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July 31, 2012

SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT**

Dear Freedom of Information Officer,

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). It is submitted on behalf of the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”).¹

I. Background

On March 22, 2012, the Attorney General, the Director of National Intelligence (“DNI”), and the Director of the National Counterterrorism Center (“NCTC”) issued an update to NCTC’s 2008 rules for handling

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 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. 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 analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

information on U.S. persons.² This request seeks information regarding the impact of the updated rules.

The updated NCTC guidelines significantly expand the ability of the NCTC to collect, analyze, and store “non-terrorism” related data on U.S. persons, putting all Americans at risk of unjustified scrutiny. Previously, the intelligence community was barred from collecting information about ordinary Americans unless the person was a terror suspect or part of an actual investigation. When the NCTC aggregated data sets, it was required to search for and identify any information collected about any other U.S. persons and discard it within 180 days.³ This check served to protect Americans’ privacy and security by forcing the NCTC to properly focus its collection efforts, and by compelling it to make timely reviews of information gathered. The 2012 guidelines eliminate this check, allowing NCTC to collect and “continually assess” information on U.S. persons for up to five years.⁴

Once information is acquired, the new guidelines authorize broad new search powers. In conducting searches aimed at identifying terrorism information, NCTC may now conduct queries that involve non-terrorism data points and pattern-based searches and analyses (i.e., data mining). Once information is gathered—including information that is not necessarily connected to terrorism—in many cases it can be given to “a federal, state, local, tribal, or foreign or international entity, or to an individual or entity not part of a government.” While this sharing can happen in relation to national security and safety, it can also occur in relation to drug and crime investigations, or to evaluate sources or contacts.⁵

All of this is happening with very little oversight. Controls over NCTC are mostly internal, and important oversight bodies such as Congress and the President’s Intelligence Oversight Board aren’t notified even of

² See Press Release, Office of the Dir. of Nat’l Intelligence and Dep’t of Justice, Revised Guidelines Issued to Allow the NCTC to Access and Analyze Certain Federal Data More Effectively to Combat Terrorist Threats (Mar. 22, 2012), <http://www.fas.org/irp/news/2012/03/odni032212.html>.

³ See Mem. of Agreement Between the Att’y Gen. and Dir. of Nat’l Intelligence on Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Ctr. of Terrorism Information Contained Within Datasets Identified as Including Non-Terrorism Information and Information Pertaining Exclusively to Domestic Terrorists (Nov. 4, 2008), <http://www.fas.org/sgp/othergov/intel/nctc-moa2008.pdf>.

⁴ U.S. Dep’t of Justice, Office of the Att’y Gen., Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Ctr. and Other Agencies of Information in the Datasets Containing Non-Terrorism Information (Mar. 22, 2012), pg. 9, <https://www.documentcloud.org/documents/327629-nctc-guidelines.html>.

⁵ See *id.* at 28.

“significant” failures to comply with the guidelines. Fundamental legal protections are being sidestepped. For example, under the new guidelines, Privacy Act notices (descriptions of how databases are used, 5 U.S.C. § 552a) must be completed by the agency that collected the information. This is so even though those agencies are apparently unaware of what NCTC is doing with the information it collects.⁶

As the updated guidelines allow NCTC to collect, store, and share data on any U.S. person, regardless of whether that person is suspected of terrorism, information regarding the new rules bears on the privacy of every American. This pervasive impact is reflected in widespread media interest in the new guidelines. Both the Washington Post and the New York Times ran front--page articles on the new guidelines following their announcement.⁷ Other national news outlets reporting on the updated guidelines included Bloomberg, CNN, Fox News, NBC News, and the Wall Street Journal.⁸ An Associated Press article on the new guidelines was reprinted by local newspapers across the country, including the Atlanta Journal, Columbus Dispatch, Denver Post, Houston Chronicle, Seattle Times, Southeast Missourian, and U-T San Diego.⁹ In addition, many internet news sources and blogs either reprinted or wrote their own coverage of NCTC’s new rules.¹⁰ Many of these stories note public concern about the scope of the

⁶ See *id.* at 5-7.

⁷ Sari Horwitz and Ellen Nakashima, *New Counterterrorism Guidelines Permit Data on U.S. Citizens to Be Held Longer*, Wash. Post, Mar. 22, 2012, available at http://www.washingtonpost.com/world/national-security/new-counterterrorism-guidelines-would-permit-data-on-us-citizens-to-be-held-longer/2012/03/21/gIQAFLm7TS_story.html; Charlie Savage, *U.S. Relaxes Limits on Use of Data in Terror Analysis*, N.Y. Times, Mar. 22, 2012, available at http://www.nytimes.com/2012/03/23/us/politics/us-moves-to-relax-some-restrictions-for-counterterrorism-analysis.html?_r=2&hp.

⁸ Seth Stern, *U.S. Agencies Allowed to Keep Residents’ Data for Five Years*, Bloomberg, Mar. 23, 2012, available at <http://www.bloomberg.com/news/2012-03-23/u-s-agencies-allowed-to-keep-residents-data-for-five-years.html>; Pam Benson, *Counterterrorism Center Can Keep Data on Americans for Longer*, Mar. 23, 2012, <http://security.blogs.cnn.com/2012/03/23/counterterrorism-center-can-keep-data-on-americans-for-longer/>; *U.S. Intelligence to Keep Tabs on Americans with no Ties to Terror*, Fox News, Mar. 22, 2012, <http://www.foxnews.com/politics/2012/03/22/us-intelligence-to-keep-tabs-on-americans-with-no-ties-to-terror/>; *Americans’ Data to be Held Longer Under Counterterrorism Rules*, NBC News, Mar. 23, 2012, http://www.msnbc.msn.com/id/46831188/ns/world_news/t/americans-data-be-held-longer-under-counterterrorism-rules/; Devlin Barrett, *Suspect Data To Be Kept Longer*, Wall St. J., Mar. 22, 2012, available at <http://online.wsj.com/article/SB10001424052702304636404577298231184587356.html>.

⁹ Eileen Sullivan, *Govt to Keep Info on Americans with No Terror Ties*, Associated Press, Mar. 22, 2012.

¹⁰ emptywheel, *The National Counterterrorism Center Just Declared All of Us Domestic Terrorists*, Empty Wheel, Mar. 23, 2012, <http://www.emptywheel.net/2012/03/23/the->

government's surveillance of U.S. persons and raise questions about whether the government is over-collecting information and infringing the privacy rights of innocent Americans.

II. Records Requested

The ACLU seeks disclosure of the following records:

1. Records created since November 1, 2008 including final memoranda, policies, procedures, directives, guidance, reports, legal analysis, inter- and intra-agency correspondence including e-mails, and training materials pertaining to the Director of National Intelligence's determination to amend the National Counterterrorism Center guidelines, including, but not limited to:
 - Records pertaining to the 2008 NCTC guidelines requirements regarding the collection, retention and use of U.S. person information, including training materials;
 - Records documenting perceived problems caused by limitations imposed in the 2008 NCTC guidelines and/or justifications for amending the guidelines;
 - Evaluations and/or audits of NCTC performance under the 2008 guidelines and/or problems and concerns associated with the implementation of the 2008 guidelines, including reports of violations of any law, regulation or policy;

national-counterterrorism-center-just-declared-all-of-us-domestic-terrorists/; Jesselyn Radack, *Govt. Keeping Data on Americans with No Connection to Terrorism*, Daily Kos, Mar. 23, 2012, <http://www.dailykos.com/story/2012/03/23/1077038/-DOJ-Expanding-Spy-Powers-Despite-Whistleblowers-Warnings>; Ankita Rao, *New Federal Counterterrorism Rules Allow For Longer Data Storage*, Mar. 23, 2012, Slate Magazine, http://slatest.slate.com/posts/2012/03/23/new_federal_counterterrorism_rules_allow_for_longer_data_storage.html; Madison Ruppert, *National Counterterrorism Center Gets Insane New Power over Private Data on Americans*, Activist Post, Mar. 23, 2012, <http://www.activistpost.com/2012/03/national-counterterrorism-center-gets.html>; Trevor Timm, *New Counterterrorism Guidelines Gives Authorities Vast Access to Private Info of Innocent Americans*, Electronic Frontier Foundation, Mar. 25, 2012, <https://www.eff.org/deeplinks/2012/03/new-counterterrorism-guidelines-gives-government-access-private-info-innocent>; Stephen C. Webster, *Terrorism Info Center Will Retain Americans' Data up to Five Years*, Raw Story, Mar. 23, 2012, <http://www.rawstory.com/rs/2012/03/23/terrorism-info-center-will-retain-americans-data-up-to-five-years/>.

- NCTC Terms and Conditions governing NCTC access to or acquisition of data sets under the 2012 NCTC guidelines;
 - Records regarding the identification of federal data sets NCTC seeks to acquire, including analysis or interpretation of the requirement that the data set “is likely to contain significant terrorism information,” and any documentation that this standard is met with each particular data set sought for acquisition by NCTC;
 - Training materials provided to NCTC employees or contractors regarding these data sets;
 - Objections to or concerns with NCTC acquisition of data sets belonging to other federal agencies received by the ODNI, including any correspondence with the agencies, the Attorney General or the National Security Council; and
 - NCTC mechanisms to correct or document the inaccuracy or unreliability of data obtained by NCTC, including the ODNI ISE Privacy Instruction and other requirements regarding data quality, data notice, and redress.
2. Records created since November 1, 2008 regarding the creation, development and operations of the Counterterrorism Data Layer, including:
- Legal memorandum concerning the creation, development and operations of the Counterterrorism Data Layer;
 - Data sets included in or contributing to the Counterterrorism Data Layer;
 - Documents detailing access requirements and use restrictions for the Counterterrorism Data Layer;
 - Training materials regarding the Counterterrorism Data Layer;
 - Contracts, requests for proposals, or other documents regarding the creation and maintenance of the Counterterrorism Data Layer by government contractors; and
 - Audits, investigations or reports detailing compliance or non-compliance with any pertinent laws, Executive Orders,

regulations, or policies, including by not limited to reports to the DNI privacy officer, the President's Intelligence Oversight Board.

3. Records created since November 1, 2008 including final memoranda, policies, procedures, directives, guidance, reports, legal analysis, inter and intra-agency correspondence including e-mails, and training materials relating to any automated data mining programs that are or will be used on NCTC data sets, or accessed by the NCTC including:
 - Documents detailing the clearly stated purpose, legal appropriateness, and demand for such data-mining programs;
 - Documents detailing the "sound rational basis" for the automated data mining program and each of its components, including any and all scientific foundations for the program and each of its components;
 - Documents detailing the frequency and effects of false positives, and the process/procedure for dealing with such occurrences;
 - Documents detailing any simulations, or laboratory-based testing of these data mining programs;
 - Requests for proposals and/or contracts from public or private sector laboratories to perform tests on each data mining program; and
 - Performance evaluations for each data mining program.
4. Records created since November 1, 2008 including final memoranda, policies, procedures, directives, guidance, reports, legal analysis, inter and intra-agency correspondence including e-mails, and training materials concerning complaints about, investigations of, and/or disciplinary actions related to the misuse or mishandling of U.S. person information as well as any investigations and/or reported legal violations concerning the implementation of the 2008 NCTC guidelines.
5. Records created since November 1, 2008 including final memoranda, policies, procedures, directives, guidance, reports, legal analysis, inter and intra-agency correspondence including e-mails, and training materials describing the process and/or procedures individuals may use to find out whether and what information about themselves is maintained in the

NCTC databases, and the process and/or procedures individuals may use to correct any inaccurate information in the system.

6. Records created since November 1, 2008 including final memoranda, policies, procedures, directives, guidance, reports, legal analysis, intra-agency correspondence including e-mails, and training materials regarding the financial and staffing resources required to implement the NCTC guidelines, including any cost-benefit analyses that have been conducted.
7. Intra-agency correspondence, correspondence with local, state or federal agencies, or memorandums of understanding created since November 1, 2008 regarding the implementation of and/or problems and concerns associated with the implementation of the NCTC guidelines.
8. *Director of Central Intelligence Directives (DCID) 6/6* of July 11, 2001, "Security Controls on the Dissemination of Intelligence Information," or successor ICD and Policies.
9. September 27, 2007 Memorandum of Agreement on the Establishment and Operation of the Interagency Threat Assessment and Coordination Group.
10. The Attorney General-approved procedures promulgated through Central Intelligence Agency Headquarters Regulation 7-1 of December 23, 1987, "Law and Policy Governing the Conduct of Intelligence Activities," as adopted by ODNI/NCTC, including any successor procedures (NCTC's EO 12333, § 2.3 Procedures).
11. National Counterterrorism Center Information Sharing Policy of February 27, 2006, "Rules of the Road," (NCTC Policy Document 11.2), or successor Policy.
12. National Counterterrorism Center Role-Based Access Policy of July 13, 2009, (NCTC Policy Document 11.7), or successor Policy.
13. ODNI Instruction 80.05, Implementation of Privacy Guidelines for Sharing Protected Information, September 2, 2009 ("ODNI ISE Privacy Instruction").
14. ODNI Instruction 80.02, Managing Breaches of Personally Identifiable Information, February 20, 2008.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic 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 possible, and that the records be provided in separate, bates-stamped files.

If any aspect of our request is unclear, we would welcome the opportunity to clarify it. We would also welcome the opportunity to discuss an appropriate processing schedule.

Finally, we request an estimated date by which you will complete the processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

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III. Application for Waiver or Limitation of Fees

A. A waiver of search, review, and duplication fees is warranted under 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 1700.6(b)(2).

The ACLU requests a waiver of search, review, and duplication fees because disclosure of the requested records 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); 32 C.F.R. § 1700.6(b)(2).

The ACLU makes this request specifically to further the public's understanding of the government's surveillance within the United States. As the news articles cited above make clear, disclosure of the requested records will "contribute significantly to public understanding." 5 U.S.C. § 552(a)(4)(A)(iii).

Disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost. The ACLU is a "non-profit, non-partisan, public interest organization." *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation and internal quotations omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (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 the Act").

B. A waiver of search and review fees is warranted under 5 U.S.C. § 551(a)(4)(A)(ii).

A waiver of search and review fees is warranted because the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii). The ACLU is a representative of the news media in that 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.” *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its public education department and web site. The web site 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 website specifically includes features on information obtained through FOIA requests. For example, the ACLU's “Accountability for 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 (<http://www.thetorturedatabase.org>) permitting webpage visitors to search the documents obtained through the FOIA. *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU 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 approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. 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 the Electronic Privacy Information Center 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”).

The ACLU also regularly publishes books,¹¹ “know your rights” publications,¹² fact sheets,¹³ and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. 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 the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to disseminate the information it receives to the public through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity.

* * *

¹¹ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights* (NYU Press 4th ed. 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).

¹² Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

¹³ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-ACLU_Fact_Sheet_UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), available at <http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act>.

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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

Alexander Abdo
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 18th floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Abdo', written in a cursive style.

Alexander Abdo
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