



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

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Chief of Staff  
Office of Information Policy  
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Attn: FOI/PA Request  
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Washington, D.C. 20530-0001

Office of Public Affairs  
Department of Justice  
950 Pennsylvania Avenue, NW., Room 1128  
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Federal Bureau of Investigation  
Record/Information Dissemination Section  
Attn: FOI/PA Request  
170 Marcel Drive  
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Elizabeth Farris,  
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National Security Division  
U.S. Department of Justice  
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950 Pennsylvania Avenue, N.W., Room 6150  
Washington, D.C. 20530-0001

**AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION**  
NATIONAL OFFICE  
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**OFFICERS AND DIRECTORS**  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

May 31, 2011

Dear Freedom of Information Officer,

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). It is submitted on behalf of the American Civil Liberties Union and the American Civil Liberties Foundation (together, the “ACLU”).<sup>1</sup>

### I. Background

This request pertains to the use by the Federal Bureau of Investigation (“FBI”) of the powers enumerated in Pub. L. 107-56, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly known as the USA PATRIOT Act (“PATRIOT Act”). Specifically, this request pertains to the FBI’s use and interpretation of Section 215 of the PATRIOT Act, as amended, which permits the government to apply for court orders requiring the production of “tangible things.”

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### II. Records Requested

We request that you release to us any and all records concerning the government’s interpretation or use of Section 215, including but not limited to: legal opinions or memoranda interpreting that provision; guidelines informing government personnel how that provision can be used; records containing statistics about the use or misuse of the provision; reports provided by the executive branch to Congress relating to the executive’s interpretation, use, or misuse of the provision; forms used by executive agencies in connection with the use of Section 215; and legal papers filed by the government or any other party in the Foreign Intelligence Surveillance Court, and opinions of that court, pertaining to the interpretation, use, or proposed use of Section 215.

With respect to the records described above, we seek only those records drafted, finalized, or issued after March 9, 2006. We do not ask you to disclose the names or identities of those entities or individuals

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<sup>1</sup> 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.

who have been served with Section 215 orders or the names or identities of those individuals or entities about whom records have been sought, but we ask that you disclose any and all records indicating the kinds or types of information that may, as a matter of policy or law, be obtained through the use of Section 215.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive electronic records be provided electronically in their native file format, if possible. 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 that the records be provided in separate, bates-stamped files.

If any aspect of our request is unclear, we would welcome the opportunity to clarify it. We would also welcome the opportunity to discuss an appropriate processing schedule.

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### III. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d). Expedited processing is warranted because the records sought are urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity, 28 C.F.R. § 16.5(d)(1)(ii), and because the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," *id.* § 16.5(d)(1)(iv).

#### A. Expedited processing is warranted under 28 C.F.R. § 16.5(d)(ii)

The records requested are needed to inform the public about federal government activity. The records relate to the FBI's use of a highly controversial surveillance authority. Specifically, the records requested relate to the FBI's use of Section 215 and to the process the FBI has put in place to ensure that the FBI's use of Section 215 powers conforms to the requirements of the Constitution and statutory law. The records are urgently needed because of recent allegations by some members of the Senate Select Committee on Intelligence that the Justice Department has adopted an overly broad interpretation of Section 215,<sup>2</sup>

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<sup>2</sup> See Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. Times, May 26, 2011, available at <http://www.nytimes.com/2011/05/27/us/27patriot.html>; Spencer Ackerman, *There's a Secret Patriot Act, Senator Says*, Wired.com, May 25, 2011, available at <http://www.wired.com/dangerroom/2011/05/secret-patriot-act/>; 157

and because there is an ongoing debate about the appropriate scope of the government's surveillance authorities.<sup>3</sup>

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii). Disseminating information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU's work and one of its primary activities. See *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information" (internal citation omitted)).

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Cong. Rec. S3259-60 (daily ed. May 24, 2011), available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-05-24/pdf/CREC-2011-05-24-pt1-PgS3247-7.pdf#page=1>.

<sup>3</sup> See, e.g., *Obama signs Patriot Act extension; will continue anti-terror surveillance powers*, Assoc. Press, May 25, 2011, available at [http://www.washingtonpost.com/politics/senate-moves-patriot-act-toward-4-year-extension-before-thursday-midnight-deadline/2011/05/25/AGnYjXBH\\_story.html](http://www.washingtonpost.com/politics/senate-moves-patriot-act-toward-4-year-extension-before-thursday-midnight-deadline/2011/05/25/AGnYjXBH_story.html); *New tea party senator gets Senate's attention*, Assoc. Press, May 25, 2011, ("[Sen. Rand] Paul has delayed action on the intelligence-gathering measures, contending they should expire because the Patriot Act gives the government too much power to monitor people's lives."), available at <http://www.foxnews.com/us/2011/05/25/new-tea-party-senator-gets-senates-attention/>; Editorial, *A chance to put protections in the Patriot Act*, Wash. Post, May 25, 2011, available at [http://www.washingtonpost.com/opinions/a-chance-to-put-protections-in-the-patriot-act/2011/05/25/AGsSPXBH\\_story.html](http://www.washingtonpost.com/opinions/a-chance-to-put-protections-in-the-patriot-act/2011/05/25/AGsSPXBH_story.html); Felicia Sonmez, *Vote on Patriot Act extension delayed as Rand Paul pushes for amendment on gun rights*, Wash. Post, May 25, 2011, available at [http://www.washingtonpost.com/blogs/2chambers/post/vote-on-patriot-act-extension-delayed-as-rand-paul-pushes-for-amendment-on-gun-rights/2011/05/25/AGhzDJBH\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/vote-on-patriot-act-extension-delayed-as-rand-paul-pushes-for-amendment-on-gun-rights/2011/05/25/AGhzDJBH_blog.html); David Kravets, *Lawmakers Punt Again on Patriot Act Reform*, Wired.com, May 20, 2011, available at <http://www.wired.com/threatlevel/2011/05/patriot-act-reform/>; David Kravets, *House Fails to Extend Patriot Act Spy Powers*, Kristy Sidor, *The Patriot Act Expiration Controversy*, The Observer at Boston College, Feb. 22, 2011, available at <http://www.thebcoobserver.com/2011/02/22/the-patriot-act-expiration-controversy/>; Wired.com, Feb. 8, 2011, available at <http://www.wired.com/threatlevel/2011/02/patriot-act-notextended/>; Charlie Savage, *Battle Looms Over the Patriot Act*, N.Y. Times, Sept. 19, 2009, available at <http://www.nytimes.com/2009/09/20/us/politics/20patriot.html?partner=rss&emc=rss>; Julian Sanchez, *A Chance to Fix the PATRIOT Act?* Cato At Liberty, Sept. 17, 2009, available at <http://www.cato-at-liberty.org/a-chance-to-fix-the-patriot-act/>; David Kravets, *Obama Backs Extending Patriot Act Spy Provisions*, Wired, Sept. 15, 2009, available at <http://www.wired.com/threatlevel/2009/09/obama-backs-expiring-patriot-act-spy-provisions/>; Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. Times, Nov. 18, 2008, available at <http://www.nytimes.com/2008/11/14/opinion/14fri4.html>.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee. Since 2007, ACLU national projects have published and disseminated over 30 reports. Many ACLU reports include description and analysis of government documents obtained through FOIA.<sup>4</sup>

The ACLU also disseminates information through its website, [www.aclu.org](http://www.aclu.org). The website addresses civil liberties issues in depth, provides features on civil liberties issues in the news, and contains hundreds of documents that relate to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, the ACLU also provides the public with educational material about the particular civil liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; government documents obtained through FOIA about the issue; and more in-depth analytic and educational multi-media features on the issue.<sup>5</sup> The ACLU website includes many features on information obtained through the FOIA.<sup>6</sup> For example, the ACLU's "Torture

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<sup>4</sup> See, e.g., ACLU, Reclaiming Patriotism: A Call to Reconsider the Patriot Act (March 2009), available at [http://www.aclu.org/pdfs/safe/free/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safe/free/patriot_report_20090310.pdf); ACLU, The Excluded: Ideological Exclusion and the War on Ideas (Oct. 2007), available at <http://www.aclu.org/national-security/excluded-ideological-exclusion-and-war-ideas>; ACLU, History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement (May 2007), available at <http://www.aclu.org/files/FilesPDFs/mlkreport.pdf>; ACLU, No Real Threat: The Pentagon's Secret Database on Peaceful Protest (Jan. 2007), available at <http://www.aclu.org/national-security/no-real-threat-pentagons-secret-database-peaceful-protest>; ACLU, Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You (July 2003), available at [http://www.aclu.org/files/FilesPDFs/spies\\_report.pdf](http://www.aclu.org/files/FilesPDFs/spies_report.pdf).

<sup>5</sup> For example, the ACLU's website about national security letter ("NSL") cases, [www.aclu.org/nsl](http://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 NSLs; myths and facts documents; and links to information and analysis of related issues.

<sup>6</sup> See, e.g., <http://www.aclu.org/accountability/released.html> (Torture FOIA); <http://www.aclu.org/accountability/olc.html> (OLC Memos);

FOIA” webpage, <http://www.aclu.org/accountability/released.html>, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search approximately 150,000 pages of documents obtained through the FOIA.

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU has created a chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance and that 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.<sup>7</sup> Similarly, the ACLU produced a chart of original statistics about the Defense Department’s use of National Security Letters based on its own analysis of records obtained through FOIA.<sup>8</sup>

B. Expedited processing is warranted under 28 C.F.R. § 16.5(d)(iv)

The records requested 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).

Since the PATRIOT Act’s enactment in 2001, Section 215 has been the subject of considerable and sustained media attention.<sup>9</sup> Over the

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<http://www.aclu.org/national-security/csrt-foia> (CSRT FOIA); <http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsawarrantless-surveillance-foia-request> (NSA FOIA); <http://www.aclu.org/national-security/patriot-foia> (Patriot Act FOIA); <http://www.aclu.org/national-security-technology-and-liberty/spyfiles> (Spy Files).

<sup>7</sup> The chart is available at [http://www.aclu.org/files/assets/olcmemos\\_chart.pdf](http://www.aclu.org/files/assets/olcmemos_chart.pdf).

<sup>8</sup> The chart is available at [http://www.aclu.org/files/assets/nsl\\_stats.pdf](http://www.aclu.org/files/assets/nsl_stats.pdf).

<sup>9</sup> See, e.g., Editorial, *Breaking a Promise on Surveillance*, N.Y. Times, July 29, 2010, available at <http://www.nytimes.com/2010/07/30/opinion/30fri1.html>; Editorial, *Patriot Act Excesses*, N.Y. Times, Oct. 7, 2009, available at <http://www.nytimes.com/2009/10/08/opinion/08thu1.html>; Press Release, Leahy renews effort to extend expiring PATRIOT Act provisions, available at <http://vtdigger.org/2011/01/27/leahy-renews-effort-to-extend-expiring-patriot-act-provisions/>; Fred H. Kate, Legal Restrictions on Transborder Data Flows to Prevent Government Access to Personal Data: Lessons from British Columbia, The Ctr. for Info. and Policy Leadership, Aug. 2005, available at

last months, as Congress has debated reauthorization of certain PATRIOT Act provisions, including Section 215, media and public attention has intensified.<sup>10</sup> Many recent news stories have included allegations by members of the Senate Select Committee on Intelligence that the Department of Justice has adopted an overbroad construction of Section 215.<sup>11</sup> While the Department of Justice claimed only to have

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<http://blog.surveymonkey.com/wp-content/uploads/2011/05/various-Canadians-have-made-similar-points.pdf>; Taking Issue: The Patriot Act: Section 215, NPR.org, July 21, 2005, available at

[http://www.npr.org/takingissue/20050721\\_takingissue\\_patriotact.html](http://www.npr.org/takingissue/20050721_takingissue_patriotact.html); Heather McDonald, *Patriot Act: Let Investigators Do Their Job*, NPR.org, July 20, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4763326>; Larry Abramson and Maria Godoy, *The Patriot Act: Key Controversies*, NPR, Dec. 16, 2005, available at <http://www.npr.org/news/specials/patriotact/patriotactdeal.html>; Dahlia Lithwick and Julia Turner, *A Guide to the Patriot Act, Part 1*, Slate, Sept. 8, 2003, available at <http://www.slate.com/id/2087984/>.

<sup>10</sup> See, e.g., Charlie Savage, *Patriot Battle Could Hinder Investigators*, N.Y. Times, May 25, 2011, available at <http://www.nytimes.com/2011/05/26/us/politics/26patriot.html>; *Senate moves to break impasse, vote on controversial provision of Patriot Act*, Assoc. Press, May 24, 2011, available at [http://www.washingtonpost.com/politics/congress-races-to-extend-patriot-act-send-to-obama-in-europe-before-friday-deadline/2011/05/24/AFrxmIAH\\_story.html](http://www.washingtonpost.com/politics/congress-races-to-extend-patriot-act-send-to-obama-in-europe-before-friday-deadline/2011/05/24/AFrxmIAH_story.html); Charlie Savage, *Deal Reached on Extension of Patriot Act*, N.Y. Times, May 19, 2011, available at <http://www.nytimes.com/2011/05/20/us/20patriot.html>; Editorial, *In Patriot Act vote, Tea Party stands up for civil liberties*, Boston Globe, Feb. 14, 2011, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/editorials/articles/2011/02/14/in\\_patriot\\_act\\_vote\\_tea\\_party\\_stands\\_up\\_for\\_civil\\_liberties/](http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2011/02/14/in_patriot_act_vote_tea_party_stands_up_for_civil_liberties/); Tom Gantert, *Civil Liberties Concerns Caused Amash to Vote Against PATRIOT Act*, Michigan Capitol Confidential, Feb. 11, 2011, available at <http://www.michiganconfidential.com/14549>; Charlie Savage, *Battle Looms Over the Patriot Act*, *supra* note 3.

<sup>11</sup> See, e.g., *4 senators win promise of a Patriot Act hearing*, Assoc. Press, May 26, 2011, available at [http://www.boston.com/news/nation/washington/articles/2011/05/26/2\\_senators\\_win\\_promise\\_of\\_patriot\\_act\\_hearings/](http://www.boston.com/news/nation/washington/articles/2011/05/26/2_senators_win_promise_of_patriot_act_hearings/); Spencer Ackerman, *There's a Secret Patriot Act, Senator Says*, Wired.com, *see supra* note 2; "Secret" legal interpretation of Patriot Act provisions troubles 4 Senators, Assoc. Press, May 26, 2011, available at [http://www.washingtonpost.com/politics/secret-legal-interpretation-of-patriot-act-provisions-troubles-2-senators/2011/05/26/AGFczGCH\\_story.html](http://www.washingtonpost.com/politics/secret-legal-interpretation-of-patriot-act-provisions-troubles-2-senators/2011/05/26/AGFczGCH_story.html); "Secret" legal interpretation of Patriot Act provisions troubles 2 Senators, Assoc. Press, May 26, 2011, available at [http://www.washingtonpost.com/politics/secret-legal-interpretation-of-patriot-act-provisions-troubles-2-senators/2011/05/26/AG7ffICH\\_story.html](http://www.washingtonpost.com/politics/secret-legal-interpretation-of-patriot-act-provisions-troubles-2-senators/2011/05/26/AG7ffICH_story.html); Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. Times, May 26, 2011, *see supra*, note 2; Steven Aftergood, *Sen. Wyden Decries "Secret Law" on PATRIOT Act*, Secrecy News, May 25, 2011, available at [http://www.fas.org/blog/secrecy/2011/05/wyden\\_secret\\_law.html](http://www.fas.org/blog/secrecy/2011/05/wyden_secret_law.html); Marcy Wheeler, *Wyden and Udall Want Obama to Admit to Secret Collection Program*, Emptywheel, May 24, 2011, available at <http://emptywheel.firedoglake.com/2011/05/24/wyden-and-udall-want-obama-to-admit-to-secret-collection-program/>.

used Section 215 powers 21 times in 2009<sup>12</sup> and 96 times in 2010,<sup>13</sup> Senators Ron Wyden and Mark Udall, along with others, recently proffered an amendment to address the government's "secret[] reinterpretation [of] public laws and statutes in a manner that is inconsistent with the public's understanding of these laws."<sup>14</sup> In that same congressional session, Senator Ron Wyden stated in open Congress that he "certainly believe[s] the public will be surprised again when they learn about some of the interpretations of the PATRIOT Act," suggesting that the FBI's numbers or public statements may be misleading or incomplete.<sup>15</sup>

#### IV. Application for Waiver or Limitation of Fees

##### A. A waiver of search, review, and duplication fees is warranted under 28 C.F.R. § 16.11(k)(1).

The ACLU is entitled to a waiver of search, review, and duplication fees 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); 28 C.F.R. § 16.11(k)(1).

The requesters are making this request specifically to further the public's understanding of the government's use of surveillance powers inside the United States. As the dozens of new articles cited above make clear, disclosure of the requested records will contribute significantly to public understanding of the operations and activities of the government. *See* 28 C.F.R. § 16.11(k)(1)(i). Disclosure is not in the ACLU's commercial interest. Any information disclosed by the government in response to this FOIA request will be made available to the public at no

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<sup>12</sup> *See* Letter to the Hon. Joseph R. Biden, Jr., Department of Justice, Office of Legislative Affairs, Apr. 30, 2011, *available at* <http://www.fas.org/irp/agency/doj/fisa/2009rept.pdf>.

<sup>13</sup> *See* Letter to the Hon. Harry Reid, Department of Justice, Office of Legislative Affairs, Apr. 29, 2011, *available at* <http://www.fas.org/irp/agency/doj/fisa/2010rept.pdf>.

<sup>14</sup> *See* 157 Cong. Rec. S3283 (daily ed. May 24, 2011) (SA 339, amendment of Mr. Wyden), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2011-05-24/pdf/CREC-2011-05-24-pt1-PgS3281.pdf#page=3>

<sup>15</sup> *See* 157 Cong. Rec. S3258-62, (daily ed. May 24, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2011-05-24/pdf/CREC-2011-05-24-pt1-PgS3247-7.pdf#page=1>.



cost. 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 requests.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (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 the Act").

B. A waiver of search and review fees is warranted under 5 U.S.C. § 551(a)(4)(A)(ii) and 28 C.F.R. 16.11(c)(1)-(3), (d)(1).

A waiver of search and review fees is warranted because the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 551(a)(4)(A)(ii); 28 C.F.R. §§ 16.11(c)(1)-(3), (d)(1). The ACLU is a representative of the news media in that it is an organization "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public," where "news" is defined as "information that is about current events or that would be of current interest to the public." 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(b)(6). 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); 28 C.F.R. § 16.11 (d) (search and review fees shall not be charged to "representatives of the news media"); *id.* § 16.11(c)(3) (review fees charged only for "commercial use request[s]").

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it "uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that "gathers information from a variety of sources," exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of FOIA); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information." *See e.g., Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding nonprofit public interest group that disseminated an electronic newsletter and

published books was a “representative of the media” for purposes of FOIA).<sup>16</sup>

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. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Please be advised that, because we are requesting expedited processing under 28 C.F.R. §§ 16.11(d)(1)(iv) as well as 16.11(d)(1)(ii), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Whatever the determination of that office, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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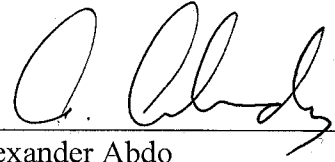
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Jameel Jaffer  
Deputy Legal Director  
American Civil Liberties Union  
125 Broad St., 18<sup>th</sup> Floor  
New York, NY 10004

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<sup>16</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived on the grounds that the ACLU is a “representative of the news media.” In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the Department of State granted a fee waiver to the ACLU with respect to its request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. In May 2005, the 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 respect to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.



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