April 23, 2009

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Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
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Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Office of Information Programs and Services
A/ISS/IPS/RL
U.S. Department of State
Washington, D.C. 20522-8100

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

To Whom it May Concern:

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. § 1900.01 et seq. The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").

1 The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and
This Request seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan ("Bagram"), including records concerning the process afforded these prisoners to challenge their detention and designation as "enemy combatants."

Recent news reports suggest that the U.S. government is detaining more than 600 individuals at Bagram. See, e.g., Charlie Savage, Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus, N.Y. Times, Apr. 3, 2009 (“The United States government is holding about 600 people at Bagram without charges and in spartan conditions.”). The Bagram prison population includes not only Afghan citizens captured in Afghanistan but also an unknown number of foreign nationals captured outside of Afghanistan but held at Bagram as suspected terrorists or "enemy combatants.” See R. Jeffrey Smith, Obama Follows Bush Policy on Detainee Access to Courts, Wash. Post, Apr. 11, 2009. Some of these prisoners have been detained for as long as six years. See James Vicini, Judge Rules Afghan Detainees Can Sue in U.S. Court, Reuters, Apr. 2, 2009. Bagram prisoners are not permitted any access to counsel, see Warren Richey, Terror Suspects Held in Afghanistan May Challenge Their Detention, Christian Science Monitor, Apr. 3, 2009, and only recently have been permitted any contact with their family, see Fisnik Abrashi, U.S. Allows First Family Visits to Afghan Prison, Assoc. Press, Sept. 23, 2008; Carlotta Gall, Video Link Plucks Afghan Detainees From Black Hole of Isolation, N.Y. Times, Apr. 13, 2008.

Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as "enemy combatants" than the process afforded prisoners at the U.S. Naval Base at Guantanamo Bay ("Guantanamo") – a process the U.S. Supreme Court declared unconstitutional last year. See Daphne Eviatar, Judge Rules Bagram Detainees Can Appeal to U.S. Courts, Wash. Independent, Apr. 3, 2009. Indeed, a federal judge recently observed that the "process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo." Al Magaleh v. Gates, --- F.Supp.2d ----, 2009 WL 863657, * 19 (D.D.C. Apr. 2, 2009). Moreover, there is public concern that the U.S. government is holding many prisoners at Bagram, rather than at Guantanamo, specifically to avoid any judicial review of their detentions in U.S. courts. Editorial, The Next Guantanamo, N.Y. Times, Apr. 12, 2009 ("the evidence suggests it was the prospect that Guantánamo fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices, including those pertaining to the detention, treatment, and process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody since the 9/11 terrorist attacks.

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detentions might be subject to judicial oversight that caused the military to divert captives to Bagram instead”.

Media reports suggest that the conditions of confinement at Bagram are primitive and that abuse and mistreatment of prisoners was once, and may still be, widespread. See, e.g., Daphne Eviatar, Judge Rules Bagram Detainees Can Appeal to U.S. Courts, Wash. Independent, Apr. 3, 2009; William Fischer, Afghan Prison Looks Like Another Guantanamo, Inter Press Service, Jan. 14, 2008 (“a recent confidential report from the International Committee of the Red Cross (ICRC) has reportedly complained about continued mistreatment of prisoners . . . massive overcrowding, ‘harsh’ conditions, lack of clarity about the legal basis for detention, prisoners held ‘incommunicado’, in ‘a previously undisclosed warren of isolation cells,’ and ‘sometimes subjected to cruel treatment’”). At least two Bagram prisoners have died while in U.S. custody; Army investigators concluded that these deaths were homicides. See Tim Golden, In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths, N.Y. Times, May 20, 2005.

The U.S. government’s Bagram detention facility has been the focus of widespread media attention and public concern for many years. Despite that attention, however, very little information about the facility – or the prisoners held there – has been made public. See, e.g., Charlie Savage, Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus, N.Y. Times, Apr. 3, 2009 (“United States officials have never provided a full accounting of the prison population”); R. Jeffrey Smith, Obama Follows Bush Policy on Detainee Access to Courts, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); William Fisher, U.S. Judge Gives Bagram Prisoners Right to Appeal, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held there”); Tim Golden and Eric Schmitt, A Growing Afghan Prison Rivals Bleak Guantánamo, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”). The American public remains ill-informed about even the most basic facts about Bagram, including, for example, many of the policies and rules that govern the U.S. government’s detention of hundreds of people there; who precisely is being detained there, for how long, and on what basis; where and under what circumstances these prisoners were captured; whether the prisoners have a meaningful opportunity for challenging their (often prolonged) detention; whether that process meets the standards required by international, domestic, and military law; and whether any prisoners have successfully challenged their detentions through the existing status determination process.
Public attention to Bagram has recently intensified significantly. Earlier this month, a federal judge ruled that some prisoners at Bagram can challenge their detention in U.S. courts. See Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009. This ruling has led to renewed scrutiny of the U.S. government’s actions at Bagram and fierce speculation about whether the Obama Administration will deviate from Bush Administration policies and practices at Bagram. See, e.g., R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009 (“The prison at the Afghan base was being expanded during the last year of the Bush administration, leading some to predict that the Pentagon would resolve its Guantanamo problem by sending more inmates to Bagram . . . . a spokesman said the [Obama] administration was taking 180 days to decide on its prison policy.”).

In short, there is renewed public concern that Bagram has become, in effect, the new Guantanamo. See, e.g., Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009.

**Requested Records**

1. All records, including logs, charts, or lists, pertaining to the number of people currently detained at Bagram.

2. All records, including logs, charts, or lists, pertaining to the names of individuals currently detained at Bagram.

3. All records, including logs, charts, or lists, pertaining to the citizenship of individuals currently detained at Bagram.

4. All records, including logs, charts, or lists, pertaining to date of capture and length of detention of individuals currently detained at Bagram.

5. All records, including logs, charts, or lists, pertaining to the places and circumstances of capture of individuals currently detained at Bagram.

6. All records created after September 11, 2001, pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram, including memoranda, correspondence, procedures, policies, directives, guidance, or guidelines concerning when, why, and under what circumstances prisoners seized outside Afghanistan should be detained at Bagram rather than being brought to the United States, handed over to another country, or detained by the United States at
Guantanamo Bay or some other detention facility outside of Afghanistan.

7. All records created after September 11, 2001, including memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines, as well as agreements, accords, contracts, correspondence, and memoranda, between the U.S. the and Afghan government, pertaining to the detention at Bagram of individuals captured in Afghanistan, and when, how, and why the determination is made by the United States to detain Afghan citizens at Bagram rather than at prisons or other facilities operated or controlled by the Afghan government.

8. All records created after September 11, 2001, pertaining to the process for determining and reviewing Bagram prisoners’ status, the process for determining whether their detention is appropriate, and the process for determining who should be released, including but not limited to:

   A. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning the development and operation of the status review process, as well as changes to that process over time.

   B. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning whether prisoners should be given access to or denied access to counsel or another representative.

   C. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning: the provision or withholding of notice to prisoners of the basis for their detention; the composition of the Unlawful Enemy Combatant Review Board (“UECRB”); the convening of or decision not to convene an UECRB; the kinds of evidence to be reviewed by the UECRB; the standard employed to determine whether detention is appropriate; the prisoner’s opportunity to submit written statements or other evidence to the UECRB; the prisoner’s opportunity to rebut the government’s evidence or question government witnesses; the presentation or consideration of exculpatory evidence; the prisoner’s opportunity to attend any UECRB hearing; the prisoner’s access to any written decisions, determinations, or rulings by the UECRB; the use of or access to interpreters at any UECRB hearing and access to translations of any written evidence or written decisions, determinations, or rulings of the UECRB; any appeal or higher-level review of UECRB
determinations or the final determinations of the final decision-maker; any annual or periodic review of the prisoners’ status after the initial determination is made.

D. Any written notices provided to prisoners at Bagram regarding the basis for their detention.

E. Any transcripts of UECRB proceedings or any other proceeding that occurs during the status determination and review process.

F. Any evidence considered in UECRB proceedings or any other proceeding that occurs during the status determination and review process including written statements provided by the detainees and unclassified summaries of the government’s evidence.

G. Any written decisions, determinations, or rulings issued by the UECRB, the commanding officer, or the final decision-maker.

H. Any written decisions, determinations, or rulings issued in the course of any appeal process or in the course of periodic reviews of the initial UECRB determination.

9. All records, including agreements, accords, contracts, correspondence, memoranda, policies, guidelines, or directives between U.S. and Afghan government officials created after September 11, 2001, pertaining to the transfer of Afghan prisoners detained at Bagram to Afghan facilities or Afghan custody; and the release of Afghan prisoners to the Afghan government, into Afghan reconciliation programs, or back into Afghan society.

10. All records created after September 11, 2001, pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram, including but not limited to memoranda, correspondence, procedures, policies, directives, guidance, or guidelines, investigatory records, disciplinary records, medical records, and autopsy reports.2

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”

2 To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on October 7, 2003 and May 25, 2004, the ACLU is not seeking those records here.
for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); see also 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); see also 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

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); 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)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also 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 issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

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). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. 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 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.  

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate the U.S. government’s detention and treatment of suspected terrorists and alleged “enemy combatants” at Bagram, as well as their transfer or rendition to Bagram from other countries. The records sought also relate to the process the U.S. government affords Bagram prisoners to challenge the basis for their detention and designation as “enemy combatants” including whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. 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 reasons, the records sought also relate to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 28 C.F.R. § 16.5(d)(1)(iv).  


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3 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.

Apr. 3, 2009 ("Some critics of Obama administration detention policy have begun calling Bagram 'Obama's GITMO,' charging that the new president is shipping detainees to the Afghan prison to evade the Supreme Court's ruling giving habeas corpus rights to prisoners at Guantanamo.").


Indeed, the U.S. government's Bagram detention facility has been the focus of widespread and consistent media attention and public concern for many years. See, e.g., Charlie Savage, Obama Upholds Detainee Policy in Afghanistan, N.Y. Times, Feb. 21, 2009; Eric Schmitt, Afghan Prison Poses Problem in Overhaul of Detainee Policy, N.Y. Times, Jan. 26, 2009; Dan Ephron, The Gitmo Dilemma - Four Reasons Obama Won't Close the Controversial Prison Soon, Newsweek, Nov. 7, 2008; 'How Bagram Destroyed Me', BBC News, Sept. 25, 2008; Fisnik Abrashi, U.S.

More generally, questions regarding the legal process afforded suspected terrorists and alleged “enemy combatants” held in U.S. custody has been the subject of continuous and sustained public interest. See, e.g., Jackie Northam, Tapes Provide First Glimpse of Secret Gitmo Panels, Nat’l Pub. Radio, Apr. 10, 2009 (reporting on the release of taped

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 records 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); 22 C.F.R. § 171.17(a); see also 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the detention and treatment of prisoners at Bagram. 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 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 records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). 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); see also 32 C.F.R. § 286.28(e)(7); 28 C.F.R. § 16.11(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 news media” for purposes of FOIA); see supra, section II.4

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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.

4 On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the 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.
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

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

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

[Signature]

Melissa Goodman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2622