



May 4, 2017

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OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

**Re: Request Under Freedom of Information Act  
(Expedited Processing & Fee Waiver/Limitation Requested)**

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

To Whom It May Concern:

The American Civil Liberties Union, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego & Imperial Counties (together, “ACLU”)<sup>1</sup> submit this Freedom of Information Act (“FOIA”) request (“Request”) for records concerning the U.S. Customs and Border Protection (“CBP”)’s compliance with and implementation of the decision of the U.S. Court of Appeals for the Ninth Circuit (the “Ninth Circuit”) in *United States v. Cotterman*, 709 F. 3d 952 (9th Cir. 2013), which requires that CBP have reasonable suspicion of wrongdoing for any forensic search of an electronic device seized at the border.

### **I. Background**

U.S. Customs and Border Protection claims the authority to seize,

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<sup>1</sup> The American Civil Liberties Union, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego & Imperial Counties are non-profit, 501(c)(4) membership organizations that educate the public about the civil liberties implications of pending and proposed state and federal legislation, provide analysis of pending and proposed legislation, directly lobby legislators, and mobilize their members to lobby their legislators.



detain, and invasively search travelers' electronic devices at U.S. border crossings without any suspicion of wrongdoing.<sup>2</sup> This means that CBP agents claim the ability to search and seize any traveler's smartphone, laptop, or other electronic device simply because the traveler is entering or leaving the country.

CBP agents rely on that authority to manually and forensically search electronic devices in increasing numbers. Such searches are invasive. During a manual search, for example, agents could click on an email application and scroll through thousands of emails stored on remote servers, or open a health application and see years' worth of data about heart rates, sleep habits, and reproductive cycles. During a forensic search, CBP makes a full copy of the data stored on the device, including deleted files and metadata, and then analyzes the contents with powerful programs that read and sort every file and byte.

According to news reports, between 2015 and 2016, the number of electronic devices CBP searched doubled—from approximately 8,500 in 2015 to 19,000 in 2016. This year, reports indicate that CBP searched more than 5,000 devices in the January and February alone.<sup>3</sup> Given the sensitive and private information contained on electronic devices—including personal correspondence, notes and journal entries, family photos, medical records, lists of associates and contacts, proprietary or privileged business information, financial records, and more—these searches raise serious questions about CBP's compliance with constitutional safeguards.

The Ninth Circuit has held that the Fourth Amendment requires that CBP support any forensic search of an electronic device seized at the border with at least a showing of reasonable suspicion. *United States v. Cotterman*, 709 F.3d 952, 962–68 (9th Cir. 2013). Yet CBP's apparent national policy does not require individualized suspicion for such searches. Accordingly, the ACLU seeks to supplement the public record to clarify CBP's implementation of *Cotterman* at border crossings within the jurisdiction of the Ninth Circuit

<sup>2</sup> U.S. Customs and Border Protection, *Border Search of Electronic Devices Containing Information*, Directive No. 3340-049, § 5.1.2 (Aug. 20, 2009), [http://www.dhs.gov/sites/default/files/publications/cbp\\_directive\\_3340049%20Homeland%20directive\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/cbp_directive_3340049%20Homeland%20directive_0.pdf).

<sup>3</sup> Cynthia McFadden et al., *American Citizens: U.S. Border Agents Can Search Your Cellphone*, NBC News, Mar. 13, 2017 (later updated), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746>.

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(i.e. at border crossings in Alaska, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon, Washington, and the nation's Pacific territories) and nationwide.

## II. Requested Records

The ACLU seeks release of all Records, including but not limited to policy and training documents or memoranda,<sup>4</sup> issued on or after March 8, 2013, concerning the following:

1. CBP's claimed authority and practices in light of *United States v. Cotterman*, 709 F. 3d 952 (9th Cir. 2013), to seize, search, review, retain, and disseminate information contained on electronic devices possessed by individuals CBP encounters at the border, functional equivalent of the border, or extended border (collectively, "Border")<sup>5</sup> (a) within the Ninth Circuit; (b) outside of the Ninth Circuit; and (c) nationwide, including any records referring to the requirement imposed by *Cotterman* that reasonable suspicion support any forensic examination of an electronic device;
2. CBP's claimed authority and practices in light of any other court decision addressing searches of electronic devices seized at the Border—including but not limited to *United States v. Kim*, 103 F. Supp. 3d 32 (D.D.C. 2015), *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014), and *United States v. Laich*, No. 08-20089, 2010 WL 259041 (E.D. Mich. Jan. 20, 2010);
3. How CBP defines a "forensic" search, review, or analysis for purposes of complying with *Cotterman*;

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<sup>4</sup> For the purposes of this Request, "Records" are collectively defined to include, but are not limited to: written communications, including e-mails and text messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; memoranda; legal opinions; evaluations; memorializations; and guidelines.

<sup>5</sup> The "border, functional equivalent of the border, or extended border" is defined to include: all ports of entry to the United States, including land ports of entry, airport ports of entry, and seaport ports of entry, as well as other locations where Customs and Border Protection conducts immigration and customs inspections of individuals and goods entering the United States.

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4. Documentation of or statistics about forensic searches of electronic devices seized at the Border (a) within the Ninth Circuit; (b) outside of the Ninth Circuit; and (c) nationwide, including any documentation of reasonable suspicion for specific searches; and
5. CBP's audits and reviews of compliance with orders and decisions issued by federal circuit (i.e., appellate) courts, including the Ninth Circuit's *Cotterman* decision, addressing searches of electronic devices seized at the Border, and records generated in the course, or as a result, of any such audits or reviews.
6. CBP's audits and reviews of compliance with orders and decisions issued by district (i.e., trial) courts addressing searches of electronic devices seized at the Border, and records generated in the course, or as a result, of any such audits or reviews.

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The ACLU specifically requests that CBP search for responsive Records at its headquarters and field offices. CBP has an obligation to search all field offices that are reasonably expected to produce any relevant information. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (agency not required to search all of its field offices because request did not ask for a search beyond the agency's central files); *see also Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013). In addition, the ACLU expects that CBP will search its agency training academy.

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).<sup>6</sup> There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgen[tly]" needed by an

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<sup>6</sup> *See also* 6 C.F.R. § 5.5(e)(1).



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 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. 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>7</sup> 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. U.S. Dep’t of Justice*, 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”).<sup>8</sup>

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 620,000 people. The ACLU also publishes regular updates and alerts via email to approximately 2.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 1.5 million social media followers (members and non-members). The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

Similarly, the ACLU of Northern California publishes a paper newsletter distributed to its members, who now number over 96,000.<sup>9</sup> The ACLU of Southern California regularly disseminates information to its members, who number more than 28,000, through blogs, action alerts, emails,

<sup>7</sup> See also 6 C.F.R. § 5.5(e)(1)(ii).

<sup>8</sup> 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. U.S. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

<sup>9</sup> The American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego & Imperial Counties are also “primarily engaged in disseminating information” through similar activities to those described in the rest of this section.

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and newsletters.<sup>10</sup> The ACLU of Southern California also has over 13,800 followers on Twitter, and approximately 22,373 individuals and organizations follow its Facebook posts containing news, information, and calls to action. The ACLU of San Diego & Imperial Counties (“ACLU-SDIC”) regularly emails its nearly 30,000 subscribers with updates and alerts about important civil liberties issues. ACLU-SDIC sends news and information to its audience of 5,100 Twitter followers and 6,800 Facebook friends on a daily basis. In the month of January 2017, ACLU-SDIC’s Facebook posts received 211,000 views and its tweets received 545,000 views. ACLU-SDIC’s quarterly newsletter reaches approximately 1,000 people. The annual membership report and meeting notice is mailed to more than 8,000 people.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>11</sup> and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>12</sup> Information obtained by

<sup>10</sup> See <http://www.aclusocal.org/about/>.

<sup>11</sup> 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>.

<sup>12</sup> See, e.g., Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, [https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856\\_story.html](https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html) (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://abcnews.go.com/US/newly-released-cia-documents-reveal-torture-detention-program/story?id=39873389> (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://www.npr.org/2015/12/09/459026249/cia-torture-report-may-remain-secret> (quoting ACLU project director Hina

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the ACLU of Northern California through FOIA requests about government conduct has also garnered extensive national coverage.<sup>13</sup> The ACLU of San Diego & Imperial Counties affiliate website also publishes information obtained through FOIA requests.<sup>14</sup> ACLU-SDIC regularly issues press statements and shares statements generated by the National ACLU and other California affiliates. ACLU-SDIC creates talking points and fact sheets that it shares with community partners, who in turn disseminate the information broadly to their constituents.

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<sup>13</sup> See, e.g., <https://www.aclunc.org/blog/justice-department-emails-show-feds-were-less-explicit-judges-cell-phone-tracking-tool>; Jennifer Valentino-Devries, *Judges Questioned Use of Cellphone Tracking Devices*, Wall Street Journal, March 27, 2013; Ellen Nakashima, *Little-known surveillance tool raises concerns by judges, privacy activists*, Washington Post, March 27, 2013; Rory Carroll, *ACLU challenges 'stingray surveillance' that allows police to track cellphones*, The Guardian, March 28, 2013; Shaun Waterman, *Can you hear me now? Feds admit FBI warrantless cellphone tracking 'very common'*, Washington Times, March 29, 2013; Kim Zetter, *Government Fights for Use of Spy Tool That Spoofs Cell Towers*, Wired, March 29, 2013; J.D. Tuccille, *Feds Routinely Track Cell Phones Without Telling Judges*, Reason.com, March 27, 2013; Declan McCullagh, *FBI prepares to defend 'Stingray' cell phone tracking*, CNET News, March 27, 2013; Kevin Gosztola, *Dissenter, DOJ Hid Routine Use of 'Stingray' Surveillance Technology from Federal Magistrate Judges*, March 27, 2013; Cyrus Farivar, *New e-mails reveal Feds not "forthright" about fake cell tower devices*, Ars Technica, March 27, 2013; Jacob Kastrenakes, *Federal agents used Stingray phone location tracker without informing judges*, The Verge.com, March 27, 2013; Josh Peterson, *DOJ emails show feds kept judges in the dark about cellphone tracking device*, The Daily Caller, March 28, 2013; *ACLU: Feds secretly using highly invasive spying tool*, Kennebec Journal/The Washington Post, March 28, 2013; Emmanuel Dunand, *FBI being sued over powerful Stingray cellphone tracking system*, RT USA, March 28, 2013; *Daniel David Rigmaiden Case Reveals Stingray Cell Phone Tracker's Covert Use*, Huffington Post, March 28, 2013; Ryan Gallagher, *Feds Accused of Hiding Information From Judges About Covert Cellphone Tracking Tool*, Slate.com by Ryan Gallagher, March 28, 2013; Stephen C. Webster, *ACLU: Email reveals feds misled judges to abuse wiretapping powers*, The Raw Story, March 28, 2013; *Surveillance technology comes under fire*, United Press International, Inc., March 28, 2013; *ACLU backs suppression of 'stingray' evidence sought by hacker*, Gantdaily.com by AHN, March 28, 2013; Danielle Walker, *Federal judge to weigh in on FBI's "stingray" cell phone surveillance*, SC Magazine, March 29, 2013; Lain Thomson *FBI on trial for warrantless Stingray mobile spying - Cellphone spying made easy - and sloppy - by electronic signal slurper*, The Register, March 29, 2013; *Feds admit FBI warrantless cellphone tracking 'very common.'* Press TV, March 30, 2013; Jack Taylor, *FBI hid the use of 'Stingray' spying technology from federal judges*, VR-Zone.com, March 31, 2013; Vanessa Blum, *Emails Detail Northern District's Use of Controversial Surveillance*, The Recorder, April 1, 2013; Rebecca Bowe, *Fed's use of spy tools under scrutiny due to privacy concerns*, San Francisco Bay Guardian, April 3, 2013.

<sup>14</sup> See, e.g., Press Release, ACLU of San Diego & Imperial Counties, CBP Releases Report, New Training Handbook (May 22, 2014), <http://www.aclusandiego.org/radio-silence-border-patrol-use-force-policies-leads-lawsuit/> (last visited Feb 2, 2017).

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Similarly, the ACLU publishes reports about government conduct and civil liberties 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.<sup>15</sup> The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties. Similarly, the ACLU of Northern California regularly publishes in-depth reports and other educational materials on civil liberties and civil rights issues.<sup>16</sup> The ACLU of San Diego & Imperial Counties also regularly publishes such materials.<sup>17</sup>

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The ACLU publishes a widely-read blog where original editorial

<sup>15</sup> See, e.g., ACLU, *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>; ACLU, *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>; ACLU, *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>; ACLU, *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](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).

<sup>16</sup> See, e.g., ACLU of Northern California, *Privacy & Free Speech: It’s Good for Business* (Feb. 10, 2016), <https://www.aclunc.org/blog/new-aclu-guide-tips-tech-companies-protecting-user-privacy-and-free-speech-2016>; ACLU of Northern California, *Reproductive Health Behind Bars in California* (Jan. 19, 2016), <https://www.aclunc.org/publications/reproductive-health-behind-bars-california>; see also <https://www.aclunc.org/search?keys=know+your+rights> (know your rights information regarding rights of students in schools, photographers, demonstrators, LGBTQ students, police interactions, prosecutorial discretion, and sex education among other topics).

<sup>17</sup> See, e.g., ACLU of San Diego and Imperial Counties, *Know Your Rights With Border Patrol*, <https://www.aclusandiego.org/wp-content/uploads/2014/10/KYR-2-pg-flyer-final.pdf> (last visited Feb. 2, 2017); see also, e.g., ACLU of San Diego and Imperial Counties, *What to Do If You’re Stopped By the Police*, <https://www.aclusandiego.org/wp-content/uploads/2014/10/What-to-Do-Police-Stops-web.pdf> (last visited Feb. 2, 2017).





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 multi-media 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](http://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 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 of Northern California publishes a similar website with a blog on breaking civil rights and civil liberties issues. Its website averages 10,000 to 20,000 visitors per week.

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The ACLU website includes many features on information obtained through the FOIA.<sup>18</sup> 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.<sup>19</sup>

<sup>18</sup> *See, e.g.*, <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; <https://www.aclu.org/cases/aclu-v-department-defense>; <https://www.aclu.org/mappingthefbi>; <https://www.aclu.org/cases/bagram-foia>; <https://www.aclu.org/national-security/csrt-foia>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; <https://www.aclu.org/patriot-foia>; <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreldirect/32088>.

<sup>19</sup> <https://www.thetorturedatabase.org>. *See also* <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.



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, rendition, and surveillance.<sup>20</sup> Similarly, the ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>21</sup>; 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 requests<sup>22</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>23</sup> The ACLU of Northern California has published charts and explanatory materials that summarize the results of information collected through open records requests, such as a map of surveillance technology deployed by California cities and counties.<sup>24</sup>

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 ACLU plans 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).<sup>25</sup> Specifically, as discussed in Part I, *supra*, the requested records seek to inform the public about CBP’s current and ongoing practices regarding the seizure and search of electronic devices at the border, and its compliance with relevant case law.

<sup>20</sup> [https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf).

<sup>21</sup> <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

<sup>22</sup> [https://www.aclu.org/sites/default/files/field\\_document/nsl\\_stats.pdf](https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf).

<sup>23</sup> <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

<sup>24</sup> <https://www.aclunc.org/article/map-state-surveillance-california>.

<sup>25</sup> *See also* 6 C.F.R. § 5.5(e)(1)(ii).

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

#### **IV. Application for Waiver or Limitation of Fees**

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).<sup>26</sup> The ACLU also requests a waiver of search fees on the grounds that it 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, news accounts underscore the substantial public interest in the records sought through this Request. Especially because little specific information has been made public about how CBP complies with the Ninth Circuit’s decision in *Cotterman* requiring reasonable suspicion for forensic searches of electronic devices seized at the border, the records sought are certain to contribute significantly to the public’s understanding of this issue. 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.

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 the 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.*

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<sup>26</sup> See also 6 C.F.R. § 5.11(k).



The ACLU also requests a waiver of search fees as a “representative of the news media” and because the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). 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);<sup>27</sup> *see also Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that 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 FOIA); *Serv. Women’s Action Network v. U.S. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, qualified for fee waivers as representatives of the news media for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep’t of Justice*, 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. U.S. Dep’t of Justice*, 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).<sup>28</sup>

<sup>27</sup> *See also* 6 C.F.R. § 5.11(b)(6).

<sup>28</sup> 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.

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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.”<sup>29</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

\* \* \*

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); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific FOIA exemptions. 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.

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<sup>29</sup> 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 a 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. Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request. 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. In March 2005, the Department of State granted a fee waiver to the ACLU for a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—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 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,

/s/ Esha Bhandari

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