



November 21, 2012

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National Security Division
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Record/Information Dissemination Section
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170 Marcel Drive
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National Security Agency
Attn: FOIA/PA Office (DJ4)
9800 Savage Road, Suite 6248
Ft. George G. Meade, MD 20755

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

Dear Freedom of Information Officer:

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). It is submitted on behalf of the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”).¹

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

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I. Request for Information

Introduction to Tor

The Tor Project (Tor) is an anonymizing network that provides censorship and surveillance resistant internet connectivity to activists, journalists, researchers and privacy advocates around the world. There are an estimated 500,000 users of Tor.² These include law enforcement and intelligence agencies in the United States, which was the intention of the U.S. Naval Research Lab, which invented the underlying technology and funded the early development of the project. Tor is also used by activists, journalists and the general public in Iran, Syria, China and other countries with authoritarian governments, which has led to significant funding for Tor from the U.S. State Department and the Broadcasting Board of Governors. However, Tor is also used by many people in the United States – it is estimated that approximately 15% of the users of Tor are located in the United States.

When someone browses the web using Tor or another Virtual Private Network (VPN),³ their Internet traffic appears to originate at the Tor or VPN server, rather than from their home connection.⁴ Thus, a U.S. citizen located in Chicago who uses a Tor exit server in France will, to Google or Facebook, appear to be a user in France. Likewise, someone in Iran connecting to the web via a Tor exit server located in San Francisco will appear to the New York Times as a web surfer from San Francisco.

The FISA Amendments Act of 2008

The FISA Amendments Act of 2008 (FAA) added several sections to the U.S. Code that relate to surveillance of persons “reasonably believed to be located outside the United States.”⁵ Although the FAA includes many definitions, it does not include a definition for this term. It is not clear from the statute, for example, whether a U.S. person using a Tor exit server abroad would be considered to be “located outside the United States”, or whether a foreign person using a Tor exit server in the United States would be considered to be a person located inside the United States.

² See generally Tor Metrics, metrics.torproject.org.

³ Tor is but one method to anonymously browse the web. Other popular methods include the use of Virtual Private Network (VPN) services, or proxies.

⁴ See: Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012).

⁵ See, for example, 50 U.S.C. § 1881(a).

Accordingly, the ACLU seeks disclosure of records regarding:

1. Policies, procedures or practices followed when collecting, intercepting, or monitoring communications to or from the Tor network, Virtual Private Networks, proxies, or other similar services.
2. Legal opinions, briefs, or decisions from any court relating to the the collection, interception, or monitoring of communications to or from the Tor the Tor network, Virtual Private Networks, proxies, or other similar services.

II. Limitation of Processing Fees

A waiver of search and review fees is warranted because 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); 28 C.F.R. § 16.11(c)(1)-(3), (d)(1). The ACLU is a representative of the news media in that 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.” *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. 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 public education department and web site. The web site 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 specifically includes features on information obtained through FOIA requests. For example, the ACLU’s “Accountability for Torture FOIA” webpage, <http://www.aclu.org/torturefoia>, 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 (<http://www.thetorturedatabase.org>) permitting webpage visitors to search the documents obtained through the FOIA. *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).

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 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. 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. *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”).

The ACLU also regularly publishes books,⁶ “know your rights” publications,⁷ fact sheets,⁸ 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. *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).

⁶ 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* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

⁷ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You're Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

⁸ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-ACLU_Fact_Sheet-UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), available at <http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act>.

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

III. Waiver of all Costs

The ACLU additionally requests a waiver of search, review, and duplication fees because disclosure of the requested records 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); 28 C.F.R. § 16.11(k)(1).

Disclosure of the requested information will help members of the public understand the privacy risks of using public transportation. The government's policies and practices for monitoring and disclosing the travel data of public transit customers are unclear. Under these circumstances, there is little doubt that the requested information will "contribute significantly to public understanding." 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k)(1).

Disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost. The ACLU is a "non-profit, non-partisan, public interest organization." *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 quotations omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of the Act").

As a nonprofit 501(c)(3) organization and "representative of the news media" as discussed in Section II, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁹

⁹ For example, in May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. Also, the Department of Health and Human Services granted a fee waiver to the ACLU