

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 18-cv-00154-DWM
)	
DEPARTMENT OF DEFENSE, et al.,)	
)	
Defendant.)	

EXHIBIT A

LEGAL DEPARTMENT



April 2, 2018

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4391/4997

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

To Whom It May Concern:

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
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TREASURER

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU")¹ submit this Freedom of Information Act ("FOIA") request (the "Request") for records pertaining to cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL pipeline.

I. Background

On January 24, 2017, the White House released its Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, which expedited the approval process for the Canada-to-Texas oil pipeline that President Barack Obama had previously rejected.² Two months later, President

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

² See Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/>; Elise Labott & Dan Beran, *Obama Rejects Keystone XL Pipeline*, CNN (Nov. 6, 2015), <http://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/index.html>.

Donald Trump announced that his administration had formally approved the pipeline.³

These decisions generated intense public controversy and debate. The president's approval of the Keystone XL Pipeline set the stage for renewed protest against oil pipelines, which activist groups say accelerate climate change, threaten clean water reserves, and invade cultural sites of American Indian tribes.⁴ In response to the president's announcement, then-chairman of the Standing Rock Sioux tribe, David Archambault II, stated, "We opposed Keystone before, and we'll oppose it again."⁵ Environmental groups, too, have made clear their intention to protest Keystone XL's construction; one prominent group has invited advocates to sign a "Pledge of Resistance," which includes a commitment to "participate in peaceful direct action that may result in my arrest, should construction begin on the Keystone XL pipeline."⁶

Government officials have consequently made clear their intention to prevent a repeat of the prolonged protests against the Dakota Access Pipeline, which drew thousands of activists to the North Dakota site, sparked physical confrontation with law enforcement authorities, and captured worldwide attention.⁷ Officials have pursued numerous strategies for impeding these protests, such as asking the federal government for guidance on the possibility of prosecuting protestors under domestic terrorism laws,⁸ enacting legislation that allows a governor or sheriff to prohibit groups numbering more than 20 from gathering on public land,⁹ and fostering cooperation between federal, state,

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³ Elise Labott & Jeremy Diamond, *Trump Administration Approves Keystone XL Pipeline*, CNN (Mar. 24, 2017), <http://www.cnn.com/2017/03/23/politics/keystone-xl-pipeline-trump-approve/index.html>.

⁴ Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, National Geographic (Jan. 25, 2017), <https://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/>.

⁵ Stand with Standing Rock, *Standing Rock Sioux Chairman Responds to Keystone Pipeline Permit Approval* (Mar. 24, 2017), <http://standwithstandingrock.net/standing-rock-sioux-chairman-responds-keystone-pipeline-permit-approval/>.

⁶ Bold Alliance, *Sign the Keystone XL Pledge of Resistance* (last visited Dec. 27, 2017), https://boldalliance.webaction.org/p/dia/action3/common/public/?action_KEY=20257; see also Michael McLaughlin, *Keystone XL Protesters Won't Back Down After Trump Approval*, Huffington Post (Mar. 24, 2017), https://www.huffingtonpost.com/entry/keystone-xl-protesters-trump-approval_us_58d55333e4b02a2eab3819e.

⁷ See, e.g., Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, Omaha World-Herald (Apr. 11, 2017), http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522cf-73cd-541c-98f2-f9b3375e8a3e.html.

⁸ Timothy Gardner, *U.S. Lawmakers Ask DOJ If Terrorism Law Covers Pipeline Activists*, Reuters (Oct. 23, 2017), <https://www.reuters.com/article/us-usa-pipelines-activism/us-lawmakers-ask-doj-if-terrorism-law-covers-pipeline-activists-idUSKBN1CS2XY>.

⁹ South Dakota Senate Bill 176 (Mar. 27, 2017), <https://www.courthousecnews.com/wp-content/uploads/2017/03/SB-176.pdf>.

and local law enforcement entities and private security contractors.¹⁰ As a further threat to activists who may wish to repeat their actions at the Dakota Access Pipeline, the *Guardian* reports that Joint Terrorism Task Force agents have attempted to contact multiple individuals involved with the North Dakota anti-pipeline movement.¹¹

Evidence of cooperation among law enforcement officials and private corporations in the area of oil pipeline protests has been widely documented. On May 27, 2017, *The Intercept* published internal documents of the security firm TigerSwan that revealed close cooperation between TigerSwan, state police forces, and federal law enforcement in at least five states around the Dakota Access Pipeline.¹² For example, a TigerSwan situation report on March 29, 2016 explicitly named the state and federal actors in attendance at a joint meeting the day before: "Met with the Des Moines Field Office of the FBI, with the Omaha and Sioux Fall offices joining by conference call. Also in attendance were representatives of the Joint Terrorism Task Force, Department of Homeland Security . . . Topics covered included the current threat assessment of the pipeline, the layout of current security assets and persons of interests. The FBI seemed were [sic] very receptive . . . follow-up meetings with individuals will be scheduled soon[.]"¹³ *The Intercept* also published communications detailing coordination "between a wide range of local, state, and federal agencies," including the revelation that the FBI participated in law enforcement operations related to the Dakota Access Pipeline protests.¹⁴ Finally, a review of federal lobbying disclosure forms by *DeSmog*, a blog focused on topics related to climate change, has revealed that the National Sheriffs' Association was

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¹⁰ Alleen Brown, *Nebraska Approves Keystone XL Pipeline as Opponents Face Criminalization of Protests*, *The Intercept* (Nov. 20, 2017), <https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/>; *Lincoln Police Prepare for All Scenarios as Pipeline Protests Near*, 1011 Now (Aug. 1, 2017), <http://www.1011now.com/content/news/Lincoln-Police-prepare-for-all-scenarios-as-pipeline-protests-437938853.html>.

¹¹ Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, *The Guardian* (Feb. 10, 2017), <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access>.

¹² Alleen Brown, Will Parrish, and Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies"*, *The Intercept* (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

¹³ Alleen Brown, Will Parrish, and Alice Speri, *TigerSwan Responded to Pipeline Vandalism by Launching Multistate Dragnet*, *The Intercept* (Aug. 26, 2017), <https://theintercept.com/2017/08/26/dapl-security-firm-tigerswan-responded-to-pipeline-vandalism-by-launching-multistate-dragnet/>.

¹⁴ Brown, Parrish & Speri, *Leaked Documents Reveal Counterterrorism Tactics*; see also *Intel Group Email Thread*, *The Intercept* (May 27, 2017), <https://theintercept.com/document/2017/05/27/intel-group-email-thread/> (documenting FBI participation in law enforcement operations around the Dakota Access Pipeline protests).

lobbying Congress for surplus military gear and on issues related to the Dakota Access Pipeline.¹⁵

Law enforcement officials have signaled that such cooperation will assist them in responding to future protests against Keystone XL and other oil pipelines. For example, on April 11, 2017, the *Omaha Herald* reported that Morton County, North Dakota Sheriff Kyle Kirchmeier, whose department was involved in responding to the Dakota Access Pipeline protests, has been in communication with other states over how to respond to oil pipeline protestors.¹⁶

Such indications and the recent existence of cooperation on this exact issue raise important questions about federal agencies' level of collaboration with state and local governments and with private security contractors in connection with oil pipeline protest actions. These questions are especially important given the uncertainty around whether and to what extent the government was engaged in surveillance of Dakota Access Pipeline protestors.¹⁷ The First Amendment protects political speech from the threat of undue government scrutiny, and the extent of such scrutiny is currently unknown.¹⁸

To provide the American public with information about federal cooperation with state and local governments and with private security contractors over possible oil pipeline protests, the ACLU seeks such information through this FOIA request.

II. Requested Records

¹⁵ Steven Horn & Curtis Waltman, *In Heat of Dakota Access Protests, National Sheriffs' Association Lobbied for More Military Gear*, *Desmog* (Apr. 27, 2017), <https://www.desmogblog.com/2017/04/27/dakota-access-sheriffs-lobbying-military-gear>.

¹⁶ Paul Hammel, *Nebraska Law Enforcement, Keystone XL Pipeline Foes Prepare for Possible Protests*, *Omaha World Herald* (Apr. 11, 2017), http://www.omaha.com/news/nebraska/nebraska-law-enforcement-keystone-xl-pipeline-foes-prepare-for-possible/article_d85522c1-73cd-541c-98f2-f9b3375e8a3c.html.

¹⁷ Alyssa Newcomb, Daniel A. Medina, Emmanuelle Saliba, and Chiara A. Sottile, *At Dakota Pipeline, Protestors Questions of Surveillance and 'Jamming' Linger*, *NBC* (Oct. 31, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-questions-surveillance-jamming-linger-n675866>; Morgan Chalfant, *ACLU Challenges Warrant to Search Facebook Page of Dakota Access Opponents*, *The Hill* (Mar. 9, 2017), <http://thehill.com/policy/cybersecurity/323131-aclu-challenges-police-effort-to-search-facebook-page-of-dakota-access>.

¹⁸ See Motion to Quash Search Warrant, American Civil Liberties Union, *In Re. Search Warrant No. 17A03639 Served On Facebook* at 5 (filed Mar. 8, 2017), https://www.aclu.org/sites/default/files/field_document/motion_to_quash_-_filed.pdf.

With respect to the agency listed above, the ACLU seeks the release of all records¹⁹ created since January 24, 2017, concerning:

(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and

(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

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).²⁰ 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).

¹⁹ For the purposes of this Request, "records" are collectively defined to include, but are not limited to, final drafts of legal and policy memoranda; guidance documents; instructions; training documents; formal and informal presentations; directives; contracts or agreements; and memoranda of understanding.

²⁰ *See also* 28 C.F.R. § 16.5(e); 32 C.F.R. § 286.8(e); 6 C.F.R. § 5.5(e).

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- 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).²¹ 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”).²²

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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 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,²³

²¹ See also 28 C.F.R. 16.5(e)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

²² 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).

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

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²⁴

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.²⁵ 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

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²⁴ See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, *The 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).

²⁵ See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone 'Playbook' — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

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

The ACLU website includes many features on information obtained through the FOIA.²⁶ 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.²⁷

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained

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

²⁷ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

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.²⁸ Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program²⁹; a summary of documents released in response to a FOIA request related to the FISA Amendments Act³⁰; 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 requests³¹; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.³²

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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).³³ Specifically, the requested records relate to forthcoming cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for protests against the Keystone XL pipeline. As discussed in Part I, *supra*, oil pipelines, protests against them, and law enforcement's responses to these protests are the subject of widespread public controversy and media attention.³⁴ The records sought relate

²⁸ *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.

²⁹ *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dcm17-tsa_detection_report-v02.pdf.

³⁰ *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natscc/faafoia20101129/20101129Summary.pdf>.

³¹ *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

³² 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>.

³³ See also 28 C.F.R. 16.5(c)(1)(ii); 32 C.F.R. § 286.8(e)(1)(i)(B); 6 C.F.R. § 5.5(e)(1)(ii).

³⁴ See *supra* notes 4–7 and accompanying text.

to a matter of widespread and exceptional media interest in planned oil pipelines, protests against them, and law enforcement responses to these protests.

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).³⁵ 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).

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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 cooperation between federal, state, and local law enforcement entities and between federal entities and private security companies around anticipated pipeline protests is publicly available, the records sought are certain to contribute significantly to the public's understanding of what type of efforts the federal government is undertaking in preparation for protests against the Keystone XL pipeline.

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.

³⁵ See also 28 C.F.R. § 16.10(k)(2); 32 C.F.R. § 286.12(l)(1); 6 C.F.R. § 5.11(k)(1).

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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).³⁶ 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)(II)³⁷; 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).³⁸

³⁶ See also 28 C.F.R. 16.10(k)(2)(ii)(B); 32 C.F.R. § 286.12 (l)(2)(ii)(b); 6 C.F.R. § 5.11(k)(2)(iii).

³⁷ See also 28 C.F.R. 16.10(b)(6); 32 C.F.R. § 286.12(b)(6); 6 C.F.R. § 5.11(b)(6).

³⁸ 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.

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

Respectfully,

/s/ Jacob J. Hutt

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