



April 22, 2008

Deborah Waller, Paralegal Specialist
Office of the Inspector General
Department of Justice
950 Pennsylvania Avenue, N.W., Room 4726
Washington, DC 20530-0001
Fax: (202) 616-9152

Information Officer
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon, Room 2C757
Washington, DC 20301-1155
Fax: (703) 696-4506

David M. Hardy, Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Department of Justice
935 Pennsylvania Avenue, N.W.
Washington, DC 20535-0001

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

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LEGAL DEPARTMENT
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
F/212.549.2651
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT /
Expedited Processing Requested**

Attention:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, and the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.* The Request is

submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively "ACLU").¹

I. Requested Records

The ACLU seeks all records relating to the Office of the Inspector General ("OIG")'s investigation into the involvement of the Federal Bureau of Investigation ("FBI") in the interrogation of detainees held in Iraq, Afghanistan, and Guantánamo Bay, Cuba ("Guantánamo Bay").

As part of this Request, the ACLU seeks the immediate release of an OIG report describing the FBI's role in interrogations, which is currently under review by the Department of Defense. See Marisa Taylor, *Lengthy Pentagon Review Delays Report on Terrorism Interrogations*, McClatchy Newspapers, Apr. 10, 2008 (describing the Department of Justice ("DOJ")'s OIG report on "whether FBI employees participated in detainee abuse, whether they witnessed or reported incidents of abuse, and how such reports were handled by the bureau"). The OIG report was written in response to allegations made by FBI agents that officials at Guantánamo Bay were using abusive techniques to interrogate detainees; these allegations surfaced as a result of a FOIA request and subsequent lawsuit filed by the ACLU.

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3), and 28 C.F.R. § 16.5(d). There is a "compelling need" for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); see also 32 C.F.R. § 286.4(d)(3)(ii); 28 C.F.R. § 16.5(d)(1)(ii). In addition, the records sought relate to a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A); see also 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a "matter of

¹ The American Civil Liberties Union Foundation is a 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, 501(c)(4) membership organization that educates the public about 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.

widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence”).

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); 32 C.F.R. § 286.4(d)(3)(ii); 28 C.F.R. § 16.5(d)(1)(ii). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. 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)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated 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. The ACLU also 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 website specifically includes features on information obtained through the FOIA. See, e.g., www.aclu.org/torturefoia; www.aclu.org/patriotfoia; www.aclu.org/spyfiles. For example, the ACLU’s “Torture FOIA” webpage, www.aclu.org/torturefoia, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. In addition, the ACLU’s “Patriot Act FOIA” webpage, www.aclu.org/patriotfoia, contains commentary about the ACLU’s FOIA request, press releases relating to documents obtained through the FOIA, and links to reports written by the ACLU from materials obtained through the FOIA. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU produces an in-depth television series on civil liberties. The ACLU plans to analyze, and disseminate to the public the information gathered through the Request.²

² In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives, Public Policy Papers,

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate to the FBI's involvement in the interrogation of detainees in Iraq, Afghanistan, and at Guantánamo Bay. *See* 32 C.F.R. § 286.4(d)(3)(ii)(A). For the same reason the records sought 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).

The FBI's involvement in these interrogations has received extensive media coverage since e-mails and memoranda documenting FBI agents' concern over the use of harsh interrogation techniques were first made public in December of 2004. *See, e.g.,* David Johnston, *More of FBI Memo Criticizing Guantánamo Methods is Released*, N.Y. Times, Mar. 22, 2005; Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. Times, Jan. 6, 2005; Dan Eggen and R. Jeffrey Smith, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Dan Eggen and R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, Wash. Post, Dec. 21, 2004; *U.S. Pledges New Jail Abuse Inquiry*, BBC News, Dec. 21, 2004; Neil Lewis and David Johnston, *New FBI Files Describe Abuse of Iraq Inmates*, N.Y. Times, Dec. 21, 2004; *FBI Reports Guantanamo "Abuse"*, CNN.com, Dec. 8, 2004; Neil Lewis, *FBI Memos Criticized Practices at Guantánamo*, N.Y. Times, Dec. 7, 2004 (reporting the disclosure, as a result of an ACLU lawsuit, of FBI memoranda describing cruel and degrading treatment of detainees by interrogators and detailing a "sharp exchange of views" between FBI and military personnel with regard to such techniques).

Public interest in these documents only grew when a second set of FBI documents was released in April 2005, this time alleging that interrogators had committed abuses which included desecrating the Koran and intentionally interrupting detainees' prayers. *See, e.g.,* Dan Eggen and Josh White, *Inmates Alleged Koran Abuse: FBI Papers Cite Complaints as Early as 2002*, Wash. Post, May 26, 2005; *FBI Records: Detainees Allege Quran Abuse; ACLU Releases Hundreds of Documents Obtained in Lawsuit*, CNN.com, May 26, 2005; *FBI Records Detail Koran Abuse Allegations*, Fox News, May 26, 2005; Brian Knowlton, *Allegations of Abuse of Koran in FBI Record*, Int'l Herald Tribune, May 26, 2005; Neil Lewis and Eric Schmitt, *Inquiry Finds Abuses at Guantánamo Bay*, N.Y. Times, May 1, 2005 (describing the Pentagon's

Department of Rare Books and Special Collections, Princeton University Library. ACLU publications are often disseminated to relevant groups across the country, which then further distribute them to their members or to other parties.

ongoing investigation into the abuses of detainees described by FBI agents). Furthermore, the July 2005 release of an investigative report, written by the Pentagon in response to the FBI allegations of detainee abuse, received significant media attention as well. *See, e.g.,* David Cloud, *Guantánamo Reprimand Was Sought, an Aide Says*, N.Y. Times, July 13, 2005 (describing allegations against Major General Geoffrey Miller which stemmed from the release of the Pentagon report); Bryan Bender, *Guantanamo Probe Finds Violations; Interrogation Reform Urged*, Boston Globe, July 13, 2005; *Officials: Gitmo Inmate Forced to Act Like Dog*, Fox News, July 13, 2005; John Lumpkin, *Investigators Urged Reprimand of Former Guantanamo Bay Commander*, San Diego Union Tribune, July 13, 2005.

The records which the ACLU now seeks relate to an OIG investigation which generated significant public interest when it was announced in January 2005. *See, e.g.,* *Justice Department Probing FBI Claims of Prisoner Abuse*, Agence France Presse, Jan. 15, 2005; Carol Rosenberg, *U.S. Examines FBI's Charges of Prison Abuse*, Miami Herald, Jan. 15, 2005; *New Probe Into FBI Allegations of Camp Abuse*, Taipei Times, Jan. 15, 2005; Eric Lichtblau, *Justice Dept. Opens Inquiry into Abuse of U.S. Detainees*, N.Y. Times, Jan. 14, 2005. Numerous recent press reports have anticipated the release of the OIG report, which suggests that public interest in the records the ACLU now seeks will be comparable to the interest generated by the document releases described above. *See, e.g.,* Marisa Taylor, *Lengthy Pentagon Review Delays Report on Terrorism Interrogations*, McClatchy Newspapers, Apr. 10, 2008 (detailing the delays encountered by the OIG in its attempts to release its report); Emma Schwartz, *Report Due on FBI Treatment of Military Detainees*, U.S. News and World Report, Feb. 8, 2008 (anticipating the release of the OIG report on FBI involvement in interrogations of detainees).

There is continued public interest in the release of documents relating to the treatment of detainees in Iraq, Afghanistan, and at Guantánamo Bay. *See, e.g.,* Dan Eggen, *FBI Reports Duct Taping, 'Baptizing' at Guantanamo*, Wash. Post, Jan. 3, 2007 (announcing the release of FBI reports detailing interrogators' use of coercive and harsh treatment, as well as intentional disruption of detainees' religious rituals, at Guantánamo Bay). In particular, the April 2008 release of a memorandum detailing the legal context for the interrogation of detainees was a subject of significant public interest. *See, e.g.,* Mark Mazzetti, *'03 U.S. Memo Approved Harsh Interrogations*, N.Y. Times, Apr. 2, 2008 (describing the ACLU's release of a Justice Department memorandum which concluded that harsh interrogation techniques were legally permissible); Lara Jakes Jordan, *Pentagon Releases Memo on Harsh Tactics*, Associated Press, Apr. 2, 2008; Evan Perez, *U.S. 2003 Memo Allowed*

'Enhanced' Interrogation, Wall St. J., Apr. 2, 2008; JoAnne Allen, *U.S. Justice Dept. Releases 2003 Interrogation Memo*, Reuters, Apr. 2, 2008.

The requested records are urgently needed within the meaning of the FOIA and the applicable regulations because: (1) the Request concerns a matter of current exigency to the American public, in particular the treatment of detainees in American custody, (2) a delayed response would compromise the American public's recognized interest of assuring that our nation's policies are in compliance with our domestic and international legal obligations, and (3) the Request concerns federal government activity. *See Al-Fayed v. C.I.A.*, 254 F.3d 300, 311 (D.C. Cir. 2001); 5 U.S.C. § 552(a)(6)(E); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(iv). Moreover, the OIG report, a report issued by the government itself, would be particularly helpful in explaining what the government acknowledges is fact in the current debate concerning the treatment of detainees in American custody and will thus contribute significantly to public understanding of the government's operations. *See id.*

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III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records 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. 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.28(d); 28 C.F.R. § 16.11(k).

Numerous news accounts reflect the considerable public interest in the records we seek. *See* cited articles, *supra*, section II. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the DoD and the FBI. *See* 32 C.F.R. § 286.28(d); 28 C.F.R. § 16.11(k)(1)(i). Moreover, disclosure is not in the ACLU's commercial interest. 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.'" (citation omitted)); OPEN Government of 2007, Pub.L. No. 110-175, 121 Stat. 2524, § 2 (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 that Act").

We also request a waiver of search, and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 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); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. §§ 16.11(d), 16.11(c)(3) (search and review fees shall not be charged to “representatives of the news media”).

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); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *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 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)³; *see supra*, section II.

* * *

Pursuant to applicable statute and regulations, we expect the determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 286.4(d)(3); 28 C.F.R. § 16.5(d)(4).

³ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, 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 United States 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 submitted that month 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. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies – the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice – did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of 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.

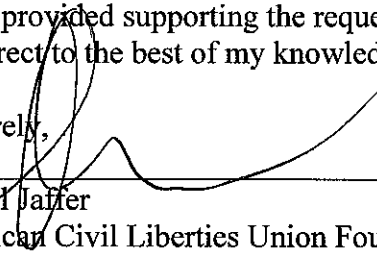
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Jameel Jaffer, Director, National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 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.

Sincerely,



Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7814