



March 16, 2005

Margaret P. Grafeld
Information and Privacy Coordinator
U.S. Department of State
SA-2, 515 22nd Street, NW, 5th Floor
Washington, DC 20522-6001

Visa Services
U.S. Department of State
2401 E Street, NW, Room L-703
Washington, DC 20522

Tony Kendrick
Director, Departmental Disclosure
Department of Homeland Security
Room 3310-15
Washington, D.C. 20528

Magda S. Ortiz
Director, FOIA/PA Program
Bureau of Citizenship and Immigration Services
111 Massachusetts Avenue, N.W., 2nd Floor
Washington, D.C. 20529

John A. Milne
FOIA/Customer Satisfaction Unit
Office of Field Operations
Bureau of Customs and Border Protection
1300 Pennsylvania Avenue, N.W., Room 5.5C
Washington, D.C. 20229

Melanie Ann Pustay
Deputy Director
Office of Public Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW
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/212.549.2631
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

Patricia D. Harris
Management Analyst
FOIA/PA Mail Referral Unit
Department of Justice
Room 1070, National Place Building
Washington, DC 20530-0001

David M. Hardy
Chief, Freedom of Information-Privacy Acts Section
Records Management Division
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

Scott A. Koch
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

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

To Whom It May Concern:

This letter constitutes a request by the American Civil Liberties Union and the American Civil Liberties Foundation (collectively "ACLU") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and under the implementing regulations of the Department of State ("DOS"), 22 C.F.R. § 171, Department of Homeland Security ("DHS"), 6 C.F.R. § 7, Department of Justice ("DOJ"), 28 C.F.R. § 16, and the Central Intelligence Agency ("CIA"), 32 C.F.R. § 1900.

This request ("Request") seeks records concerning the use of the immigration laws to exclude scholars and other prominent individuals from the United States based on their political views and/or expressive or associational activity.

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.

I. RECORDS REQUESTED

The ACLU seeks disclosure of any and all records¹ created after October 26, 2001, concerning:

1. The use or contemplated use of USA PATRIOT Act, Pub. Law No. 107-56 § 411(a)(1)(A)(iii), codified at 8 U.S.C. § 1182(a)(3)(B)(i)(VI) (hereinafter “the ideological exclusion provision”),² including, but not limited to:
 - a. Records concerning the use, waiver, or contemplated use or waiver of the ideological exclusion provision by a consular official, an immigration official at a port of entry, a DOS official, a DHS official, or any other government employee or official.
 - b. Records indicating the names, nationalities, and professions of the individuals who have been excluded³ under the ideological exclusion provision.
 - c. Notifications of the potential applicability of the ideological exclusion provision sent by a consular official or by an

¹ The term “records” as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

² The ideological exclusion provision states that an alien is inadmissible if he or she has used a “position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activity.”

³ The term “exclude” as used herein refers to the denial of a visa or petition, the denial of admission, or the revocation of a visa or petition.

- immigration official at a port of entry, to the Secretary of State or Department of Homeland Security.
- d. Records documenting consultation between a consular official, immigration official at a port of entry, and/or the Secretary of State and any component or official of DHS, DOJ, FBI, or CIA regarding the use, waiver, or contemplated use or waiver of the ideological exclusion provision.
 - e. Records containing guidance, policies, or procedures for the use, waiver, or contemplated use or waiver of the ideological exclusion provision. Such records would include records regarding the entry or retrieval of data relevant to the use, waiver, or contemplated use or waiver of the ideological exclusion provision into or from an electronic or computer database such as the State Department's Automated Visa Look-Out System, the Interagency Border Inspection System, or the Nonimmigrant and Immigrant Lookout System.
 - f. Statistical data or statistical reports regarding the use, waiver, or contemplated use or waiver of the ideological exclusion provision including the number of times the provision has been used to exclude an individual from the United States.
2. Records concerning the use or contemplated use of any of the security or foreign policy inadmissibility grounds⁴ to exclude individuals from the United States based on, or based in part on, their political views and/or expressive or associational activity.
 3. Records concerning the use of or contemplated use of Immigration and Naturalization Act § 212(a)(3)(C)(iii), codified at 8 U.S.C. § 1182(a)(3)(C)(iii).⁵

⁴ Immigration and Naturalization Act ("INA") § 212(a)(3)(A)-(F), codified at 8 U.S.C. § 1182(a)(3)(A)-(F).

⁵ INA § 212(a)(3)(C)(iii), codified at 8 U.S.C. § 1182(a)(3)(C)(iii) states that an alien cannot be excluded "because of the alien's past, current, or expected beliefs, statements or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest."

4. Records concerning notifications made pursuant to INA § 212(a)(3)(C)(iv), codified at 8 U.S.C. § 1182(a)(3)(C)(iv).⁶

II. 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 . . .”); *see also* 22 C.F.R. § 171.15(c) (DOS); 6 C.F.R. § 5.11(d) (DHS); 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(d)(1) (DOJ); 32 C.F.R. § 1900.13 (CIA).

The ACLU is a “representative of the news media” within the meaning of the statute and regulations 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. *See, e.g.,*

⁶ INA § 212(a)(3)(C)(iv), codified at 8 U.S.C. § 1182(a)(3)(C)(iv) states that if a determination is made pursuant to INA § 212(a)(3)(C)(iii), “the Secretary of States must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.”

www.aclu.org/patriotfoia; www.aclu.org/torturefoia. 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.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The ACLU intends to disseminate the information gathered by this Request through these channels.⁷

III. 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.”), DOS regulation 22 C.F.R. § 171.17(a) (fees “shall be waived or reduced where it is determined that disclosure 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”), DHS regulation 6 C.F.R. § 5.11(k)(1)(i)-(ii) (same), DOJ regulation 28 C.F.R. § 16.11(k)(1)(i)-(ii) (same), and CIA regulation 32 C.F.R. § 1900.13(b)(2) (same).

Disclosure in this case meets the both the statutory and regulatory 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

⁷ 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.

ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁸

Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of government conduct. Specifically, it will further public understanding of the government's use of the immigration laws to exclude individuals from the U.S. because of their perceived political views and expressive or associational activity. This type of government activity implicates important First Amendment rights of United States citizens. This type of activity also implicates the integrity of the political process, which depends on the free flow of ideas.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

According to news reports, the government has recently excluded foreign scholars from the U.S. because of their political views. For example, news reports indicate that Tariq Ramadan, a prominent Swiss scholar, was excluded on this basis. The public has a legitimate interest in learning whether individuals are being excluded from the U.S. because of their political views and what policies govern the executive's use of the immigration laws for this purpose.

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 11th policies.⁹

⁸ 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.

⁹ As discussed in footnote 5, 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 II. Once again, the ACLU will make any information disclosed as a result of this FOIA available to the public at no cost.

IV. 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.” 6 C.F.R. § 5.5(d)(1)(ii) (DHS); *see also* 28 C.F.R. § 16.5(d)(ii) (DOJ); 22 C.F.R. § 171.12(b)(2) (DOS); 32 C.F.R. § 1900.34(c)(2) (CIA).

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

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

This Request clearly relates to activity of the federal government. The request concerns the government’s increasing use of the immigration laws to exclude individuals from the U.S. because of their political views and expressive or associational activity. *See, e.g. Nicaraguan Bows Out of Teaching Post*, Boston Globe, Mar. 8, 2005 (reporting on exclusion of Dora Maria Telléz, a Nicaraguan scholar who had been slated to teach at Harvard University); Duncan Campbell, *US Bars Nicaragua Heroine as ‘Terrorist’*, Guardian, Mar. 4, 2005 (same); Peter Slevin, *Lacking Visa, Islamic Scholar Resigns Post at Notre Dame*, Wash. Post, Dec. 15, 2004, at A6 (reporting that Tariq Ramadan was excluded under “an anti-terrorism law” and that the details behind the visa revocation “remain confidential”); Nina Bernstein, *U.S. Denies Cuban Scholars Entry to Attend a Meeting*, N.Y. Times, Oct. 1, 2004, at A15 (reporting that among those denied entry to the U.S. were “poets, sociologists, art historians and economists, among them a professor who was a visiting scholar at Harvard last fall and others who had frequently lectured at leading American Universities”).

There is an urgency to inform the public about the federal government activity at issue for at least three reasons. First, the subject matter of this Request may implicate ongoing violations of constitutional rights. Often, individuals who are excluded by the government because of their political beliefs are prominent foreign scholars who have been invited to speak or teach in the United States by academic institutions or associations. The exclusion of such individuals infringes upon the First Amendment rights of U.S. citizens and residents. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 396 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (noting that the First Amendment “was fashioned to assure unfettered interchange of ideas,” and is the foundation of “a profound national commitment to the principle that

debate on public issues should be uninhibited, robust, and wide-open”). Requests for information bearing upon potential Constitutional violations require an immediate response so that ongoing violations cease, and future violations are prevented.

Second, the use of the immigration laws to exclude individuals because of their political views may have a chilling effect on the exercise of First Amendment rights. See *Abourezk v. Reagan*, 785 F.2d 1043, 1052 n.8 (1986) (“In the first amendment area, such “chill” has long been recognized by the courts as a harm independent from the actual application” of a law.); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (“It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.”). The chilling effect may be exacerbated by the fact that the public has little information about what policies govern the executive’s use of the immigration laws to exclude aliens because of their political beliefs. Individuals abroad may be deterred from applying for a visa for fear they will be excluded. U.S. academic institutions and professional associations may similarly decline to invite controversial scholars for fear their visa applications will be denied or for fear that they will face unnecessary and embarrassing ideological scrutiny by the U.S. government.

Third, the Request pertains in part to a controversial provision of the Patriot Act, a statute that has prompted intense public debate and media coverage. See, e.g., *ACLU v. DOJ*, 321 F.3d 24, 31 (D.D.C. 2004) (noting that “ever since it was proposed, the Patriot Act has engendered controversy and debate,” and holding that FOIA request for information about certain Patriot Act provisions warranted expedited processing) (quotations and citations omitted); Eric Lichtblau, *Gonzales Lays Out His Priorities at Justice Dept.*, N.Y. Times, Mar. 1, 2005 (reporting that one of Attorney General Gonzalez’s top priorities is to “extend federal antiterrorism powers under the USA Patriot Act,” and noting that Gonzalez “affirmed the Bush administration’s insistence in recent months that Congress move quickly to extend . . . the Patriot Act”); Eric Lichtblau, *Bush Aide Calls Criticism of Patriot Act Uninformed*, N.Y. Times, Oct. 27, 2004, at A18 (describing escalating debate between government officials about provisions of the Patriot Act); Gail Russell, *House, Senate Diverge on 9/11 Response*, Christian Sci. Monitor (Boston), Sept. 27, 2004, at USA-3 (describing debate over laws proposed to expand or supplement Patriot Act provisions); Bob Egelko, *Bush, Kerry Divided on Scope of Patriot Act*, S.F. Chron., Sept. 20, 2004, at A1 (describing measures legislators and members of the Bush administration have proposed to amend, expand, repeal, or renew Patriot Acts provisions); Tom Maertens, *Patriot Act*

Ineffective and Needlessly Tosses Aside Constitutional Protections, St. Paul Pioneer Press (Minn.), Aug. 19, 2004, at 15A (reporting that polls show “few Americans know what is in the act or that it vastly increases the government’s power over American citizens”); Editorial, *Patriot Act*, Phila. Inquirer, Aug. 7, 2004, at A9 (reporting that 9/11 commission called for “a full and informed debate on the Patriot Act”); Editorial, *More Patriot Act Games*, Wash. Post, July 18, 2004, at B6 (criticizing Justice Department report on implementation of Patriot Act for not “offer[ing] the sort of systematic data on the frequency of using the new powers that will be necessary to assess the act comprehensively”); 2004 State of the Union Address, Jan. 20, 2004, available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (President Bush remarked that “[k]ey provisions of the Patriot Act are set to expire next year” and called for renewal of the Act).¹⁰ As Congress

¹⁰ Department of Justice regulations also provide for expedited processing where the information sought relates 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). This request clearly meets that standard. See, e.g., Kathleen Burge, *Nicaraguan Bows Out of Teaching Post*, Boston Globe, Mar. 8, 2005 (reporting on exclusion of Dora Maria Telléz); Duncan Campbell, *US Bars Nicaragua Heroine as ‘Terrorist’*, Guardian, Mar. 4, 2005 (discussing exclusion of Dora Maria Telléz); Stephanie Nebehay, *Islamic scholar, visa withheld, gives up U.S. post*, Reuters News, Dec. 14, 2004 (reporting on Ramadan’s resignation and noting that the U.S. government had invoked the Patriot Act in revoking the visa); *Swiss Muslim Scholar Denied US Visa Resigns Notre Dame Job*, Dow Jones International News, Dec. 14, 2004 (reporting on the exclusion of Ramadan and noting that the visa revocation “sparked protests from at least four U.S. scholars’ groups, led a United Nations-sponsored institution to issue an academic freedom alert, and inspired appeals on Ramadan’s behalf from some Jewish groups”); Caryle Murphy, *For Muslims, A Beleaguered Feeling*, Wash. Post, Oct. 15, 2004, at B1 (reporting on the perceived unwarranted targeting of Muslims, citing as an example Tariq Ramadan’s exclusion); Don Wycliff, *Constricting Our Freedoms*, Chi. Trib., Oct. 14, 2004, at 27 (criticizing DHS decisions to exclude Tariq Ramadan and Yusuf Islam without “explain[ing] to the press or the public”); Doug Cassel, *Peace of Mind’s Price*, Chi. Trib., Oct. 10, 2004, at 1 (reporting on Ramadan’s exclusion and lamenting the exclusion of an important scholar); Shelley Murphy, *Pop Singer is Forced to Leave U.S.*, Boston Globe, Sept. 23, 2004, at B1 (reporting on exclusion of Yusuf Islam); *Muslim Scheduled to Teach at Notre Dame Has Visa Revoked*, L.A. Times, Aug. 25, 2004, at A23 (reporting on Ramadan’s exclusion); Andrea

determines whether parts of the Act should be amended or repealed, the public is entitled to basic information concerning the government's use of the Act over the last three years.

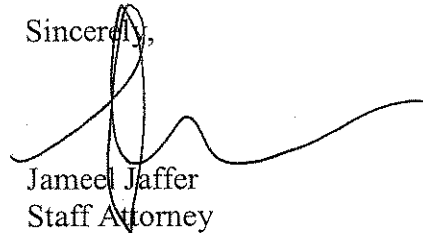
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Jameel Jaffer
Staff Attorney
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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
Staff Attorney
American Civil Liberties Union

Rodriguez, *Cubans Denied Visas to Attend Grammys*, Associated Press, Feb. 5, 2004 (reporting on exclusion of five "Cuban acts nominated for Grammy Awards"); Burton Bollag, *Closing the Gates: A Cuban Scholar Shut Out*, Chronicle of Higher Education, Apr. 11, 2003, at p.16 (discussing exclusion of Cuban scholars from a conference in Dallas). The suggestion that individuals are being excluded for speech that could be protected by the First Amendment raises questions about government integrity and adversely affects the public's confidence in the fair application of the immigration laws.