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**DATE:** March 15, 2017

**RE:** Freedom of Information Act Request

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LEGAL DEPARTMENT



March 15, 2017

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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")<sup>1</sup> submit this Freedom of Information Act ("FOIA") request (the "Request") for records pertaining to (1) the legal basis for the United States' January 29, 2017 raid in al Ghayil, Yemen (the "al Ghayil Raid"); (2) the process by which the government evaluated and approved the al Ghayil Raid, including the evidentiary standard by which the factual evidence for conducting the raid was evaluated; (3) the factual basis for, and process by which, the decision was made to designate certain portions of Yemeni provinces as "areas of active hostilities" prior to the raid; (4) before-the-fact and after-action assessments of civilian or bystander casualties of the raid; and (5) the number, identities, legal status, and affiliations of those killed by the United States during the raid.

### I. Background

On January 25, 2017, while dining at the White House, President Donald Trump approved a military raid of the small village of al Ghayil, Yemen.<sup>2</sup> A few days later, in the early hours of January 29, Navy SEAL Team 6 carried out the raid, which left several civilians dead and raised concerns about the legal basis, planning, and execution of the operation.<sup>3</sup> In a press release later that day,

<sup>1</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, 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.

<sup>2</sup> Fred Kaplan, *What Happened Behind the Scenes Before the Yemen Raid?*, Slate (Feb. 2, 2017, 6:06 PM), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2017/02/who\\_s\\_to\\_blame\\_for\\_the\\_botched\\_yemen\\_raid\\_that\\_killed\\_a\\_navy\\_seal.html](http://www.slate.com/articles/news_and_politics/war_stories/2017/02/who_s_to_blame_for_the_botched_yemen_raid_that_killed_a_navy_seal.html).

<sup>3</sup> Eric Schmitt & David E. Sanger, *Raid in Yemen: Risky from the Start and Costly in the End*, N.Y. Times (Feb. 1, 2017), <https://nyti.ms/2k15LPn>.

President Trump described the raid as “successful,” a characterization echoed by other White House officials.<sup>4</sup> A number of other officials, including Senator John McCain, have questioned this characterization.<sup>5</sup>

Following the raid, the Department of Defense conducted a review pursuant to Army Regulation 15-6, which involved three separate investigations into the al Ghayil Raid: (1) an investigation into the death of U.S. Navy SEAL Ryan Owens; (2) an investigation into the civilian casualties; and (3) an investigation into the crash and subsequent destruction of the Osprey aircraft.<sup>6</sup> On March 9, 2017, the head of U.S. Central Command, General Joseph Votel, informed the Senate Armed Services Committee that two of the three investigations were complete, leaving only the investigation into the crash of the Osprey tilt-rotor aircraft ongoing.<sup>7</sup>

During his testimony, General Votel disclosed that the investigation into civilian casualties concluded that between four and twelve civilians died during the raid.<sup>8</sup> This tally conflicts with other reports that have placed that number higher. Human Rights Watch, for example, reported that at least fourteen civilians were killed, nine of whom were children.<sup>9</sup> The Bureau of Investigative Journalism reported that twenty-five civilians were killed in the raid.<sup>10</sup> Another

<sup>4</sup> Press Release, Office of the Press Secretary, White House, Statement by the President on U.S. Service Member Killed in Yemen (Jan. 29, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/29/statement-president-us-service-member-killed-yemen>; see Aaron Blake, *The White House Has Really Backed Itself Into a Corner on the Yemen Raid*, Wash. Post (Feb. 28, 2017), [http://wapo.si/21STawb?tid=ss\\_tw](http://wapo.si/21STawb?tid=ss_tw) (quoting Press Secretary Sean Spicer as saying that the raid was “absolutely a success” and that “anybody who would suggest otherwise doesn’t fully appreciate how successful that mission was”).

<sup>5</sup> Nolan D. McCaskill, *McCain Rebuffs White House’s Call for Apology Over Yemen Raid*, Politico (Feb. 8, 2017, 2:58 PM), <http://politi.co/2k41FYb> (quoting Senator McCain as calling the raid a “failure”); see Ewen MacAskill, Spencer Ackerman & Jason Burke, *Questions Mount Over Botched Yemen Raid Approved by Trump*, Guardian (Feb 2., 2017, 7:32 PM), <https://www.theguardian.com/world/2017/feb/02/trump-approved-yemen-raid-five-days-after-inauguration>.

<sup>6</sup> Gabrielle Levy, *White House Responds to Call for Investigation from Slain SEAL’s Father*, U.S. News (Feb. 27, 2017, 5:09 PM), <https://www.usnews.com/news/politics/articles/2017-02-27/white-house-yemen-raid-that-killed-scal-triggers-three-pronged-pentagon-review>.

<sup>7</sup> Missy Ryan, *Yemen Raid Killed Up to a Dozen Civilians, Military Investigation Says*, Wash. Post (Mar. 9, 2017), [http://wapo.si/2mqJjQZ?tid=ss\\_tw](http://wapo.si/2mqJjQZ?tid=ss_tw); Ryan Browne & Barbara Starr, *What We Know About the Yemen Raid*, CNN (Mar. 11, 2017, 12:48 PM), <http://www.cnn.com/2017/03/11/politics/yemen-raid-details-investigation>.

<sup>8</sup> Ryan, *supra* note 7.

<sup>9</sup> *Yemen: US Should Investigate Civilian Deaths in Raid*, Human Rts. Watch (Feb. 24, 2017, 12:01 AM), <https://www.hrw.org/news/2017/02/24/yemen-us-should-investigate-civilian-deaths-raid>.

<sup>10</sup> Namir Shabibi & Nasser al Sane, *Nine Young Children Killed: The Full Details of Botched US Raid in Yemen*, Bureau of Investigative Journalism (Feb. 9, 2017), <https://www.thebureauinvestigates.com/stories/2017-02-09/nine-young-children-killed-the-full-details-of-botched-us-raid-in-yemen>.

report from Yemen estimates that up to thirty civilians were killed during the raid.<sup>11</sup> Journalist Iona Craig visited al Ghayil, interviewed survivors and witnesses, and reported that at least six women and ten children were killed.<sup>12</sup>

In his testimony, General Votel informed Congress that there were no indicators of “poor decision-making or bad judgment” related to the raid, and he determined that “there was no need for an additional investigation into this particular operation.”<sup>13</sup>

The outcome of the raid and conclusions of the subsequent investigations have raised serious concerns about both the legal and factual bases for the al Ghayil Raid. According to reports, the military obtained a temporary grant of authority to treat portions of Yemen as “areas of active hostilities.”<sup>14</sup> The *New York Times* reported that the Trump administration has exempted certain parts of Yemen from policy constraints laid out by the Obama administration in the Presidential Policy Guidance (“PPG”), which requires “near certainty” that no civilians will be killed in a planned operation.<sup>15</sup> The “temporary” characterization of certain areas of Yemen as “areas of active hostilities” gives rise to concerns about the process by which the administration has made this designation and its factual and legal bases for doing so.

Factually, the raid’s outcome causes concern that the administration acted without adequate evidence and assurance that the raid would be conducted in accordance with legal and policy safeguards against civilian casualties. Additionally, in light of the discrepancy between the government’s announced tally of civilian casualties and the assessments of credible independent reporting and investigating, coupled with the inadequate information the government has released supporting its assessment, the public does not have a sound basis to evaluate government claims of deaths and injuries caused, and the legality of the operation.<sup>16</sup>

To provide the American public with information about the legal and factual bases for the al Ghayil Raid, why certain areas of Yemen were

<sup>11</sup> Ryan, *supra* note 7.

<sup>12</sup> Iona Craig, *Death in al Ghayil*, Intercept (Mar. 9, 2017, 9:00 AM), <https://intercept.v2mK3RF2>.

<sup>13</sup> Alex Emonson, *New Evidence Contradicts Pentagon’s Account of Yemen Raid, but General Closes the Case*, Intercept (Mar. 9, 2017, 6:06 PM), <https://interc.pt/2mGflc7..>

<sup>14</sup> See, e.g., Missy Ryan, Thomas Gibbons-Neff & Ali Al-Mujahed, *Accelerating Yemen Campaign, U.S. Conducts Flurry of Strikes Targeting al-Qaeda*, Wash. Post (Mar. 2, 2017), [http://wapo.st/2lzeXAs?tid=ss\\_tw](http://wapo.st/2lzeXAs?tid=ss_tw).

<sup>15</sup> Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules*, N.Y. Times (Mar. 12, 2017), <https://nyti.ms/2mA3euS>.

<sup>16</sup> Disparities between official government tallies and those of reporters and NGOs are not unique to the Trump administration. See, e.g., Ryan Devereaux, *Obama Administration Finally Releases its Duhinus Drone Death Toll*, Intercept (July 1, 2016, 6:18 PM), <http://interc.pt/29Q2XD>.

“temporarily” designated as areas of active hostilities, and the extent of the civilian casualties that resulted from the raid, the ACLU seeks information through this FOIA request.

## II. Requested Records

The ACLU seeks the release of any and all records—including legal and policy memoranda, guidance documents, before-the-fact assessments, and after-action reports—that pertain to:

- (1) The legal and policy bases in domestic, foreign, and international law upon which the government evaluated or justified the al Ghayil Raid, including but not limited to records related to the designation of parts of Yemen as “areas of active hostilities,” and the legal and factual basis that the government uses in designating such areas;
- (2) The process by which the government approved the al Ghayil Raid, including which individuals possessed decision-making authority and the evidentiary standard by which the factual evidence was evaluated to support the determination;
- (3) The process by which the decision was made to designate three parts of Yemen as “areas of active hostilities”;
- (4) Before-the-fact assessments of civilian or bystander casualties of the raid and the “after-action” investigation into the raid; and
- (5) The number and identities of individuals killed or injured in the al Ghayil Raid, including but not limited to the legal status of those killed or injured, with these separated out by individuals intentionally targeted and collateral casualties or injuries.

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).<sup>17</sup> There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgenc[ly]” 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>18</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>19</sup>

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The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 620,000 people. The ACLU also publishes regular updates and alerts via email to over 2.5 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3 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>20</sup>

<sup>17</sup> See also 32 C.F.R. § 286.8(e) (DoD); 28 C.F.R. § 16.5(e) (DOJ); 22 C.F.R. § 171.11(f) (State Department); 32 C.F.R. § 1900.34 (CIA).

<sup>18</sup> See also 32 C.F.R. § 286.8(e)(1)(i)(B) (DoD); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 22 C.F.R. § 171.11(f)(2) (State Department); 32 C.F.R. § 1900.34(e)(2) (CIA).

<sup>19</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).

<sup>20</sup> 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

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>21</sup>

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 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>22</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.

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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>.

<sup>21</sup> See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screening 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).

<sup>22</sup> 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 Visits 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](https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf).



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 educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.<sup>23</sup> 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.<sup>24</sup>

<sup>23</sup> 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/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/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-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/nsi-documents-released-dod?redirect=cpredirect/32088>.

<sup>24</sup> *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia>.

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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.<sup>25</sup> Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program<sup>26</sup>; a summary of documents released in response to a FOIA request related to the FISA Amendments Act<sup>27</sup>; 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 requests<sup>28</sup>; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.<sup>29</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.

*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).<sup>30</sup> Specifically, the requested records relate to the legal and factual bases for the recent al Ghayil

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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>.

<sup>25</sup> *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU, [https://www.aclu.org/sites/default/files/pdfs/safe/free/olc-memos\\_2009\\_0305.pdf](https://www.aclu.org/sites/default/files/pdfs/safe/free/olc-memos_2009_0305.pdf).

<sup>26</sup> *Bad Trip: Dehunking the TSA's 'Behavior Detection' Program*, ACLU (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).

<sup>27</sup> *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

<sup>28</sup> *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

<sup>29</sup> 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>.

<sup>30</sup> *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 22 C.F.R. § 171.11(f)(2) (State Department); 32 C.F.R. § 1900.34(c)(2) (CIA).

Raid and the subsequent investigations. As discussed in Part I, *supra*, the al Ghayil Raid is the subject of widespread public controversy and media attention.<sup>31</sup>

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).<sup>32</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 little specific information about the legal and factual justification for the raid or the subsequent investigation is publicly available, the records sought are certain to contribute significantly to the public's understanding of the legal and policy framework under which the government operated and the extent of civilian casualties that occurred during the raid.

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)).

<sup>31</sup> See *supra* Part I, at 2-4 nn. 2-15.

<sup>32</sup> 32 C.F.R. § 286.12(l)(1) (DOD); 28 C.F.R. § 16.10(k)(2) (DOJ); 22 C.F.R. § 171.16(a) (State Department); 32 C.F.R. § 1900.13(b)(2) (CIA).

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 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>33</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*, 32 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>34</sup>

<sup>33</sup> See also 32 C.F.R. § 286.12(h)(6) (DOD); 28 C.F.R. § 16.10(b)(6) (DOJ); 22 C.F.R. § 171.14(b)(5)(ii)(C) (State Department); 32 C.F.R. § 1900.02(h)(3) (CIA).

<sup>34</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.

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>15</sup> 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) (DoD); 28 C.F.R. § 16.5(e)(4) (DOJ); 22 C.F.R. § 171.11(f)(4) (State Department); 32 C.F.R. § 1900.34(c) (CIA).

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.

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

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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).

<sup>15</sup> In September 2016, the State Department granted a fee waiver to the ACLU with regard to a FOIA request concerning the targeted killing program. Similarly, in March 2009, the State Department also 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. 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 addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003.

Respectfully,



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