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**Re: Request Under Freedom of Information Act
(Expedited Processing & Fee Waiver/Limitation Requested)**

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) seeking the disclosure of the Privacy and Civil Liberties Oversight Board’s report on the implementation of Presidential Policy Directive 28: Signals Intelligence Activities.

I. Background

In January 2014, President Obama issued Presidential Policy Directive 28: Signals Intelligence Activities (“PPD-28”) to “articulate[] principles to guide why, whether, when, and how the United States conducts signals intelligence

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, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s 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.

activities for authorized foreign intelligence and counterintelligence purposes.”² This directive articulated general principles to govern the collection of signals intelligence; imposed certain limits on the use of information collected in bulk; and announced very modest protections related to the retention and dissemination of personal information of non-U.S. persons. In addition, through PPD-28, President Obama encouraged the Privacy and Civil Liberties Oversight Board (“PCLOB”) to provide him “with a report that assesses the implementation of any matters contained within this directive that fall within its mandate.”³

According to the PCLOB’s Fiscal Year 2018 Budget Justification, the PCLOB completed this report (“Report” or “PPD-28 Report”) and submitted it to President Obama in December 2016.⁴ Emails released by the PCLOB confirm that the Board submitted the Report to the National Security Council on December 23, 2016. The PCLOB also delivered two copies of the Report to the Senate Select Committee on Intelligence on January 3, 2017, and it scheduled delivery of the Report to the House Permanent Select Committee on Intelligence that same day.⁵

In February 2017, Senator Ron Wyden wrote to the Office of the Director of National Intelligence (“ODNI”), urging the release of the PPD-28 Report: “According to the 2016 Signals Intelligence Reform Progress Report published by your office, the PCLOB had been engaged in an ‘ongoing review of PPD-28 activities.’ I understand that this review is now complete. Significant portions of the PCLOB’s PPD-28 report are unclassified and should be made

² Press Release, White House Off. of Press Secretary, Presidential Policy Directive—Signals Intelligence Activities: Presidential Policy Directive/PPD-28 (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> (“PPD-28”); *see also* Press Release, White House Off. of Press Secretary, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

³ PPD-28 § 5(c), *supra* note 2; *see also* History and Mission, Privacy & Civil Liberties Oversight Board, <https://www.pclob.gov/about> (accessed July 11, 2018) (“In [PPD-28], the President encouraged the Board to provide him with an assessment of the implementation of any matters contained in the directive that fall within the Board’s mandate.”).

⁴ Privacy & Civil Liberties Oversight Board, *Fiscal Year 2018: Budget Justification* at 13 (2017), [https://www.pclob.gov/library/\(U\)%20PCLOB%20CBJ%20FY%202018%20L.pdf](https://www.pclob.gov/library/(U)%20PCLOB%20CBJ%20FY%202018%20L.pdf).

⁵ Emails between Jen Burita, Legislative & Media Affairs Officer, PCLOB, and staff members of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, U.S. Congress (Jan. 3, 2017), *available at* <https://www.documentcloud.org/documents/3480437-PCLOB-4.html> (obtained from PCLOB via FOIA request by *The Intercept*); *see also* Jenna McLaughlin, *The U.S. Government’s Privacy Watchdog is Basically Dead, Emails Reveal*, *Intercept*, Mar. 3, 2017, <https://theintercept.com/2017/03/03/the-governments-privacy-watchdog-is-basically-dead-emails-reveal>.

available to the public.”⁶ Senator Wyden asked the ODNI to promptly publish “an appropriately redacted version” of the PPD-28 Report and to “review for declassification the portions of the report that are currently classified, so that a more complete copy of the report can be made public at a later date.”⁷ The ODNI responded to Senator Wyden in May 2017, stating that the Report is a “deliberative document” and that the office was “not in a position to publicly release a redacted version of the report.”⁸

The European Union has also called for the release of the Report in connection with the EU–U.S. Privacy Shield, a transatlantic data-sharing agreement. In October 2017, in the European Commission’s first annual review of the functioning of Privacy Shield, the Commission stated: “it was confirmed [by the United States] that the report has been checked from a national security point of view and certain parts are de-classified”; however, the Report is being withheld from the public on the basis of “Presidential privilege.”⁹ The Commission observed that “[g]iven the relevance of PPD-28 for the limitations and safeguards applying to government access for signals intelligence, and thus for the Commission’s regular review of its adequacy assessment, the release of the report by the U.S. authorities would be of particular importance.”¹⁰

Just last week, on July 5, 2018, the European Parliament addressed the continued withholding of the PPD-28 Report in its Resolution on the Adequacy of the Protection Afforded by the EU–U.S. Privacy Shield.¹¹ The resolution called for the complete suspension of the Privacy Shield agreement unless the United States complies with EU law by September 2018. Among Parliament’s

⁶ Letter from Sen. Ron Wyden to Michael Dempsey, Acting Dir. of Nat’l Intelligence (Feb. 15, 2017), <https://www.wyden.senate.gov/imo/media/doc/Letter%20to%20ODNI%20on%20releasing%20PPD-28%20Report.pdf> (“Wyden Letter”); see also ODNI, *DNI Signals Intelligence Reform 2016 Progress Report*, IC on the Record (Jan. 18, 2017), <https://icontherecord.tumblr.com/ppd-28/2016>.

⁷ Wyden Letter, *supra* note 6.

⁸ Letter from Deirdre M. Walsh, Dir. of Legislative Aff., ODNI, to Sen. Ron Wyden (May 10, 2017), <https://www.wyden.senate.gov/imo/media/doc/Letter%20from%20ODNI%20in%20response%20to%20PPD-28%20report%20request.pdf>.

⁹ European Commission, SWD (2017) 344 final, *Commission Staff Working Document Accompanying COM(2017) final* at 31 (October 18, 2017), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605619 (“European Commission Review”).

¹⁰ *Id.*

¹¹ European Parliament, *Resolution on the Adequacy of the Protection Afforded by the EU–US Privacy Shield*, Eur. Parl. Doc. P8_TA-PROV(2018)0315 (July 5, 2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0315+0+DOC+XML+V0//EN&language=EN> (“European Parliament Resolution”); see also Natasha Lomas, *EU Parliament Calls for Privacy Shield to Be Pulled Until US Complies*, TechCrunch, Jul. 5, 2018, <https://techcrunch.com/2018/07/05/eu-parliament-calls-for-privacy-shield-to-be-pulled-until-us-complies>.

concerns is the U.S. government's withholding of the PPD-28 Report "[i]n light of the fact that Presidential Policy Directive 28 is one of the central elements on which the Privacy Shield is built."¹²

The PCLOB's PPD-28 Report is of clear and enormous public importance. Release of the Report is critical to the intense and ongoing debate over the significance of PPD-28's reforms¹³ and the lawfulness of Privacy Shield.¹⁴ The public has a right to know how its personal data is being collected, retained, and disseminated by the U.S. government, particularly in light of the

¹² *Id.* § 6.

¹³ See, e.g., Editorial Board, *The President on Mass Surveillance*, N.Y. Times, Jan. 17, 2014, <https://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html>; Benjamin Wittes, *The President's Speech and PPD-28: A Guide for the Perplexed*, Lawfare (Jan. 20, 2014, 11:02 A.M.), <https://www.lawfareblog.com/presidents-speech-and-ppd-28-guide-perplexed> ("The PPD is an exceedingly-clever document, one that conveys and writes into policy a great deal of values without constraining a great deal of practice."); David R. Shedd, *How Obama Unilaterally Chilled Surveillance*, Wall Street J., Nov. 29, 2015, <https://www.wsj.com/articles/how-obama-unilaterally-chilled-surveillance-1448833262>; Cameron Kerry & Alan Charles Raul, *The Economic Case for Preserving PPD-28 and Privacy Shield*, Lawfare (Jan. 17, 2017, 3:19 P.M.), <https://www.lawfareblog.com/economic-case-preserving-ppd-28-and-privacy-shield> ("This directive has been vital in restoring global trust in US technology and values. And it is central to the European Commission's conclusion in its Privacy Shield decision that US law adequately safeguards EU citizens."); James Bamford, *Donald Trump Has the Keys to the Most Invasive Surveillance State in History*, Foreign Pol., Jan. 6, 2017, <https://foreignpolicy.com/2017/01/06/donald-trump-has-the-keys-to-the-most-invasive-surveillance-state-in-history-nsa-cia>; Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. Times, Jan. 17, 2014, <https://www.nytimes.com/2014/01/18/us/politics/obama-nsa.html> ("Mr. Obama also said he was taking the 'unprecedented step' of extending privacy safeguards to non-Americans[.]"); Cindy Cohn, *Empty Promises on Privacy for Foreigners Abroad in PPD-28*, Electronic Frontier Foundation (Oct. 26, 2016), <https://www.eff.org/deeplinks/2016/10/empty-promises-privacy-foreigners-abroad>; Adam Klein, *Trump, Tech, and the Future of Government Surveillance*, TechCrunch, Feb. 8, 2017, <https://techcrunch.com/2017/02/08/trump-tech-and-the-future-of-government-surveillance>; Coalition Letter to Senate (June 24, 2016), available at <https://cdt.org/files/2016/06/2016-06-30-Intel-Auth-PCLOB-ltr-final.pdf> (letter from coalition of 50 civil society groups, including the ACLU, urging Senate to oppose proposed legislation, in part because it "would limit PCLOB's mandate to protecting only the rights of U.S. persons, thus barring PCLOB from doing much of the [PPD-28] review for which the President called"); Steven Nelson, *Trump White House Plans to Revive Privacy Board*, U.S. News, July 26, 2017, <https://www.usnews.com/news/articles/2017-07-26/trump-white-house-plans-to-revive-privacy-board> (quoting Sen. Wyden: "The administration can't have it both ways—citing the PCLOB's public reports as evidence of effective oversight while burying this [PPD 28] report").

¹⁴ See, e.g., European Parliament Resolution, *supra* note 11; European Commission Review, *supra* note 9; Letter from ACLU to Bruno Gencarelli, Head of Unit, European Commission (June 30, 2017), <https://www.aclu.org/letter/aclu-letter-european-commission-annual-review-eu-us-privacy-shield>; Press Release, Access Now, End the Privacy Shield: Access Now Urges the European Commission to Suspend Privacy Shield Due to Changes in US Policies (Feb. 8, 2017), <https://www.accessnow.org/end-privacy-shield-access-now-urges-european-commission-suspend-privacy-shield-due-changes-us-policies>; Human Rights Watch, *US Surveillance Makes Privacy Shield Invalid* (July 26, 2017, 12:01 A.M.), <https://www.hrw.org/news/2017/07/26/us-surveillance-makes-privacy-shield-invalid>.

PCLOB's duty to "make its reports . . . available to the public to the greatest extent that is consistent with the protection of classified information and applicable law."¹⁵ Thus, the ACLU seeks the release of the PCLOB's PPD-28 Report through this FOIA request.

II. Requested Record

The ACLU seeks the release of the PCLOB's final PPD-28 Report, defined above.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that the Report be provided electronically in its native file format, if possible. Alternatively, the ACLU requests that the record be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the record be provided in separate, Bates-stamped files.

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III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁶ There is a "compelling need" for this record, as defined in the statute, because the information requested is "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

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

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).¹⁷ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 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

¹⁵ 42 U.S.C. § 2000ee(f)(1); *see also History and Mission*, PCLOB, *supra* note 4 ("Twice each year, the Board must report to Congress and the President on its activities, making the reports available to the public *to the greatest extent possible*." (emphasis added)).

¹⁶ *See also* 32 C.F.R. § 1700.12 (ODNI); 6 C.F.R. § 1001.8(h) (PCLOB).

¹⁷ *See also* 32 C.F.R. § 1700.12(c)(2) (ODNI); 6 C.F.R. § 1001.8(h)(1)(ii) (PCLOB).

in disseminating information”).¹⁸

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,¹⁹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²⁰

Similarly, the ACLU publishes reports about government conduct and

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¹⁸ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

¹⁹ *See, e.g.,* Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

²⁰ *See, e.g.,* Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.²¹ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. See <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website 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 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, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained

²¹ See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU- Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

through the FOIA.²² For example, the ACLU’s “Predator Drones FOIA” webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.²³

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.²⁴ Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA’s behavior detection program²⁵; a summary of documents released in response to a

²² See, e.g., Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of ‘Zero-Day’ Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

²³ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

²⁴ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

²⁵ *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

FOIA request related to the FISA Amendments Act²⁶; 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 requests²⁷; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.²⁸

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The record requested is not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

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

The PPD-28 Report is urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁹ Specifically, the requested report relates to the executive branch's implementation of the principles and privacy safeguards set forth in PPD-28. As discussed in Part I, *supra*, PPD-28 and the PCLOB's Report are the subject of widespread public controversy and media attention.³⁰ The Report relates to a matter of exceptional media interest—specifically, the U.S. government's implementation of PPD-28 and its handling of the personal data of Americans and non-Americans.³¹

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested record is in the public interest and because disclosure 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.

²⁶ *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

²⁷ *Statistics on NSL's Produced by Department of Defense*, ACLU, <https://www.aclu.org/other/statistics-nsls-produced-dod>.

²⁸ Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

²⁹ *See also* 32 C.F.R. § 1700.12(c)(2) (ODNI); 6 C.F.R. § 1001.8(h) (PCLOB).

³⁰ *See supra* notes 13, 14.

³¹ *See id.*

§ 552(a)(4)(A)(iii).³² The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the record is not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. *The Request 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 ACLU.*

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the record sought through this Request. Given the ongoing and widespread media attention to this issue, the record sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the PCLOB’s review of the government’s implementation of PPD-28 is publicly available, the record sought is certain to contribute significantly to the public’s understanding.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. *The ACLU is a representative of the news media and the record is not sought for commercial use.*

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the record is not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).³³ The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C.

§ 552(a)(4)(A)(ii)(III)³⁴; *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, 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 the FOIA); *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters,

³² *See also* 32 C.F.R. § 1700.6(b)(2) (ODNI); 6 C.F.R. § 1001.10(n) (PCLOB).

³³ *See also* 32 C.F.R. § 1700.6(i)(2) (ODNI); 6 C.F.R. § 1001.10(h) (PCLOB).

³⁴ *See also* 32 C.F.R. § 1700.2(h)(4) (ODNI); 6 C.F.R. § 1001.2 (PCLOB).

including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).³⁵

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.”³⁶ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

³⁵ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

³⁶ In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days from ODNI and within 20 days from the PCLOB. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 32 C.F.R. § 1700.12(b) (ODNI); 6 C.F.R. § 1001.8(h)(4) (PCLOB).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

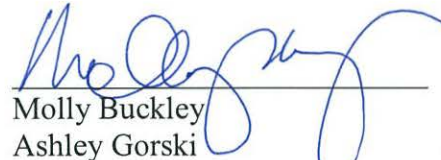
Thank you for your prompt attention to this matter. Please furnish the applicable record to:

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION**

Ashley Gorski
American Civil Liberties Union
125 Broad Street—18th Floor
New York, New York 10004
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I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,



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implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.