



June 30, 2009

Chief, Requester Liaison Division
Office of Information Programs and Services
Department of State, SA-2
Washington, D.C. 20522-8100

**Re: Appeal of Fee Waiver Denial, Freedom of Information Act
Request Case Number 200903327**

To Whom it May Concern,

Requesters American Civil Liberties Union and American Civil Liberties Foundation (collectively, "ACLU") write to appeal the Office of Information Programs and Services' determination to deny a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17(a) (the ACLU's request for a "public interest" fee waiver) with respect to Freedom of Information Act (FOIA) Request Case Number 200903327. The Request seeks records concerning the detention and treatment of prisoners held at the Bagram Theater Internment Facility ("Bagram"). *See* Exh. A (FOIA Request dated April 23, 2009). The ACLU received Acting Chief Patrick Scholl's letter denying the fee waiver on June 9, 2009. *See* Exh. B (State Department response).¹

A waiver of search, review, and duplication fees is warranted here because disclosure of the requested records "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a). FOIA's legislative history makes clear that the "fee waiver provision . . . is to be liberally construed in favor of waivers for non-commercial requesters." *Federal Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted). In determining whether a request meets this test, the State Department considers four factors:

¹ By separate letter, dated June 15, 2009, the ACLU has contested the determination that the ACLU belonged in the "All Other Requester" fee category rather than the "representative of the news media category," and has provided further substantiation of its entitlement to recognition as news media requesters. *See* Exh. C (letter to Mr. Scholl).

(i) The subject of the request, i.e., whether the subject of the requested records concerns the operations or activities of the government; (ii) The informative value of the information to be disclosed, i.e., whether the disclosure is likely to contribute to an understanding of government operations or activities; (iii) The contribution to an understanding of the subject by the general public likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public; and (iv) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

22 C.F.R. § 171.17(a)(1).

Mr. Scholl did not provide any explanation for the determination to deny the ACLU a “public interest” fee waiver. This failure has made it extremely difficult for the ACLU to formulate this appeal. *Cf. Gruber Educ. Project v. Dep’t of Justice*, 24 F. Supp. 2d 1, 11 (D.D.C. 1998) (“The agency is obliged to explain its refusal to waive fees.”); *Friends of the Coast Fork v. U.S. Dep’t of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (“[T]he government’s denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester’s case.”). Mr. Scholl’s failure to state the reasons for his decision constitutes an independent ground for overturning it. *See Gruber*, 24 F. Supp. 2d at 11 (“The [agency] must either allow a 100% waiver or provide a detailed justification for its refusal . . .”).

Nonetheless, under the FOIA statute, State Department regulations, and federal case law on this issue the ACLU’s request for records about Bagram plainly meets the public interest fee waiver standard.²

The Subject of the Request Concerns the Operations or Activities
of the Government

² Mr. Scholl’s letter stated that any appeal of the fee waiver determination should “address the points listed in the enclosed sheet titled “Requests for Fee Waivers.” Exh. B at 3. However, the ACLU did not receive any such enclosed sheet.

The Request unquestionably concerns the operations or activities of the government. The Request “seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility,” Exh. A at 2, a facility operated and maintained by the United States government. *See* Declaration of Colonel James W. Gray at ¶ 3, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 06-CV-01669 (JDB)) (identifying Bagram as “a Department of Defense (‘DoD’) detention facility”). The Request therefore clearly concerns activities of the government related to the operation of Bagram, including policymaking with respect to detention, rendition, and transfer of prisoners, the prisoner status determination and review process, internal oversight, and interaction with foreign governments. *See* Exh. A at 4–6. The ACLU’s Request therefore meets the first prong of the public interest fee waiver standard. 22 C.F.R. § 171.17(a)(1)(i).

The Disclosure of the Requested Records is Likely to Contribute Significantly to an Understanding of Government Operations and Activities³

The Request seeks information that will contribute significantly to public understanding of government operations and activities, as required by 22 C.F.R. § 171.17(a)(1)(ii) and (iv). A request is deemed likely to contribute significantly to the public’s understanding of government operations where “public knowledge will be enhanced following the disclosure.” *Federal Cure*, 602 F. Supp. 2d at 205. This is particularly true where publicly available information about the subject of the Request is limited. *Id.*; *see also Forest Guardians v. U.S. Dep’t of the Interior*, 416 F.3d 1173, 1181 (10th Cir. 2005); *Cnty. Legal Servs., Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 405 F. Supp. 2d 553, 559 (E.D. Pa. 2005).

The disclosure of records responsive to this request will significantly enhance the public’s knowledge about the government’s operations and activities at Bagram—an issue that is currently at the center of an extensive public debate. The records requested here will inform the national debate about U.S. policy with respect to the detention and treatment of suspected terrorists and individuals designated as enemy combatants. The Executive branch, Congress, and the public are already in the throes of resolving not only how to close Guantanamo and what to do with detainees held there, but what to do with suspected terrorists and combatants held at other off-shore detention facilities, and what to do with suspected terrorists and combatants captured in the future. It is vital that the debate about these serious and complex national questions be as

³ This discussion combines factors two and four in the State Department regulation referenced above. *See* 22 C.F.R. § 171.17(a)(1)(ii), (iv).

informed as possible and the release of the requested records will help accomplish that.

Information about the Bagram detention facility—which currently houses a large but unknown number of individuals captured not only in Afghanistan but from various places *outside* of Afghanistan—is central to the detention policy debate. The most difficult detention policy questions (both what to do with people currently being detained and what to do with people captured in the future) cannot be resolved without an informed understanding of Bagram. See Exh. A at 8–10 (citing articles discussing the role of Bagram in the detainee policy debate); *id.* at 10 (citing editorials calling for policy change at Bagram); see also Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, Jun. 3, 2009 (remarking that President Obama “didn’t mention Bagram at all” in his May 21st speech about detention policy but that human rights lawyers say “Bagram will play a critical role in shaping the Obama administration’s detainee policy”); *id.* (“Other legal experts said Obama’s decision to leave Bagram out of his May 21 speech won’t remove his need to confront the legal problems posed by the site.”); *Special Report With Bret Baier: ‘Special Report’ Panel on Obama’s Trip Overseas* (Fox News television broadcast June 8, 2009) (panelist on news program stating that “the hypocrisy is that detention without trial, even if you close Gitmo, is happening in Afghanistan at the Bagram Air Base”);⁴ Jack Goldsmith, Op-Ed, *The Detainee Shell Game*, Wash. Post, May 31, 2009; (“A little-noticed consequence of elevating standards at Guantanamo is that the government has sent very few terrorist suspects there in recent years. Instead, it holds more terrorists -- without charge or trial, without habeas rights, and with less public scrutiny -- at Bagram Air Base in Afghanistan.”); Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (“The Bagram prison – where about 600 people, mostly Afghans, are being held indefinitely and without charges – is a delicate issue for the Obama administration at a time when it is struggling to come up with a plan for detainees in the prison at Guantánamo Bay, Cuba, which it intends to close.”); Tim Reid, *Guantánamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“It is Bagram, not Guantánamo, that should trouble the world’s conscience.”); Editorial, *War and Justice*, Wash. Post, May 23, 2009 (discussing President Obama’s failure to address Bagram in his May 21st speech about detention policy and stating: “The United States is detaining foreign suspects in this Afghan prison without judicial oversight, and the administration has argued in court for the continuing right to do so If it was wrong for the Bush administration to use Guantanamo Bay to evade judicial oversight in such cases, it can’t be right for the Obama administration to use Bagram to the same end.”); Eric Schmitt & Mark

⁴ Transcript available at http://www.foxnews.com/printer_friendly_story/0,3566,525443,00.html.

Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. Times, May 23, 2009 (“How the United States is dealing with terrorism suspects beyond those already in the prison at Guantánamo Bay, Cuba, was a question Mr. Obama did not address in the speech he gave Thursday about his antiterrorism policies. . . . Some suspects are being imprisoned without charges at a United States air base in Afghanistan”); Daniel Hemel, *More Rights at Gitmo Than Bagram*, Letter to the Editor, Wall St. J., May 13, 2009; Joe Garofoli, *100 Days: Half-Truths and Contradictions*, San Francisco Chron., Apr. 29, 2009 (“Bagram Airbase in Afghanistan holds more prisoners than Guantanamo and prisoners there have few rights.”).

Despite the central importance of this debate, there is currently a dearth of publicly available information about Bagram. See Exh. A at 3. Indeed, news reports and publications by non-governmental organizations repeatedly comment on the lack of publicly available information about the detention facility. See, e.g., Ian Pannell, Video, *Ex-Detainees Allege Bagram Abuse*, BBC News, June 24, 2009, http://news.bbc.co.uk/2/hi/south_asia/8116046.stm (“This is Bagram. We can only show you the runway. The detention camp is kept secret.”); Tim Reid, *Guantanamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“[T]he grossly underreported story is a US-run jail that Mr. Obama does not want the world to focus on - the makeshift prison on the US airbase at Bagram, Afghanistan. There, more than 600 prisoners, many held for years and all without charge and indefinitely, are packed into conditions far worse than Guantánamo. They have virtually no access to lawyers. Journalists and human rights groups are barred.”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 2, 2009 (“United States officials have never provided a full accounting of the prison population”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“[T]he U.S. has not released details of who is held [at Bagram.]”); Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002.”); Amnesty International, *USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review* (Feb. 2009), available at <http://www.amnesty.org/en/library/info/AMR51/021/2009/en> (“The new administration has not yet said what its intentions are for US detentions in Afghanistan, in particular the long-term detention facility being operated by the US Department of Defense at Bagram airbase, where hundreds of detainees are being held.”); see also Exh. A at 3. Without the release of basic information such as who is being detained at Bagram, for how long, where they were captured, and on what authority and basis they are being

held, and without the release of information about the process that is afforded these prisoners to challenge their detention, the public's understanding of U.S. detention policy will be woefully uninformed. The information requested by the ACLU addresses ten distinct categories of information that are currently unavailable to the public. Exh. A at 4–6. Release of records responsive to the Request will contribute significantly to public understanding of government operations at Bagram by addressing major question not answered by media reporting or previous government disclosures.

Limited public availability of information is relevant in assessing the significance of the contribution to public understanding. A fee waiver is warranted where the information requested would inform a public debate that is based on incomplete publicly available information. See *Federal Cure*, 602 F. Supp. 2d at 205; *Forest Guardians*, 416 F.3d at 1181; *Cnty. Legal Servs.*, 405 F. Supp. 2d at 559–60 (stating that when “the existence of [a] policy was well known [but] the details of the policy in practice were not,” a public interest fee waiver is warranted because the “request would likely shed light on information that is new to the interested public”) (citing *Forest Guardians*, 416 F.3d at 1180); *Manley v. Dep’t of the Navy*, 2008 WL 4326448, at *7 (S.D. Ohio 2008) (holding that when “media reports do not reveal the objective and substantive information underlying the administration and implementation of the [policy in question],” a FOIA request significantly contributes to the public understanding by “provid[ing] the public with the objective foundation from which to assess” government policy). The critical detention policy debate is happening now, but in the absence of much public information about Bagram. The ACLU’s Request will therefore “increase the limited information currently [available] regarding the subject matter of the . . . FOIA request.” *Federal Cure*, 602 F. Supp. 2d at 203; see also *Cnty. Legal Servs.*, 405 F. Supp. 2d at 559 (finding public interest fee waiver warranted where the FOIA request was “likely to uncover information that would be unavailable otherwise”).⁵

⁵ As indicated in the Request, a small and scattered body of information about Bagram does exist in the public domain. Exh. A at 2–4. The extremely limited information about Bagram available in the public domain, however, does not justify denying a fee waiver. When requested records are only “publicly available in piecemeal and hard-to-access form,” a requestor’s plans to consolidate and publicize the information satisfy the requirements for a fee waiver. *Forest Guardians*, 416 F.3d at 1181; see also *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) (“[T]he mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further ‘public understanding’ within the meaning of the fee waiver provision.”); *Federal Cure*, 602 F. Supp. 2d at 205–06. Further, as described above, most of the information sought in the Request is “not even in the public domain; . . . accordingly, current availability of the information is not a bar to the . . . fee waiver request.” *Federal Cure*, 602 F. Supp. 2d at 206.

The requested records will significantly enhance the public's ability to understand and meaningfully participate in a detention policy debate that is happening right now. The executive branch is already in the midst of resolving important detention policy questions. On May 21st, President Obama gave an hour-long speech specifically about U.S. policy with respect to Guantanamo and detention policy more generally. White House Office of the Press Secretary, *Remarks by the President on National Security*, May 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/; see also, e.g., William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 23, 2009; Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009; Peter Finn, *Obama Endorses Indefinite Detention Without Trial for Some*, Wash. Post, May 22, 2009; *Washington News: Obama, Cheney Lay Out Views On Post-9/11 Policies*, U.S. News & World Rep., May 22, 2009; Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. Times, May 21, 2009; Peter Baker, *News Analysis: Obama Faces Pitfalls on Detainees*, N.Y. Times, May 21, 2009; Sheryl Gay Stolberg, *Obama Is Said to Consider Preventive Detention Plan*, N.Y. Times, May 20, 2009; Joseph Williams, *Obama Keeps Tribunals, Draws Ire*, Boston Globe, May 16, 2009; Amanda Ruggeri, *Obama Restarts Bush-Era Military Tribunals*, U.S. News & World Rep., May 15, 2009. The executive branch task force reviewing detainee policy is expected to announce its findings and proposals in July. See Exh. A at 4, 9; see also Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009 ("A White House task force reviewing detention policy is set to make recommendations in late July."). The question of what to do with prisoners at Bagram—again, both those who are already there and those who may be held there in the future—is a key piece of the debate. See Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, June 3, 2009 (reporting human rights advocate's statement that "Bagram is certainly going to be the focus of concerns for the administration" and that "[w]hatever recommendations [the detainee task force] makes are going to be driven by the present state of affairs at Bagram.").

Debate on these issues is taking place in Congress as well, and is likely to intensify significantly after the release of the executive branch's proposal on detainee policy next month. President Obama has expressed his desire to work with Congress to craft new detention-related legislation. See, e.g., William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 22, 2009; William Glaberson, *Despite Plan, Guantánamo Trials Still Problematic*, N.Y. Times, May 18, 2009 ("[S]enior administration officials said they planned to ask Congress for additional reforms of the military commission system . . ."). Congressional hearings on detention policy have already been occurred.

See The Legal, Moral, and National Security Consequences of 'Prolonged Detention': Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 111th Cong. (June 9, 2009); see also Mark Murray, Boehner: Obama 'Importing' Terrorists, MSNBC.com, June 9, 2009 (reporting that Republicans in Congress were critical of the Obama administration's decision to bring Guantanamo detainee to U.S. for criminal trial in U.S. federal court); Indira A. R. Lakshmanan, Democrats Aren't Yielding to Obama, N.Y. Times, June 9, 2009; Fate of Guantánamo Detainees Weighs Heavily on Spending Bills, CQPolitics.com, June 4, 2009; Frank James, Congress' Dems Still Irked By Obama On Gitmo, Tribunals, NPR.org, June 3, 2009; David D. Kirkpatrick & David M. Herszenhorn, Guantánamo Closing Hands Republicans a Wedge Issue, N.Y. Times, May 23, 2009; Margaret Talev and David Lightman, Guantánamo Closure is a Tough Sell for President, Miami Herald, May 21, 2009; GOP Attacks Obama Over Guantanamo Bay Plan, United Press Int'l, May 17, 2009.

Ongoing court cases about the rights of Bagram detainees also continue to generate attention and have intensified public debate about U.S. detention policy. *See Tom Curry, Bagram: Is it Obama's New Guantanamo?, MSNBC.com, June 3, 2009 (reporting that Judge "Bates' ruling has fueled criticism of the Obama administration, in the United States and abroad" for its Bagram policies); Daphne Eviatar, Judge Allows Government to Appeal (and Delay) Bagram Detainee Case, Wash. Independent, June 3, 2009; Nedra Pickler, Judge Holds Bagram Detainee Cases Pending Appeal, Assoc. Press, June 2, 2009; Josh Gerstein, W.H. Gets Breathing Room on Detainees, Politico.com, June 1, 2009; Ruben Navarrette Jr., Obama Cutting and Pasting Bush Policies, S.F. Chron., May 20, 2009 (criticizing Obama administration's position in Bagram litigation). The debate about whether prisoners at Bagram should be entitled to file *habeas* petitions in U.S. courts has made it particularly important for the public to understand what kind of administrative process Bagram prisoners are given to challenge the basis for their detention, whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. *See* Exh. A at 8-12; *see also* Richard A. Oppel, Jr., U.S. Captain Hears Pleas for Afghan Detainee, N.Y. Times, May 25, 2009 (reporting on a Bagram detainee whom an Army Captain believes may be improperly detained as a case of mistaken identity and a *habeas* petition that will be filed on his behalf in U.S. courts); Spencer Ackerman, *McChrystal's Full Letter to Levin on Detainees*, Wash. Independent, June 2, 2009.*

Finally, the request also seeks records about the mistreatment of prisoners at Bagram, a matter of public concern in its own right. Separate and apart from the looming national debate about whom the U.S. should

be detaining around the world, on what basis, and with what process, the nation remains embroiled in a fundamental debate about the torture and mistreatment of detainees held in U.S. custody. More specifically, there is a vibrant public debate about whether those who authorized the torture of detainees held in U.S. custody should be investigated and prosecuted for alleged misconduct and how the nation can most accurately obtain a full accounting of detainee mistreatment since September 11. The release of the requested records will help inform this urgent and vital debate. See Exh. A at 12–16; see also Ian Pannell, *Ex-Detainees Allege Bagram Abuse*, BBC News, June 24, 2009 (“A number of former detainees have alleged they were beaten, deprived of sleep and threatened with dogs at the Bagram military base.”); Walter Pincus, *Army Report Shows How Rules That Don’t Work Are Ignored*, Wash. Post, June 9, 2009 (reporting on mistreatment of detainees at Bagram); Karen DeYoung & Ann Scott Tyson, *McChrystal to Face Questions on Plans for Afghanistan*, Wash. Post, June 2, 2009 (reporting on how members of Congress probed McChrystal’s knowledge of detainee abuse); Stan Grant, *Ex-Taliban Claims Abuse at Gitmo, Bagram*, CNN.com, May 24, 2009; Chris Good, *Obama’s Evolving Opposition To A Truth Commission*, TheAtlantic.com, May 22, 2009; Alex Gibney, *Killing Wussification*, TheAtlantic.com, May 21, 2009 (discussing torture at Bagram); Liz Halloran, *Torture Debate Ties Washington In Partisan Knots*, NPR.org, May 20, 2009; Scott Shane, *Advocacy Groups Seek Disbarment of Ex-Bush Administration Lawyers*, N.Y. Times, May 18, 2009; Daphne Eviatar, *Hearing Lays Groundwork for Torture Prosecutions*, Wash. Independent, May 14, 2009; ‘*Enhanced Interrogations’ Don’t Work, Ex-FBI Agent Tells Panel*, CNN.com, May 13, 2009; Spencer Ackerman, *FBI Agent’s Account of Interrogations Conflicts with Report*, Wash. Independent, May 12, 2009; Walter Pincus, *U.S. Military Personnel Were Split on Past Interrogations, Report Says*, Wash. Post, May 12, 2009; Michael Isikoff, *‘We Could Have Done This the Right Way,’* Newsweek, May 4, 2009; Bobby Ghosh, *A Top Interrogator Who’s Against Torture*, Time, Apr. 24, 2009; Ali Soufan, *My Tortured Decision*, N.Y. Times, Apr. 23, 2009 (FBI interrogator Ali Soufan’s first-hand account of his interrogation of Abu Zubaydah and his disagreements with the CIA over the use of “enhanced interrogation techniques”).

The national importance of the detention and treatment policy debate is evidenced by the widespread media attention to these issues generally, Exh. A at 11–16, and Bagram specifically, Exh. A at 8–11. See also *supra*. But although the debate over Bagram and related issues is robust, information available to the public to inform the debate is sparse. See *supra*; Exh. A at 3. Because the Request would provide new information to the public about an issue of great public concern, disclosure of requested records is likely to “contribute significantly to public

understanding of government operations or activities.” 22 C.F.R. § 171.17(a)(1)(iv).

Contribution to an Understanding of the Subject by the General
Public is Likely to Result From Disclosure

Disclosure of the requested records is likely to contribute to the public’s understanding about Bagram because the ACLU intends to widely disseminate the information it obtains through the Request to a broad audience. Public distribution of records requested under FOIA “contributes to the public understanding” for the purposes of securing a fee waiver. 22 C.F.R. § 171.17(a)(1)(iii); *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (“The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject”).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The ACLU intends to disseminate information released pursuant to the Request through all the means discussed in our letter dated June 15, 2009, which explains why the ACLU qualifies as a news media requester and is primarily engaged in dissemination of information. *See* Exh. C. As detailed in the June 15 letter, the ACLU’s regular means of distributing and publicizing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely-read blog; a heavily visited website, including searchable databases of documents obtained through FOIA requests and documents interpreting and commenting on FOIA releases; and even an in-depth television series. Exh. C at 2–8. The ACLU also regularly issues press releases to call attention to documents released through FOIA and other breaking news. *See, e.g.*, Press Release, American Civil Liberties Union, *New Evidence Of Abuse At Bagram Underscores Need For Full Disclosure About Prison, Says ACLU*, June 24, 2009, available at <http://aclu.org/safefree/detention/40021prs20090624.html>; Press Release, American Civil Liberties Union, *Justice Department Releases Bush Administration Torture Memos*, Apr. 16, 2009, available at <http://www.aclu.org/safefree/torture/39393prs20090416.html>; Press Release, American Civil Liberties Union, *Documents Obtained By ACLU Provide Further Evidence That Abuse Of Iraqi Prisoners Was Systemic*, Nov. 19, 2008, available at <http://www.aclu.org/safefree/torture/37818prs20081119.html>; Press Release, American Civil Liberties Union, *FBI Improperly Using Patriot Act Surveillance Powers, ACLU Charges*, Nov. 29, 2007, available at <http://www.aclu.org/safefree/nationalsecurityletters/32904prs20071129.html>. ACLU attorneys are frequently interviewed for news stories about documents released through ACLU FOIA requests. *See, e.g.*, Carrie

Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dept. Wants More Time to Review IG's Findings on Detainee Treatment*, Wash. Post, June 20, 2009 (quoting ACLU staff attorney Amrit Singh); Peter Finn & Julie Tate, *CIA Mistaken on 'High-Value' Detainee, Document Shows*, Wash. Post, June 16, 2009 (quoting ACLU staff attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. Times, June 10, 2009 (quoting ACLU National Security Project director Jameel Jaffer); Joby Warrick, *Like FBI, CIA Has Used Secret 'Letters,'* Wash. Post, Jan. 25, 2008 (quoting ACLU staff attorney Melissa Goodman). These mechanisms for publicizing and distributing records released under FOIA demonstrate “the intention and ability to disseminate the information to the public.” 22 C.F.R. § 171.17(a)(1)(iii); see also *Forest Guardians*, 416 F.3d at 1180 (finding that publishing an online newsletter and maintaining a website are sufficient to show how the requestor will disseminate information); *Carney*, 19 F.3d at 815 (holding that publishing academic research constitutes adequate dissemination for a public interest fee waiver purposes); *Federal Cure*, 602 F. Supp. 2d at 203–04 (in public interest fee waiver analysis, finding organization’s “website, newsletter and chat room are an adequate means of disseminating information” it would obtain through the FOIA request, and noting that organization’s “stature as [an] advocacy organization . . . len[t] credence” to its dissemination argument); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 26–27 (D.D.C. 2006) (holding that organization’s website, plus printed newsletter with “3,400 reported subscribers and an estimated readership population of 18,000, [demonstrate the requestor’s] ability to distribute” information to the public); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 185 F. Supp. 2d 54, 62 (D.D.C. 2002) (holding that “allowing reporters to inspect [released] documents, ‘blast faxing’ press releases, maintaining a website and appearing on radio and television programs” shows that the requested information will contribute to public understanding).

The ACLU’s plans to widely disseminate records released through the Request and to interpret and explain those records to the public will clearly contribute to public understanding. As demonstrated, the ACLU “has expertise in the subject area as well as the intention and ability to disseminate the information to the public.” 22 C.F.R. § 171.17(a)(1)(iii). Therefore, the Request qualifies for a fee waiver because disclosure of records is in the public interest.

Disclosure is Not in the ACLU’s Commercial Interest

Disclosure is not in the ACLU’s commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. See Exh. A at 7 (“[ACLU] material[s] are] widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost

or for a nominal fee. The ACLU also disseminates information through its heavily visited website”); Exh. C at 8 n.9 (“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.”).

The ACLU is a non-profit organization.⁶ By definition, non-profit organizations do not pursue commercial interests, and non-profit FOIA requestors are deemed to meet the requirement that disclosure of information “is not primarily in the commercial interest of the requester.” 22 C.F.R. § 171.17(a); *see Federal Cure*, 602 F. Supp. 2d at 201 (“As a § 501(c)(3) non-profit organization, the Court agrees that FedCURE’s requests are not rooted in a ‘purpose that furthers [its] commercial, trade, or profit interests.’” (citation omitted)); *Center for Medicare Advocacy, Inc v. Dep’t of Health & Human Servs.*, 577 F. Supp. 2d 221, 242 (D.D.C. 2008) (noting that “a well known not-for profit-organization” does not have a commercial interest in disclosure of information).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The Grant of Expedited Processing Indicates That a Public Interest Waiver is also Warranted

Finally, the State Department granted expedited processing to the ACLU’s Request but simultaneously denied a public interest fee waiver. *See* Exh. B at 3. Expedited processing is granted if “[t]he information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.” 22 C.F.R. § 171.12(a)(2). The requirements for expedited processing are similar (in relevant respects) to those for a public interest fee waiver. *Compare id.* (expedited processing), *with* 22 C.F.R. § 171.17(a) (fee waiver). Both require that information will be publicly disseminated. 22 C.F.R. §§ 171.12(a)(2), 171.17(a)(1)(iii). Both require that released records will “inform the public,” *id.* § 171.12(a)(2), or “contribut[e] to an understanding of the subject by the general public.” *Id.* § 171.17(a)(1)(iii). Both must concern activities of the federal government. *Id.* §§ 171.17(a)(1)(i), 171.12(a)(2). Mr. Scholl’s response letter does not explain why expedited processing was granted but a fee waiver was denied. Because the State Department has determined that the Request meets the requirements for expedited processing, it should also grant a fee waiver based on the similar criteria in the fee waiver regulations.

⁶ The ACLU comprises two separate corporate entities, the American Civil Liberties Union Foundation and the American Civil Liberties Union. The American Civil Liberties Union Foundation is a § 501(c)(3) non-profit organization. The American Civil Liberties Union is a § 501(c)(4) non-profit organization. No part of the ACLU operates for profit.

* * *

As explained above, the ACLU's Request meets the requirements for a public interest fee waiver. Because disclosure of responsive records is firmly in the public interest, we therefore respectfully request that you reconsider Mr. Scholl's decision to deny our fee waiver request. We look forward to your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Goodman". The signature is fluid and cursive, with the first name "Melissa" written in a larger, more prominent script than the last name "Goodman".

Melissa Goodman
Staff Attorney
ACLU's National Security Project

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

EXHIBIT A



April 23, 2009

Information Officer
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon, Room 2C757
Washington, D.C. 20301-1155

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

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

Office of Information Programs and Services
A/ISS/IPS/RL
U.S. Department of State
Washington, D.C. 20522-8100

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LEGAL DEPARTMENT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT/
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, and the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").¹

¹The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and

This Request seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan ("Bagram"), including records concerning the process afforded these prisoners to challenge their detention and designation as "enemy combatants."

Recent news reports suggest that the U.S. government is detaining more than 600 individuals at Bagram. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 ("The United States government is holding about 600 people at Bagram without charges and in spartan conditions."). The Bagram prison population includes not only Afghan citizens captured in Afghanistan but also an unknown number of foreign nationals captured outside of Afghanistan but held at Bagram as suspected terrorists or "enemy combatants." *See* R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009. Some of these prisoners have been detained for as long as six years. *See* James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009. Bagram prisoners are not permitted any access to counsel, *see* Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Science Monitor, Apr. 3, 2009, and only recently have been permitted any contact with their family, *see* Fisnik Abrashi, *U.S. Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008.

Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as "enemy combatants" than the process afforded prisoners at the U.S. Naval Base at Guantanamo Bay ("Guantanamo") – a process the U.S. Supreme Court declared unconstitutional last year. *See* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009. Indeed, a federal judge recently observed that the "process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo." *Al Maqaleh v. Gates*, --- F.Supp.2d ---, 2009 WL 863657, * 19 (D.D.C. Apr. 2, 2009). Moreover, there is public concern that the U.S. government is holding many prisoners at Bagram, rather than at Guantanamo, specifically to avoid any judicial review of their detentions in U.S. courts. Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009 ("the evidence suggests it was the prospect that Guantanamo

fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices, including those pertaining to the detention, treatment, and process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody since the 9/11 terrorist attacks.

detentions might be subject to judicial oversight that caused the military to divert captives to Bagram instead”).

Media reports suggest that the conditions of confinement at Bagram are primitive and that abuse and mistreatment of prisoners was once, and may still be, widespread. *See, e.g.,* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; William Fischer, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008 (“a recent confidential report from the International Committee of the Red Cross (ICRC) has reportedly complained about continued mistreatment of prisoners . . . massive overcrowding, ‘harsh’ conditions, lack of clarity about the legal basis for detention, prisoners held ‘incommunicado’, in ‘a previously undisclosed warren of isolation cells,’ and ‘sometimes subjected to cruel treatment’”). At least two Bagram prisoners have died while in U.S. custody; Army investigators concluded that these deaths were homicides. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The U.S. government’s Bagram detention facility has been the focus of widespread media attention and public concern for many years. Despite that attention, however, very little information about the facility – or the prisoners held there – has been made public. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“United States officials have never provided a full accounting of the prison population”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held there”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”). The American public remains ill-informed about even the most basic facts about Bagram, including, for example, many of the policies and rules that govern the U.S. government’s detention of hundreds of people there; who precisely is being detained there, for how long, and on what basis; where and under what circumstances these prisoners were captured; whether the prisoners have a meaningful opportunity for challenging their (often prolonged) detention; whether that process meets the standards required by international, domestic, and military law; and whether any prisoners have successfully challenged their detentions through the existing status determination process.

Public attention to Bagram has recently intensified significantly. Earlier this month, a federal judge ruled that some prisoners at Bagram can challenge their detention in U.S. courts. *See* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009. This ruling has led to renewed scrutiny of the U.S. government's actions at Bagram and fierce speculation about whether the Obama Administration will deviate from Bush Administration policies and practices at Bagram. *See, e.g.*, R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009 ("The prison at the Afghan base was being expanded during the last year of the Bush administration, leading some to predict that the Pentagon would resolve its Guantanamo problem by sending more inmates to Bagram . . . a spokesman said the [Obama] administration was taking 180 days to decide on its prison policy.").

In short, there is renewed public concern that Bagram has become, in effect, the new Guantanamo. *See, e.g.*, Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009.

Requested Records

1. All records, including logs, charts, or lists, pertaining to the number of people currently detained at Bagram.
2. All records, including logs, charts, or lists, pertaining to the names of individuals currently detained at Bagram.
3. All records, including logs, charts, or lists, pertaining to the citizenship of individuals currently detained at Bagram.
4. All records, including logs, charts, or lists, pertaining to date of capture and length of detention of individuals currently detained at Bagram.
5. All records, including logs, charts, or lists, pertaining to the places and circumstances of capture of individuals currently detained at Bagram.
6. All records created after September 11, 2001, pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram, including memoranda, correspondence, procedures, policies, directives, guidance, or guidelines concerning when, why, and under what circumstances prisoners seized outside Afghanistan should be detained at Bagram rather than being brought to the United States, handed over to another country, or detained by the United States at

Guantanamo Bay or some other detention facility outside of Afghanistan.

7. All records created after September 11, 2001, including memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines, as well as agreements, accords, contracts, correspondence, and memoranda, between the U.S. and Afghan government, pertaining to the detention at Bagram of individuals captured in Afghanistan, and when, how, and why the determination is made by the United States to detain Afghan citizens at Bagram rather than at prisons or other facilities operated or controlled by the Afghan government.
8. All records created after September 11, 2001, pertaining to the process for determining and reviewing Bagram prisoners' status, the process for determining whether their detention is appropriate, and the process for determining who should be released, including but not limited to:
 - A. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning the development and operation of the status review process, as well as changes to that process over time.
 - B. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning whether prisoners should be given access to or denied access to counsel or another representative.
 - C. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning: the provision or withholding of notice to prisoners of the basis for their detention; the composition of the Unlawful Enemy Combatant Review Board ("UECRB"); the convening of or decision not to convene an UECRB; the kinds of evidence to be reviewed by the UECRB; the standard employed to determine whether detention is appropriate; the prisoner's opportunity to submit written statements or other evidence to the UECRB; the prisoner's opportunity to rebut the government's evidence or question government witnesses; the presentation or consideration of exculpatory evidence; the prisoner's opportunity to attend any UECRB hearing; the prisoner's access to any written decisions, determinations, or rulings by the UECRB; the use of or access to interpreters at any UECRB hearing and access to translations of any written evidence or written decisions, determinations, or rulings of the UECRB; any appeal or higher-level review of UECRB

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

determinations or the final determinations of the final decision-maker; any annual or periodic review of the prisoners' status after the initial determination is made.

- D. Any written notices provided to prisoners at Bagram regarding the basis for their detention.
 - E. Any transcripts of UECRB proceedings or any other proceeding that occurs during the status determination and review process.
 - F. Any evidence considered in UECRB proceedings or any other proceeding that occurs during the status determination and review process including written statements provided by the detainees and unclassified summaries of the government's evidence.
 - G. Any written decisions, determinations, or rulings issued by the UECRB, the commanding officer, or the final decision-maker.
 - H. Any written decisions, determinations, or rulings issued in the course of any appeal process or in the course of periodic reviews of the initial UECRB determination.
9. All records, including agreements, accords, contracts, correspondence, memoranda, policies, guidelines, or directives between U.S. and Afghan government officials created after September 11, 2001, pertaining to the transfer of Afghan prisoners detained at Bagram to Afghan facilities or Afghan custody; and the release of Afghan prisoners to the Afghan government, into Afghan reconciliation programs, or back into Afghan society.
10. All records created after September 11, 2001, pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram, including but not limited to memoranda, correspondence, procedures, policies, directives, guidance, or guidelines, investigatory records, disciplinary records, medical records, and autopsy reports.²

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need"

² To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on October 7, 2003 and May, 25, 2004, the ACLU is not seeking those records here.

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 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *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 omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also 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 website specifically includes features on information obtained through the FOIA. *See, e.g.,* www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; www.aclu.org/exclusion. For example, the ACLU’s “Torture FOIA” webpage, www.aclu.org/torturefoia, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, 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. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze, 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.³

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate the U.S. government's detention and treatment of suspected terrorists and alleged "enemy combatants" at Bagram, as well as their transfer or rendition to Bagram from other countries. The records sought also relate to the process the U.S. government affords Bagram prisoners to challenge the basis for their detention and designation as "enemy combatants" including whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. *See* 22 C.F.R. 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1900.34(c)(2). For the same reasons, the records sought 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).

A recent court ruling that some prisoners at Bagram can challenge their detention in U.S. courts has sparked widespread media interest in and public concern about the U.S. government's practices at Bagram. *See, e.g.,* Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Nira Totenberg, *Ruling: Afghan Detainees Granted Habeas Corpus*, Nat'l Pub.

³ In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

Radio, Apr. 3, 2009; Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; Kim Landers, *Terrorism Suspects 'Can Challenge Afghan Detention'*, ABCNews.com, Apr. 3, 2009; William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Ari Shapiro, *Terror Suspects to Gain Access to U.S. Courts*, Nat'l Pub. Radio, Apr. 2, 2009; Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Sci. Monitor, Apr. 3, 2009; *Judge: 3 Can Challenge Detention at Bagram*, United Press Int'l, Apr. 2, 2009; James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *Inmates at Afghan Prison Can Challenge Detention*, AFP, Apr. 2, 2009; Nedra Pickler, *Judge: Bagram Prisoners Can Challenge Detention*, Assoc. Press, Apr. 2, 2009; Josh Gerstein, *Judge OKs Suits by Some Held by U.S. in Afghanistan*, Politico.com, Apr. 2, 2009; Marc Ambinder, *Judge: The Great Writ May Apply at Bagram*, TheAtlantic.com, Apr. 2, 2009; Lyle Denniston, *Major Extension of Boumediene*, Scotusblog.com, Apr. 2, 2009.

Public interest in Bagram has also recently intensified significantly due to speculation about what the Obama administration will do with the hundreds of people imprisoned there and whether it will craft new policies to govern Bagram detentions. *See, e.g.*, Michael Scherer, *Civil Liberties Advocates Dismayed at Obama's Recent Moves*, Time, Apr. 21, 2009; Josh Gerstein, *Legal Left Cools Toward Obama*, Politico.com, Apr. 14, 2009; Glenn Greenwald, *An Emerging Progressive Consensus on Obama's Executive Power and Secrecy Abuses*, Salon.com, Apr. 13, 2009; *The Rachel Maddow Show* (MSNBC television broadcast Apr. 13, 2009) (transcript available at <http://www.msnbc.msn.com/id/30210708/>); Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Stuart Taylor Jr., *A Judicial Decision That Plagues Obama*, Nat'l Journal, Apr. 11, 2009; Del Quentin Wilber, *A Plea to Obama from Father of Detainee*, Wash. Post, Apr. 9, 2009; Bruce Fein, *Czar Obama: The President's Incredibly Imperialist Wielding of Executive Power*, Slate.com, Apr. 9, 2009; Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *see also* William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service,

Apr. 3, 2009 (“Some critics of Obama administration detention policy have begun calling Bagram ‘Obama’s GITMO,’ charging that the new president is shipping detainees to the Afghan prison to evade the Supreme Court’s ruling giving habeas corpus rights to prisoners at Guantanamo.”).

In the past few weeks, numerous editorial boards have called for change on Bagram policy. See Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 13, 2009; Editorial, *Obama Should Define Rights of Suspected Terrorists Held by U.S. Abroad*, L.A. Times, Apr. 9, 2009; Editorial, *The Constitution’s Reach*, Wash. Post, Apr. 7, 2009; see also Marie Cocco, *The Father of Guantanamo*, Truthdig.com, Apr. 8, 2009; Editorial, *A Reckoning at Bagram*, Wash. Post, Mar. 7, 2009; Editorial, *Overreach at Bagram*, Wash. Post, Jan. 7, 2009. Some editorial boards have criticized Judge Bates’ ruling. See, e.g., Editorial, *Off Base on Terror*, N.Y. Daily News, Apr. 4, 2009; Editorial, *Imperial Judiciary Goes Global*, Nat’l Review, Apr. 3, 2009.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The Obama administration’s recent decision to quickly appeal the Bagram ruling sparked another round of intense media coverage. See, e.g., Daphne Eviatar, *Obama Bungles Bagram*, Wash. Independent, Apr. 13, 2009; Josh Gerstein, *DOJ: Courts Could Harm Afghan Effort*, Politico.com, Apr. 12, 2009; R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama Sticks to Bush Detainee Policy*, United Press Int’l, Apr. 11, 2009; Marc Ambinder, *Obama Appeals Bagram Detainee Ruling*, TheAtlantic.com, Apr. 11, 2009; Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009. Public speculation about whether the Obama administration will alter Bagram policy continues despite the decision to appeal the Bagram ruling. See, e.g., R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“officials said that [appeal] did not foreclose a change of heart after the completion in July of a comprehensive review of detainee policy”); Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009 (“The future of Bagram detainees is one of the issues now being reviewed by a task force studying detainee policy worldwide.”).

Indeed, the U.S. government’s Bagram detention facility has been the focus of widespread and consistent media attention and public concern for many years. See, e.g., Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. Times, Feb. 21, 2009; Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. Times, Jan. 26, 2009; Dan Efron, *The Gitmo Dilemma – Four Reasons Obama Won’t Close the Controversial Prison Soon*, Newsweek, Nov. 7, 2008; *‘How Bagram Destroyed Me’*, BBC News, Sept. 25, 2008; Fisnik Abrashi, *U.S.*

Allows First Family Visits to Afghan Prison, Assoc. Press, Sept. 23, 2008; Suzanne Goldenberg and Saeed Shah, *Mystery of 'Ghost of Bagram' - Victim of Torture or Captured in a Shootout?*, The Guardian, Aug. 6, 2008; Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. Times, Aug. 5, 2008; Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, Wash. Post, June 29, 2008; Katie Paul, *The Road From Gitmo: Alternative Ways of Handling Suspects in the War on Terror*, Newsweek, June 27, 2008; Eric Schmitt and Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008; Fisnik Abrashi, *Red Cross Faults Afghan Prison*, Assoc. Press, Apr. 15, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008; Candance Rondeaux, Josh White, and Julie Tate, *Afghan Detainees Sent Home to Face Closed-Door Trials*, Wash. Post, Apr. 13, 2008; Tim Golden and David Rohde, *Afghans Hold Secret Trials for Men That U.S. Detained*, N.Y. Times, Apr. 10, 2008; Ian Austin, *Canadian TV Network Seeks Release of Afghan*, N.Y. Times, Feb. 21, 2008; William Fisher, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008; Andrew Gumbel, *Bagram Detention Center Now Twice the Size of Guantanamo*, The Independent, Jan. 8, 2008; Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. Times, Jan. 7, 2008; *U.S. Expands Afghan Base at Bagram*, Assoc. Press, Oct. 6, 2007; Richard Leiby, *Down a Dark Road*, Wash. Post, Apr. 27, 2007; Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, Assoc. Press, Oct. 2, 2006; Eliza Griswold, *American Gulag: Prisoners' Tales from the War on Terror*, Harpers, Sept. 1, 2006; Carlotta Gall and Ruhullah Khapalwak, *Some Afghans Freed from Bagram Cite Harsh Conditions*, N.Y. Times, June 8, 2006; William Fisher, *Bagram - 'Son of Guantanamo'*, Inter Press Service, Feb. 28, 2006; Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006; Tim Golden, *Years After 2 Afghans Died, Abuse Case Faltering*, N.Y. Times, Feb. 13, 2006; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. Times, Jan. 8, 2006; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. Times, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005; Emily Bazelon, *From Bagram to Abu Ghraib*, Mother Jones, March/April 2005; Stephanie Hanes, *Two Groups Detail Abuse of Afghan Prisoners*, Baltimore Sun, May 5, 2004; Pamela Constable, *An Afghan boy's Life in U.S. Custody: Camp in Cuba Was Welcome Change After Harsh Regime at Bagram*, Wash. Post, Feb. 12, 2004.

More generally, questions regarding the legal process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody has been the subject of continuous and sustained public interest. See, e.g., Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, Nat'l Pub. Radio, Apr. 10, 2009 (reporting on the release of taped

recordings of the “combatant status review tribunals” of six detainees); Andy Worthington, *Bad News, Good News for the Guantanamo Uighurs*, Huffington Post, Feb. 19, 2009; Jane Perlez, Raymond Bonner and Salman Masood, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. Times, Jan. 5, 2009; Jeffrey Toobin, *Camp Justice*, The New Yorker, Apr. 14, 2008; Scott Horton, *Military Lawyers and the Gitmo Commissions*, Harpers, Oct. 30, 2007; *Army Officer: Guantanamo Hearings are Flawed*, MSNBC.com, Aug. 6, 2007; Andrew C. McCarthy, *The Profession v. Gitmo*, Nat’l Review, June 25, 2007; Jeffrey Toobin, *Killing Habeas Corpus*, The New Yorker, Dec. 4, 2006; Daniel Eisenberg and Timothy J. Burger, *What’s Going On at Gitmo?*, Time, May 29, 2005; Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, Wash. Post, Feb. 1, 2005. In particular, the Supreme Court’s June 2008 ruling that Guantanamo Bay detainees had a constitutional right to *habeas* was the subject of significant public attention and media interest. See, e.g., Kevin Drum, *Boumediene v. Bush*, CBS News, June 22, 2008; Robyn E. Blumner, *Supreme Court Preserves a Razor-Thin Redemption*, St. Petersburg Times, June 22, 2008; Richard Epstein, *How To Complicate Habeas Corpus*, N.Y. Times, June 21, 2008; Jack Balkin, *Two Takes: With ‘Boumediene,’ the Court Reaffirmed a Basic Principle*, U.S. News & World Report, June 19, 2008; David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts*, N.Y. Times, June 13, 2008; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008. Furthermore, the military commission proceedings held at Guantanamo in 2008 also generated substantial public interest. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008; Editorial, *A Mixed Verdict on Hamdan*, L.A. Times, Aug. 7, 2008; Scott Shane and William Glaberson, *Judge Clears Way for Trial of Bin Laden’s Driver*, N.Y. Times, July 17, 2008; Joanne Mariner, *Arresting the 9/11 Suspects, Guantánamo-Style*, Salon.com, June 7, 2008; Jackie Northam, *Sept. 11 Suspects Arraigned at Guantanamo Bay*, Nat’l Pub. Radio, June 6, 2008; Adam Zagorin, *U.S. Justice on Trial at Gitmo*, Time, June 4, 2008; *Gitmo’s Courtroom Wrangling Begins*, Time, Apr. 25, 2008.

More broadly, there has been continued public interest in the treatment of suspected terrorists detained by the United States ever since allegations of abuse and mistreatment first surfaced in December 2002. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002; see also Emily Bourke, *Red Cross Finds Doctors Present During CIA Torture*, ABC News, Apr. 8, 2009; Scott Shane, *Report Outlines Medical Workers’ Role in Torture*, N.Y. Times, Apr. 6, 2009; *Guantanamo Guard Admits Prisoner Abuse, ACLU Demands ‘Top to Bottom’ Review*, FoxNews.com, Dec. 18, 2008; *Detainee Abuse Linked to Bush Administration*, Assoc. Press, Dec. 12, 2008; *What FBI Agents Saw During U.S. Interrogations*, Int’l Herald

Tribune, May 22, 2008; Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, Wash. Post, May 21, 2008; Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; Jane Mayer, *The Black Sites*, The New Yorker, Aug. 13, 2007; Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo*, Wash. Post, Feb. 10, 2005; R. Jeffrey Smith and Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Neil Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004; Neil Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, Wash. Post, Jun. 27, 2004; Dana Priest and Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, Wash. Post, June 10, 2004; Dana Priest and Joe Stephens, *Pentagon Approved Tougher Interrogations*, Wash. Post, May 9, 2004.

The release of documents concerning the treatment of suspected terrorists detained by the U.S. has generated significant public interest and media attention. See, e.g., Brian Knowlton, *Report Gives New Detail on Approval of Brutal Techniques*, N.Y. Times, Apr. 22, 2009; Joby Warrick and Peter Finn, *Harsh Tactics Readied Before Their Approval: Senate Report Describes Secret Memos*, Wash. Post, Apr. 22, 2009; Jonathan S. Landay, *Report Says Abusive Tactics Used to Link Iraq to Al Qaeda*, Miami Herald, Apr. 22, 2009; Jess Bravin, *Interrogation Views Spread with Help of Bush Aides*, Wall St. J., Apr. 22, 2009; Julian E. Barnes, *Military Helped With CIA Interrogation Tactics, Report Says*, L.A. Times, Apr. 22, 2009; Robert Baer, *Why Obama Needs to Reveal Even More on Torture*, Time.com, Apr. 20, 2009; Dan Froomkin, *How Many Others Were Tortured?*, Wash. Post, Apr. 7, 2009; Scott Shane, *Report Outlines Medical Workers' Role in Torture*, N.Y. Times, Apr. 6, 2009; Joby Warwick and Julie Tate, *Report Calls CIA Detainee Treatment 'Inhuman'*, Wash. Post, Apr. 6, 2009; Editorial, *The Tortured Memos*, N.Y. Times, Mar. 4, 2009; Devlin Barrett, *Officials: CIA Destroyed 92 Detainee Tapes*, Chicago Tribune, Mar. 3, 2009; David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008; *White House Denies Torture Assertion*, USA Today, Oct. 4, 2007; Jane Mayer, *The Memo*, The New Yorker, Feb. 27, 2006; Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice is Called Serious Breach of Geneva Conventions*, Wash. Post, Oct. 24, 2004; Dana Priest and Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, Wash. Post, June 24, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, Wash. Post, June 8, 2004.

Indeed, the release of documents pursuant to the ACLU's past requests for records relating to the treatment of suspected terrorists in U.S. custody has been the subject of substantial and continuing public interest. To date, the ACLU has received over 100,000 pages of documents in response to its October 2003 request for such records, generating widespread attention from the public and the media. See, e.g., Mark Mazzetti and Scott Shane, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009; Ben Feller, *Obama Open to Torture Memos Probe, Prosecution*, Wash. Post, Apr. 22, 2009; Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, Or Penalty, On Interrogators*, N.Y. Times, Apr. 22, 2009; Michael Sniffen, *3 Lawyers Face Scrutiny for Torture Advice*, Wash. Post, Apr. 22, 2009; Peter Baker and Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. Times, Apr. 21, 2009; *In CIA Visit, Obama Defends Interrogation Memo Release*, CNN.com, Apr. 20, 2009; *Sept. 11 Planner Waterboarded 183 Times*, Reuters, Apr. 20, 2009; Michael Scherer and Bobby Ghosh, *How Waterboarding Got Out of Control*, Time.com, Apr. 20, 2009; *Memo: Two al Qaeda Leaders Waterboarded 266 Times*, CNN.com, Apr. 20, 2009; Scott Shane, *2 Suspects Waterboarded 266 Times*, N.Y. Times, Apr. 20, 2009; Joshua Brustein, *Former C.I.A. Director Defends Interrogation*, N.Y. Times, Apr. 19, 2009; R. Jeffrey Smith, *Justice Dept. Memos' Careful Legalese Obscured Harsh Reality*, Apr. 19, 2009; Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; John Hendren, *Ex-CIA Official: 'This Was Torture'*, ABC News, Apr. 18, 2009; Greg Miller, *Did Waterboarding Work?*, Chicago Tribune, Apr. 18, 2009; Dana Priest, *White House Releases Torture Memos, Won't Pursue Prosecutions*, Wash. Post, Apr. 17, 2009; Editorial, *Dealing With a Disgrace*, Wash. Post, Apr. 17, 2009; Editorial, *Close the Torture Loophole*, L.A. Times, Apr. 17, 2009; Mark Mazzetti, *C.I.A. Memos Could Bring More Disclosures*, N.Y. Times, Apr. 17, 2009; Greg Miller and Josh Meyer, *Memos Reveal Harsh CIA Interrogation Methods*, L.A. Times, Apr. 17, 2009; Matt Apuzzo, *Memos Describe CIA's Harsh Interrogation Program*, Assoc. Press, Apr. 17, 2009; Carrie Johnson and Julie Tate, *New Interrogation Details Emerge*, Wash. Post, Apr. 17, 2009; Justin Vogt, *Zubaydah's Sanity, Bybee's Clarity*, New Yorker, Apr. 17, 2009; Glenn Greenwald, *The Significance of Obama's Decision to Release the Torture Memos*, Salon.com, Apr. 17, 2009; Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009; Ariane de Vogue, *DOJ Releases Controversial Torture Memos*, ABC News.com, Apr. 16, 2009; Michael Scherer, *Bush Approved Use of Insects*, Time.com, Apr. 16, 2009; Mark Mazzetti, *Obama Releases Interrogation Memos, Says CIA Operatives Won't Be Prosecuted*, N.Y. Times, Apr. 16, 2009; Terry Frieden, *More Delays in Release of 'Torture' Documents*, CNN.com, Apr. 2, 2009; Scott Shane, *Administration is Debating Release of Interrogation Memos*, N.Y. Times, Mar. 31, 2009; *New York Judge Orders Release of CIA 'Torture' Documents*,

FoxNews.com, Mar. 28, 2009; Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. Times, July 25, 2008; Mark Mazzetti, '03 *U.S. Memo Approved Harsh Interrogations*, N.Y. Times, Apr. 2, 2008; Dan Eggen and Josh White, *Memo: Laws Didn't Apply to Interrogators*, Wash. Post, Apr. 2, 2008; Evan Perez, *U.S. 2003 Memo Allowed 'Enhanced' Interrogation*, Wall St. J., Apr. 2, 2008; Lara Jakes Jordan, *Pentagon Releases Memo on Harsh Tactics*, FoxNews.com, Apr. 1, 2008; *FBI Records: Detainees Allege Quran Abuse; ACLU Releases Hundreds of Documents Obtained in a Lawsuit*, CNN.com, May 26, 2005; *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. Times, Mar. 30, 2005; *U.S. Memo Shows Iraq Jail Methods*, BBC News, Mar. 30, 2005; Neil Lewis & Douglas Jehl, *Files Show New Abuse Cases in Afghan and Iraqi Prisons*, N.Y. Times, Feb. 18, 2005; Nat Hentoff, *What Did Rumsfeld Know? ACLU Releases Documents of U.S. Torture of Detainees by More than 'A Few Bad Apples'*, Village Voice, Dec. 28, 2004; Thomas Ricks, *Detainee Abuse by Marines is Detailed*, Wash. Post, Dec. 15, 2004; Paisley Dodds, *Unsealed Navy Documents Show More Prisoner Abuse*, Phila. Enquirer, Dec. 15, 2004; Richard A. Serrano, *Marines Burned, Shocked Prisoners, Documents Revealed*, Seattle Times, Dec. 15, 2004; *ACLU: Records Show Marines Tortured Iraqi Prisoners*, CNN.com, Dec. 15, 2004.

In addition, the records that the ACLU seeks include records relating to the "rendition" of suspected terrorists from their place of capture outside of Afghanistan to detention at Bagram Air Base. Rendition is an issue that is independently the subject of extensive public and media attention. See, e.g., Ariel David, *Italian Court Deals Prosecution a Blow in CIA Rendition Case*, San Jose Mercury News, Mar. 12, 2009; Julie Sell, *U.N. Report Says U.S. Led 'Black Site' Renditions in War on Terrorism*, Miami Herald, Mar. 11, 2009; Kevin Sullivan, *Former Guantanamo Prisoner Alleges Torture*, Wash. Post, Mar. 8, 2009; Paisley Dodds, *British Official Acknowledges Rendition Role*, Chicago Tribune, Feb. 27, 2009; Desmond Butler, *Alleged CIA Torture Victim Speaks Out*, FoxNews.com, Nov. 29, 2006; Jane Mayer, *The CIA's Travel Agent*, The New Yorker, Oct. 30, 2006; Jerry Markon, *Lawsuit Against CIA is Dismissed; Mistaken Identity Led to Detention*, Wash. Post, May 19, 2006; Scott Shane, *German Sues Over Abduction Said to Be at Hands of CIA*, N.Y. Times, Dec. 6, 2005; *German Claims Torture in Suing CIA's Ex-Director*, USA Today, Dec. 6, 2005; *Lawsuit Claims CIA Kidnapped, Tortured German Man*, CNN.com, Dec. 6, 2005; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition'*, Wash. Post, Dec. 4, 2005; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, Wash. Post, Nov. 2, 2005; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. Times, May 29, 2005;

Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, Newsweek, Feb. 28, 2005; Jane Mayer, *Outsourcing Torture*, The New Yorker, Feb. 14, 2005; DeNeen L. Brown and Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian's Case Called "Typical" of CIA*, Wash. Post, Nov. 5, 2003.

III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "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); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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 the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the detention and treatment of prisoners at Bagram. *See* 22 C.F.R. § 171.17(a)(1)(ii); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2)(ii). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this 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)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review 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); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

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); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *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 a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 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 news media” for purposes of FOIA); *see supra*, section II.⁴

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to 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.

⁴ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. 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. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. 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.

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

Melissa Goodman, Staff Attorney, National Security Project
American Civil Liberties Union
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,

A handwritten signature in cursive script, appearing to read "Melissa Goodman", written over a horizontal line.

Melissa Goodman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2622

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

EXHIBIT B



United States Department of State

Washington, D.C. 20520

Case Number: 200903327

Ms. Melissa Goodman, Esq.
American Civil Liberties Union
125 Broad St. 18th Fl.
New York, NY 10004-2400

Dear Ms. Goodman:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request, dated April 23, 2009, for copies of documents concerning detention and treatment of prisoners at Bagram Theater Internment Facility, Bagram Air Force Base, Afghanistan from 9-11-2001 to the present.

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

*Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov*

*Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAStatus@state.gov*

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

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov

Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAStatus@state.gov

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

Civil Records
National Archives & Records Administration
Washington, DC 20408

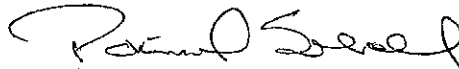
If you wish to review further information on our requirements for maintenance or disposal of records, please visit the following website:
foia.state.gov/records.asp.

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,



Patrick Scholl, Acting Chief
Requester Communications Branch
ISO 9001:2000 Certified

Enclosures: As stated.

Air Force

John Espinal
HAF/IMII (FOIA)
1000 Air Force Pentagon
Washington, D.C. 20330-1000
telephone number: (703) 693-2735
fax number: (703) 693-2746
e-mail address: haf.foia@pentagon.af.mil

Defense Intelligence Agency

Alesia Y. Williams
Chief, FOIA Staff, DAN-1A
Washington, D.C. 20340-5100
telephone number: (301) 394-5188
fax number: (301) 394-5356
e-mail address: foia@dia.mil

Office of the Director of National Intelligence

John F. Hackett
Director, Information Management Office
Washington, D.C. 20511
telephone number: (703) 482-1707

National Security Agency

Pamela N. Phillips
Chief, FOIA/PA Office, DJP4
9800 Savage Road, Suite 6248
Ft. George G. Meade, MD 20755-6248
telephone number: (301) 688-6527
fax number: (301) 688-4762

**§ 171.15 Fees to be charged—
categories of requesters.**

Under the FOIA, there are four categories of requesters: Commercial use requesters, educational and noncommercial scientific institutions, representatives of the news media, and all other requesters. The fees for each of these categories are:

(a) *Commercial use requesters.* When the Department receives a request for documents for commercial use as defined in § 171.11(l), it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The Department may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (*see* § 171.16(b)).

(b) *Educational and non-commercial scientific institution requesters.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution, as defined in § 171.11(m) and (n), and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(c) *Representatives of the news media.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 171.11(o), and the request must not be made for a commercial use. A request for records supporting

the news dissemination function of the requester shall not be considered to be a commercial use request.

(d) *All other requesters.* The Department shall charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

**§ 171.14 Fees to be charged—
general.**

The Department shall seek to charge fees that recoup the full allowable direct costs it incurs in processing a FOIA request. It shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Department will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. With the exception of requesters seeking documents for a commercial use, the Department will provide the first two hours of search time and the first 100 pages of duplication without charge. By making a FOIA request, the requester shall be considered to have agreed to pay all applicable fees up to \$25.00 unless a fee waiver has been granted.

(a) *Searches for responsive records.* If the Department estimates that the search costs will exceed \$25.00, the requester shall be so notified. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request to meet the requester's needs at a lower cost. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(1) *Manual searches.* The Department will charge at the salary rate (*i.e.*, basic pay plus 16 percent of basic pay) of the employee making the search.

(2) *Computer searches.* The Department will charge at the actual direct cost of providing the service. This

63939 Federal Register /
Vol. 69, No. 212 /
Wednesday, November 3,
2004 / Rules and Regulations
will include the cost of operating
the central processing unit
(CPU) for that portion of
operating time that is directly
attributable to searching for
records responsive to a FOIA
request and

operator/programmer salary
attributable to the search.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are releasable. Charges may be assessed for the initial review only; *i.e.*, the review undertaken the first time the Department analyzes the applicability of a specific exemption to a particular record or portion of a record.

(c) *Duplication of records.* Records shall be duplicated at a rate of \$.15 per page. For copies prepared by computer, such as tapes or printouts, the Department shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Department shall charge the actual direct costs of producing the document.

If the Department estimates that the duplication costs will exceed \$25.00, the requester shall be so informed. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(d) *Other charges.* The Department shall recover the full costs of providing services such as those enumerated below:

(1) Certifying that records are true copies (*see* part 22 of this chapter); (2) Sending records by special methods such as express mail, overnight courier, *etc.*

(f) Payment shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Information and Privacy Coordinator.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

§ 171.11 Definitions.

Unusual Circumstances

As used in this subpart, the following definitions shall apply:

(a) *Freedom of Information Act* or *FOIA* means the statute codified at 5 U.S.C. 552, as amended.

(b) *Department* means the United States Department of State, including its field offices and Foreign Service posts abroad;

(c) *Agency* means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency;

(d) *Information and Privacy Coordinator* means the Director of the Department's Office of Information Programs and Services (IPS) who is responsible for processing requests for access to information under the FOIA, the Privacy Act, E.O. 12958, and the Ethics in Government Act;

(e) *Record* means all information under the control of the Department, including information created, stored, and retrievable by electronic means, regardless of physical form or characteristics, made in or received by the Department and preserved as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of the data contained therein. It includes records of other Government agencies that have been expressly placed under the control of the Department upon termination of those agencies. It does not include personal records created primarily for the personal convenience of an individual and not used to conduct Department business and not integrated into the Department's record keeping system or files. It does not include

records that are not already in existence and that would have to be created specifically to meet a request. However, information available in electronic form shall be searched and compiled in response to a request unless such search and compilation would significantly interfere with the operation of the Department's automated information systems.

(f) *Control* means the Department's legal authority over a record, taking into account the ability of the Department to use and dispose of the record as it sees fit, to legally determine the disposition of a record, the intent of the record's creator to retain or relinquish control over the record, the extent to which Department personnel have read or relied upon the record, and the degree

63937 Federal Register /
Vol. 69, No. 212 /
Wednesday, November 3,
2004 / Rules and Regulations
to which the record has been
integrated into the Department's
record keeping system or files.

(g) *Direct costs* means those costs the Department incurs in searching for, duplicating, and, in the case of commercial requests, reviewing documents in response to a FOIA request. The term does not include overhead expenses.

(h) *Search costs* means those costs the Department incurs in looking for, identifying, and retrieving material, in paper or electronic form, that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Department shall attempt to ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the Department and the requester.

(i) *Duplication costs* means those costs the Department incurs in copying

a requested record in a form appropriate for release in response to a FOIA request. Such copies may take the form of paper copy, microfiche, audio-visual materials, or machine-readable electronic documentation (e.g., disk or CD-ROM), among others.

(j) *Review costs* means costs the Department incurs in examining a record to determine whether and to what extent the record is responsive to the FOIA request and the extent to which it may be disclosed to the requester. It does not include costs of resolving general legal or policy issues that may be raised by a request.

(k) *Unusual circumstances*. As used herein, but only to the extent reasonably necessary to the proper processing of the particular request, the term "unusual circumstances" means:

- (1) The need to search for and collect the requested records from Foreign Service posts or other separate and distinct Department offices;
 - (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or
 - (3) The need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the Department that have a substantial subject matter interest therein. Such consultation shall be conducted with all practicable speed.
- (l) *Commercial use request* means a request from or on behalf of one who requests information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester belongs within this category, the Department will look at the use to which the requester will put the information requested.

(m) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program or programs of scholarly research.

(n) *Non-commercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is used in paragraph (l) of this section and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(o) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. News media include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase by the general public. Freelance journalists may be regarded as working for a news organization if they can demonstrate, such as by past publication, a likelihood of publication through a representative of the news media, even though not actually employed by it.

(p) *All other* means an individual or organization not covered by a definition in paragraphs (l), (m), (n), or (o) of this section.

EXHIBIT C



June 15, 2009

Patrick Scholl
 Acting Chief, Requester Communications Branch
 Office of Information Programs and Services
 Department of State, SA-2
 Washington, D.C. 20522-8100

Re: Freedom of Information Act Request Case Number 200903327

Dear Mr. Scholl,

I am writing in response to your recent response to Freedom of Information Act (FOIA) Request Case Number 200903327, the American Civil Liberties Union's (ACLU) request for records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility. In that response, you granted the ACLU's request for expedited processing; you denied the ACLU's request for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17(a) (its request for a "public interest" fee waiver); and you determined that the ACLU belonged in the "All Other Requester" category for fee-related purposes. Exh. A (State Department response).

This letter pertains only to the ACLU's request for a limitation of fees based on its status as a "representative of the news media."¹ Although you determined that the ACLU belonged in the "All Other Requester" category, you indicated that since the ACLU had requested inclusion in a different fee category – the "representative of the news media" category – it should "forward the information requested on the enclosed sheet titled 'Requester Categories' to substantiate [the ACLU's] inclusion in a particular category of requestor." Below is the substantiation that you requested.²

A waiver of search and review fees is warranted here because the ACLU is a "representative of the news media" and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 22 C.F.R. § 171.17(a). *See* Exh. B at 7-8, 16-17 (original FOIA request).

¹ The ACLU will administratively appeal the public interest fee waiver denial by separate letter to the proper appellate authority.

² The ACLU did not receive the referenced sheet pertaining to 'Requester Categories.' Nonetheless, the information provided herein substantiates the ACLU's status as a "representative of the news media" based on the FOIA statute, the State Department regulations, and the federal case law on this issue.

AMERICAN CIVIL LIBERTIES
 UNION FOUNDATION
 NATIONAL OFFICE
 125 BROAD STREET, 18TH FL.
 NEW YORK, NY 10004-2400
 T/212.549.2500
 WWW.ACLU.ORG

OFFICERS AND DIRECTORS
 SUSAN N. HERMAN
 PRESIDENT

ANTHONY D. ROMERO
 EXECUTIVE DIRECTOR

RICHARD ZACKS
 TREASURER

As recently as three months ago, the State Department determined that the ACLU was a “representative of the news media” for FOIA fee purposes with respect to a different FOIA request. *See* Exh. C (March 2009 determination by the State Department that the ACLU is a “representative of the news media”). Other federal agencies have determined that the ACLU is a representative of the news media with respect to other FOIA requests. *See* Exh. D (December 2008 determination by the Department of Justice that the ACLU is a “representative of the news media”); Exh. E (May 2005 determination by the Department of Commerce that ACLU is a “representative of the news media”).

The D.C. Circuit has ruled that any “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” qualifies as a “representative of the news media” under FOIA’s fee waiver provisions. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The ACLU plainly meets this standard. Obtaining information about government activity, analyzing that information, -- transforming that information with editorial skill, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities. Notably, 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.” *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Nat’l Security 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,” is a news media requester).³

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 that is widely distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analysis of information obtained from the government through FOIA, as well as information about cases, government policies,

³ 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 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 Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54; *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public education functions).

pending legislation, abuses of constitutional rights, and polling data. See *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 13-14 (finding EPIC a representative of the news media because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”); *Ctr. for Pub. Integrity v. Dep’t of Health & Human Servs.*, 2007 WL 2248071 *5 (D.D.C. Aug. 3, 2007) (finding CPI a news media requester because its journalist members “write and post an online newsletter” and post information obtained through FOIA in that newsletter).

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, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. See *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC a news media requester because it “researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this “news” through the sale of its books to the public.”); see also *Nat’l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to publish “document sets” on “topic[s] of current interest”).⁴ Since 2007 alone, ACLU national projects have published over 25 reports in which they have gathered information and “use[d] [their] editorial skills to turn the raw materials into a distinct work, and distribute[d] that work to an audience.” *Id.* at 1387.⁵ Many ACLU reports include description and

⁴ In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

⁵ See, e.g., *Mental Illness and the Death Penalty* (May 2009), available at http://www.aclu.org/pdfs/capital/mental_illness_may2009.pdf; *Human Rights Begin at Home* (April 2009), available at http://www.udhr60.org/human_rights_full.pdf; *Reclaiming Patriotism*, (March 2009), available at http://www.aclu.org/pdfs/safe/free/patriot_report_20090310.pdf; *Missing the Mark: Alternative Schools in the State of Mississippi* (Feb. 2009), available at http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf; *A Looming Crisis* (Dec. 2008), available at http://www.aclum.org/lockingupkids/pdf/looming_crisis_web.pdf; *De Facto Disenfranchisement* (Oct. 2008), available at http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf; *A Violent*

analysis of government documents obtained through FOIA. See, e.g., *Reclaiming Patriotism*, (Mar. 2009), available at http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at http://www.aclu.org/images/asset_upload_file893_29902.pdf; *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007),

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Education: Corporal Punishment of Children in US Public Schools (Aug. 2008), available at http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf; *Fusion Center Update* (July 2008), available at http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf; *Enacting a Reasonable Federal Shield Law* (July 2008), available at http://www.aclu.org/images/asset_upload_file113_35870.pdf; *Locking Up Our Children* (May 2008), available at http://www.aclu.org/pdfs/racialjustice/locking_up_our_children_web_ma.pdf; *Pandemic Preparedness: The Need for a Public Health—Not a Law Enforcement / National Security—Approach* (Jan. 2008), available at http://www.aclu.org/images/asset_upload_file399_33642.pdf; *Race & Ethnicity in America: Turning a Blind Eye to Injustice* (Dec. 2007), available at http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf; *What's Wrong With Fusion Centers?* (Dec. 2007), available at http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf; *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; *Reclaiming Our Rights: Declaration of First Amendment Rights and Grievances* (Sept. 2007), available at http://www.aclu.org/images/asset_upload_file955_36822.pdf; *Even Bigger, Even Weaker: The Emerging Surveillance Society: Where Are We Now?* (Sept. 2007), available at http://www.aclu.org/pdfs/privacy/bigger_weaker.pdf; *Working in the Shadows: Ending Employment Discrimination for LGBT Americans* (Sept. 2007), available at http://www.aclu.org/pdfs/lgbt/enda_20070917.pdf; *Broken Promises: Two Years After Katrina* (Aug. 2007), available at http://www.aclu.org/pdfs/prison/brokenpromises_20070820.pdf; *The Persistent Problem of Racial Disparities in the Federal Death Penalty* (June 2007), available at http://www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf; *Conditions of Confinement in Immigration Detention Facilities* (June 2007), available at http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf; *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at http://www.aclu.org/images/asset_upload_file893_29902.pdf; *Disavowed: The Government's Unchecked Retaliation Against National Security Whistleblowers* (May 2007), available at http://www.aclu.org/pdfs/safefree/disavowed_report.pdf; *A Blueprint for Meeting the Needs of Girls in TYC Custody* (May 2007), available at http://www.aclu.org/images/asset_upload_file373_29875.pdf; *Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy* (Apr. 2007), available at http://www.aclu.org/images/asset_upload_file576_29402.pdf; *Criminalizing the Classroom* (March 2007), available at http://www.nyclu.org/files/criminalizing_the_classroom_report.pdf; *Publish and Perish: The Need for a Federal Reporters' Shield Law* (Mar. 2007), available at http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf; *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at http://www.aclu.org/pdfs/safefree/spyfiles_norcalthreat_20070117.pdf.

available at

http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; *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.

The ACLU also regularly publishes books, “know 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. Some of the more recent books published by the ACLU include: Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press, Apr. 1, 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).⁶ Some of the more recent “know your rights” publications include: *Know Your Housing Rights: For Survivors of Domestic Violence* (Feb. 2008), available at <http://www.aclu.org/womensrights/violence/33978pub20080206.html>; *Know Your Rights! - Students Wallet Card* (June 2007), available at <http://www.aclu.org/lgbt/youth/30427pub20070615.html>. Some of the more recent ACLU fact sheets include: *The Truth About Torture* (Apr. 2009), available at http://www.aclu.org/images/torture/asset_upload_file501_33165.pdf; *Guantánamo Fact Sheet* (Nov. 2008), available at http://www.aclu.org/pdfs/safefree/closegitmo/gitmo_factsheet.pdf; *Torture & Secrecy* (Dec. 2008), available at http://www.aclu.org/images/torture/asset_upload_file585_38059.pdf; *America's Surveillance Society* (Nov. 2009), available at http://www.aclu.org/images/asset_upload_file381_37802.pdf.⁷ These materials are specifically designed to be educational and widely disseminated to the public. See *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC to be a news media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties); *Nat'l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester where it had previously

⁶ A search of Amazon.com conducted on June 5, 2009 produced over 60 books published by the ACLU.

⁷ For many more ACLU fact sheets on various civil liberties topics see: http://www.aclu.org/safefree/relatedinformation_fact_sheets.html, http://www.aclu.org/lgbt/relatedinformation_fact_sheets.html, http://www.aclu.org/privacy/relatedinformation_fact_sheets.html, http://www.aclu.org/womensrights/relatedinformation_fact_sheets.html, http://www.aclu.org/reproductiverights/relatedinformation_fact_sheets.html, and http://www.aclu.org/intlhumanrights/relatedinformation_fact_sheets.html.

published only one book); *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference on Civil Rights to be “primarily engaged in the dissemination of information” because it “disseminate[d] information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice.”).

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://blog.aclu.org/>. 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>.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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. Most ACLU cases have dedicated webpages in which the ACLU publishes and disseminates information about the case itself (i.e. case developments, analyses of case developments, a comprehensive archive of court filings, judicial opinions), which, even standing alone, is a significant endeavor to publish and disseminate news. However, case webpages are not only vehicles for dissemination of information about case developments; these webpages also have educational material about the particular civil liberties issue or problem, recent news about the particular issue, analyses of congressional or executive branch action on the particular issue, government documents obtained through FOIA about the particular issue, and more in-depth analytic and educational multi-media features on the issue. *See, e.g., Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54 (finding Judicial Watch a news media requester because it disseminated information to the press and public through its website).⁸

⁸ For example, the ACLU’s website about its 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. For a sampling of other similar case pages

The ACLU website specifically includes features on information obtained through the FOIA, including: www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; www.aclu.org/exclusion. For example, the ACLU's "Torture FOIA" webpage, www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, 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. Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos it obtained through FOIA, http://www.aclu.org/safefree/general/olc_memos.html, contains commentary and analysis of the memos, an original comprehensive chart about OLC memos (see below); links to web features created by ProPublica, an independent, non-profit investigative journalism organization based on information gathering, research, and analysis conducted by the ACLU; and ACLU videos created about the memos. See *Nat'l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to public "document sets" whereby Archive staff would "cull those of particular interest . . . supplement the chosen documents with detailed cross-referenced indices, other finding aids, and a sophisticated retrieval system in order to make it more accessible to potential users") (internal citations omitted); *Judicial Watch, Inc.* 133 F. Supp. 2d at 53-54 (finding Judicial Watch a news media requester because it posted documents obtained through FOIA on its website).

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

with case information, reporting of news on the issue, blogs, and original analytic and educational content see: <http://www.aclu.org/lgbt/relationships/californiamarriage.html> (same-sex marriage case page); <http://www.aclu.org/safefree/rendition/index.html> (extraordinary rendition case page); <http://www.aclu.org/immigrants/detention/hutto.html> (immigration detention conditions case page).

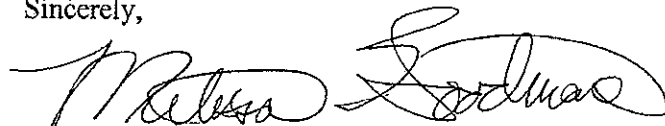
Administration Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part. The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf. Similarly, the ACLU produced a chart of original statistics about the Defense Department's use of NSLs based on its own analysis of records obtained through FOIA. That chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf. See *Nat'l Sec. Archive*, 880 F.2d at 1387 (explaining that National Security Archive was a news media requester because it obtained "documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedic work that it will then offer to the public"); *id.* (explaining that National Security Archive was a news media requester because it "gather[ed] information from a variety of sources; exercise[d] a significant degree of editorial discretion in deciding what documents to use and how to organize them; devise[d] indices and finding aids; and distribute[d] the resulting work to the public.").

The ACLU has also produced an in-depth television series on civil liberties called "The Freedom Files." See <http://aclu.tv/>. The Freedom Files is a series of half-hour documentaries that feature true stories about real people to highlight vital civil liberties issues. The episodes also have commentary and analysis from experts on particular civil liberties problems and some episodes some also include analysis of information the ACLU has obtained through FOIA. See <http://aclu.tv/episodes>. In addition to distribution through the ACLU's website, The Freedom Files series aired on Court TV, Link TV, and PBS stations nationwide. With each episode, the ACLU distributed issue fact sheets, reports, and FAQs. See <http://aclu.tv/educate>. Season two of The Freedom Files came with a Teacher's Guide as well. See <http://aclu.tv/teachersguide>.

In sum, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. The ACLU plainly qualifies as a "representative of the news media" for FOIA fee waiver purposes. As Senator Leahy said during debate about FOIA's fee waiver provisions: "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986).⁹

⁹ The ACLU plans to analyze, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Goodman". The signature is fluid and cursive, with the first name "Melissa" written in a larger, more prominent script than the last name "Goodman".

Melissa Goodman
Staff Attorney
ACLU's National Security Project

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

and the Requesters plan to disseminate the information disclosed as a result of this
Request to the public at no cost.