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Re: Request Under Freedom of Information Act/ Expedited Processing Requested

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU")[1] and Muslim Advocates[2] submit this Freedom of Information Act ("FOIA") request for records pertaining to the questioning of U.S. citizens and legal residents about their protected religious and political beliefs,

[1] The American Civil Liberties Union Foundation is a 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 the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 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] Muslim Advocates is a 501(c)(3) nonprofit organization that promotes equality, liberty, and justice for all, regardless of faith, through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.

associations, and religious practices and charitable giving by government officials conducting inspections at ports of entry to the United States.[3]

Over the past several years, U.S. citizens and legal residents who are Muslim, or who are perceived to be Muslim, have been questioned by U.S. Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP") officers about their protected religious and political beliefs, associations, and religious practices and charitable giving when returning home to the United States from abroad. At ports, land border crossings, and international airports across the country, these individuals have been stopped and questioned about topics including their religious identity, the mosque they attend, how often they pray, their views on U.S. military engagement in Iraq, and their opinions about the U.S. president—despite the absence of credible evidence supporting a reasonable suspicion that they have engaged in wrongdoing. Some have also been subjected to lengthy questioning and searches of their electronic devices, such as laptops and cell phones, and have had data from these devices copied. Civil rights organizations have documented that such cases have taken place at ports of entry across the country. Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith, and Finances of Americans Returning Home* 6-8, 19-22, 25-26, 27-28, 32-36, 38-42 (2009); Asian Law Caucus, *Returning Home: How U.S. Government Practices Undermine Civil Rights at Our Nation's Doorstep* 10-21 (2009).

The questioning of U.S. citizens and legal residents who are Muslim, or who are perceived to be Muslim, about their protected beliefs, associations, and activities during inspection at ports of entry to the United States raises grave civil rights and privacy concerns. Such questioning may violate these individuals' rights under the Constitution and federal law, including the First and Fourth Amendments and the Religious Freedom Restoration Act ("RFRA").

Individuals who are questioned in this manner also fear that information about their First Amendment-protected beliefs and activities is recorded, disseminated in government databases, and used to unjustly target them for future law enforcement attention. They and others in the American Muslim, Arab, South Asian, and Sikh communities also worry that they may be subject to future invasive and illegal questioning about their protected beliefs, associations, and activities when returning to the country from abroad and feel chilled from exercising core rights to freedom of speech, association, and free exercise of religion. *Returning Home* at 12-13. Civil rights organizations have expressed concern that such questioning is indicative of discrimination and a practice of religious and racial profiling. *Id*. at 24-32; William Fisher, *No Warm Welcome for American Muslim Travelers*, Arab Am. News, Apr. 25, 2009.

[3] The ACLU and Muslim Advocates (collectively "Requesters") submit this request pursuant to the FOIA, 5 U.S.C. § 552, the Department of Homeland Security ("DHS") implementing regulations, 6 C.F.R. § 5, and the Customs and Border Protection implementing regulations, 19 C.F.R. § 103.1-.13, for records maintained by Customs and Border Protection and other DHS components.

U.S. citizens and legal residents have a right to know what questions they may be asked and what questions they are required to answer when they seek to reenter the United States from abroad. Despite more than two years of advocacy by impacted individuals and civil rights organizations, however, neither DHS nor CBP has clarified government policy on these issues. The public remains in the dark about:

- whether U.S. citizens and legal residents may be asked about their protected religious and political beliefs or about their associations, religious practices, or religious charitable giving during border inspections;
- what standards govern CBP questioning of U.S. citizens and legal residents about such topics so as to safeguard privacy and civil rights and to prevent illegal and inappropriate profiling on the basis of religion, race, and/or ethnicity;
- which questions, if any, U.S. citizens and legal residents are required to answer on these topics; and
- whether or how an entrant's responses to questions about beliefs, associations, and activities that are protected by the First Amendment and other law are recorded and disseminated to other components of DHS, other government agencies, or persons or entities outside the government, and the standards governing the retention and destruction of such information.

The ACLU and Muslim Advocates file this request to obtain documents that shed light on these questions because it is imperative for the public to have a better understanding of the policy and practice of questioning U.S. citizens and legal residents about beliefs and practices that are protected by the Constitution and federal law.

Requested Records

1. All records[4] created since September 11, 2001 pertaining to CBP's authority to question an individual during inspection at a port of entry to the United States about political views or opinions, religious beliefs, associations, and religious practices and charitable giving. This should include, but not be limited to records regarding:

   a. The stage of inspection when individuals may be asked such questions;

   b. The criteria for selecting individual travelers for such questioning, including real or perceived religion, race, ethnicity, and/or national origin, and listing status in government databases, including the Traveler Enforcement and Compliance System ("TECS");

[4] The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to, correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

c. The standards governing whether information provided by an individual in response to such questioning is recorded and/or reported to, entered into, or disseminated through databases, or by other means, to other components of DHS, other government agencies, or persons or entities outside the government, and the standards governing the retention and destruction of such information;

d. The permissible response(s) of DHS and/or CBP officers to an individual's refusal to answer questions during inspection at a port of entry;

e. An entrant's access to legal counsel or ability to invoke a right to remain silent during inspection at a port of entry;

f. The compliance or non-compliance of the records responsive to Request No. 1(a)-(c) with the Constitution and international, federal, state, and/or local privacy and anti-discrimination laws, including the Religious Freedom Restoration Act;

g. The compliance or non-compliance of records responsive to Request No. 1(a)-(c) with the Department of Justice's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, and DHS and CBP policy, including the Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities (Jun. 1, 2004);

h. CBP audit and review of compliance with its policies governing such questioning and documents generated in the course of, or as the result of, any audits or reviews;

i. Intelligence directives related to the stopping and questioning of travelers (whether created by or disseminated by CBP) about protected information;

j. Any protocols for engaging FBI or other law enforcement agencies during the questioning of a traveler during inspection at a port of entry.

2. All records created since September 11, 2001 regarding the questioning of individuals during inspection at ports of entry about their political beliefs or views, religious beliefs, associations, and religious practices and charitable giving, including:

a. Statistics reflecting the number of individuals subject to such questioning both in absolute terms and as a proportion of the total number of travelers;

b. Statistics reflecting the number of individuals subjected to questioning in response to an intelligence directive or watch list, including the number of individuals within this group who were subsequently referred to further law enforcement action;

c. Statistics reflecting the real or perceived religion, race, ethnicity, and/or national origin of individuals selected for such questioning, and any requirement for DHS or its components to collect, track and/or publicly report such data;

d. Complaints about, investigations of, disciplinary actions related to, and reported legal problems regarding such questioning of individuals by CBP officers;

e. The process and/or procedures that individuals may use to determine whether and what information about their protected political beliefs or views or religious beliefs, associations, and charitable giving has been entered into government databases, how to correct any errors, and how to challenge decisions to retain such information;

f. The names of the terrorist watch lists and law enforcement databases that are accessed by CBP officers and used to identify individuals for questioning about protected information.

I. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d). There is a "compelling need" for these records 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 Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 6 C.F.R. § 5.5(d)(1)(ii).

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); 6 C.F.R. § 5.5(d)(1)(ii). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU's work and one of its primary activities. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 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" (internal citation omitted)).[5]

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 300,000 people. Both of these newsletters often include descriptions and analysis of information obtained through FOIA.

[5] Notably, courts have found that organizations with missions similar to that of the ACLU and that engage in information dissemination activities similar to that of 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) (Leadership Conference on Civil Rights); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (Electronic Privacy Information Center).

The ACLU regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. Since 2007 alone, ACLU national projects have published and disseminated over 30 reports. Many ACLU reports include description and analysis of government documents obtained through FOIA.[6] The ACLU also regularly publishes books, "know your rights" publications, 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.[7]

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* http://www.aclu.org/blog. The ACLU also 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* http://www.aclu.org/multimedia/index.html. The ACLU has also produced an in-depth television series on civil liberties called "The Freedom Files." *See* http://aclu.tv/.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. 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, the ACLU also provides the public with educational material about the particular civil liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; government documents obtained through FOIA about the issue; and more in-depth analytic and educational multi-media features on the issue.[8]

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[6] *See, e.g.*, ACLU, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act* (March 2009), *available at* http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; ACLU, *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; ACLU, *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), *available at* http://www.aclu.org/images/asset_upload_file893_29902.pdf; ACLU, *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), *available at* http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; ACLU, *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003), *available at* http://www.aclu.org/FilesPDFs/spies_report.pdf.

[7] A recent search of Amazon.com produced over 60 books published by the ACLU.

[8] For example, the ACLU's website about national security letter ("NSL") cases, www.aclu.org/nsl, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis

The ACLU website includes many features on information obtained through the FOIA.[9] For example, the ACLU's "Torture FOIA" webpage, http://www.aclu.org/accountability/released.html, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA.

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance and that describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part.[10] Similarly, the ACLU produced 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.[11]

Muslim Advocates is also "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Muslim Advocates' efforts to end racial and religious profiling and the targeting of individuals by law enforcement use the tools of legal advocacy, policy reform, and community education, through a variety of means, including an electronic newsletter, its website, publications, seminars, webinars, and a heavily circulated know your rights video, *Got Rights?,* which provides guidance to individuals about how to handle contact from law enforcement officials at home or at the border. Muslim Advocates represents the fears and concerns of the community to government and law enforcement officials, for example by testifying before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution about the increase in invasive interrogations and laptop, cell phone, and digital camera searches of law-abiding American citizens returning home from travel abroad, and educates the community and greater public through the publication of materials, including a widely disseminated

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and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSLs; myths and facts documents; and links to information and analysis of related issues.

[9] *See, e.g.*, http://www.aclu.org/accountability/released.html (Torture FOIA); http://www.aclu.org/accountability/olc.html (OLC Memos); http://www.aclu.org/national-security/csrt-foia (CSRT FOIA); http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request (NSA FOIA); http://www.aclu.org/national-security/patriot-foia (Patriot Act FOIA); http://www.aclu.org/national-security_technology-and-liberty/spy-files (Spy Files).

[10] The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf.

[11] The chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf.

report, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, which documents the systematic and widespread practice of federal agents interrogating Americans at our nation's borders. The report chronicles the experiences of law-abiding Americans who are being systematically selected by Customs and Border Protection agents for searches and interrogations on the basis of race, religion, and national origin. This includes, but is not limited to, the search and review of data on laptops, digital cameras and cell phones, without evidence or even suspicion that the travelers have engaged in wrongdoing.

The ACLU and Muslim Advocates plan 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.

Furthermore, the records sought are urgently needed "to inform the public about actual or alleged federal government activity." 6 C.F.R. § 5.5(d)(1)(ii). The records sought pertain to the questioning of U.S. citizens and legal residents about their protected political opinions, religious beliefs, associations, and religious practices and charitable activities during border inspections—even in the absence of any suspicion or evidence of wrongdoing. CBP officers have asked U.S. citizens who are Muslim, or who are perceived to be Muslim, whether they "hate" the U.S. government, *Returning Home* at 14, and about their opinions about Barack Obama, *id.* at 16, the mosques they attend, *id*. at 20, their activities on behalf of charitable organizations, *Unreasonable Intrusions* at 20, their associations with lawful religious organizations, *id.* at 21-22, their reasons for converting to Islam, *id*. at 28, 39, the contents of their lectures and their views of religious doctrine, *id* at 38. In one documented case, a CBP agent asked a citizen about opinions that he had expressed about the U.S. war in Iraq and events in the Middle East in a letter to the editor of a local paper. *Id*. at 28. Such questioning in the coercive context of border inspections implicates the First Amendment and RFRA because it risks chilling the free exchange of ideas and the free exercise of association and religion. It may also infringe on core Fourth Amendment rights because it involves highly invasive, non-routine government probing into a traveler's protected beliefs and activities.

Disclosure of the requested information will contribute significantly to public understanding of whether and when CBP officers are authorized to question U.S. citizens and legal residents about protected beliefs, associations and activities when reentering the United States from abroad, and what guidelines, if any, are in place to ensure that their rights are adequately protected. Granting CBP authorities unbridled discretion to question U.S. citizens and legal residents about their protected beliefs and activities raises a serious risk of discriminatory enforcement against religious and racial minorities. Indeed, reports that U.S. citizens and legal residents who are Muslim, or who are perceived to be Muslim, have been questioned at the border about their protected beliefs, associations, and activities raise serious concerns about the profiling of American Muslims, Arabs, and South Asians post-9/11. *Returning Home* at 24-32; Yamini Kaul, *U.S. Minorities Decry Racial Profiling at Congressional Hearing*, All Headline News, June 18, 2010 (noting reports by civil rights organizations of invasive and abusive

conduct towards American Muslims traveling to the U.S. from abroad); Omar Sacirbey, *12,000 American Muslims to Make Pilgrimage to Mecca*, Hous. Chron., Nov. 12, 2010 ("In recent years, many Muslims returning from travel abroad have complained about religious profiling and lengthy searches and questioning at airports and border crossings."); *see also* Neil MacFarquhar, *Borders Spell Trouble for Arab-American*, N.Y. Times, Apr. 29, 2007 (noting public concern regarding profiling of American Muslims and Arabs post-9/11); Neil MacFarquhar, *Terror Fears Hamper U.S. Muslims' Travel*, N.Y. Times, June 1, 2006 (noting fears of Arab-American and civil rights organizations that border officials profile Arabs and Muslims). As a consequence, members of the American Muslim, Arab, and South Asian communities fear that they will be inappropriately and illegally questioned about their protected beliefs, associations, and practices when returning to the United States from abroad and feel chilled from exercising their rights.

Impacted individuals also fear that information about their First Amendment-protected speech, associations, beliefs and practices may be recorded and disseminated in government databases without protection for their privacy or civil rights. *See, e.g.*, Ellen Nakashima, *Terror Suspect List Yields Few Arrests*, Wash. Post, Aug. 25, 2007 (noting public concern about potential privacy invasions resulting from government collection and retention of electronic records on Americans' international travel and other activities gleaned through border inspections).

The records requested are urgently needed because U.S. citizens and legal residents do not know what questions they may be asked and what questions they are required to answer when they seek to reenter the United States from abroad, or whether adequate safeguards exist to protect them from illegal and inappropriate violations of their rights under the Constitution and federal law, privacy infringements, profiling, or future CBP or law enforcement scrutiny due to their First Amendment protected beliefs, associations, and activities. Nor do they know if their real or perceived religion, race, ethnicity, or national origin is a factor in the decision of CBP officers to question them about such sensitive and protected topics.

Furthermore, the invasive questioning at the border of U.S. citizens and legal residents who are Muslims, or who are perceived to be Muslim, has won considerable media attention. Molly Kavanaugh, *Do Guards at the Border Cross the Line?*, Cleveland Plain Dealer, Apr. 8, 2007 (reporting case of Muslim citizen questioned by border agents about a letter he wrote to the editor of his local paper expressing political opinions about events in the Middle East); Kelly Kennedy, *Chicagoan Stranded at the Border*, Chi. Trib., June 29, 2005 (reporting inappropriate and invasive questioning of Muslims by CBP officers). The questioning of Muslims at the border about their First Amendment-protected beliefs, associations, and activities has garnered special attention in recent years. *See, e.g.*, William Fisher, *No Warm Welcome for American Muslim Travelers*, Arab Am. News, Apr. 25, 2009; Howard Friedman, *Report Urges Changes to Protect Against Improper Searches of Muslims Returning to U.S.*, Religion Clause, Apr. 24, 2009; Spencer S. Hsu, *U.S. Border Screening Under Fire*, Wash. Post, Apr. 20, 2009;

Pak Civil Liberty Groups Seek Review of US 'Screening' Policy, Asian News Int'l, Apr. 21, 2009.

As the widespread public interest attests, records pertaining to the questioning at the border of U.S. citizens and legal residents who are Muslim, or are perceived to be Muslim, are "urgen[tly needed] to inform the public about an actual or alleged federal government activity." 6 C.F.R. § 5.5(d)(1)(ii).

Accordingly, expedited processing is appropriate in this case.

Application for Waiver or Limitation of Fees

We request 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 the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. In light of the ongoing and widespread media attention to inappropriate and potentially illegal questioning of U.S. citizens and legal residents who are Muslims, or who are perceived to be Muslim, by CBP about protected beliefs, associations, and activities when seeking to return home from abroad, the records sought in the instant request will significantly contribute to public understanding of the issue. Similarly, news accounts also indicate serious public concern about whether government officials respect rights protected by the Constitution and federal law when handling of information provided by U.S. citizens in response to questioning during border inspections. *See, e.g.*, Nakashima, *supra*. Disclosure of the requested information will foster critical understanding of this issue as well.

In addition, disclosure is not in the commercial interest of the ACLU or Muslim Advocates.[12] As described above, any information disclosed by the ACLU and Muslim Advocates 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.'") (citation omitted).

For the same reasons, we also request a waiver of document search and review fees on the grounds that a waiver "is in the public interest because furnishing the information primarily benefits the general public" within the meaning of the CBP

[12] The ACLU and Muslim Advocates do not seek disclosure to further a commercial interest. Both organizations are "non-profit, non-partisan, public interest organization[s]." *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003).

regulation permitting such a waiver. 19 C.F.R. § 103.10(d)(2)(ii). As described in further detail above, disclosure of the requested information will primarily benefit the public by fostering critical understanding of two issues of serious public concern: inappropriate and potentially illegal questioning of U.S. citizens and legal residents who are Muslims, or who are perceived to be Muslim, during border inspections and the government's handling of the information collected through such means.

We also request a waiver of document search and review fees on the grounds that the ACLU and Muslim Advocates qualify as "representative[s] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 6 C.F.R. § 5.11(d). Accordingly the fees associated with this Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 6 C.F.R. § 5.11(d) (1) (search fees shall not be charged to "representatives of the news media").

The ACLU and Muslim Advocates meet the statutory and regulatory definitions of a "representative of the news media" because they are "entit[ies] that gather[] information of potential interest to a segment of the public, use[] [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU and Muslim Advocates are therefore "representative[s] of the news media" for the same reasons they are both "primarily engaged in the dissemination of information."

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." In March 2009, the Department of State granted a fee waiver to the ACLU with respect to its request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. *See* Exh. A (March 2009 determination by the State Department). Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. Exh. B (December 2008 determination by the Department of Justice). In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio frequency identification chips in United States passports. *See* Exh. C (May 2005 determination by the Department of Commerce).[13]

[13] The ACLU has been granted fee waivers in other FOIA requests as well. In March 2005, the Department of State granted a fee waiver to the ACLU with respect to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Furthermore, courts have also found other organizations whose mission, function, publishing, and public education activities are similar in kind to that of the ACLU and Muslim Advocates to be "representatives of the news media." *See, e.g.*, *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the 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," a news media requester).[14]

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Pursuant to the applicable statute and regulations, we expect the determination regarding expedited processing within 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 FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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

Nusrat Choudhury
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

We affirm that the information provided supporting the request for expedited processing is true and correct to the best of our knowledge and belief.

Sincerely,

Nusrat Choudhury
Staff Attorney
American Civil Liberties Union Foundation

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[14] Courts have founds 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 at 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.

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Exhibit A

United States Department of State

Washington, D.C. 20520

MAR 31 2009

Case Number: 200900076

Mr. Jameel Jaffer
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400

Dear Mr. Jaffer:

This is in response to your Freedom of Information Act (FOIA) request, dated December 9, 2008, for copies of documents concerning the Office of Legal Counsel (OLC) after September 11, 2001 in the paragraphs 1 through 4 (A through J) and 3 through 4 (A-B) as stated in your request. The time frame for this request is 2001-2008.

We will begin the processing of your request based upon the information provided in your communication. We will notify you as soon as responsive material has been retrieved and reviewed.

We wish to advise you that the cut-off date for retrieving records is either the date you have given the Department by specifying a particular time frame, or the date the search initiated.

Fees

The Freedom of Information Act (FOIA) requires agencies to assess fees to recover the direct costs of processing requests, unless a fee waiver has been granted.

According to our regulations, by making a FOIA request, you have agreed to pay all applicable fees up to $25 unless a fee waiver has been granted.

You may specify a willingness to pay a greater amount. If the estimated fees exceed this limit, you will be notified.

☐ You have stated your willingness to pay the fees incurred in the processing of this request up to $_____.

☒ Please let us know if you are willing to pay the fees that will be incurred in the processing of your request. You may set a limit of the maximum amount that you wish to pay. Please be advised that, without an agreement to pay fees, your request will be processed without cost up to the required first 2 hours of search time (for all other requester category only) and duplication of the first 100 pages (for all other, media, educational and non-commercial scientific requester categories).

We will notify you of the costs incurred in processing your request as soon as the search for, and review of, any responsive documents have been completed.

Based upon the information that you have provided, we have placed you in the requester category checked below. This request will be processed in accordance with the fee schedule designated for that category (see 22 C.F.R. 171, enclosed).

☐ Commercial Use Requesters – Requires us to assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record(s) sought.

☐ Educational Institution Requesters – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☐ Non-commercial Scientific Institution Requesters – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☒ Representatives of the News Media – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☐ All Other Requesters – Requires us to assess charges that recover the full reasonable direct cost of searching for and duplicating the record(s) sought, after the first 100 pages of duplication, and the first two hours of search time.

☐ You have indicated your inclusion in a category different than the one indicated above. Please forward the information requested on the enclosed sheet titled "Requester Categories" to substantiate your inclusion in a particular category of requester.

Fee Waiver

☒ Your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.

☐ Based upon the information provided in your letter, your request for a fee waiver has been denied. If you wish to appeal this decision, you may write to the Chief, Requester Liaison Division, at the address given on the bottom of this page. Your appeal should address the points listed in the enclosed sheet titled "Requests for Fee Waivers." Your appeal must be sent to us within 30 days from the date that you receive this letter.

Expedition

☐ After consideration of your request for expedited processing under the Department's rules governing Freedom of Information Act requests, we have determined that your request does warrant expedited processing.

Although we cannot promise that the processing of your request will be completed by a specific date, it will be processed ahead of all other requests now pending with the Department, except for those other requests already determined to warrant expedition.

☒ Our published regulations regarding expedition, 22 C.F.R. 171.12(b), require a specific showing of a compelling need. Expeditious

processing is granted only in the following situations: (1) imminent threat to the life or physical safety of an individual; (2) urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity and the information is urgently needed in that a particular value of the information would be lost if not disseminated quickly; (3) substantial humanitarian reasons; and (4) loss of substantial due process rights. Your request does not meet any of the established criteria. Regrettably, I must advise that you have not provided adequate justification for expedition. However, you may be assured that we will make every effort to process your request in as timely a manner as possible. For your convenience, I have enclosed a copy of the Department's expeditious processing criteria.

If you wish to appeal the denial of expedition, you may write to the Chief, Requester Liaison Division, at the address below, within 30 days of receipt of this letter.

Other Agency Material

☐ Some of the material that you seek appears to have been originated by another agency(ies). If you wish to contact the Freedom of Information/Privacy Office of that agency(ies), the address(es) can be found on the attached list.

☐ Some of the records you seek are no longer in the possession of the State Department. The majority of Department of State records (excluding passport and visa records) which are 25 years or older are transferred to the National Archives and Records Administration (NARA) in accordance with Title 22, Code of Federal Regulations, Part 171.6. Accordingly, requests for such records should be addressed to:

National Archives and Records Administration
8601 Adelphi Road, Room 311
College Park, MD 20740-6001

☐ For pre-1925 passport records, and visa records dating 1910-1940, please contact:

Civil Records
National Archives & Records Administration
Washington, DC 20408

If you wish to review further information on our requirements for maintenance or disposal of records, please visit the following website: foia.state.gov/records.asp.

While we will make every effort to meet the time limits cited in the FOIA (5 U.S.C. § 552), unusual circumstances may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

If you have any questions, please do not hesitate to contact us at the number or address below. We can provide faster service if you include the case number of your request in your communications with us.

We are pleased to be of service to you.

Sincerely,

Carrie B. Allen

Carrie B. Allen
Requester Communications Branch
ISO 9001:2000 Certified

Enclosures: As stated.

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov

Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAStatus@state.gov

Exhibit B

U.S. Department of Justice

Office of the Inspector General

December 18, 2008

Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004

Subject: Freedom of Information/Privacy Act Request [09-OIG-61]

Dear Mr. Jaffer:

Your Freedom of Information Act (FOIA) request seeking records relating to the detention, interrogation, treatment, or prosecution of suspected terrorists was received in this office on December 10, 2008. We have assigned your request control number 09-OIG-61. Please cite this number in any future inquiry relating to your request.

We have been informed by the Office of Public Affairs that your request for expedited FOIA processing pursuant to 28 C.F.R. § 16.5(d) has been granted, as such we will process your request as expeditiously as possible.

You have also requested a fee waiver on the basis of §16.11(b)(6) (representative of the news media) and §16.11(k) (public interest). We are granting your request for news media status and accordingly, you will not incur search fees in connection with your request. We will make a determination regarding your request under §16.11(k) once we have completed our search for responsive documents and are in a better position to determine whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government. We will inform you regarding our decision on this aspect of your fee waiver prior to incurring any expense that could be attributed to you.

If you are dissatisfied with my action on your request, you may appeal by writing to the Director, Office of Information and Privacy, U.S. Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of

Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

Deborah M. Waller
FOI/PA Specialist

Exhibit C

UNITED STATES DEPARTMENT OF COMMERCE
National Institute of Standards and Technology
Gaithersburg, Maryland 20899-

May 3, 2005

Mr. Christopher Calabrese
ACLU
125 Broad Street, 18th floor
New York, NY 10004-2400

Dear Mr. Calabrese,

This letter is to acknowledge receipt of your April 25, 2005 Freedom of Information Act (FOIA) request to the National Institute of Standards and Technology (NIST) for information regarding radio frequency identification chips for use in United States passports. Your request was received at the NIST FOIA Control Desk on April 28, 2005, and was assigned FOIA Log #05-37.

For the purpose of the FOIA, you are in the "News Media" category. Your fee waiver request has been granted.

NIST is currently processing your FOIA request and we will be releasing documents on a rolling basis.

Per our telephone conversation of today, enclosed is the GPO news release No. 05-01 dated 01/12/05.

Sincerely,

Sharon E. Bisco

Sharon E. Bisco
Freedom of Information Act Officer

Enclosure

NIST