

July 15, 2009

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

Attention:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, and the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.1 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").¹

¹ The American Civil Liberties Union Foundation is a 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, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of

I. Requested Record

- 1) A legal memorandum dated May 4, 2009, from David Barron, Acting Assistant Attorney General of the Office of Legal Counsel (OLC), to a Department of Justice (DOJ) Task Force, which reportedly addresses, *inter alia*, the constitutional rights that certain Guantánamo Bay detainees might legally claim if tried through military commissions in the United States and the admissibility of statements obtained through coercion in such military commission proceedings.

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for this record 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* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A).

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); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). 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 information” (internal citation omitted)). The ACLU’s regular means of distributing and publicizing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter

pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate 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.

distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely-read blog; a heavily visited website, which includes a new accountability microsite, <http://www.aclu.org/accountability>; and a video series. The ACLU also regularly issues press releases to call attention to documents released through FOIA and other breaking news. *See, e.g.,* Press Release, American Civil Liberties Union, *New Evidence Of Abuse At Bagram Underscores Need For Full Disclosure About Prison, Says ACLU*, June 24, 2009, available at <http://aclu.org/safefree/detention/40021prs20090624.html>; Press Release, American Civil Liberties Union, *Justice Department Releases Bush Administration Torture Memos*, Apr. 16, 2009, available at <http://www.aclu.org/safefree/torture/39393prs20090416.html>; Press Release, American Civil Liberties Union, *Documents Obtained By ACLU Provide Further Evidence That Abuse Of Iraqi Prisoners Was Systemic*, Nov. 19, 2008, available at <http://www.aclu.org/safefree/torture/37818prs20081119.html>; Press Release, American Civil Liberties Union, *FBI Improperly Using Patriot Act Surveillance Powers, ACLU Charges*, Nov. 29, 2007, available at <http://www.aclu.org/safefree/nationalsecurityletters/32904prs20071129.html>. ACLU attorneys are frequently interviewed for news stories about documents released through ACLU FOIA requests. *See, e.g.,* Carrie Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dept. 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).

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.,* www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; www.aclu.org/exclusion. For example, the ACLU's "Torture FOIA" webpage, www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about

the documents obtained through the FOIA. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). Finally, 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 the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The record requested is 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.²

Furthermore, the record sought directly relates to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the record sought relates to the legal position held by the OLC regarding the constitutional rights that may be afforded to certain Guantánamo Bay detainees if they are tried in military commissions in the United States. *See* 22 C.F.R. 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1900.34(c)(2). For the same reason the record sought also relates 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); *see also* 32 C.F.R. § 1900.34(c)(2) (providing for expedited processing when “the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity”).

The ACLU became aware of the requested record on June 29, 2009, through a *Wall Street Journal* article that described the contents of the memorandum, which had been leaked to its newsroom. Jess Bravin, *New Rift Opens Over Rights of Detainees*, Wall St. J., June 29, 2009. The article asserted that the memorandum’s conclusions “could alter significantly the way the commissions operate.” *Id.* Notably, the article discussed the memorandum’s position that the coerced or involuntary statements of Guantánamo Bay detainees will likely be viewed as inadmissible by federal courts on Fifth Amendment Due Process grounds—a point of contention between the OLC and the Pentagon. *Id.* Since the leak, the requested record and its contents have been the subject of significant and sustained media attention. *See, e.g.*, David Johnston, *Rights Cited in U.S. Trials Of Detainees*, N.Y. Times, June 29, 2009; *Task Force Defining Detainee Rights*, Stars and Stripes, June 30, 2009. In a

² 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 material available at the American Civil Liberties Union Archives at Princeton University Library.

recently published editorial, the *New York Times* called for the memorandum's release outright. *Undoing the Damage*, N.Y. Times, July 11, 2009 (stating that they are "puzzled" by the Obama administration's failure to make this "vital" record public).

The contents of the requested record are also the subject of an ongoing congressional debate over military commissions, and were a focus of a recent July 7, 2009 hearing before the Senate Armed Services Committee titled "Military Commissions." At the hearing, Assistant Attorney General David Kris, among others, outlined the Administration's position on the reform of military commissions and the rights of Guantánamo Bay detainees. The proceedings drew significant media interest. *See, e.g.*, Spencer Ackerman, *Obama Military Commissions Vision Takes Shape*, Wash. Ind., July 7, 2009; Dan De Luce, *Detainees Require More Legal Rights in Court: US Officials*, AFP, July 7, 2009; James Vicini, *Government Seeks Voluntary Statements at Guantanamo Trials*, Reuters, July 7, 2009; David Johnston, *In Senate, Debate on Detainee Legal Rights*, N.Y. Times, July 8, 2009; Jess Bravin, *Detainees, Even if Acquitted, Might Not Go Free*, Wall St. J., July 8, 2009. On July 8, 2009, discussion of the subject of the OLC memorandum continued in Congress at a related hearing on "Legal Issues Surrounding the Military Commissions System," which again drew significant media attention. *See, e.g.*, Andrew Morgan, *Military Commissions System 'Broken': Former Guantanamo Prosecutor*, Jurist.com, July 8, 2009; Spencer Ackerman, *Vandeveld vs. Franks*, Wash. Ind., July 8, 2009; Dan Robinson, *US Congress Debates Detainee Policy, Military Commissions*, Voice of Am., July 9, 2009.

Indeed, the current Administration's proposed reforms to and continued support of the military commissions system generally has been the subject of sustained public and media attention since May 2009, when President Obama announced publicly that he intended to revive the commissions. *See* Peter Finn, *Obama Set to Revive Military Commissions; Changes Would Boost Detainee Rights*, Wash. Post, May 9, 2009; Lara Jakes, *Obama to Restart Military Tribunals, With More Rights*, Boston Globe, May 15, 2009; William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. Times, May 16, 2009; Carol J. Williams, *Obama Hasn't Fixed Image of Tribunals*, L.A. Times, May 16, 2009; Warren Richey, *Obama: Bring Some Guantanamo Detainees to U.S., Detain Some Indefinitely*, Christian Science Monitor, May 21, 2009; Sheryl Gay Stolberg, *Obama Would Move Some Terror Detainees to U.S.*, N.Y. Times, May 22, 2009. Clearly, the full release of the requested record would further elucidate the current Administration's position on military commissions, thereby enhancing the ongoing political and legal debate and deepening the public's understanding of this important issue.

III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

Numerous news accounts reflect the considerable public interest in the record we seek. *See* cited articles, *supra*, section II. Given the ongoing and widespread media attention to this issue, the record sought in the instant Request will significantly contribute to public understanding of the operations and activities of the DOJ and the government. *See* 22 C.F.R. § 171.17(a)(1)(ii); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2)(ii). Moreover, disclosure is not in the ACLU's commercial interest. 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)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the record is not sought for commercial use. 28 C.F.R. § 16.11(c)(1)-(2), (d)(1). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. § 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

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. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (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 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 media” for purposes of FOIA)³; see *supra*, section II.

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions 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.

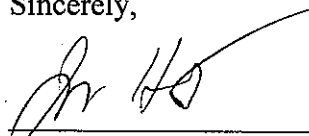
Thank you for your prompt attention to this matter. Please furnish the applicable record to:

Jonathan Hafetz, Staff Attorney, National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

³ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, 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 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 regard to a request submitted that month 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 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. 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.

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 'Jr Hf', is written over a horizontal line.

Jonathan Hafetz
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