



October 15, 2008

FOIA/PA Mail Referral Unit
Justice Management Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW.
Washington, DC 20530-0001

Re: Request Under Freedom of Information Act/Expedited
Processing Requested

AMERICAN CIVIL LIBERTIES
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RICHARD ZACKS
TREASURER

To Whom It May Concern:

This letter constitutes a request ("Request") by the American Civil Liberties Union and the American Civil Liberties Foundation (collectively "ACLU") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Department of Justice implementing regulations, 28 CFR § 16.11.¹

On October 9, 2008, ABC News reported that National Security Agency ("NSA") officials intentionally intercepted, transcribed, and disseminated amongst themselves the private communications of hundreds of innocent Americans even though those communications were completely unrelated to national security or terrorism. Brian Ross, Vic Walter, Anna Schecter, *Inside Account of U.S. Eavesdropping on Americans*, ABC News, Oct. 9, 2008. The ABC report revealed that NSA officials routinely monitored the communications of soldiers, aid workers, human rights monitors, and journalists working overseas, including calls to family and friends in the United States. *Id.* For example, according to an individual who worked at the NSA, the NSA monitored the communications of aid workers from non governmental organizations such as the International Committee of the Red Cross and Doctors Without Borders and "continued to collect on them" rather than "blocking" the numbers even though they "knew they were working for these aid organizations." *Id.* The report also revealed that the NSA

¹ The ACLU 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 sought information and educated the public about various government surveillance methods utilized and expanded since the 9/11 terrorist attacks, including the NSA's surveillance of U.S. communications.

monitored salacious calls such as the private “phone sex” calls of military officers calling home. *Id.* These revelations suggest that either there are no real safeguards in place to protect the privacy rights of Americans whose communications are targeted or swept up in NSA monitoring or that existing safeguards are ineffective or are being ignored.

Requested Records

1. Any and all legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created between 1993 and the present pertaining to the acquisition, processing, analysis, retention, storage, or dissemination of U.S. communications² – whether targeted for interception or incidentally intercepted – during the course of NSA surveillance activities conducted inside or outside the United States.
2. Any and all records created between September 2001 and the present concerning complaints about, investigations of, or disciplinary actions related to the NSA’s monitoring of U.S. communications.

Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and corresponding regulations. The records at issue are urgently needed by an organization “primarily engaged in disseminating information” in order to “inform the public concerning actual or alleged Federal Government activity,” 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii). The records sought also 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).

The ACLU is “primarily engaged in disseminating information” to the public within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v); 28 C.F.R. § 16.5 (d)(1)(ii). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 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

² The term “U.S. communications” refers to any communication to which at least one party is (1) a U.S. citizen or legal permanent resident or (2) a person or entity located in the United States.

information"). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone for no cost or for a nominal fee through the ACLU's public education department. The ACLU also 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 website specifically includes features on information obtained through the FOIA. See, e.g., www.aclu.org/torturefoia; www.aclu.org/spyfiles; www.aclu.org/patriot_foia/index.html; www.aclu.org/exclusion; <http://www.aclu.org/natsec/foia/search.html>. 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. Depending on the results of this Request, the ACLU will likewise disseminate the information obtained about government surveillance to the public through these channels.³

Furthermore, the records sought concern actual or alleged federal government activity, 28 C.F.R. § 16.5(d)(1)(ii), as well a matter of widespread media interest which raises possible questions about the government's integrity which affects public confidence, 28 C.F.R. § 16.5(d)(1)(iv). Specifically, the Request pertains to the NSA's vast and seemingly unchecked collection of U.S. communications, potential abuse of its surveillance authority, and the lack of safeguards in place to protect the privacy rights of Americans (or the intentional disregard of those safeguards by NSA officials). 32 C.F.R. § 286.4(d)(3)(ii)-(ii)(A).

These most recent revelations about the NSA's monitoring of innocent Americans have generated significant media interest. See, e.g., *Uncle Sam Has Big Ears*, The Hartford Courant, Oct. 15, 2008; Brian Ross and Anna Schechter, *Did NSA Lie, Cover-Up? Senators Open Second Probe*, ABC News, Oct. 13, 2008; Greg Miller, *U.S. Tapped Intimate Calls From Americans Overseas, 2 Eavesdroppers Say*, L.A. Times, Oct. 10, 2008; Joby Warrick, *U.S. Allegedly Listened In on Calls of Americans Abroad*, Wash. Post, Oct. 10, 2008; Scott Shane, *Panel to Study Military Eavesdropping*, N.Y. Times, Oct. 9, 2008; Pam Benson, *Report: U.S. Spied on Americans' Intimate Conversations Abroad*, CNN, Oct. 9, 2008;

³ 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. The ACLU also makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

Jonathan S. Landay, *Did U.S. Government Snoop on Americans' Phone Calls?*, Miami Herald, Oct. 9, 2008; *U.S. Probes Claims Officials Eavesdropped on Calls*, Reuters, Oct. 9, 2008; *Fort Gordon Listening Operation Questioned in ABC News Report*, Augusta Chronicle, Oct. 9, 2008; Glenn Greenwald, *Major Shock: Eavesdropping Powers Abused Without Oversight*, Salon.com, Oct. 9, 2008; Ryan Singel, *NSA Snooped on Innocent Americans' Private Calls from Iraq. Former Operators Charge*, Wired, Oct. 9, 2008; David Edwards and Muriel Kane, *ABC: NSA Agents Admit Spying on Americans' Private Calls*, Raw Story, Oct. 9, 2008; Brian Ross, Vic Walter, Anna Schecter, *Inside Account of U.S. Eavesdropping on Americans*, ABC News, Oct. 9, 2008. Members of Congress quickly issued statements expressing concern about the NSA's activities. See, e.g., Press Release, Statement of Sen. John J. Rockefeller (Oct. 9, 2008) (calling new revelations "extremely disturbing"); Kim Zetter, *Inside Operation Highlander: the NSA's Wiretapping of Americans Abroad*, Wired, Oct. 10, 2008; Scott Shane, *Panel to Study Military Eavesdropping*, N.Y. Times, Oct. 9, 2008.

Indeed, the NSA's ability to engage in highly intrusive electronic surveillance of U.S. citizens and residents in the name of national security has been the subject of extraordinary and consistent public concern since media reports in 2005 revealed that President Bush had authorized the NSA to conduct warrantless electronic surveillance inside the nation's borders in disregard of the Foreign Intelligence Surveillance Act, see, e.g., James Risen and Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, and that the NSA was compiling vast databases of purely domestic telephone records as well, see Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006. NSA's monitoring of U.S. communication continues to stimulate widespread public concern, particularly now that Congress has enacted a law that expands the NSA's surveillance authority. See, e.g., Randall Mikkelsen, *Bush Signs Spy Bill and Draws Lawsuit*, Reuters, July 11, 2008; Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008; Editorial, *Our View on Security vs. Privacy: Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008.⁴

⁴ See also James Risen, *Subpoenas Sent to White House on Wiretapping*, N.Y. Times, July 28, 2007 (reporting on continuing revelations about the NSA's warrantless wiretapping program); Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, Congressional Quarterly, Jan. 18, 2007 (reporting on ruling issued by the Foreign Intelligence Surveillance Court in January 2007 that prompted the Administration to cease the warrantless wiretapping program); Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. Times, Aug. 2, 2007 (reporting on another Foreign Intelligence Surveillance Court ruling issued in May 2007 that modified the earlier rulings); Ellen Nakashima, *A Push to Rewrite Wiretap Law*, Wash. Post, Aug. 1, 2007; Editorial, *Stampeding Congress, Again*, N.Y. Times, Aug. 3, 2007 (reporting on the passage of the Protect America Act); Greg Miller, *Spy Chief Reveals Details of Operations*, L.A. Times, Aug. 23, 2007; Eric Lichtblau, *More Sharp Words Traded Over Lapsed Wiretap Law*, N.Y. Times, Feb. 23, 2008 (reporting on the continuing legislative

Thus, the NSA's monitoring of innocent U.S. communications are urgently needed to inform the public concerning an "actual or alleged federal government activity." 28 C.F.R. § 16.5(d)(1)(ii). The records also plainly relate to a matter of widespread media interest regarding "questions about the government's integrity which affect[s] public confidence." 28 C.F.R. § 16.5(d)(1)(iv). The records sought are crucial to informing the public about how, precisely, the NSA handles the U.S. communications it intercepts, what policies are in place to ensure that the NSA is limiting the acquisition, retention, and dissemination of U.S. communications, and whether safeguards exist to protect against abuse of this invasive surveillance power. 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. Accordingly, expedited processing is appropriate in this case.

Application for Waiver or Limitation of Fees

We request 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); 28 C.F.R. § 16.11(k)(1).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the NSA. See 28 C.F.R. § 16.11(k)(1)(i). In addition, disclosure is not in the ACLU's 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.'") (citation omitted).

debate about the Foreign Intelligence Surveillance Act and the expiration of the Protect America Act); Charlie Savage, *Adviser Says McCain Backs Bush Wiretaps*, N.Y. Times, June 6, 2008; Jose Antonio Vargas, *Obama Defends Compromise on New FISA Bill*, Wash. Post, July 4, 2008 (reporting on presidential candidates' position on warrantless wiretapping); Bradley Olsen, *Domestic Spying Quietly Goes On*, Baltimore Sun, July 7, 2008 (reporting on speculation about other electronic surveillance activities to which the public remains unaware).

We also request a waiver of document search and duplication fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 28 C.F.R. § 16.11(c)(1)-(2); 28 C.F.R. § 16.11(d)(1). 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." *Nat'l 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 therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information." See *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).⁵

* * *

Pursuant to the applicable regulations and statute, we expect the determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).

If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

⁵ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. 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 respect to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, 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, three separate agencies – 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 submitted by the ACLU in August 2002.

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

to:

Melissa Goodman
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Goodman", written over a horizontal line.

MELISSA GOODMAN

Staff Attorney

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AMERICAN CIVIL LIBERTIES
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