

March 5, 2024

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Re: Request Under Freedom of Information Act Concerning Implementation of Attorney General Garland’s December 16, 2022, Charging and Sentencing Memoranda

(Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation (together, the “ACLU”),⁴ the National Association of Criminal Defense Lawyers (“NACDL”), and the Federal Public & Community Defenders

¹ FOIA Request sent via: <https://www.foia.gov/request/agency-component/8216158f-8089-431d-b866-dc334e8d4758/>

² FOIA Request sent via: <https://www.foia.gov/request/agency-component/10bd62cb-aa01-4e3f-bf90-04a3af627789/>

³ FOIA Request sent via: <https://www.foia.gov/request/agency-component/57fbedf0-cef4-46e8-8a3c-bfece4efc69c/>

⁴ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26

(“FPD”) (collectively “Requesters”) submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to the Department of Justice’s (“DOJ”) implementation of Attorney General Garland’s December 16, 2022, Charging and Sentencing Memoranda (collectively “Memoranda”).

The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. The ACLU’s Criminal Law Reform Project and Justice Division advocate specifically for the constitutional and civil rights of those impacted by criminal legal systems, using litigation and advocacy to confront systemic government conduct that fuels the carceral state.



The FPD provide legal representation in 92 federal districts at the trial, appellate, and post-conviction stages to people who cannot afford to retain an attorney. As nearly 90 percent of people charged with federal offenses require court-appointed counsel, FPD represent the vast majority of people subjected to the federal criminal legal system.

NACDL is a professional bar association dedicated to promoting a rational and humane criminal justice policy for America. Its 10,000 direct members and 40,000 state, local, and international affiliate members include public defenders, private criminal defense lawyers, active-duty military defense counsel, judges, and law professors who support NACDL’s mission to promote the proper and fair administration of criminal justice; ensure justice and due process for persons accused of crime; and foster the integrity, independence and expertise of the criminal defense profession.

I. Background

On December 16, 2022, Attorney General Garland issued two memoranda to all federal prosecutors: General Department Policies Regarding Charging, Pleas, and Sentencing (“General Memo”)⁵, and Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases (“Drug Memo”).⁶

U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

⁵ Office of the Attorney General, Department of Justice, *General Department Policies Regarding Charging, Pleas, and Sentencing* (Dec. 16, 2022),

https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_general_department_policies_regarding_charging_pleas_and_sentencing.pdf.

⁶ Office of the Attorney General, Department of Justice, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* (Dec. 16, 2022),

https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf.



The Memoranda require all federal prosecutors to make important changes in how they litigate criminal cases, and accordingly, have been the subject of widespread public controversy and media attention.⁷ The policies in the Memoranda have now been in effect for over one year.⁸

The changes required in these Memoranda include:

1. “[C]harges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges (*i.e.*, those for which the elements are also satisfied by the defendant’s conduct, and do not carry mandatory minimum terms of imprisonment) would not sufficiently reflect the seriousness of the defendant’s criminal conduct, danger to the community, harm to victims, or other considerations outlined above.”⁹

The General Memo further requires, “[t]o ensure consistency and accountability,” that “[a]ny decision to include a mandatory minimum charge in a charging document or plea agreement must [] obtain supervisory approval.”¹⁰

2. “[I]n cases in which Title 21 mandatory minimum sentences are applicable based on drug type and quantity, prosecutors should decline to charge the

⁷ See, e.g., Glenn Thrush, *Justice Dept. Revises Rules for Drug Cases to Address Racial Disparities*, N.Y. Times (Dec. 16, 2022), <https://www.nytimes.com/2022/12/16/us/politics/justice-dept-crack-cocaine.html>; David Nakamura, *U.S. attorney general moves to end sentencing disparities on crack, powder cocaine*, Wash. Post (Dec. 16, 2022, 2:21 PM), <https://www.washingtonpost.com/national-security/2022/12/16/doj-cocaine-garland/>; Associated Press, *Garland Moves to End Disparities in Crack Cocaine Sentencing*, U.S. News (Dec. 16, 2022, 8:17 PM), <https://www.usnews.com/news/politics/articles/2022-12-16/garland-moves-to-end-disparities-in-crack-cocaine-sentencing>; Hannah Rabinowitz, *Attorney General Garland instructs prosecutors to end sentencing disparities between crack and powder cocaine*, CNN (Dec. 16, 2022, 4:30 PM), <https://www.cnn.com/2022/12/16/politics/crack-powder-cocaine-sentencing-disparities/index.html>; Steve Marshall, *Biden’s latest surrender on public safety puts us all at risk*, Fox News (Jan. 17, 2023, 12:00 PM), <https://www.foxnews.com/opinion/biden-latest-surrender-public-safety-risk>; Michael Waldman, *Garland Takes on Mandatory Minimums*, Brennan Ctr. for Just. (Jan. 11, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/garland-takes-mandatory-minimums>; *US Attorney General calls for end to cocaine sentencing disparity*, Al Jazeera (Dec. 16, 2022), <https://www.aljazeera.com/news/2022/12/16/us-attorney-general-calls-for-end-to-cocaine-sentencing-disparity>.

⁸ General Memo at 6 (“The policies contained in this memorandum and the accompanying memorandum regarding drug cases apply to all prosecutions initiated no later than 30 days after the issuance of these memoranda.”).

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

quantity necessary to trigger a mandatory minimum sentence if the defendant satisfies” certain criteria.¹¹

Further, “[i]n cases in which prosecutors determine that some but not all of the criteria are satisfied, prosecutors should not automatically charge the quantity necessary to trigger the mandatory minimum, but rather weigh the considerations set forth in this memorandum and the General Policies Memorandum to carefully determine, through the exercise of their discretion and in consultation with their supervisors, whether a Title 21 charge with a mandatory minimum sentence is appropriate.”¹²



3. “In deciding whether to file an information under 21 U.S.C. § 851 requiring imposition of enhanced statutory penalties, prosecutors in drug cases should be guided by the same criteria discussed above for charging mandatory minimum offenses, as well as whether the filing would create a significant and unwarranted sentencing disparity with equally or more culpable co-defendants.”¹³
4. Because “[t]he Justice Department supports elimination of the crack-to-powder sentencing disparity,”¹⁴ “[i]f charging a mandatory minimum term of imprisonment under Title 21 for a drug offense involving crack cocaine is deemed warranted under this memorandum, prosecutors should charge the pertinent statutory quantities that apply to powder cocaine offenses.”¹⁵
5. “At sentencing, prosecutors should advocate for a sentence consistent with the guidelines for powder cocaine rather than crack cocaine. Where a court concludes that the crack cocaine guidelines apply, prosecutors should generally support a variance to the guidelines range that would apply to the comparable quantity of powder cocaine.”¹⁶

These Memoranda include requirements for U.S. Attorney’s Offices and commitments by DOJ to conduct training, implementation, reporting, and transparency measures to ensure that all federal prosecutors adopt and consistently apply Attorney General Garland’s policies on the ground.¹⁷

The changes required in these Memoranda are responsive to longstanding and documented injustices in the federal criminal legal system.

¹¹ Drug Memo at 1.

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ General Memo at 4-5; Drug Memo at 5.



A. Mandatory Minimum Sentences Triggered by Drug Quantities

Mandatory minimum drug sentences have a long and failed track record. First, these laws have failed to function in the way that Congress intended. As the Sentencing Commission has explained, there was a “general congressional desire to link the Act’s minimum penalties and specified drug quantities such that ‘kingpin’ traffickers would be subject to the ten-year minimum sentence and ‘middle-level’ traffickers would be subject to the five-year minimum sentence.”¹⁸ Unfortunately, the evidence has proven that the assumed close correlation between higher drug quantities and higher culpability was a mistake: in practice, drug mandatory minimums “often apply to offenders who perform relatively low-level functions.”¹⁹ Second, these mandatory minimums have significantly contributed to the urgent and festering crisis of mass incarceration,²⁰ which disproportionately affects Black and brown people and communities.²¹ Third, these long sentences have failed to reduce the harms associated with drug use.²² The evidence is clear that quantity-based drug mandatory minimums are failing at what they were intended to do and are simply bad policy.

The Memoranda’s requirement that federal prosecutors exercise greater restraint in using mandatory minimums is a step in the right direction towards what is ultimately needed: wholesale rejection of the false assumption that mandatory minimum sentences are applied only to kingpins and policy that appropriately reflects “criminological research ... that long prison sentences are counterproductive to public safety.”²³

¹⁸ U.S. Sent’g Comm’n, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System* 11 (Oct. 2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 4 (“In fiscal year 2016, the average sentence for offenders who were convicted of an offense carrying a drug mandatory minimum penalty was 94 months of imprisonment, more than double the average sentence (42 months) for drug offenders not convicted of an offense carrying a mandatory minimum penalty.”).

²¹ Katie Mettler, *States imprison black people at five times the rate of whites – a sign of a narrowing yet still-wide gap*, Wash. Post (Dec. 4, 2019, 6:54 PM), <https://www.washingtonpost.com/crime-law/2019/12/04/states-imprison-black-people-five-times-rate-whites-sign-narrowing-yet-still-wide-gap/> (stating that the ratio between Black and white people in federal prison populations is 7:1, and the ratio between white and Hispanic people is 4.6:1).

²² For example, in 2020, “[o]verdose deaths soared to a record 93,000 . . . According to the CDC, there were fewer than 7,200 total U.S. overdose deaths reported in 1970, when a heroin epidemic was raging in U.S. cities. There were about 9,000 in 1988, around the height of the crack epidemic.” Mike Stobbe, *US overdose deaths hit record 93,000 in pandemic last year*, Associated Press (July 14, 2021, 8:45 PM), <https://apnews.com/article/overdose-deaths-record-covid-pandemic-fd43b5d91a81179def5ac596253b0304>.

²³ Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project (May 12, 2021), <https://www.sentencingproject.org/publications/a-second-look-at-injustice/>.



Mandatory minimums also create undue pressure to plead guilty and punish those who have exercised their right to trial. It is no coincidence that the increased prevalence of mandatory minimums in the federal system corresponds with a sharp decline in federal trials. In fact, the Drug Memo acknowledges that mandatory minimum charges “should not be filed simply to exert leverage to induce a plea or because the defendant elected to exercise the right to trial.”²⁴

Reducing the use of mandatory minimums can also ameliorate racial disparities in the sentence lengths between similarly situated Black and white federal defendants. Research has shown that “[t]he initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.”²⁵

B. Enhanced Statutory Penalties in Drug Cases Under 21 U.S.C. § 851

In 2018, the Sentencing Commission published a report on the application and impact of enhanced statutory penalties under 21 U.S.C. § 851.²⁶ The Commission’s key findings included: “851 enhancements were applied inconsistently, with wide geographic variations in the filing, withdrawal, and ultimate application of the 851 enhancements for eligible drug trafficking offenders”; and “[w]hile 851 enhancements had a significant impact on all racial groups, Black offenders were impacted most significantly.”²⁷

The inflexibility of § 851 enhancements for prior drug convictions is especially troubling given that extreme racial disparities in drug enforcement are documented throughout the country,²⁸ and because the statute does not require that triggering state convictions bear any indicia of reliability. As DOJ has itself recognized, the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963), remains unfulfilled 60 years after the U.S. Supreme Court’s landmark decision that the right to counsel in criminal proceedings is in fact a right for all, and not a privilege reserved only for people who can pay for it. On the occasion of its 60th anniversary, Attorney General Garland said “[w]ith its decision in *Gideon*, the Supreme Court transformed the American legal system by renewing the foundational promise of equal justice under law . . . There is still so much more work to be done to make the promise of *Gideon* real. The Justice Department

²⁴ Drug Memo at 3.

²⁵ M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1323 (2014).

²⁶ U.S. Sent’g Comm’n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* (July 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.

²⁷ *Id.* at 6-7.

²⁸ ACLU, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.



recognizes the urgency and seriousness of these challenges.”²⁹ Ten years ago, former Attorney General Holder also recognized the public defense crisis, recounting that he “frequently witnessed the devastating consequences of inadequate representation. [He] saw that wrongful convictions and unjust sentences carry a moral cost that’s impossible to measure – and undermine the strength, integrity, and public trust in our legal system.”³⁰ Indeed, the ACLU’s docket reflects that many public defense systems across the country are failing to ensure the integrity of state and local convictions and the constitutional rights of people accused of crimes.³¹ Yet in a federal drug case, someone’s sentence can be significantly enhanced based upon prior convictions that occur in state courts where, as former Attorney General Holder recognized, “indigent defense systems exist in a state of crisis.”³² The federal criminal system must have higher standards.

C. The Crack/Powder Cocaine Sentencing Disparity

The sentencing disparity between crack and powder cocaine has come to embody the racial inequities in our criminal legal system. It is now well-known that when Congress passed the Anti-Drug Abuse Act of 1986, it “didn’t really have an evidentiary basis for [the 100:1 disparity].”³³ Soon after Congress enacted the 100:1 ratio, evidence revealed that the disparity could not be justified.³⁴ Indeed, it turns out that crack is neither more addictive than powder cocaine nor

²⁹ Off. of Pub. Affs., U.S. Dep’t of Just., *Justice Department Commemorates the 60th Anniversary of Gideon v. Wainwright* (Mar. 17, 2023),

<https://www.justice.gov/opa/pr/justice-department-commemorates-60th-anniversary-gideon-v-wainwright>.

³⁰ U.S. Dep’t of Just., *Attorney General Eric Holder Speaks at the Justice Department’s 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright* (Mar. 15, 2013),

<https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-justice-departments-50th-anniversary-celebration-us>.

³¹ The ACLU and its state affiliates have challenged failing public defense systems in Montana, Massachusetts, Maine, California, Idaho, Nevada, Oregon, South Carolina, New York, Michigan, Pennsylvania, Utah, Washington, Missouri, and Louisiana.

³² U.S. Dep’t of Just., *Attorney General Eric Holder Speaks at the Justice Department’s 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright* (Mar. 15, 2013),

<https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-justice-departments-50th-anniversary-celebration-us>.

³³ 156 Cong. Rec. H6196-204, H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel Lungren).

³⁴ *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987, at *5 (D. Neb. July 29, 1993) (then-Chief Judge Strom observing that “the evidence is clear that the cocaine molecule is the same whether the drug being used is powder form or in crack form, and is not inherently more dangerous in crack form.”); Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. Am. Med. Ass’n 1580, 1580 (1996) (concluding that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack).



more immediately addicting.³⁵ As the Sentencing Commission stated in 2007, “[c]rack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause identical effects.”³⁶

In addition to being irrational, the disparity had catastrophic consequences for Black defendants. Before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for Black people was 11% higher than for white people; four years later, it was 49% higher.³⁷ Even though 66% of crack users are white and only 17% of crack users are Black,³⁸ the vast majority of people convicted of crack cocaine offenses are Black. For example, in 2010, white people constituted 7.3% and Black people an astonishing 78.5% of the defendants sentenced under the federal crack cocaine laws.³⁹

By the time Congress passed the Fair Sentencing Act of 2010, the undeniable consensus was that none of Congress’s earlier rationales for the disparity were supported by reliable evidence.⁴⁰ It was also clear in 2010 that Black people bore the brunt of this irrational system. And yet, when Congress passed ameliorative legislation, it failed to eradicate the disparity. It instead replaced the 100:1 ratio with a lower but equally senseless 18:1 ratio. Many legislative efforts to eradicate the disparity followed, but none have succeeded and this discriminatory law remains in effect.⁴¹ Thus, it is significant that the Drug Memo instructs federal prosecutors to refrain from charging cases

³⁵ Hatsukami & Fischman, *supra*, at 1580.

³⁶ U.S. Sent’g Comm’n, *Cocaine and Federal Sentencing Policy*, 62 (May 2007), https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

³⁷ Barbara Stone Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed 20* (1992).

³⁸ See, e.g., Substance Abuse and Mental Health Servs. Admin., *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables*, Table 1.38A: Crack Use in Lifetime among Persons Aged 12 or Older, by Age Group and Demographic Characteristics (reporting 5,797 white users of crack, 1,564 Black users of crack, and 8,776 total crack users as of 2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf>.

³⁹ U.S. Sent’g Comm’n, *FY2010 Sourcebook of Federal Sentencing Statistics*, Table 34: Race of Drug Offenders in Each Drug Type (2010), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table34_0.pdf.

⁴⁰ *United States v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005) (“Courts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification . . .”).

⁴¹ See, e.g., Families Against Mandatory Minimums, *FAMM releases statement on EQUAL Act not being included in the omnibus appropriations bill* (Dec. 20, 2022), <https://famm.org/famm-releases-statement-on-equal-act-not-being-included-in-the-omnibus-appropriations-bill/>; Carrie Johnson, *A bill that would have impacted racial disparity in cocaine crimes died in the Senate*, Nat’l Pub. Radio (Jan. 10, 2023, 3:15 PM), <https://www.npr.org/2023/01/09/1147909174/a-bill-that-would-have-impacted-racial-disparity-in-cocaine-crimes-died-in-the-s>.

so as to trigger this statutory disparity, and to advocate for equal sentencing between crack and powder cocaine cases.

D. Training, Implementation, Reporting, and Transparency

Attorney General Garland wisely included requirements for U.S. Attorney's Offices and commitments by DOJ to conduct training, implementation, reporting, and transparency measures to ensure compliance with the Memoranda's new policies.⁴² After former Attorney General Holder issued charging and sentencing guidance,⁴³ federal prosecutors' compliance was inconsistent. In 2015, former Attorney General Loretta Lynch received a letter from law Professors Kate Stith, Douglas Berman, and Mark Osler.⁴⁴ They raised concerns that "at least some federal prosecutors are not consistently complying with [Holder's 2014 memorandum]" instructing prosecutors "not to leverage 21 U.S.C. § 851 enhancements to induce defendants to plead guilty."⁴⁵ Indeed Steven H. Cook, then head of the National Association of Assistant United States Attorneys, reportedly said that the Holder memorandum "has been interpreted differently by individual prosecutors, sometimes in the same office."⁴⁶ Given this history, it is important to monitor DOJ's efforts to consistently enforce Attorney General Garland's Memoranda.

In February 2024, the FPD received information from attorneys in multiple districts describing regularly litigating cases that were inconsistent with the letter and spirit of the Memoranda, including districts indicating that present mandatory minimum practices have not changed in any meaningful way since the issuance of the Memoranda.

* * *

Requesters seek information through this FOIA Request so that the

⁴² General Memo at 4-5; Drug Memo at 5.

⁴³ Off. of the Att'y Gen., *Attorney General Eric Holder Memorandum Re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-pon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>; Off. of the Att'y Gen., *Attorney General Eric Holder Memorandum Re: Guidance Regarding § 851 Enhancements in Plea Negotiations* (Sept. 24, 2014), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf.

⁴⁴ Kate Stith, Douglas Berman, and Mark Osler, *Letter to Attorney General Loretta Lynch* (Nov. 9, 2015), https://sentencing.typepad.com/files/letter-to-hon.-loretta-e.-lynch-from-professor-kate-stith_douglas-berman_and-mark-osler.pdf.

⁴⁵ *Id.* at 1.

⁴⁶ Ann E. Marimow, *Softening sentences, losing leverage: Some prosecutors fear the consequences of weakening mandatory minimums for drug convictions*, Wash. Post (Oct. 31, 2015), <https://www.washingtonpost.com/sf/national/2015/10/31/leverage/>.



public can know whether federal prosecutors are complying with Attorney General Garland’s December 16, 2022 policies, and to what extent DOJ is fulfilling its own commitments to monitor and enforce compliance.

II. Requested Records

Requesters seek:

- 1) All data⁴⁷—including but not limited to the statute and subsection(s) of each charge—that exists in the software program DOJ has developed “that enables real-time, trackable reporting by districts and litigating divisions of all charges brought by the Department that include mandatory minimum sentences.”⁴⁸
- 2) All policy directives, guidance documents, legal memoranda, policy memoranda, training materials, guidelines for running searches, guidelines for monitoring, or similar records concerning the data and software referenced above in (1).
- 3) All information⁴⁹—including but not limited to the statute and subsection(s) of each charge— that the Executive Office for United States Attorneys has received from United States Attorney’s Offices and litigating divisions to comply with the requirement that “each United States Attorney’s Office and litigating division must report semi-annually to the Executive Office for United States Attorneys the number and percentage of charging documents and plea agreements in which it has included mandatory minimum charges.”⁵⁰
- 4) All policies that the Executive Office for United States Attorneys has received from districts or divisions to comply with the requirement that “[a]ll district-or division-specific policies must be readily available to prosecutors and shared with the Executive Office for United States Attorneys.”⁵¹
- 5) All further guidance the Deputy Attorney General has issued to comply with the requirement that “[t]he Deputy Attorney General will oversee implementation of these memoranda and will issue further guidance as appropriate.”⁵²



⁴⁷ The Requesters do not seek any personal identifying information.

⁴⁸ General Memo at 4.

⁴⁹ The Requesters do not seek any personal identifying information.

⁵⁰ General Memo at 4.

⁵¹ *Id.* at 5.

⁵² *Id.* at 6.



- 6) All further guidance the Criminal Division and the Executive Office for United States Attorneys has issued to comply with the requirement that “[t]he Criminal Division and the Executive Office for United States Attorneys will issue further guidance on how to structure [] charges” to comply with the requirement that “[i]f charging a mandatory minimum term of imprisonment under Title 21 for a drug offense involving crack cocaine is deemed warranted under this memorandum, prosecutors should charge the pertinent statutory quantities that apply to powder cocaine offenses.”⁵³

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Requesters ask that responsive electronic records be provided electronically in their native format, and specifically that data be provided in Excel.

III. Application for Expedited Processing

The Requesters seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).⁵⁴ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization “primarily engaged in disseminating information . . . to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

- A. *The ACLU and NACDL are organizations 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. *See id.*⁵⁵ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See Am. C.L. Union v. U.S. Dep’t of Just.*, 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” . . . (quoting *Elec. Priv. Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003))).⁵⁶

⁵³ Drug Memo at 5.

⁵⁴ *See also* 28 C.F.R. s 16.5(e).

⁵⁵ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

⁵⁶ Courts have found that the ACLU, as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU, are “primarily engaged in disseminating information.” *See, e.g., Leadership Conf. on Civ. Rts. v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Am. C.L. Union v. U.S. Dep’t of Just.*, 321 F. Supp.



The ACLU regularly publishes the *ACLU* 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 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 million social media followers. The magazine as well as the email and social media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,⁵⁷ and ACLU attorneys are interviewed frequently for news stories about

2d 24, 29 n.5 (D.D.C. 2004) (quoting *Elec. Priv. Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

⁵⁷ See, e.g., ACLU, *Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction*, Press Releases (June 28, 2019, 9:45 PM), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; ACLU, *New Documents Reveal NSA Improperly Collected Americans' Call Records Yet Again*, Press Releases (June 26, 2019, 7:45 AM), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; ACLU, *ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists*, Press Releases (Mar. 21, 2019, 12:45 PM), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; ACLU, *ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities*, Press Releases (Dec. 21, 2018, 12:15 PM), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; ACLU, *New Documents Reveal Government Plans to Spy on Keystone XL Protesters*, Press Releases (Sept. 4, 2018, 10:15 AM), <https://www.aclu.org/press-releases/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; ACLU, *ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody*, Press Releases (May 22, 2018, 5:45 PM), <https://www.aclu.org/press-releases/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; ACLU, *ACLU Demands CIA Records on Campaign Supporting Haspel Nomination*, Press Releases (May 4, 2018, 2:45 PM), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; ACLU, *Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women*, Press Releases (May 3, 2018, 1:30 PM), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; ACLU, *Civil Rights Organizations Demand Police Reform Documents from Justice Department*, Press Releases (Jan. 4, 2018, 11:30 AM), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; ACLU, *ACLU Files Lawsuits Demanding Local Documents on Implementation of Trump Muslim Ban*, Press Releases (Apr. 12, 2017, 11:00 AM), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; ACLU, *U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit*, Press Releases (Aug. 6, 2016, 9:15 AM), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; ACLU, *CIA Releases Dozens of Torture Documents in Response to ACLU Lawsuit*, Press Releases (June 14, 2016, 6:15 PM), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; ACLU, *ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site*, Press

documents released through ACLU FOIA requests.⁵⁸

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests. 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 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 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 thousands of documents relating to the issues on which the ACLU is focused.

Releases (Apr. 14, 2016, 9:30 AM), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

⁵⁸ 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, 1:55 PM) <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting former ACLU attorney Nusrat Choudhury); Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screening Program*, Intercept (Feb. 8, 2017, 8:57 AM), <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, 8:03 PM), <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); 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); ABC News, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, ABC (June 15, 2016, 5:28 PM), <http://abcn.ws/2jy40d3> (quoting ACLU attorney Dror Ladin); Nicky Woolf, *US Marshals spent \$10m on equipment for warrantless Stingray surveillance*, Guardian (Mar. 17, 2016, 10:00 AM), <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nathan Freed Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR (Dec. 9, 2015, 5:26 AM), <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).



The ACLU's website also serves as a clearinghouse for news about ACLU cases, including analysis about case developments and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.⁵⁹

The ACLU website includes many features on information obtained through the FOIA. The ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of its contents relating to government policies on rendition, detention, and interrogation.⁶⁰ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.⁶¹

⁵⁹ See, e.g., ACLU, *ACLU v. ODNI – FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, Court Cases (Sept. 14, 2023), <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; ACLU, *ACLU v. DOJ: FOIA Lawsuit Seeking Information on Federal Agencies' Surveillance of Social Media*, Court Cases (Mar. 26, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ – FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, Court Cases (Apr. 23, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; ACLU, *Executive Order 12,333 – FOIA Lawsuit*, Court Cases (Dec. 3, 2018), <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU, *ACLU v. United States*, Court Cases (Nov. 1, 2021), <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; ACLU, *ACLU v. DOJ – FOIA Lawsuit Demanding OLC Opinion on "Common Commercial Service Agreements"*, Court Cases (Apr. 6, 2016), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; ACLU, *FOIA Request for Justice Department Policy Memos on GPS Location Tracking*, Court Cases (Mar. 12, 2014), <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; ACLU, *Florida Stingray FOIA*, Court Cases (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*, News & Commentary (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>.

⁶⁰ ACLU, *The Torture Database*, <https://www.thetorturedatabase.org>. See also ACLU, *FOIA Database Regarding the U.S. Government's Violent Extremism Initiatives*, <https://www.aclu.org/foia-collection/cve-foia-documents>; ACLU, *TSA Behavior Detection FOIA Database*, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; ACLU, *Targeted Killing FOIA Database*, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

⁶¹ ACLU, *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, Document (Oct. 7, 2009), <https://www.aclu.org/documents/index-bush-era-olc-memoranda-relating-interrogation-detention-rendition-andor-surveillance>; ACLU, *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010* (Nov. 29, 2010),



Similarly, a significant aspect of NACDL's mission is to ensure that the American public is informed about the conduct of its government in matters that affect criminal justice. As part of this effort, NACDL publishes a monthly magazine called "The Champion" that features timely and informative articles on the latest developments in criminal law, procedure, and policy. The magazine directly circulates to approximately 10,000 recipients, including lawyers, law libraries, law professors, federal and state judges, members of the news media, and members of the public interested in the administration of justice. NACDL also publishes a monthly electronic newsletter and daily news brief, both of which are distributed to NACDL members via e-mail. Additionally, NACDL regularly issues news releases to the press and public that are widely disseminated through e-mail, Facebook, and Twitter, and posted on NACDL's website, www.nacdl.org. NACDL has a long history of publishing reports about governmental activity and criminal justice issues that are broadly circulated and available to the public at little or no cost, including manuals and government reports obtained through FOIA.

The Requesters plan to analyze, publish, and disseminate to the public information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate 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).⁶² Specifically, they pertain to DOJ's implementation of its own charging and sentencing policies in federal criminal cases, including whether U.S. Attorneys are consistently abiding by DOJ policy that the crack/powder sentencing disparity should be eliminated because it "is still responsible for unwarranted racial disparities in sentencing" and "higher penalties for crack cocaine offenses are not necessary to achieve (and actually undermine) our law enforcement priorities."⁶³ As discussed in Part I, *supra*, there has been considerable media attention about the new policies announced in these Memoranda. Thus, the records sought relate to a matter of widespread and exceptional media and public interest. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the Department of Justice implementing regulations.⁶⁴

<https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; ACLU, *Statistics on NSLs Produced by Department of Defense*, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

⁶² *See also* 28 C.F.R. § 16.5(e)(1)(ii).

⁶³ Drug Memo at 4.

⁶⁴ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

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 because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).⁶⁵ The Requesters also seek 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)(III)⁶⁶; *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F. 2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that “gathers information from a variety of sources; exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them; devises indices and finding aids; and distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 288 (D. Conn. 2012) (finding that the requesters, including the ACLU, were “representatives of the news media” and thus qualified for public interest fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *Am. C.L. Union of Wash. v. U.S. Dep’t of Just.*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *Am. C.L. Union v. U.S. Dep’t of Just.*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information” . . . (quoting *Elec. Priv. Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003))). 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 that are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Elec. Priv. Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 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 v. Dep’t of Def.*, 880 F. 2d 1381, 1387 (D.C. Cir. 1989); *Jud. Watch, Inc.*

⁶⁵ *See also* 28 C.F.R. § 16.10(k)(2).

⁶⁶ *See also* 28 C.F.R. § 16.10(b)(6).

v. U.S. Dep't of Just., 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).⁶⁷

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.”⁶⁸ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the Requesters expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4).



If the Request is denied in whole or in part, the Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. The Requesters expect the release of all segregable portions of otherwise exempt material. The Requesters reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

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

⁶⁷ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Priv. Info. Ctr.*, 241 F. Supp. 2d at 29, n.5; *Nat’l Sec. Archive*, 880 F.2d at 1387. *See also Leadership Conf. on Civ. Rts.*, 404 F. Supp. 2d at 260; *Jud. Watch, Inc.*, 133 F. Supp. 2d at 53–54.

⁶⁸ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al-Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

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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).

Sincerely,

/s/ Emma Andersson

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