



August 16, 2011

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**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT
EXPEDITED PROCESSING REQUESTED**

Dear FOIA Officer,

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552; the Office of Management and Budget implementing regulations, 5 C.F.R. § 1303.1, *et seq.*; the Department of Justice (“DOJ”) implementing regulations, 28 C.F.R. § 16.1, *et seq.*; the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*; the Office of the Director of National Intelligence implementing regulations, 32 C.F.R. § 1700.1, *et seq.*; the Department of Defense implementing regulations, 32 C.F.R. § 286.1, *et seq.*; the Department of Homeland Security implementing regulations, 6 C.F.R. § 5.1, *et seq.*; the Federal Communications Commission implementing regulations, 47 C.F.R. § 0.461, *et seq.*; the Office of Science and Technology Policy implementing regulations, 32 C.F.R. 2400.22, *et seq.*; and the Department of Commerce implementing regulations, 15 C.F.R. § 4.1, *et seq.*; seeking records relating to Presidential power to restrict access to or shut down portions of the internet, aka the “kill switch.” This Request is submitted on behalf of the

American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”).¹

Records Requested

The ACLU seeks records relating to the power of the President to shut down, disrupt or otherwise limit or restrict access to, or traffic to and from, systems, networks and infrastructure connected to the internet, including but not limited to:

1. Any and all memoranda (legal or otherwise, including Office of Legal Counsel memoranda), procedures, policies, directives, practices, guidance, guidelines or rules, created since January 19, 2001, discussing the power of the President to shut down, disrupt or otherwise limit or restrict access to, or traffic to and from, systems, networks and infrastructure connected to the internet, including but not limited to any documents discussing the exercise of Presidential authorities under Section 706 of the Communications Act of 1934, 47 U.S.C. § 606, as amended; Executive Order No. 12472 or any other relevant Executive Order; 47 C.F.R. § 202; any National Cyber Incident Response Plan or similar plan; or an internet “kill switch.”
2. Any and all inter or intra-agency correspondence created since January 19, 2001, relating to the power of the President to shut down, disrupt or otherwise limit or restrict access to, or traffic to and from, systems, networks and infrastructure connected to the internet, including but not limited to any correspondence discussing the exercise of Presidential authorities under Section 706 of the Communications Act of 1934, 47 U.S.C. § 606, as amended; Executive Order No. 12472 or any other relevant Executive Order; 47 C.F.R. § 202; any National Cyber Incident Response Plan or similar plan; or an internet “kill switch.”
3. Any and all memoranda (legal or otherwise, including Office of Legal Counsel memoranda), procedures, policies, directives, practices, guidance, guidelines, rules, National Cyber Incident Response Plans or similar plans, and any inter or intra-agency

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¹ The American Civil Liberties Union is a 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. The American Civil Liberties Union Foundation is a separate 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, educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

correspondence, created since January 19, 2001, reflecting the authorities referred to and relied upon by Philip Reitingger, then-Deputy Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, and Jason C. Chipman, Senior Counsel to the Deputy Attorney General, Department of Justice, regarding the power of the President to shut down, disrupt or otherwise limit or restrict access to, or traffic to and from, systems, networks and infrastructure connected to the internet, including a “kill switch,” during their testimony on May 23, 2011 before the Senate Committee on Homeland Security and Government Affairs.

Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 5 C.F.R. § 1303.10(d); 28 C.F.R. § 16.5(d); 22 C.F.R. § 171.12(b); 32 C.F.R. § 1700.12; 32 C.F.R. § 286.4(d)(3); 6 C.F.R. § 5.5(d); 47 C.F.R. § 0.461(h); 32 C.F.R. 2400.22; and 15 C.F.R. § 4.6(e). Expedited processing is warranted 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)(II); 5 C.F.R. § 1303.10(d)(1)(ii); 28 C.F.R. § 16.5(d)(1)(ii); 22 C.F.R. § 171.12(b)(2); 32 C.F.R. § 1700.12(2); 32 C.F.R. § 286.4(d)(3)(ii); 6 C.F.R. § 5.5(d)(1)(ii); 47 C.F.R. § 0.461(h)(1)(ii); 32 C.F.R. 2400.22; 15 C.F.R. § 4.6(e)(iv), and because the records sought 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); 15 C.F.R. § 4.6(e)(iii). Furthermore, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i).

A. The requester is primarily engaged in the dissemination of information.

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. Obtaining information about government activity, analyzing that information, and publishing and widely disseminating that information to the press and public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities. *See Am. Civil Liberties Union 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)).

Although the ACLU is perhaps most well known for its litigation activities, it is far more than a large public-interest law firm. The ACLU's principal mission is not to litigate important civil-rights and civil-liberties cases, but to preserve and defend the guarantees of the Bill of Rights and civil-rights laws, using litigation as just one of many tactics. Every aspect of the ACLU's work in furtherance of this mission—including litigation—can fairly be described as information dissemination. Indeed, public education and dissemination of information is a key component of the ACLU's litigation efforts; litigation is a highly effective vehicle for educating the press and public about civil-liberties problems.

Most ACLU cases have dedicated webpages through which the ACLU publishes and disseminates information about the cases themselves (*i.e.*, case developments, analyses of case developments, a comprehensive archive of court filings, and judicial opinions); these efforts, even standing alone, are a significant endeavor in publication and dissemination of news. Case webpages, however, do not just disseminate information about case developments; these webpages also have educational material about the particular civil-liberties issue or problem, recent news about the particular issue, analyses of congressional or executive-branch action on the particular issue, governmental documents obtained through FOIA about the particular issue, and more in-depth analytic and educational multimedia features on the issue. For example, the ACLU's website about its national security letter ("NSL") cases, <http://www.aclu.org/nsl>, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases; links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag-order power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSLs; "myths-and-facts" documents; and links to information and analysis of related issues.²

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its

² For a sampling of other similar case pages with case information, reporting of news on the issue, blogs, and original analytic and educational content, see: <http://www.aclu.org/lgbt/relationships/californiamarriage.html> (same-sex marriage case page); <http://www.aclu.org/safefree/rendition/index.html> (extraordinary rendition case page); <http://www.aclu.org/immigrants/detention/hutto.html> (immigration detention conditions case page).

material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee.

AMERICAN CIVIL LIBERTIES
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The ACLU also regularly issues press releases to call attention to documents released through FOIA and other breaking news. *See, e.g.*, Press Release, American Civil Liberties Union, *Important Electronic Privacy Information Legislation Introduced In Senate*, May 17, 2011, <http://www.aclu.org/technology-and-liberty/important-electronic-privacy-information-legislation-introduced-senate>; Press Release, American Civil Liberties Union, *Justice Department Asks Appeals Court To Reconsider Ruling Allowing Challenge To Warrantless Wiretapping Law*, May 13, 2011, <http://www.aclu.org/national-security/justice-department-asks-appeals-court-reconsider-ruling-allowing-challenge-warrant>; Press Release, American Civil Liberties Union, *New Reports on 9/11 Interrogation Tapes Underscore Need For Full Accountability And Transparency, Says ACLU*, Aug. 17, 2010, <http://www.aclu.org/national-security/new-reports-911-interrogation-tapes-underscore-need-full-accountability-and-transp>; Press Release, American Civil Liberties Union, *ACLU Files Lawsuit Challenging Unconstitutional "No Fly List"*, June 30, 2010, <http://www.aclu.org/national-security/aclu-files-lawsuit-challenging-unconstitutional-no-fly-list>; Press Release, American Civil Liberties Union, *ACLU Calls on Administration and Congress To Follow The Rule of Law In Terrorism Cases*, May 4, 2010, <http://www.aclu.org/national-security/aclu-calls-administration-and-congress-follow-rule-law-terrorism-cases>; Press Release, American Civil Liberties Union, *Newly Released Documents Reveal Details of Civilian Casualty Claims in Afghanistan and Iraq*, Apr. 1, 2010, <http://www.aclu.org/national-security/newly-released-documents-reveal-details-civilian-casualty-claims-afghanistan-and-i>; Press Release, American Civil Liberties Union, *Most Guantanamo Detainees Were Not Involved In Plots Against U.S., Report Reveals*, May 29, 2010, <http://www.aclu.org/national-security/most-guantanamo-detainees-were-not-involved-plots-against-us-report-reveals>; Press Release, American Civil Liberties Union, *ACLU Files Habeas Corpus Petitions On Behalf Of Four Bagram Detainees*, Feb. 26, 2010, <http://www.aclu.org/national-security/aclu-files-habeas-corpus-petitions-behalf-four-bagram-detainees>; Press Release, American Civil Liberties Union, *Internal Report Finds Flagrant National Security Letter Abuse By FBI*, Jan. 20, 2010, <http://www.aclu.org/national-security/internal-report-finds-flagrant-national-security-letter-abuse-fbi>.

ACLU attorneys are frequently quoted in news stories about documents requested or released through ACLU FOIA requests. *See, e.g.*, Joshua E.S. Phillips, *Inside the Detainee Abuse Task Force*, *The Nation*, May 30, 2011 (quoting ACLU staff attorney Alexander Abdo); Scott Shane & Benjamin Weiser, *Dossier Shows Push for More Attacks After 9/11*, *N.Y. Times*, Apr. 25, 2011 (quoting ACLU project director Hina Shamsi); Eric

Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 21, 2011 (quoting ACLU deputy legal director Jameel Jaffer).

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is distributed to approximately 300,000 people. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding EPIC to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”); *Ctr. for Pub. Integrity v. Dep't of Health & Human Servs.*, No. 06-1818 (JDB), 2007 WL 2248071, at *5 (D.D.C. Aug. 3, 2007) (finding CPI to be a news-media requester because its journalist members “write and post an online newsletter” and post information obtained through FOIA in that newsletter).

The ACLU regularly publishes reports about governmental activity and civil-liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA.³ This material is broadly circulated to the public and

³ See, e.g., *Policing Free Speech: Police Surveillance and Obstruction of First Amendment-Protected Activity* (Aug. 2010), http://www.aclu.org/files/assets/policingfreespeech_20100806.pdf; *Establishing A New Normal: National Security, Civil Liberties, and Human Rights Under the Obama Administration* (July 2010), <http://www.aclu.org/files/assets/EstablishingNewNormal.pdf>; *Report of the American Civil Liberties Union on the Nomination of Elena Kagan to be Associate Justice of the U.S. Supreme Court* (June 2010), <http://www.aclu.org/files/assets/2010-6-21-KaganReport-SCOTUS.pdf>; *Sentenced to Stigma* (Apr. 2010), <http://www.aclu.org/files/assets/health0410webwcover.pdf>; *America Unrestored* (Jan. 2010), http://www.aclu.org/files/pages/americau unrestored_11_20100119.pdf; *Mental Illness and the Death Penalty* (May 2009), http://www.aclu.org/pdfs/capital/mental_illness_may2009.pdf; *Human Rights Begin at Home* (Apr. 2009), http://www.udhr60.org/human_rights_full.pdf; *Reclaiming Patriotism* (Mar. 2009), http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; *Missing the Mark: Alternative Schools in the State of Mississippi* (Feb. 2009), http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf; *A Looming Crisis* (Dec. 2008), http://www.aclum.org/lockingupkids/pdf/looming_crisis_web.pdf; *De Facto Disenfranchisement* (Oct. 2008), http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf; *A Violent Education: Corporal Punishment of Children in U.S. Public Schools* (Aug. 2008),

available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, and law students and faculty, for no cost or for a nominal fee. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC a news-media requester because it “researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this ‘news’ through the sale of its books to the public”); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (finding National Security Archive to be a news-media requester because it intended to publish “document sets” on “topic[s] of current interest”).⁴

The ACLU also regularly publishes books, “know your rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil-liberties issues and governmental policies that implicate civil rights and liberties. Some of the recent books published by the ACLU include: Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights* (NYU Press 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).⁵ Some of the more recent “know your rights” publications include: *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; *Know Your Options at the Airport* (Nov. 2010), http://www.aclu.org/files/assets/aclu_know_your_options_at_airport_nov2010.pdf; *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf. Some of the more recent ACLU fact sheets include: *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (May 13, 2011),

http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf; *Fusion Center Update* (July 2008), http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf; *Enacting a Reasonable Federal Shield Law* (July 2008), http://www.aclu.org/images/asset_upload_file113_35870.pdf; *Locking Up Our Children* (May 2008), http://www.aclu.org/pdfs/racialjustice/locking_up_our_children_web_ma.pdf; *Pandemic Preparedness: The Need for a Public Health—Not a Law Enforcement/National Security—Approach* (Jan. 2008), http://www.aclu.org/images/asset_upload_file399_33642.pdf.

⁴ 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 the Princeton University Library.

⁵ A search of Amazon.com conducted on August 15, 2011 produced over 50 books published by the ACLU.

<http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; *The Facts About "The No Taxpayer Funding For Abortion Act"* (Apr. 2011), http://www.aclu.org/files/assets/Chris_Smith_bill-_ACLU_Fact_Sheet_UPDATED-4-30-11.pdf.⁶ These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties); *Nat'l Sec. Archive*, 880 F.2d at 1386 (finding the National Security Archive to be a news-media requester where it had previously published only one book); *see also Leadership Conference on Civil Rights v. Gonzalez*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference on Civil Rights to be "primarily engaged in the dissemination of information" because it "disseminat[e] information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice").

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil-rights and civil-liberties news is posted daily. *See* <http://blog.aclu.org/>. The ACLU also creates and disseminates original editorial and educational content on civil-rights and civil-liberties news through multimedia projects, including videos, podcasts, and interactive features. *See* <http://www.aclu.org/multimedia/index.html>.

The ACLU also disseminates information through its website, www.aclu.org. The website addresses civil liberties issues in depth, provides features on civil liberties issues in the news, and contains hundreds of documents that relate 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, the ACLU also provides the public with educational material about the particular civil liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; government documents obtained through FOIA about the issue; and more in-depth analytic and educational multimedia features on the issue.

The ACLU website specifically includes features on information obtained through FOIA, including: <http://www.aclu.org/torturefoia>;

⁶ For many more ACLU fact sheets on various civil liberties topics see: http://www.aclu.org/safefree/relatedinformation_fact_sheets.html, http://www.aclu.org/lgbt/relatedinformation_fact_sheets.html, http://www.aclu.org/privacy/relatedinformation_fact_sheets.html, http://www.aclu.org/womensrights/relatedinformation_fact_sheets.html, http://www.aclu.org/reproductiverights/relatedinformation_fact_sheets.html, and http://www.aclu.org/intlhumanrights/relatedinformation_fact_sheets.html.

<http://www.aclu.org/olcmemos/>;
<http://www.aclu.org/safefree/torture/csrtfoia.html>;
<http://www.aclu.org/natsec/foia/search.html>;
<http://www.aclu.org/safefree/nsaspying/30022res20060207.html>;
<http://www.aclu.org/patriotfoia>; www.aclu.org/spyfiles;
<http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.htm>;
<http://www.aclu.org/exclusion>. For example, the ACLU's "Torture FOIA" webpage, <http://www.aclu.org/torturefoia>, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos it obtained through FOIA, http://www.aclu.org/safefree/general/olc_memos.html, contains commentary on and analysis of the memos; an original comprehensive chart about OLC memos (see below); links to web features created by ProPublica—an independent, non-profit, investigative-journalism organization—based on information gathering, research, and analysis conducted by the ACLU; and ACLU videos created about the memos. *See Nat'l Sec. Archive*, 880 F.2d at 1386 (finding the National Security Archive to be a news-media requester because it intended to publish "document sets" whereby its staff would "cull those of particular interest . . . supplement the chosen documents with 'detailed cross-referenced indices, other finding aids, and a sophisticated computerized retrieval system' in order to make it more accessible to potential users"); *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2005) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-era OLC memos relating to interrogation, detention, rendition and surveillance. The chart describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part. It is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf. Similarly, the ACLU produced a chart of original statistics about the Defense Department's use of NSLs based on its own analysis of records obtained through FOIA. That chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf.

See Nat'l Sec. Archive, 880 F.2d at 1387 (explaining that the National Security Archive is a news-media requester because it obtained “documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedic work that it will then offer to the public”); *id.* (explaining that the National Security Archive is a news-media requester because it “gather[ed] information from a variety of sources; exercise[d] a significant degree of editorial discretion in deciding what documents to use and how to organize them; devise[d] indices and finding aids; and distribute[d] the resulting work to the public”).

The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.” *See* <http://aclu.tv/>. The Freedom Files is a series of half-hour documentaries that features true stories about real people to highlight vital civil-liberties issues, and includes commentary and analysis from experts on particular civil-liberties problems; some portions also include explanation and analysis of information the ACLU has obtained through FOIA. *See* <http://aclu.tv/episodes>. In addition to distribution through the ACLU’s website, The Freedom Files series aired on Court TV, Link TV and PBS stations nationwide. With each episode, the ACLU distributed fact sheets, reports and FAQs. *See* <http://aclu.tv/educate>. The second season of The Freedom Files came with a teacher’s guide as well. *See* <http://aclu.tv/teachersguide>.

ACLU attorneys also frequently speak at conferences, before community groups and in academic settings.

In sum, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. The ACLU plainly qualifies as an organization primarily engaged in the dissemination of information for FOIA’s expedited processing purposes.

Courts have found organizations with missions similar to the ACLU’s and that engage in information-dissemination activities similar to the ACLU’s to be “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference—whose mission is “to serve as the site of record for relevant and up-to-the minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws . . .”—to be “primarily engaged in the dissemination of information”); *Am. Civil Liberties Union*, 321 F. Supp. 2d at 29 n.5 (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).⁷

B. The requested records are urgently needed to inform the public about federal-government activity.

We make this Request to retrieve information about the President’s ostensible power to limit the public’s access to and use of the internet, and government planning to exercise that power. The records requested here are urgently needed to inform the national debate about how and whether the federal government can and will enhance our cybersecurity while remaining true to the freedoms enshrined in our Constitution, issues which have been the subject of continuous and widespread public and media attention over the past many months.

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Allowing the President to potentially shut down all internet communication via a “kill switch” has become a matter of strong public concern. *See, e.g.,* Jennifer Booton, *The Kill Switch: ‘Death Panels of Cyber Security’*, Fox Bus., Mar. 29, 2011, <http://fxn.ws/oy9jll>; Editorial, *The Internet Kill Switch Rebooted*, Wash. Times, Mar. 7, 2011, <http://bit.ly/oFait6>; Declan McCullagh, *Internet ‘Kill Switch’ Bill Gets a Makeover*, CNET Privacy Inc. Blog, Feb. 18, 2011, <http://cnet.co/qodbzN>; Kelly Riddell, *Senators Dump Internet ‘Kill Switch’ for Cyber-Attack Response*, Bloomberg, Feb. 18, 2011, <http://bloom.bg/qu0sME>; Michael Hickins, *Chertoff: Internet Kill Switch Would Be ‘Troubling’*, Wall St. J. Digits Blog, Feb. 17, 2011, <http://on.wsj.com/n14HfY>; Jon Swartz, *‘Kill Switch’ Internet Bill Alarms Privacy Experts*, USA Today, Feb. 15, 2011, <http://usat.ly/n3rKo6>; Sean Lawson, *Is America Really Building An Internet ‘Kill Switch’*, Forbes The Firewall Blog, Feb. 11, 2011, <http://onforb.es/qAvxDj>; *Reaching for the Kill Switch*, Economist, Feb. 10, 2011, <http://econ.st/qlbgQf>; David Linthicum, *The Internet Kill Switch Idea is Already Hurting Cloud Computing*, InfoWorld, Feb. 8, 2011, <http://bit.ly/nMYsaF>; John D. Sutter, *Could the U.S. Shut Down the Internet?*, CNN, Feb. 3, 2011, <http://bit.ly/roc9go>; Dan Costa, *Egypt Flips Internet Kill Switch. Will the U.S.?*, PC Mag., Jan. 28, 2011, <http://bit.ly/qvCLOz>; David Kravets, *Internet ‘Kill Switch’ Legislation Back*

⁷ Notably, other agencies routinely grant the ACLU’s requests for expedited processing of FOIA requests, therefore recognizing that the ACLU is primarily engaged in disseminating information. In the past five years, the ACLU has been granted expedited processing by the Office of Information Policy of the Department of Justice (August 2011, July 2011 and June 2011), the FBI (June 2011), the Office of Legal Counsel of the Department of Justice (June 2011), the National Security Division of the Department of Justice (June 2011 and May 2009), the Department of Justice (December 2008), the National Security Agency (October 2008), the Department of the Army (July 2006), the Defense Intelligence Agency (March 2006), the Civil Division of the Department of Justice (March 2006), and the Department of Justice’s Office of Information and Privacy (January 1906).

in Play, Wired Threat Level Blog, Jan. 28, 2011, <http://bit.ly/npXcr4>;
Declan McCullagh, *Internet 'Kill Switch' Bill Will Return*, CNET Privacy
Inc. Blog, Jan. 24, 2011, <http://cnet.co/obhLbN>.

Efforts to significantly curtail internet activity and/or implement an internet “kill switch” have been undertaken with great controversy in Egypt, China, Iran and Syria. *See, e.g.*, James Glanz & John Markoff, *Egypt Leaders Found 'Off' Switch for Internet*, N.Y. Times, Feb. 15, 2011, <http://nyti.ms/qJGGHx>; Evgeny Morozov, *Egypt Action May Spread Internet Kill Switch Idea*, S.F. Chron., Feb. 6, 2011, <http://bit.ly/pFCeNo>; Jennifer Valentino-DeVries, *How Egypt Killed the Internet*, Wall St. J. Digits Blog, Jan. 28, 2011, <http://on.wsj.com/nQ4lzL>; Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. Times, Jan. 28, 2011, <http://nyti.ms/eumNM6>; Nathan Olivarez-Giles, *Egyptian Government Shuts Off Nearly All Internet Service*, L.A. Times, Jan. 28, 2011, <http://lat.ms/owUXE2>; Hamza Hendawi & Sarah El Deeb, *Egypt: Internet Down, Police Counterterrorism Unit Up*, Associated Press, Jan. 27, 2011, available at <http://abcn.ws/gnY6DE>; Sharon LaFraniere & David Barboza, *China Tightens Censorship of Electronic Communications*, N.Y. Times, Mar. 21, 2011, <http://nyti.ms/rcQxJd>; Keith B. Richburg, *Nervous About Unrest, Chinese Authorities Block Web Site, Search Terms*, Wash. Post, Feb. 26, 2011, <http://wapo.st/eXN5ot>; Jeremy Page, *Beijing Blocks Protest Reports*, Wall St. J., Jan. 31, 2011, <http://on.wsj.com/qYzKLB>; Edward Wong & David Barboza, *Wary of Egypt Unrest, China Censors Web*, N.Y. Times, Jan. 31, 2011, <http://nyti.ms/oolm6e>; Christopher Rhoads & Farnaz Fassihi, *Iran Vows to Unplug Internet*, Wall St. J., May 28, 2011, <http://on.wsj.com/qqf9SJ>; *Report: Iran's Paramilitary Launches Cyber Attack*, Associated Press, Mar. 14, 2011, available at <http://fxn.ws/o4D8zf>; Reza Sayah, *Iran Hinders Web Searches Leading Up to Planned Rally, Sources Say*, CNN, Feb. 12, 2011, <http://bit.ly/oF169v>; Nazila Fathi, *Iran's Opposition Seeks More Help in Cyberwar With Government*, N.Y. Times, Mar. 18, 2010, <http://nyti.ms/nJenPb>; Nazila Fathi, *Iran Disrupts Internet Service Ahead of Protests*, N.Y. Times, Feb. 10, 2010, <http://nyti.ms/nNTYUi>; Nicholas D. Kristof, Op-Ed., *Tear Down This Cyberwall!*, N.Y. Times, June 17, 2009, <http://nyti.ms/nNFxNO>; *Iran Blocks Internet on Eve of Rallies*, Associated Press, Dec. 6, 2009, available at <http://bit.ly/neHrqK>; Jim Crogan, *Syria Uses Cyber Warfare to Attack Pro-Democracy Supporters*, Fox News, June 9, 2011, <http://fxn.ws/qKuaWI>; Elizabeth Flock, *Syria Internet Services Shut Down as Protestors Fill Streets*, Wash. Post BlogPost, June 3, 2011, <http://wapo.st/p9EOkP>; Christopher Rhoads, *Syria's Internet Blockage Brings Risk of Backfire*, Wall St. J., June 3, 2011, <http://on.wsj.com/pfEFqj>; *Syria Internet Disrupted As Egypt Blackout Catches On In Middle East: Reports*, Huffington Post, Mar. 30, 2011, <http://huff.to/nKnjj1>; Khaled Yacoub Oweis, *Syria Tightens Internet Ban After Tunis Unrest – Users*, Reuters, Jan. 26, 2011, available at <http://bit.ly/pP4CTL>.

U.S. officials, particularly President Barack Obama and Secretary of State Hillary Clinton, have condemned leaders in other nations for disrupting internet activity, declaring internet freedom to be a core pillar of American foreign policy. *See, e.g.*, President Barack Obama, *Remarks by the President on the Middle East and North Africa*, speech given on May 19, 2011, at U.S. Department of State, <http://1.usa.gov/ifwPC2>; Secretary of State Hillary Rodham Clinton, *Internet Rights and Wrongs: Choices & Challenges in a Networked World, Address*, speech given on Feb. 15, 2011, at George Washington University, <http://1.usa.gov/q040Wc>; Secretary of State Hillary Rodham Clinton, *Remarks on Internet Freedom*, speech given on Jan. 21, 2010, at The Newseum, <http://1.usa.gov/oz3nKM>. These statements have generated significant media attention as well. *See, e.g.*, Max Schulman, *The State Department's Shameful Record on Internet Freedom*, *The New Republic*, Aug. 8, 2011, <http://bit.ly/nIW137>; Mary Beth Sheridan, *Autocratic Regimes Fight Web-Savvy Opponents with Their Own Tools*, *Wash. Post*, May 22, 2011, <http://wapo.st/mMUefk>; Steven Lee Myers, *Rights Abuses Extend Across Middle East, Even Among U.S. Security Allies, Report Says*, *N.Y. Times*, Apr. 9, 2011, <http://bit.ly/ppnhRT>; Andrew Quinn, *Clinton to Lay Out U.S. Internet Freedom Plan*, *Reuters*, Feb. 15, 2011, available at <http://reut.rs/pHI1EP>; Mary Beth Sheridan, *Clinton Calls for 'Serious Conversation' About Internet Freedom*, *Wash. Post*, Feb. 15, 2011, <http://wapo.st/pQnGQf>; Andrew Quinn, *China Faces Internet "Dictator's Dilemma": Clinton*, *Reuters*, Feb. 15, 2011, available at <http://reut.rs/qBCiXu>; Bruce Gottlieb, *Clinton on Internet Freedom: Living by the Standards We Hold the World To*, *The Atlantic*, Feb. 15, 2011, <http://bit.ly/pSfJT2>; Mark Landler & Brian Knowlton, *US Policy to Address Internet Freedom*, *N.Y. Times*, Feb. 14, 2011, <http://nyti.ms/reh5xa>.

The United States' policies with respect to cyber security have been the subject of intense media attention, especially since the Pentagon announced that computer sabotage from a foreign nation can constitute an act of war. *See, e.g.*, Somini Sengupta, *U.S. Agents, an Aerial Snoop and Teams of Hackers*, *N.Y. Times*, Aug. 7, 2011, <http://nyti.ms/qcpj34>; Adam Rawnsley, *Can Darpa Fix the Cybersecurity 'Problem from Hell?'*, *Wired Danger Room Blog*, Aug. 5, 2011, <http://bit.ly/nXtc6Q>; Tabassum Zakaria, *Pentagon Cyber Program to Fund Hacker Innovation*, *Reuters*, Aug. 4, 2011, available at <http://reut.rs/oTgjFQ>; John D. Sutter, *Department of Defense Tries to Court Hackers*, *CNN*, Aug. 4, 2011, <http://bit.ly/ruStcY>; *Interview with Howard Schmidt, White House Cybersecurity Coordinator*, *C-SPAN*, Aug. 2, 2011, <http://cs.pn/riQfZ0>; Adam Clark Estes, *The NSA Wants More Hackers for Their 'Collection of Geeks'*, *The Atlantic Wire*, Aug. 2, 2011, <http://bit.ly/plZ6jv>; Brendan Sasso & Gautham Nagesh, *Senators Unveil International Cybercrime Bill*, *The Hill Tech. Blog*, Aug. 2, 2011, <http://bit.ly/mY27nK>; *Herding Cats: Democratic Senators Introduce Cybersecurity Bills as Reid Tries to Consolidate Efforts*, *Infosecurity*, July

29, 2011, <http://bit.ly/oHXHpT>; Jim Finkle, *U.S. Government Says Stuxnet Could Morph into New Threat*, Reuters, July 28, 2011, available at <http://reut.rs/nJZJS3>; Diane Bartz, *Reid Pushes US Republicans for Cybersecurity Bill*, Reuters, July 27, 2011, available at <http://reut.rs/pWyvkW>; Robert Burns, *Army Chief Sees Cybersecurity as "Defining Issue"*, Associated Press, July 26, 2011, available at <http://onforb.es/o6vQT5>; Gautham Nagesh, *Cyber-Attacks on US Grow, Experts Say*, The Hill Tech. Blog, July 26, 2011, <http://bit.ly/oXHBvd>; Elizabeth Montalbano, *DOD Website Sells Public on Cybersecurity Strategy*, InformationWeek, July 25, 2011, <http://bit.ly/py2k38>; Ellen Nakashima, *GAO Faults Pentagon Cyber Efforts*, Wash. Post, July 25, 2011, <http://wapo.st/ppe3ma>; Micah Zenko, *Cyber Attacks and Pentagon Responses*, Council on Foreign Relations Blog, July 25, 2011, <http://on.cfr.org/nOlyx7>; Sens. Joe Lieberman, Susan Collins & Tom Carper, Letter to the Editor, *A Cyberspace Office at the White House*, Wash. Post, July 23, 2011, <http://wapo.st/plfBvH>; Jeanna Smialek, *Michael McCaul's Cybersecurity Bill Moves Forward*, Houston Chron. Texas on the Potomac Blog, July 21, 2011, <http://bit.ly/oaEGZx>; Josh Smith, *House Panel Approves Cybersecurity Standards Bill*, Nat'l J., July 21, 2011, <http://bit.ly/qV3gGz>; Laura Crimaldi, *Nation's Fight Against Cyber Intruders Goes Local*, Associated Press, July 20, 2011, available at <http://bit.ly/nvu7al>; David Lerman, *Senators Demand Answers on U.S. Cyber Warfare Policy*, Bloomberg, July 20, 2011, <http://bloom.bg/oEQlrw>; John T. Bennett, *Senators: US needs to Define Acts of Cyberwar*, The Hill Tech. Blog, July 19, 2011, <http://bit.ly/ovjBdR>; John T. Bennett, *McCain: White House, Pentagon Must Clarify Military's Cyber Role*, The Hill, July 19, 2011, <http://bit.ly/mU07RN>; Ben Pershing, *On Cybersecurity, Congress Can't Agree on Turf*, Wash. Post, July 18, 2011, <http://wapo.st/qB9bA5>; Jennifer Martinez, *DOD Could Use Force in Cyber War*, Politico, July 15, 2011, <http://politi.co/oxUnsf>; Rep. Jim Langevin, Letter to the Editor, *Beefing Up the Nation's Cybersecurity System*, Wash. Post, July 15, 2011, <http://wapo.st/qGQoS>; Julian E. Barnes & Siobhan Gorman, *Cyberwar Plan Has New Focus on Deterrence*, Wall St. J., July 15, 2011, <http://on.wsj.com/oDi9mr>; Tom Gjelten, *Pentagon Strategy Prepares for War in Cyberspace*, Nat'l Pub. Radio, July 15, 2011, <http://n.pr/o3UoQP>; Diane Bartz, *Key Senator Calls for Special Cyber Security Panel*, Reuters, July 13, 2011, available at <http://reut.rs/pqBaqx>; Kevin Baron, *Cyber Strategy: Take a More Active Role in Preventing Attacks*, Stars and Stripes, July 14, 2011, <http://1.usa.gov/qf2zh1>; *Pentagon Releases Cyber Security Strategy*, Fox News, July 14, 2011, <http://bit.ly/piYFXd>; Larisa Epatko, *Quick Take: The Pentagon's Cybersecurity Plan*, PBS, July 14, 2011, <http://to.pbs.org/pqjynn>; Staff Writers, *McCain Calls for Special Cybersecurity Panel*, Agence France-Presse, July 13, 2011, available at <http://bit.ly/nR26nI>; Ellen Nakashima, *Pentagon to Unveil Cybersecurity Strategy*, Wash. Post, July 13, 2011, <http://wapo.st/orwnKs>; Catherine Hollander, *Lieberman, Collins, Carper Seek 'Gold Standard' in*

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Additionally, cyber attacks on governmental offices and large corporations have generated significant concern among the public and considerable media attention. See, e.g., Michael Joseph Gross, *Enter the Cyber-Dragon*, Vanity Fair, Sept. 2011, <http://vnty.fr/qSbJS6>; Jasmin Melvin, *Congresswoman Eyes McAfee Briefing on Cyber Attacks*, Reuters, Aug 10, 2011, available at <http://reut.rs/o4jbbx>; David Sarno, Salvador Rodriguez & Ken Dilanian, *Hackers Infiltrate Computer Networks of*

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The requested records are urgently needed to inform the public as both Houses of Congress are considering numerous pieces of cybersecurity legislation. In addition to the cybersecurity legislative proposal put forth by the White House, no fewer than 17 cybersecurity bills have been introduced during the 112th Congress.⁸ There have been at least 14 Congressional hearings on cybersecurity since March 2011 alone.⁹ In late June 2011,

⁸ See, e.g., Cybersecurity Education Enhancement Act of 2011, H.R. 76, 112th Cong. (2011); Homeland Security Cyber and Physical Infrastructure Protection Act of 2011, H.R. 174, 112th Cong. (2011); Executive Cyberspace Coordination Act of 2011, H.R. 1136, 112th Cong. (2011); Cybersecurity Enhancement Act of 2011, H.R. 2096, 112th Cong. (2011); SAFE Data Act, H.R. 2577, 112th Cong. (2011); Data Accountability and Trust Act (DATA) of 2011, H.R. 1841, 112th Cong. (2011); Tough and Smart National Security Act, S. 8, 112th Cong. (2011); Cybersecurity and Internet Safety Standards Act, S. 372, 112th Cong. (2011); Cybersecurity and Internet Freedom Act of 2011, S. 413, 112th Cong. (2011); Cyber Security and American Cyber Competitiveness Act of 2011, S. 21, 112th Cong. (2011); Cyber Security Public Awareness Act of 2011, S. 813, 112th Cong. (2011); Cybersecurity Enhancement Act of 2011, S. 1152, 112th Cong. (2011); Cyberspace Warriors Act of 2011, S. 1159, 112th Cong. (2011); Electronic Communications Privacy Act Amendments Act of 2011, S. 1011, 112th Cong. (2011); Personal Data Privacy and Security Act of 2011, S. 1151, 112th Cong. (2011); Data Security and Breach Notification Act of 2011, S. 1207, 112th Cong. (2011); Information Technology Investment Management Act of 2011, S. 801, 112th Cong. (2011).

⁹ See, e.g., *Cybercrime: Updating the Computer Fraud and Abuse Act to Protect Cyberspace and Combat Emerging Threats: Hearing Scheduled Before the S. Comm. on the Judiciary*, 112th Cong. (2011); *Cybersecurity: An Overview of Risks to Critical Infrastructure: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 112th Cong. (2011); *Examining the Homeland Security Impact of the Obama Administration's Cybersecurity Proposal: Hearing Before the Subcomm. on Cybersecurity, Infrastructure Protection and Sec. Technologies of the H. Comm. on Homeland Sec.*, 112th Cong. (2011); *Cybersecurity: Evaluating the Administration's Proposals: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. (2011); *Cybersecurity and Data Protection in the Financial Sector: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 112th Cong. (2011); *Cybersecurity: Assessing the Nation's Ability to Address the Growing Cyber Threat: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011); *Cybersecurity: Assessing the Immediate Threat to the United States: Hearing Before the Subcomm. on National Sec., Homeland Defense and Foreign Operations of the*

Speaker of the House John Boehner and House Majority Leader Eric Cantor appointed a Cybersecurity Task Force, due to report back in October 2011.¹⁰ But legislation is moving forward in the interim. Cybersecurity legislation passed the House Committee on Science, Space, and Technology on July 21, 2011, and is expected to go to the floor of the full House after the August recess.¹¹ In the Senate, Majority Leader Harry Reid is pushing for the swift enactment of cybersecurity legislation and has secured the agreement of Republicans to a bi-partisan drafting process.¹² Therefore, time is of the essence; the records requested here will be key to informing the public as the on-going legislative debate moves forward.

Furthermore, as evidenced by the media coverage listed above, expedited processing is warranted because the records requested 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); 15 C.F.R. § 4.6(e)(iii). There can be no greater question of governmental integrity than the extent to which it will protect our Constitutional freedoms. How and when the government plans to use its supposed authority to restrict internet access goes to the heart of freedom of speech and association, bedrock principles on which this nation was founded. The Obama Administration has made clear via the speeches mentioned above and policy initiatives that cybersecurity must be balanced with fundamental rights. *See, e.g.,* Office of the President, *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World* (May 2011), <http://1.usa.gov/luajv7> (“Our

H. Comm. on Oversight and Gov’t Reform, 112th Cong. (2011); Cybersecurity: Innovative Solutions to Challenging Problems: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of the H. Comm. on the Judiciary, 112th Cong. (2011); Protecting Cyberspace: Assessing the White House Proposal: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, 112th Cong. (2011); Full Committee Hearing: to receive testimony on a joint staff Discussion Draft pertaining to cyber security of the bulk-power system and electric infrastructure and for other purposes: Hearing Before the S. Comm. on Energy and Natural Resources, 112th Cong. (2011); The Department of Homeland Security Cybersecurity Mission: Promoting Innovation and Securing Critical Infrastructure: Hearing Before the Subcomm. on Cybersecurity, Infrastructure Protection and Sec. Technologies of the H. Comm. on Homeland Sec., 112th Cong. (2011); Cyber Security: Responding to the Threat of Cyber Crime and Terrorism: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary, 112th Cong. (2011); Examining the Cyber Threat to Critical Infrastructure and the American Economy: Hearing Before the Subcomm. on Cybersecurity, Infrastructure Protection and Sec. Technologies of the H. Comm. on Homeland Sec., 112th Cong. (2011).

¹⁰ Press Release, *Speaker Boehner & Leader Cantor Announce New Cybersecurity Task Force Led by Rep. Thornberry*, June 24, 2011, available at <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=248724>.

¹¹ Josh Smith, *House Panel Approves Cybersecurity Standards Bill*, Nat’l J., July 21, 2011, <http://bit.ly/os2tW6>. There is a companion bill, S. 1152 before the Senate Committee on Commerce, Science and Transportation.

¹² Diane Bartz, *Reid Pushes US Republicans for Cybersecurity Bill*, Reuters, July 27, 2011, available at <http://reut.rs/rmOVbH>.

international cyberspace policy reflects our core commitments to fundamental freedoms, privacy, and the free flow of information.” *Id.* at 5.). The documents sought here will directly address just how our government deals with that tension.

For the same reasons, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i).

Application for Waiver or Limitation of Fees

- A. *A waiver of search, review, and reproduction fees is warranted under 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70; 28 § 16.11(k)(1); 22 C.F.R. § 171.17(a); 32 C.F.R. § 1700.6(b)(2); 32 C.F.R. § 286.28(d); 6 C.F.R. § 5.11(k); 47 C.F.R. § 0.470(e)(1); 32 C.F.R. 2400.22; and 15 C.F.R. § 4.11(k)(1).*

The ACLU requests a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the United States government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

The ACLU makes this Request specifically to retrieve any and all documents relating to the power of the President to shut down, disrupt or otherwise limit or restrict access to, or traffic to and from, systems, networks and infrastructure connected to the internet. In doing so, the ACLU seeks to further the public’s understanding of the authority of the federal government to cut off access to the internet, a vital organ of American commerce and communication. As the dozens of news articles cited above make clear, interest in this topic is widespread and exceptional and disclosure of the requested records will contribute significantly to public understanding of the operations and activities of the government. Moreover, disclosure is not in the requester’s commercial interest. Any information disclosed by the requesters 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.*, 326 F.3d at 1312 (“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”).

B. *A waiver of search and review fees is warranted under 5 U.S.C. § 552(a)(4)(A)(ii); 5 C.F.R. § 1303.50; 28 C.F.R. § 16.11(c)(1)-(3), (d)(1); 22 C.F.R. § 171.15(c); 32 C.F.R. § 32 C.F.R. § 1700.6(i)(2); 286.28(e)(7); 6 C.F.R. § 5.11(d); 47 C.F.R. § 0.470(a)(2)(i); 32 C.F.R. 2400.22; and 15 C.F.R. § 4.11(d)(1).*

A waiver of search and review fees is warranted because the requester 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). The ACLU is a representative of the news media in that it is an organization “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public,” where “news” is defined as “information that is about current events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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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); *see also Nat’l Sec. Archive*, 880 F.2d at 1387 (finding that an organization that “gathers information from a variety of sources,” 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 the purposes of FOIA); *cf. Am. Civil Liberties Union 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 that it is “primarily engaged in the dissemination of information.” *See 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 media” for purposes of FOIA).¹³ Indeed, the ACLU

¹³ 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.” In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2011, the CIA granted a fee waiver with respect to the same request. In March 2009, the Department of State granted a fee waiver to the ACLU with respect to its request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. In May 2005, the 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 respect to a request regarding the use of immigration laws to exclude prominent non-

of Washington recently was held to be a “representative of the news media.” *Am. Civil Liberties Union of Wash. v. Dep’t of Justice*, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011). And given the on-going Congressional debate, the White House’s placement of cybersecurity and internet freedom front and center in national security and foreign policy discussions, and intense media interest in cybersecurity generally and the “kill switch” in particular, there can be little question that the subject of this Request is “news.”

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).

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Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 5 C.F.R. § 1303.10(d)(4); 28 C.F.R. § 16.5(d)(4); 22 C.F.R. § 171.12(b); 32 C.F.R. § 1700.12(b); 32 C.F.R. § 286.4(d)(3); 6 C.F.R. § 5.5(d)(4); 47 C.F.R. § 0.461(h)(4)(i); 32 C.F.R. 2400.22; 15 C.F.R. § 4.6(e)(4).

If this FOIA 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. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Please be advised that because we are requesting expedited processing under DOJ implementing regulations section 16.5(d)(1)(ii) as well as section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmalzer’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

Thank you for your prompt attention to this matter.

citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, 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.

Please furnish the applicable records to:

Zachary Katznelson
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Sincerely,



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