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

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to the United States’ newly announced policy regarding the International Criminal Court (“ICC”).

I. Background

On September 10, 2018, the U.S. National Security Advisor John Bolton gave a speech at the Federalist Society in which he labeled the ICC as “illegitimate”, “unchecked”, and “dangerous.”² He further

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

² See “Full Text of John Bolton’s speech to the Federalist Society.” AL JAZEERA, Sept. 10 2018, <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>.

stated that the United States will not join, assist, or cooperate with the ICC because it continues to be a “free-wheeling global organization claiming jurisdiction over individuals without their consent” and is “antithetical to [the United States’] ideals.” Mr. Bolton even went so far as to describe the ICC as “the founders’ worst nightmare come to life: an elegant office building in a faraway country that determines the guilt or innocence of American citizens.”³

Furthermore, Mr. Bolton detailed the United States’ intentions to sanction the ICC and its staff if they open an investigation into allegations of torture committed by U.S. forces in Afghanistan. Mr. Bolton said the Trump Administration “...will respond against the ICC and its personnel to the extent permitted by US law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans.”⁴

This represents a drastic shift in U.S. policy towards the ICC. While the U.S. is not a member of the court, it has supported the court’s efforts to hold perpetrators of war crimes accountable when it has been in the best interests of the United States and its allies.⁵ Bolton’s policy speech raises serious concerns about the United States’ engagement with international war crimes tribunals and its commitment to fighting impunity for mass atrocities.⁶ The Trump administration’s new policy has the potential of isolating the United States from its closest democratic allies; Turkey and the United States are currently the only nations in North Atlantic Treaty Organization (NATO) that are not members of the ICC.⁷

In response to Mr. Bolton’s policy speech, several countries and key international bodies spoke out in defense of the ICC’s mandate. The

³ *See Id.*

⁴ *See Id.*

⁵ Alex Whiting, *Why John Bolton vs. Int’l Criminal Court is Different from Version 1.0*, JUST SECURITY, Sept. 10, 2018, <https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture>.

⁶ Gardiner Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council*, THE NEW YORK TIMES, Jun. 19, 2018, <https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html>.

⁷ Alex Whiting, *Why John Bolton vs. Int’l Criminal Court is Different from Version 1.0*, JUST SECURITY, Sept. 10, 2018, <https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture>.



French Ministry of Foreign Affairs expressed the nation’s unwavering cooperation with the court,⁸ while Germany’s Foreign Office tweeted their ongoing commitment to the ICC.⁹ The European Union’s foreign policy chief, Federica Mogherini, stated that the European Union “will continue to fully and strongly support the ICC and its work.”¹⁰ Furthermore, the President of the Assembly of States Parties to the Rome Statute, O-Gon Kwon, released a statement on September 11 that both reaffirmed the Assembly of States Parties’ support of the ICC, and emphasized the important role of the ICC in the international legal system: “The Court’s mandate is to help put an end to impunity for the most serious crimes of concern to the international community as a whole and to bring justice to those affected by such crimes. . . . The Assembly of States Parties remains committed to uphold and defend the principles and values enshrined in the Rome Statute, including in particular the judicial independence of the Court.”¹¹

In his speech, Mr. Bolton suggested that the court may claim universal jurisdiction and investigate and prosecute “acts of aggression” by the United States, warning that the term could be used to cover many U.S. military and intelligence operations overseas.¹² These sentiments run contrary to the fact that the court lacks jurisdiction over the “crime of aggression” by *non*-members—and even members must specifically agree to such jurisdiction.



⁸ *After Trump threats, France stands by International Criminal Court*, REUTERS, Sept. 11, 2018, https://www.reuters.com/article/us-usa-trump-icc-france/after-trump-threats-france-stands-by-international-criminal-court-idUSKCN1LR1QW?utm_source=reddit.com.

⁹ *See* @GermanyDiplo. “Since 2002, the International Criminal Court @IntlCrimCourt has been enforcing international law in cases of the most serious crimes. We are committed to the work of the ICC - in particular when it comes under fire.” *Twitter*, Sept. 11, 2018, 10:50 a.m., <https://twitter.com/GermanyDiplo/status/1039526566089371648>.

¹⁰ *EU Backs ICC After US Questions Court’s Legitimacy*, ASSOCIATED PRESS, Sept. 13, 2018, <https://www.usnews.com/news/world/articles/2018-09-13/eu-backs-icc-after-us-questions-courts-legitimacy>.

¹¹ *See* “Statement by the President of the Assembly, O-Gon Kwon, reaffirming support for the ICC.” Sept. 11, 2018, https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1405.aspx.

¹² *See* “Full Text of John Bolton’s speech to the Federalist Society,” AL JAZEERA, Sept. 10 2018, <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>.

As exemplified in remarks during the September 11 State Department daily briefing,¹³ it is unclear to the American public what legal authority the Trump administration has to sanction and prosecute ICC judges and prosecutors, as well as any other company or states that will assist the ICC in its investigations.¹⁴

To provide the American public with information about the Trump administration's positions concerning the United States' working relationships with international justice and human rights bodies—information that is crucial to the public given the United States' historic involvement with and support for international war crime tribunals and organizations—the ACLU seeks such information through this FOIA request.

II. Requested Records

The ACLU seeks the following records created on or between January 20, 2017, to the present:

(1) Any communication concerning the U.S. government's new policy¹⁵ towards the International Criminal Court as described in National Security Advisor Bolton's speech on September 10, 2018;

(2) Any legal and policy memoranda concerning the U.S. government's threat to ban ICC judges and prosecutors from entering the United States, to sanction their funds in the U.S. financial system, and to prosecute them in the U.S. criminal system; and

(3) Any legal and policy memoranda concerning the U.S. government's threat to sanction any company or state that assists an ICC investigation of Americans.

For the purposes of this Request, "communication" is collectively defined to include, but is not limited to: talking points,

¹³ See "Department Press Briefing – September 11, 2018." Sept. 11, 2018, <https://www.state.gov/r/pa/prs/dpb/2018/09/285807.htm>.

¹⁴ Marty Lederman, *Does Trump Have Legal Authority to Follow Through on John Bolton's Threats to the Int'l Criminal Court?*, JUST SECURITY, Sept. 20, 2018, <https://www.justsecurity.org/60705/explains-boltons-threats-icc>.

¹⁵ For the purposes of this Request "new policy" refers to the U.S. government's intent to inflict travel and financial sanctions on the International Criminal Court and the implications of such actions on future cooperation with the International Criminal Court's judges and prosecutors, as well as any other company or state that will assist the International Criminal Court's investigations into U.S. torture allegations in Afghanistan.



intelligence notes, assessments, bulletins, instructions, directives, guidance documents, formal and informal presentations, training documents, alerts, updates, advisories, reports, contracts or agreements, minutes or notes of meetings and phone calls, other memoranda, legal opinions, evaluations, memorializations, guidelines, emails, and social media posts.

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

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁶ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

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

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).¹⁷ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).¹⁸

¹⁶ *See also* 32 C.F.R. § 286.8(e); 32 C.F.R. § 1900.34; 22 C.F.R. § 171.11(f).

¹⁷ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B); 22 C.F.R. § 171.11(f)(2); 32 C.F.R. § 1900.34(c)(2).

¹⁸ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights*



The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,¹⁹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²⁰

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated



v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

¹⁹ See, e.g., Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

²⁰ See, e.g., Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, *Intercept* (Feb. 8, 2017), <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, *Wash. Post* (Aug. 6, 2016), <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, *ABC* (June 15, 2016), <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, *Guardian* (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, *NPR* (Dec. 9, 2015), <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.²¹ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. See <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its 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, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information

²¹ See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 am), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 pm), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 pm), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 pm), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 pm), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.



obtained through the FOIA.²² For example, the ACLU’s “Predator Drones FOIA” webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.²³

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.²⁴ Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA’s behavior



²² See, e.g., Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of ‘Zero-Day’ Exploit Decisionmaking Process* (June 26, 2015, 11:00 am), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 am), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

²³ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

²⁴ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

detection program²⁵; a summary of documents released in response to a FOIA request related to the FISA Amendments Act²⁶; 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 requests²⁷; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.²⁸

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

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

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁹ Specifically, the requested communications and memoranda related to the U.S. government's threat to ban ICC judges and prosecutors from entering the United States, to sanction their funds in the U.S. financial system, and to prosecute them in the U.S. criminal system. As discussed in Part I, *supra*, the United States' new policy towards the International Criminal Court could significantly affect accountability by international war crime tribunals and organizations, and are the subject of widespread public controversy and media attention.³⁰ The records sought relate to a matter of widespread and exceptional media interest in U.S. foreign affairs.³¹



²⁵ *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

²⁶ *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

²⁷ *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

²⁸ Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

²⁹ *See also* 22 C.F.R. § 171.11(f)(2); 32 C.F.R. § 286.8(e)(1)(i)(B); 32 C.F.R. § 1900.34(c)(2).

³⁰ *See supra* Part I.

³¹ *See id.*

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

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).³² The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. *The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the intent to inflict travel and financial sanctions on the International Criminal Court, as well as any other company or state that will assist the International Criminal Court’s investigations into U.S. torture allegations in Afghanistan is publicly available, the records sought are certain to contribute significantly to the public’s understanding of the compatibility of domestic policy with international human rights standards.

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

³² See also 32 C.F.R. § 286.12(l)(1); 22 C.F.R. § 171.16(a); 32 C.F.R. § 1900.13(b)(2).



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

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).³³ The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III)³⁴; *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial

³³ *See also* 32 C.F.R. § 286.12 (l)(2)(ii)(b); 22 C.F.R. § 171.16 (a)(iii); 32 C.F.R. § 1900.13(i)(2).

³⁴ *See also* 32 C.F.R. § 286.12(b)(6); 22 C.F.R. § 171.14(b)(5)(ii)(C); 32 C.F.R. § 1900.02(h)(3).



Watch, self-described as a “public interest law firm,” a news media requester).³⁵

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.”³⁶ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 32 C.F.R. § 286.8(e)(1); 22 C.F.R. § 171.11(f)(4); 32 C.F.R. § 1900.34(c).

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



³⁵ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

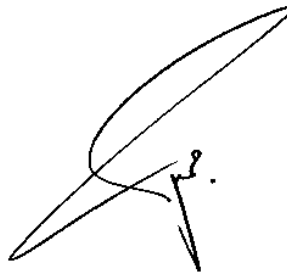
³⁶ In June 2017, the DOS granted a fee-waiver request regarding a FOIA request for records relating to the Trump administration’s plans to redefine the United States’ role in the international human rights system. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

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

Jamil Dakwar
American Civil Liberties Union
125 Broad Street—18th Floor
New York, New York 10004
T: 212.519.7870
F: 212.549.2654
jdakwar@aclu.org

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

Respectfully,

A handwritten signature in black ink, appearing to read 'J. Dakwar', is written over a horizontal line.

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