² Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25109 (May 30, 2019).

³ *Id.*

⁴ Nahal Toosi, *State Department to Launch New Human Rights Panel Stressing 'Natural Law,'* POLITICO, May 30, 2019, <https://www.politico.com/story/2019/05/30/human-rights-state-department-1348014>.

On June 5, 2019, the legal blog Just Security published a draft of the Commission’s Charter.⁵ The draft Charter echoes the purpose stated in the Department of State’s notice, expanding upon the structure, duties, and membership of the Commission. Per the draft Charter, the Commission will provide policy advice directly to Secretary of State Pompeo, implying potential bypass of both the Office of the Legal Adviser and the Bureau of Democracy, Human Rights and Labor (“DRL”)⁶ and withholding commentary on the distinction between the new body’s intended purview and the DRL’s current engagement with human rights and diplomacy.⁷ The Charter instructs formation of a Commission “comprised of no more than fifteen members who have distinguished backgrounds in U.S. diplomacy, international law, and human rights.”⁸ It is further stipulated that the Commission’s constituents will be determined by the Secretary of State’s appointments, though the document remains silent on the opportunity for the inclusive and expansive nomination process FACA envisions.⁹

The Federal Register notice on the State Department’s plan to establish a “Commission on Unalienable Rights” has generated considerable media coverage and controversy. Media outlets, including the Washington Post, New York Times, Politico, and ABC News have reported on the proposed Commission and its far-reaching implications. The Washington Post Editorial Board challenged Secretary Pompeo’s asserted necessity of a renewed “solid definition of human rights,” which Secretary Pompeo used to justify the creation of the Commission.¹⁰

Additionally, former officials from both the Bush and Obama administrations have expressed concern over the motivations for and implications of such a commission.¹¹ U.S. Representative Tom Malinowski, former Assistant Secretary of State for Democracy, Human Rights, and Labor under the Obama administration, expressed doubt that the commission would “expand[] rights.”¹² Also a former Assistant Secretary of State for Democracy, Human Rights, and Labor under the Obama administration, Michael Posner echoed such doubts,

⁵ Rebecca Hamilton, *Exclusive: Draft Charter of Pompeo’s “Commission on Unalienable Rights” Hides Anti-Human Rights Agenda*, JUST SECURITY, Jun. 5, 2019, <https://www.justsecurity.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf>.

⁶ U.S. DEP’T OF STATE FOREIGN AFF. MANUAL, 1 FAM 510, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (DRL) (2018).

⁷ Hamilton, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Editorial Board, *Trump Should Focus More on Defending Human Rights than Redefining Them*, WASH. POST, June 2, 2019, https://www.washingtonpost.com/opinions/global-opinions/trump-should-focus-more-on-defending-human-rights-than-redefining-them/2019/06/02/39eba7fc-83c7-11e9-bce7-40b4105f7ca0_story.html.

¹¹ Another Obama-era DRL official, Rob Berschinski, also expressed concern that the commission “was announced with no prior outreach to or input from the human rights community.” Conor Finnegan, *State Dept. Panel to Redefine Human Rights Based on ‘Natural Law and Natural Rights,’* ABC NEWS, May 31, 2019, <https://abcnews.go.com/Politics/state-dept-panel-redefine-human-rights-based-natural/story?id=63400485>.

¹² Toosi, *supra* note 4.

calling the Commission “an ill-conceived initiative that calls into question the Department’s decades-long record of support for human rights and the promotion of democracy.”¹³

Along a similar vein, former top U.S. officials have communicated confusion about the Commission’s conception, especially given that it seemingly overlaps with existing bureaucracy.¹⁴ David Kramer, the former George W. Bush Administration Assistant Secretary of State for Democracy, Human Rights, and Labor, questioned the Commission’s contribution, stating he is not “sure what this commission is supposed to do that the human rights bureau doesn’t already do.”¹⁵ Politico also identified the Commission’s potential overlap with the DRL, the bureau presently dedicated to human rights issues.¹⁶ Posner, in turn, saw the duplicative purview as “an unsubtle dig at those who already work daily on these issues within the State Department.”¹⁷ In addition to former government officials, several human rights organizations have publicly opposed the creation of this body.¹⁸

Five prominent senators—Robert Menendez, Patrick Leahy, Richard J. Durbin, Christopher A. Coons, and Jeanne Shaheen—issued a letter addressed to Secretary Pompeo on June 12, 2019, communicating concern over “the process and intent behind” the Commission conceptualization and requesting additional information regarding the Commission.¹⁹ Expressing alarm at the exclusion of any mention of DRL in the Commission’s current function, structure, and purview, the Senators assert that, “it is hard to envision what work the Department’s proposed Commission would conduct that DRL could not carry

¹³ Michael Posner, *Why a New Commission Could Undercut the U.S.’ Human Rights Efforts*, FORBES, Jun. 11, 2019, <https://www.forbes.com/sites/michaelposner/2019/06/11/why-a-new-commission-could-hurt-undercut-the-state-departments-human-rights-efforts/#2b03a90e337f>.

¹⁴ Conor Finnegan, *State Dept. Panel to Redefine Human Rights Based on ‘Natural Law and Natural Rights’*, ABC NEWS, May 31, 2019, <https://abcnews.go.com/Politics/state-dept-panel-redefine-human-rights-based-natural/story?id=63400485>.

¹⁵ Toosi, *supra* note 4.

¹⁶ *Id.*

¹⁷ Posner, *supra* note 13.

¹⁸ In an Amnesty International statement, Tarah Demant contended that, “the fact that this panel was announced without details or consultation with human rights experts suggests . . . [it] may be just another instrument to negate rights.”¹⁸ *AIUSA Statement on Proposed State Department Human Rights Panel* (May 31, 2019), Amnesty International, <https://www.amnestyusa.org/press-releases/aiusa-statement-on-proposed-state-department-human-rights-panel/>. In a New York Times article, Ty Cobb, global director of the Human Rights Campaign, similarly criticized the commission’s proposal, saying, “We sincerely doubt that this commission is being organized to ensure that the human rights of LGBTQ people and others . . . are being protected.” Ernesto Londoño, *Pride Flags and Foreign Policy: U.S. Diplomats See Shift on Gay Rights*, N.Y. TIMES, June 9, 2019, <https://www.nytimes.com/2019/06/09/world/americas/pride-flags-us-embassies.html>.

¹⁹ Letter from United States Senators to Secretary of State Mike Pompeo (June 12, 2019), <https://www.foreign.senate.gov/imo/media/doc/06-12-19%20Unalienable%20rights%20commission%20letter%20signed.pdf>.

out.”²⁰ The U.S. Senators further express concern over the rumored membership, divergent from the balanced constituency required under FACA, as well as the Federal Register notice’s evocation of natural law, “a term sometimes used in association with discrimination against marginalized populations.”²¹

Much of the details of the Commission remain unclear. In their critique, the Washington Post Editorial Board noted that it was “hard to say” what aspect of contemporary human rights discourse the proposed Commission would address due to the absence of further information about the Commission.²² Similarly, ABC News grasped at possible interpretations of the Commission’s references to “natural law,” seeking answers by discussing prior publications from individuals reportedly serving on the Commission.²³ The New York Times linked the Commission’s announcement to its discussions of other recent attacks on L.G.B.T.Q. rights by the Trump Administration.²⁴

Questions about the Commission’s membership makeup have also emerged.²⁵ The draft Charter nominally states the intent to build committee membership that is “diverse,” pursuant to FACA’s requirement that “membership of the advisory board be fairly balanced in terms of the points of view represented.” Casting doubts upon this stated intent, ABC News reported Robert George’s prominent involvement in the conceptualization and creation of the Commission, who is a known advocate against LGBTQ and women’s rights.²⁶

As the CATO Institute predicted, the commission’s “implications are far reaching, not only for the rest of the world but for America itself.”²⁷ The proposed new body is unprecedented in its scope and vague in its purview. Consequently, it has evoked numerous questions to which the American public deserves responses. In an effort to provide the American public with information about the creation and intended function of this Commission, the ACLU seeks such information through this FOIA request.

II. Requested Records

The ACLU seeks the following records created on or between January 01, 2019, to the present:

²⁰ *Id.*

²¹ *Id.*

²² Editorial Board, *supra* note 10.

²³ Finnegan, *supra* note 14.

²⁴ Londoño, *supra* note 18.

²⁵ Hamilton, *supra* note 5; Finnegan, *supra* note 14.

²⁶ Finnegan, *supra* note 14.

²⁷ Roger Pilon, *Natural Rights vs. Human Rights: the State Department’s New Commission on Unalienable Rights*, CATO INSTITUTE, May 31, 2019, <https://www.cato.org/blog/natural-rights-vs-human-rights-state-departments-new-commission-unalienable-rights>.

- (1) Any communication concerning the U.S. State Department's Commission on Unalienable Rights, about which a notice was published in the Federal Registrar on May 30, 2019;
- (2) Any communication concerning change of U.S. foreign policy on human rights based on natural law or natural rights;
- (3) Any communication regarding possible membership of the Commission on Unalienable Rights and any communication between U.S. government officials and said possible members;
- (4) Any communication concerning DRL's prior and planned involvement in the Commission.

For the purposes of this Request, "communication" is collectively defined to include, but is not limited to: talking points, intelligence notes, assessments, bulletins, instructions, directives, guidance documents, formal and informal presentations, training documents, alerts, updates, advisories, reports, contracts or agreements, minutes or notes of meetings and phone calls, other memoranda, legal opinions, evaluations, memorializations, guidelines, emails, and social media posts.

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).²⁸ There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

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

²⁸ *See also* 32 C.F.R. § 286.8(e); 32 C.F.R. § 1900.34; 22 C.F.R. § 171.11(f).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁹ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding 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” to be “primarily engaged in disseminating information”).³⁰

The ACLU regularly publishes *ACLU Magazine*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 935,000 people. The ACLU also publishes regular updates and alerts via email to over 3.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 4.6 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,³¹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.³²

²⁹ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B); 22 C.F.R. § 171.11(f)(2); 32 C.F.R. § 1900.34(c)(2).

³⁰ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³¹ *See, e.g.,* Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

³² *See, e.g.,* Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screening Program*, Intercept (Feb. 8, 2017), <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President*

Similarly, the ACLU publishes reports about government conduct and civil liberties and human rights issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.³³ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil and human rights issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multimedia projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, 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 ACLU’s

Approves Drone Strikes, Wash. Post (Aug. 6, 2016), <http://wapo.st/2jy62eW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC (June 15, 2016), <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR (Dec. 9, 2015), <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

³³ *See, e.g.*, Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 am), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 pm), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 pm), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 pm), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 pm), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.³⁴ For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.³⁵

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention,

³⁴ See, e.g., Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 am), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 am), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

³⁵ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

rendition, and surveillance.³⁶ Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program³⁷; a summary of documents released in response to a FOIA request related to the FISA Amendments Act³⁸; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests³⁹; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.⁴⁰

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

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. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).⁴¹ Specifically, the requested communications and memoranda related to the U.S. government's threat to ban ICC judges and prosecutors from entering the United States, to sanction their funds in the U.S. financial system, and to prosecute them in the U.S. criminal system. As discussed in Part I, *supra*, the United States' new policy towards the International Criminal Court could significantly affect accountability by international war crime tribunals and organizations, and are the subject of widespread public controversy and media attention.⁴² The records sought relate to a matter of widespread and exceptional media interest in U.S. foreign affairs.⁴³

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

³⁶ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

³⁷ *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

³⁸ *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

³⁹ *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

⁴⁰ Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

⁴¹ *See also* 22 C.F.R. § 171.11(f)(2); 32 C.F.R. § 286.8(e)(1)(i)(B); 32 C.F.R. § 1900.34(c)(2).

⁴² *See supra* Part I.

⁴³ *See id.*

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure 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.” 5 U.S.C. § 552(a)(4)(A)(iii).⁴⁴ The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. *The Request 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 ACLU.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the intent to inflict travel and financial sanctions on the International Criminal Court, as well as any other company or state that will assist the International Criminal Court’s investigations into U.S. torture allegations in Afghanistan is publicly available, the records sought are certain to contribute significantly to the public’s understanding of the compatibility of domestic policy with international human rights standards.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, 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.” (quotation marks omitted)).

B. *The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).⁴⁵ 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,

⁴⁴ See also 32 C.F.R. § 286.12(l)(1); 22 C.F.R. § 171.16(a); 32 C.F.R. § 1900.13(b)(2).

⁴⁵ See also 32 C.F.R. § 286.12 (l)(2)(ii)(b); 22 C.F.R. § 171.16 (a)(iii); 32 C.F.R. § 1900.13(i)(2).

and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III)⁴⁶; *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington 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”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).⁴⁷

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”⁴⁸ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

⁴⁶ *See also* 32 C.F.R. § 286.12(b)(6); 22 C.F.R. § 171.14(b)(5)(ii)(C); 32 C.F.R. § 1900.02(h)(3).

⁴⁷ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

⁴⁸ In June 2017, the DOS granted a fee-waiver request regarding a FOIA request for records relating to the Trump administration’s plans to redefine the United States’ role in the international human rights system. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the

* * *

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); 32 C.F.R. § 286.8(e)(1); 22 C.F.R. § 171.11(f)(4); 32 C.F.R. § 1900.34(c).

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.

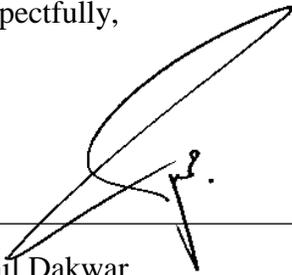
Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Jamil Dakwar
American Civil Liberties Union
125 Broad Street—18th Floor
New York, New York 10004
T: 212.519.7850
F: 212.549.2654
jdakwar@aclu.org

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).

January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division 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 March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

Respectfully,



Jamil Dakwar
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, New York 10004
T: 212.519.7850
F: 212.549.2654
jdakwar@aclu.org