LEGAL DEPARTMENT



March 3, 2016

Headquarters Air Force / AAII (FOIA)
1000 Air Force Pentagon
Washington, D.C. 20330-1000
Fax: 571-256-3109
Email: usaf.pentagon.saf-aa-mbx.haf-foia-workflow@mail.mil

Department of the Army
Freedom of Information Act Office Suite 144
7701 Telegraph Road, Room 150
Alexandria, VA 22315-3905
Fax: 703-428-6522
Email: usarmy.belvoir.hqda-oaa-aha.mbx.rmda-foia@mail.mil

Commandant (CG-611)
Attn: FOIA Officer
U.S. Coast Guard Stop 7710
2703 Martin Luther King, Jr. Ave., SE
Washington, D.C. 20593-7710
Email: EFOIA@uscg.mil

Defense Intelligence Agency
Attn: DAN-1A (FOIA)
200 MacDill Blvd.
Washington, D.C. 20340-5100
Fax: 301-394-5356
Email: foia@dodiis.mil

Department of Energy
FOIA Requester Service Center
1000 Independence Ave., SW
Mail Stop MA-90
Washington, D.C. 20585
Fax: 202-586-0575
Email: FOIA-Central@hq.doe.gov

Department of Homeland Security
Office of Intelligence & Analysis
FOIA Officer / Requester Service Center Contact
Washington, D.C. 20528
Fax: 202-612-1936
Email: I&AFOIA@hq.dhs.gov

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT B. REMAR
TREASURER

FOIA Request
Department of the Treasury
Washington, D.C. 20220
Fax: 202-622-3895

Chief, Freedom of Information / Privacy Act Unit, FOI / Records Management Section
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, VA 22152
Fax: 202-307-8556
Email: dea.foia@usdoj.gov

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Head, FOIA/PA
Headquarters U.S. Marine Corps (ARSF), FOIA/PA Section (ARSF)
3000 Marine Corps Pentagon
Washington, D.C. 20350-3000
Fax: 703-614-6287
Email: hqmcfoia@usmc.mil

FOIA Contact
Mail Stop S01-EGM
7500 GEOINT Drive
Springfield, VA 22150
Fax: 571-557-3130
Email: foianga@nga.mil

FOIA Contact
Attn: OCIO / Information Review and Release Group
14675 Lee Road
Chantilly, VA 20151-1715
Fax: 703-227-9198

FOIA Contact, Chief of Naval Operations
DNS-36
2000 Navy Pentagon
Washington, D.C. 20350-2000
Fax: 202-685-6580

Federal Bureau of Investigation
FOI/PA Request
Record / Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: 540-868-4391

Email: foiparequest@ic.fbi.gov

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

Office of Freedom of Information
Department of Defense
1155 Defense Pentagon, Room 2C757
Washington, D.C. 20301-1155
Fax: 571-372-0500

National Security Agency
FOIA/PA Office (DJ4)
9800 Savage Road, Suite 6248
Ft. George G. Meade, MD 20755-6248
Fax: 443-479-3612

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Director, Information Management Division
Office of the Director of National Intelligence
Washington, D.C. 20511
Fax: 703-874-8910
Email: dni-foia@dni.gov

Office of Information Programs and Services
A/GIS/IPS/RL
U.S. Department of State
Washington, D. C. 20522-8100
Fax: 202-261-8579

FOIA/PA Mail Referral Unit
Justice Management Division
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
Fax: 202-261-8579

Re: Request Under Freedom of Information Act (Expedited Processing Requested)

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 Information Act ("FOIA") request (the "Request") for records pertaining to the use of prepublication review processes in Intelligence Community agencies.

I. Background

For many decades, the government has required a vast number of its employees to submit any works—written and oral, fiction and non-fiction—that discuss their government service for security review before public release.[2] In recent years, the government's "prepublication review" processes have grown increasingly far-reaching and burdensome, resulting in escalating public and congressional concern about their legality and fairness.[3] The details of these processes are not governed by any uniform executive-branch policy. Instead, they are determined by individual agencies' regulations, which have varying standards and requirements.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

[1] The American Civil Liberties Union Foundation is a 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 rights and 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, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

[2] *See* Jack Goldsmith & Oona Hathaway, *The Government's Prepublication Review Process is Broken*, Wash. Post, Dec. 25, 2015, http://wapo.st/1YTgg1j; Jack Goldsmith & Oona Hathaway, *The Scope of the Prepublication Review Problem, and What to Do About It*, Lawfare, Dec. 30, 2015, https://www.lawfareblog.com/scope-prepublication-review-problem-and-what-do-about-it; Oona Hathaway & Jack Goldsmith, *Path Dependence and the Prepublication Review Process*, Just Security, Dec. 28, 2015, https://www.justsecurity.org/28552/path-dependence-prepublication-review-process; Oona Hathaway & Jack Goldsmith, *More Problems with Prepublication Review*, Just Security, Dec. 28, 2015, https://www.justsecurity.org/28548/problems-prepublication-review/; Kevin Casey, Note, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 Colum. L. Rev. 417 (2015).

[3] *See, e.g.*, Michael V. Hayden, *Playing to the Edge: American Intelligence in the Age of Terror* 426 (2016) ("Since all of my writing has to be cleared for classification, I dutifully submitted the piece and was told that no articles about drones would be cleared *regardless of the content*. I actually think that's a misuse of the review process, but beyond that, it's just plain stupid."); *see also id.* at xii, 121–22.

There is very little publicly available information regarding these policies, or the bodies within agencies that administer them.[4] What little information is public, however, makes clear that prepublication-review criteria are frequently overbroad, and that the process is both riddled with delays and susceptible to abuse by the officials overseeing it. These known features of the process raise serious questions about whether prepublication review, as currently constituted, violates authors' First Amendment rights to speak and the public's First Amendment right to receive important information about the government.[5]

In an effort to supplement the public record with information about agencies' prepublication review policies and practices, and to identify their potential impacts on free-speech rights and government transparency and accountability, the ACLU seeks such information through this FOIA request.

II. Requested Records

The ACLU seeks the release of records that are or contain the following:

(1) policies, standards, and guidance related to prepublication review;

(2) final legal analyses of past, present, or proposed prepublication-review requirements;

(3) final decisions of officials conducting prepublication reviews;

(4) correspondence with former agency employees (or their representatives) who have submitted materials for prepublication review since January 1, 2009;

(5) statistics relating to prepublication review, including but not limited to information documenting the total numbers of individuals who have submitted works for review, the total number of works submitted for review, the total number of submissions approved without change, the total number of submissions returned with proposed redactions or other

[4] The authorities within agencies that administer prepublication review standards appear to have varying names. For example, the Central Intelligence Agency refers to a "Publications Review Board"; the Federal Bureau of Investigation refers to a "Prepublication Review Office"; and the National Security Agency refers to a "Prepublication Review Authority." *See* FBI, Prepublication Review Policy Guide (June 4, 2015), http://1.usa.gov/1LBt63I; NSA, Policy 1-30 ¶ 5(h) (Oct. 28, 2014), http://1.usa.gov/1LBt9fL; John Hollister Hedley, *Reviewing the Work of CIA Authors: Secrets, Free Speech, and Fig Leaves*, CIA.gov (May 8, 2007), http://1.usa.gov/1LBteAg.

[5] *See, e.g.*, Steven Aftergood, *Fixing Pre-Publication Review: What Should Be Done?*, Just Security, Jan 15, 2016, https://www.justsecurity.org/28827/fixing-pre-publication-review-done (suggesting that the process "has become dysfunctional, overstepping legitimate national security boundaries and infringing on freedom of speech as well as the public's right to know").

modifications, the total number of pending submissions, and the duration of prepublication review processes.

(6) titles, subject matters, and dates of works submitted for prepublication review; and

(7) information about enforcement proceedings instituted or contemplated on the basis of violations of prepublication-review requirements, including breach-of-contract actions, agency administrative proceedings, and civil or criminal litigation.

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 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).[6] There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgent[ly]" needed by an organization primarily engaged in disseminating information "to inform the public about 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 the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 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").[7]

---

[6] *See also* 6 C.F.R. § 5.5(d); 10 C.F.R. § 1004.5(d)(6); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(e); 31 C.F.R. § 1.5(e); 32 C.F.R. §§ 1700.12, 1900.34(c).

[7] 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

The ACLU regularly publishes a newsletter that reports on and analyzes civil liberties-related current events. The newsletter is disseminated 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 email. The electronic newsletter is disseminated to approximately 300,000 people. Both of these newsletters 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,[8] and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.[9]

---

disseminating information." *See, e.g.*, *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

[8] *See, e.g.*, Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Using "Mosque Outreach" for Intelligence Gathering (Mar. 27, 2012), http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach" (Dec. 1, 2011), https://www.aclu.org/news/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community-outreach; Press Release, American Civil Liberties Union, FOIA Documents from FBI Show Unconstitutional Racial Profiling (Oct. 20, 2011), http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling; Press Release, American Civil Liberties Union, Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem (Oct. 19, 2011), http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse; Press Release, American Civil Liberties Union, ACLU Lawsuit Seeks Information from FBI on Nationwide System for Collecting "Suspicious Activity" Information (Aug. 25, 2011), https://www.aclu.org/national-security/aclu-lawsuit-seeks-information-fbi-nationwide-system-collecting-suspicious; Press Release, American Civil Liberties Union, New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU (June 24, 2009), http://www.aclu.org/ national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu.

[9] *See, e.g.*, Brad Knickerbocker, *ACLU: FBI Guilty of "Industrial Scale" Racial Profiling*, The Christian Science Monitor, Oct. 21, 2011, http://www.csmonitor.com/USA/Justice/2011/1021/ACLU-FBI-guilty-of-industrial-scale-racial-profiling; Joshua E.S. Phillips, *Inside the Detainee Abuse Task Force*, The Nation, May 13, 2011, http://www.thenation.com/article/inside-detainee-abuse-task-force/ (quoting ACLU staff attorney Alexander Abdo); Scott Shane & Benjamin Weiser, *Dossier Shows Push for More Attacks After 9/11*, N.Y. Times, Apr.

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. Since 2011 alone, ACLU national projects have published and disseminated dozens of reports, many of which include a description and analysis of government documents obtained through FOIA requests.[10] 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* http://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 interactive features. *See* http://www.aclu.org/multimedia. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many

---

25, 2011, http://nyti.ms/ty47ZA (quoting ACLU project director Hina Shamsi); Eric Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 21, 2011, http://nyti.ms/tgFpkd (quoting ACLU deputy legal director Jameel Jaffer).

[10] *See, e.g.*, ACLU, FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process (June 26, 2015), https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process; ACLU, ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems (Oct. 29, 2013), https://www.aclu.org/aclu-eye-fbi-documents-reveal-lack-privacy-safeguards-and-guidance-governments-suspicious-activity-0; ACLU, Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority (Sept. 2013), https://www.aclu.org/unleashed-and-unaccountable-fbis-unchecked-abuse-authority; Yale Law School and ACLU, Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors (June 2012), https://www.aclu.org/sites/default/files/field_document/hrp_traffickingreport_web_0.pdf; Human Rights Watch and ACLU, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System (July 2010), https://www. aclu.org/files/assets/ usdeportation0710_0.pdf; ACLU, Reclaiming Patriotism: A Call to Reconsider the Patriot Act (March 2009), https://www.aclu.org/files/pdfs/safefree/patriot_report_20090310.pdf; ACLU, The Excluded: Ideological Exclusion and the War on Ideas (Oct. 2007), https://www.aclu.org/sites/default/files/field_document/the_excluded_report.pdf; ACLU, History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement (May 2007), https://www.aclu.org/sites/default/files/field_document/asset_upload_file893_29902.pdf; ACLU, No Real Threat: The Pentagon's Secret Database on Peaceful Protest (Jan. 2007), https://www.aclu.org/report/no-real-threat-pentagons-secret-database-peaceful-protest; ACLU, Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You (July 2003), http://www.aclu.org/FilesPDFs/spies_report.pdf.

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, as well as 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, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.[11] For example, the ACLU's "Predator Drones FOIA" webpage, https://www.aclu.org/national-security/predator-drones-foia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, 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 FOIA documents relating to government policies on rendition, detention, and interrogation.[12]

The ACLU has also published a number of charts and explanatory materials 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 created an original chart that provides the public and news media with a comprehensive summary of index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.[13] Similarly, the ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act[14]; a chart of original statistics about the Defense Department's use of National

---

[11] *See, e.g.*, https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process; https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights; http://www.aclu.org/national-security/predator-drone-foia; http://www.aclu.org/national-security/anwar-al-awlaki-foia-request; https://www.aclu.org/cases/aclu-v-department-defense; http://www.aclu.org/mappingthefbi; https://www.aclu.org/cases/bagram-foia; https://www.aclu.org/national-security/csrt-foia; http://www.aclu.org/safefree/nsaspying/30022res20060207.html; https://www.aclu.org/patriot-foia; http://www.aclu.org/spyfiles; http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html; https://www.aclu.org/national-security/ideological-exclusion.

[12] http://www.torturedatabase.org. *See also* https://www.aclu.org/national-security/aclu-v-department-defense.

[13] https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

[14] https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf.

Security Letters based on its own analysis of records obtained through FOIA[15]; and an analysis of documents obtained through FOIA about FBI surveillance flights over Baltimore.[16]

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

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).[17] Specifically, the requested records relate to government agencies' prepublication review processes. As discussed in Part I, *supra*, the lawfulness and effectiveness of government agencies' prepublication review processes—and the related problem of overclassification of government information[18]—are the subject of widespread public controversy and media attention.[19] 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.[20]

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

---

[15] https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

[16] https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights.

[17] *See also* 6 C.F.R. § 5.5(d)(ii); 10 C.F.R. § 1004.5(d)(6); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(e)(ii); 31 C.F.R. § 1.5(e)(2)(ii); 32 C.F.R. §§ 1700.12(c)(2), 1900.34(c)(2).

[18] *See, e.g.*, Steven Lee Myers & Matt Apuzzo, *As Presidential Campaign Unfolds, So Do Inquiries Into Clinton's Emails*, N.Y. Times, Mar. 2, 2016, http://nyti.ms/1LBvur2; Abbe David Lowell, *The Broken System of Classifying Government Documents*, N.Y. Times, Feb. 29, 2016, http://nyti.ms/1LBvnMc.

[19] *See supra* notes 2, 3, and 5, and accompanying text.

[20] *See id.*

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).[21]

As discussed above, news accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the government's prepublication-review process is publicly available, the records sought are certain to contribute significantly to the public's understanding of the law, policies, and process being applied by government agencies in their reviews of authors' works.

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 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)).

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a "representative[] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). 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)[22]; *see also Nat'l Sec. Archive v. DOD*, 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. DOD*, 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. DOJ*, 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

[21] *See also* 6 C.F.R. § 5.11(k); 10 C.F.R. § 1004.9(a)(8); 22 C.F.R. § 171.17; 28 C.F.R. § 16.10(k); 31 C.F.R. § 1.7(b)-(d); 32 C.F.R. §§ 1700.6(b), 1900.13(b).

[22] *See also* 6 C.F.R. § 5.11(b)(6), (d)(1), (k)(2)(iii), (k)(3)(ii); 10 C.F.R. § 1004.9(a)(8), (b)(3); 22 C.F.R. § 171.15(c); 28 C.F.R. § 16.10(b)(6), (c)(1)(i), (d)(1); 31 C.F.R. § 1.7(a)(3); 32 C.F.R. §§ 1700.6(i)(2), 1900.13(i)(2).

distinct work, and distributes that work to an audience"); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is therefore a "representative of the news media" for the same reasons 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*, No. 13-0920, 2015 WL 5120863 (D.C. Cir. Aug. 28, 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).[23]

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."[24] As was true in those instances, the ACLU meets the requirements for a fee waiver here.

---

[23] 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 / public education activities. *See, e.g.*, *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

[24] 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 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 2009, the CIA granted a fee waiver with respect to the same request. 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. Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. 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 on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted

* * *

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); 6 C.F.R. § 5.5(d)(4) (Department of Homeland Security); 10 C.F.R. § 1004.5(d)(7) (Department of Energy); 22 C.F.R. § 171.12(b) (State Department); 28 C.F.R. § 16.5(e) (Department of Justice); 31 C.F.R. § 1.5(e)(4) (Treasury Department); 32 C.F.R. §§ 1700.12(b) (Department of Defense); *id.* § 1900.34(c) (Central Intelligence Agency).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions 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.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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

Benjamin Good
American Civil Liberties Union
125 Broad Street—18th Floor
New York, NY 10004
T: 212.549.2500
F: 212.549.2654
bgood@aclu.org

---

by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,

Benjamin Good
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, NY 10004
T: 212.549.2500
F: 212.549.2654
bgood@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION