



May 7, 2015

Melanie Ann Pustay
Director, Office of Information Policy
United States Department of Justice
1425 New York Avenue, NW, Suite 11050
Washington, D.C. 20530-000

Re: **Freedom of Information Appeal, FOIPA Request No.
1315015-000**

Dear Ms. Pustay,

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Federal Bureau of Investigation's ("FBI") refusal to confirm or deny the existence or nonexistence of records requested by Freedom of Information Act ("FOIA") request number 1315015-000 ("Request"). The request seeks records regarding the acquisition, possession, and use of cell site simulators deployed on aircraft. See Ex. A (FOIA Request dated November 19, 2014). Record/Information Dissemination Section Chief David M. Hardy's letter refusing to confirm or deny the existence or nonexistence of responsive records ("Response Letter") is dated March 26, 2015. See Ex. B (Response Letter). The ACLU respectfully requests reconsideration of this determination and the release of records responsive to the Request.

The ACLU requested release of five distinct categories of information pertaining to the acquisition, possession, and use of cell site simulators deployed on aircraft. See Ex. A at 3–4. The FBI denied the ACLU's FOIA request with a Glomar response. The Response Letter invoked FOIA exemption (b)(7)(E) and stated, in conclusory terms, that "the FBI neither confirms nor denies the existence of records responsive to" the Request, because "[t]he mere acknowledgment of whether or not the FBI has any such records in and of itself would disclose techniques, procedures, and/or guidelines that could reasonably be expected to risk of [sic] circumvention of the law." Ex. B.

The Glomar response provided here is far too sweeping and categorical. Under FOIA, an agency may invoke the Glomar response—refusing to confirm or deny the existence of requested records—only if the very fact of the records' existence or nonexistence would "cause harm cognizable under an FOIA exception." *ACLU v. CIA*, 710 F.3d 422, 426 (2013) (citation and internal quotation marks omitted). The FBI's Response Letter invoked FOIA exemption (b)(7)(E), but it is extremely unlikely that merely confirming or denying the existence of responsive records would

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risk circumvention of the law by revealing a generally unknown law enforcement technique, procedure, or guideline—particularly in light of the widespread public controversy over airborne cell site simulators, other federal agencies' acknowledgment of their use, and the FBI's release of details regarding its use of cell site simulator technology.

The Response Letter fails to adequately justify the sweeping and categorical Glomar response. The Response Letter provides only a conclusory explanation of the basis for invoking the Glomar response, and it does not explain why acknowledging the existence or nonexistence of any responsive records “could reasonably be expected to risk circumvention of the law” by revealing a generally unknown law enforcement technique, procedure, or guideline. See 5 U.S.C. § 552(b)(7)(E); Ex. B. Further, the Response Letter makes no attempt to distinguish between the five distinct categories of information contained in the ACLU's Request or to explain why confirming or deny any particular category of requested records would trigger the (b)(7)(E) exemption. The summary and categorical rationale provided in the Response Letter is not an adequate justification for denying the ACLU's FOIA request in toto. See *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (remanding with instructions that “the CIA must substantiate its Glomar response with ‘reasonably specific detail’”); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C. 2009) (declining to accept agency's conclusory statements of (b)(7)(E) exemption's applicability and instructing that agency must do more than “merely recite the statutory standards” (quoting *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392–93 (D.C. Cir. 1987)) (internal quotation marks omitted)); *Riquelme v. CIA*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (“[A] Glomar response does not . . . relieve [an] agency of its burden of proof.” (citing *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976))).

Nor is it likely that the agency could provide an adequate explanation of exemption (b)(7)(E)'s applicability. Exemption (b)(7)(E) protects only law enforcement techniques, procedures, and guidelines that are unknown to the general public. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 551 (6th Cir. 2001); *ACLU v. U.S. Dep't of Justice*, No. 12 CIV. 7412 WHP, 2014 WL 956303, at *7 (S.D.N.Y. Mar. 11, 2014) (Slip Op.). Because the FBI issued a Glomar response, claiming that (b)(7)(E) protects the mere existence or nonexistence of responsive records, the proper focus of the public knowledge inquiry is only the general subject of the request—that is, airborne cell site simulators. See *Marino v. Drug Enforcement Admin.*, 685 F.3d 1076, 1081 (D.C. Cir. 2012) (“[I]n the context of a Glomar response, the public domain exception is triggered when ‘the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,’ regardless whether the contents of the records have been disclosed.” (quoting *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007))).

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The FBI bears the burden of establishing that the use of airborne cell site simulators is not known to the public, see *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995), but it is doubtful that the agency can do so. In 2014, the Wall Street Journal published a report on the Justice Department's use of aircraft-mounted cell site simulators in criminal investigations. Devlin Barrett, *Americans' Cellphones Targeted in Secret U.S. Spy Program*, Wall St. J., Nov. 13, 2014, <http://www.wsj.com/articles/americans-cellphones-targeted-in-secret-u-s-spy-program-1415917533>. Citing sources inside the Justice Department, the report explained how the technology works and provided details on its use by the U.S. Marshals Service aboard Cessna aircraft. *Id.* According to the report, the Marshals Service "[s]ometimes . . . deploys the technology on targets requested by other parts of the Justice Department." *Id.* After that report was published, there was widespread coverage of the program by mainstream media. See, e.g., Spencer Ackerman et al., *US government planes mimic cellphone towers to collect user data – report*, Guardian (Nov. 14, 2014), <http://www.theguardian.com/world/2014/nov/14/government-planes-mimic-cellphone-towers-to-collect-user-data-report>; Gail Sullivan, *Report: Secret government program uses aircraft for mass cellphone surveillance*, Wash. Post, Nov. 14, 2014, <http://www.washingtonpost.com/news/morning-mix/wp/2014/11/14/report-secret-government-program-uses-aircraft-for-mass-cellphone-surveillance/>; Kim Zetter, *The Feds Are Now Using 'Stingrays' in Planes to Spy on Our Phone Calls*, Wired (Nov. 14, 2014), <http://www.wired.com/2014/11/feds-motherfng-stingrays-motherfng-planes/>; Megan Geuss, *Feds gather phone data from the sky with aircraft mimicking cell towers*, Ars Technica (Nov. 13, 2014), <http://arstechnica.com/tech-policy/2014/11/13/feds-gather-phone-data-from-the-sky-with-aircraft-mimicking-cell-towers/>. See also Matthew M. Aid, *Spy Copters, Lasers, and Break-In Teams*, Foreign Policy, Nov. 19, 2013, <http://foreignpolicy.com/2013/11/19/spy-copters-lasers-and-break-in-teams/> ("Some of the vans, aircraft, and helicopters used by the FBI for this [surveillance of foreign diplomatic and consular facilities in the United States] are equipped with equipment capable of intercepting cell-phone calls and other electronic forms of communication.").

Relatedly, previous government acknowledgment of information sought in a FOIA request waives an otherwise valid Glomar claim. *Wolf*, 473 F.3d at 378. In response to a 2012 FOIA request, the Department of Homeland Security, Immigrations and Customs Enforcement released documents that included information on the purchase of an "Airborne Flight Kit" for a Stingray II cell site simulator and a class to train agents in its use. *U.S. Immigration & Customs Enforcement, Limited Sources Justification and Approval – Harris IT Services Corporation* (Sept. 20, 2010), available at <https://www.documentcloud.org/documents/479397->



#document/p44. The ACLU's pending Request was not limited to information about the FBI's "acquisition, possession and use of cell site simulators deployed on aircraft," but rather "the Department of Justice's and Department of Homeland Security's . . ." Ex. A. Thus, the FBI's sweeping and categorical Glomar response cannot possibly be justified. See *ACLU v. CIA*, 710 F.3d at 428 (rejecting agency's Glomar response in part because FOIA request was not limited to documents regarding CIA drone use).

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Even apart from the media coverage and government acknowledgement of airborne cell site simulators, the FBI itself has repeatedly and publicly divulged details regarding its use of cell site simulators generally, which has also been the subject of extensive public debate. As a result of FOIA litigation pursued by the Electronic Privacy Information Center ("EPIC"), the FBI released thousands of pages of documents pertaining to its use of cell site simulators, including FBI policies, legal analysis, and technical explanations. See Elec. Privacy Info. Ctr., *EPIC v. FBI - Stingray / Cell Site Simulator*, <https://epic.org/foia/fbi/stingray/>; see also Ryan Gallagher, *FBI Documents Shine Light on Clandestine Cellphone Tracking Tool*, *Slate* (Jan. 10, 2013, 2:14 PM), http://www.slate.com/blogs/future_tense/2013/01/10/stingray_imsi_catcher_fbi_documents_shine_light_on_controversial_cellphone.html. Even at the pleadings stage, the FBI's answer to EPIC's complaint admitted a number of details of the kind sought by the ACLU's present request. See Def's Answer, *EPIC v. FBI*, No. 2013-cv-00442 (TSC) (Nov. 5, 2014) (admitting, inter alia, that the FBI had used cell site simulator technology to track and locate phones, that the FBI possessed documents concerning the use of cell site simulator devices, and that cell site simulators may collect information from non-targets). The FBI has also released records concerning cell site simulators to other FOIA requesters. See, e.g., <https://www.muckrock.com/foi/united-states-of-america-10/fbi-agreements-with-harris-corpboeing-and-meeting-minutes-re-stingrays-16083/#files>. Beyond FOIA disclosures, the FBI has publicly disclosed details about its use of cell site simulators in numerous other judicial proceedings. See, e.g., *United States v. Rigmaiden*, 844 F. Supp. 2d 982, 995 (D. Ariz. 2012) (reviewing FBI's stipulations regarding its use of a cell site simulator in a criminal investigation); *United States v. Allums*, No. 2:08-CR-30 TS, 2009 WL 806748, at *1 (D. Utah, Mar. 24, 2009) (recounting FBI agent's step-by-step testimony on how he located an individual using a cell site simulator); *Search Warrant to Obtain Location, Other Data, & Telephone Records for a Cellular Telephone Facility, In Re Application of the United States for the Authorization to Obtain Location Data Concerning a Cellular Tel. Facility Currently Assigned Telephone Number (908) 448-3855*, Mag. No. 12-3092 (D.N.J. 2012) (publicly docketed search warrant describing cell site



simulator's capabilities).

The FBI cannot avoid its FOIA obligations by resorting to excessive precision in defining the relevant law enforcement technique for (b)(7)(E) purposes. See *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (explaining that allowing this strategy would let government “withhold information under Exemption 7(E) under any circumstances, no matter how obvious the investigative practice at issue, simply by saying that the ‘investigative technique’ at issue is not the practice but the application of the practice to the particular facts underlying that FOIA request”). The FBI’s use of cell site simulators is well known and publicly acknowledged by the agency. The same is true of the FBI’s use of aerial surveillance generally. See, e.g., *United States v. Medina*, 761 F.2d 12, 18 n.6 (1st Cir. 1985) (“The F.B.I. conducted both an automobile and aerial surveillance of the site where the ransom was left.”); *Amato v. United States*, 549 F. Supp. 863, 867 (D.N.J. 1982) (“An FBI airplane overhead observed [the suspects’] movements.”); Dan Roberts, FBI admits to using surveillance drones over US soil, *Guardian* (June 19, 2013), <http://www.theguardian.com/world/2013/jun/19/fbi-drones-domestic-surveillance>; Nabiha Syed, Why the FBI Thinks Warrantless Drone Surveillance Is Constitutional, *Slate* (Dec. 17, 2013), http://www.slate.com/blogs/future_tense/2013/12/17/fbi_slideshow_explains_why_it_thinks_warantless_drone_surveillance_is_constitutional.html. The subject of the request is merely the conjunction of a well-known practice with a well-known technology. The Response Letter offers no explanation of why the fact of the existence of responsive records is exempt from disclosure.

The FBI has failed to articulate a cogent rationale for refusing to confirm or deny the existence or nonexistence of records responsive to the Request, and it is difficult to imagine a credible justification in light of the information already available to the public and the nature of the information sought. Maintaining a Glomar response in this situation runs counter to the letter and spirit of President Obama’s directive that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act (Jan. 21, 2009), <http://1.usa.gov/rA14o1>.

Moreover, the FBI’s position is inconsistent with the Department of Justice’s reevaluation of its policy concerning disclosure of information about cell site simulator technology. See Devlin Barrett, U.S. Will Change

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Stance on Secret Phone Tracking, Wall. St. J., May 3, 2015, http://www.wsj.com/article_email/u-s-will-change-stance-on-secret-phone-tracking-1430696796-lMyQjAxMTI1NDA0MzEwNjMzWj (“Senior officials have also decided they must be more forthcoming about how and why the [cell site simulator] devices are used.”). Even assuming the FBI’s Glomar response is proper—which it is not—the ACLU respectfully requests that the Request be reprocessed in light of the agency’s revised position, and that the Glomar response be withdrawn.

For the foregoing reasons, we respectfully request that you reconsider the decision to neither confirm nor deny the existence or nonexistence of any records responsive to the Request and that you release records responsive to the Request. We look forward to your prompt response.

Respectfully Submitted,

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EXHIBIT A



November 19, 2014

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Re: Freedom of Information Act Request /
Cell Site Simulators Deployed on Aircraft

To Whom It May Concern:

This letter is a request under the Freedom of Information Act by the American Civil Liberties Union ("ACLU"). This request seeks records regarding the acquisition, possession, and use of cell site simulators deployed on aircraft.

Cell site simulators, also called IMSI catchers (in reference to the unique identifier—or international mobile subscriber identity—of wireless devices), impersonate a wireless service provider's cell tower, prompting cell phones and other wireless devices to communicate with them. One model of this technology, which the U.S. Marshals Service and likely other agencies deploy on aircraft, is sometimes called a "dirtbox" or "DRT box," after its manufacturer Digital Receiver Technology, Inc. (DRT).¹ Cell site simulators are commonly used in two ways: to collect unique numeric identifiers associated with phones in a given location, or to ascertain the location of a phone when the officers know the numbers associated with it but don't know precisely where it is. Both of these uses raise privacy concerns. Collecting unique identifiers of all phones in a particular location inherently collects location data on many innocent people. And using a cell site simulator to ascertain the location of a specific cell phone can reveal that it is in a constitutionally protected place, such as a home, that has traditionally been immune from search unless law enforcement agents obtain a warrant based on probable cause.

Even when law enforcement is using a cell site simulator to track a particular suspect's phone, the technology inevitably sweeps in information about innocent bystanders' phones, and can interfere with their calls on the wireless network. Deploying cell site simulators on airplanes heightens concerns by affecting a larger geographic area and therefore more people's phones.

A recent press report has revealed that the Department of Justice uses cell site simulators deployed on aircraft in criminal investigations.² As explained by the Wall Street Journal, the U.S. Marshals Service program

¹ See Devlin Barrett, *Americans' Cellphones Targeted in Secret U.S. Spy Program*, Wall St. J., Nov. 13, 2014, http://online.wsj.com/articles/americans-cellphones-targeted-in-secret-u-s-spy-program-1415917533?mod=WSJ_hp_LEFTTopStories&cb=logged0.8041513075437096. Other models of cell site simulators produced by the Harris Corporation include the "Stingray," "Triggerfish," "Kingfish," and "Hailstorm." See Ryan Gallagher, *Meet the Machines that Steal Your Phone's Data*, Ars Technica (Sept. 25, 2013), <http://arstechnica.com/tech-policy/2013/09/meet-the-machines-that-steal-your-phones-data/>.

² See Barrett, *supra* note 1.

began in 2007 and involves regular flights using Cessna aircraft from at least five airports. Each flight is able to collect data from tens of thousands of cellphones. Other federal agencies are also known to have purchased equipment allowing use of cell site simulators on aircraft as well. For example, U.S. Immigration and Customs Enforcement purchased an "Airborne Flight Kit" for a Stingray II cell site simulator as early as 2010.³

This request seeks additional information about the Department of Justice's and Department of Homeland Security's acquisition, possession, and use of cell site simulators deployed on aircraft.

Records Requested

Please provide copies of the following records created from January 1, 1997 to the present:

1. All policies, guidelines, rules, practices, or legal analysis regarding the use of cell site simulators deployed on aircraft, including those concerning:
 - a. restrictions on when, where, how, and against whom they may be used;
 - b. what information can be acquired using this technology;
 - c. the possibility of disruption of lawful phone calls;
 - d. protections for non-targets;
 - e. limitations on retention and use of collected data;
 - f. when a warrant or other legal process must be obtained;
 - g. deployment of this technology in investigations conducted with other agencies or at the request of other agencies;
 - h. disclosure of information acquired using this technology to other agencies; and
 - i. when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.

³ U.S. Immigration & Customs Enforcement, Limited Sources Justification and Approval – Harris IT Services Corporation (Sept. 20, 2010), available at <https://www.documentcloud.org/documents/479397-#document/p44>.

2. Records regarding the acquisition of cell site simulators that were meant for aircraft deployment or were used on aircraft, including invoices, purchase orders, contracts, loan agreements, procurement documents (including but not limited to solicitation documents or notices of proposed contracts, proposed bids, unsolicited proposals, and/or documents justifying contracting without full and open competition), correspondence with companies providing the devices (including, but not limited to, Boeing DRT and Harris Corporation), and similar documents.
3. All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators deployed on an aircraft in criminal investigations, as well as any affidavits or other documents filed in support thereof, warrants or orders, denials of warrants or orders, and returns of warrants associated with those applications. If any responsive records are sealed, please provide a record containing the date and docket number for each sealed document.
4. Records reflecting the docket numbers—or, if unavailable, other identifying information—of all criminal cases in which law enforcement officers sought permission to use, were authorized to use, or in fact used a cell site simulator deployed on an aircraft as part of the underlying investigation.
5. Records reflecting the number of investigations in which cell site simulators deployed on aircraft have been used, and the number of those investigations that have resulted in prosecutions.

Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a “compelling need” for these records, as defined in the statute and regulations, because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity. 5 U.S.C. § 552(a)(6)(E)(v).

1. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II). *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30

n.5 (D.D.C. 2004) (finding that a 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” is “primarily engaged in disseminating information” (internal citation omitted)); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is “to serve as the site of record for relevant and up-to-the-minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws”—to be “primarily engaged in the dissemination of information”).

Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU’s regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 390,000 households; email updates to 1.1 million subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog that attracts more than 40,000 unique visitors per month; heavily visited websites, including a Stingray resource⁴; and a video series.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news.⁵

⁴ ACLU, *Stingray Tracking Devices: Who’s Got Them?*,

<https://www.aclu.org/maps/stingray-tracking-devices-whos-got-them>

⁵ *See, e.g.*, Release, American Civil Liberties Union, *Documents Show FBI Monitored Bay Area Occupy Movement*, Sept. 14, 2012, <http://www.aclu.org/node/36742>; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Using “Mosque Outreach” for Intelligence Gathering*, Mar. 27, 2012,

<http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering>; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of “Community Outreach,”* Dec. 1, 2011, <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>; Press Release, American Civil Liberties Union, *FOIA Documents from FBI Show Unconstitutional Racial Profiling*, Oct. 20, 2011, <http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling>; Press Release, American Civil Liberties Union, *Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem*, Oct. 19, 2011, <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>; Press Release, American Civil Liberties Union, *New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU*, June 24, 2009, <http://www.aclu.org/national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu>.

ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁶

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA. For example, the ACLU maintains an online "Torture Database," a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation. The ACLU also maintains a "Torture FOIA" webpage containing commentary about the ACLU's FOIA request, press releases, and analysis of the FOIA documents. (That webpage also notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA. See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007)). Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos. In addition to websites, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

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

- 2) *The record sought is 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; moreover, this document relates to a breaking news story of general public interest.

⁶ See, e.g., Carrie Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dep't Wants More Time to Review IG's Findings on Detainee Treatment*, Wash. Post, June 20, 2009 (quoting ACLU staff attorney Amrit Singh); Peter Finn & Julie Tate, *CIA Mistaken on 'High-Value' Detainee, Document Shows*, Wash. Post, June 16, 2009 (quoting ACLU staff attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. Times, June 10, 2009 (quoting ACLU National Security Project director Jameel Jaffer); Joby Warrick, *Like FBI, CIA Has Used Secret 'Letters'*, Wash. Post, Jan. 25, 2008 (quoting ACLU staff attorney Melissa Goodman).

We make this Request to further the public's understanding of Department of Justice and Department of Homeland Security programs that deploy cell site simulators on aircraft. National news stories have highlighted the significance of these programs for the public record. *See, e.g., Barrett, supra note 1; Gail Sullivan, Report: Secret Government Program Uses Aircraft for Mass Cellphone Surveillance*, Wash. Post, Nov. 14, 2014, www.washingtonpost.com/news/morning-mix/wp/2014/11/14/report-secret-government-program-uses-aircraft-for-mass-cellphone-surveillance/?tid=hp_mm; Spencer Ackerman et al., *US Government Planes Mimic Cellphone Towers to Collect User Data – Report*, The Guardian (Nov. 14, 2014), www.theguardian.com/world/2014/nov/14/government-planes-mimic-cellphone-towers-to-collect-user-data-report; Julian Hatter, *Report: Secret Justice Program Spied on Cellphones*, The Hill (Nov. 14, 2014), <http://thehill.com/policy/technology/224129-report-feds-using-airplane-trackers-to-monitor-cellphones>; *US Government Planes Collecting Phone Data, Report Claims*, BBC News (Nov. 14, 2014), <http://www.bbc.com/news/technology-30054137>; Megan Geuss, *Feds Gather Phone Data from the Sky with Aircraft Mimicking Cell Towers*, Ars Technica (Nov. 13, 2014), <http://arstechnica.com/tech-policy/2014/11/feds-gather-phone-data-from-the-sky-with-aircraft-mimicking-cell-towers/>.

National news outlets and the public maintain great interest in learning about this technology. The news story is still developing.⁷

Limitation of Processing Fees

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(i)(II) (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .”) and 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(c)(3), 16.11(d)(1) (search and review fees shall not be charged to representatives of “the news media”). As a representative of the news media, the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this request should, therefore, be limited accordingly.

The ACLU meets the definition 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

⁷ *See Devin Barrett & Gautham Nagesh, U.S. Defends Marshals in Wake of Secret Cellphone Spying Report*, Wall St. J., Nov. 14, 2014, <http://online.wsj.com/articles/justice-dept-defends-u-s-marshals-in-wake-of-secret-cellphone-spy-report-1415980141>.

distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its communications department and web site. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website's blog attracts more than 40,000 unique visitors per month. The website specifically includes features on information obtained through the FOIA. For example, the ACLU's "Accountability for Torture FOIA" webpage, <http://www.aclu.org/torturefoia>, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. See *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 390,000 households. The ACLU also sends email updates to 1.1 million. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. Cf. *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13-14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a "bi-weekly electronic newsletter that is distributed to over 15,000 readers" about "court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements").

The ACLU also regularly publishes books,⁸ “know your rights” publications,⁹ fact sheets,¹⁰ and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

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

Disclosure is not in the ACLU’s commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citation and internal quotations omitted) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

⁸ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights* (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

⁹ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

¹⁰ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill_ACLU_Fact_Sheet_UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), available at <http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act>.

Waiver of All Costs

The ACLU additionally requests a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it 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.”).

The requested information will “contribute significantly to public understanding.” *Id.* Disclosure of the requested information will help the American public better understand the tradeoffs between law enforcement needs and citizens’ privacy. The public needs more information about the use of cell site simulators deployed on aircraft so that it can play a meaningful role in determining how the balance should be struck. The public has already demonstrated a strong interest in learning more about this technology, as is apparent by the escalating amount of press coverage devoted to this issue. *See, e.g., supra* p. 7.

As a nonprofit 501(c)(3) organization and “representative of the news media” as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.¹¹

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I).

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask

¹¹ For example, in June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006.

that you release all segregable portions of otherwise exempt material.

We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees.

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

Nathan Freed Wessler
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 18th floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Nathan Freed Wessler
Staff Attorney
American Civil Liberties Union

EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

March 26, 2015

MR. NATHAN FREED WESSLER
AMERICAN CIVIL LIBERTIES UNION
125 BROAD STREET
18TH FLOOR
NEW YORK, NY 10004

FOIPA Request No.: 1315015-000
Subject: CELL SITE SIMULATORS
DEPLOYED ON AIRCRAFT

Dear Mr. Wessler:

This is in response to your Freedom of Information/ Act (FOIA) request.

Please be advised that the FBI neither confirms nor denies the existence of records responsive to your request pursuant to FOIA exemption (b) (7) (E) [5 U.S.C. §552 (b)(7)(E)]. The mere acknowledgment of whether or not the FBI has any such records in and of itself would disclose techniques, procedures, and/or guidelines that could reasonably be expected to risk of circumvention of the law. Thus, the FBI neither confirms nor denies the existence of any records.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-000, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of your request.

Enclosed for your information is a copy of the FBI Fact Sheet and Explanation of Exemptions.

Sincerely,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)