NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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March 15, 2011

Re: Request Under Freedom of Information Act

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").[1]

[1] 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.

I. Background

This request pertains to the FBI's issuance of national security letters ("NSLs") under 18 U.S.C. §§ 2709 and 3511 (collectively, the "national security letter statute" or "NSL statute"). The FBI uses NSLs to obtain sensitive information from wire and electronic communication service providers. In certain contexts, the NSL statute permits the FBI to impose non-disclosure orders on the recipients of NSLs.

In December 2008, the United States Court of Appeals for the Second Circuit construed the NSL statute (1) to permit a nondisclosure requirement only when senior FBI officials certify that disclosure may result in an enumerated harm that is related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities"; (2) to place on the government the burden to show that a good reason exists to expect that disclosure of receipt of an NSL will risk an enumerated harm; (3) to require the government, in attempting to satisfy that burden, to adequately demonstrate that disclosure in a particular case may result in an enumerated harm. *Doe v. Mukasey*, 549 F.3d 861, 883 (2d Cir. 2008). The court also invalidated the subsection of the NSL statute that directs the courts to treat as conclusive executive official's certifications that disclosure of information may endanger the national security of the United States or interfere with diplomatic relations. *Id.*

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In addition, the Court ruled that the NSL statute is unconstitutional to the extent that it imposes a non-disclosure requirement on NSL recipients without placing on the government the burden of initiating judicial review of that requirement. *Id.* The Court held that this deficiency, however, could be addressed without additional legislation if the FBI adopted a "reciprocal notice" policy. The Court explained:

> [T]here appears to be no impediment to the Government's including notice of a recipient's opportunity to contest the nondisclosure requirement in an NSL. If such notice is given, time limits on the nondisclosure requirement pending judicial review, as reflected in *Freedman* [*v. Maryland*], would have to be applied to make the review procedure constitutional. We would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement, absent a ruling favorable to the Government upon judicial review, to [a] 10-day period in which the NSL recipient decides whether to contest the nondisclosure requirement, the 30-day period in which the Government considers whether to seek judicial review, and a further period of 60 days in which a court must adjudicate the merits,

unless special circumstances warrant additional time. *See Thirty-Seven Photographs*, 402 U.S. at 373-74, 91 S. Ct. 1400 (imposing time limits to satisfy constitutional requirements). If the NSL recipient declines timely to precipitate Government-initiated judicial review, the nondisclosure requirement would continue, subject to the recipient's existing opportunities for annual challenges to the nondisclosure requirement provided by subsection 3511(b). If such an annual challenge is made, the standards and burden of proof that we have specified for an initial challenge would apply, although the Government would not be obliged to initiate judicial review.

In those instances where an NSL recipient gives notice of an intent to challenge the disclosure requirement, the Government would have several options for completing the reciprocal notice procedure by commencing such review. First, it is arguable that the Government can adapt the authority now set forth in subsection 3511(c) for the purpose of initiating judicial review. That provision authorizes the Attorney General to "invoke the aid of any [relevant] district court" in the event of "a failure to comply with a request for ... information made to any person or entity under section 2709(b)" or other provisions authorizing NSLs. 18 U.S.C. § 3511(c). Since an NSL includes both a request for information and a direction not to disclose that the FBI has sought or obtained information, an NSL recipient's timely notice of intent to disclose, furnished in response to notice in an NSL of an opportunity to contest the nondisclosure requirement, can perhaps be considered the functional equivalent of the "failure to comply" contemplated by subsection 3511(c). Second, the Government might be able to identify some other statutory authority to invoke the equitable power of a district court to prevent a disclosure that the Government can demonstrate would risk harm to national security. Third, and as a last resort, the Government could seek explicit congressional authorization to initiate judicial review of a nondisclosure requirement that a recipient wishes to challenge. We leave it to the Government to consider how to discharge its obligation to initiate judicial review.

Id. 883-84 (footnote omitted).

II. Records Requested

We seek the following records:

1. Any records discussing the "reciprocal notice" procedure described in the Second Circuit's above-referenced decision, how or whether that procedure should be implemented, what procedure should or will be adopted in its place, whether the procedures used within the Second Circuit should be, or are, different from those used elsewhere, or the statutory or other authority that the FBI should or will invoke in order to commence judicial proceedings to enforce non-disclosure orders.

2. Any records advising FBI personnel how to implement the NSL statute, including any records advising FBI personnel of the circumstances in which non-disclosure orders may be imposed, the circumstances in which the FBI should or will seek judicial review of non-disclosure orders, or the circumstances in which the FBI should or will lift non-disclosures after they have been imposed.

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3. Any forms used by the FBI in issuing NSLs under the NSL statute, advising NSL recipients of their right to contest non-disclosure orders, and informing NSL recipients that wish to contest non-disclosure orders that the FBI intends to seek judicial review.

4. Any records indicating how many NSLs the FBI has issued, how many different electronic communications service providers those NSLs were served on, how many Americans' information was sought by each of those NSLs, how many of those NSLs were accompanied by non-disclosure orders, how many times NSL recipients advised the FBI of their intent to contest non-disclosure orders, how many times the FBI sought judicial review of non-disclosure orders, how many times judges upheld non-disclosure orders that had been challenged, and how many times the FBI lifted non-disclosure orders after they had been imposed.

With respect to all of the categories of records described above, we seek only those records drafted, finalized, or issued after December 15, 2008. We do not ask you to disclose the nature of the information that the FBI sought with any particular NSL, which specific individuals or entities received NSLs, or which specific NSLs were accompanied by non-disclosure orders.

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.

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).

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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 NSLs, and to the processes that the FBI has put in place to ensure that the FBI's use of NSLs conforms to the constitutional requirements discussed in the Second Circuit's 2008 decision. The records are urgently needed because the DOJ's Inspector General has reported that the NSL provision has been abused,[2] because there is an ongoing debate about the appropriate scope of the government's surveillance authorities,[3]

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[2] A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records (January 2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf.

[3] *See, e.g.*, *Congress Delays Debate on Patriot Act and Privacy*, Boston Globe, Feb. 17, 2011, *available at* http://bo.st/e7KfpU; Charlie Savage, *As Online Communications Stymie Wiretaps, Lawmakers Debate Solutions*, N.Y. Times, Feb. 17, 2011, *available at* http://nyti.ms/fstGt4; Ellen Nakashima, *Dispute Brewing on Web Data Access: Critics Decry Obama Plan to Aid FBI Probes*, Boston Globe, Aug. 1, 2010, *available at* http://bo.st/bBvhVq; Pete Yost, *FBI's Push to Clarify Electronic Authority Raises Privacy Concerns*, Wash. Post, Aug. 2, 2010, *available at* http://wapo.st/9M7L9o; Ellen Nakashima, *Group Challenging Enhanced Surveillance Law Faces Uphill Climb*, Wash. Post, Apr. 19, 2010, *available at* http://wapo.st/f3gG89; David Kravets, *Lawmakers Cave to FBI in Patriot Act Debate*, Wired, Oct. 1, 2009, *available at* http://bit.ly/2AFeCU; James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 16, 2009, *available at* http://nyti.ms/hNoe6; Editorial, *Breaking a Promise on Surveillance*, July 29, 2010, *available at* http://nyti.ms/bLJPVb; Editorial, *When It Comes to Terror, We Can't Tell You*, N.Y. Times, Apr. 3, 2010, *available at* http://nyti.ms/aha79c; Editorial,

because Congress will shortly have to consider whether certain related surveillance provisions should be reauthorized,[4] and because proposed legislation would add a new sunset date of December 31, 2013 for the NSL provision.[5]

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)).

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.[6] The ACLU also

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Spying, Civil Liberties, and the Courts, N.Y. Times, Apr. 15, 2010, *available at* http://nyti.ms/bCAslP.

[4] *See, e.g.*, *Patriot Act Extended for Three Months*, N.Y. Times, Feb. 17, 2011, *available at* http://nyti.ms/f9jIkp (reporting that certain Patriot Act provisions are scheduled to sunset this summer); Eric Lichtblau, *Congress Strikes Deal to Overhaul Wiretap Law*, N.Y. Times, June 20, 2008, *available at* http://nyti.ms/ePfslO (reporting that FISA Amendments Act will sunset at end of 2012).

[5] USA PATRIOT Act Sunset Extension Act of 2011, S. 193, 112th Cong. (2011).

[6] *See, e.g.*, ACLU, Reclaiming Patriotism: A Call to Reconsider the Patriot Act (March 2009), *available at* http://bit.ly/euFsPI; ACLU, The Excluded: Ideological Exclusion and the War on Ideas (Oct. 2007), *available at* http://bit.ly/fMtCCp; ACLU, History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement (May 2007), *available at* http://bit.ly/hpqsqd; ACLU, No Real Threat: The Pentagon's Secret Database on Peaceful Protest (Jan. 2007), *available at* http://bit.ly/gScmU8; ACLU, Unpatriotic Acts: The FBI's Power to Rifle Through Your Records

disseminates information through an electronic newsletter, which is distributed to subscribers by e-mail.

The ACLU also disseminates information through its website, 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.[7] The ACLU website includes many features on information obtained through the FOIA.[8] For example, the ACLU's "Torture 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.

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and Personal Belongings Without Telling You (July 2003), *available at* http://bit.ly/ep0qsI.

[7] For example, the ACLU's website about 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 NSLs; myths and facts documents; and links to information and analysis of related issues.

[8] *See, e.g.*, http://www.aclu.org/accountability/released.html (Torture FOIA); http://www.aclu.org/accountability/olc.html (OLC Memos); http://www.aclu.org/national-security/csrt-foia (CSRT FOIA); http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsa-warrantless-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/spy-files (Spy Files).

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.[9] 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.[10]

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).

NSLs have been the subject of considerable media attention over the last several years. Dan Eggen, *Key Part of Patriot Act Ruled Unconstitutional: Internet Providers' Data at Issue*, Wash. Post, Sept. 30, 2004, *available at* http://wapo.st/dX8W6S; Julia Preston, *Judge Strikes Down Section of Patriot Act*, N.Y. Times, Sept. 30, 2004, *available at* http://wapo.st/dX8W6S; Eric Lichtblau, *FBI Demands Library Records: Request in Connecticut, Allowed by Patriot Act, Is First of Its Kind*, San Francisco Chronicle, Aug. 26, 2005, *available at* http://bit.ly/bHsibs; Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records*, N.Y. Times, Aug. 26, 2005, *available at* http://nyti.ms/hYUfQd; Dan Eggen, *Library Challenges FBI Request: Patriot Act Prohibits Details of Lawsuit From Being Released*, Wash. Post, Aug. 26, 2005, *available at* http://wapo.st/eLx98H; Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Wash. Post, Nov. 6, 2005, *available at* http://wapo.st/fDvYsr; *FBI Pushing Patriot Act Powers*, Wired, Nov. 6, 2005, *available at* http://bit.ly/fbuxEi; Eric Lichtblau & Mark Mazzetti, *Pentagon, CIA Step Up Spying on Americans: They Use National Security Letters to Get Financial Data*, San Francisco Chronicle, Jan. 14, 2007, *available at* http://bit.ly/g14stv; Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. Times, Jan.

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[9] The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf.

[10] The chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf.

14, 2007, *available at* http://nyti.ms/eorzRV; Mark Mazzetti, *Cheney Defends Efforts to Obtain Records*, N.Y. Times, Jan. 15, 2007, *available at* http://nyti.ms/flY1N8; David Stout, *F.B.I. Head Admits Mistakes in Use of Security Act*, N.Y. Times, Mar. 10, 2007, *available at* http://nyti.ms/epda5F; Jeffrey Rosen, *Who's Watching the F.B.I.?*, N.Y. Times Magazine, Apr. 15, 2007, *available at* http://nyti.ms/dVjkdh; Ryan Singel, *Court Strikes Down Key Patriot Act Power Again*, Wired, Sept. 6, 2007, *available at* http://bit.ly/i3RSpm; Adam Liptak, *Judge Voids F.B.I. Tool Granted by Patriot Act*, N.Y. Times, Sept. 7, 2007, *available at* http://nyti.ms/ecui8B; Eric Lichtblau, *FBI Data Mining Reached Beyond Initial Targets*, N.Y. Times, Sept. 9, 2007, *available at* http://nyti.ms/g34M; Mark Mazzetti & Eric Lichtblau, *Pentagon Review Faults Bank Record Demands*, N.Y. Times, Oct. 14, 2007, *available at* http://nyti.ms/eYo5nb; Eric Lichtblau, *F.B.I. Made 'Blanket' Demands For Phone Records*, N.Y. Times, Mar. 13, 2008, *available at* http://nyti.ms/hno81X; Carrie Johnson, *Lawmakers Want FBI Access to Data Curbed*, Wash. Post, Apr. 15, 2008, *available at* http://wapo.st/ev37AN; Carrie Johnson and Ellen Nakashima, *White House Seeks Renewal of Surveillance Laws, Perhaps with Tweaks*, Wash. Post, Sept. 16, 2009, *available at* http://wapo.st/11yZWN; Ellen Nakashima, *White House Proposal Would Ease FBI Access to Records of Internet Activity*, Wash. Post, July 29, 2010, *available at* http://wapo.st/9jZvWx.

The litigation that led to the Second Circuit's 2008 decision was the subject of extraordinary media attention. *Federal Appeals Panel Puts Limits on Patriot Act*, Associated Press, Dec. 16, 2008, *available at* http://bit.ly/icP0sR; David Kravets, *Court Narrows National Security Secrecy, Limits Oversight*, Wired, Dec. 15, 2008, *available at* http://bit.ly/XpUDl; Ed Brayton, *Appeals Court: Patriot Act Gag Order Unconstitutional*, Michigan Messenger, Dec. 17, 2008, *available at* http://bit.ly/4cdYwo; Mark Hamblett, *2nd Circuit Requires Judicial Review Before Security Letter Gag Order*, N.Y. Law Journal, Dec. 16, 2008, *available at* http://bit.ly/fHrxRA; Kurt Opsahl, *Second Circuit Rules Against National Security Letter Gag Orders*, Electronic Frontier Foundation, Dec. 15, 2008, *available at* http://bit.ly/fnDRPG; Julian Sanchez, *Appeals Court Puts Restrictions on NSL Gag Orders*, Ars Technica, Dec. 15, 2008, *available at* http://bit.ly/hjBATT; Charlie Savage, *Judge Rules Against FBI Data-Gathering Tool*, The Boston Globe, Sept. 7, 2007, *available at* http://bo.st/huvMEW; Adam Piptak, *Judge Voids F.B.I. Tool Granted By Patriot Act*, N.Y. Times, Sept. 7, 2007, *available at* http://nyti.ms/ecui8B; Dan Eggen, *Judge Strikes Down Part of Patriot Act: FBI National Security Letters Deemed Unconstitutional*, San Francisco Chronicle, Sept. 7, 2007, *available at* http://bit.ly/fxZg8V; Dan Eggen, *Judge Invalidates Patriot Act Provisions: FBI Is Told to Halt Warrantless Tactic*, Wash. Post, Sept. 7, 2007; Anemona Hartocollis, *Censored Affidavit Issued in National Security Case*, N.Y. Times, Sept. 26, 2006, *available at* http://bit.ly/eA8dzq; Alison Leigh Cowan, *Judges Question Patriot Act in Library and Internet Case*,

N.Y. Times, Nov. 3, 2005, *available at* http://nyti.ms/htFlyB; Julia Preston, *Judge Allows Peek Into Challenge to Antiterrorism Law*, N.Y. Times, May 13, 2004, *available at* http://nyti.ms/fIGORk; Julia Preston, *Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data*, N.Y. Times, Sept. 30, 2004, *available at* http://bit.ly/eJo97s; Editorial, *The Wrong Balance on Civil Liberties*, N.Y. Times, Sept. 16, 2007, *available at* http://nyti.ms/fMbdCe; Editorial, *Patriot Act Balancing Act: A Ruling On Gag Orders In Terrorism Investigations Falls Short*, N.Y. Times, Sept. 12, 2007, *available at* http://wapo.st/i9QAmY; Editorial, *Judicial Pushback*, Wash. Post, Oct. 11, 2004, *available at* http://wapo.st/dW7y09.

NSLs have again been the subject of extraordinary media attention very recently because (i) the FBI partially lifted its gag order on the Internet service provider that served as plaintiff in *Doe v. Mukasey*; and (ii) the FBI attempted to use a parallel surveillance authority to obtain information from Twitter about individuals alleged to be associated with WikiLeaks. *See, e.g.*, Ellen Nakashima, *Plaintiff Who Challenged FBI National Security Letters Reveals Concerns*, Wash. Post, Aug. 10, 2010, *available at* http://wapo.st/93L49g; Kim Zetter, *'John Doe' Who Fought FBI Spying Freed from Gag Order After 6 Years*, Wired, Aug. 10, 2010, *available at* http://bit.ly/bXJgxV; Scott Horton, *Tales from Stasiland: the Letter that Makes You Disappear*, Harper's Magazine, Aug. 10, 2010, *available at* http://bit.ly/b76uBT; Radio Interview by Bob Garfield with Nicholas Merrill, *On the Media*, National Public Radio, Jan. 21, 2011, *available at* http://bit.ly/emKFqr; Noam Cohen, *Twitter Shines a Spotlight on Secret F.B.I. Subpoenas*, N.Y. Times, Jan. 9, 2011, *available at* http://nyti.ms/gnUG5I; Paul Sonne, *U.S. Asks Twitter for WikiLeaks Data*, Wall St. J., Jan. 10, 2011, *available at* http://on.wsj.com/fxui8J; Erik Hayden, *Twitter Resists WikiLeaks Subpoena*, The Atlantic, Jan. 11, 2011, *available at* http://bit.ly/hgWiPx; Anthony Boadle, *U.S. Orders Twitter to Hand Over WikiLeaks Records*, Reuters, Jan. 8, 2011, *available at* http://reut.rs/eOpSye; Glenn Greenwald, *DOJ Subpoenas Twitter Records of Several WikiLeaks Volunteers*, Salon, Jan. 7, 2011, *available at* http://bit.ly/eM8oTj; Ryan Singel, *Twitter's Response to WikiLeaks Subpoena Should Be the Industry Standard*, Wired, Jan. 10, 2011, *available at* http://bit.ly/gaJ8Rk; Miguel Helft & Claire Cain Miller, *1986 Privacy Law Is Outrun by the Web*, N.Y. Times, Jan. 9, 2011, *available at* http://nyti.ms/hlNMj8, Charlie Savage, *WikiLeaks Allies Fight Order on Twitter Data*, N.Y. Times, Feb. 15, 2011, *available at* http://nyti.ms/hcXAQa.

Virtually all of the stories cited above raise questions, either explicitly or implicitly, about "the government's integrity which affect public confidence." Many of the stories note public concern about the scope of the government's surveillance authorities and the manner in which those authorities are being used. Multiple stories raise questions about the

government's imposition of gag orders on NSL recipients, and some of the stories question whether the gag orders are preventing the public from learning the extent and nature of the government's surveillance activities. Some of the stories raise the question whether the government is over-collecting information and whether the secrecy surrounding the government's use of NSLs is warranted.

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 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 non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).[11]

[11] On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as 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

* * *

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, by cc to Matthew Miller, Director of Public Affairs for DOJ, we are requesting the expedited processing of this request. Notwithstanding Mr. Miller's determination, we look forward to your reply within 20 business days, as the statue requires under section 552(a)(6)(A)(I).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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.
New York, NY 10004

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

JAMEEL JAFFER
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Tel. 212-519-7814
Fax. 212-549-2654

Cc: Matthew Miller
Director, Office of Public Affairs
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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.