

March 20, 2019

Office of Information Programs and Services
A/GIS/IPS/RL
Department of State, SA-2
Washington, DC 20522-8100

Re: Freedom of Information Act Request

To Whom It May Concern:

We are concerned by recent reports that the U.S. Department of State held a telephone briefing conference exclusively for “faith-based media.” The government has no business discriminating against media outlets based on their religious affiliation or lack thereof. We therefore write to request information concerning this troubling practice.

This is a request for production of records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the Department of State, 22 CFR Part 171, on behalf of the American Civil Liberties Union Foundation (“ACLU”).

The ACLU seeks all information related to the March 18, 2019 phone briefing for “faith-based media” (“the briefing”), including, but not limited to, a transcript or any other written, audio, or video recording of the briefing, a list of which media outlets were allowed to participate in the briefing, and the criteria used to invite these outlets.

I. Background

On March 18, 2019, Secretary of State Michael R. Pompeo held a phone briefing in anticipation of his trip to the Middle East.¹ The Department of State allowed only “faith-based media” to join the call, excluding many reporters and media outlets who regularly cover the Department and Secretary Pompeo.²

¹ Michelle Kosinski and Jennifer Hansler, *State Department Bars Press Corps From Pompeo Briefing, Won’t Release List of Attendees*, CNN, Mar. 19, 2019, <https://www.cnn.com/2019/03/18/politics/state-department-faith-outlets-briefing/index.html?fbclid=IwAR3PfkRtdESXb0apEBYe9xKIO9r59ykWYipMNDhJYxU4tO-xFhTq6-Vyfw>.

² *Id.*

At least one member of the State Department press corps was invited and then un-invited after RSVPing.³ That reporter was told that the call was for “faith-based media only.”⁴

The Department of State has not released a transcript of the call or a list of the media outlets that were allowed to participate.⁵

II. Definitions

For purposes of this request, the term “materials” includes but is not limited to any and all objects, complaints, submissions, writings, drawings, graphs, charts, tables, electronic or computerized data compilations, budgets, accountings, balance sheets or other financial statements, invoices, receipts, minutes, emails, electronic or computerized documents, photographs, audiotapes, videotapes, transcripts, drafts, correspondence, notes, notes of oral communications, and non-identical copies, including but not limited to copies with notations.

For purposes of this request, the term “Department of State” means any individual or group of individuals working for the Department of State and any sub-department, office, board, program, group, agency, bureau, administration, and/or other subdivision within the Department of State.

III. Request

Please provide any and all materials from January 1, 2019 until present relating to the briefing, including, but not limited to, materials relating to:

1. The organization and/or planning of the briefing.
2. The reporters and media outlets that were invited to participate in the briefing.
3. The reporters and media outlets that were denied access to the briefing.
4. The criteria used to select the reporters and media outlets invited to participate in the briefing.
5. The content of the briefing.

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.

The ACLU requests that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. However, to the extent that a response to this request would require the Department of State to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

In the event you determine that materials contain information that falls within the statutory exemptions to mandatory disclosure, the ACLU requests that such information be reviewed for possible discretionary disclosure. The ACLU also request that, in accordance with 5 U.S.C. § 552(b), any and all reasonably segregable portions of otherwise exempt materials be produced. To the extent the request is denied, the ACLU expects to receive notice in writing, including a description of the information withheld, the reasons for denial, and any exemptions relied upon.

IV. Application for Waiver or Limitation of Fees

Because we ask that you respond to our request as quickly as possible, and thus do not wish to slow down the agency's response, we do not ask for a fee waiver if the fee pursuant to 5 U.S.C. § 552(a)(4)(A) associated with this request is less than \$500.00.

If, however, the fee exceeds \$500.00, we request that the fee be waived pursuant to 22 CFR § 171.16. 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). The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. As explained below, disclosure in this case meets both of these tests 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." (quotation marks omitted)).

First, disclosure pursuant to this request is in the public interest. The records pertain directly to the operations and activities of the federal government; the information to be learned from the requested documents is not already public knowledge; and disclosure will contribute to the public good in a significant way because the requested records concern the operations of a federal agency. Moreover, disclosure is not in the ACLU's commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization." *See Judicial Watch*, 326 F.3d at 1310. Additionally, the purpose of the request is to monitor and vindicate legal rights; it is unrelated to business, trade, or profit.

Second, the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). 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); *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity

that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating 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 5, 10-15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).⁶

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁷ As was true in those instances, the ACLU meets the requirements for a fee waiver


⁶ 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 and 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 v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

⁷ In May 2016, the FBI granted a fee-waiver request to the ACLU regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ 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 on 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

here. If the fee exceeds \$500.00, it should be waived for the aforementioned reasons. In the event that the fee exceeds \$500.00 and is not waived, please provide us with prior notice so that we can discuss arrangements.

Pursuant to applicable statutes and regulations, the ACLU expects a determination on this request within twenty working days. *See* 22 CFR §171.11. Thank you for your prompt attention to this matter. Please furnish the applicable records to the undersigned.

Sincerely,



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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.