

April 16, 2020

Centers for Disease Control and Prevention
FOIA Office
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U.S. Department of Health and Human Services
FOIA Office
HHS.ACFO@hhs.gov

**Re: FOIA Request Concerning Location Data For COVID-19 Crisis
Response
(Expedited Processing Requested)**

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation, and the ACLU of Massachusetts (together, the “ACLU”)¹ submit this Freedom of Information Act request (the “Request”).

The Request seeks records pertaining to the use of location data by the Centers for Disease Control and Prevention (“CDC”) and U.S. Department of Health and Human Services (“HHS”) to respond to the national health crisis caused by the outbreak of the novel coronavirus, SARS-CoV-2. The Request also seeks records pertaining to waiver of enforcement of certain privacy protections provided by the Health Insurance Portability and Accountability Act (“HIPAA”) and implementing regulations.

I. Background

The World Health Organization (“WHO”) defines public health surveillance as “the continuous, systematic collection, analysis and interpretation of health-related data needed for the planning, implementation, and evaluation of public health practice.”²

According to the WHO, public health surveillance is used to:

¹ 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 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.

² World Health Organization, *Surveillance*, <https://www.who.int/emergencies/surveillance>.



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- serve as an early warning system for impending public health emergencies;
- document the impact of an intervention, or track progress towards specified goals; and
- monitor and clarify the epidemiology of health problems, to allow priorities to be set and to inform public health policy and strategies.

Id.

Public health surveillance systems are information networks that allow health authorities to predict and track infectious diseases. This surveillance means something different than intelligence surveillance or law enforcement surveillance.³ Further, the intention and purpose behind public health surveillance systems is to protect and advance public health. Public health surveillance is based on science and informed by experts who study and analyze how diseases spread and how to contain and mitigate their effects.⁴ As you know, this kind of surveillance is very important in pandemic response.⁵

The current pandemic of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, presents unique challenges. Public health experts say the nation has three immediate needs: strong social distancing measures, widespread testing capability, and material support for hospitals being overwhelmed by victims.⁶

In countries with more comprehensive testing, governments are shifting to case detection, contact tracing, isolation of cases, and quarantine of exposed individuals. All of this—as well as the social distancing measures currently in place in the United States—is occurring at small and large scales, involving lockdowns and quarantines of whole towns,⁷ cities,⁸ states,⁹ and countries.¹⁰

³ ACLU of Massachusetts, *Surveillance in the Age of Total Information Awareness*, <https://privacysos.org/report/>.

⁴ Peter Nsubuga et al., *Public Health Surveillance: A Tool for Targeting and Monitoring Interventions*, in *DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES* 997 (Dean T. Jamison et al. eds., 2d ed. 2006).

⁵ See World Health Organization, *Communicable Disease Surveillance And Response Systems: Guide To Monitoring And Evaluating*, 2006, https://www.who.int/csr/resources/publications/surveillance/WHO_CDS_EPR_LYO_2006_2.pdf.

⁶ See Jason Horowitz, *Italy's Health Care System Groans Under Coronaviru—a Warning to the World*, N.Y. Times, (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html> (updated Mar. 17, 2020).

⁷ See Lorenzo Tondo, *Scientists Say Mass Tests in Italian Town Have Halted Covid-19 There*, The Guardian, (Mar. 18, 2020), <https://www.theguardian.com/world/2020/mar/18/scientists-say-mass-tests-in-italian-town-have-halted-covid-19>.



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Certain countries are currently using digital location data to track the spread of the virus, and in some cases to track individual people subjected to quarantine orders. Location tracking uses information created by devices like cell phones to identify and track people, enabling both corporations and the government to know their location, in real-time and historically.¹¹

According to the press, the tech industry and the White House are engaged in discussions about how cell phone location data might be deployed to fight COVID-19 domestically.¹²

The government is also reportedly in talks with insurers about sharing patient health data in a nationwide data system. According to Politico, “[o]ne memo submitted by a group of health technology companies to [Jared] Kushner, Vice President Mike Pence and Health Secretary Alex Azar and circulated widely within the administration, predicted it could supply the government with information on where and how many patients are seeking care across 80 percent of the U.S. ‘in short order.’”¹³

A survey of the current discussions about the use of digital surveillance technology shows that location data can be used in the following ways (“Possible Uses”):

- The use of mass location data to identify unknown individuals who may have been exposed to a contagious person;
- The use of specific location data to assist in identifying where an infected person was in the recent past;

⁸ See Nectar Gan, *China Lifts 76-Day Lockdown on Wuhan as City Reemerges from Coronavirus Crisis*, CNN, (Apr. 8, 2020), <https://www.cnn.com/2020/04/07/asia/coronavirus-wuhan-lockdown-lifted-intl-hnk/index.html>.

⁹ See Faith Karimi & Sarah Moon, *California Orders Its Nearly 40 Million Residents to Stay Home to Prevent the Spread of Coronavirus*, CNN, (Mar. 20, 2020), <https://www.cnn.com/2020/03/19/us/california-coronavirus-stay-home-order/index.html>.

¹⁰ See Juliana Kaplan, Lauren Frias and Morgan McFall-Johnsen, *A Third of the Global Population Is on Coronavirus Lockdown—Here's Our Constantly Updated List of Countries and Restrictions*, Bus. Insider, (Apr. 15, 2020), <https://www.businessinsider.com/countries-on-lockdown-coronavirus-italy-2020-3>.

¹¹ See ACLU, *Location Tracking*, <https://www.aclu.org/issues/privacy-technology/location-tracking>.

¹² See Tony Romm, Elizabeth Dvoskin & Craig Timberg, *U.S. Government, Tech Industry Discussing Ways to Use Smartphone Location Data to Combat Coronavirus*, Wash. Post, (Mar. 17, 2020), <https://www.washingtonpost.com/technology/2020/03/17/white-house-location-data-coronavirus/>.

¹³ Adam Cancryn, *Kushner's Team Seeks National Coronavirus Surveillance System*, Politico, (Apr. 7, 2020), <https://www.politico.com/news/2020/04/07/kushner-coronavirus-surveillance-174165> (updated Apr. 8, 2020).



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- The use of location data to know details and information about how and where people are seeking care;
- The use of location data for purposes of enforcement of mandatory quarantines, stay-at-home orders, or similar measures; and
- The use of aggregate location data for other purposes related to the spread of COVID-19.¹⁴

Location data are extremely sensitive. In recognition of that sensitivity, in *Carpenter v. United States* the Supreme Court ordered that these data should not be disclosed to law enforcement absent a warrant.

Holding that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location information],” the Court decided that the “location information obtained from [the defendant’s] wireless carriers was the product of a search.” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

Moreover, it is not possible to anonymize cell phone location data that use a persistent identifier, because the records show where people live, work, and travel to frequently—information that can be connected to a person’s name relatively easily.¹⁵ It is therefore critical that the government only use location data to fight COVID-19 if it is justified by public health necessity, and is proven to be effective, and implemented in a way that protects privacy and civil liberties.

It is also critical that the government maintain necessary protections for private medical information. On April 2, 2020, HHS announced it would suspend imposition of penalties under the HIPAA Privacy Rule, 45 C.F.R. Parts 160 & 164, for certain disclosures of protected health information by business associates of covered entities that would otherwise not be permitted, and would allow business associates to make those disclosures without prior approval from the covered entity.¹⁶ These changes have potentially broad

¹⁴ See generally Jay Stanley & Jennifer S. Granick, *The Limits of Location Tracking in an Epidemic* (Apr. 8, 2020), <https://www.aclu.org/report/aclu-white-paper-limits-location-tracking-epidemic>; see also Privacy International, *Tracking the Global Response to COVID-19*, <https://privacyinternational.org/examples/tracking-global-response-covid-19>; Amnesty International, *COVID-19, Surveillance and the Threat to Your Rights*, (Apr. 3, 2020), <https://www.amnesty.org/en/latest/news/2020/04/covid-19-surveillance-threat-to-your-rights/>.

¹⁵ See Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. Times (Dec. 19, 2019), <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>. (explaining that “it’s child’s play to connect real names to the dots that appear on the maps” of cell phone location data).

¹⁶ Dep’t of Health & Human Servs., *Notification of Enforcement Discretion under HIPAA to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities in Response to COVID-19*,



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implications, and HHS has not provided clear public justification for why these changes are necessary and whether they are a reasonable and effective means to expedite effective responses to the COVID-19 crisis while maintaining robust protection for health privacy.¹⁷

In emergencies, we understand that many previously unacceptable practices may be adopted temporarily. But details matter, and it's critical that the government be transparent with the public about its plans to use location data or health data during the crisis. The principal focus of this FOIA request is therefore to obtain records that will help the ACLU and the public understand what the government is already doing, what it is considering implementing, and its relationship to technology companies and other entities that hold sensitive data about millions of Americans.

II. Requested Records

The ACLU requests the following records from CDC and HHS. This Request seeks records created on or after January 1, 2020:

1. All contracts, memoranda of understanding, letters of commitment, licenses, subscription agreements, and other agreements with vendors, pertaining to Possible Uses of location data and government access to or receipt of data from commercial databases containing location information derived from cell phones or other sources;
2. All communications with vendors or private companies that possess, provide, or sell location data about using or accessing it for Possible Uses, and all communications discussing or mentioning those vendors or private companies;
3. All policies, procedures, guidelines, formal or informal guidance, advisories, directives, training materials, presentations, and memoranda concerning:

<https://www.hhs.gov/sites/default/files/notification-enforcement-discretion-hipaa.pdf>; Dep't of Health & Human Servs., *OCR Announces Notification of Enforcement Discretion to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities During The COVID-19 Nationwide Public Health Emergency* (Apr. 2, 2020), <https://www.hhs.gov/about/news/2020/04/02/ocr-announces-notification-of-enforcement-discretion.html>.

¹⁷ See World Privacy Forum, *April 6, 2020 WPF Statement on COVID-19 Business Associate HIPAA Waiver*, <https://www.worldprivacyforum.org/2020/04/april-2-2020-wpf-statement-on-covid-19-and-changes-in-hipaa-practices/>.



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- a. Possible Uses of location data and the source of those Possible Uses;
- b. Access to commercial databases containing cell phone location information or other location data;
- c. Acquisition, processing, retention, use, or dissemination of cell phone location information or other location data purchased from a commercial vendor;
- d. The anonymization and de-anonymization of cell phone location information or other location data purchased or otherwise acquired from a commercial vendor;
- e. The use of cell phone location information or other location data purchased or otherwise acquired from a commercial vendor in COVID-19-related issues; and
- f. Any other health-related use of information that consists of, was obtained from, or was derived from cell phone location information or other location data purchased or otherwise acquired from a commercial vendor;

- 4. All formal legal analysis concerning access to commercial databases containing cell phone location information, or the acquisition, processing, retention, use, or dissemination of cell phone location information purchased or otherwise acquired from a commercial vendor, including the application of *Carpenter v. United States*, 138 S. Ct. 2206 (2018), to this information;
- 5. All formal legal analysis concerning access to commercial databases containing other location data, or the acquisition, processing, retention, use, or dissemination of other location data purchased or otherwise acquired from a commercial vendor;
- 6. Records sufficient to show the volume of cell phone location information or other location data contained in the commercial databases for which CDC and HHS have purchased or otherwise obtained access, and records sufficient to show the volume of data that the agencies have accessed from these databases;
- 7. Records sufficient to show the number of times each year that CDC and HHS employees or contractors have accessed commercial databases containing cell phone location information or other location data, or have used information obtained from such databases, or are planning to use any of those;



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8. Memoranda and similar records prepared by private health insurers discussing the use of patient data or location information to respond to the COVID-19 crisis; and
9. Records pertaining to the HHS decision, announced on April 2, 2020, to waive enforcement of certain privacy requirements under the Health Insurance Portability and Accountability Act and implementing regulations against business associates of covered entities, including but not limited to communications, memoranda, and records pertaining to specific entities or circumstances in which the waiver has been cited, invoked, or anticipated to be invoked to permit sharing of otherwise protected patient information.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁸ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by organizations 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 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. *See id.*¹⁹ 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 ACLU v. Dep't of Justice*, 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

¹⁸ *See also* 45 C.F.R § 5.27.

¹⁹ *See also* 45 C.F.R § 5.27(b)(ii).



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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”).²⁰

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to 850,000 people. The ACLU also publishes regular updates and alerts via email to 3.9 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 4.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,²¹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²²



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²⁰ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

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

²² *See, e.g.,* Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill (Mar. 21, 2019), <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept (Feb. 8, 2017),

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.²³ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its frequently visited website, <https://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. 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

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

²³ *See, e.g.*, ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’—Except for the Ones That Really Matter Most* (Aug. 8, 2016), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.



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relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.²⁴

The ACLU website includes many features on information obtained through the FOIA. For example, the ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of its contents relating to government policies on rendition, detention, and interrogation.²⁵ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.²⁶

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



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²⁴ See, e.g., *ACLU v. ODNI*—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ*—FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media, ACLU Case Page, <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, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingrayfoia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (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>.

²⁵ *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

²⁶ Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010, ACLU (Nov. 29, 2010), https://www.aclu.org/files/pdfs/natsec/faafoia_20101129/20101129Summary.pdf; Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; Statistics on NSL’s Produced by Department of Defense, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

- 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).²⁷ Specifically, the requested records relate to the purchase, acquisition, and use of cell phone location information or other location data by the CDC and the HHS in the middle of the COVID-19 outbreak, and the suspension of enforcement of longstanding protections in the HIPAA Privacy Rule. As noted in the Background section of the Request, that debate on these issues is happening *now*, and there is a pressing need for the records sought in this Request. The records sought relate to matters of widespread and exceptional media and public interest: the government’s use of cell phone location information and other location data to contain the spread of the novel coronavirus, and privacy protections for other sensitive health information. The public, the press, and lawmakers²⁸ are in need of immediate access to this information in order to inform an ongoing debate, which will likely only increase in importance as the COVID-19 crisis drags on.

Given the foregoing, ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to 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).²⁹ The ACLU also requests a waiver of search fees on the grounds that each organization qualifies as a “representative of the news media” and neither organization seeks the records for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

- A. *The Request 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 ACLU.*

²⁷ *See also* 45 C.F.R § 5.27(b)(ii).

²⁸ *See* Letter from Sen. Edward J. Markey, to Michael Kratsios, Chief Tech. Officer of the U.S., Office of Sci. and Tech. Policy (Mar. 19, 2020), <https://www.markey.senate.gov/imo/media/doc/Markey%20Letter%20-%20OSTP%20Location%20Data%203.18.20.pdf>.

²⁹ *See also* 45 C.F.R § 5.54.



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As discussed above, media accounts underscore the substantial public interest in the records sought through this Request. *See supra* Section III.B. Given the ongoing and widespread media attention to the possible use of cell phone location information or other location data or health information to contain the spread of the novel coronavirus, the records sought will significantly contribute to public understanding of matters of profound importance. Moreover, because so little information is publicly available concerning the government’s purchase, acquisition, and use of location data, the records sought are critical to understanding the scope of this practice, the government’s purported legal justifications for it, and its broader implications for Fourth Amendment and other constitutional rights.

The ACLU is not filing this Request to further its commercial interest. As described above, the ACLU is a not-for-profit organization, and any information disclosed by the ACLU as a result of this FOIA Request will be made available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. The ACLU is a representative of the news media and the records are not sought for commercial use.

The ACLU also requests a waiver of search fees on the basis that the ACLU qualifies as a “representative of the news media” and does not seek the records for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).³⁰ 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)³¹; *see also Nat’l Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. Dep’t of Justice*, 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

³⁰ *See also* 45 C.F.R § 5.54(b)(2)(ii)-(iii)

³¹ *Id.*



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editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU therefore is a “representative of the news media” for the same reasons that it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” to be a news media requester).³² 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.”³³ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

³² 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. Privacy Info Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; see also *Leadership Conference on Human Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

³³ 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 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 May 2016, the FBI granted a fee waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also, in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.



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Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 45 C.F.R § 5.27(c).

If the Request is denied in whole or in part, the ACLU asks that you justify all denials by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

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

Nathan Freed Wessler
ACLU Speech, Privacy, and Technology Project
125 Broad Street, 18th Floor
New York, NY 10004
nwessler@aclu.org

Please note that the ACLU's offices are currently closed due to the Covid-19 crisis, are not accepting deliveries sent via UPS, FedEx, or other parcel services, and are not forwarding parcels sent via USPS. **Please transmit any response letters and responsive records via email. If records must be mailed on a CD/DVD, please contact Nathan Wessler at nwessler@aclu.org for his home mailing address.**

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

Sincerely,



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