



CREATING
LAW
ENFORCEMENT
ACCOUNTABILITY &
RESPONSIBILITY

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**Re: FOIA Request Concerning Purchase and Use of Cell Phone Location Data
(Expedited Processing Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ and the Creating Law Enforcement Accountability & Responsibility (“CLEAR”) Project at the City University of New York (“CUNY”) School of Law² submit this Freedom of Information Act request (the “Request”). The Request seeks records from the Bureau of Alcohol, Tobacco, Firearms, & Explosives, Central Intelligence Agency, Defense Intelligence Agency, Department of the Air Force, Department of the Army, Department of Justice, Department of the Navy, Department of the Treasury, Drug Enforcement Agency, Federal Bureau of Investigation, Internal Revenue Service, National Security Agency, Office of the Director of National Intelligence, and U.S. Special Operations Command (“SOCOM”) (collectively, the “Agencies”), pertaining to the purchase of cell phone location data.

I. Background

On November 16, 2020, *Motherboard* reported that the “U.S. military is buying the granular movement data of people around the world, harvested from innocuous-seeming apps,” including a Muslim prayer app that has more than 98 million downloads worldwide, a Muslim dating app, a popular Craigslist app, and an app for following storms.³ According to Senator Ron Wyden, these U.S. military purchases include data harvested from phones inside the United States.⁴ This is the first detailed public report on the U.S. military’s purchase of cell phone location data.

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 The CLEAR Project is a clinical project of Main Street Legal Services at the CUNY School of Law in Long Island City, New York, dedicated to addressing the needs of communities targeted by government policies and practices deployed under the guise of national security and counterterrorism.

³ Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, *Motherboard* (Nov. 16, 2020), <https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x>.

⁴ *Id.*

Through reporting and technical analysis, *Motherboard* uncovered two separate data streams from which the U.S. military has obtained location information.

The first stream involves a company named Babel Street, which offers a product called “Locate X.” In a statement to *Motherboard*, Navy Cmdr. Tim Hawkins, a SOCOM spokesperson, confirmed SOCOM’s purchase of Locate X. Several other federal agencies have reportedly purchased Locate X as well.⁵ According to former Babel Street employees, the company’s data comes largely from third-party aggregators who offer revenue to mobile app developers in exchange for data.⁶ Although the Locate X data is not explicitly linked to name of the cell phone’s owner, a former Babel Street employee explained to *Motherboard* that the company could “absolutely deanonymize a person,” and that employees would “play with it, to be honest.”⁷ Other reporting has established that it is trivially easy to identify particular individuals using their location information, by following their pattern of movements to and from their homes, or by pairing the data with publicly available information.⁸

The second stream of location information involves a company named X-Mode, which encourages app developers to incorporate “software development kits” that collect app users’ location data and send it to X-Mode, often unbeknownst to app users. X-Mode then sells this data to several clients, including U.S. military contractors. Senator Ron Wyden told *Motherboard* that X-Mode said it is selling location data harvested from U.S. phones to U.S. military customers, via defense contractors.⁹

Others recent news reports have discussed government agencies’ purchase of similar cell phone location data from two additional companies: Anomaly Six and Venntel.¹⁰

⁵ *Id.*; see also, e.g., Byron Tau, *Academic Project Used Marketing Data to Monitor Russian Military Sites*, Wall St. J. (July 20, 2020), <https://www.wsj.com/articles/academic-project-used-marketing-data-to-monitor-russian-military-sites-11595073601> (“Documents reviewed by the Journal show that in the U.S., Babel Street had sold its products to nearly every major defense, national-security or law-enforcement agency, including the Central Intelligence Agency, the National Security Agency, the Justice Department, the Department of Homeland Security, the Defense Intelligence Agency and U.S. Cyber Command.”).

⁶ Charles Levinson, *Through Apps, Not Warrants, ‘Locate X’ Allows Federal Law Enforcement To Track Phones*, Protocol (Mar. 5, 2020), <https://www.protocol.com/government-buying-location-data>.

⁷ Cox, *supra* note 3.

⁸ See Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. Times (Dec. 19, 2019), <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>. (explaining that “it’s child’s play to connect real names to the dots that appear on the maps” of cell phone location data).

⁹ Cox, *supra* note 3.

¹⁰ See Byron Tau, *U.S. Government Contractor Embedded Software in Apps to Track Phones*, Wall St. J. (Aug. 7, 2020), <https://www.wsj.com/articles/u-s-government-contractor-embedded-software-in-apps-to-track-phones-11596808801>; Byron Tau & Michelle Hackman, *Federal Agencies Use Cellphone Location Data for Immigration Enforcement*, Wall St. J. (Feb. 7, 2020), <https://www.wsj.com/articles/federal-agencies-use-cellphone-location-data-for-immigration-enforcement-11581078600>.

These developments raise serious concerns about the scope of the Agencies' purchases, the Agencies' discriminatory focus on Muslims, and the warrantless acquisition and use of location information from people inside the United States, where fundamental Fourth Amendment protections most strongly apply. In 2018, the Supreme Court in *Carpenter v. United States* held that the government must get a warrant to obtain cell phone location history, given its highly sensitive and revealing nature. Despite this precedent, some government lawyers have reportedly approved the purchase of cell phone location information from commercial databases, on the theory that "the Carpenter ruling doesn't apply" to such purchases.¹¹ Other government lawyers have reportedly discouraged agencies from buying data from commercial databases, given the controversial nature of these purchases.¹²

The ACLU and CLEAR submit this FOIA request to provide the public with information about the Agencies' purchase and use of cell phone location information.

II. Requested Records

The ACLU requests the following records from the Agencies. This Request seeks records created on or after January 1, 2017:

1. All contracts, memoranda of understanding, letters of commitment, licenses, subscription agreements, and other agreements with vendors, including but not limited to Babel Street, X-Mode, Anomaly Six, or Venntel, concerning government access to or receipt of data from commercial databases containing cell phone location information, including but not limited to Locate X.
2. All records pertaining to the "governmentwide evaluation of Locate X," as described in *The Wall Street Journal*.¹³
3. All communications with Babel Street, X-Mode, Anomaly Six, or Venntel relating to commercial databases containing cell phone location information.
4. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, training materials, presentations, and memoranda concerning:
 - a. Access to commercial databases containing cell phone location information;

¹¹ Byron Tau & Michelle Hackman, *Federal Agencies Use Cellphone Location Data for Immigration Enforcement*, Wall St. J. (Feb. 7, 2020), <https://www.wsj.com/articles/federal-agencies-use-cellphone-location-data-for-immigration-enforcement-11581078600>.

¹² Levinson, *supra* note 6 ("The technology was controversial enough that some agencies, including the FBI and the ATF, declined to purchase Locate X after those agencies' lawyers nixed it, a former Babel Street employee said.").

¹³ Byron Tau, *Academic Project Used Marketing Data to Monitor Russian Military Sites*, Wall St. J. (July 20, 2020), <https://www.wsj.com/articles/academic-project-used-marketing-data-to-monitor-russian-military-sites-11595073601> ("The federal government did a governmentwide evaluation of Locate X, according to documents reviewed by the Journal, which also showed that Babel Street has worked closely with U.S. government agencies and contractors to develop and refine the product.").

- b. Acquisition, processing, retention, use, or dissemination of cell phone location information purchased from a commercial vendor;
 - c. The anonymization or de-anonymization of cell phone location information purchased from a commercial vendor;
 - d. The use of cell phone location information purchased from a commercial vendor in military operations, foreign intelligence investigations, or domestic activities;
 - e. The use of evidence in any court application, trial, hearing, or other proceeding that consists of, was obtained from, or was derived from cell phone location information purchased from a commercial vendor;
 - f. The use of “lead” or “tip” information that consists of, was obtained from, or was derived from cell phone location information purchased from a commercial vendor; and
 - g. The circumstances under which the government notifies criminal defendants, or other parties in legal proceedings, of the use of evidence that consists of, was obtained from, or was derived from cell phone location information purchased from a commercial vendor.
5. All formal legal analysis concerning access to commercial databases containing cell phone location information, or the acquisition, processing, retention, use, or dissemination of cell phone location information purchased from a commercial vendor, including the application of (i) *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and (ii) First Amendment protections, including for association, expression, and exercise of religion.
6. Records sufficient to show the volume of cell phone location data contained in the commercial databases for which your Agency has purchased access, and records sufficient to show the volume of cell phone location data that your Agency has obtained from these databases.
7. Records sufficient to show the number of times each year that your Agency’s employees or contractors have accessed commercial databases containing cell phone location information, or have used location data obtained from such databases.
8. All records concerning the use of evidence in any court application, trial, hearing, or other proceeding that consists of, was obtained from, or was derived from cell phone location information purchased from a commercial vendor, including records concerning whether defendants or respondents received notice of the government’s reliance on such information and its provenance.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU and CLEAR request that responsive records be provided electronically in their native file format, if possible. Alternatively, the ACLU and CLEAR 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 that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU and CLEAR request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁴ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by organizations 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 and CLEAR are organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The ACLU and CLEAR are “primarily engaged in disseminating information” within the meaning of the statute. *See id.*¹⁵ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU’s and CLEAR’s work and are among their primary activities. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).¹⁶

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to 850,000 people. The ACLU also publishes regular updates and alerts via email to 3.9 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 4.8 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,¹⁷ and ACLU attorneys are interviewed

¹⁴ *See also* 32 C.F.R. § 1900.34 (CIA); 32 C.F.R. § 286.8(e) (DOD); 28 C.F.R. § 16.5(e) (DOJ); 32 C.F.R. § 1700.12 (ODNI); 31 C.F.R. § 1.4(e) (Treasury).

¹⁵ *See also* 32 C.F.R. § 1900.34(c)(2) (CIA); 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. § 1700.12(c)(2) (ODNI); 31 C.F.R. § 1.4(e)(1)(ii) (Treasury).

¹⁶ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

¹⁷ Press Release, ACLU, Federal Court Rules Gov’t Cannot Unilaterally Detain U.S. Resident Indefinitely (Dec. 13, 2019), <https://www.aclu.org/press-releases/federal-court-rules-government-cannot-unilaterally-detain-us-resident-indefinitely>; Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall

frequently for news stories about documents released through ACLU FOIA requests.¹⁸

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.¹⁹ 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

Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans’ Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; 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 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>.

¹⁸ *See, e.g.*, Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill (Mar. 21, 2019), <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); 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 ACLU attorney Hugh Handeyside); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, Associated Press (Jan. 18, 2017), <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi).

¹⁹ *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* (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* (Aug. 8, 2016), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *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* (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* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

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 frequently visited website, <https://www.aclu.org>. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including 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.²⁰

The ACLU website includes many features on information obtained through the FOIA. For example, 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.²¹ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.²²

Similarly, CLEAR is “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). The CLEAR Project is part of the CUNY School of Law, an educational

²⁰ See, e.g., *ACLU v. ODNI*—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act, ACLU Case Page, <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 Case Page, <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 Case Page, <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 Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingrayfoia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (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>.

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

²² Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010, ACLU (Nov. 29, 2010), https://www.aclu.org/files/pdfs/natsec/faafoia_20101129/20101129Summary.pdf; Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; Statistics on NSL’s Produced by Department of Defense, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

institution that operates a program of scholarly research and publication. It was created to serve the needs of individuals from marginalized communities, including Muslim, Arab, and South Asian communities, affected by policies and practices deployed under the guise of national security and counterterrorism. The impact on these communities is compounded by the secrecy surrounding these policies and practices. One of CLEAR's primary goals is therefore to educate the communities it serves on the policies and practices affecting them by widely disseminating information on them obtained through FOIA.

Since its inception, CLEAR has conducted hundreds of Know Your Rights presentations to communities across the New York City metropolitan area, including trainings on an individual's rights while traveling, and on interactions with law enforcement officers. *See* <https://www.cunyclear.org/resources>. CLEAR regularly updates the content of these presentations, and their accompanying materials, to incorporate information obtained from the government through the FOIA over time to include, for example, information on the authority CBP claims to search electronic devices, watchlisting, and information related to the Controlled Application Review and Resolution Program ("CARRP"). *See id.* CLEAR publishes and widely distributes materials incorporating this information.²³ For maximum reach, CLEAR has also created videos incorporating this information for wide dissemination online.²⁴

In order to document and raise awareness on the impact of policies on communities with whom CLEAR works, CLEAR publishes reports examining and commenting on information obtained from the government and law enforcement entities.²⁵ CLEAR frequently serves as a resource for the news media on these issues as well.²⁶

The records requested are not sought for commercial use and the ACLU and CLEAR plan to analyze, publish, and disseminate the information disclosed as a result of this Request to the public at no cost.

²³ *See, e.g.*, CLEAR Project, "What to Do in Interactions with Law Enforcement", <https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c526b0cb8a045df091a58f4/1548905230279/ENGLISH+WHAT+TO+DO+IN+INTERACTION+WITH+LAW+ENFORCEMENT.pdf>; CLEAR Project, "Flying While Muslim", <https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c526bcf8a922d94b7b728bb/1548905424463/ENGLISH+FLYING+WHILE+MUSLIM.pdf>.

²⁴ *See, e.g.*, CLEAR Project, "Flying While Muslim: Your Rights at U.S. Airports & Borders," *available at* <https://youtu.be/Qv3C9V731Ns>.

²⁵ *See, e.g.*, CUNY CLEAR *et al.*, *Mapping Muslims: NYPD Spying and Its Impact on American Muslims* (2013).

²⁶ Cora Courier, *Hidden Loopholes Allow FBI Agents to Infiltrate Political and Religious Groups*, *The Intercept*, Jan. 31, 2017, <https://theintercept.com/2017/01/31/hidden-loopholes-allow-fbi-agents-to-infiltrate-political-and-religious-groups/>; Alleen Brown *et al.*, *Standing Rock Documents Expose Inner Workings of "Surveillance-Industrial Complex"*, *The Intercept*, June 3, 2017, <https://theintercept.com/2017/06/03/standing-rock-documents-expose-inner-workings-of-surveillance-industrial-complex/>; Cora Courier, *Revealed: The FBI's Secret Methods for Recruiting Informants at the Border*, *The Intercept*, Oct. 5, 2016, <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/>.

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

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁷ Specifically, the requested records relate to the government's purchase and use of cell phone location information, including the Agencies' legal analyses, policies, and practices. Federal agencies' purchases of cell phone location information are already the subject of widespread public controversy and media attention, and have resulted in calls for congressional hearings and inspector general investigations.²⁸ Some of these investigations are already underway: in October, the Treasury Inspector General for Tax Administration said that he would review the purported legal basis for the Internal Revenue Service's purchase of cell phone location information, and just yesterday, the Inspector General for the Department of Homeland Security said that he would open an investigation into the agency's warrantless surveillance of Americans' cell phones.²⁹ However,

²⁷ *See also* 32 C.F.R. § 1900.34(c)(2) (CIA); 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 28 C.F.R. § 16.5(e)(l)(ii) (DOJ); 32 C.F.R. § 1700.12(c)(2) (ODNI); 31 C.F.R. § 1.4(e)(1)(ii) (Treasury).

²⁸ *See, e.g.,* Byron Tau, *Most American Object to Government Tracking of Their Activities Through Cellphones*, Wall St. J. (Nov. 25, 2020), <https://www.wsj.com/articles/most-americans-object-to-government-tracking-of-their-activities-through-cellphones-11606305601>; Johana Bhuiyan, *Muslims Reel Over a Prayer App That Sold User Data: 'A Betrayal from Within Our Own Community'*, L.A. Times (Nov. 23, 2020), <https://www.latimes.com/business/technology/story/2020-11-23/muslim-pro-data-location-sales-military-contractors>; Shira Ovide, *Government Surveillance by Data*, N.Y. Times (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/technology/government-surveillance-by-data.html>; Hamed Aleaziz & Caroline Haskins, *DHS Authorities Are Buying Moment-by-Moment Geolocation Cellphone Data To Track People*, BuzzFeed News (Oct. 30, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-dhs-cell-phone-data-tracking-geolocation>; Letter from Sen. Ron Wyden, *et al.*, to Hon. Joseph Cuffari, Inspector Gen., DHS (Oct. 23, 2020), *available at* <https://www.wyden.senate.gov/imo/media/doc/102320%20Wyden%20Warren%20Brown%20Markey%20Schatz%20Letter%20RE%20CBP%20Phone%20Tracking.pdf>; Joseph Cox, *CBP Refuses to Tell Congress How it is Tracking Americans Without a Warrant*, Motherboard (Oct. 23, 2020), <https://www.vice.com/en/article/n7vwex/cbp-dhs-venntel-location-data-no-warrant>; Joseph Cox, *CBP Bought 'Global' Location Data from Weather and Game Apps*, Motherboard (Oct. 6, 2020), <https://www.vice.com/en/article/n7wakg/cbp-dhs-location-data-venntel-apps>; Joseph Cox, *The IRS Is Being Investigated for Using Location Data Without a Warrant*, Motherboard (Oct. 6, 2020), <https://www.vice.com/en/article/qj479d/irs-investigation-location-data-no-warrant-venntel>; Joseph Cox, *Customs and Border Protection Paid \$476,000 to a Location Data Firm in New Deal*, Motherboard (Aug. 25, 2020), <https://www.vice.com/en/article/k7qyv3/customs-border-protection-venntel-location-data-dhs>; Byron Tau, *IRS Used Cellphone Location Data to Try to Find Suspects*, Wall St. J. (June 19, 2020), <https://www.wsj.com/articles/irs-used-cellphone-location-data-to-try-to-find-suspects-11592587815>; Press Release, Sen. Edward J. Markey, *Senator Markey Demands Answers From Homeland Security Regarding Its Use of Location Data for Immigration Enforcement* (Feb. 12, 2020), <https://www.markey.senate.gov/news/press-releases/senator-markey-demands-answers-from-homeland-security-regarding-its-use-of-location-data-for-immigration-enforcement>; Levinson, *supra* note 6; Tau & Hackman, *supra* note 11; Editorial, *Apps Are Selling Your Location Data. The U.S. Government is Buying.*, Wash. Post (Feb. 9, 2020), https://www.washingtonpost.com/opinions/apps-are-selling-your-location-data-the-us-government-is-buying/2020/02/09/9d09475e-49e2-11ea-b4d9-29cc419287eb_story.html; Editorial, *The Government Uses 'Near Perfect Surveillance' Data on Americans*, N.Y. Times (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/opinion/dhs-cell-phone-tracking.html>.

²⁹ Byron Tau, *Tax Agency Watchdog Is Investigating IRS Use of Cellphone Location Data*, Wall St. J. (Oct. 6, 2020), <https://www.wsj.com/articles/tax-agency-watchdog-investigating-irs-use-of-cellphone-location-data-11602014554>; Byron Tau, *Homeland Security Watchdog to Probe Department's Use of Phone Location Data*, Wall St. J. (Dec. 2, 2020), <https://www.wsj.com/articles/homeland-security-watchdog-to-probe-departments-use-of-phone-location-data-11606910402>.

without access to information about the Agencies' legal reasoning, policies, and practices, lawmakers and the public cannot participate fully in the debate about whether and how acquisition and use of this information should be permitted. That debate is happening *now*, and there is a pressing need for the records sought in this Request. The records sought relate to a matter of widespread and exceptional media interest: the federal government's purchase of databases containing enormous volumes of sensitive location data—including the data of U.S. persons.

Given the foregoing, the ACLU and CLEAR have satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU and CLEAR 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 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).³⁰ The ACLU and CLEAR also request a waiver of search fees on the grounds that each organization qualifies as a “representative of the news media” and neither organization seeks the records 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 or of CLEAR.

As discussed above, media accounts underscore the substantial public interest in the records sought through this Request. *See supra* Sections I & III.B. Given the ongoing and widespread media attention to federal agencies' purchase and use of cell phone location information, the records sought will significantly contribute to public understanding of matters of profound importance. Moreover, because so little information is publicly available concerning the government's purchase and use of location data from commercial vendors, the records sought are critical to understanding the scope of this practice, the government's purported legal justifications for it, and its broader implications for Fourth Amendment rights.

Neither the ACLU nor CLEAR is filing this Request to further its respective commercial interest. As described above, any information disclosed by the ACLU or CLEAR as a result of this FOIA Request will be made 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)).

³⁰ *See also* 32 C.F.R. § 1900.13(b)(2) (CIA); 32 C.F.R. § 286.12(l)(1) (DOD); 28 C.F.R. § 16.10(k)(2) (DOJ); 32 C.F.R. § 1700.6(b)(2) (ODNI); 31 C.F.R. § 1.7(k)(1) (Treasury).

B. *The ACLU and CLEAR are representatives of the news media and the records are not sought for commercial use.*

The ACLU and CLEAR also request a waiver of search fees on the basis that the ACLU and CLEAR each qualify as a “representative of the news media” and neither organization seeks the records for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).³¹ The ACLU and CLEAR meet the statutory and regulatory definitions of a “representative of the news media” because each 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)³²; *see also Nat’l Sec. Archive v. Dep’t of Defense*, 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. Dep’t of Defense*, 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. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU and CLEAR are therefore each a “representative of the news media” for the same reasons that they are “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 and CLEAR’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. 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,” to be a news media requester).³³ 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.”³⁴ As was true in those instances, the ACLU and CLEAR meet the requirements for a fee waiver here.

³¹ *See also* 32 C.F.R. § 1900.13(i)(2) (CIA); 32 C.F.R. § 286.12(d)(1)(i) (DOD); 28 C.F.R. § 16.10(c)(1)(i) (DOJ); 32 C.F.R. § 1700.6(i)(2) (ODNI); 31 C.F.R. § 1.7(d)(1) (Treasury).

³² *See also* 32 C.F.R. § 1900.02(h)(3) (CIA); 32 C.F.R. § 286.12(b)(6) (DOD); 28 C.F.R. § 16.10(b)(6) (DOJ); 32 C.F.R. § 1700.2(h)(4) (ODNI); 31 C.F.R. § 1.7(b)(6) (Treasury).

³³ 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 Human Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

³⁴ 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 May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents

* * *

Pursuant to applicable statutes and regulations, the ACLU and CLEAR expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 32 C.F.R. § 1900.34(c) (CIA); 32 C.F.R. § 286.8(e)(1) (DOD); 28 C.F.R. § 171.11(f)(4) (DOJ); 32 C.F.R. § 1700.12(b) (ODNI); 31 C.F.R. § 1.4(e)(5) (Treasury).

If the Request is denied in whole or in part, the ACLU and CLEAR ask that you justify all denials by reference to specific exemptions to FOIA. The ACLU and CLEAR expect the release of all segregable portions of otherwise exempt material. The ACLU and CLEAR reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

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

Ashley Gorski
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New York, New York 10004
T: 212-549-2500
agorski@aclu.org
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We affirm that the information provided supporting the request for expedited processing is true and correct to the best of our knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Sincerely,


Ashley Gorski

related to electronic device searches at the border. In April 2017, 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 May 2016, the FBI granted a fee waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee waiver request regarding a FOIA request for documents related to "national security letters" issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted 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.

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