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Transmitted Via Facsimile and Overnight Mail

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**AMERICAN CIVIL  
LIBERTIES UNION**

TECHNOLOGY AND LIBERTY  
PROJECT

PLEASE RESPOND TO:  
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RICHARD ZACKS  
TREASURER

Director, Departmental Disclosure & FOIA  
The Privacy Office  
Department of Homeland Security  
Arlington, VA 22202

Re: Freedom of Information Act Request

Attention:

This is a request pursuant to the Freedom of Information Act (5 U.S.C. § 552) for all agency records<sup>1</sup> held by Customs and Border Patrol and the Department of Homeland Security related to the Automated Targeting System which was the subject of discussion in Privacy Act of 1974: System of Records; Automated Targeting System, DHS6-2006-0060, 71 Fed. Reg. 64,543. Individual requests have been sent to each of the agencies addressed above.

Requester American Civil Liberties Union is a non-profit, non-partisan, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of such legislation, and lobbies legislators directly and through its members concerning such legislation. Requester American Civil Liberties Union Foundation is a separate 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.

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<sup>1</sup> The term records includes but is not limited to letters, correspondence, tape recordings, notes, data, memoranda, reports email, computer source and object code, technical manuals, technical specifications, or any other materials.

## I. LIMITATION OF PROCESSING FEES

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by ... a representative of the news media ...”).

The ACLU is a “representative of the news media” within the meaning of the statute because it is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Electronic Privacy Information Ctr. v. Dep’t of Defense*, 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 news media”); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group “primarily engaged in disseminating information”).

Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. The ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials. Through the ACLU’s public education department, such material is made available to everyone, including to 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 web site: <http://www.aclu.org>. The web site addresses civil rights and civil liberties issues in depth and contains many thousands of documents relating to these issues. The website includes features on information obtained through the FOIA. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail.

In addition to the national ACLU offices in New York and Washington, D.C., there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material through a variety of means including their own websites, publications, and newsletters. In addition, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University.

The ACLU intends to disseminate the information gathered by this

request through these channels.<sup>2</sup>

## II. WAIVER OF PROCESSING FEES

The ACLU additionally requests a waiver of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”). Disclosure in this case meets the statutory criteria 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.’”). Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.<sup>3</sup>

Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of government conduct. Note the considerable amount of press coverage regarding this issue, (*Homeland Security's Automated Program of Risk Assessments for Travelers: Why It Fails to Sufficiently Protect Individual Privacy*, FIND LAW, December 7, 2006, *DHS Passenger Scoring Illegal?*, WIRED NEWS, December 7, 2006, *ACLU Urges U.S. to Stop Collection of Traveler Data*, WASHINGTON POST, December 2, 2006, *US Plans to Screen All Who Enter, Leave Country*, WASHINGTON POST, November 30, 2006, *Feds Rate Travelers for Terrorism*, ASSOCIATED PRESS, November 30, 2006) which is a clear indication that disclosure is likely to contribute significantly to public understanding of government operations or activities. Any delays in responding to this request for records would compromise a significant recognized interest to and throughout the American general public.

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<sup>2</sup> The ACLU does not seek disclosure to further a commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

<sup>3</sup> For example, three separate components of DOJ – 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 fees for a FOIA request submitted in August 2002 for records concerning the FBI’s use of the Patriot Act’s surveillance provisions. Neither the DOJ nor DOS charged fees for FOIA requests submitted in October 2003 and June 2004 for records concerning the treatment of detainees held by the U.S. in Iraq, Afghanistan, and at Guantanamo Naval Base.

As a nonprofit 501(c)(3) organization and “representative of the news media,” the ACLU is well situated to disseminate information it gains from this request. As discussed in Section I, the ACLU has played an active role in educating the public about civil liberties issues by disseminating the information it obtains through the FOIA. The ACLU has also played a pivotal role in disseminating information about the civil liberties implications of post-September 11<sup>th</sup> policies.<sup>4</sup>

### III. EXPEDITED PROCESSING REQUEST

Expedited processing is warranted because there is “[a]n urgency to inform the public about an actual or alleged federal government activity” and the Request is “made by a person primarily engaged in disseminating information.” § 552(a)(6)(E)(v).

The ACLU is “primarily engaged in disseminating information” for the same reasons it is a “representative of the news media,” as discussed in Sections I and II.

This request clearly relates to activity of the federal government and to the personal data and constitutionally protected travel of Americans.

There is an urgency to inform the public about the federal government activity at issue for at least two reasons. First, although it has apparently been operating for several years, the extent of this program was only made public in the last two weeks. Disclosing the full extent of the program is crucial for determining if improper or illegal behavior has occurred and limiting the harm to the rights of Americans.

Secondly, access to records will likely provide information vital to educating the public and informing the ongoing debate about the program.

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

Barry Steinhardt  
Director, Technology & Liberty Program  
American Civil Liberties Union  
915 15<sup>th</sup> NW  
Washington, DC 20004

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<sup>4</sup> As discussed in footnote 1, the records requested are not sought for commercial use, and the requesters plan to disseminate the information disclosed as a result of this FOIA request through the channels described in Section I. Once again, the ACLU will make any information disclosed as a result of this FOIA available to the public at no cost.

We affirm that the information provided supporting the request for expedited processing is true and correct to the best of our knowledge and belief.

Sincerely,

Barry Steinhardt  
Director, Technology and Liberty Program

**AMERICAN CIVIL  
LIBERTIES UNION  
FOUNDATION**