

October 16, 2019

VIA CERTIFIED U.S. MAIL

Office of Information Programs and Services
A/GIS/IPS/RL
Department of State, SA-2
Washington, DC 20522-8100

Re: Freedom of Information Act Request

To Whom It May Concern:

We write regarding the use of State Department resources in connection with a speech delivered to the American Association of Christian Counselors on October 11, 2019, by Secretary of State Michael Pompeo. Entitled “Being a Christian Leader,” the speech was—for all intents and purposes—a Christian sermon and was promoted extensively through the State Department’s official Facebook and Twitter accounts, as well as the Department’s website. Under the Establishment Clause of the First Amendment to the U.S. Constitution, government officials are not permitted to use their offices and government resources to proselytize. Thus, we seek further information regarding this matter to determine the full nature of the Department’s constitutional violation and to identify the decisionmakers responsible.

Specifically, this is a request for the production of records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of State, 22 CFR Part 171, on behalf of the American Civil Liberties Union Foundation (ACLU).¹

The ACLU seeks all information related to Secretary Pompeo’s October 11 speech, including, but not limited to, all communications, documents, and other materials reflecting the use of the State Department’s online and technological resources, employee time, or any other government resource (whether monetary or in-kind) in connection with the event.

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 civil rights and civil liberties issues across the country. 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.

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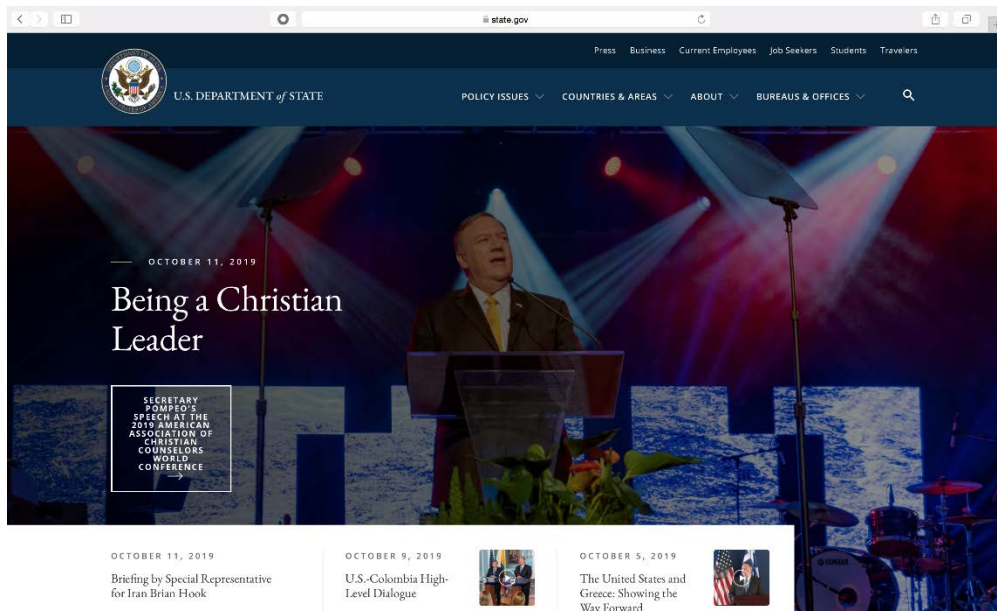
OFFICERS AND DIRECTORS
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I. Background

On October 11, 2019, Secretary Pompeo delivered a speech at a conference of the American Association of Christian Counselors. During the address, entitled “Being a Christian Leader,” Secretary Pompeo repeatedly promoted particular Christian beliefs, quoting scripture and urging attendees to conduct themselves in accordance with his interpretation of biblical tenets.

The State Department used its official social media channels and website to tout and publicize this religious speech and urged the public to watch it.² Before the event, the Department devoted a number of social media posts to advertising it. The Department also streamed the speech live on its official Facebook page and website. Subsequently, officials continued to use official social media accounts to promote the event, and, over the weekend, the Department’s website prominently featured the speech.³ As recently as Monday evening (October 14), visitors to the site were greeted with this image:



II. Definitions

For purposes of this request, the term “materials” includes, but is not limited to, any and all objects, complaints, submissions, writings, drawings, graphs, charts, tables, electronic or computerized data compilations, budgets, accountings, balance sheets or other financial statements, invoices, receipts, minutes, emails, electronic or computerized documents, photographs, audiotapes,

² Andrew Whalen, *State Department’s Promotion of ‘Being a Christian Leader’ on Website Criticized for Potential Violation of Constitution*, Newsweek (Oct. 14, 2019), <https://www.newsweek.com/mike-pompeo-christian-leader-speech-trump-secretary-state-separation-church-1465143>.

³ Examples of social media and website posts are attached to this request.

videotapes, transcripts, drafts, correspondence, notes, notes of oral communications, and non-identical copies, including but not limited to copies with notations.

For purposes of this request, the terms “Department of State,” “State Department,” and “the Department” mean any individual or group of individuals working for the Department of State and any sub-department, office, board, program, group, agency, bureau, administration, and/or other subdivision within the Department of State.

III. Request

Please provide any and all materials from September 1, 2019, until present relating to Secretary Pompeo’s October 11 speech including, but not limited to, materials relating to:

1. Arrangements for Secretary Pompeo to attend the conference and deliver his religious speech.
2. The use of the State Department’s social media accounts (*e.g.*, Facebook, Twitter, YouTube, Instagram, etc.) in promoting or advertising the speech or disseminating a video or transcript of the speech after its conclusion.
3. The use of the State Department’s Facebook page and website to livestream the speech.
4. The inclusion of the speech on the State Department’s website and the decision to feature the speech on the website’s landing page after the speech concluded.
5. The decision to remove any mention of the speech from the landing page of the State Department’s website.
6. The use of State Department employees’ time in connection with arranging, promoting, live streaming, or disseminating the speech.
7. The use of any other State Department or governmental resources (whether monetary or in-kind) in connection with arrangements for the speech, the delivery of the speech, live streaming of the speech, the promotion of the speech, and/or dissemination of the speech after its conclusion.
8. Complaints submitted to the State Department regarding the speech.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests 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.

The ACLU requests that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits. However, to the extent that a response to this request would require the Department of State to provide multiple copies of identical material, the request is limited so that only one copy of the identical material is requested.

In the event you determine that materials contain information that falls within the statutory exemptions to mandatory disclosure, the ACLU requests that such information be reviewed for possible discretionary disclosure. The ACLU also request that, in accordance with 5 U.S.C. § 552(b), any and all reasonably segregable portions of otherwise exempt materials be produced.

To the extent the request is denied, the ACLU expects to receive notice in writing, including a description of the information withheld, the reasons for denial, and any exemptions relied upon.

IV. Application for Waiver or Limitation of Fees

Because we ask that you respond to our request as quickly as possible, and thus do not wish to slow down the agency's response, we do not ask for a fee waiver if the fee pursuant to 5 U.S.C. § 552(a)(4)(A) associated with this request is less than \$500.00.

If, however, the fee exceeds \$500.00, we request that the fee be waived pursuant to 22 CFR § 171.16. The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records 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. § 552(a)(4)(A)(iii). 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 records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). As explained below, disclosure in this case meets both of these tests and 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.") (internal quotation marks omitted).

First, disclosure pursuant to this request is in the public interest. The records pertain directly to the operations and activities of the federal government; the information to be learned from the requested documents is not already public knowledge; and disclosure will contribute to the public good in a significant way because the requested records concern the operations of a federal agency. Moreover, disclosure is not in the ACLU's commercial interest. The ACLU is a "non-profit, non-partisan, public interest organization." *See Judicial Watch*, 326 F.3d at 1310. Additionally, the purpose of the request is to monitor and vindicate legal rights; it is unrelated to business, trade, or profit.

Second, the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). 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" through its website, its print magazine, and other printed and electronic publications. 5 U.S.C. § 552(a)(4)(A)(ii)(III); *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, 290 (D. Conn. 2012) (requesters, including the ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests sent 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 v. DOJ*, 321 F.

Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public-interest group to be “primarily engaged in disseminating 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.” *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 5, 10-15 (finding non-profit public-interest group that disseminated an electronic newsletter and published books to be a “representative of the news media” for purposes of 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).⁴

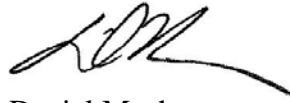
On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁵ As was true in those instances, the ACLU meets the requirements for a fee waiver here. If the fee exceeds \$500.00, it should be waived for the aforementioned reasons. In the event that the fee exceeds \$500.00 and is not waived, please provide us with prior notice so that we can discuss arrangements.

⁴ 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 and 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 v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

⁵ For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, U.S. Customs and Border Protection (CBP) granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 that allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of the Inspector General granted fee-wavier requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

Pursuant to the applicable statutes and regulations, the ACLU expects a determination on this request within twenty working days. *See* 22 CFR §171.11. Thank you for your prompt attention to this matter. Please furnish the applicable records to the undersigned.

Sincerely,



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