



July 14, 2009

*Via Overnight Delivery and via e-mail to FOIA@hq.dhs.gov*  
U.S. Department of Homeland Security  
Privacy Office  
245 Murray Drive SW, Building 410  
STOP-0550  
Washington, DC 20528-0550  
Phone: 703-235-0790 or 866-431-0486  
Fax: 703-235-0443

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

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
IMMIGRANTS'  
RIGHTS PROJECT

To Whom It May Concern:

PLEASE RESPOND TO:  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2660  
F/212.549.2654  
WWW.ACLU.ORG

This is a request for records made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, implementing regulations 8 C.F.R. § 103.10 and 6 C.F.R. § 5, and any other applicable regulations.

### **I. Request for Information**

CALIFORNIA OFFICE  
39 DRUMM STREET  
SAN FRANCISCO, CA 94111-4805  
T/415.343.0770  
F/415.395.0950

The American Civil Liberties Union ("ACLU") Immigrants' Rights Project hereby requests disclosure of the following records in your possession:

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

- The new standardized § 287(g) Memorandum of Agreement ("MOA") referenced in the July 10, 2009 Department of Homeland Security ("DHS") press release ("July 10 release") available at [www.dhs.gov/ynews/releases/pr\\_1247246453625.shtm](http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm) (enclosed); and
- The eleven new MOAs referenced in the July 10 release, which DHS has entered into with the following agencies: Gwinnett (GA) County Sheriff's Department.; Monmouth (NJ) County Sheriff's Office; Rhode Island Department of Corrections; Delaware Department of Corrections – Sussex Correctional Institution; Houston (TX) Police Department; City of Mesquite (NV) Police Department; Morristown (NJ) Police Department; City of Mesa (AZ) Police Department; Florence (AZ) Police Department; Guilford County (NC) Sheriff's Office; Charleston County (SC) Sheriff's Office.

### **II. Request for Expedited Processing**

The ACLU seeks expedited processing of this request. Expedition is available for requests “(I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i). *See also ACLU v. Department of Justice*, 321 F. Supp. 2d 24, 27–28 (D.D.C. 2004). FOIA directs agencies to “process as soon as practicable any requests for records to which [they have] granted expedited processing.” 5 U.S.C. § 552(a)(6)(E)(iii).

With respect to entities “primarily engaged in disseminating information,” a compelling need is demonstrated by an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are “whether the request concerns a matter of current exigency to the American public” and “whether the consequences of delaying a response would compromise a significant recognized federal government activity.” *ACLU*, 321 F. Supp. 2d at 29.

There is a compelling need for the information requested. The July 10 release indicates that DHS will require all 66 existing 287(g) participants to enter into the new standardized MOA. That process is reportedly ongoing and expected to be completed in under three months. In addition, DHS reported that 42 additional MOA requests were pending in February 2009.<sup>1</sup> Even assuming that the 11 new agreements announced on July 10 were among the 42 pending requests, DHS is likely considering at least 97 MOAs — covering thousands of officers — based on the new standardized agreement.

It is therefore extremely important that the public have access to the new standardized MOA and newly-signed MOAs to evaluate whether appropriate measures have been taken to address the significant flaws in the program identified by the Government Accountability Office, Members of Congress, the press, police, advocacy groups, and others<sup>2</sup>

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<sup>1</sup> Statement of Richard M. Stana, Government Accountability Office, to House Committee on Homeland Security, March 4, 2009, [www.gao.gov/new.items/d09381t.pdf](http://www.gao.gov/new.items/d09381t.pdf) (“GAO Statement”).

<sup>2</sup> *See, e.g.*, GAO Statement, *supra*; House Committee on Homeland Security Hearing, “Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law,” Mar. 4, 2009; House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and Subcommittee on the Constitution, Civil Rights, and Civil Liberties Hearing, “The Public Safety and Civil Rights Implications of State and Local Enforcement of

and to allow interested parties to express their views before new agreements are entered into. A delay in responding to this request would compromise the public's confidence in law enforcement and its interest in an informed and timely debate about matters of urgent concern.

### III. Request for Fee Waiver

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 or at a [reduced] 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." (internal quotation omitted)).

The ACLU is a national organization that works to defend and preserve individual rights and freedoms provided by the Constitution and the laws of the United States for all people, including the basic constitutional rights to privacy, free expression, and due process of law. The ACLU has more than 500,000 members. Some of the major activities of the organization include gathering information on issues of public significance, using its editorial skills to turn that information into distinct publications such as reports, newsletters, right-to-know pamphlets, fact sheets, and other educational materials, and distributing those materials to the general public.

Disclosure pursuant to this request is in the public interest. First, the records pertain directly to the operations and activities of the federal government. Access to this information is a prerequisite for the public to meaningfully evaluate the 287(g) program. Second, the ACLU has

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Federal Immigration Laws," Apr. 2, 2009; Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, [www.policefoundation.org/pdf/strikingabalance/Narrative.pdf](http://www.policefoundation.org/pdf/strikingabalance/Narrative.pdf); "More Immigration Non-Solutions," N.Y. Times, July 13, 2009, at A18; University of North Carolina Immigration & Human Rights Policy Clinic and ACLU-NC, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, [www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf](http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf).

significant “knowledge [and] expertise as may be necessary to understand this information,” 28 C.F.R. § 16.11(k)(2)(iii). The ACLU has obtained, compiled and analyzed information relating to the 287(g) program and to state and local involvement in immigration enforcement for years.<sup>3</sup> Thus, release of this information to the organization is likely to contribute to public understanding of the issue.

Furthermore, the ACLU meets the definition of a representative of the news media under FOIA 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 distinct work, and distributes that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Because it qualifies as a representative of the news media, DHS should find that the ACLU possesses the “intention to effectively convey information to the public.” 28 C.F.R. § 16.11(k)(2)(iii).

Finally, disclosure is not in the ACLU’s “commercial, trade, or profit interest[.]” 28 C.F.R. § 16.11(b)(1). The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch*, 326 F.3d at 1310. The purpose of the request is to monitor and vindicate legal rights; it is unrelated to commercial business, trade, or profit.

Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU and its regional affiliates. For example, the Federal Bureau of Investigation, Office of Intelligence Policy and Review, and Office of Information and Privacy of the Department of Justice have previously declined to charge the ACLU fees associated with FOIA requests. The fees should likewise be waived in this instance. If a fee waiver is denied, the requestors are prepared to pay fees up to \$25. We ask that you inform us first if fees in excess of \$25 may be charged, though we reserve the right to appeal a denial of fee waivers.

#### **IV. No Basis for Withholding or Delay**

There is no colorable basis for withholding the requested records. During the Bush Administration, U.S. Immigration and Customs Enforcement (“ICE”), a DHS component, provided all MOAs in existence as of April, 2008 in response to a FOIA request. ICE

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<sup>3</sup> See, e.g., ACLU Written Statement for April 2, 2009 Joint Hearing, [www.aclu.org/images/asset\\_upload\\_file968\\_39242.pdf](http://www.aclu.org/images/asset_upload_file968_39242.pdf).

specifically determined “[a]fter carefully reviewing the 287(g) Memorandum of Agreements ... that they are appropriate for public release” without any deletions or exemptions.<sup>4</sup> In addition, ICE affirmatively makes available 47 MOAs, either unredacted or with minimal redactions, on its website at [www.ice.gov/foia/readingroom.htm#37](http://www.ice.gov/foia/readingroom.htm#37).

President Obama has reversed the Bush administration’s restrictive FOIA policy and has directed that all agencies are bound by “a presumption in favor of disclosure.” 74 Fed. Reg. 4683 (Memorandum of the President dated Jan. 21, 2009). Since § 287(g) MOAs were not subject to withholding even under the previous policy, it is plain that the MOAs requested here must be released.

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Moreover, even leaving aside our entitlement to expedited processing, the requested records can and should be provided immediately, or at most in a matter of days. The responsive documents are plainly identified in the request, require no search, and are readily available for transmission. Indeed, they should have been posted online at the same time as the July 10 statement. As the Attorney General has explained, “Open government requires agencies to work proactively and respond to requests promptly. ... [A]gencies should readily and systematically post information online *in advance of any public request*.”<sup>5</sup> In any event, “when information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner.”<sup>6</sup>

If this request is denied in whole or in part, we additionally ask that you justify all deletions by reference to specific provisions under the Freedom of Information Act. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver.

Thank you for your prompt attention to this matter. As explained above, the requested records can and should be produced immediately. We remind you that under the statute, the request for expedited

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<sup>4</sup> See final response to FOIA request DIS 2-01 OI:MS:ID, 08-FOIA-2009 DLM. ICE provided approximately 16 additional MOAs signed between April and September, 2008, in response to a subsequent request.

<sup>5</sup> [www.dhs.gov/xlibrary/assets/foia/ag\\_foia\\_memo2009-03-19.pdf](http://www.dhs.gov/xlibrary/assets/foia/ag_foia_memo2009-03-19.pdf), at 3 (emphasis added).

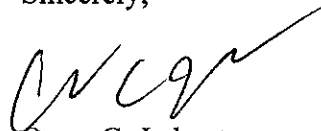
<sup>6</sup> *Id.*

processing must be determined within ten (10) calendar days and this request for records must be determined within twenty (20) days. *See* 28 C.F.R. § 16.5(d)(4); 5 U.S.C. § 552 (a)(6)(A)(i).

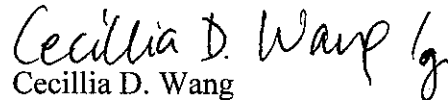
Please furnish all applicable records to: ACLU Immigrants' Rights Project, 125 Broad St., 18th Fl., New York, NY 10004. Electronic copies may be sent to [ojadwat@aclu.org](mailto:ojadwat@aclu.org). If you have any questions regarding this matter, please telephone Omar Jadwat at (212) 549-2620.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Sincerely,



Omar C. Jadwat  
ACLU Immigrants' Rights Project  
125 Broad St., 18th Fl.  
New York, NY 10004



Cecillia D. Wang  
ACLU Immigrants' Rights Project  
39 Drumm St.  
San Francisco, CA 94111

Encl.