

KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University



January 27, 2020

via FedEx

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Ft. George G. Meade, MD 20755-6932

Central Intelligence Agency
Attn: Information and Privacy Coordinator
Washington, DC 20505

U.S. Department of State
Office of Information Programs and Services
2201 C Street N.W., Suite B266
Washington, DC 20520-0000

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
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Department of Justice
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Re: Freedom of Information Act Request
Expedited Processing Requested

To whom it may concern,

The Knight First Amendment Institute at Columbia University, the American Civil Liberties Union, and the American Civil Liberties Union Foundation (the "Requesters") submit this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records pertaining to agency prepublication review of writings by certain former government officials.

I. Background

Millions of current and former government employees are prohibited from publishing manuscripts that discuss their government service without first submitting the manuscripts for "prepublication review."[1] In recent years, the prepublication-review system has become dysfunctional and politicized, resulting in escalating public and congressional concern.[2] The dysfunction and politicization of the prepublication-review system raises serious First Amendment concerns.[3]

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[1] *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/pathdependence-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).

[2] *See, e.g.*, 115 Cong. Rec. H3300 (daily ed. May 3, 2017) (statement of Rep. Nunes); 115 Cong. Rec. S2750 (daily ed. May 4, 2017) (statement of Sen. Burr); 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.

[3] *See, e.g.*, Complaint, *Edgar* v. *Maguire*, No. 8:19-cv-985-GJH (D. Md. Apr. 2, 2019) (challenging the constitutionality of four agencies' prepublication-review processes); Steven Aftergood, *Fixing Pre-Publication Review: What Should Be Done?*, Just Security (Jan 15, 2016), https://www.justsecurity.org/28827/fixing-prepublication-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").

The Requesters have filed four previous FOIA requests for records relating to various aspects of the prepublication-review process, including two requests for records relating to the prepublication-review procedures of various agencies,[4] and two requests for records relating to the review of writings by certain former government officials.[5]

Recent allegations that the prepublication-review system is being used to suppress or delay speech critical of the Trump administration raise new questions about how the system is being administered.[6] Accordingly, the Requesters now seek additional records.

II. Records Requested

The Requesters seek the following records with respect to the individuals listed below:

1. all correspondence between the government and any of the individuals listed below relating to the prepublication review or publication of the material listed below;

2. all inter- and intra-agency correspondence relating to the prepublication review or publication of the material by any of the individuals listed below; and

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[4] A copy of the requests may be found at https://knightcolumbia.org/documents/0580ee49ef/2016.03.03_PPR-FOIA-1-Request.pdf and https://knightcolumbia.org/documents/102ef8df44/2018.05.11_ECF-1-2_Attachment-B.pdf.

[5] A copy of the requests may be found at https://knightcolumbia.org/documents/d453cd39bc/2018.05.11_ECF-1-1_Attachment-A.pdf and https://knightcolumbia.org/documents/5004f5812f/2018.05.11_ECF-1-3_Attachment-C.pdf.

[6] *See, e.g.*, Complaint, *Snodgrass v. Dep't of Defense*, No. 19-cv-2607 (D.D.C. Aug. 29, 2019); Maggie Haberman & Michael S. Schmidt, *Trump Tied Ukraine Aid to Inquiries He Sought, Bolton Book Says*, N.Y. Times (Jan. 26, 2020), https://www.nytimes.com/2020/01/26/us/politics/trump-bolton-book-ukraine.html ("The White House could use the pre-publication review process, which has no set time frame, to delay or even kill the book's publication or omit key passages"); Chris Mills Rodrigo, *McCabe Concerned About 'Unfair Treatment' After Book Release Delayed by FBI*, Hill (Oct. 11, 2018), https://thehill.com/blogs/blog-briefing-room/news/410964-mccabe-concerned-about-unfair-treatment-after-book-delayed-over; Brett Samuels, *Bolton Lawyer Slams 'Corrupted' White House Review Process After Book Leak*, Hill (Jan. 26, 2020), https://thehill.com/homenews/administration/480027-bolton-lawyer-slams-corrupted-white-house-review-process-after-book.

3. all records reflecting decisions—interim, final, and post-appeal—related to the prepublication review of the material published by any of the individuals listed below.

Specifically, we seek the above records with respect to the publications and appearances listed under each named individual below:

1. Elliot Ackerman, former U.S. Marine

    a. *Places and Names: On War, Revolution, and Returning* (2019).

    b. *A New Generation Enlists for a War Older than They Are*, Time (Oct. 10, 2019), https://time.com/longform/marines.

    c. *What Did Our Generation Learn in Iraq and Afghanistan?*, Daily Beast (May 27, 2018), https://www.thedailybeast.com/what-did-our-generation-learn-in-iraq-and-afghanistan.

    d. *Goodbye, My Brother*, Esquire (Mar. 23, 2017), https://www.esquire.com/news-politics/a53669/goodbye-my-brother.

2. Nada Bakos, former CIA Analyst

    a. *The Targeter: My Life in the CIA, Hunting Terrorists and Challenging the White House* (2019).

3. John Bolton, former National Security Advisor

    a. *The Legal Case for Striking North Korea First*, Wall St. J. (Feb. 28, 2018), https://www.wsj.com/articles/the-legal-case-for-striking-north-korea-first-1519862374.

    b. *The Iran Deal Was Betrayed by Its Own Abysmal Record*, Wash. Post (May 10, 2018), https://www.washingtonpost.com/opinions/john-bolton-the-iran-deal-was-betrayed-by-its-own-abysmal-record/2018/05/09/c8f6bc9a-53bf-11e8-9c91-7dab596e8252_story.html.

    c. *The Room Where It Happened* (forthcoming Mar. 17, 2020).[7]

[7] To be published by Simon & Schuster. *See Title, Release Date Revealed for Bolton Memoir*, Hill (Jan. 26, 2020), https://thehill.com/homenews/media/480030-title-release-date-revealed-for-bolton-memoir.

4. John Brennan, former Director of the CIA

    a. *Untitled* (forthcoming 2020).[8]

    b. All appearances from August 1, 2019 to December 31, 2019 as an analyst for NBC News and MSNBC, including any blanket approvals to appear on the networks.

        Examples from this period include, but are not limited to:

        (i) *Former CIA Director John Brennan on IG Report: Trump Was 'Fully Aware' of Russian Interference*, NBC News (Dec. 10, 2019), https://www.nbcnews.com/video/former-cia-director-john-brennan-on-ig-report-trump-was-fully-aware-of-russian-interference-74867781780.

        (ii) *Brennan: W.H. Handling of Trump's Ukraine Call 'An Aberration*,' MSNBC (Oct. 29, 2019), http://www.msnbc.com/rachel-maddow/watch/brennan-w-h-handling-of-trump-s-ukraine-call-an-aberration-72292421910.

        (iii) *John Brennan on 'All Roads with Trump Lead to Putin*,*'* MSNBC (Oct. 16, 2019), http://www.msnbc.com/the-last-word/watch/john-brennan-on-all-roads-with-trump-lead-to-putin-71439941790.

5. Josh Campbell, former Special Assistant to the FBI Director

    a. *Crossfire Hurricane: Inside Donald Trump's War on the FBI* (2019).

6. Ash Carter, former Secretary of Defense

    a. *Inside the Five-Sided Box: Lessons from a Lifetime of Leadership in the Pentagon* (2019).

[8] To be published by Celadon Books. *See* Press Release, Celadon Books, Book Deal for Former CIA Director John Brennan (Nov. 28, 2018), https://celadonbooks.com/news-posts/book-deal-for-former-cia-director-john-brennan.

7. James Clapper, former Director of National Intelligence

    a. *Facts and Fears: Hard Truths from a Life in Intelligence* (2018).

    b. All appearances from August 1, 2019 to December 31, 2019 as an analyst for CNN, including any blanket approvals to appear on the network.

        Examples from this period include, but are not limited to:

        (i) *Former Intel Chief Compares Al-Baghdadi and Bin Laden Raids*, CNN (Oct. 28, 2019), https://www.cnn.com/videos/politics/2019/10/29/trump-obama-situation-room-photos-clapper-ctn-vpx.cnn.

        (ii) *Clapper: Trump Administration Is Sending Us This Message*, CNN (Oct. 7, 2019), https://www.cnn.com/search/?size=10&q=%22james%20clapper%22&page=1&type=video.

        (iii) *Clapper Says Blocking Aid to Ukraine is a Gift to Russia*, CNN (Aug. 29, 2019), https://www.cnn.com/search/?size=10&q=%22james%20clapper%22&page=1&type=video.

8. Amaryllis Fox, former CIA covert agent

    a. *Life Undercover: Coming of Age in the CIA* (2019).

9. Robert Gates, former Secretary of Defense

    a. *Passion for Leadership: Lessons on Change and Reform from Fifty Years of Public Service* (2016).

    b. *Sizing Up the Next Commander-in-Chief*, Wall St. J. (Sept. 16, 2016), https://www.wsj.com/articles/sizing-up-the-next-commander-in-chief-1474064606.

    c. *Ending DACA Will Hurt Immigrant Troops*, N.Y. Times (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/opinion/robert-gates-daca-immigrant-troops.html.

    d. *To End the Shutdown, Try Thinking Big on Immigration*, Wall St. J. (Jan. 18, 2019), https://www.wsj.com/articles/to-end-

the-shutdown-try-thinking-big-on-immigration-11547853380.

e. *Exercise of Power: America and the Post-Cold War World* (forthcoming 2020).[9]

10. Mike German, former FBI undercover agent

    a. *Disrupt, Discredit, and Divide: How the New FBI Damages Democracy* (2019).

11. Nikki Haley, former U.S. Ambassador to the United Nations

    a. *When I Challenge the President, I Do It Directly. My Anonymous Colleague Should Have, Too*., Wash. Post (Sept. 7, 2018), https://www.washingtonpost.com/opinions/when-i-challenge-the-president-i-do-it-directly-my-anonymous-colleague-should-have-too/2018/09/07/d453eaf6-b2ae-11e8-9a6a-565d92a3585d_story.html.

    b. *With All Due Respect: Defending America with Grit and Grace* (2019).

12. Michael Hayden, former NSA Director; former CIA Director; former Deputy Director of National Intelligence

    a. *The End of Intelligence*, N.Y. Times (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/opinion/sunday/the-end-of-intelligence.html.

    b. *The Assault on Intelligence: American National Security in an Age of Lies* (2018).

    c. All appearances from January 1, 2018 to May 31, 2018 as an analyst for CNN, including any blanket approvals to appear on the network.

       Examples from this period include, but are not limited to:

       (i) *Hayden: New Iran Approach a Heavy Lift*, CNN (May 21, 2018), https://www.cnn.com/videos/tv/2018/05/21/amanpour-michael-hayden.cnn.

[9] To be published by Knopf. *See* Penguin Random House, https://www.penguinrandomhouse.com/books/550375/exercise-of-power-by-robert-m-gates.

(ii) *Ex-CIA Chief: Here's What Trump Should Say About Putin*, CNN (Apr. 3, 2018), https://www.cnn.com/videos/tv/2018/04/03/lead-hayden-trump-russia-putin-syria-live.cnn.

(iii) *Hayden on McMaster: Trump Abusing Members of His Inner Circle*, CNN (Feb. 20, 2018), https://www.cnn.com/videos/tv/2018/02/20/lead-hayden-2-trump-russia-investigation-mcmaster-live.cnn.

13. Mary Jennings Hegar, former U.S. Air Force service member

    a. *Shoot Like a Girl: One Woman's Dramatic Fight in Afghanistan and on the Home Front* (2017).

14. John Kerry, former Secretary of State

    a. *Every Day Is Extra* (2018).

    b. *Forget Trump. We All Must Act on Climate Change*, N.Y. Times (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/opinion/kerry-climate-change-trump.html.

    c. *Disband Your Climate Denial Panel, Mr. President*, Wash. Post (Feb. 25, 2019), https://www.washingtonpost.com/opinions/john-kerry-disband-your-climate-denial-panel-mr-president/2019/02/25/002f6b0e-3924-11e9-aaae-69364b2ed137_story.html.

    d. *Trump Has Formally Pulled the U.S. out of the Paris Agreement. This is a Dark Time for America*, Wash. Post (Nov. 4, 2019), https://www.washingtonpost.com/opinions/2019/11/04/trump-just-formally-pulled-us-out-paris-agreement-this-is-dark-day-america.

    e. *Diplomacy Was Working until Trump Abandoned It*, N.Y. Times (Jan. 9, 2020), https://www.nytimes.com/2020/01/09/opinion/john-kerry-trump-iran.html.

15. Chelsea Manning, former U.S. Army intelligence analyst

    a. *Untitled* (forthcoming 2020).[10]

16. James N. Mattis, former Secretary of Defense

    a. *Call Sign Chaos: Learning to Lead* (2019).

17. Andrew McCabe, former Deputy Director of the FBI

    a. *Not In My Worst Nightmares Did I Dream My FBI Career Would End This Way*, Wash. Post (Mar. 23, 2018), https://www.washingtonpost.com/opinions/andrew-mccabe-not-in-my-worst-nightmares-did-i-dream-my-fbi-career-would-end-this-way/2018/03/23/5ff8fd8c-2eb9-11e8-8688-e053ba58f1e4_story.html.

    b. *Every Day Is a New Low in Trump's White House*, Atlantic (Feb. 14, 2019), https://www.theatlantic.com/politics/archive/2019/02/andrew-mccabe-fbi-book-excerpt-the-threat/582748.

    c. *The Threat: How the FBI Protects America in the Age of Terror and Trump* (2019).

    d. All appearances from September 1, 2019 to December 31, 2019 as a contributor for CNN, including any blanket approvals to appear on the network.

       Examples from this period include, but are not limited to:

       (i) *McCabe: We've Never Seen an Oval Office Photo Like This*, CNN (Dec. 10, 2019), https://www.cnn.com/videos/politics/2019/12/10/lavrov-trump-meeting-mccabe-ebof-vpx.cnn.

       (ii) *McCabe on ISIS Raid: Credit Trump for 'Tough Decision,'* CNN (Oct. 27, 2019), https://www.cnn.com/search?size=10&q=andrew%20mccabe&type=video.

       (iii) *McCabe: Whistleblower's Actions Took Incredible Courage*, CNN (Sept. 19, 2019), https://www.cnn.com/

[10] To be published by Farrar, Straus and Giroux. *See* Macmillan Publishers https://us.macmillan.com/books/9780374279271.

videos/politics/2019/09/19/dni-whistleblower-trump-mccabe-newday-sot-vpx.cnn.

18. K.T. McFarland, former Deputy National Security Advisor

    a. *Revolution: Trump, Washington and "We the People"* (forthcoming 2020).[11]

    b. All appearances from September 1, 2019 to December 31, 2019 as an analyst for Fox News, including any blanket approvals to appear on the network.

       Examples from this period include, but are not limited to:

       (i) *KT McFarland Predicts Trump Would Endorse Iran Regime Change If Citizens Demand It*, Fox News (Nov. 26, 2019), https://video.foxnews.com/v/6109190194001#sp=show-clips.

       (ii) *KT McFarland Speaks for the First Time on Michael Flynn: It's Time to Investigate the Investigators*, Fox News (Nov. 5, 2019), https://video.foxnews.com/v/6100717362001#sp=show-clips.

       (iii) *KT McFarland Praises President Trump's Address to the United Nations General Assembly*, Fox News (Sept. 24, 2019), https://video.foxnews.com/v/6089071045001#sp=show-clips.

19. H.R. McMaster, former National Security Advisor

    a. *America First Doesn't Mean America Alone*, Wall St. J. (May 30, 2017), https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426.

    b. *Battlegrounds* (forthcoming 2020).[12]

[11] To be published by Post Hill Press. *See* Simon & Schuster, https://www.simonandschuster.com/books/Revolution/KT-McFarland/9781642934045.

[12] To be published by HarperCollins Publishers. *See* Hillel Italie, *H.R. McMaster Book Scheduled for 2020*, Associated Press (July 11, 2018) https://apnews.com/7ed471769a914e369448173f41866049/H.R.-McMaster-book-scheduled-for-2020.

20. Robert O'Neill, former U.S. Navy Seal

    a. *The Operator: Firing the Shots that Killed Osama bin Laden and My Years as a SEAL Team Warrior* (2017).

21. Samantha Power, former U.S. Ambassador to the United Nations

    a. *The Education of an Idealist: A Memoir* (2019).

22. Susan Rice, former National Security Advisor

    a. *Tough Love: My Story of the Things Worth Fighting For* (2019).

23. Sean Spicer, former White House Press Secretary; White House Communications Director

    a. *The Briefing: Politics, the Press, and the President* (2018).

24. Matthew Whitaker, former Acting Attorney General

    a. *Mueller's Investigation of Trump Is Going Too Far*, CNN (Nov. 7, 2018), https://www.cnn.com/2017/08/06/opinions/rosenstein-should-curb-mueller-whittaker-opinion/index.html.

    b. *Above the Law: The Inside Story of How the Justice Department Tried to Subvert President Trump* (forthcoming 2020).[13]

25. John Yoo, former Deputy Assistant Attorney General

    a. *Executive Power Run Amok*, N.Y. Times (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html.

    b. *It's Now Impeachment or Bust. As It Should Be*, Wash. Post (Apr. 19, 2019), https://www.washingtonpost.com/opinions/john-yoo-its-now-impeachment-or-bust-as-it-should-be/2019/04/19/e1919860-6214-11e9-9ff2-abc984dc9eec_story.html.

[13] To be published by Regnery Publishing. *See* Regnery Publishing, https://www.regnery.com/9781684510498/above-the-law.

c. *Beware of Impeaching Trump. It Could Hurt the Presidency*, N.Y. Times (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/opinion/ukraine-trump.html.

d. *No, I Didn't Call Alexander Vindman a Spy. But Ukraine Did Engage in Espionage.*, USA Today (Nov. 1, 2019), https://www.usatoday.com/story/opinion/2019/11/01/john-yoo-alexander-vindman-ukraine-espionage-testimony-column/4111757002/.

e. *Defender in Chief: How Donald Trump Is Fighting for the Constitution* (forthcoming 2020).[14]

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unduly burdensome, we ask that you give us an opportunity to narrow the scope of our request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

We ask that you provide responsive electronic records in their native file format. *See* 5 U.S.C. § 552(a)(3)(B).

III. Application for Expedited Processing

The Requesters seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a "compelling need" for the documents sought because the information they contain 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 Requesters are primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The Requesters are "primarily engaged in disseminating information" within the meaning of FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II).

The Knight First Amendment Institute is an organization at Columbia University dedicated to defending and strengthening the freedoms of speech and the press in the digital age. Research and public education are central to the Institute's mission. Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press

[14] To be published by Macmillan Publishers. *See* Macmillan Publishers, https://us.macmillan.com/books/9781250269577.

and the public are among the core activities the Institute performs. *See, e.g.*, *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").

One priority of the Knight Institute's work is "ensuring access to information necessary for self-government."[15] The Institute seeks "to broaden public access to information through changes in government policy and the law" so that the public has the requisite information to "hold the powerful accountable and participate fully in the process of self-government."[16] To do this, the Institute disseminates information about government activity—including information about government activity obtained under FOIA—through a variety of means, including its website,[17] Twitter account,[18] press releases,[19] blog posts,[20] op-eds,[21] and regular

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[15] *See About the Knight Institute*, Knight First Amendment Institute, https://knightcolumbia.org/page/about-the-knight-institute.

[16] *Id.*

[17] *See* Knight First Amendment Institute, https://knightcolumbia.org.

[18] *See* Knight First Amendment Institute (@knightcolumbia), Twitter, https://twitter.com/knightcolumbia (Knight Institute account with over 10,000 followers).

[19] *Knight Institute Calls on DOJ's Executive Office for Immigration Review to Suspend Policy Silencing Immigration Judges*, Knight First Amendment Institute (Jan. 6, 2020), https://knightcolumbia.org/content/knight-institute-calls-on-dojs-executive-office-for-immigration-review-to-suspend-policy-silencing-immigration-judges (describing an agency policy obtained through FOIA).

[20] *See, e.g.*, Carrie DeCell & Harsha Panduranga, *Social Media Vetting of Visa Applicants Violates the First Amendment*, Just Security (Dec. 6, 2019), https://www.justsecurity.org/67627/social-media-vetting-of-visa-applicants-violates-the-first-amendment; Carrie DeCell, *We Need to Know More About Government Searches of Travelers' Electronic Devices*, Just Security (Sept. 15, 2017), https://www.justsecurity.org/45058/lawsuit-underscores-disclosures-government-searches-travelers-electronic-devices; Ramya Krishnan & Trevor Timm, *Report Reveals New Details about DOJ's Seizing of AP Phone Records*, Colum. J. Rev. (May 23, 2019), https://www.cjr.org/watchdog/doj-ap-phone-records.php; Ramya Krishnan, *More Questions Than Answers from DOJ Letter About Journalist Surveillance*, Colum. J. Rev. (July 13, 2018), https://www.cjr.org/united_states_project/surveillance-justice-department-reporters-sessions.php; Ramya Krishnan, *Comey's Book and Prepublication Review*, Just Security (Apr. 16, 2018), https://www.justsecurity.org/54960/comeys-book-prepublication-review.

[21] *See, e.g.*, Alex Abdo, *Facebook Is Shaping Public Discourse. We Need to Understand How*, Guardian (Sept. 15, 2018),

engagement with the press.[22] The Institute also publishes records obtained through FOIA in "Reading Rooms" on the Institute's website, which allows the public to search, filter, and view the records.[23]

Through its research program, the Institute has published two influential essay series, one focused on emerging threats to the system of free expression and the other focused on reimagining the First Amendment in the digital age.[24] In addition, the Institute has convened two research symposia—drawing practitioners, lawyers, academics, and journalists—to debate, discuss, and reflect on key issues in First Amendment doctrine. The first, "A First Amendment for All? Free Expression in an Age of Inequality," was held in March 2018;[25] the second, "The Tech Giants, Monopoly Power, and Public Discourse," was held in November 2019;[26] and a third, "Data and

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https://www.theguardian.com/commentisfree/2018/sep/15/facebook-twitter-social-media-public-discourse.

[22] *See* Cora Currier, *Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process*, Intercept (Sept. 17, 2018), https://theintercept.com/2018/09/17/journalists-fisa-court-spying (reporting on DOJ rules obtained by the Knight Institute under FOIA); Ellen Nakashima, *U.S. Spy Agencies Sued for Records on Whether They Warned Khashoggi of Impending Threat of Harm*, Wash. Post (Nov. 20, 2018), https://www.washingtonpost.com/world/national-security/us-spy-agencies-sued-for-records-on-whether-they-warned-khashoggi-of-impending-threat-of-harm/2018/11/20/21ef3750-ed21-11e8-8679-934a2b33be52_story.html (describing FOIA lawsuits); Charlie Savage, *Trump Administration Sued Over Social Media Screening for Visa Applicants*, N.Y. Times (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/us/politics/visa-applications-social-media.html (describing this APA and First Amendment lawsuit); Charlie Savage, *U.S. Government Went Through These People's Phones at the Border. Read Their Stories.*, N.Y. Times (Dec. 22, 2017), https://www.nytimes.com/2017/12/22/us/politics/us-border-search-complaints.html (describing and publishing several hundred complaints obtained by the Knight Institute about warrantless searches of electronic devices at the border).

[23] *See, e.g.*, *Ideological Screening at the Border*, Knight First Amendment Institute, https://knightcolumbia.org/reading-room/ideological-screening-at-the-border.

[24] These essays are available at https://knightcolumbia.org/research.

[25] *A First Amendment for All? Free Expression in an Age of Inequality*, Knight First Amendment Institute (Mar. 23, 2018), https://knightcolumbia.org/content/a-first-amendment-for-all-free-expression-in-an-age-of-inequality.

[26] *Leading Legal Scholars, Economists, and Technologists to Headline Fall Symposium*, Knight First Amendment Institute (July 11, 2019), https://knightcolumbia.org/content/the-tech-giants-monopoly-power-and-public-discourse-symposium-to-include-leading-legal-scholars-economists-and-technologists.

Democracy," is scheduled for Fall 2020.[27] In addition, the Institute regularly holds and co-sponsors public events in support of its mission to defend freedom of speech and the press in the digital age.[28]

The ACLU is similarly "primarily engaged in disseminating information" within the meaning of FOIA. Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and the public are critical and substantial components of the ACLU's work and are among its primary activities.[29]

The ACLU regularly publishes *ACLU Magazine*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 4 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, in addition to other breaking news,[30] and ACLU attorneys are interviewed

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[27] *Knight Institute to Convene Data and Democracy Symposium*, Knight First Amendment Institute (Jan. 8, 2020), https://knightcolumbia.org/content/knight-institute-to-convene-data-and-democracy-symposium.

[28] *See Events*, Knight First Amendment Institute, https://knightcolumbia.org/events.

[29] 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 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).

[30] *See, e.g.*, 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 Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination; Press Release, ACLU, Advocates File FOIA Request for ICE Documents on Detention of Pregnant Women (May 3, 2018), https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department; Press Release, ACLU, ACLU Files Lawsuits

frequently for news stories about documents released through ACLU FOIA requests.[31]

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, occasionally, for a small fee.[32] ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.[33] The ACLU also regularly publishes books, "know your rights"

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 'Playbook' in Response to ACLU Lawsuit (Aug. 6, 2016), https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit; Press Release, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site; Press Release, ACLU, 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.

[31] *See, e.g.*, 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); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post (Aug. 6, 2016), http://wapo.st/2jy62cW (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, ABC (June 15, 2016), http://abcn.ws/2jy40d3 (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent $10M on Equipment for Warrantless Stingray Device*, Guardian (Mar. 17, 2016), https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR (Dec. 9, 2015), http://n.pr/2jy2p71 (quoting ACLU project director Hina Shamsi).

[32] *See, e.g.*, ACLU, *Bad Trip: Debunking the TSA's 'Behavior Detection' Program* (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.

[33] *See, e.g.*, Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017), https://www.aclu.org/blog.

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 interactive features. *See* https://www.aclu.org/multimedia. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org, which includes many features on information obtained through the FOIA.[34] The website addresses civil rights and civil liberties

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speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site*, ACLU (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*, ACLU (Aug. 8, 2016), https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333*, ACLU (Oct. 30, 2014), https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems*, ACLU (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

[34] *See, e.g.*, *ACLU* v. *DOJ*—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties, ACLU (Apr. 23, 2019), https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties; Executive Order 12,333—FOIA Lawsuit, ACLU (Dec. 3, 2018), https://www.aclu.org/cases/executive-order-12333-foia-lawsuit; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU (Feb. 26, 2018), https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance; *ACLU* v. *DOJ*—FOIA Lawsuit Demanding OLC Opinion "Common Commercial Service Agreements," ACLU (Apr. 6, 2016), https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU (Mar. 12, 2014), https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking; Florida Stingray FOIA, ACLU (Feb. 22, 2015), https://www.aclu.org/cases/florida-stingray-foia; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-

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. 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 FOIA documents relating to government policies on rendition, detention, and interrogation.[35]

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.[36]

The Requesters plan to analyze, publish, and disseminate to the public the information gathered through this FOIA request at no cost.

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

The documents sought are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).

While agencies' pre-publication regulations are in part public, the implementation of those regulations is almost entirely invisible outside the government. The records requested here are urgently needed to allow the public to better understand the way the regulations are implemented, and to enable it to evaluate whether agencies' prepublication-review processes are effective and fair. The records would also allow the public to better understand the lawfulness of agencies' activity on a matter that closely

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breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting.

[35] *The Torture Database*, ACLU, https://www.thetorturedatabase.org; *see also Countering Violent Extremism FOIA Database*, ACLU, https://www.aclu.org/foia-collection/cve-foia-documents; *TSA Behavior Detection FOIA Database*, ACLU, https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database; *Targeted Killing FOIA Database*, ACLU, https://www.aclu.org/foia-collection/targeted-killing-foia-database.

[36] *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance* (2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

relates to fundamental rights and gives room for abuse of discretion, impacting public trust in government. The effectiveness, fairness, and lawfulness of the prepublication-review process is a matter of significant public interest and ongoing media attention.[37]

For these reasons, the Requesters are entitled to expedited processing.

IV. Application for Waiver or Limitation of Fees

The Requesters seek a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to the 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).

For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further the Requesters' commercial interests. The Requesters will make any information disclosed available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *See Judicial Watch, Inc.* v. *Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

The Knight Institute also requests a waiver of search and review fees on the grounds that it qualifies as an "educational . . . institution" whose purposes include "scholarly . . . research" and that the records are not sought

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[37] *See, e.g.*, Deanna Paul, *These Former Officers Say the CIA and NSA Are Censoring Them. Now They're Suing.*, Wash. Post (Apr. 2, 2019), https://www.washingtonpost.com/nation/2019/04/02/these-former-agents-say-cia-nsa-are-censoring-them-now-theyre-suing; Samuels, *supra* note 6; Charlie Savage, *Ex-National Security Officials Sue to Limit Censorship of Their Books*, N.Y. Times (Apr. 2, 2019), https://www.nytimes.com/2019/04/02/us/politics/prepublication-censorship-system.html; Rachel Weiner, *Judge Grants Government Proceeds From Edward Snowden's Book*, Wash. Post (Dec. 17, 2019), https://www.washingtonpost.com/local/legal-issues/judge-grants-government-proceeds-from-edward-snowdens-book/2019/12/17/ab38c2a8-160e-11ea-9110-3b34ce1d92b1_story.html; Dan Lamothe, *Mattis's Former Speechwriter Faces Warning from Pentagon as He Prepares Book, Memos Show*, Wash. Post (Sept. 4, 2019), https://www.washingtonpost.com/national-security/2019/09/04/mattiss-former-speechwriter-faces-warning-pentagon-he-prepares-book-memos-show/; Nada Bakos & John Nixon, *The CIA Is Delaying Our Books' Publication, and That Hurts Our Democracy*, Wash. Post (Dec. 22, 2016), https://www.washingtonpost.com/opinions/the-cia-is-delaying-our-books-publication-and-that-hurts-our-democracy/2016/12/22/068f115c-ba8c-11e6-94ac-3d324840106c_story.html.

for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute performs scholarly research on the application of the First Amendment in the digital era. The Institute's research program brings together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and potential solutions. For example, the Institute has held multiple research symposia—convening academics, practitioners, journalists, and students—and it has curated multiple scholarly essay series.[38]

The Requesters also request a waiver of search and review fees on the grounds that they are "representative[s] of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The Requesters each meet the statutory definition of a "representative of the news media" because each "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive* 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 FOIA); *accord Serv. Women's Action Network* v. *DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012); *ACLU of Wash.* v. *DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011); *ACLU*, 321 F. Supp. 2d at 30 n.5. Courts have found other non-profit organizations, whose mission of research and public education is similar to that of the Requesters, to be "representatives of the news media." *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 group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of 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," was a news media requester).

For these reasons, the Requesters are entitled to a fee waiver.

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[38] Examples of published essays are available at https://knightcolumbia.org/research.

Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email. Please direct any correspondence and responses to this request to Ramya Krishnan (ramya.krishnan@knightcolumbia.org).

I certify that the above is true and correct to the best of my knowledge.

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