

December 22, 2022

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

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The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this request (the “Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and its implementing regulations.²

The ACLU seeks disclosure of recent Foreign Intelligence Surveillance Court (“FISC”) opinions concerning the government’s surveillance activities, including those conducted pursuant to Section 702 of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1881a.

Section 702, which authorizes warrantless surveillance of U.S. persons’ international communications, is one of the most sweeping surveillance authorities ever enacted by Congress. That authority is set to expire in December 2023. Over the next year, Congress will consider whether to reauthorize these surveillance powers and will newly examine the breadth and intrusiveness of the digital searches the government conducts under this authority.

Following a protracted review of the government’s Section 702 application in 2021, the FISC issued at least one opinion addressing significant issues raised by the government’s surveillance. But the government has yet to release that opinion publicly, despite the statutory requirement that it make the opinion publicly available to the greatest extent practicable. *See* 50 U.S.C. § 1872.

The delay in disclosing the FISC’s opinion has kept the public in the dark regarding surveillance issues with immense consequences for Americans’ privacy rights. The public cannot wait any longer for release of an opinion that is vitally necessary to an informed debate about whether these surveillance powers should be reauthorized or reformed.

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 civil rights and civil liberties issues across the country. 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.

² *See* 28 C.F.R. § 16.1 (Department of Justice); 32 C.F.R. § 286 (Department of Defense); and 32 C.F.R. § 1900 (Central Intelligence Agency); 32 C.F.R. § 1700.1 (Office of the Director of National Intelligence).

I. Background

Section 702 authorizes the widespread warrantless collection of Americans' international communications. Under the statute, agency analysts may collect the communications of any non-U.S. person abroad—including communications to and from Americans—where a “significant purpose” of the surveillance is “foreign intelligence” collection. 50 U.S.C. § 1881a(a), (h)(2)(A)(v). In practice, the government has used this authority to seize and search the communications of Americans and others on an immense scale. Since its enactment, Section 702 has been the subject of widespread news coverage and public controversy, with opponents raising grave privacy and other constitutional concerns.³ In January 2018, following a heated debate, a divided Congress reauthorized Section 702 but imposed a new sunset date in 2023. That deadline is now approaching.

In the fourteen years since Section 702's enactment, the government has used this authority to access and retain huge volumes of communications. In 2011, Section 702 surveillance resulted in the retention of more than 250 million Internet communications—a number that does not reflect the far larger quantity of communications whose contents the NSA searched before discarding them. *See [Redacted]*, No. [Redacted], 2011 WL 10945618, at *9–10 (FISC Oct. 3, 2011). The government has not disclosed the overall number of communications collected under Section 702 today, but as the number of Section 702 targets has grown—to include more than 232,000 individuals, groups, and organizations—it is likely the government collects over a *billion* communications each year. Off. of the Dir. of Nat'l Intel., Annual Statistical Transparency Report Regarding the Intelligence Community's Use of National Security Surveillance Authorities 17 (Apr. 2022) (“2022 ODNI Transparency Report”), <https://bit.ly/3Wt6Qj2>.⁴ Whenever the NSA's targets—who may be journalists, academics, or human rights advocates abroad—communicate with someone in the United States, those communications are subject to interception and retention under Section 702.

Section 702 has long raised constitutional objections because it permits the surveillance of Americans without a finding of probable cause or any

³ *See, e.g.*, Editorial, *Mass Surveillance Isn't the Answer to Fighting Terrorism*, N.Y. Times, Nov. 17, 2015, <https://www.nytimes.com/2015/11/18/opinion/mass-surveillance-isnt-the-answer-to-fighting-terrorism.html>; Jake Laperruque, *Secrets, Surveillance, and Scandals: The War on Terror's Unending Impact on Americans' Private Lives*, POGO, Sept. 7, 2021, <https://www.pogo.org/analysis/2021/09/secrets-surveillance-and-scandals-the-war-on-terrors-unending-impact-on-americans-private-lives>.

⁴ In 2011, when the NSA collected 250 million communications, it was monitoring approximately 35,000 “unique selectors” associated with its targets. Glenn Greenwald, *No Place to Hide* 111 (2014), <https://bit.ly/3fr2cBx>.

suspicion of wrongdoing at all. Rather than applying for individualized warrants, the government presents annual certifications to the Foreign Intelligence Surveillance Court (“FISC”), without identifying its individual targets or the various places and facilities at which its surveillance will be directed. 50 U.S.C. §§ 1881a(a), 1881a(g)(4). The statute’s safeguards are limited to the requirement that each agency adopt internal “procedures” that are “reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination” of U.S. person information. 50 U.S.C. §§ 1881a(e), 1801(h)(1), 1821(4)(A). The FISC’s role is limited to approving these general procedures and the annual certifications; it does not approve the government’s interception of individual Americans’ communications.

Communications intercepted under Section 702 are amassed in government databases, where intelligence analysts and criminal investigators can conduct warrantless queries seeking the private messages, emails, internet chats of U.S. persons. The scale of these intrusions is vast: FBI agents alone conduct millions of U.S. person queries—or “backdoor searches”—each year. 2022 ODNI Transparency Report 20. Indeed, agents around the country can generally search for and read through U.S. persons’ private communications without needing to obtain even a supervisor’s approval. *See* FBI, Section 702 Querying Procedures (Sept. 17, 2019), <https://bit.ly/3WqpOXA>.

Despite the breadth and intrusiveness of this surveillance regime, the public lacks critical information about how Section 702 surveillance has expanded and evolved in recent years—information that is essential for a meaningful debate about reauthorization. Behind closed doors, the FISC has been examining novel issues related to the government’s Section 702 applications since at least late 2020. It has appointed amici to assist in that process, and it declined to “issue any Section 702 orders in 2021” as part of an extended review process. 2022 ODNI Transparency Report 16.⁵ Yet as the reauthorization debate approaches, the government has failed to publicly release the opinions issued by the FISC in the course of its review, and the public has no insight into the kinds of novel Section 702 surveillance the intelligence agencies are seeking to conduct.

This Request seeks records that will illuminate how Section 702 authority has been used in recent years, what safeguards currently exist to protect Americans’ privacy, and the FISC’s analysis of the significant issues raised by this surveillance. The release of the requested documents is necessary to enable an informed legislative and public debate over Section

⁵ The FISC may appoint amici curiae to help the Court evaluate applications that “present[] a novel or significant interpretation of the law.” 50 U.S.C. § 1803(i)(2). Such amici have played an important role in the FISC’s evaluation of Section 702 surveillance.

702 reauthorization that fully accounts for the impact of this surveillance on Americans.

II. Records Requested

The ACLU requests all FISC or FISCR opinions or orders dated on or after January 1, 2021, that address novel or significant issues, including but not limited to novel or significant issues concerning Section 702 surveillance.

We request that responsive electronic records be provided electronically in their native file format. *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 agency's possession, and in separate, Bates-stamped files.

III. Request for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).⁶ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an 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 an organization primarily engaged in disseminating information 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).⁷ 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. DOJ*, 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”).⁸

⁶ *See also* 32 C.F.R. § 286.8(e) (DOD); 28 C.F.R. § 16.5(e) (DOJ); 32 C.F.R. § 1900.34 (CIA); 32 C.F.R. § 1700.12 (ODNI).

⁷ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 32 C.F.R. § 1900.34(c)(2) (CIA); 32 C.F.R. § 1700.12(c)(2) (ODNI).

⁸ 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

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to over 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,⁹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹⁰

engaged in disseminating information.” See, e.g., *Leadership Conf. 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. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

⁹ See, e.g., Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>; Press Release, ACLU, 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>.

¹⁰ See, e.g., Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program> (quoting former ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What*

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.¹¹ 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.

The ACLU publishes a widely read blog where original editorial 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. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties

Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting former 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 deputy project director Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

¹¹ See, e.g., ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site*, ACLU (Nov. 22, 2016), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most*, ACLU (Aug. 8, 2016), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU & ACLU-DC, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, ACLU (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333*, ACLU (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

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.¹²

The ACLU website includes many features on information obtained through the FOIA. 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 its contents relating to government policies on rendition, detention, and interrogation.¹³ The ACLU has also published a number of charts and explanatory materials that collect,

¹² See, e.g., *ACLU v. ODNI – FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU (last updated Apr. 2, 2019), <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ – FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media*, ACLU (last updated Mar. 26, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ – FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU (last updated Apr. 23, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; *Executive Order 12,333 – FOIA Lawsuit*, ACLU (last updated Dec. 3, 2018), <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; *ACLU v. United States*, ACLU (last updated Nov. 1, 2021), <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance> (ACLU motions requesting public access to FISA court rulings on government surveillance); *ACLU v. DOJ – FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements,”* ACLU (last updated Apr. 6, 2016), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; *FOIA Request for Justice Department Policy Memos on GPS Location Tracking*, ACLU (last updated Mar. 12, 2014), <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; *Florida Stingray FOIA*, ACLU (last updated Feb. 22, 2015), <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

¹³ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org> (last visited Dec. 21, 2022); see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents> (last visited Dec. 21, 2022); *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database> (last visited Dec. 21, 2022); *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database> (last visited Dec. 21, 2022).

summarize, and analyze information it has obtained through the FOIA.¹⁴

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 requesters plan 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.

The records sought are urgently needed to inform the public about actual or alleged federal government activity. The records pertain to the collection of Americans' communications data in vast quantity, and to the government's interpretation and implementation of a controversial federal statute that impacts Americans' privacy and associational rights. Disclosure is necessary because there remains a significant and conspicuous gap in the public's knowledge when it comes to the impact of Section 702 surveillance on Americans. This information is urgently needed to inform the public and congressional debate about whether Section 702 should be reauthorized or allowed to sunset in 2023.

The requested records 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(e)(1)(iv), and to a "breaking news story of general public interest" that concerns "actual or alleged Federal government activity." 32 C.F.R. § 286.4(d)(3)(ii).

The government's intrusive surveillance powers under Section 702 have been a significant matter of public concern and media interest for many years. This warrantless surveillance has been the subject of widespread media coverage since the statute's enactment. *See, e.g.*, Editorial, *Mr. Bush v. the Bill of Rights*, N.Y. Times, June 18, 2008, <https://www.nytimes.com/2008/06/18/opinion/18wed1.html>; Peter Grier, *White House Scores Key Victory on Government Eavesdropping*, Christian Science

¹⁴ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (2010), https://www.aclu.org/files/pdfs/natsec/faafoia_20101129/20101129Summary.pdf; *Statistics on NSL's Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf (last visited Dec. 21, 2022).

Monitor, July 10, 2008,
<https://www.csmonitor.com/USA/Politics/2008/0710/p02s05-uspo.html>.

Public and media interest in the government's surveillance power surged beginning in June 2013, when it was revealed that the NSA was systematically collecting the phone records of millions of Americans. *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *Guardian*, Jun. 6, 2013, <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>; Andy Greenberg, *Intelligence Officials Admit that Edward Snowden's NSA Leaks Call for Reforms*, *Forbes*, Sept. 13, 2013, <https://www.forbes.com/sites/andygreenberg/2013/09/13/intelligence-officials-admit-that-edward-snowdens-leaks-call-for-reforms/>; Ed Pilkington, *Secret Court Lets NSA Extend its Trawl of Verizon Customers' Phone Records*, *Guardian*, Jul. 19, 2013, <https://www.theguardian.com/world/2013/jul/19/nsa-extended-verizon-trawl-through-court-order>. Following these revelations regarding the breadth and scope of NSA surveillance, public demands for surveillance reform led to the passage of the USA Freedom Act in June 2015, another moment of intense media focus on the government's surveillance programs. *See, e.g.*, Editorial, *The USA Freedom Act: A Smaller Big Brother*, *L.A. Times*, May 6, 2015, <https://www.latimes.com/opinion/editorials/la-ed-usa-freedom-act-telephone-records-privacy-20150506-story.html>.

Section 702 returned to the media spotlight in 2017 and 2018, when Congress debated and ultimately approved a six-year extension of Section 702. *See, e.g.*, Charlie Savage, *Fight Brews Over Push to Shield Americans in Warrantless Surveillance*, *N.Y. Times*, May 6, 2017, <https://www.nytimes.com/2017/05/06/us/politics/congress-surveillance-nsa-privacy.html>; Ted Barrett and Ashley Killough, *Senate passes FISA Section 702 reauthorization*, *CNN*, Jan. 18, 2018, <https://www.cnn.com/2018/01/18/politics/fisa-reauthorization-senate-vote/index.html>; Anna Dubenko, *Right and Left React to the Extension of Warrantless Surveillance*, *N.Y. Times*, Jan. 11, 2018, <https://www.nytimes.com/2018/01/11/us/politics/right-left-react-nsa-spying-warrantless-surveillance.html>. Similar public interest and press attention can be expected to return surround the 2023 reauthorization debate.

In the last three years, the national media has continued to regularly report on developments related to Section 702 surveillance, including widespread searches of Americans' communications under this authority and the release of declassified FISC opinions. *See, e.g.*, Dustin Volz, *Wall Street J., FBI Conducted Potentially Millions of Searches of Americans' Data Last Year, Report Says*, Apr. 29, 2022, <https://www.wsj.com/articles/fbi-conducted-potentially-millions-of-searches-of-americans-data-last-year-report-says->

11651253728; Los Angeles Times, *Editorial: Clamp Down on FBI's Backdoor Surveillance of Americans*, May 2, 2021, <https://www.latimes.com/opinion/story/2021-05-02/editorial-clamp-down-on-fbis-backdoor-surveillance-of-americans>; Charlie Savage, *Court Approves Warrantless Surveillance Rules While Scolding F.B.I.*, N.Y. Times, Sept. 5, 2020, <https://www.nytimes.com/2020/09/05/us/politics/court-approves-warrantless-surveillance-rules-while-scolding-fbi.html>.

As the sustained media interest concerning Section 702 surveillance shows, the subject of the Request is 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(e)(1)(iv). Moreover, recent disclosures concerning Section 702 and the looming reauthorization debate constitute a “breaking news story of general public interest.” 32 C.F.R. § 286.4(d)(3)(ii)(A).

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).¹⁵ 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. 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, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. 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. Because limited information about the government’s recent applications to expand or modify Section 702 surveillance is publicly available, the records sought are certain to contribute significantly to the public’s understanding of how Section 702 has been implemented and what limits apply to the government’s surveillance powers.

¹⁵ 32 C.F.R. § 286.12(l)(1) (DOD); 28 C.F.R. § 16.10(k)(2) (DOJ); 32 C.F.R. § 1900.13(b)(2) (CIA); 32 C.F.R. § 1700.6(b)(2) (ODNI).

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 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.

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. 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)¹⁶; *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*, 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.*,

¹⁶ *See also* 32 C.F.R. § 286.12(b)(6) (DOD); 28 C.F.R. § 16.10(b)(6) (DOJ); 32 C.F.R. § 1900.02(h)(3) (CIA); 32 C.F.R. § 1700.2(h)(4) (ODNI).

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. 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).¹⁷

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.”¹⁸ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 1900.21(d); 28 C.F.R. § 16.5(e)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. §1700.12(b).

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material in

¹⁷ 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 at 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conf. on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

¹⁸ For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-wavier requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so we may begin the process of requesting a Mandatory Declassification Review under the terms of Executive Order 13,526.

I certify that the foregoing information provided in support of the request for expedited processing is true and correct to the best of my knowledge and belief.

Executed on December 22, 2022.

Sincerely,

/s/ Sarah Taitz

Sarah Taitz

Patrick Toomey

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