LEGAL DEPARTMENT

February 22, 2016

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Re: FREEDOM OF INFORMATION ACT REQUEST

To Whom It May Concern:

Under the Freedom of Information Act, the American Civil Liberties Union, the American Civil Liberties Union Foundation, and its affiliate the American Civil Liberties Union of Northern California (collectively, "ACLU"),[1] and the Stanford Center for Internet and Society ("CIS") request the disclosure of records, as specified below, related to the government's efforts to obtain court orders issued pursuant to the All Writs Act compelling technology providers to assist in law-enforcement investigations.

This request supplements a pending FOIA request sent by the ACLU and CIS on December 10, 2015, included as Exhibit A. That request is listed as FOIA-2016-00710 with the Executive Office for United States Attorneys, and CRM-300505463 with the Criminal Division of the Department of Justice. The Background section of the December 10, 2015 request is incorporated by reference here, and additional background information is included below.

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I. Background

On February 16, 2016, the government applied for and obtained a court order under the All Writs Act that would compel Apple, Inc. to provide the Federal Bureau of Investigation ("FBI") with "signed" software that could be used to disable certain security features on an iPhone that the FBI seeks to unlock and search. The court's order allowed Apple time to object,[2] and Apple has indicated that it intends to oppose the order, given the strong privacy and security interests at stake.[3]

The government's February 16, 2016 application is not the first time it has relied on the All Writs Act, 28 U.S.C. § 1651, to compel third-party technology providers to assist in law-enforcement investigations. The government indicated during a hearing before Magistrate Judge James Orenstein

[1] The American Civil Liberties Union is a 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 Foundation is a separate, 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, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes the American Civil Liberties Union's members to lobby their legislators.

[2] *See* Order, *In re Search of an Apple iPhone Seized during Execution of a Search Warrant*, ED 15-0451M (C.D. Cal. Feb. 16, 2016).

[3] Letter from Tim Cook, CEO, Apple, A Message to our Customers (Feb. 16, 2016), http://www.apple.com/customer-letter/.

in October 2015 that, at the time, it had obtained at least 70 orders under the All Writs Act compelling a third party to unlock a mobile device.[4]

Following that disclosure during the hearing in front of Judge Orenstein, the ACLU and CIS filed a FOIA request seeking information relating to orders sought or obtained under the All Writs Act compelling technology providers to unlock mobile devices.

In light of the government's more recent and publicized application under the All Writs Act, which compels Apple to create software that does not exist, the ACLU and CIS seek records related to *all* uses of the All Writs Act to compel technology providers to assist with law-enforcement investigations.

III. The Requested Records

Accordingly, the ACLU and CIS (collectively, "Requesters") seek disclosure of the following records:

1. The government's applications for court orders, issued pursuant to the All Writs Act, compelling a technology provider[5] to assist law enforcement, including but not limited to applications such as the government's February 16, 2016 application in the Central District of California seeking to compel Apple to create custom software, whether or not the applications are under seal, and for all judicial districts and courts in the country.

2. The court orders issued in such cases compelling a technology provider to assist law enforcement, or denying or otherwise addressing the government's application, whether or not the orders are under seal, and for all judicial districts and courts in the country.

3. The docket numbers and court information of all such cases.

4. The data and/or results of any survey the government has conducted of federal prosecutors with respect to the number of times and/or the cases in which they have attempted to obtain court orders under the

[4] Transcript of Oral Argument at 24, *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued By this Court* (*In re Order*), No. 1:15-mc-01902-JO, 2015 WL 5920207, at *1 (E.D.N.Y. Oct. 9, 2015).

[5] As used in this request, "technology providers" includes not only manufacturers of mobile devices—including smartphones, computers, and tablets—such as Apple, but also network service operators, software vendors, social media companies, website operators, and all other providers of information technology products or services, including but not limited to providers of electronic communications services as defined by 18 U.S.C. § 2510(15), providers of remote computing services as defined by 18 U.S.C. § 2711(2), and providers of interactive computer services as defined by 47 U.S.C. § 230(f)(2).

All Writs Act compelling technology providers to assist law enforcement.

5. Any memoranda or other correspondence related to any such survey.

6. Any policies, guidance, memoranda, or directives that address the circumstances in which law enforcement may or will rely on the All Writs Act to seek to compel technology providers to provide assistance.

7. Any policies, guidance, memoranda, or directives that address how and when law enforcement should seek a court order under the All Writs Act compelling a technology provider to provide assistance, including any sample language for inclusion in an application, affidavit, or proposed order to be submitted to a court when seeking such an order.

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The Requesters request that responsive electronic records be provided electronically in their native file format.[6] If this FOIA request is denied in whole or in part, the Requesters request disclosure of the reasons for each denial, pursuant to 5 U.S.C. § 552(a)(6)(A)(i). In addition, the Requesters request release of all segregable portions of otherwise exempt material, in accordance with 5 U.S.C. § 552(b).

IV. Expedited Processing

The Requesters request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a "compelling need" for expeditious disclosure because the documents requested are urgently needed by organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.[7] In addition, there is an "urgency to inform the public" concerning the requested records.[8]

1. The records sought are urgently needed to inform the public about actual or alleged government activity.

There has been enormous public interest in the government's February 16, 2016 application under the All Writs Act seeking to compel Apple to create custom "signed" software containing security vulnerabilities that would enable the FBI to break into an iPhone. The application and order have been extensively covered in the media, including in the New York Times, the Los

[6] *See* 5 U.S.C. § 552(a)(3)(B).

[7] *Id.* § 552(a)(6)(E)(v).

[8] 28 C.F.R. § 16.5(e)(1)(ii); *Open Am. v. Watergate Spec. Prosec. Force*, 547 F.2d 605, 614 (D.C. Cir. 1976) (recognizing right of expedition).

Angeles Times, the Washington Post, the Wall Street Journal, and CNN.[9] Apple has indicated that it intends to oppose the order.[10] Members of Congress have weighed in on the debate.[11] Whether the government should have the authority to compel technology companies to provide law enforcement access to locked mobile devices has been a matter of growing public concern for many months now,[12] and the latest case raises the prospect of technology companies being conscripted to provide custom software or other assistance to law enforcement with far-reaching implications for civil liberties.

While litigation over this issue remains ongoing, and potential legislation is debated, it is critical that the public be given a full accounting of the circumstances in which the government has invoked, and continues to invoke, the All Writs Act to compel technology companies to assist law enforcement. Given the ongoing and contentious policy debate surrounding device encryption and surveillance, the government's efforts to require technology companies to assist law enforcement should not be shrouded in secrecy.

[9] Greg Botelho et al., *Anger, Praise for Apple for Rebuffing FBI over San Bernardino Killer's Phone*, CNN.com (Feb. 19, 2016), http://www.cnn.com/2016/02/18/us/san-bernardino-shooter-phone-apple-reaction/index.html; Paresh Dave & Tracey Lien, *Battle Lines Drawn over Encryption as Apple Rebuffs FBI*, L.A. Times (Feb. 18, 2016), http://www.latimes.com/business/technology/la-fi-apple-iphone-tech-20160219-story.html; Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. Times (Feb. 17, 2016), http://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html; Andrea Peterson, *The Centuries-Old Law the Government Wants to Use to Unlock a Terrorist's iPhone*, Wash. Post (Feb. 17, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/02/17/the-centuries-old-law-the-government-wants-to-use-to-unlock-a-terrorists-iphone/; Georgia Wells, *The iPhone Standoff Debate: Privacy, Security and What's at Stake*, Wall St. J. (Feb. 17, 2016), http://blogs.wsj.com/digits/2016/02/17/the-iphone-standoff-debate-privacy-security-and-whats-at-stake/?mod=ST1.

[10] *See supra* note 3.

[11] *See Congress Should Decide Encryption Issue, Sen. Angus King Says*, Nat'l Pub. Radio (Feb. 19, 2016), http://www.npr.org/2016/02/19/467318832/congress-should-decide-encryption-issue-sen-angus-king-says; Press Release, Rep. Zoe Lofgren, Lofgren Statement on Court Order to Decrypt Apple iPhone (Feb. 17, 2016), https://lofgren.house.gov/news/documentsingle.aspx?DocumentID=398061.

[12] *See, e.g.*, Cyrus Farivar, *Faced With an iPhone They Can't Unlock, Cops Again Turn to Apple for Help*, Ars Technica (Oct. 21, 2015), http://arstechnica.com/tech-policy/2015/10/judge-does-us-law-allow-feds-to-compel-apple-to-unlock-an-iphone/; Sarah Jeong, *The Obscure 1789 Statute that Could Force Apple to Unlock a Smartphone*, Vice: Motherboard (Oct. 13, 2015, 2:15 PM), http://motherboard.vice.com/read/writs-and-giggles; Ellen Nakashima, *With Court Order, Federal Judge Seeks to Fuel Debate about Data Encryption*, Wash. Post (Oct. 10, 2015), https://www.washingtonpost.com/world/national-security/federal-judge-stokes-debate-about-data-encryption/2015/10/10/c75da20e-6f6f-11e5-9bfe-e59f5e244f92_story.html; John Riley, *Judge Declines to Order Apple to Disable Security on Device Seized By U.S.*, Newsday (Oct. 9, 2015), http://www.newsday.com/news/new-york/federal-jurist-won-t-force-apple-to-disable-security-on-device-seized-by-u-s-1.10943147; Danny Yadron, *U.S. Cites Aged Law to Decrypt Phone Data*, Wall St. J. (Nov. 27, 2014), http://www.wsj.com/articles/u-s-cites-aged-law-to-decrypt-phone-data-1417131617.

Expedited release of the requested records is necessary to allow the public to better understand the conditions under which the government has compelled third parties technology providers to assist law enforcement. In addition, expedited release will allow Americans to learn how the government has secretly invoked a contested and antiquated legal authority to gain such access. Therefore, the records sought are urgently needed to inform the public about actual or alleged federal government activity, as demonstrated by the numerous media articles cited above and the extensive debate that is ongoing about this issue.[13]

2. The Requesters are organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The Requesters are "primarily engaged in disseminating information" within the meaning of the statute and regulations.[14]

ACLU. Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU's mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU's regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 390,000 households; email updates to 1.1 million subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog that attracts more than 40,000 unique visitors per month; heavily visited websites;[15] and a video series.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news.[16]

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[13] *See* 28 C.F.R. § 16.5(e)(3).

[14] 5 U.S.C. § 552(a)(6)(E)(v)(II); *see ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information") (citation omitted); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is "to serve as the site of record for relevant and up-to-the-minute civil rights news and information" and to "disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws"—to be "primarily engaged in the dissemination of information").

[15] *See* ACLU, https://www.aclu.org (last visited Feb. 22, 2016).

[16] *See, e.g.*, Press Release, American Civil Liberties Union, Erie County Sheriff Records Reveal Invasive Use of "Stingray" Technology (Apr. 7, 2015), https://www.aclu.org/news/erie-county-sheriff-records-reveal-invasive-use-stingray-technology; Press Release, ACLU, U.S. to Release Targeted Killing Memo Sought by ACLU FOIA Lawsuit (May 20, 2014), https://www.aclu.org/news/us-release-targeted-killing-memo-sought-aclu-foia-lawsuit; Press Release, ACLU, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), http://www.aclu.org/node/36742; Press Release, ACLU, FOIA Documents Show FBI

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

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA. For example, the ACLU maintains an online "Torture Database," a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation. The ACLU also maintains a "Torture FOIA" webpage containing commentary about the ACLU's FOIA request, press releases, and analysis of the FOIA documents. (That webpage also notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA.[17]). Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos. In addition to websites, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

CIS. CIS is a public interest technology law and policy program at Stanford Law School and a part of the Law, Science and Technology Program at Stanford Law School. Founded in 2000, CIS studies the interaction of technology and the law and examines how that dynamic can either promote or harm public goods such as privacy, free speech, innovation, and scientific inquiry. CIS provides law students and the general public with educational resources and analyses of policy issues arising at the intersection of law, technology, and the public interest. CIS also sponsors a range of public events, including a speaker series, conferences, and workshops.[18]

Using "Mosque Outreach" for Intelligence Gathering (Mar. 27, 2012), http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering; Press Release, ACLU, FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach" (Dec. 1, 2011), http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community; Press Release, ACLU, FOIA Documents from FBI Show Unconstitutional Racial Profiling (Oct. 20, 2011), http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling; Press Release, ACLU, Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem (Oct. 19, 2011), http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse.

[17] *See* Jameel Jaffer & Amrit Singh, Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond (2007).

[18] *About Us*, Center for Internet and Society, https://cyberlaw.stanford.edu/about-us (last visited Feb. 22, 2016).

Dissemination of information about actual or alleged government activity is a key component of CIS's work. CIS has dedicated staff specifically responsible for researching government activity in the area of encryption law and policy, such as the court orders that are the subject of this Request.[19] CIS disseminates information to the public through its website;[20] posts on Just Security,[21] an online forum for the rigorous analysis of U.S. national security law and policy, as well as other blogs; news interviews;[22] speeches at other law schools;[23] and publications including white papers, books, and academic writing.[24] CIS disseminates this information to educate the public and to encourage decision makers in the public and private sectors to further democratic values in the design of new laws and new technologies.

The Requesters plan to analyze 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.

[19] Jennifer Granick, *Federal Judge Shines a Spotlight on the "Going Dark" Debate*, Center for Internet and Society (Oct. 14, 2015), https://cyberlaw.stanford.edu/blog/2015/10/federal-judge-shines-spotlight-%E2%80%9Cgoing-dark%E2%80%9D-debate.

[20] *Blog*, Center for Internet and Society, https://cyberlaw.stanford.edu/blog (last visited Feb. 22, 2016).

[21] *See, e.g.*, Jennifer Granick & Riana Pfefferkorn, *Update on Apple's Compelled-Decryption Case*, Just Security (Oct. 20, 2015), https://www.justsecurity.org/26964/update-apples-compelled-decryption-case/; Jennifer Granick & Riana Pfefferkorn, *The All Writs Act, Software Licenses, and Why Judges Should Ask More Questions*, Just Security (Oct. 26, 2015), https://www.justsecurity.org/27109/writs-act-software-licenses-judges-questions/; Jennifer Granick & Riana Pfefferkorn, *A Quick Update: Apple, Privacy, and the All Writs Act of 1789*, Just Security (Oct. 30, 2015), https://www.justsecurity.org/27214/quick-update-apple-privacy-writs-act-1789/.

[22] *See, e.g.*, Aarti Shahani, *Phone Carriers Tight-Lipped On How They Will Comply with New Surveillance Law*, Nat'l Pub. Radio (June 8, 2015), http://www.npr.org/sections/alltechconsidered/2015/06/04/411870819/phone-carriers-are-tight-lipped-over-law-that-overhauls-nsa-surveillance (CIS Director of Civil Liberties Jennifer Granick interviewed for news radio show about phone companies' obligations under the newly-enacted USA Freedom Act).

[23] *See, e.g.*, Jennifer Granick, Presentation at U.C. Davis Law School: Bye Bye, American Spies (Jan. 13, 2015) (announcement available at http://performancestudies.ucdavis.edu/2015/01/06/digitalculturesnews-jennifer-granick-esq-bye-bye-american-spies-on-january-13th/) (discussing U.S. government role in undermining global encryption standards, intercepting Internet companies' data center transmissions, using auto-update to spread malware, and demanding law enforcement back doors in products and services).

[24] *See, e.g.*, Barbara van Schewick & Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 Stan. L. Rev. Online 85 (Jan. 20, 2015) (analyzing draft bill in the U.S. Congress about regulation of Internet service providers); *see generally Publications*, Center for Internet and Society, https://cyberlaw.stanford.edu/publications (last visited Feb. 22, 2016).

V. Limitation of Processing Fees

The Requesters request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Requesters fit within this statutory mandate, the ACLU as a representative of the news media and CIS as an educational institution. Fees associated with the processing of this request should, therefore, be limited accordingly.

ACLU. The ACLU meets the definition of a representative of the news media because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."[25]

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Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its communications department and website. 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 website's blog attracts more than 40,000 unique visitors per month. The website specifically includes features on information obtained through the FOIA. For example, the ACLU's "Accountability for Torture FOIA" webpage contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA.[26]

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 390,000 households. The ACLU also sends email updates to 1.1 million subscribers. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data.[27]

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[25] *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

[26] *The Torture Database*, https://www.aclu.org/torturefoia (last visited Feb. 22, 2016); *see Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

[27] *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a "bi-weekly electronic newsletter

The ACLU also regularly publishes books,[28] "know your rights" publications,[29] fact sheets,[30] and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public.[31]

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

CIS. The Request is made by CIS which, as part of Stanford Law School, qualifies as an "educational institution" as defined by Section 552 of the FOIA and its implementing regulations.[32] As required by applicable regulations, CIS's Request (1) "is authorized by, and is made under the auspices of, an educational institution"; (2) seeks records "not . . . for a commercial use, but rather . . . to further scholarly research"; and (3) "serve[s] the scholarly research goals of the

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that is distributed to over 15,000 readers" about "court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.").

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

[29] "Know your rights" publications include: *Know Your Rights: Demonstrations and Protests*, ACLU (Nov. 2011), http://www.aclu.org/files/assets/kyr_protests.pdf; *Gender-Based Violence & Harassment: Your School, Your Rights*, ACLU (May 2011), http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; *Know Your Rights: What to Do If You're Stopped by Police, Immigration Agents or the FBI*, ACLU (June 2010), http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

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

[31] *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

[32] 5 U.S.C. § 552(a)(4)(A)(ii)(II) (requiring processing fee limitation for records sought for non-commercial use and requested by "an educational . . . institution, whose purpose is scholarly . . . research"); 28 C.F.R. § 16.10(b)(4) (Department of Justice regulation defining "educational institution" as "any school that operates a program of scholarly research" for purposes of FOIA request processing fees); *see Nat'l Sec. Archive*, 880 F.2d at 1383–84 (concluding that Congress intended the phrase "educational institution" in Section 552(a)(4)(A) to be given "the ordinary meaning of that term," that is, "school").

institution rather than an individual research goal."[33] CIS seeks the requested records in furtherance of CIS's institutional research goals, namely its research project pertaining to the government's policies, practices, and legal rationale for compelling third parties to provide access to otherwise encrypted data. CIS has funding from Stanford University's Cyber Initiative earmarked specifically for this research,[34] has dedicated staff to perform this research,[35] has published repeatedly on this topic,[36] and plans to publish academic white papers and/or law review articles to analyze and disseminate to the public the information it receives through this Request. CIS's Request is therefore entitled to limitation of processing fees.[37]

Disclosure is not in the Requesters' commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization."[38] CIS is part of Stanford University, a nonprofit 501(c)(3) educational institution.[39] Any information disclosed by the Requesters as a result of this FOIA will be available to the public at no cost.

VI. Waiver of Costs

The Requesters also request a waiver of all search, review, or duplication fees on the ground that disclosure of the requested information is in the public interest because it is "likely to contribute significantly to public understanding of the operations or activities of the government," and it is "not primarily in the commercial interest of the requester[s]."[40] This request clearly satisfies these criteria.

There can be no doubt that the subject of the request is of significant interest to the American public. As discussed above, the government's use of orders issued under the All Writs Act circumvents an ongoing and heated public

[33] 28 C.F.R. § 16.10(b)(4).

[34] *See Funded Research Projects*, Stanford Cyber Initiative, https://cyber.stanford.edu/research-and-publications/funded-research-projects (last visited Feb. 22, 2016) (listing interdisciplinary research project on U.S. cryptography law and policy, co-headed by CIS Director of Civil Liberties Jennifer Granick).

[35] *See supra* note 19.

[36] *See supra* notes 19, 21.

[37] 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(c)(1)(i), (d)(1) (Department of Justice regulations exempting from search fees requests by educational institutions and representatives of the news media).

[38] *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 and internal quotation marks omitted).

[39] *Stanford Legal Facts*, Office of the General Counsel, Stanford University, https://ogc.stanford.edu/stanford-legal-facts (last visited Feb. 22, 2016).

[40] 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.10(k)(1).

debate on whether the government should be able to compel technology companies to provide access to data stored on individuals' devices, and to what extent technology companies should be forced to assist law enforcement. The government's admission that it has relied on the All Writs Act for this authority in upwards of 70 cases suggests the government has developed a policy and practice of compelling third parties to provide such assistance without robust public oversight.

The Request satisfies all of the considerations set forth in the applicable regulation for deciding whether "requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."[41] The Requesters seek records that pertain directly to federal government activities.[42] Because the requested records may be scattered across various sources and many are likely under seal, disclosure would significantly enhance public understanding of government policies and practices apparently developed in secret without public scrutiny.[43] Due to their relevance to the ongoing policy debate, the records would be of interest to a broad audience, including legal scholars, organizations that protect constitutional rights, other members of the news media, and the public at large.[44]

As a nonprofit organization and "representative of the news media" as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. The ACLU does not have a commercial interest in the records, and will disseminate them free of charge.[45] Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.[46]

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[41] 28 C.F.R. § 16.10(k)(2).

[42] *See id.* § 16.10(k)(2)(i).

[43] *See id.* § 16.10(k)(2)(ii), (iv).

[44] *See id.* § 16.10(k)(2)(iii) (noting that representatives of the news media presumptively satisfy this factor).

[45] *Id.* § 16.10(k)(1); *see also id.* § 16.10(k)(3)(ii) ("A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.").

[46] For example, in May 2014, Amtrak granted a fee waiver with respect to the ACLU's request for records regarding the collection of data about Amtrak passengers. In December 2013, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents regarding policies, procedures, and practices followed to obtain search queries from search engine operators for law enforcement or intelligence purposes. In June 2011, the National Security Division also granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In

Likewise, as part of a 501(c)(3) nonprofit educational institution, CIS does not have a commercial interest in the disclosure of the requested records. CIS plans to disseminate the records received in response to this Request to law students, legal scholars, civil liberties organizations, and the general public, through methods including its website,[47] blog posts, and academic publications such as white papers and/or law review articles.[48]

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days of your receipt of this Request.[49] We also request that you provide an estimated date on which you will finish processing this request.[50]

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material.

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

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

Esha Bhandari
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
ebhandari@aclu.org

January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006.

[47] A requester's dissemination of information obtained through FOIA requests primarily or exclusively online rather than through traditional print outlets does not disqualify a request from a public-interest waiver. *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1117 (D.C. Cir. 2015) ("[S]urely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website.").

[48] 28 C.F.R. § 16.10(k)(1).

[49] *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4).

[50] *See* 5 U.S.C. § 552(a)(7)(B).

I certify that the foregoing is true and correct.

Sincerely,

/s/ Esha Bhandari

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AMERICAN CIVIL LIBERTIES UNION FOUNDATION

EXHIBIT A

December 10, 2015

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
Email: MRUFOIA.Requests@usdoj.gov

Kenneth Courter
Chief, FOIA/PA Unit
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Susan B. Gerson
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AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
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Re: FREEDOM OF INFORMATION ACT REQUEST

To Whom It May Concern:

Under the Freedom of Information Act, the American Civil Liberties Union, the American Civil Liberties Union Foundation, and its affiliate the American Civil Liberties Union of Northern California (collectively, "ACLU"),[1] and the Stanford Center for Internet and Society ("CIS") request the disclosure of records, as specified below, related to the government's efforts to obtain court orders issued pursuant to the All Writs Act compelling manufacturers of mobile devices to unlock passcode-protected devices.

I. Background

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

On October 8, 2015, the government applied for a court order under the All Writs Act that would compel Apple, Inc. to bypass the lock screen of an iPhone as part of a criminal investigation in New York.[2] In response to the government's application, Magistrate Judge James Orenstein issued an opinion questioning the government's position that the All Writs Act authorized the type of order sought. He requested further briefing on the question and set a hearing on the issue.[3] During the hearing, the government indicated there are at least 70 cases in which it has applied for and obtained an order under the All Writs Act to compel a third party to unlock a mobile device.[4]

The All Writs Act was first introduced in the 1789 Judiciary Act and provides: "The Supreme Court and all courts established by Act of Congress

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[1] The American Civil Liberties Union is a 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 Foundation is a separate, 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, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes the American Civil Liberties Union's members to lobby their legislators.

[2] Memorandum and Order, *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued By this Court* (*In re Order*), No. 1:15-mc-01902-JO, 2015 WL 5920207, at *1 (E.D.N.Y. Oct. 9, 2015); Reply Brief of Government at 5, *In re Order*, No. 1:15-mc-01902-JO (E.D.N.Y. Oct. 22, 2015); *United States v. Jun Feng*, No. 14-CR-387 (E.D.N.Y.).

[3] Memorandum and Order, *In re Order*, 2015 WL 5920207, at *10–*11.

[4] Transcript of Oral Argument at 24, *In re Order*, No. 1:15-mc-01902-JO (Oct. 26, 2015).

may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[5] In practice, the All Writs Act allows a court to issue an order to effectuate a prior order authorized by a statute or grant of authority.[6] Relying on the All Writs Act, the government has sought court orders to compel third-party device manufacturers to unlock devices that the government has seized but says it cannot unlock itself.

Until the government asserted before Judge Orenstein that it has relied on the All Writs Act to compel device unlocking in at least 70 cases, the public was not aware of the scope of the government's use of the All Writs Act in such cases.[7] Many of the applications for orders issued under the All Writs Act, and the orders themselves, remain under seal. For example, in its brief to Judge Orenstein, the government described three cases in which it had applied for and obtained orders under the All Writs Act to compel Apple to unlock a device.[8] But the public had little or no notice of the use of the All Writs Act in these cases before the government submitted that brief. Even when these documents are not sealed, they are contained on disparate dockets and difficult to aggregate by the public. The government has compelled device unlocking in secret, thereby avoiding public evaluation of the overall policy. By contrast, the government makes publicly available its policies and sample applications for obtaining electronic evidence by various other means, further underscoring its secretive treatment of compelled device unlocking.[9]

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[5] 28 U.S.C. § 1651.

[6] *See United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of *orders it has previously issued* in its exercise of jurisdiction otherwise obtained" (emphasis added)); *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 42 n.7 (1985) (courts may resort to the All Writs Act "to fill statutory interstices.").

[7] Transcript of Oral Argument at 24, *In re Order*, No. 1:15-mc-01902-JO (E.D.N.Y. Oct. 26, 2015).

[8] Reply Brief of Government at 9–10, *In re Order*, No. 1:15-mc-01902-JO (E.D.N.Y. Oct. 22, 2015).

[9] *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Office of Legal Education, Executive Office for United States Attorneys, http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf (last visited Nov. 30, 2015) (manual for Department of Justice attorneys, providing legal analysis of government's authority for search and seizure of electronic evidence as well as sample language for, among others, search warrant affidavits for computers or email accounts, pen register applications, and applications for orders under 18 U.S.C. § 2703(d)).

Manufacturers of mobile devices, including Apple, offer customers the option of protecting the data stored or accessible on their devices through the use of a passcode. In some cases, depending on the particular operating system used by the device, this data is encrypted. Encryption allows for plaintext readable content to be transformed into a seemingly incomprehensible jumble of characters, known as ciphertext, readable only with the possession of a "key" that decrypts the scrambled information and returns it to its original form.[10] Encryption is commonly used to protect the privacy and data security of information stored on or transmitted to and from computers, cell phones, tablets, and other electronic devices. Given the growing reliance on mobile phones for sensitive communications, financial transactions, and data storage, technology companies increasingly offer cell phones that use encryption to protect data stored on the devices, as well as to protect text messages and voice and video conversations.[11]

Over the last five years, senior law enforcement officials and Congress have engaged in robust debate about whether technology companies such as Apple should be required to build "backdoors" into the encryption now commonly used to secure data stored in computers and mobile devices or transferred between them.[12] These backdoors would enable law enforcement to compel technology companies to provide ready access to that data. There has been no congressional action mandating such access and the Obama administration reportedly shelved its effort to seek legislation mandating the creation of technological backdoors.[13] The attacks in Paris on November 13, 2015, have renewed the debate on whether technology companies should be compelled to provide the government with access to encrypted data, even though there is no publicly available evidence

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[10] Tricia E. Black, *Taking Account of the World As It Will Be: The Shifting Course of U.S. Encryption Policy*, 53 Fed. Comm. L.J. 289, 292 (2001).

[11] *See Riley v. California*, 134 S. Ct. 2473, 2489–90 (2014) (mobile phones provide storage and access to private and sensitive information, including calendars, photographs, videos, financial and medical records, and location data); *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013).

[12] *See* Ellen Nakashima & Barton Gellman, *As Encryption Spreads, U.S. Grapples with Clash Between Privacy, Security*, Wash. Post (Apr. 10, 2015), https://www.washingtonpost.com/world/national-security/as-encryption-spreads-us-worries-about-access-to-data-for-investigations/2015/04/10/7c1c7518-d401-11e4-a62f-ee745911a4ff_story.html; Matt Apuzzo et al., *Apple and Other Tech Companies Tangle with U.S. Over Data Access*, N.Y. Times (Sept. 7, 2015), http://www.nytimes.com/2015/09/08/us/politics/apple-and-other-tech-companies-tangle-with-us-over-access-to-data.html.

[13] Nicole Perlroth & David E. Sanger, *Obama Won't Seek Access to Encrypted User Data*, N.Y. Times (Oct. 10, 2015), http://www.nytimes.com/2015/10/11/us/politics/obama-wont-seek-access-to-encrypted-user-data.html.

that encryption contributed to the attacks.[14] By seeking court orders, typically under seal, to compel companies to unlock mobile devices, the government has bypassed this public debate and has done so largely in secret. Release of the requested documents will help Americans to understand how often and in what contexts the government has compelled third-party companies to break into locked mobile devices.

III. The Requested Records

Accordingly, the ACLU and CIS (collectively, "Requesters") seek disclosure of the following records:

1. The government's applications for court orders compelling a third party to unlock a mobile device, including in the 70 cases the government referred to during the October 26, 2015 hearing before Judge Orenstein in the Eastern District of New York.

2. The court orders issued in such cases, including the 70 aforementioned cases, compelling a third party to unlock a mobile device or denying or otherwise addressing the government's application.

3. The docket numbers and court information of all such cases, including the 70 aforementioned cases.

4. The data and/or results of any survey the government has conducted of federal prosecutors with respect to the number of times and/or the cases in which they have attempted to obtain court orders compelling third parties to unlock a mobile device.

5. Any memoranda or other correspondence related to any such survey.

6. Any policies, guidance, memoranda, or directives that address the circumstances in which law enforcement may or will seek to compel a third party to unlock a mobile device.

7. Any policies, guidance, memoranda, or directives that address how and when law enforcement should seek a court order

[14] *See, e.g.*, Danny Yadron et al., Paris Attacks Fan Encryption Debate, Wall St. J. (Nov. 19, 2015), http://www.wsj.com/articles/paris-attacks-fan-encryption-debate-1447987407; Sam Theilman, *US and European Officials Reignite 'Back Door' Encryption Debate after Paris*, Guardian (Nov. 18, 2015), http://www.theguardian.com/technology/2015/nov/18/us-europe-reignite-debate-back-door-encryption-paris-attacks.

compelling a third party to unlock a mobile device, including any sample language for inclusion in an application, affidavit, or proposed order to be submitted to a court when seeking such an order.

The Requesters request that responsive electronic records be provided electronically in their native file format.[15] If this FOIA request is denied in whole or in part, the Requesters request disclosure of the reasons for each denial, pursuant to 5 U.S.C. § 552(a)(6)(A)(i). In addition, the Requesters request release of all segregable portions of otherwise exempt material, in accordance with 5 U.S.C. § 552(b).

IV. Expedited Processing

The Requesters request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a "compelling need" for expeditious disclosure because the documents requested are urgently needed by organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.[16] In addition, there is an "urgency to inform the public" concerning the requested records.[17]

1. The Requesters are organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The Requesters are "primarily engaged in disseminating information" within the meaning of the statute and regulations.[18]

ACLU. Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU's mission and work. The ACLU disseminates this information to educate the

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[15] *See* 5 U.S.C. § 552(a)(3)(B).

[16] *Id.* § 552(a)(6)(E)(v).

[17] 28 C.F.R. § 16.5(e)(1)(ii); *Open Am. v. Watergate Spec. Prosec. Force*, 547 F.2d 605, 614 (D.C. Cir. 1976) (recognizing right of expedition).

[18] 5 U.S.C. § 552(a)(6)(E)(v)(II); *see ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information") (internal citation omitted); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is "to serve as the site of record for relevant and up-to-the-minute civil rights news and information" and to "disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws"—to be "primarily engaged in the dissemination of information").

public and promote the protection of civil liberties. The ACLU's regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 390,000 households; email updates to 1.1 million subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog that attracts more than 40,000 unique visitors per month; heavily visited websites;[19] and a video series.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news.[20] ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA. For example, the ACLU maintains an online "Torture Database," a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation. The ACLU also maintains a "Torture FOIA" webpage containing commentary about the ACLU's FOIA request, press releases, and analysis of the FOIA documents. (That webpage also notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA.[21]). Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos obtained through FOIA contains

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[19] *See* ACLU, https://www.aclu.org (last visited Dec. 8, 2015).

[20] *See, e.g.*, Press Release, American Civil Liberties Union, Erie County Sheriff Records Reveal Invasive Use of "Stingray" Technology (Apr. 7, 2015), https://www.aclu.org/news/erie-county-sheriff-records-reveal-invasive-use-stingray-technology; Press Release, ACLU, U.S. to Release Targeted Killing Memo Sought by ACLU FOIA Lawsuit (May 20, 2014), https://www.aclu.org/news/us-release-targeted-killing-memo-sought-aclu-foia-lawsuit; Press Release, ACLU, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), http://www.aclu.org/node/36742; Press Release, ACLU, FOIA Documents Show FBI Using "Mosque Outreach" for Intelligence Gathering (Mar. 27, 2012), http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering; Press Release, ACLU, FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach" (Dec. 1, 2011), http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community; Press Release, ACLU, FOIA Documents from FBI Show Unconstitutional Racial Profiling (Oct. 20, 2011), http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling; Press Release, ACLU, Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem (Oct. 19, 2011), http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse.

[21] *See* Jameel Jaffer & Amrit Singh, Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond (2007).

commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos. In addition to websites, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

CIS. CIS is a public interest technology law and policy program at Stanford Law School and a part of the Law, Science and Technology Program at Stanford Law School. Founded in 2000, CIS studies the interaction of technology and the law and examines how that dynamic can either promote or harm public goods such as privacy, free speech, innovation, and scientific inquiry. CIS provides law students and the general public with educational resources and analyses of policy issues arising at the intersection of law, technology, and the public interest. CIS also sponsors a range of public events, including a speaker series, conferences, and workshops.[22]

Dissemination of information about actual or alleged government activity is a key component of CIS's work. CIS has dedicated staff specifically responsible for researching government activity in the area of encryption law and policy, such as the compelled unlocking applications and orders that are the subject of this Request.[23] CIS disseminates information to the public through its website;[24] posts on Just Security,[25] an online forum for the rigorous analysis of U.S. national security law and policy, as well as other blogs; news interviews;[26] speeches at other law schools;[27] and

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[22] *About Us*, Center for Internet and Society, https://cyberlaw.stanford.edu/about-us (last visited Dec. 1, 2015).

[23] Jennifer Granick, *Federal Judge Shines a Spotlight on the "Going Dark" Debate*, Center for Internet and Society (Oct. 14, 2015), https://cyberlaw.stanford.edu/blog/2015/10/federal-judge-shines-spotlight-%E2%80%9Cgoing-dark%E2%80%9D-debate.

[24] *Blog*, Center for Internet and Society, https://cyberlaw.stanford.edu/blog (last visited Dec. 1, 2015).

[25] *See, e.g.*, Jennifer Granick & Riana Pfefferkorn, *Update on Apple's Compelled-Decryption Case*, Just Security (Oct. 20, 2015), https://www.justsecurity.org/26964/update-apples-compelled-decryption-case/; Jennifer Granick & Riana Pfefferkorn, *The All Writs Act, Software Licenses, and Why Judges Should Ask More Questions*, Just Security (Oct. 26, 2015), https://www.justsecurity.org/27109/writs-act-software-licenses-judges-questions/; Jennifer Granick & Riana Pfefferkorn, *A Quick Update: Apple, Privacy, and the All Writs Act of 1789*, Just Security (Oct. 30, 2015), https://www.justsecurity.org/27214/quick-update-apple-privacy-writs-act-1789/.

[26] *See, e.g.*, Aarti Shahani, *Phone Carriers Tight-Lipped On How They Will Comply with New Surveillance Law*, National Public Radio (June 8, 2015), http://www.npr.org/sections/alltechconsidered/2015/06/04/411870819/phone-carriers-are-

publications including white papers, books, and academic writing.[28] CIS disseminates this information to educate the public and to encourage decision makers in the public and private sectors to further democratic values in the design of new laws and new technologies.

The Requesters plan to analyze 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.

2. 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, as demonstrated by numerous articles that have been published on the subject of that activity.[29]

Whether the government should have the authority to compel technology companies to provide law enforcement access to locked mobile devices is a matter of increasing public concern and growing media attention.[30] Given the ongoing and contentious policy debate surrounding

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tight-lipped-over-law-that-overhauls-nsa-surveillance (CIS Director of Civil Liberties Jennifer Granick interviewed for news radio show about phone companies' obligations under the newly-enacted USA Freedom Act).

[27] *See, e.g.*, Jennifer Granick, Presentation at U.C. Davis Law School: Bye Bye, American Spies (Jan. 13, 2015) (announcement available at http://performancestudies.ucdavis.edu/2015/01/06/digitalculturesnews-jennifer-granick-esq-bye-bye-american-spies-on-january-13th/) (discussing U.S. government role in undermining global encryption standards, intercepting Internet companies' data center transmissions, using auto-update to spread malware, and demanding law enforcement back doors in products and services).

[28] *See, e.g.*, Barbara van Schewick & Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 Stan. L. Rev. Online 85 (Jan. 20, 2015) (analyzing draft bill in the U.S. Congress about regulation of Internet service providers); *see generally Publications*, Center for Internet and Society, https://cyberlaw.stanford.edu/publications (last visited Dec. 4, 2015).

[29] *See* 28 C.F.R. § 16.5(e)(3).

[30] *See, e.g.*, Cyrus Farivar, *Faced With an iPhone They Can't Unlock, Cops Again Turn to Apple for Help*, Ars Technica (Oct. 21, 2015), http://arstechnica.com/tech-policy/2015/10/judge-does-us-law-allow-feds-to-compel-apple-to-unlock-an-iphone/; Sarah Jeong, *The Obscure 1789 Statute that Could Force Apple to Unlock a Smartphone*, Vice: Motherboard (Oct. 13, 2015, 2:15 PM), http://motherboard.vice.com/read/writs-and-giggles; Ellen Nakashima, *With Court Order, Federal Judge Seeks to Fuel Debate about Data Encryption*, Wash. Post (Oct. 10, 2015), https://www.washingtonpost.com/world/national-security/federal-judge-stokes-debate-about-data-encryption/2015/10/10/c75da20e-6f6f-11e5-9bfe-e59f5e244f92_story.html; John Riley, *Judge Declines to Order Apple to Disable Security on Device Seized By U.S.*,

device encryption, the government's efforts to require third parties to unlock and thereby decrypt data stored on mobile devices should not be shrouded in secrecy. The lack of transparency with respect to such access is all the more troubling because of the disputed nature of the authority provided by the All Writs Act.[31]

Expedited release of the requested records is necessary to allow the public to better understand the conditions under which the government has compelled third parties to provide access to otherwise locked devices. In addition, expedited release will allow Americans to learn how the government has secretly invoked a contested and antiquated legal authority to gain such access.

V. Limitation of Processing Fees

The Requesters request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Requesters fit within this statutory mandate, the ACLU as a representative of the news media and CIS as an educational institution. Fees associated with the processing of this request should, therefore, be limited accordingly.

ACLU. The ACLU meets the definition of a representative of the news media because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."[32]

Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including

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Newsday (Oct. 9, 2015); http://www.newsday.com/news/new-york/federal-jurist-won-t-force-apple-to-disable-security-on-device-seized-by-u-s-1.10943147; Danny Yadron, *U.S. Cites Aged Law to Decrypt Phone Data*, Wall St. J. (Nov. 27, 2014), http://www.wsj.com/articles/u-s-cites-aged-law-to-decrypt-phone-data-1417131617.

[31] Judge Orenstein concluded that "the authorities on which the government relie[d]," and which they have relied on in prior cases, "do not support the conclusion that the All Writs Act permits the relief that the government seeks." Memorandum and Order, *In re Order*, 2015 WL 5920207, at *10. Civil liberties advocates, including the ACLU, have argued that the All Writs Act does not provide the authority to compel device unlocking. *See, e.g.*, Andrew Crocker, *Sifting Fact from Fiction with All Writs and Encryption: No Backdoors*, EFF: Deeplinks Blog (Dec. 3, 2014), https://www.eff.org/deeplinks/2014/12/sifting-fact-fiction-all-writs-and-encryption-no-backdoors ("Simply put, the government cannot use an authority like the All Writs Act to force a company to backdoor its product.").

[32] *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its communications department and website. 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 website's blog attracts more than 40,000 unique visitors per month. The website specifically includes features on information obtained through the FOIA. For example, the ACLU's "Accountability for Torture FOIA" webpage contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA.[33]

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 390,000 households. The ACLU also sends email updates to 1.1 million subscribers. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data.[34]

The ACLU also regularly publishes books,[35] "know your rights" publications,[36] fact sheets,[37] and educational brochures and pamphlets

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[33] *The Torture Database*, https://www.aclu.org/torturefoia (last visited Nov. 6, 2015); *see Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

[34] *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a "bi-weekly electronic newsletter that is distributed to over 15,000 readers" about "court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements.").

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

[36] "Know your rights" publications include: *Know Your Rights: Demonstrations and Protests*, ACLU (Nov. 2011), http://www.aclu.org/files/assets/kyr_protests.pdf; *Gender-Based Violence & Harassment: Your School, Your Rights,* ACLU (May 2011), http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; *Know Your Rights: What to Do If You're Stopped by Police, Immigration Agents or the FBI*, ACLU (June 2010), http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public.[38]

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

CIS. The Request is made by CIS which, as part of Stanford Law School, qualifies as an "educational institution" as defined by Section 552 of the FOIA and its implementing regulations.[39] As required by applicable regulations, CIS's Request (1) "is authorized by, and is made under the auspices of, an educational institution"; (2) seeks records "not . . . for a commercial use, but rather . . . to further scholarly research"; and (3) "serve[s] the scholarly research goals of the institution rather than an individual research goal."[40] CIS seeks the requested records in furtherance of CIS's institutional research goals, namely its research project pertaining to the government's policies, practices, and legal rationale for compelling third parties to provide access to otherwise encrypted data. CIS has funding from Stanford University's Cyber Initiative earmarked specifically for this research,[41] has dedicated staff to perform this research,[42] has published

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

[38] *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

[39] 5 U.S.C. § 552(a)(4)(A)(ii)(II) (requiring processing fee limitation for records sought for non-commercial use and requested by "an educational . . . institution, whose purpose is scholarly . . . research"); 28 C.F.R. § 16.10(b)(4) (Department of Justice regulation defining "educational institution" as "any school that operates a program of scholarly research" for purposes of FOIA request processing fees); *see Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1383-84 (D.C. Cir. 1989) (concluding that Congress intended the phrase "educational institution" in Section 552(a)(4)(A) to be given "the ordinary meaning of that term," that is, "school").

[40] 28 C.F.R. § 16.10(b)(4).

[41] *See Funded Research Projects*, Stanford Cyber Initiative, https://cyber.stanford.edu/research-and-publications/funded-research-projects (last visited Dec. 1, 2015) (listing interdisciplinary research project on U.S. cryptography law and policy, co-headed by CIS Director of Civil Liberties Jennifer Granick).

repeatedly on this topic,[43] and plans to publish academic white papers and/or law review articles to analyze and disseminate to the public the information it receives through this Request. CIS's Request is therefore entitled to limitation of processing fees.[44]

Disclosure is not in the Requesters' commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization."[45] CIS is part of Stanford University, a nonprofit 501(c)(3) educational institution.[46] Any information disclosed by the Requesters as a result of this FOIA will be available to the public at no cost.

VI. Waiver of Costs

The Requesters also request a waiver of all search, review, or duplication fees on the ground that disclosure of the requested information is in the public interest because it is "likely to contribute significantly to public understanding of the operations or activities of the government," and it is "not primarily in the commercial interest of the requester[s]."[47] This request clearly satisfies these criteria.

There can be no doubt that the subject of the request is of significant interest to the American public. As discussed above, the government's use of orders issued under the All Writs Act circumvents an ongoing and heated public debate on whether the government should be able to compel technology companies to provide access to data stored on individuals' devices. The government's admission that it has relied on the All Writs Act for this authority in upwards of 70 cases suggests the government has developed a policy and practice of compelling third parties to provide such access without robust public oversight. This conduct is of particular concern because the government is relying on a contested interpretation of an antiquated statute to gain this access.

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[42] *See supra* note 23.

[43] *See supra* notes 23, 25.

[44] 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(c)(1)(i), (d)(1) (Department of Justice regulations exempting from search fees requests by educational institutions and representatives of the news media).

[45] *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 and internal quotation marks omitted).

[46] *Stanford Legal Facts*, Office of the General Counsel, Stanford University, https://ogc.stanford.edu/stanford-legal-facts (last visited Nov. 24, 2015).

[47] 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.10(k)(1).

The Request satisfies all of the considerations set forth in the applicable regulation for deciding whether "requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government."[48] The Requesters seek records that pertain directly to federal government activities.[49] Because the requested records are scattered across various sources and many are under seal, disclosure would significantly enhance public understanding of government policies and practices apparently developed in secret without public scrutiny.[50] Due to their relevance to the ongoing policy debate, the records would be of interest to a broad audience, including legal scholars, organizations that protect constitutional rights, other members of the news media, and the public at large.[51]

As a nonprofit organization and "representative of the news media" as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. The ACLU does not have a commercial interest in the records, and will disseminate them free of charge.[52] Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.[53]

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[48] 28 C.F.R. § 16.10(k)(2).

[49] *See id.* § 16.10(k)(2)(i).

[50] *See id.* § 16.10(k)(2)(ii), (iv).

[51] *See id.* § 16.10(k)(2)(iii) (noting that representatives of the news media presumptively satisfy this factor).

[52] *Id.* § 16.10(k)(1); *see also id.* § 16.10(k)(3)(ii) ("A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.").

[53] For example, in May 2014, Amtrak granted a fee waiver with respect to the ACLU's request for records regarding the collection of data about Amtrak passengers. In December 2013, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents regarding policies, procedures, and practices followed to obtain search queries from search engine operators for law enforcement or intelligence purposes. In June 2011, the National Security Division also granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006.

Likewise, as part of a 501(c)(3) nonprofit educational institution, CIS does not have a commercial interest in the disclosure of the requested records. CIS plans to disseminate the records received in response to this Request to law students, legal scholars, civil liberties organizations, and the general public, through methods including its website,[54] blog posts, and academic publications such as white papers and/or law review articles.[55]

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days of your receipt of this Request.[56] We also request that you provide an estimated date on which you will finish processing this request.[57]

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material.

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

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

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ebhandari@aclu.org

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[54] A requester's dissemination of information obtained through FOIA requests primarily or exclusively online rather than through traditional print outlets does not disqualify a request from a public-interest waiver. *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1117 (D.C. Cir. 2015) ("[S]urely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website.").

[55] 28 C.F.R. § 16.10(k)(1).

[56] *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4).

[57] *See* 5 U.S.C. § 552(a)(7)(B).

I certify that the foregoing is true and correct.

Sincerely,

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