

KNIGHT
FIRST AMENDMENT
INSTITUTE at
COLUMBIA UNIVERSITY

ACLU

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Office of Legal Counsel
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Room 5511, 95 Pennsylvania Avenue, N.W.
Department of Justice
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Re: Freedom of Information Act Request
Expedited Processing Requested

Dear Ms. Golden,

The Knight First Amendment Institute at Columbia University and the American Civil Liberties Union ("the Requesters") submit this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for legal opinions and memoranda drafted by the Office of Legal Counsel ("OLC") pertaining to prepublication review.

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

[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; Tom Hamburger, Josh Dawsey, & Derek Hawkins, *Bolton Faces Potential Legal Battles in Standoff with White House Over His Book*, Wash. Post (Jan. 31, 2020), https://www.washingtonpost.com/politics/bolton-faces-potential-legal-battles-in-standoff-with-white-house-over-his-book/2020/01/31/53da5572-445c-11ea-b5fc-eefa848cde99_story.html; Oona Hathaway & Jack Goldsmith, *Path Dependence and the Prepublication Review Process*, Just Security (Dec. 28, 2015), https://www.justsecurity.org/28552/pathdependence-

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]

The OLC's "core function" is to settle legal questions or resolve interagency disputes, by providing legal advice and opinions to the executive branch.[4] In discharging its duties, the "OLC generally avoids abstract or code-like decrees."[5] Instead, the office occupies a "quasi-judicial" role within the Executive Branch that follows a "decisional process resembling [that of] a court: it is case specific and precedent based."[6] To that

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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. Ratcliffe*, 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").

[4] Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) [hereinafter Best Practices Memorandum], *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (The "OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law."); *see also* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for A Unitary Executive*, 15 Cardozo L. Rev. 337, 337 (1993) (discussing how the OLC details the President's constitutional objections to pending legislation; advises the President on executive orders, executive privilege, and other programmatic and legal matters; advises Executive Branch agencies on legal questions; and resolves interagency disputes, among other duties); Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. Legis. & Pub. Pol'y 239, 245 (2014).

[5] *See* Daphna Renan, *The Law Presidents Make*, 103 Va. L. Rev. 805, 815 (2017).

[6] *Id.*

end, the OLC often issues "formal written opinions."[7] These opinions bind the Executive Branch in its interpretation of the law unless or until they are withdrawn or reconsidered by the OLC, displaced by a judicial ruling, or overruled by either the President or Attorney General.[8] Because overruling by the President or Attorney General "happens rarely,"[9] the OLC generally has the final word on how the Executive Branch interprets and applies the law.

As such, the OLC's opinions create "a body of formal, written law that is relied upon, distinguished, and evaluated over time."[10] This body of law is important to understanding the government's powers, policies, and responsibilities, as well as the private rights of individuals, in the realm of prepublication review. But because the OLC has published "only a fraction" of its formal written opinions,[11] the public has not yet been able to ascertain the effect of OLC opinions on prepublication review.

The Requesters have filed five 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,[12] and three requests for records relating to the review of writings by certain former government officials.[13]

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[7] These OLC opinions are sometimes referred to as "Attorney General opinion[s]" or "memorandums." *See* Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 Wake Forest L. Rev. 93, 94 (2008)

[8] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1305 (2000)("When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General."); *see also* Renan, supra note 5, at 816 ("Barring [the President's or Attorney General's] reversal, OLC creates the binding law of the executive."); Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. Legis. & Pub. Pol'y 239, 246 (2014).

[9] *See* Renan, *supra* note 5, at 816.

[10] *See id.*, at 815.

[11] Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1476 (2010).

[12] 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.

[13] A copy of the requests may be found at https://knightcolumbia.org/documents/d453cd39bc/2018.05.11_ECF-1-1_Attachment-A.pdf,

Records disclosed in response to these requests have raised new questions about the role of executive-branch-wide guidance—including OLC legal opinions and memoranda—in shaping agency prepublication-review processes. As noted above, the OLC plays a "quasi-judicial" role within the executive branch, and although it has disclosed one formal written opinion concerning an agency's prepublication review regime, it is likely that it has issued but not disclosed others.[14] Accordingly, the Requesters now file this request.

II. Requested Records

The Requesters seek the release of the following records:

1. OLC formal written opinions relating to prepublication review

Where a document contains information that falls into the category 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).

With respect to the form of production, we ask that you provide responsive electronic records in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). If you determine that is not feasible, we ask that the records be provided 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 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).

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https://knightcolumbia.org/documents/5004f5812f/2018.05.11_ECF-1-3_Attachment-C.pdf, https://knightcolumbia.org/documents/2aa4f1da83/2020.01.27---FOIA-Request.pdf.

[14] *See* Office of Legal Counsel, Dep't of Justice, *Constitutionality of Regulations Requiring Prepublication Clearance of Books by Former Iranian Hostages* (1981), *available at* https://www.justice.gov/file/22666/download.

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 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]

[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.

Twitter account,[18] press releases,[19] blog posts,[20] op-eds,[21] and regular engagement with the press.[22] The Institute also publishes records obtained

[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.*, Alex Abdo & Meenakshi Krishnan, *Explainer: Prepublication Review and How it Applies to Bolton*, Just Security (Jan. 30, 2020), https://www.justsecurity.org/68364/explainer-prepublication-review-and-how-it-applies-to-bolton/; 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; Alex Abdo, Jameel Jaffer, Meenakshi Krishnan, & Ramya Krishnan, *A District Court Endorses a Broken Prepublication Review System*, Just Security (Apr. 21, 2020), https://www.justsecurity.org/69794/a-district-court-endorses-a-broken-prepublication-review-system/; 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), https://www.theguardian.com/commentisfree/2018/sep/15/facebook-twitter-social-media-public-discourse; Jameel Jaffer & Ramya Krishnan, *We May Never See John Bolton's Book*, The New York Times (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/opinion/trump-john-bolton-book.html.

[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,

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 three influential essay series, one focused on emerging threats to the system of free expression, the second focused on reimagining the First Amendment in the digital age, and the third focused on the technology giants' power to shape public discourse.[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 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]

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.

[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

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 850,000 people. The ACLU also publishes regular updates and alerts via email to over 3.9 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 4.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests. The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, in addition to other breaking news,[30] and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.[31]

"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, Federal Court Rules Gov't Cannot Unilaterally Detain U.S. Resident Indefinitely (Dec. 13, 2019), https://www.aclu.org/press-releases/federal-court-rules-government-cannot-unilaterally-detain-us-resident-indefinitely; Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans' Call Records Yet Again (June 26, 2019), https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban. Press Release, ACLU, U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit (Aug. 6, 2016), https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit.

[31] *See, e.g.*, Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times (June 26, 2019), https://www.nytimes.com/2019/06/26/ us/telecom-nsa-domestic-calling-records.html (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill (Mar. 21, 2019), https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records (quoting ACLU attorney Nusrat Choudhury); Cora Currier, *TSA's Own Files Show Doubtful Science*

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" 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

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Behind Its Behavioral Screen Program, Intercept (Feb. 8, 2017), https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program (quoting ACLU attorney Hugh Handeyside); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, Associated Press (Jan. 18, 2017), https://www.apnews.com/865c32eebf4d457499c017eb837b34dc (quoting ACLU project director Hina Shamsi).

[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.
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.

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 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

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[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-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.

summary index of Bush-era OLC 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' prepublication-review regulations are in part public, the implementation of those regulations is almost entirely invisible outside the government. Recent reports raise particularly urgent concerns that the government may be strategically deploying prepublication review to amplify favorable speech and suppress critical speech before the November 2020 presidential election. Most prominently, the current administration allegedly used prepublication review to delay the publication of former National Security Advisor John Bolton's memoir.[37]

The records requested here are urgently needed to allow the public to better understand the legality of agency prepublication-review regulations and processes, and the role of the OLC in shaping them. Given that the present system of prepublication review allows significant room for agency discretion, these records would also allow the public to better understand the OLC's resolution of legal questions and interagency disputes concerning how prepublication review is implemented. The effectiveness, fairness, and lawfulness of prepublication-review processes are matters of significant public interest and ongoing media attention.[38]

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[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.

[37] Maggie Haberman & Katie Benner, *Trump Administration Sues To Try to Delay Publication of Bolton's Book*, N.Y. Times (July 3, 2020), https://www.nytimes.com/2020/06/16/us/politics/john-bolton-book-publication.html.

[38] *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-

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 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.[39]

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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.

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

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.

Thank you for your attention to our request. We would be happy to discuss its terms with you over 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.

/s/ *Ramya Krishnan*

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