

March 26, 2021

Office of the Director of National Intelligence
Gregory Koch
Director, Information Management Office
ATTN: FOIA/PA
Washington, D.C. 20511
Email: dni-foia@dni.gov

Federal Bureau of Investigation
FOIA Officer
Record/Information Dissemination Section
Attn: FOIPA Request
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4997



U.S. Department of Homeland Security
Lynn Parker Dupree
Chief Privacy Officer/Chief FOIA Officer
Privacy Office, Mail Stop 0655
2707 Martin Luther King Jr. Ave. SE
Washington, D.C. 20528-065
Email: foia@hq.dhs.gov

U.S. Customs and Border Protection
FOIA Officer
90 K Street, NE
FOIA Division
Washington, D.C. 20229

Central Intelligence Agency
Information and Privacy Coordinator
Washington, D.C. 20505
Fax: (703) 613-3007

National Security Agency
Attn: FOIA/PA Office
Ft. George G. Meade, MD 20755-6932
Fax: (443) 479-3612

Defense Intelligence Agency
ATTN: FAC2C (FOIA)
7400 Pentagon
Washington, D.C. 20301-7400
Email: brittley.timmons@dodiis.mil

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

Department of Justice
FOIA/PA Mail Referral Unit
Room 115
LOC Building
Washington, D.C. 20530-0001
Email: MRUFOIA.Requests@usdoj.gov

Department of Justice, Office of the Attorney General &
Office the Deputy Attorney General
Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
6th Floor
441 G Street, NW
Washington, DC 20530

Department of Justice, National Security Division
Arnetta Mallory, Government Information Specialist
3 Constitution Square
175 N Street, NE, 12th Floor
Washington, DC 20530-0001
Email: nsdfoia@usdoj.gov

National Counterterrorism Center
Office of the Director of National Intelligence
Gregory Koch
Director, Information Management Office
ATTN: FOIA/PA
Washington, D.C. 20511
Email: dni-foia@dni.gov

**Re: FOIA Request Concerning Artificial Intelligence Systems
(Expedited Processing Requested) (Corrected)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of

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.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

Information Act request (the “Request”). The Request seeks records from the Office of the Director of National Intelligence (“ODNI”), Federal Bureau of Investigation (“FBI”), U.S. Department of Homeland Security (“DHS”), U.S. Customs and Border Protection (“CBP”), Central Intelligence Agency (“CIA”), National Security Agency (“NSA”), Defense Intelligence Agency (“DIA”), Department of Justice (“DOJ”), and National Counterterrorism Center (“NCTC”) (collectively, the “Agencies”) pertaining to the deployment and use of Artificial Intelligence systems.

I. Background

On March 1, 2021, the National Security Commission on Artificial Intelligence (“NSCAI”) issued its final report, outlining a national strategy to meet the opportunities and challenges posed by Artificial Intelligence (“AI”).² The Commission describes AI as “a constellation of technologies” that “solve tasks requiring human-like perception, cognition, planning, learning, communication, or physical action; and technologies that may learn and act autonomously whether in the form of software agents or embodied robots.”³ AI systems are increasingly used to make decisions, recommendations, classifications, or predictions that impact Americans and others as they go about their daily lives.

The report urges the federal government, including intelligence agencies, to continue rapidly developing and deploying AI systems for a wide range of purposes. Those purposes include conducting surveillance, exploiting social media information and biometric data, performing intelligence analysis, countering the spread of disinformation via the Internet, and predicting threats.⁴ The report observes that individual intelligence agencies have already made progress toward these goals, and it calls for “ubiquitous AI integration in each stage of the intelligence cycle” by 2025.⁵

In June 2020, the Office for the Director of National Intelligence released its Artificial Intelligence Framework for the Intelligence Community.⁶ One of the core principles endorsed in that framework is transparency. Yet the public knows almost nothing about what kinds of AI systems are being developed or used by the Intelligence Community, what policies constrain the deployment or operation of AI systems in practice, and

² National Security Commission on Artificial Intelligence, Final Report (2021) (“NSCAI Final Report”), <https://reports.nsc.ai.gov/final-report/table-of-contents/>.

³ NSCAI Final Report at 32.

⁴ NSCAI Final Report at 23, 81, 109–10.

⁵ NSCAI Final Report at 23, 81, 109–10.

⁶ ODNI, Artificial Intelligence Ethics Framework for the Intelligence Community (Version 1.0 2020), <https://www.intelligence.gov/artificial-intelligence-ethics-framework-for-the-intelligence-community>.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

what risks these systems may pose to equality, due process, privacy, free expression, and public safety.

Indeed, although both the Commission’s report and ODNI’s framework recognize the potential dangers of AI systems—and the resulting need for enforceable limits and safeguards—there is virtually no information about whether such limits and safeguards exist today, even as agencies across the federal government race to develop and adopt AI systems.

Of particular concern is the way AI systems may be biased against people of color and marginalized communities, and may be used to automate, expand, or legitimize discriminatory government conduct. AI systems may perpetuate biases that are embedded in the datasets used to train those systems, and they may have higher error rates when applied to people of color and marginalized communities because of flaws in the algorithms or underlying data.⁷ In addition, AI systems may be used to guide or expand government activities that have long been used to unfairly scrutinize communities of color—including intrusive surveillance, investigative questioning, detention, and watchlisting.

The ACLU submits this FOIA request to provide the public with information about the Agencies’ development and use of AI systems.

II. Requested Records

For the purposes of this Request, AI includes technologies that solve tasks requiring human-like perception, cognition, planning, learning, communication, or physical action; and technologies that may learn and act autonomously, including in the form of software agents or embodied robots.⁸ It also includes “automated decision systems”—meaning any algorithm, computer program, software, method, statistical model, or process that uses data-based analysis to replace or aid human decision-making.⁹ AI can involve analyzing complex datasets about human populations to generate scores, predictions, classifications, or recommendations used to make decisions.

⁷ See, e.g., Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; Larry Hardesty, *Study finds gender and skin-type bias in commercial artificial-intelligence systems*, MIT News (Feb. 11, 2018), <http://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligencesystems-0212>; Nat’l Inst. Standards & Tech., *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>.

⁸ See NSCAI Final Report at 32.

⁹ For purposes of the Request, “algorithm” means a specific procedure, set of rules, or order of operations designed to solve a problem or make a calculation, classification, or recommendation.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

The ACLU requests the following records from the Agencies. This Request seeks records created on or after January 1, 2018:

1. All reports, presentations, assessments, audits, summaries, case studies, memoranda, or training materials concerning AI uses or trials, including but not limited to such records concerning:
 - a. Descriptions of value, benefits, effectiveness, or successes;
 - b. Descriptions of risks, limitations, flaws, or failures;
 - c. Potential or actual bias;
 - d. Error rates;
2. All formal or informal privacy impact assessments, civil liberties impact assessments, civil rights impact assessments, or Inspector General reports concerning the use or proposed use of AI.
3. All policies, procedures, guidelines, formal guidance, advisories, directives, reports, presentations, training materials, and memoranda concerning the safeguards or limitations that apply to the acquisition, testing, or use of AI, including but not limited to:
 - a. Permissible or impermissible uses of AI;
 - b. Approval processes, testing processes, compliance processes, and documentation processes for AI;
 - c. Grievance or complaint processes related to the use of AI;
 - d. Requirements for human review of AI outputs, classifications, recommendations, identifications, predictions, or decisions.
4. All records containing formal legal analysis concerning any use or potential use of AI and:
 - a. Compliance with the Constitution; or
 - b. Compliance with federal law, rules, or regulations concerning civil rights, discrimination, privacy, immigration, criminal investigations, criminal prosecutions, or intelligence gathering.
5. All presentations, proposals, or marketing materials provided by contractors, vendors, or other commercial entities concerning AI.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

6. All records implementing or applying ODNI’s Artificial Intelligence Framework for the Intelligence Community, including but not limited to policies, procedures, guidelines, formal or informal guidance, directives, training materials, or advisories concerning the Framework.
7. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, reports, presentations, training materials, and memoranda concerning:
 - a. The use of AI to identify, nominate, select, task, recommend, or prioritize targets or selectors for surveillance or data collection.
 - b. The use of AI to review, process, or analyze information acquired through surveillance or data collection, including but not limited to video data, image data, audio or voice data, communications content, communications metadata, location data, and biometrics.
 - c. The use of AI to identify, recommend, or prioritize for human review information acquired through surveillance or data collection.
 - d. The use of AI to identify, recommend, or prioritize for human investigation individuals who have been subject to surveillance or data collection.
8. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, training materials, presentations, and memoranda concerning:
 - a. The use of AI to identify or recommend individuals for potential placement on watchlists, including but not limited to databases containing biographic and substantive information maintained by the Terrorist Screening Center, the National Counterterrorism Center, and the Department of Homeland Security.
 - b. The use of AI to perform individualized risk assessments, make individualized predictions, or conduct “threat assessments” of individuals, including but not limited to the Automated Targeting System used by the Department of Homeland Security.
9. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, training materials, presentations, and memoranda concerning the use of AI to identify, classify,



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

recommend, or confirm targets for the use of force, including lethal force.

10. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, reports, presentations, training materials, and memoranda concerning the use of AI, directly or indirectly, to assist criminal or immigration investigations, including but not limited to such records concerning:
 - a. Permissible or impermissible uses of AI;
 - b. Notice, disclosure, or discovery in judicial proceedings and judicial filings related to the use of AI;
 - c. Omission or non-disclosure of the use of AI in investigative records;
 - d. Treatment of information generated by AI as “tip,” “lead,” “confidential source,” or “confidential informant” information.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests 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 requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁰ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

- A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within

¹⁰ *See also* 32 C.F.R. § 1900.34 (CIA); 6 C.F.R. § 5.5(e) (DHS); 32 C.F.R. § 286.8(e) (DOD); 28 C.F.R. § 16.5(e) (DOJ); 32 C.F.R. § 1700.12 (ODNI).

the meaning of the statute. *See id.*¹¹ 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 work and are among its 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”).¹²

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,¹³



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

¹¹ *See also* 32 C.F.R. § 1900.34(c)(2) (CIA); 6 C.F.R. § 5.5(e)(1)(ii) (DHS); 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).

¹² 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 Conf. on Civil Rts. v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Priv. Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003) (“disseminates information to the public”).

¹³ 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 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*

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹⁴

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.¹⁵ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and

‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>.

¹⁴ 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).

¹⁵ See, e.g., Hugh Handeyside, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (Feb. 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/national-security/targeted-killing/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* (May 27, 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>.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

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.¹⁶

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.¹⁷ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.¹⁸

¹⁶ See, e.g., *ACLU v. ODNI*—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act, <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, <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, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, <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, <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/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

¹⁷ *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>.

¹⁸ ACLU, *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010* (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; ACLU, *Index of Bush-Era OLC Memoranda Relating to*



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

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

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

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).¹⁹ Specifically, the requested records relate to the government’s development, acquisition, and use of AI to automate a variety of government activities that have profound impact on Americans and others—including conducting surveillance, analyzing biometric data, performing “threat” assessments, and even guiding the use of lethal weapons.²⁰ Federal agencies’ use of AI is already the subject of widespread public debate and media attention, and has resulted in congressional hearings and demands for greater oversight.²¹ In its report, the National Security Commission on AI repeatedly calls the federal government’s need to develop and deploy AI an “urgent” priority and acknowledges that such efforts are already well underway.²² The public’s need for basic information that will allow it to participate in the adoption of appropriate safeguards governing these society-altering systems is no less urgent. Indeed, without access to information about the Agencies’ policies, practices, legal reasoning, and practices, neither the public nor their representatives in Congress can participate fully in deliberations about whether and how acquisition and use of AI should be permitted. The development of these systems is speeding ahead, as the National Security Commission on AI’s report only underscores, and thus there is a pressing need for the records sought in this Request.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

Interrogation, Detention, Rendition and/or Surveillance, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; ACLU, *Statistics on NSL's Produced by Department of Defense*, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

¹⁹ *See also* 32 C.F.R. § 1900.34(c)(2) (CIA); 6 C.F.R. § 5.5(e)(1)(ii) (DHS); 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).

²⁰ *See, e.g.*, NSCAI Final Report at 23, 109–10.

²¹ *See, e.g.*, Mila Jasper, *Lawmakers, Experts, Industry Highlight Need for Ethics After Defense Commission Releases Final AI Report*, Nextgov (Mar. 16, 2021), <https://www.nextgov.com/emerging-tech/2021/03/lawmakers-experts-industry-highlight-need-ethics-after-defense-commission-releases-final-ai-report/172704/>; Tom Simonite, *What's This? A Bipartisan Plan for AI and National Security*, Wired (July 30, 2020), <https://www.wired.com/story/bipartisan-plan-ai-national-security/>; *Game Changers: Artificial Intelligence (Parts I, II & III)*, Hearing Before the Subcomm. on Information Technology of the H. Comm. on Oversight and Government Reform, 115th Cong. (2018).

²² *See, e.g.*, NSCAI Final Report at 23, 28, 51, 110, 292, 343, 594.

The records sought relate to a matter of widespread and exceptional media interest: the federal government’s development and use of AI. Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).²³ The ACLU also requests a waiver of search fees on the grounds that the 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.*

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’ acquisition and use of artificial intelligence, 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 development and deployment of AI, the records sought are critical to understanding the scope of these efforts, the procedures and safeguards governing the use of AI, and the broader implications for civil rights and civil liberties.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be 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)).

²³ *See also* 32 C.F.R. § 1900.13(b)(2) (CIA); 6 C.F.R. § 5.11(k)(1) (DHS); 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).



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

B. *The ACLU is a representative of the news media and the records are not sought for commercial use.*

The ACLU also requests a waiver of search fees on the basis that the ACLU qualifies as a “representative of the news media” and does not seek the records for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).²⁴ 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)²⁵; *see also Nat’l Sec. Archive v. Dep’t of Def.*, 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 Def.*, 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 29 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Priv. 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).²⁶ On account of

²⁴ *See also* 32 C.F.R. § 1900.13(i)(2) (CIA); 6 C.F.R. § 5.11(d)(1) (DHS); 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).

²⁵ *See also* 32 C.F.R. § 1900.02(h)(3) (CIA); 6 C.F.R. § 5.11(b)(6) (DHS); 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).

²⁶ 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. Priv. Info Ctr.*, 241 F. Supp. 2d 5;



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”²⁷ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 1900.34(c) (CIA); 6 C.F.R. § 5.5(e)(4) (DHS); 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).

If the Request is denied in whole or in part, the ACLU asks that you justify all denials by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves 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:

Patrick Toomey
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004

Nat'l Sec. Archive, 880 F.2d at 1387; *see also Leadership Conf. on Human Rts.*, 404 F. Supp. 2d at 260; *Judicial Watch*, 133 F. Supp. 2d at 53–54.

²⁷ 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 related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In 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.



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org

T: 212-549-2500
ptoomey@aclu.org
nspfoia@aclu.org

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,



Patrick Toomey
Ashley Gorski
Hugh Handeyside
Brett Max Kaufman
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, New York 10004
T: 212-549-2500
ptoomey@aclu.org



AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

LEGAL DEPARTMENT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2564
aclu.org