

October 24, 2018

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Anthony Romero  
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**Re: Request Under Freedom of Information Act  
(Expedited Processing & Fee Waiver/Limitation Requested)**

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation and the American Civil Liberties Union of Northern California (together, the “ACLU”)<sup>1</sup> submit this Freedom of Information Act (“FOIA”) request (the “Request”) seeking the disclosure of records related to the Department of Homeland Security’s (DHS) use or assessment of Amazon “Rekognition” and other face recognition technology.

### **I. Background**

On May 22, 2018, the ACLU released documents involving Rekognition – face surveillance technology that Amazon has aggressively marketed to law

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<sup>1</sup> 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, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. 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. The American Civil Liberties Union of Northern California is the Northern California affiliate of the national ACLU.



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enforcement agencies across the country.<sup>2</sup> The documents raised concerns that Amazon was actively encouraging and facilitating use of the technology that posed privacy and civil liberties concerns. Following the release of these documents, nearly seventy organizations called on Amazon to stop selling this technology to the government.

Release of the documents also promoted increased Congressional concern over government use of face recognition technology. Several members of Congress issued statements expressing concern with face recognition, including Amazon Rekognition specifically. For example, the Congressional Black Caucus sent a letter to Amazon CEO Jeff Bezos noting face recognition’s “high propensity for misuse”; its “profound negative” consequences for “people of color, including immigrants and protesters”; and members’ “serious concern that wrong decisions will be made” based on data sets built on a history of unfair, and often unconstitutional, policing.<sup>3</sup>

Subsequently, on July 26, 2018, the ACLU released the results of a test of showing that Rekognition falsely identified twenty-eight members of Congress as matching mugshot photos, when relying on the technology’s default confidence score. Members of color were disproportionately represented in the false matches. Results of this test were widely reported by major media outlets.<sup>4</sup>

Following release of this information, Republicans and Democrats in Congress wrote to Amazon expressing concern with Rekognition. Specifically, 25

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<sup>2</sup>Matt Cagle and Nicole Ozer, *Amazon Teams Up With Government to Deploy Dangerous New Facial Recognition Technology*, ACLU (May 22, 2018), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazon-teams-government-deploy-dangerous-new>.

<sup>3</sup>Breland, Ali, *Black Caucus Raises Concerns Over Amazon Facial Recognition Software*, The Hill (May 24, 2018), <http://thehill.com/policy/technology/389267-black-caucus-blasts-amazon-facial-recognition-software>.

<sup>4</sup>See, e.g. Natasha Singer, *Amazon’s Facial Recognition Wrongly Identifies 28 Lawmakers*, A.C.L.U. Says, NY Times, July 26, 2018, <https://www.nytimes.com/2018/07/26/technology/amazon-aclu-facial-recognition-congress.html> (quoting ACLU of Northern California attorney Jacob Snow); Tony Romm, *Amazon’s facial-recognition tool misidentified 28 lawmakers as people arrested for a crime, study finds*, Wash. Post, July 26, 2018, [https://www.washingtonpost.com/technology/2018/07/26/amazons-facial-recognition-tool-misidentified-lawmakers-people-arrested-crime-study-finds/?utm\\_term=.94792ea56d44](https://www.washingtonpost.com/technology/2018/07/26/amazons-facial-recognition-tool-misidentified-lawmakers-people-arrested-crime-study-finds/?utm_term=.94792ea56d44) (quoting ACLU of Northern California attorney Jacob Snow); Adia Robinson, *Amazon facial recognition technology misidentifies 28 lawmakers as those previously arrested, ACLU says*, ABC, July 26, 2018, <https://abcnews.go.com/Politics/amazon-facial-recognition-technology-misidentifies-28-lawmakers-previously/story?id=56853183>; Ryan Suppe, *Amazon’s facial recognition tool misidentified 28 members of Congress in ACLU test*, USA Today, July 26, 2018, <https://www.usatoday.com/story/tech/2018/07/26/amazon-rekognition-misidentified-28-members-congress-aclu-test/843169002/> (quoting ACLU of Northern California attorney Jacob Snow); Jeffrey Dastin, *Amazon’s face ID tool mismatched 28 members of Congress to mug shots: ACLU*, Reuters, July 26, 2018, <https://www.reuters.com/article/us-amazon-com-facial-recognition/amazons-face-id-tool-mismatched-28-members-of-congress-to-mugshots-aclu-idUSKBN1KG1K7> (quoting ACLU of Northern California attorney Jacob Snow).

members of the House of Representatives sent a letter to Amazon requesting a meeting with CEO Jeffrey Bezos, urging the company to work with policymakers and stakeholders “[b]efore Amazon Rekognition or similarly technology is on the market or used by law enforcement.” The letter expressed alarm concerning “the deleterious impact this tool – if left unchecked – will have on communities of color; immigrants; protestors peaceably assembling and others petitioning the Government for a redress of grievances; or any other marginalized group.”<sup>5</sup> Three members of Congress also sent an additional letter to Amazon expressing concern over the test results and requesting additional information regarding Rekognition.<sup>6</sup> Moreover, four Senators wrote to thirty-nine federal law-enforcement agencies, including DHS, requesting more information regarding potential uses of face recognition technology.



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On July 27, 2018, the DHS Blue Campaign appeared to tweet in support of Amazon and Rekognition, stating “.@Amazon facial recognition #technology could aid in fight to #endtrafficking: <https://t.co/GaTn5egRsr>.” The tweet linked to a *New York Times* article titled, “Amazon’s Facial Recognition Wrongly Identifies 28 Lawmakers, A.C.L.U. Says.” (Screenshot Attached). The tweet was later taken down.

The tweet is notable because it appears to violate 5 CFR §2635.702, which prohibits employees from endorsing “any product, service, or enterprise,” absent narrow exceptions. It also appears contrary to guidance from the Office of Government Ethics, which states that, “Executive branch employees may not use their Government positions to suggest that the agency or any part of the executive branch endorses an organization (including a nonprofit organization), product, service, or person.” The tweet may also raise concerns under 48 § CFR 3.101-1, which urges avoidance of a conflict of interest or the appearance of a conflict of interest in Government-contractor relationships.

The DHS conduct is also of interest because Amazon appears to be marketing its face recognition technology to DHS. Recently released documents show that Amazon hosted Immigration and Customs Enforcement (ICE) officials in June 2018 for a workshop to discuss potential uses of Rekognition by the agency. In an email following up on this meeting, Amazon officials list a series of “action items” based on those conversations, including providing list of algorithms the company supports, requesting information about a “text use case,” and the development of a possible innovation workshop. On June 31, Amazon officials also shared their rebuttal to the ACLU test with DHS officials, noting it may be of interest given “ongoing efforts.”<sup>7</sup>

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<sup>5</sup>Alba, Davey, *Bipartisan Lawmakers Want to Talk to Amazon About Its Facial Recognition Tech*, BuzzFeed (July 27, 2018), [https://www.buzzfeednews.com/article/daveyalba/congressmen-mismatched-to-mugshots-by-amazon-tech-demand?bftwnews&utm\\_term=4ldqpgc#4ldqpgc](https://www.buzzfeednews.com/article/daveyalba/congressmen-mismatched-to-mugshots-by-amazon-tech-demand?bftwnews&utm_term=4ldqpgc#4ldqpgc).

<sup>6</sup> *Id.*

<sup>7</sup> Laperruque and Peterson. *Amazon Pushes ICE to Buy Its Face Recognition Surveillance Tech* (October 23, 2018), <https://www.thedailybeast.com/amazon-pushes-ice-to-buy-its-face-recognition-surveillance-tech?ref=home>.



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DHS has provided little public information regarding whether it is currently exploring new ways in which to use face recognition technology for immigration and law enforcement purposes. In an October 16, 2018 letter responding to an inquiry by Senator Wyden, ICE agency officials indicated that it only used face recognition technology as part of its Alternatives to Detention Intensive Supervision Program III. However, the agency did not provide any information related to alternative uses of face recognition that are being explored by the agency.<sup>8</sup>

Release of the requested records is necessary to answer questions regarding whether DHS: 1) has taken inappropriate steps to promote or endorse Amazon Rekognition in an effort to influence the public debate; 2) has a “conflict of interest” or the “appearance of a conflict of interest” related to Amazon or any agency procurement processes; or 3) is deploying or seeking to deploy face recognition technology in a manner that has not been previously disclosed to the public or subject to privacy impact assessments.

## **II. Records Requested**

This request seeks the following records:

1. Any policy directives, guidance documents, memoranda, training materials, or similar records created after January 1, 2015 governing the use of face recognition technology for immigration or law enforcement purposes.
2. Records dated or created after January 1, 2015 relating to the purchase of face recognition technology and related software and services, including but not limited to purchase orders, invoices, RFPs, licensing agreements, documentation of selection, sole source or limited source justification and approval documentation, contracts (including non-disclosure agreements), and other memoranda and documentation. This should include any purchase of Rekognition or other face recognition technology and services from Amazon, as well as any purchase of facial recognition technology or services from other companies.
3. Records dated or created after January 1, 2015 related to meetings or follow-up actions with any vendors, companies, or other private entities marketing face recognition to DHS for immigration, intelligence, or law enforcement use.

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<sup>8</sup> Letter from ICE Deputy Director Ronald Vitiello to Senator Ron Wyden (Oct. 26, 2018), <https://www.documentcloud.org/documents/5014365-102576-Wyden-Final-Signed-Response.html>.

4. All communications,<sup>9</sup> including those involving DHS Blue Campaign staff, since January 1, 2018 related to Amazon Rekognition, including communications referencing the ACLU test released on July 26, 2018.
5. All communications related to the tweet that DHS Campaign Blue posted on July 27, 2018 stating, “@Amazon facial recognition #technology could aid in fight to #endtrafficking: <https://t.co/GaTn5egRsr>.”

### **III. Application for Expedited Processing**

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>10</sup> There is a “compelling need” for this record, 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 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. 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>11</sup> Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).<sup>12</sup>

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via



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<sup>9</sup> For purposes of this request, “communications” should include, but not be limited to: memoranda, letters, emails, text messages (including messages sent via SMS, Blackberry Messenger, social media direct message programs, and other means), and other written communications; voicemail messages; and notes or records of meetings, phone calls, and other verbal communications.

<sup>10</sup> *See also* 6 C.F.R. § 5.5(e).

<sup>11</sup> *See also* 6 C.F.R. § 5.5(e)(1)(ii).

<sup>12</sup> 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).

email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 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,<sup>13</sup> and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>14</sup>

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.<sup>15</sup> The ACLU also



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<sup>13</sup> See, e.g., Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

<sup>14</sup> See, e.g., Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screening Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

<sup>15</sup> See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 PM), <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*

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 heavily visited website, [www.aclu.org](http://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, as well as 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.

The ACLU website includes many features on information obtained through the FOIA.<sup>16</sup> For example, the ACLU’s “Predator Drones FOIA”



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*for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems* (Oct. 29, 2013), [https://www.aclu.org/sites/default/files/assets/eye\\_on\\_fbi\\_-\\_sars.pdf](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).

<sup>16</sup> *See, e.g.*, Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of ‘Zero-Day’ Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.<sup>17</sup>

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.<sup>18</sup> Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program<sup>19</sup>; a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>20</sup>; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests<sup>21</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>22</sup>

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are 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.



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<sup>17</sup> *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>18</sup> *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](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf).

<sup>19</sup> *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), [https://www.aclu.org/sites/default/files/field\\_document/dem17-tsa\\_detection\\_report-v02.pdf](https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf).

<sup>20</sup> *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

<sup>21</sup> *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

<sup>22</sup> Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.



- 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).<sup>23</sup> Specifically, the requested records relate to DHS use of face recognition technology, which is an issue of considerable public debate and Congressional interest, as described above. In addition, the records related to conduct that may violate existing regulations and policies by suggesting that the Executive Branch endorses Amazon or its Rekognition technology.

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



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#### **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 are 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). The ACLU also requests 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).

- 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.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about use of face recognition by DHS is publicly available, the records sought are certain to contribute significantly to the public’s understanding of this topic.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be 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)).

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<sup>23</sup> *See also* 6 C.F.R. § 5.5(e)(1)(ii).

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



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The ACLU also requests 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).<sup>24</sup> 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); *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. DOD*, 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. DOJ*, 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”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). 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 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. DOJ*, 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).<sup>25</sup>

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news

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<sup>24</sup> *See also* 6 C.F.R. 5.11.

<sup>25</sup> 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 / 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 Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

media.”<sup>26</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

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); 6 C.F.R. 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions 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.



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

Neema Singh Guliani  
915 15<sup>th</sup> St NW, 6<sup>th</sup> Floor  
Washington, DC 20005  
T: 202-675-2322  
F: 202-546-0738  
nguliani@aclu.org

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).

Respectfully,

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<sup>26</sup> 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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A handwritten signature in black ink, appearing to read "Neema Singh Guliani".

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