



March 29, 2013

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

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 C.F.R. § 16.1 *et seq.*,¹ for information relating to the government’s use in legal proceedings of evidence obtained or derived from surveillance conducted under the Foreign Intelligence Surveillance Act Amendments Act of 2008.

I. Background

On July 10, 2008, President Bush signed into law the Foreign Intelligence Surveillance Act Amendments Act of 2008 (“FISA Amendments Act” or “FAA”). This controversial piece of legislation not only effectively ratified the secret warrantless surveillance program that President Bush had authorized in late 2001,² it gave the National Security Agency (“NSA”) new power to conduct dragnet surveillance of Americans’ international telephone calls and emails. The FAA gives the government virtually limitless power to

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

² Media reports in 2005 first revealed that soon after the September 11 terrorist attacks, President Bush authorized the NSA to conduct warrantless electronic surveillance of Americans inside the nation’s borders even though the Foreign Intelligence Surveillance Act expressly prohibited the practice. *See, e.g.,* James Risen and Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005

collect Americans' international communications en masse, without a warrant, without suspicion of any kind, and with only very limited judicial oversight. The FAA's massive electronic surveillance power implicates core privacy and free speech concerns for all Americans.

The FAA has now been in effect for almost five years. However, the public remains largely in the dark about how the government has interpreted and actually implemented its sweeping spying power under the FAA. Furthermore, the scant information that has surfaced regarding interpretation and implementation of the FAA is troubling. News reports suggest that the government has interpreted the FAA authority broadly to permit mass collection of U.S. communications, and that the NSA has systematically abused its (already broad) FAA power. *See* Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 15, 2009 (stating that the NSA's "overcollection" of American' communications has been "significant and systemic"); James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 16, 2009 (highlighting the NSA's over-collection of Americans' personal emails).

Despite this secrecy, public statements by government officials indicate that information obtained or derived from FAA surveillance has contributed to the detention and prosecution of terrorism suspects. For instance, on December 27, 2012, Senator Feinstein testified in support of reauthorizing the FAA, stating, "[I]n the past four years, there have been 100 arrests to prevent something from happening in the United States, some of these plots have been thwarted because of this program. I think it is a vital program."³ Senator Feinstein also specifically named or described at least nine alleged terrorism plots which, she said, may have been thwarted on account of communications intercepted pursuant to the FAA.⁴ Many of the men associated with these alleged terrorist plots have since been prosecuted by the Department of Justice.

Significantly, criminal defendants who are prosecuted using evidence obtained or derived from FAA surveillance are entitled to notice. *See* 50 U.S.C. §§ 1806(c), 1881e(a). The Supreme Court recently affirmed that "if the Government intends to use or disclose information obtained or derived from a §1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."⁵ During the course of recent litigation relating to the constitutionality of the FAA, the government made similar

³ 158 Cong. Rec. S8393 (daily ed. Dec. 27, 2012) (statement of Sen. Feinstein).

⁴ *Id.*

⁵ *Clapper v. Amnesty Int'l USA*, No. 11-1025, slip op. at 22, 568 U.S. ___ (Feb. 26, 2013) (citing 50 U.S.C. §§ 1806(c), 1806(e), 1881e(a)).

representations.⁶ Yet, in nearly five years, the government has never provided a defendant with notice of its intent to use FAA evidence or the fruit of FAA surveillance.

This Request seeks records that would illuminate how the Department of Justice and individual U.S. Attorneys have been using evidence obtained or derived from the FAA in criminal prosecutions; how the Department of Justice and individual U.S. Attorneys have been interpreting the FAA's notice provisions; and whether the Department of Justice and individual U.S. Attorneys have been complying with the constitutional and statutory requirement that the government provide notice of its intent to use evidence obtained or derived from FAA surveillance under 50 U.S.C. §§ 1881e(a), 1806(c).

II. Requested Records

1. The case name, docket number, and court of all legal proceedings, including criminal prosecutions, current or past, in which the Department of Justice intends or intended to enter into evidence, or otherwise used or disclosed in any trial, hearing, or other proceeding, any information obtained or derived from electronic surveillance pursuant to the authority of the FAA.
2. Policies, procedures, and practices governing the provision of notice to "aggrieved persons," as set forth in 50 U.S.C. § 1881e(a) and § 1806(c), of the government's intent to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding information obtained or derived from electronic surveillance pursuant to the authority of the FAA.
3. Legal memoranda or opinions addressing or interpreting the FAA's notice provision or requirements, as set forth in 50 U.S.C. § 1881e(a) and § 1806(c).

We request that responsive electronic records be provided electronically in their native file format, if possible. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agencies' possession, and that the records be provided in separate, Bates-stamped files.

We also request that you provide an estimated date on which you will complete the processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

⁶ Br. for Petitioner at 8, *Clapper v. Amnesty Int'l USA*, No. 11-1025, 568 U.S. ___ (Feb. 26, 2013).

III. Request for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); and 32 C.F.R. § 1700.12. There is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1700.12(c)(2). In addition, the records sought relate to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 28 C.F.R. § 16.5(d)(1)(iv).

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

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1700.2(h)(4). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU’s work and one of its primary activities. *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 information” (internal citation omitted)).⁷

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

⁷ *See also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is “to serve as the site of record for relevant and up-to-the-minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws”—to be “primarily engaged in the dissemination of information”).

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news.⁸ ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁹

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA.¹⁰ For example,

⁸ See, e.g., Release, American Civil Liberties Union, *Documents Show FBI Monitored Bay Area Occupy Movement*, Sept. 14, 2012, <http://www.aclu.org/node/36742>; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Using "Mosque Outreach" for Intelligence Gathering*, Mar. 27, 2012, <http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach,"* Dec. 1, 2011, <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>; Press Release, American Civil Liberties Union, *FOIA Documents from FBI Show Unconstitutional Racial Profiling*, Oct. 20, 2011, <http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling>; Press Release, American Civil Liberties Union, *Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem*, Oct. 19, 2011, <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>; Press Release, American Civil Liberties Union, *New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU*, June 24, 2009, <http://www.aclu.org/national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu>.

⁹ See, e.g., Carrie Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dep't Wants More Time to Review IG's Findings on Detainee Treatment*, Wash. Post, June 20, 2009 (quoting ACLU staff attorney Amrit Singh); Peter Finn & Julie Tate, *CIA Mistaken on 'High-Value' Detainee, Document Shows*, Wash. Post, June 16, 2009 (quoting ACLU staff attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. Times, June 10, 2009 (quoting ACLU National Security Project director Jameel Jaffer); Joby Warrick, *Like FBI, CIA Has Used Secret 'Letters,'* Wash. Post, Jan. 25, 2008 (quoting ACLU staff attorney Melissa Goodman).

¹⁰ See, e.g., <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; <http://www.aclu.org/torturefoia>; <http://www.aclu.org/olcmemos>; <http://www.aclu.org/mappingthefbi>; <http://www.aclu.org/national-security/bagram-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; <http://www.aclu.org/patriotfoia>; <http://www.aclu.org/spyfiles>; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; and <http://www.aclu.org/exclusion>.

the ACLU maintains an online “Torture Database,” a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.¹¹ The ACLU also maintains a “Torture FOIA” webpage containing commentary about the ACLU’s FOIA request, press releases, and analysis of the FOIA documents.¹² (That webpage also notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA. *See* Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007)). Similarly, the ACLU’s webpage about the Office of Legal Counsel (“OLC”) torture memos obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU’s information gathering, research, and analysis; and ACLU videos about the memos.¹³ In addition to websites, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part.¹⁴ Similarly, the ACLU produced 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.¹⁵

The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not

¹¹ <http://www.torturedatabase.org>.

¹² <http://www.aclu.org/torturefoia>.

¹³ http://www.aclu.org/safefree/general/olc_memos.html.

¹⁴ The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf.

¹⁵ The chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf.

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.¹⁶

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

The records sought are urgently needed to inform the public about actual or alleged federal government activity. The records sought pertain to the Department of Justice's use of information obtained or derived from FAA surveillance in criminal prosecutions and other legal proceedings. The records sought also pertain to the government's interpretation and implementation of a controversial federal statute that seriously impacts American's privacy and free speech rights. The records sought are urgently needed because almost nothing is known about how the government has interpreted the scope of its FAA surveillance powers, how it has actually used those powers, and how many Americans have been affected. Moreover, this information is vitally needed to inform the ongoing public and congressional debate about whether the government's electronic surveillance power should be narrowed or surveillance laws should be amended.

The requested records 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), and to a matter where there is "urgency to inform the public about an actual or alleged federal government activity." 28 C.F.R. § 16.5(d)(1)(ii).

The government's intrusive electronic surveillance power has been a significant matter of public concern and media interest for many years, particularly after the revelation of the NSA's warrantless wiretapping program. The legislation that emerged out of that controversy—the FAA—has been the subject of widespread interest and debate since the moment it was introduced. Indeed, in the weeks leading up to its enactment, the law was the subject of particularly intense coverage. *See, e.g.,* Sean Lengell, *House Approves Update of Bipartisan Spy Laws*, Wash. Times, June 21, 2008; Editorial, *Mr. Bush v. the Bill of Rights*, N.Y. Times, June 18, 2008 (stating that "all indications are" that many of the FAA's provisions are "both unnecessary and a threat to the Bill of Rights"). The law was also strongly criticized in many of the nation's leading editorial pages. *See, e.g.,* Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008 (stating that the

¹⁶ 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. Further, the ACLU makes archived materials available at the American Civil Liberties Union Archives at Princeton University Library.

FAA would “make it easier to spy on Americans at home, reduce the courts’ powers and grant immunity to the companies that turned over Americans’ private communications without warrant”); Editorial, *Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008.

The eventual passage and enactment of the FAA garnered similarly widespread coverage and attention. See Peter Grier, *White House Scores Key Victory on Government Eavesdropping*, Christian Science Monitor, July 10, 2008; Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008; Shailagh Murray, *Obama Joins Fellow Senators in Passing New Wiretapping Measure*, Wash. Post, July 10, 2008; Antonio Vargas, *Obama Defends Compromise on New FISA Bill*, Wash. Post, July 4, 2008. Major editorial pages continued to weigh in on the law. See, e.g., Editorial, *The Day of the New Surveillance Law*, N.Y. Times, July 11, 2008; Editorial, *FISA Follies*, Wash. Post, July 3, 2008. The immediate filing of a constitutional challenge to the law was the subject of widespread media interest. See, e.g., Ryan Singel, *Bush Signs Spy Bill, ACLU Sues*, Wired, July 10, 2008; Grant Gross, *ACLU Files Lawsuit to Challenge Surveillance Law*, PC World, July 10, 2008.

Media attention to the FAA surged, once again, in 2009 when *The New York Times* reported that the NSA was using its FAA powers to vacuum up U.S. communications by the millions, that it was potentially abusing its sweeping FAA power, and that it was possibly “overcollecting” purely domestic communications in a systematic manner. See Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 15, 2009; see also Joby Warrick, *Problems in Wiretapping Bring Change*, Wash. Post, Apr. 16, 2009; Pamela Heiss, *Senate Panel to Probe Wiretapping Violations*, Assoc. Press, Apr. 16, 2009; Glenn Greenwald, *The NYT’s Predictable Revelation: New FISA Law Enabled Massive Abuses*, Salon, Apr. 15, 2009. Later that year, similar reports that the NSA was “over-collecting” Americans’ personal emails again drew significant media attention. See James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 16, 2009; see also Editorial, *The Eavesdropping Continues*, N.Y. Times, June 18, 2009; Kim Zetter, *NSA Secret Database Ensnared President Clinton’s Private E-mail*, Wired, June 17, 2009; Marc Ambinder, *Pinwale and the New NSA Revelations*, The Atlantic Online, June 16, 2009.

As questions about the scope of the government’s wiretapping programs have mounted, this intense public interest has persisted. In September and December 2012, Congress debated whether it should reauthorize the FAA, prompting extensive public comment. See, e.g., Jon Ribeiro, *U.S. House Votes to Extend Surveillance Under FISA*, PC World, Sept. 13, 2012; Alex Pareene, *Senate FISA Vote Inspiring Display of Bipartisan Commitment to Ignoring Fourth Amendment*, Salon, Dec. 28, 2012. Two months ago, in February 2013, the Supreme Court turned aside a civil

challenge to the FAA brought on behalf of journalists, lawyers, and human rights advocates, generating further public interest. *See Clapper v. Amnesty Int'l USA*, No. 11-1025, slip op. at 22, 568 U.S. __ (Feb. 26, 2013); Scott Lemieux, *Secret Wiretapping Cannot Be Challenged Because It's Secret*, *The American Prospect*, Feb. 26, 2013; Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, *The New York Times*, Feb. 26, 2013. In the *Amnesty* litigation, both the Supreme Court and the Executive Branch indicated that the proper avenue for judicial review of the government's warrantless wiretapping program is a criminal or administrative proceeding where FAA material is at issue. The Request seeks information bearing directly on this matter of public interest.

As the sustained media interest concerning the scope and privacy implications of the government's electronic surveillance power clearly shows, the government's use of information obtained or derived from FAA surveillance constitutes 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 Request will inform urgent and ongoing debate about the government's surveillance and wiretapping activities.

Accordingly, expedited processing should be granted.

IV. Application for Waiver or Limitation of Fees and Costs

A. Release of the record is in the public interest.

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 the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k); 32 C.F.R. § 1700.6(b).

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 Department of Justice's use of information obtained or derived from FAA surveillance. Given that very little is known about how the government has interpreted and implemented its FAA power in practice, the records sought are certain to contribute significantly to the public's understanding of the issue. 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).

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

We also request a waiver of document reproduction 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(d); 32 C.F.R. § 1700.6(i)(2). Accordingly, fees associated with the processing of this request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A).

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)(II); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for FOIA purposes).¹⁷ Indeed, the ACLU

¹⁷ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard 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, 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.

recently was held to be a “representative of the news media.” *Serv. Women’s Action Network v. Dep’t of Defense*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at *3 (D. Conn. May 14, 2012). *See also Am. Civil Liberties Union of Wash. v. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

Notably, 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.” *See, e.g., Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA); *Nat’l Security Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. 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).¹⁸

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

* * *

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).

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 Department of Justice 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 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.

¹⁸ 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 Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54; *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public education functions).

the right to appeal a decision to withhold any information or to deny a waiver of fees.

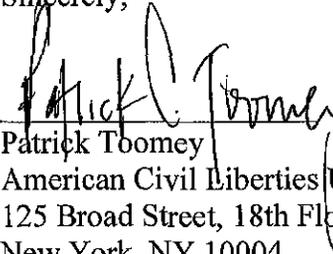
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Patrick Toomey
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.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Patrick Toomey
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