March 1, 2010

Federal Bureau of Investigation
Record Information/Dissemination Section
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Winchester, VA 22602-4843

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Office of the Director of National Intelligence (ODNI)
Washington, D.C. 20511

Office of the Director of National Intelligence (ODNI)
Attn: Office of the Inspector General
Washington, D.C. 20511

Re: <u>Request Under Freedom of Information Act/Expedited Processing Requested</u>

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively "ACLU")[1] submit this Freedom of

[1] The American Civil Liberties Union Foundation is a 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 the civil rights and 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, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and

Information Act ("FOIA") request for records pertaining to the scope and implementation of the FBI's eGuardian program.[2]

In January 2009, the FBI launched a program called eGuardian to track and share information about "suspicious activity" and potential terrorist threats nationwide.[3] Through eGuardian, the FBI collects "Suspicious Activity Reports" or "SARs" from local, state, and federal law enforcement and intelligence agencies. According to the FBI's own description of the program, "suspicious activity" that should be reported, collected, and shared with law enforcement officials nationwide includes "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention."[4] This vague and broad description includes activity such as photographing important buildings or any other activity that might suggest an individual is a potential terrorist threat.[5]

This system of tracking, analyzing, and disseminating widely Americans' "suspicious" activity raises grave privacy concerns. Moreover, unless carefully implemented and closely monitored, this kind of "suspicious" activity reporting program may encourage illegal and inappropriate profiling on the basis of race, ethnicity, national origin, and/or religion. Indeed, similar government "threat assessment" and information sharing systems have led to widespread abuses. For example, the Pentagon's TALON system—a precursor to the Guardian and eGuardian systems—was used to monitor and improperly retain information about peaceful protest activity as potential "terrorist threats." *See, e.g.*, Peter Spiegel, *Pentagon Wrongfully Retained Data, Review Finds*, L.A. Times, Apr. 6, 2006.

Although the eGuardian program has now been in effect for almost one year, the public remains largely in the dark about how local, state, and federal authorities have interpreted the program's broad mandate and have used this potentially invasive "suspicious activity" reporting system. Specifically, Americans remain unaware of the kinds of activity that may be deemed "suspicious"; how eGuardian information is used; whether effective

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proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

[2] The ACLU submits this request pursuant to the FOIA, 5 U.S.C. § 552, the Department of Justice ("DOJ") implementing regulations, 28 C.F.R. § 16.1, and the Office of the Director of National Intelligence ("ODNI") implementing regulations, 32 C.F.R. § 1700.1.

[3] The eGuardian system is the unclassified version of the FBI's "Guardian" system.

[4] eGuardian Threat Tracking System: Privacy Impact Assessment for the eGuardian Threat Tracking System, http://foia.fbi.gov/eguardian_threat.htm (last visited Feb. 26, 2010).

[5] *See* Federal Bureau of Investigation, Headline Archives, Connecting the Dots: Using New FBI Technology (Sept. 19, 2008), http://www.fbi.gov/page2/sept08/eguardian_091908.html.

safeguards are in place to protect Americans against unwarranted privacy invasions or discriminatory surveillance based on their race, ethnicity, national origin, and/or religion; and whether the eGuardian system has been abused. Thus, it is imperative that the public have a better understanding of the scope and implementation of the FBI's eGuardian program.

Requested Records

1. Records created since January 1, 2006[6] indicating the number of:
   - A. People whose activities have been reported to the eGuardian system;
   - B. SARs or incidents reported to the eGuardian system;
   - C. SARs or incidents entered into the eGuardian system;
   - D. SARs or incidents reported but rejected for entry into the eGuardian system.

2. Final memoranda, policies, procedures, directives, guidance, legal analysis, and training materials created since January 1, 2006, pertaining to:
   - A. The sources of data reported to, entered into, or disseminated through the eGuardian system, including commercial sources.
   - B. The definition of "suspicious activity" that may be collected, reported, entered into, retained, or disseminated through eGuardian;
   - C. The standards and procedures used to evaluate what information should or can be reported to, entered into, or disseminated through the eGuardian system;
   - D. The standards and procedures used to evaluate what information should be rejected or not entered into the eGuardian system;
   - E. eGuardian's compliance or non-compliance with international, federal, state and/or local privacy and anti-discrimination laws, and federal regulations governing criminal intelligence systems;
   - F. The verification and maintenance of the accuracy of data in the eGuardian system;
   - G. The retention or destruction of information in the eGuardian system;
   - H. The use or consideration of race, religion, national origin and/or ethnicity as factors to support the reporting of, the

[6] Although the FBI publicly announced the deployment of eGuardian in a September 2008 press release, other publicly-available government documents suggest that the program was in development (or even operational) as far back as March 2006. *See* Connecting the Dots, *supra* note 5; Office of the Inspector General, The Federal Bureau of Investigation's Efforts to Protect the Nation's Seaports (Redacted and Unclassified) (March 2006), at http://www.justice.gov/oig/reports/FBI/a0626/findings3.htm ("The FBI plans to deploy E-Guardian in April 2006.").

dissemination of, the evaluation of whether to enter, or the destruction of information in the eGuardian system;

I. Changes to or revisions of the eGuardian program.

III. Intra-agency correspondence or correspondence with local, state, or federal agencies created since January 1, 2006 regarding the implementation of and/or problems and concerns associated with the implementation of eGuardian.[7]

IV. Records created since January 1, 2006 concerning evaluations, tests, analyses, and/or assessments of:

A. The implementation of and/or performance of the eGuardian system;

B. The effectiveness and/or ineffectiveness of the eGuardian system, including the standards, procedures, and analyses used to evaluate what information should or can be reported to, entered into, retained in, or disseminated through the eGuardian system;

C. The accuracy of information maintained in the eGuardian system;

D. Problems with the eGuardian system.

V. Records created since January 1, 2006 concerning complaints about, investigations of, and/or disciplinary actions related to the misuse or abuse of the eGuardian system, as well as any investigations and/or reported legal violations concerning the implementation of the program;

VI. Records created since January 1, 2006 describing the process and/or procedures individuals may use to find out whether and what information about themselves is maintained in the eGuardian system, and how to correct any inaccurate information in the system.

VII. Records created since January 1, 2006 regarding the financial and staffing resources required to operate eGuardian, including any cost-benefit analyses of the system.

Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); and 32 C.F.R. § 1700.12. There is a "compelling need" for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity. 5

[7] The ACLU does not seek specific suspicious activity reports; rather, it seeks correspondence pertaining to the polices and general operation of the eGuardian program.

U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1700.12(c)(2). In addition, the records sought 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(d)(1)(iv).

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1700.12(c)(2). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU's work and one of its primary activities. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 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" (internal citation and quotation marks omitted)).[8]

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 300,000 people. Both of these newsletters often include descriptions and analysis of information obtained through FOIA.

The ACLU regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. Since 2007 alone, ACLU national projects have published and disseminated over 30 reports. Many ACLU reports include a description and analysis of government documents obtained through FOIA.[9] The ACLU also regularly publishes books, "know

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[8] Notably, courts have found that organizations with missions similar to that of the ACLU and that engage in information dissemination activities similar to that of 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) (Leadership Conference on Civil Rights); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (Electronic Privacy Information Center).

[9] *See, e.g.*, ACLU, Reclaiming Patriotism: A Call to Reconsider the Patriot Act, (March 2009), *available at* http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; ACLU, The Excluded: Ideological Exclusion and the War on Ideas (Oct. 2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; ACLU, History Repeated: The

your rights" publications, 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.[10]

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* http://www.aclu.org/blog. The ACLU also 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* http://www.aclu.org/multimedia/index.html. The ACLU has also produced an in-depth television series on civil liberties called "The Freedom Files." *See* http://aclu.tv/.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, the ACLU also provides the public with educational material about the particular civil liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; government documents obtained through FOIA about the issue; and more in-depth analytic and educational multi-media features on the issue.[11]

Dangers of Domestic Spying by Federal Law Enforcement (May 2007), *available at* http://www.aclu.org/images/asset_upload_file893_29902.pdf; ACLU, No Real Threat: The Pentagon's Secret Database on Peaceful Protest (Jan. 2007), *available at* http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; ACLU, Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You (July 2003), *available at* http://www.aclu.org/FilesPDFs/spies_report.pdf.

[10] A recent search of Amazon.com produced over 60 books published by the ACLU.

[11] For example, the ACLU's website about national security letter ("NSL") cases, www.aclu.org/nsl, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSL; myths and facts documents; and links to information and analysis of related issues.

The ACLU website includes many features on information obtained through the FOIA.[12] For example, the ACLU's "Torture FOIA" webpage, http://www.aclu.org/accountability/released.html, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA.

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part.[13] Similarly, the ACLU produced 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.[14]

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.

Furthermore, the records sought are urgently needed to inform the public about actual or alleged federal government activity. The records sought pertain to the scope and implementation of the FBI's eGuardian monitoring and information-sharing system. The records sought are urgently needed because the system implicates core privacy concerns, but almost nothing is known about the implementation of the eGuardian program, the standards that guide or limit this potentially-invasive tracking system, and whether the system is being abused. Without disclosure of the records sought, the public will remain in the dark about the operation of this "suspicious

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[12] *See, e.g.*, http://www.aclu.org/accountability/released.html (Torture FOIA) ; http://www.aclu.org/accountability/olc.html (OLC Memos); http://www.aclu.org/national-security/csrt-foia (CSRT FOIA); http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request (NSA FOIA); http://www.aclu.org/national-security/patriot-foia (Patriot Act FOIA); http://www.aclu.org/national-security_technology-and-liberty/spy-files (Spy Files).

[13] The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf.

[14] The chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf.

activity" reporting system, and cannot assess for themselves whether the program is necessary, effective, or subject to sufficient limits and oversight. Finally, in light of the gross abuses that occurred under the Talon system, there exists a real urgency to assure the public that eGuardian's implementation has not resulted in similar misconduct.

The requested records also 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(d)(1)(iv).

Nation-wide suspicious activity reporting and information-sharing programs like eGuardian—whether operated by the FBI or another federal agency—have been the subject of sustained media interest since they were first introduced in 2006. *See e.g.*, Ben Bain, *Counterterrorism Goes Local*, Fed. Computer Wk., Apr. 25, 2008; Ben Bain, *Standard Updated for Reporting Suspicious Activity*, Fed. Computer Wk., May 22, 2009; Karen DeYoung, *GAO Faults Agencies' Sharing of Terror Data*, Wash. Post, Apr. 19, 2006; Karen DeYoung, *Group Will Sort Terrorism Alerts for Local Governments*, Wash. Post, Nov. 17, 2006; Siobhan Gorman, *U.S. Seeks Terror Tips From States, Cities*, Wall St. J., June 13, 2008; Spencer S. Hsu, *Napolitano Seeks New Recruit in Terror Fight: You*, July 30, 2009; Eric Schmitt, *Surveillance Effort Draws Civil Liberties Concern*, N.Y. Times, Apr. 29, 2009; Mary Beth Sheridan & Spencer S. Hsu, *Localities Operate Intelligence Centers to Pool Terror Data*, Wash. Post, Dec. 31, 2006; Christine Simmons, *Report: Is Data Sharing Stopping Terrorists?*, Assoc. Press, July 22, 2008.

The FBI's eGuardian/suspicious activity reporting program in particular has been the subject of widespread media interest. Indeed, the eGuardian program was the subject of intense scrutiny as soon as it was announced. *See e.g.*, Carrie Johnson, *FBI Threat Tracking Improves, Report Says*, Wash. Post, Nov. 8, 2008; David Morgan, *Pentagon to Test Unclassified Alternative to Talon*, Reuters, Aug. 6, 2008. Concerns about the privacy implications of eGuardian generated widespread media attention as well. *See e.g.*, Devlin Barret, *FBI Shares Threat-Tips with Local Police Agencies*, Assoc. Press, Jan. 14, 2009 (quoting ACLU policy counsel Michael German stating, "The concern [with eGuardian] is, what's being collected, who is it being shared with, and who is responsible for any action taken as a result. . . . If the federal government is creating this national system, it's their responsibility that only the proper and correct information is being put in."); *FBI Launches Tip-Sharing for Inauguration*, CBSNews.com, Jan. 13, 2009 (same).

Discussion of the eGuardian system has reached Congress as well. In May 2009, FBI Director Robert S. Mueller discussed the program before the

House Judiciary Committee. *See FBI Oversight: Hearing Before the Comm. on the Judiciary* (2009) (Statement of FBI Dir. Robert S. Mueller). In April of this year, the Director of the ACLU's Washington Legislative Office, Caroline Fredrickson, discussed the program in testimony to the Senate Judiciary Committee. *See Protecting National Security and Civil Liberties: Strategies for Terrorism Information Sharing*: *Before the Comm. on the Judiciary* (2009) (Statement of Dir. of ACLU Washington Legislative Office, Caroline Fredrickson).

In late 2008, the FBI's classified counterpart to the eGuardian system—Guardian—attracted significant media attention when the DOJ Inspector General released a report indicating that the program lacked effective supervisory review, and contained outdated and incomplete records. *See* U.S. Department of Justice, Office of the Inspector General Audit Division, The Federal Bureau of Investigation's Terrorist Threat and Suspicious Incident Tracking System, ii-iii (November 2008); *see also* Johnson, *FBI Threat Tracking Improves, Report Says*, *supra*; Randall Mikkelsen, *FBI Finds Most Terrorism Threat Reports Baseless*, Reuters, Nov. 7, 2008; Jason Ryan, *Justice Department Report Reveals How FBI Tracks Threats to U.S.*, ABC News, Nov. 7, 2008.

Moreover, the controversial Pentagon "threat tracking" system TALON—a precursor to the Guardian and eGuardian systems—remained the subject of intense media scrutiny and controversy after the public learned (through investigative reports and disclosures made in response to FOIA requests) that information relating to U.S. antiwar protests and other peaceful political activity had been collected and maintained in a database (like eGuardian) designed to track potential terrorist threats. *See* Tim Grieve, *The Pentagon May Be Watching You*, Salon.com, Dec. 14, 2005; Michael Isikoff, *The Other Big Brother*, Newsweek, Jan. 30, 2006; Lisa Myers, *Is the Pentagon Spying on Americans*?, MSNBC.com, Dec. 14, 2005; Vicky O'Hara, *Pentagon to Probe Abuse of Security Database*, NPR, Dec. 15, 2005; Walter Pincus, *Pentagon Will Review Database on U.S. Citizens*, Wash. Post, Dec. 15, 2005; Spiegel, *Pentagon Wrongfully Retained Data, Review Finds*, *supra*.

When TALON was finally discontinued in 2007, a number of media outlets reported on the program's dubious legacy. *See* Robert Burns, *Pentagon to Shut Down Controversial Antiterror Database*, Assoc. Press, Aug. 22, 2007; Andrew Gray, *Pentagon Ditches Controversial Security Database*, Reuters, Aug. 21, 2007; Mark Mazzetti, *Pentagon Is Expected to Close Intelligence Unit*, N.Y. Times, Apr. 2, 2008; *U.S. to Shut Anti-Terror Database*, BBC News, Aug. 22, 2007. Media outlets also reported that the Pentagon transitioned data collection responsibility from TALON to the Guardian system. *See, e.g.*, Morgan, *Pentagon to Test Unclassified Alternative to Talon*, *supra*.

As the sustained media interest concerning the government's collection of suspicious activity reports on citizens clearly attests, the implementation (and potential abuse) of the FBI's e-Guardian program constitutes 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(d)(1)(iv).

Accordingly, expedited processing is appropriate in this case.

III. Application for Waiver or Limitation of Fees

We request 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." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 1700.6(b).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant request will significantly contribute to public understanding of the operations and activities of local, state, and federal authorities that are responsible for implementing eGuardian. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 1700.6(b)(2). Very little is currently known about how these authorities have interpreted the eGuardian mandate in practice. In light of the negative precedent set by the Talon program, the records sought are certain to contribute significantly to the public's understanding of what activity qualifies as "suspicious" according to the authorities concerned, how eGuardian is being used, whether eGuardian is being abused, and whether the program is otherwise infringing on the civil rights and/or liberties of Americans. In addition, disclosure is not in the ACLU's 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.'") (citation omitted).

We also request a waiver of document reproduction fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 28 C.F.R. § 16.11(d); 32 C.F.R. § 1700.6(i)(2). 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); *see also Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that "gathers information from a variety of sources," 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); *cf. ACLU v. Dep't of Justice*, 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."

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." In March 2009, the Department of State granted a fee waiver to the ACLU with respect to its request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. *See* Exh. A (March 2009 determination by the State Department). Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. Exh. B (December 2008 determination by the Department of Justice). 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. *See* Exh. C (May 2005 determination by the Department of Commerce).[15] 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., Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep't of Justice*, 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).[16]

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[15] The ACLU has been granted fee waivers in other FOIA requests as well. In March 2005, the Department of State granted a fee waiver to the ACLU with respect to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

[16] Courts have founds these organizations to be "representatives of the news media" even though they engage in litigation and lobbying activities beyond their dissemination of

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Pursuant to the applicable regulations and statute, we expect the determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I).

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 expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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

Nusrat Choudhury
National Security Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

Nusrat Choudhury

Nusrat Choudhury
National Security Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2654

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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; s*ee also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

Exhibit A

United States Department of State

Washington, D.C. 20520

MAR 31 2009

Case Number: 200900076

Mr. Jameel Jaffer
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400

Dear Mr. Jaffer:

This is in response to your Freedom of Information Act (FOIA) request, dated December 9, 2008, for copies of documents concerning the Office of Legal Counsel (OLC) after September 11, 2001 in the paragraphs 1 through 4 (A through J) and 3 through 4 (A-B) as stated in your request. The time frame for this request is 2001-2008.

We will begin the processing of your request based upon the information provided in your communication. We will notify you as soon as responsive material has been retrieved and reviewed.

We wish to advise you that the cut-off date for retrieving records is either the date you have given the Department by specifying a particular time frame, or the date the search initiated.

Fees

The Freedom of Information Act (FOIA) requires agencies to assess fees to recover the direct costs of processing requests, unless a fee waiver has been granted.

According to our regulations, by making a FOIA request, you have agreed to pay all applicable fees up to $25 unless a fee waiver has been granted.

You may specify a willingness to pay a greater amount. If the estimated fees exceed this limit, you will be notified.

☐ You have stated your willingness to pay the fees incurred in the processing of this request up to $_____.

☒ Please let us know if you are willing to pay the fees that will be incurred in the processing of your request. You may set a limit of the maximum amount that you wish to pay. Please be advised that, without an agreement to pay fees, your request will be processed without cost up to the required first 2 hours of search time (for all other requester category only) and duplication of the first 100 pages (for all other, media, educational and non-commercial scientific requester categories).

We will notify you of the costs incurred in processing your request as soon as the search for, and review of, any responsive documents have been completed.

Based upon the information that you have provided, we have placed you in the requester category checked below. This request will be processed in accordance with the fee schedule designated for that category (see 22 C.F.R. 171, enclosed).

☐ Commercial Use Requesters – Requires us to assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record(s) sought.

☐ Educational Institution Requesters – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☐ Non-commercial Scientific Institution Requesters – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☒ Representatives of the News Media – Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.

☐ All Other Requesters – Requires us to assess charges that recover the full reasonable direct cost of searching for and duplicating the record(s) sought, after the first 100 pages of duplication, and the first two hours of search time.

☐ You have indicated your inclusion in a category different than the one indicated above. Please forward the information requested on the enclosed sheet titled "Requester Categories" to substantiate your inclusion in a particular category of requester.

Fee Waiver

☒ Your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.

☐ Based upon the information provided in your letter, your request for a fee waiver has been denied. If you wish to appeal this decision, you may write to the Chief, Requester Liaison Division, at the address given on the bottom of this page. Your appeal should address the points listed in the enclosed sheet titled "Requests for Fee Waivers." Your appeal must be sent to us within 30 days from the date that you receive this letter.

Expedition

☐ After consideration of your request for expedited processing under the Department's rules governing Freedom of Information Act requests, we have determined that your request does warrant expedited processing.

Although we cannot promise that the processing of your request will be completed by a specific date, it will be processed ahead of all other requests now pending with the Department, except for those other requests already determined to warrant expedition.

☒ Our published regulations regarding expedition, 22 C.F.R. 171.12(b), require a specific showing of a compelling need. Expeditious

processing is granted only in the following situations: (1) imminent threat to the life or physical safety of an individual; (2) urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity and the information is urgently needed in that a particular value of the information would be lost if not disseminated quickly; (3) substantial humanitarian reasons; and (4) loss of substantial due process rights. Your request does not meet any of the established criteria. Regrettably, I must advise that you have not provided adequate justification for expedition. However, you may be assured that we will make every effort to process your request in as timely a manner as possible. For your convenience, I have enclosed a copy of the Department's expeditious processing criteria.

If you wish to appeal the denial of expedition, you may write to the Chief, Requester Liaison Division, at the address below, within 30 days of receipt of this letter.

Other Agency Material

☐ Some of the material that you seek appears to have been originated by another agency(ies). If you wish to contact the Freedom of Information/Privacy Office of that agency(ies), the address(es) can be found on the attached list.

☐ Some of the records you seek are no longer in the possession of the State Department. The majority of Department of State records (excluding passport and visa records) which are 25 years or older are transferred to the National Archives and Records Administration (NARA) in accordance with Title 22, Code of Federal Regulations, Part 171.6. Accordingly, requests for such records should be addressed to:

National Archives and Records Administration
8601 Adelphi Road, Room 311
College Park, MD 20740-6001

☐ For pre-1925 passport records, and visa records dating 1910-1940, please contact:

Civil Records
National Archives & Records Administration
Washington, DC 20408

If you wish to review further information on our requirements for maintenance or disposal of records, please visit the following website: foia.state.gov/records.asp.

While we will make every effort to meet the time limits cited in the FOIA (5 U.S.C. § 552), unusual circumstances may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

If you have any questions, please do not hesitate to contact us at the number or address below. We can provide faster service if you include the case number of your request in your communications with us.

We are pleased to be of service to you.

Sincerely,

Carrie B. Allen

Carrie B. Allen
Requester Communications Branch
ISO 9001:2000 Certified

Enclosures: As stated.

Exhibit B

U.S. Department of Justice

Office of the Inspector General

December 18, 2008

Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004

Subject: Freedom of Information/Privacy Act Request [09-OIG-61]

Dear Mr. Jaffer:

Your Freedom of Information Act (FOIA) request seeking records relating to the detention, interrogation, treatment, or prosecution of suspected terrorists was received in this office on December 10, 2008. We have assigned your request control number 09-OIG-61. Please cite this number in any future inquiry relating to your request.

We have been informed by the Office of Public Affairs that your request for expedited FOIA processing pursuant to 28 C.F.R. § 16.5(d) has been granted, as such we will process your request as expeditiously as possible.

You have also requested a fee waiver on the basis of §16.11(b)(6) (representative of the news media) and §16.11(k) (public interest). We are granting your request for news media status and accordingly, you will not incur search fees in connection with your request. We will make a determination regarding your request under §16.11(k) once we have completed our search for responsive documents and are in a better position to determine whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government. We will inform you regarding our decision on this aspect of your fee waiver prior to incurring any expense that could be attributed to you.

If you are dissatisfied with my action on your request, you may appeal by writing to the Director, Office of Information and Privacy, U.S. Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of

Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,

Deborah M. Waller
FOI/PA Specialist

Exhibit C

UNITED STATES DEPARTMENT OF COMMERCE
National Institute of Standards and Technology
Gaithersburg, Maryland 20899-

May 3, 2005

Mr. Christopher Calabrese
ACLU
125 Broad Street, 18th floor
New York, NY 10004-2400

Dear Mr. Calabrese,

This letter is to acknowledge receipt of your April 25, 2005 Freedom of Information Act (FOIA) request to the National Institute of Standards and Technology (NIST) for information regarding radio frequency identification chips for use in United States passports. Your request was received at the NIST FOIA Control Desk on April 28, 2005, and was assigned FOIA Log #05-37.

For the purpose of the FOIA, you are in the "News Media" category. Your fee waiver request has been granted.

NIST is currently processing your FOIA request and we will be releasing documents on a rolling basis.

Per our telephone conversation of today, enclosed is the GPO news release No. 05-01 dated 01/12/05.

Sincerely,

Sharon E. Bisco

Sharon E. Bisco
Freedom of Information Act Officer

Enclosure

NIST