



June 10, 2009

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Mark Hanson
FOIA Director
U.S. Customs and Border Protection
FOIA Division
799 9th Street NW, Mint Annex
Washington, DC 20229

FOIA/PA
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive SW
STOP-0550
Washington, DC 20528-0550

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

To Whom It May Concern:

This letter constitutes a request by the American Civil Liberties Union and the American Civil Liberties Foundation (collectively "ACLU") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and under the implementing regulations of the Department of Homeland Security ("DHS"), 6 C.F.R. § 5 for records maintained by Customs and Border Protection ("CBP") or other DHS components.

In July 2008, CBP issued its Policy Regarding Border Search Of Information, which permits CBP to subject travelers to suspicionless searches of information contained in documents and electronic devices, including laptop computers. Based on this policy and practice, innumerable international travelers—including U.S. citizens—have had their most personal information searched, reviewed, retained, and disseminated in the absence of any suspicion and without reasonable safeguards.

Requester American Civil Liberties Union is a non-profit, non-partisan, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of such legislation, and lobbies legislators directly and through its members concerning such legislation. Requester American Civil Liberties Union Foundation is a separate 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 civil rights and civil liberties issues.

I. RECORDS REQUESTED

The ACLU seeks disclosure of any and all records¹ created after January 1, 2007 concerning:

1. All records regarding CBP's authority to search, review, retain, and disseminate information possessed by individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border. This should include, but not be limited to:
 - (a) Records reflecting revisions of, or documents superseding, the "Policy Regarding Border Search of Information" released to the public on July 16, 2008.
 - (b) Policies, practices, and procedures regarding criteria for selecting individual travelers whose information will be searched, reviewed, retained, or disseminated to other components of DHS, other government agencies, or persons or entities outside the government.
 - (c) Policies, practices, and procedures regarding the search, review, retention and dissemination of business information;
 - (d) Policies, practices, and procedures regarding information that may be legally privileged;
2. Records regarding the retention of documents or electronic devices by CBP, including the number of documents or electronic devices

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

retained, the length of retention, the reasons for retention, and the ultimate disposition of retained material.

3. Records regarding the dissemination of documents or electronic devices to other components of DHS, other government agencies, or persons or entities outside the government.
4. Policies, practices, and procedures whereby CBP audits and reviews compliance with its policies governing border searches of information contained in documents and electronic devices, and documents generated in the course of, or as the result of, any audits and reviews.
5. Records regarding complaints filed by individuals or organizations affected by CBP's policies or practices related to the search, review, retention, or dissemination of travelers' information.
6. Statistics reflecting the number of travelers subject to suspicionless searches of their information at the border, both in absolute terms and as a proportion of the total number of travelers subject to CBP's jurisdiction.
7. Statistics reflecting the race, ethnicity, country of origin, citizenship, and gender of individuals subjected to suspicionless searches of their information at the border.

II. LIMITATION OF PROCESSING FEES

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .”); *see also* 6 C.F.R. § 5.11(d)(1).

The ACLU is a “representative of the news media” within the meaning of the statute and regulations because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *Nat. Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic

newsletter and published books was a “representative of the news media”); *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 “primarily engaged in disseminating information”).

Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. The ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials. Through the ACLU’s public education department, such material is made 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 web site: <http://www.aclu.org>. The web site addresses civil rights and civil liberties issues in depth and contains many thousands of documents relating to these issues. The website includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/patriotfoia; www.aclu.org/torturefoia. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers by e-mail.

In addition to the national ACLU offices in New York and Washington, D.C., there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material through a variety of means including their own websites, publications, and newsletters. In addition, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University.

The ACLU intends to disseminate the information gathered by this Request through these channels.²

III. WAIVER OF PROCESSING FEES

The ACLU additionally requests a waiver of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is

² The ACLU does not seek disclosure to further a commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

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.”), and DHS regulation, 6 C.F.R. § 5.11(k)(1)(i)-(ii).

Disclosure in this case meets the both the statutory and regulatory criteria and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch* 326 F.3d at 1312 (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”). Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.³

Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of government conduct. Specifically, it will further public understanding of the government’s expansive exercise of search authority over all travelers, including U.S. citizens, passing through the country’s international borders. These searches implicate core Fourth Amendment interests, because they involve highly intrusive governmental probing into a traveler’s most private information. They also implicate the First Amendment, because searching or retaining a traveler’s “information”—especially the vast stores of information contained in a laptop or other electronic storage device—risks chilling the free exchange of ideas. Granting CBP agents unbridled discretion to conduct suspicionless searches also raises a serious risk of discriminatory enforcement against racial and religious minorities.

The scope of CBP’s policies regarding the search of electronic information is a matter of serious public concern. *See Ellen Nakashima, Expanded Powers to Search Travelers at Border Detailed*, THE WASH. POST, Sept. 23, 2008, at A2. David E. Brodsky, Timothy M. Haggerty & Tamara J.

³ For example, DHS did not charge fees for its production to the ACLU of documents regarding the ideological exclusion of foreign scholars. Other agencies have reached similar decisions. For example, three separate components of Department of Justice – 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 fees for a FOIA request submitted in August 2002 for records concerning the FBI’s use of the Patriot Act’s surveillance provisions. Neither the Justice Department nor the Department of State charged fees for FOIA requests submitted in October 2003 and June 2004 for records concerning the treatment of detainees held by the U.S. in Iraq, Afghanistan, and at Guantanamo Naval Base.

Britt, *At the Border, Laptops Are Open Books*, THE NAT'L LAW J., July 22, 2008, available at

<http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=120242314422>

4. Beyond the impact on all members of the traveling public, CBP's policies and practices raise special concerns for business travelers, who fear that confidential materials or business secrets may be compromised as the result of suspicionless searches. Searches of laptop or other storage devices also have an acute impact on individuals whose exercise of First Amendment-protected speech may be chilled by the prospect of government officials reviewing, storing, or disseminating informational materials.

As a nonprofit 501(c)(3) organization and "representative of the news media", the ACLU is well-situated to disseminate the information it gains from this request. As discussed in Section I, the ACLU has played an active role in educating the public about civil liberties issues by disseminating the information it obtains through FOIA. The ACLU has also played a pivotal role in disseminating information about the civil liberties implications of policies enacted in the name of national security.

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

Catherine Crump
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,



Catherine Crump
Staff Attorney
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7806
ccrump@aclu.org