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

To Whom It May Concern:

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

The ACLU seeks disclosure of Department of Justice documents concerning a core Fourth Amendment question bearing on the privacy rights of Americans: in what circumstances does the Department of Justice consider information or evidence to be “derived from” surreptitious surveillance, including surveillance conducted under the Foreign Intelligence Surveillance Act (“FISA”) and the Wiretap Act (“Title III”). The Department’s answer to this question affects when it notifies Americans that their phone calls, emails, and other internet communications have been seized and searched by the government. Without such notice, Americans typically have no way of discovering that they have been surveilled, and thus no way of seeking court review of these searches and seizures of their private communications.

Public release of this information is urgently needed. The government conducts thousands of wiretaps and other searches under FISA and Title III each year. The government’s notice policies therefore implicate the privacy interests of numerous Americans, who are generally unable to challenge the lawfulness of government searches without proper notice. Moreover, official disclosures show that the Department of Justice for years failed to notify criminal defendants when evidence was “derived from” surveillance under Section 702 of FISA. As part of the ongoing debate about whether to reauthorize Section 702 when it expires this year, Congress is presently considering whether reforms to Section 702 are necessary. Information about how the government is interpreting key

¹ See 28 C.F.R. § 16.1.

² The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

elements of FISA is critical to this public debate and these imminent legislative judgments.

* * *

I. Records Requested

1. The memorandum titled “Determining Whether Evidence Is ‘Derived From’ Surveillance Under Title III or FISA,”³ as well as:
 - a. Any cover letter or other document attached to this memorandum;
 - b. Any version of this memorandum created or distributed on or after November 23, 2016, whether considered “final” or otherwise; and
 - c. Any record modifying, supplementing, superseding, or rescinding this memorandum or its contents.

* * *

We request that responsive electronic records be provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and in separate, Bates-stamped files.

II. Request for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and the statute’s implementing regulations. There is a “compelling need” for these records, as defined in the statute and regulations, 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 government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(iv).

A. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and relevant regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1)(ii). *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that “gathers information of potential interest to a segment of the

³ The ACLU understands that a final version of this document was distributed within the Department of Justice on November 23, 2016.

public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” (internal citation omitted)); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws”—to be “primarily engaged in the dissemination of information”).

Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU’s regular means of disseminating and editorializing 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; heavily visited websites, including an accountability microsite, <http://www.aclu.org/accountability>; and a video series. The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news. ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁴

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA.⁵ For example, the ACLU maintains an online archive of surveillance-related documents released via FOIA as well as other sources.⁶ Similarly, the ACLU maintains an online “Torture Database,” which is a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.⁷ The ACLU’s webpage concerning the Office of Legal Counsel torture memos obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-

⁴ *See, e.g.*, Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, *Guardian*, Mar. 17, 2016 (quoting ACLU attorney Nate Wessler); Peter Finn & Julie Tate, *CIA Mistaken on ‘High-Value’ Detainee, Document Shows*, *Wash. Post*, June 16, 2009 (quoting ACLU attorney Ben Wizner).

⁵ *See, e.g.*, <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; <http://www.aclu.org/mappingthefbi>; <http://www.aclu.org/patriotfoia>; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>.

⁶ <https://www.aclu.org/nsa-documents-search>.

⁷ <http://www.torturedatabase.org>.

journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos.⁸ In addition to its websites, 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 FOIA.

Similarly, the ACLU of Northern California actively disseminates and frequently garners extensive media coverage of the information it obtains about actual or alleged government activity through FOIA and California's statutory counterpart, the California Public Records Act. It does so through a heavily visited website (averaging between 10,000 and 20,000 visitors per week) and a paper newsletter distributed to its members, who now number over 80,000. In the past, information obtained by the ACLU-NC through FOIA requests concerning government surveillance practices have garnered extensive national coverage.⁹ ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events.

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.¹⁰

⁸ http://www.aclu.org/safefree/general/olc_memos.html.

⁹ See, e.g., <https://www.aclunc.org/blog/justice-department-emails-show-feds-were-less-explicit-judges-cell-phone-tracking-tool>; Jennifer Valentino-Devries, *Judges Questioned Use of Cellphone Tracking Devices*, Wall St. J. (Mar. 27, 2013); Ellen Nakashima, *Little-Known Surveillance Tool Raises Concerns by Judges, Privacy Activists*, Wash. Post (Mar. 27, 2013); Rory Carroll, *ACLU Challenges 'Stingray Surveillance' that Allows Police to Track Cellphones*, Guardian (Mar. 28, 2013); Shaun Waterman, *Can You Hear Me Now? Feds Admit FBI Warrantless Cellphone Tracking 'Very Common'*, Wash. Times (Mar. 29, 2013); Kim Zetter, *Government Fights for Use of Spy Tool That Spoofs Cell Towers*, Wired (Mar. 29, 2013); J.D. Tuccille, *Feds Routinely Track Cell Phones Without Telling Judges*, Reason.com (Mar. 27, 2013); Josh Peterson, *DOJ Emails Show Feds Kept Judges in the Dark About Cellphone Tracking Device*, Daily Caller (Mar. 28, 2013); *ACLU: Feds Secretly Using Highly Invasive Spying Tool*, Wash. Post (Mar. 28, 2013); Ryan Gallagher, *Feds Accused of Hiding Information From Judges About Covert Cellphone Tracking Tool*, Slate.com, (Mar. 28, 2013); *Feds Admit FBI Warrantless Cellphone Tracking 'Very Common'*, Press TV (Mar. 30, 2013); Vanessa Blum, *Emails Detail Northern District's Use of Controversial Surveillance*, Recorder (Apr. 1, 2013).

¹⁰ 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.

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

The records sought are urgently needed to inform the public. They relate to matters in which there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” 28 C.F.R. § 16.5(e)(1)(ii), as well as matters “of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” *id.* § 16.5(e)(1)(iv).

The records sought pertain to the government’s interpretation and implementation of surveillance laws that have drawn public scrutiny and significantly impact Americans’ privacy and free speech rights. In particular, they pertain to the Department of Justice’s use of information derived from surveillance under FISA and Title III in criminal prosecutions and other legal proceedings. This information is vitally needed to inform the ongoing public and congressional debate about whether the government’s electronic surveillance powers should be narrowed, whether Section 702 of FISA should be reauthorized in its current form when it expires this year, and whether Congress should act to strengthen existing notice requirements. Indeed, despite the government’s failure to properly provide notice of surveillance in the past, little remains known about how the government interprets its duty to provide notice of surveillance to Americans.

The government’s electronic surveillance powers have been a significant matter of public concern and media interest for many years, particularly after the revelation of the NSA’s warrantless wiretapping program. The legislation that emerged out of that controversy—Section 702 of FISA—has been the subject of widespread interest and debate since the moment it was introduced in 2008. *See, e.g.*, Sean Lengell, *House Approves Update of Bipartisan Spy Laws*, Wash. Times, June 21, 2008; Editorial, *Mr. Bush v. the Bill of Rights*, N.Y. Times, June 18, 2008; Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008 (stating that the FAA would “make it easier to spy on Americans at home, reduce the courts’ powers and grant immunity to the companies that turned over Americans’ private communications without warrant”); Editorial, *Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008.

This public debate has only grown with recent disclosures concerning the scope and intrusiveness of government surveillance. Scores of articles published during the past three years have addressed the government’s surveillance activities—under FISA, Section 702, and Title III. *See, e.g.*, Barton Gellman et al., *In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are*, Wash. Post, (July 5, 2014), <http://wapo.st/1xyyGZF>; Charlie Savage, *N.S.A. Said to Search Content of Messages to and from U.S.*, N.Y. Times (Aug. 8, 2013), <http://nyti.ms/1ppBBoT>; Charlie Savage & Nicole Perloff, *Yahoo Said to Have Aided U.S. Email Surveillance by Adapting Spam*

Filter, N.Y. Times (Oct. 5, 2016), <http://nyti.ms/2jeRXx7>; Brad Heath & Brett Kelman, *Police Used Apparently Illegal Wiretaps to Make Hundreds of Arrests*, USA Today (Nov. 19, 2015), <http://usat.ly/1IEJmoF>.

A number of those articles have highlighted pressing concerns about whether the government is properly interpreting its obligation to provide notice of foreign-intelligence surveillance to criminal defendants and others. *See, e.g.*, Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 15, 2013, <http://nyti.ms/12ANzNM>; Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013, <http://nyti.ms/1bAe7QZ>. That concern became particularly acute in the aftermath of the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), when it became apparent that the Department of Justice had not been providing notice to criminal defendants as expressly required by statute. *See, e.g.*, Devlin Barrett, *U.S. Spy Program Lifts Veil in Court*, Wall St. J., July 31, 2013, <http://on.wsj.com/19nu8KC>. Revelations of this failure have drawn intense public attention because, after *Clapper*, criminal prosecutions are one of the few avenues for obtaining judicial review of surveillance programs that affect thousands or even millions of Americans. *See* Scott Lemieux, *Secret Wiretapping Cannot Be Challenged Because It's Secret*, The American Prospect, Feb. 26, 2013; Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. Times, Feb. 26, 2013. Indeed, both the Supreme Court and the Executive Branch indicated in *Clapper* that the proper avenue for judicial review of wiretapping activities is a criminal or administrative proceeding where the fruit of that surveillance is at issue. *See Clapper*, 133 S. Ct. 1138. Judicial review is impossible, however, unless criminal defendants and others receive notice of these searches. The request seeks information concerning Department of Justice policies and legal interpretations that bear directly on this matter of public concern.

As these events and sustained media interest clearly show, there is “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” 28 C.F.R. § 16.5(e)(1)(ii), and the government’s use of information obtained or derived from foreign-intelligence surveillance constitutes a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 28 C.F.R. § 16.5(d)(1)(iv). The Request will inform an urgent and ongoing debate about the government’s surveillance and wiretapping activities.

Accordingly, expedited processing should be granted.

III. Application for Waiver or Limitation of Fees

A. Release of the records is in the public interest.

We request a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is in the public interest because

it is likely to contribute significantly to the public understanding of the United States government's operations or activities and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k).

As discussed above, numerous news accounts reflect the considerable public interest in the requested records. Given the ongoing and widespread media attention to this issue, the records sought by the Request will significantly contribute to the public understanding of the operations and activities the agencies that are responsible for implementing Section 702. *See* 28 C.F.R. § 16.11(k)(1)(i). In addition, disclosure is not in the ACLU's commercial interest. As described above, any information disclosed as a part of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (citation omitted); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (finding that "disclosure, not secrecy, is the dominant objective of the Act," quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1992)).

B. The ACLU qualifies as a representative of the news media.

A waiver of search and review fees is warranted because the ACLU qualifies as a "representative of the news media" and the requested records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); *see also* 28 C.F.R. § 16.11(k). Accordingly, fees associated with the processing of this request should be "limited to reasonable standard charges for document duplication."

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *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 24, 30 n.5 (D.D.C. 2004) (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 that 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 FOIA purposes). The ACLU recently was held to be a "representative of the news media." *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at *3 (D. Conn. May 14, 2012); *see also ACLU of Wash. v. Dep't of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a "representative of the news

media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).¹¹

* * *

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

If the request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material in accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so we may begin the process of requesting a Mandatory Declassification Review under the terms of Executive Order 13,526.

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

Executed on the 6th day of February, 2017.

Sincerely,



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¹¹ In October 2015, the Department of State granted a fee waiver with respect to a request for documents relating to Executive Order 12,333. In October 2013, the Department of State granted a fee waiver with respect to a request for documents relating to the government’s targeted-killing program. In April 2013, the DOJ National Security Division granted a fee waiver with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee waiver with respect to a FOIA request for documents related to national security letters issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted a fee waiver request related to the same FOIA request issued to the DOJ.