



November 8, 2013

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
Fax: (301) 341-0772
Email: MRUFOIA.Requests@usdoj.gov

Bette Farris, Supervisory Paralegal
Office of Legal Counsel
Department of Justice
Room 5515, 950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001
Email: usdoj-officeoflegalcounsel@usdoj.gov

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

Susan B. Gerson, Acting Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Suite 7300, 600 E Street, N.W.
Washington, DC 20530-0001
Fax: (202) 252-6047
Email: USAEO.FOIA.Requests@usdoj.gov

David M. Hardy, Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Department of Justice
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4997
Email: foiparequest@ic.fbi.gov

Ken Courter
Acting Chief, FOIA/PA Unit
Criminal Division
Department of Justice
Suite 1127, Keeney Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Fax: (202) 514-6117

Email: crm.foia@usdoj.gov

Katherine L. Myrick, Chief
Freedom of Information Operations Unit
FOI/Records Management Section
Drug Enforcement Administration
Department of Justice
West Building, 6th Floor
700 Army Navy Drive
Arlington, VA 22202
Fax: (202) 307-8556
Email: DEA.FOIA@usdoj.gov

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Re: Request Under Freedom of Information Act

To Whom It May Concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, the American Civil Liberties Union and the American Civil Liberties Foundation (collectively “ACLU”)¹ request records regarding the government’s access to records of search queries entered into online search engines.

I. Background

The queries that people enter into online search engines can reveal deeply private information about them, such as facts about their medical diagnoses, financial stability, religion, sexual desires, relationship status, family secrets, and political beliefs. *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 687 (N.D. Cal. 2006). The major online search engine operators, including Google, Microsoft (which operates Bing), Yahoo!, and Ask.com,²

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

² See Press Release, *comScore Releases September 2013 U.S. Search Engine Rankings* (Oct. 16, 2013), http://www.comscore.com/Insights/Press_Releases/2013/10/comScore_Releases_September_2013_US_Search_Engine_Rankings (listing most-used U.S. search engines).

log and retain information about users' search queries.³ The retained information includes not only the queries entered into the search engines, but also unique identifying information about the users entering those queries, such as the Internet Protocol ("IP") address assigned to the user by the user's internet service provider, and the unique cookie ID assigned to the user's computer by the search engine operator itself.⁴

Public attention and concern has recently focused on warrantless electronic surveillance by law enforcement,⁵ but little is known about the policies and practices of the federal government when it seeks search query information from search engine operators. To the extent that the government seeks uniform resource locators ("URLs") that themselves contain search queries,⁶ the Department of Justice Criminal Division's Computer Crime and Intellectual Property Section and the United States Attorneys' Manual have recognized that this information raises special concerns meriting particularly close attention.⁷ But the public does not know whether it is government policy or practice to obtain a search warrant before requesting search queries from search engine operators, or whether other safeguards are in place to protect the privacy of sensitive information revealed by search queries. Moreover, although lawyers working for Google and Microsoft have stated that their respective companies treat search queries as content under the Electronic

³ See *Privacy Policy*, Google (last modified June 24, 2013), <http://www.google.com/intl/en/policies/privacy/>; *Bing Privacy Statement*, Microsoft (last updated October, 2013), <http://www.microsoft.com/privacystatement/en-us/bing/default.aspx#>; *Yahoo Privacy Policy*, Yahoo! (last updated May 31, 2013), <http://info.yahoo.com/privacy/us/yahoo/details.html>; *Privacy Policy*, Ask (effective Aug. 23, 2013), <http://about.ask.com/privacy-policy>.

⁴ See, e.g., *Privacy Policy*, Google, *supra*; *Key Terms: Server Logs*, Google, <http://www.google.com/intl/en/policies/privacy/key-terms/#toc-terms-server-logs>; *Bing Privacy Statement*, Microsoft, *supra*.

⁵ See, e.g., Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. Times, Sept. 1, 2013, <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html>; Editorial, *An E-mail Loophole Congress Needs to Close*, Wash. Post, July 10, 2013, http://www.washingtonpost.com/opinions/an-e-mail-loophole-congress-needs-to-close/2013/07/10/dad66dca-e8d5-11e2-8f22-de4bd2a2bd39_story.html; FoxNews.com, *IRS Tells Agents It Can Snoop on Emails without Warrant, Internal Documents Show*, Apr. 11, 2013, <http://www.foxnews.com/politics/2013/04/11/irs-tells-agents-it-can-snoop-on-emails-without-warrant-internal-documents-show/>.

⁶ If a user "enters a search phrase [into a search engine], that search phrase would appear in the URL after the first forward slash. This would reveal content . . ." *In re Application of U.S. for an Order Authorizing use of A Pen Register & Trap On (xxx) Internet Serv. Account/User Name, (xxxxxxx@xxx.com)*, 396 F. Supp. 2d 45, 49 (D. Mass. 2005). For example, a Google search for the word "justice" yields a results page with the URL: <https://encrypted.google.com/#q=justice>.

⁷ See Computer Crime & Intellectual Property Section, Criminal Division, Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 153 (2009); United States Attorneys' Manual § 9-7.500.

Communications Privacy Act,⁸ it remains unclear if broadband internet providers or other backbone internet providers, who also have access to many of the URLs accessed by their customers, similarly insist on warrants. And while one legal scholar has expressed uncertainty about whether search queries are even covered by the protections of the Electronic Communications Privacy Act, the government's position on this question is unknown.⁹

II. Requested Records

The ACLU seeks disclosure of records regarding:

1. Policies, procedures, and practices followed to obtain search queries¹⁰ from search engine operators for law enforcement purposes. This includes:
 - a. Requests for all or some search queries entered by a particular person or persons, whether identified by name, IP address, or other unique identifier; and
 - b. Requests for the names, IP addresses, or other identifying information for all or some people who have entered a particular search query or queries into an online search engine.
2. Whether the policies, procedures, and practices sought in Section 1, above, involve obtaining a warrant or other legal process, and what specific legal process is required.
3. Whether search engine queries may be intercepted in real-time, with a Pen Register or Trap & Trace order (*see* 18 U.S.C. § 3127(3)–(4)).

⁸ See Symposium, U.S.F. L. Rev., *Big Brother in the 21st Century? Reforming the Electronic Communications Privacy Act*, Feb. 24, 2012, available at www.youtube.com/watch?v=MCuAf0kE-1g (remarks of Richard Salgado, Senior Counsel for Law Enforcement & Info. Sec., Google Inc.); *Reform and the Revolution in Cloud Computing: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 73 (2010) (testimony of Michael D. Hintze, Associate Gen. Counsel, Microsoft Corp.) (“[W]e think probably the best interpretation of search under ECPA is that the query itself would be content . . .”).

⁹ *ECPA Part 1: Lawful Access to Stored Content; Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations of the H. Comm. on the Judiciary*, 113th Cong. (Mar. 19, 2013) (written statement of Orin S. Kerr, Professor, George Washington Univ. Law Sch.).

¹⁰ For the purposes of this Request, “search query” means the term or terms entered into a search engine by a user.

4. Policies, procedures, and practices followed to obtain or intercept URLs that contain or reveal search queries, if different from the policies, procedures, and practices followed to obtain search queries in other forms.
5. Court opinions and orders authorizing or denying disclosure of search queries for law enforcement purposes.
6. Whether online search engines are considered an “electronic communication service”¹¹ or “remote computing service”¹² as defined for purposes of the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. § 2703, and thus whether ECPA governs requests to search engine operators for search queries and related information.
7. All discussion of the impact of *Gonzales v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006), on the government’s ability to obtain search queries from search engine operators.
8. Policies and practices of search engine operators regarding the legal showing or legal process they require from the government before disclosing search query information, including any incidents in which search engines refused to comply with subpoenas or orders issued under 18 U.S.C. § 2703(d).
9. All discussion related to the capability (or lack thereof) of search engines to provide search queries to the government in real-time or prospectively, regardless of the legal process used.
10. All discussion related to the adoption and default use of Secure Socket Layer (SSL) or Hypertext Transfer Protocol Secure (HTTPS) encryption technology by Google to protect the transmission of search queries.¹³

¹¹ An “electronic communication service” is defined as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15).

¹² A “remote computing service” is defined as “the provision to the public of computer storage or processing services by means of an electronic communications system.” 18 U.S.C. § 2711(2).

¹³ See, e.g., Valerie Caproni, Statement Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, *Going Dark: Lawful Electronic Surveillance in the Face of New Technologies*, Hearing, Feb. 17, 2011 (Serial 112-59), available at: http://judiciary.house.gov/hearings/printers/112th/112-59_64581.PDF (“Google, for the last 9 months, has been encrypting all gmail. So as it travels on the Internet, it is encrypted. We think that is great.”); *SSL Search*, Google,

We request that responsive electronic records be provided electronically in their native file format, if possible. *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 agencies' possession, and that the records be provided in separate, Bates-stamped files.

We also request that you provide an estimated date on which you will complete the processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

III. Offices To Be Searched

This request is directed at the following components of the Department of Justice: Criminal Division; Drug Enforcement Administration; Executive Office for United States Attorneys; Federal Bureau of Investigation; and Office of Legal Counsel.

For the Executive Office of United States Attorneys, the ACLU requests that the agency search its headquarters as well as the following United States Attorneys' offices: Northern District of California, Central District of California, District of Columbia, District of Massachusetts, Southern District of New York, Southern District of Texas, Eastern District of Virginia, and Western District of Washington.

IV. 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 . . .") and 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(d)(1) (search and review fees shall not be charged to "representatives of the news media"). As a representative of the news media, the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this request should, therefore, be limited accordingly.

The ACLU meets the definition 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

<https://support.google.com/websearch/answer/173733?hl=en&topic=1678515> (last visited Nov. 7, 2013) ("Google Search uses SSL to encrypt the connection between your computer and Google to help prevent intermediary parties . . . from intercepting or interfering with your search activities.").

distinct work, and distributes that work to an audience.” *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. Specifically, the ACLU publishes a continuously updated blog, newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated 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 through its public education department and web site. The ACLU web site 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 website specifically includes features on information obtained through the FOIA.¹⁴ For example, the ACLU’s “Accountability for Torture FOIA” webpage, <https://www.aclu.org/accountability-torture>, contains commentary about the ACLU’s FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. *See Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU maintains and publishes a widely read blog specifically dedicated to covering issues involving “civil liberties in the digital age,”¹⁵ through which the organization disseminates news and commentary about FOIA requests similar to this one.¹⁶ The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as

¹⁴ *See, e.g.*, <https://www.aclu.org/national-security/warrantless-electronic-communications-foia-requests>; <https://www.aclu.org/technology-and-liberty/foia-request-justice-department-policy-memos-gps-location-tracking>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.thetorturedatabase.org>; <http://www.aclu.org/mappingthefbi>.

¹⁵ <https://www.aclu.org/blog/free-future>.

¹⁶ *See, e.g.*, Nathan Freed Wessler, *New Documents Suggest IRS Reads Emails Without a Warrant*, Free Future, (Apr. 10, 2013), <https://www.aclu.org/blog/technology-and-liberty-national-security/new-documents-suggest-irs-reads-emails-without-warrant>.

information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations 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”).

The ACLU also regularly publishes books,¹⁷ “know your rights” publications,¹⁸ fact sheets,¹⁹ and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. 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 the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity.

¹⁷ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press 4th ed. 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).

¹⁸ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Pregnant, Post-Partum & Breastfeeding Workers* (Oct. 2013), available at https://www.aclu.org/files/assets/kyr_pregant_breastfeeding.pdf; ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You're Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

¹⁹ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-ACLU_Fact_Sheet_UPDATED-4-30-11.pdf.

Disclosure is not in the ACLU's commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization." 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 and internal quotations omitted)). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

V. Waiver of All Costs

The ACLU additionally requests a waiver of all costs 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 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.").

Disclosure of the requested information will help members of the public understand the privacy risks of using online search engines such as Google and Bing. The legal status of warrantless searches of online search queries is unsettled.²⁰ Meanwhile, the public lacks information about the scale or nature of government requests for search query information. The requested information will "contribute significantly to public understanding." 5 U.S.C. § 552(a)(4)(A)(iii).

As a nonprofit 501(c)(3) organization and "representative of the news media" as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.²¹

²⁰ See *ECPA Part 1: Lawful Access to Stored Content: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations of the H. Comm. on the Judiciary*, 113th Cong. 40–41 (Mar. 19, 2013) (written statement of Orin S. Kerr, Professor, George Washington Univ. Law Sch.).

²¹ Fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2012, the Bureau of Prisons granted a fee waiver to the ACLU for a FOIA request seeking documents concerning isolated confinement of prisoners in BOP custody. In March 2012, the Department of Justice Criminal Division granted a fee waiver to the ACLU for a FOIA request seeking records about the government's access to the contents of individuals' private electronic communications. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. 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

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

Nathan Freed Wessler
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 18th floor
New York, NY 10004

Sincerely,



Nathan Freed Wessler
Staff Attorney
American Civil Liberties Union

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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 U.S. 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 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.