

November 21, 2018

National Security Agency  
Attn: FOIA/PA Office  
9800 Savage Road, Suite 6932  
Ft. George G. Meade, MD 20755-6932

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

Federal Bureau of Investigation  
Attn: FOIA/PA Request  
Record/Information Dissemination Section  
170 Marcel Drive  
Winchester, VA 22602-4843

Patricia Gaviria  
Director, Information Management Division  
Attn: FOIA/PA  
Office of the Director of National Intelligence  
Washington, DC 20511

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, DC 20530-0001

Arnetta Mallory  
FOIA Initiatives Coordinator  
National Security Division  
Department of Justice  
Room 6150  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Deborah Waller, Government Information Specialist  
Office of the Inspector General  
Department of Justice  
Room 4726  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001



National Office  
125 Broad Street,  
18<sup>th</sup> Floor  
New York, NY 10004  
Tel: (212) 549-2644  
Fax: (212) 549-2644  
aclu.org

Susan N. Herman  
*President*

Anthony D. Romero  
*Executive Director*

Richard Zacks  
*Treasurer*

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

To Whom It May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and its implementing regulations.<sup>1</sup> The Request is submitted by the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively “ACLU”).<sup>2</sup>

The ACLU seeks disclosure of information concerning the government’s surveillance activities, including those conducted under the USA Freedom Act.<sup>3</sup> Three provisions of the USA Freedom Act, including Section 215—which permits the querying and collection of vast amounts of Americans’ communications data—are scheduled to expire in December 2019. The debate surrounding the renewal of these provisions will offer an opportunity to evaluate, for the first time, the strength of certain privacy protections instituted by the Act. As Congress considers whether to reauthorize these surveillance powers, additional information about their breadth and implementation is urgently needed to inform the public debate.

**I. Background**

On June 2, 2015, President Obama signed the USA Freedom Act into law. This legislation extended, in modified form, three controversial provisions of the Patriot Act originally enacted in 2001.<sup>4</sup> Most notably, the

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<sup>1</sup> See 28 C.F.R. § 16.1 (Department of Justice); 32 C.F.R. § 286 (Department of Defense); and 32 C.F.R. § 1900 (Central Intelligence Agency); 32 C.F.R. § 1700.1 (Office of the Director of National Intelligence).

<sup>2</sup> The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. 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.

<sup>3</sup> Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (“USA Freedom Act” or “the Act”), 129 Stat. 268.

<sup>4</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA Patriot Act”), 115 Stat 272, was enacted in the wake of the September 11 attacks and drastically expanded the government’s surveillance powers. The USA Freedom Act reauthorized three of these Patriot Act provisions: Section 215, the “roving wiretap” provision, and the “lone wolf” provision. All three provisions are now set to expire in December 2019.

USA Freedom Act prohibited the bulk collection of Americans' communications records under Section 215. After the National Security Agency's ("NSA") abuse of this provision was revealed in 2013, the ensuing public outcry prompted lawmakers to pass measures restricting the government's surveillance powers. In addition to prohibiting bulk collection, the Act directed the government to adopt procedures that minimize the collection and retention of irrelevant records, required the Foreign Intelligence Surveillance Court ("FISC") to publish declassified copies of its significant opinions, and mandated the appointment of amici curiae to represent the public in significant cases before the FISC. It also introduced more comprehensive government reporting requirements.

The USA Freedom Act prohibited intelligence agencies from using Section 215 to collect and store Americans' data in bulk.<sup>5</sup> At the same time, however, the Act created a new framework for the government to conduct wide-ranging queries of communications records held by companies. The government is permitted to collect records that are two "hops" from its surveillance targets—meaning it is permitted to collect the communication records of a target (the first hop), *plus* the communications records of every individual who is in contact with that target (the second hop). The Act attempts to protect against overbroad intrusions on Americans' private data by requiring the government to conduct queries based on narrowly-defined "specific selection term[s]" and by mandating minimization procedures that require "the prompt destruction of all call detail records" that are not "foreign intelligence information." 50 U.S.C. § 1861(c)(2)(F).

Yet even with these safeguards, the intelligence agencies are collecting massive amounts of communications data under Section 215. In 2017, the government collected 534,396,285 call detail records based on only 40 surveillance targets.<sup>6</sup> Moreover, the scale of collection is growing rapidly: although the number of targets remained stable from 2016 to 2017, the total number of call records collected more than tripled. *See* Charlie Savage, *N.S.A. Triples Collection of Data From U.S. Phone Companies*, N.Y. Times, May 4, 2018.

The USA Freedom Act also reformed the Foreign Intelligence Surveillance Court. Those changes provide for the appointment of amici curiae to help the Court evaluate applications that "present[] a novel or significant interpretation of the law." 50 U.S.C. § 1803(i)(2). Amici are

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<sup>5</sup> It similarly restricts bulk collection carried out through pen registers, tap and trace devices, and national security letters. *See* USA Freedom Act, 129 Stat. 268, Title II, Title V.

<sup>6</sup> ODNI, Statistical Transparency Report, Calendar Year 2017, at 33–35 (2018), <https://bit.ly/2PJy998>.

appointed at the Court's discretion and may—but are not required to—“advance the protection of individual privacy and civil liberties.” *Id.* § 1803(i)(4). The Act also instructs the Director of National Intelligence to conduct a declassification review of any FISC opinions “that include[ ] a significant construction or interpretation of any provision of law” and to make such opinions publicly available in redacted form. *Id.* § 1872. Declassified opinions published under this provision show that the Court continues to approve expansive surveillance powers for the government, even over the objections of court-appointed amici. *See, e.g.,* Del Quentin Wilber, *U.S. Spy Court Judge Dismissed Privacy Advocate's Concerns About Data Use*, L.A. Times, Apr. 19, 2016.

The reform provisions of the USA Freedom Act were the subject of fierce public debate leading up to its enactment. *See, e.g.,* Spencer Ackerman, *NSA Reform Bill Imperiled as it Competes with Alternative Effort in the Senate*, Guardian, Apr. 28, 2015; Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 is Sharply Limited*, N.Y. Times, Jun. 2, 2015. Since its passage, the Act has continued to engender widespread concern. *See, e.g.,* Editorial, *Mass Surveillance Isn't the Answer to Fighting Terrorism*, N.Y. Times, Nov. 17, 2015. Since the Act's passage, the government has released information on the implementation of Section 215, published a handful of declassified FISC opinions, and released certain statistics on its use of surveillance authorities. These disclosures have generated significant media coverage. *See, e.g.,* Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without Warrant*, N.Y. Times, Apr. 19, 2016; Mark Hosenball, *NSA Collected Americans' Phone Records Despite New Limits, Report Says*, Time, May 3, 2017.

Nonetheless, the public lacks critical information about how the USA Freedom Act has been interpreted over the past three years, and about how many Americans have their private data swept into government databases under the new statutory framework. For example, the government has failed to comply with the Act's requirement that it publicly report the number of unique identifiers returned by the government's queries of communications data. *See* 50 U.S.C. § 1873(b)(5)(B). Similarly, neither the government nor the FISC have publicly disclosed how they interpret and apply key statutory terms that were intended to limit the scope of this surveillance. Without this information, the public is left with few ways of ascertaining the effectiveness of the Act's reform measures or what has caused the surge in call records collected under Section 215.

In 2019, Congress will consider reauthorization of surveillance authorities in the USA Freedom Act, including Section 215. As part of that debate, Congress will also have the opportunity to evaluate the new oversight

and transparency measures that the Act codified. It is crucial that both Congress and the public fully understand the impact of these measures on the privacy of Americans. This Request seeks records that will illuminate how the government interprets its surveillance authority under the USA Freedom Act, the application of new restrictions to communications collected under Section 215, and the effectiveness of newly instituted transparency and reporting requirements.

## **II. Records Requested**

### **Records requested from all agencies**

1. Inspector general reports dated on or after June 1, 2015, concerning surveillance conducted pursuant to 50 U.S.C. § 1861 or 50 U.S.C. §§ 1841–1846.
2. Reports or FISC filings dated on or after June 1, 2015, concerning compliance violations related to surveillance conducted pursuant to 50 U.S.C. § 1861 or 50 U.S.C. §§ 1841–1846.
3. Policies, procedures, guidance, reports, or FISC filings concerning the requirement that investigations of U.S. persons in which orders are sought pursuant to 50 U.S.C. § 1861 and 50 U.S.C. §§ 1842–43 must not be “conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

### **Records requested from the Department of Justice, including the FBI**

4. Filings, orders, or opinions in the FISC or Foreign Intelligence Surveillance Court of Review (“FISCR”) dated on or after June 1, 2015, containing discussion or analysis of:
  - a. The meaning of “specific selection term” or “specific identifier” in 50 U.S.C. § 1861 or 50 U.S.C. § 1841–42.
  - b. The requirement that a specific selection term “limit, to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose of seeking the tangible things,” 50 U.S.C. § 1861(k)(4)(A)(i)(II).

- c. The meaning of “call detail records” in 50 U.S.C. § 1861, including but not limited to the meaning of “session-identifying information.”<sup>7</sup>
5. The following minimization procedures:
  - a. The most recent set of minimization procedures approved as part of an application for the production of call detail records on an ongoing basis, pursuant to 50 U.S.C. § 1861(b)(2)(C).
  - b. The four most recent sets of minimization procedures approved as part of an application for the production of tangible things, pursuant to 50 U.S.C. § 1861(b)(2)(B).
  - c. The four most recent sets of privacy or minimization procedures approved as part of an application for installation of a pen register or trap and trace device, pursuant to 50 U.S.C. § 1842.
  - d. The current standard minimization procedures for surveillance conducted pursuant to Title I, Title III, Section 703, Section 704, and Section 705(b) of FISA.<sup>8</sup>
6. Filings, orders, or opinions in the FISC or FISCR concerning the Supreme Court’s decision in *Carpenter v. United States*, 585 U.S. \_\_\_ (2018).
7. FISC filings dated on or after January 1, 2015, that provide notice pursuant to FISC Rule of Procedure 11—identifying an issue not previously presented to the court—and all related filings, submissions, legal memoranda, orders, or opinions.<sup>9</sup>
8. The following records related to the appointment of amici curiae in the FISC:
  - a. FISC orders or other records dated after June 1, 2015, in which the FISC advised the government that it was considering appointment of an amicus curiae in response to a proposed application; the

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<sup>7</sup> The ACLU does not seek records in Category 4 that merely quote the statutory terms without any discussion or analysis of their meaning.

<sup>8</sup> If no standard minimization procedures exist for a given authority, the ACLU requests the most recent set of FISC-approved minimization procedures for surveillance under that authority.

<sup>9</sup> Throughout this Request, the ACLU does not seek FISC records that are purely administrative in nature, such as an order setting a briefing schedule.

proposed application itself; and all responsive filings by the government.

- b. Legal memoranda, orders, or opinions in the FISC or FISCR in any matter in which an amicus curiae was appointed.
  - c. Transcripts of any oral argument before the FISC or FISCR in which an amicus curiae participated.<sup>10</sup>
9. FISC filings dated on or after January 1, 2015, made by the recipient of a FISC order—including but not limited to any challenge initiated by a communications provider—and all responsive filings by the government.
10. Legal memoranda, orders, or opinions in the FISC or FISCR addressing the applicability of the Fourth Amendment or FISA to the use of cell-site simulator technology—including but not limited to a “stingray” device—as well as the most recent set of minimization procedures approved as part of an application in the FISC to use cell-site simulator technology.
11. Notifications of FISA surveillance:
- a. Provided pursuant to 50 U.S.C. § 1845(c) or (d) and dated on or after January 1, 2009.
  - b. Provided pursuant to 50 U.S.C. § 1881e(a) or (b) and dated on or after January 1, 2016.
12. The criminal complaint or indictment for each criminal case filed on or after June 1, 2015, in which investigators or prosecutors received information obtained or derived from Section 215, 50 U.S.C. § 1861, including but not limited to “lead” information.

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Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

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<sup>10</sup> The ACLU does not seek records in Category 8(b) or (c) that have already been officially disclosed.

We request that responsive electronic records be provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request 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 in separate, Bates-stamped files.

### III. Request for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>11</sup> 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).<sup>12</sup> Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information").<sup>13</sup>

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 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

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<sup>11</sup> *See also* 32 C.F.R. § 286.8(e) (DoD); 28 C.F.R. § 16.5(e) (DOJ); 32 C.F.R. § 1900.34 (CIA); 32 C.F.R. § 1700.12 (ODNI).

<sup>12</sup> *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DoD); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 32 C.F.R. § 1900.34(c)(2) (CIA); 32 C.F.R. § 1700.12(c)(2) (ODNI).

<sup>13</sup> Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are "primarily engaged in disseminating information." *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

over 4 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>14</sup> and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>15</sup>

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various

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<sup>14</sup> See, e.g., Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>; Press Release, ACLU, 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>.

<sup>15</sup> 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).

sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.<sup>16</sup> 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](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and

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<sup>16</sup> See, e.g., ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), [https://www.aclu.org/sites/default/files/field\\_document/dem17-tsa\\_detection\\_report-v02.pdf](https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf); 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), <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), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s ‘Empowering Males of Color’ Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

educational multi-media features.<sup>17</sup>

The ACLU website includes many features on information obtained through the FOIA. 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 its contents relating to government policies on rendition, detention, and interrogation.<sup>18</sup> The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.<sup>19</sup>

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

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<sup>17</sup> See, e.g., *ACLU v. DOJ—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ—FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015) <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

<sup>18</sup> *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>19</sup> *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), [https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf); *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), [https://www.aclu.org/files/pdfs/natsec/faafoia\\_20101129/20101129Summary.pdf](https://www.aclu.org/files/pdfs/natsec/faafoia_20101129/20101129Summary.pdf); *Statistics on NSL’s Produced by Department of Defense*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/nsl\\_stats.pdf](https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf).

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

The records sought are urgently needed to inform the public about actual or alleged federal government activity. The records pertain to the collection of Americans' communications data in vast quantity, and to the government's interpretation and implementation of a controversial federal statute that impacts Americans' privacy and associational rights. Disclosure is necessary because there remains a significant and conspicuous gap in the public's knowledge when it comes to the impact of Section 215 surveillance on Americans. This information is urgently needed to inform the ongoing public and congressional debate about whether the government's surveillance authority should be narrowed, amended, or otherwise limited in advance of any reauthorization vote in 2019.

The requested records relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(e)(1)(iv), and to a "breaking news story of general public interest" that concerns "actual or alleged Federal government activity." 32 C.F.R. § 286.4(d)(3)(ii).

The government's intrusive surveillance powers have been a significant matter of public concern and media interest for many years. The powers scheduled to sunset in December 2019 originated in the Patriot Act, which was the subject of widespread public controversy when it was first enacted and with each subsequent renewal. *See, e.g.,* Larry Abramson, *The Patriot Act: Alleged Abuses of the Law*, NPR, July 20, 2005; Andrea Peterson, *Patriot Act Author: 'There has been a Failure of Oversight'*, Wash. Post, Oct. 11, 2013; David Kravets, *Obama Backs Extending Patriot Act Spy Provisions*, Wired, Sept. 15, 2009.

Public and media interest in the government's surveillance power surged beginning in June 2013, when it was revealed that the NSA was systematically collecting the phone records of millions of Americans. *See, e.g.,* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian, Jun. 6, 2013; Andy Greenberg, *Intelligence Officials Admit that Edward Snowden's NSA Leaks Call for Reforms*, Forbes, Sept. 13, 2013; Ed Pilkington, *Secret Court Lets NSA Extend its Trawl of Verizon Customers' Phone Records*, Guardian, Jul. 19, 2013. Responding to demands for greater public transparency, the government has periodically declassified and released additional information concerning the authorities and operations of its Section 215 program. *See* Stuart Dredge, *US Intelligence*

*Services to Go 'On the Record' With New Tumblr Blog*, Guardian, Aug. 22, 2013.

The USA Freedom Act, which emerged out of public demands for surveillance reform, has been the subject of widespread interest and debate since the moment it was proposed. In the months leading up to its enactment, the Act was the subject of particularly intense coverage. *See, e.g.*, Editorial, *The USA Freedom Act: A Smaller Big Brother*, L.A. Times, May 6, 2015. That media interest was driven, in part, by the fact that the Second Circuit Court of Appeals ruled the government's bulk collection of call records illegal just weeks before Section 215 was set to expire. *See* Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data is Ruled Illegal*, N.Y. Times, May 7, 2015.

Since Congress passed the USA Freedom Act in June 2015, national news stories have examined and highlighted the Act's impact on Americans' privacy rights. *See, e.g.*, Lee Ferran, *NSA Can Access More Phone Data Than Ever*, ABC, Oct. 20, 2016. Questions about the scope, legality, and wisdom of the government's surveillance under these provisions remain hotly debated in the media and in Congress. *See, e.g.*, Mark Hosenball, *NSA Collected Americans' Phone Records Despite Law Change: Report*, Reuters, May 2, 2017. For example, the NSA recently revealed that it had collected phone records in violation of the Act for nearly three years, prompting it to purge hundreds of millions of records from its databases. *See* Charlie Savage, *NSA Purges Hundreds of Millions of Call and Text Records*, N.Y. Times, June 29, 2018. Declassified FISC opinions and company transparency reports disclosed pursuant to the USA Freedom Act have also regularly drawn media attention. *See, e.g.*, Josh Gerstein, *Court Troubled by Surveillance Excesses at FBI, NSA*, Politico, Apr. 19, 2016; Kif Leswing, *The FBI Let Apple Reveal the Existence of a Single Secret Inquiry*, Bus. Insider, May 23, 2017. Public interest in the USA Freedom Act will undoubtedly continue to grow as the upcoming expiration date approaches. *See, e.g.*, Spencer Ackerman, *Rand Paul Allies Plan New Surveillance Reforms to Follow USA Freedom Act*, Guardian, June 2, 2015.

As the sustained media interest concerning the USA Freedom Act shows, the subject of the Request is a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(e)(1)(iv). Moreover, ongoing disclosures concerning Section 215 and the looming reauthorization debate constitute a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A).

#### 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).<sup>20</sup> 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 limited information about the implementation of the USA Freedom Act is publicly available, the records sought are certain to contribute significantly to the public’s understanding of the scope of the government’s surveillance authority.

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)).

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). 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

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<sup>20</sup> 32 C.F.R. § 286.12(1)(1) (DOD); 28 C.F.R. § 16.10(k)(2) (DOJ); 32 C.F.R. § 1900.13(b)(2) (CIA); 32 C.F.R. § 1700.6(b)(2) (ODNI).

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)<sup>21</sup>; *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).<sup>22</sup>

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”<sup>23</sup> As was true in those instances, the ACLU meets the requirements for a fee waiver here.

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<sup>21</sup> *See also* 32 C.F.R. § 286.12(b)(6) (DOD); 28 C.F.R. § 16.10(b)(6) (DOJ); 32 C.F.R. § 1900.02(h)(3) (CIA); 32 C.F.R. § 1700.2(h)(4) (ODNI).

<sup>22</sup> Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

<sup>23</sup> For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social

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Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 1900.21(d); 28 C.F.R. § 16.5(e)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. §1700.12(b).

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 in accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so we may begin the process of requesting a Mandatory Declassification Review under the terms of Executive Order 13,526.

I certify that the foregoing information provided in support of the request for expedited processing is true and correct to the best of my knowledge and belief.

Executed on the 21<sup>st</sup> day of November, 2018.

Sincerely,



Noor Zafar

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media surveillance. 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 June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-wavier requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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 June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies' removal of "extremist" content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

American Civil Liberties Union  
Foundation  
125 Broad Street, 18th floor  
New York, NY 10004  
Tel: 212 549 2642  
Fax: 212 549 2654  
nzafar@aclu.org