



September 20, 2017

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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 request for records pertaining to the factual basis for, and process by which, the Equal Employment Opportunity Commission (“EEOC”) and the Office of Budget and Management (“OMB”) determined to stay the enforcement of the pay data component of the revised EEO-1 form.

I. Background

The Equal Pay Act of 1963 prohibits gender-based pay discrimination.² Likewise, Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in wages and other terms, conditions, and privileges of employment.³ Yet the gender pay gap—under which women working full time are paid only 80.5 percent of the

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.

² See 29 U.S.C. § 206(d).

³ See 42 U.S.C. § 2000e, *et seq.*

median annual wages paid to white men, and women of color are paid even less—is a persistent problem.⁴ As the former Chair of the EEOC explained, “[p]ay discrimination goes undetected because of a lack of accurate information about what people are paid.”⁵ In other words, it is impossible to establish that pay discrimination has occurred without access to actual pay data. Yet workers have very little information about how their pay compares to the pay of their coworkers. And EEOC officials had previously lacked access to comprehensive pay data from employers in order to gain a better understanding of pay practices and trends.⁶

To address this problem, on September 29, 2016, the EEOC adopted a new requirement that private employers with 100 or more employees and federal contractors with 50 or more employees submit pay data annually. The data were to be included on the existing Employer Information Report (EEO-1 form) that employers are already required to file each year. The form consists of 10 broad occupational categories, such as senior officials and managers, service workers, and technicians, and requires employers to provide a breakdown of their workforce by race, gender, and ethnicity for each category.⁷ The requirement added a new pay data component to the form, requiring covered employers to provide W-2 earnings and hours worked for each occupational category broken down by race, gender, and ethnicity. Employers were to file the new form for the first time on March 31, 2018.⁸

The requirement was the result of a rigorous, multi-year deliberative process and was supported by extensive substantive evidence. In 2010, the EEOC joined President Obama’s National Equal Pay Task Force, which sought to improve enforcement of federal laws prohibiting pay discrimination.⁹ At the Task Force’s recommendation, the EEOC engaged the National Academy of Sciences

⁴ See, e.g., Grace Donnelly, *The Gender Pay Gap Narrowed in 2016. But Only by 2 Cents.*, *Fortune* (Sept. 13, 2017), <http://fortune.com/2017/09/13/gender-pay-gap-2016/>.

⁵ See Danielle Paquette & Drew Harwell, *Obama targets gender pay gap with plan to collect companies’ salary data*, *Wash. Post*, (Jan. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/29/obama-targets-gender-pay-gap-with-plan-to-collect-salary-data-from-big-businesses/?utm_term=.90b8a2420102.

⁶ Claire Cain Miller, *Trump Reverses a Rule Aimed at Equalizing Pay*, *N.Y. Times*, Sept. 1, 2017, at B2.

⁷ See EEOC, *Equal Employment Opportunity Employer Information Report EEO-1, Standard Form 100*, Rev. Jan. 2006, <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2-2.pdf>.

⁸ See, e.g., Agency Information Collection Activities; Notice of Submission for OMB Review; Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 135 (July 14, 2016); Danielle Paquette, *The Trump administration just halted this Obama-era rule to shrink the gender wage gap*, *Wash. Post*, (Aug. 30, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/30/the-trump-administration-just-halted-this-obama-era-rule-to-shrink-the-gender-wage-gap/?utm_term=.54e2599cbe0b; James F. Peltz, *White House stops plan for companies to report worker pay by race and gender*, *L. A. Times*, (Aug. 30, 2017), <http://www.latimes.com/business/la-fi-pay-data-rollback-20170830-story.html>.

⁹ See Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 20 (Feb. 1, 2016).

to study whether and how to implement a pay data collection.¹⁰ It also commissioned an independent Pilot Study to identify the most efficient means to collect pay data.¹¹ In March 2012, the EEOC held a two-day meeting with employer representatives, statisticians, and human resources experts.¹² While the administration originally proposed creating a new form to collect wage and hour data through the Office of Federal Contract Compliance Programs (OFCCP), in response to employer feedback about burdens that would arise from a completely new data collection form, the EEOC eventually proposed using the existing EEO-1 form.¹³

The EEOC then published two versions of the proposed EEO-1 for public comment, receiving thousands of comments from individual members of the public, employers, Members of Congress and others.¹⁴ It held a public hearing on March 16, 2016, during which it heard from 15 witnesses representing employers, employees, and academics.¹⁵ It formally submitted the proposed revisions to the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) for consideration and approval under the Paperwork Reduction Act.¹⁶

After this exhaustive process, the EEOC concluded that the proposed pay data collection would “enhance and increase the efficiency” of its enforcement of the Equal Pay Act while also “facilitating employer self-evaluation and voluntary compliance” with the law.¹⁷

On September 29, 2016, then-EEOC Chair Jenny Yang formally announced the decision: “Collecting pay data is a significant step forward in addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal anti-discrimination laws.”¹⁸ The statement explained that in order to address privacy concerns, the EEOC would not disclose EEO-1

¹⁰ *Id.*; 81 Fed. Reg. 135, *supra* note 8; National Research Council, *Collecting Compensation Data from Employers* (2012).

¹¹ *See* 81 Fed. Reg. 20, *supra* note 9; Sage Computing Inc., *Final Report to Conduct a Pilot Study for How Compensation Earnings Data Could be Collected From Employers on EEOC's Survey Collection Systems (EEO-1, EEO-4, and EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5)* (2015), <https://www.eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf>.

¹² 81 Fed. Reg. 20, *supra* note 9.

¹³ *Id.*

¹⁴ *See* Press Release, EEOC, EEOC Announces Second Opportunity for Public to Submit Comments on Proposal to Collect Pay Data (July 13, 2016); Press Release, EEOC, EEOC to Collect Summary Pay Data (Sept. 26, 2016) [hereinafter EEOC to Collect Summary Pay Data]; 81 Fed. Reg. 135, *supra* note 8.

¹⁵ 81 Fed. Reg. 135, *supra* note 8.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ EEOC to Collect Summary Pay Data, *supra* note 14. *See also* Paquette & Harwell, *supra* note 5 (quoting Chairwoman Yang as saying “[c]ollecting this pay data would help fill a critical void we need to ensure American workers receive fair pay for their work.”).

data for a specific employer. Instead, it would “publish[] large-scale aggregated EEO-1 data in a way that fully protects employer confidentiality and employee privacy.”¹⁹

After President Trump took office in January, 2017, he replaced Chairwoman Yang with Acting Chairwoman Victoria Lipnic. Employer groups including the Equal Employment Advisory Council (“EEAC”), the U.S. Chamber of Commerce (“Chamber”), and the Business Roundtable soon requested that the pay data reporting requirements be revoked, rescinded, reconsidered or stayed.²⁰ The President’s daughter, Ivanka Trump, whose White House portfolio as an assistant to the President includes women’s economic empowerment, also met with “experts” who believed that the requirement would not work as intended.²¹

On August 29, 2017, OIRA, which had initially approved the EEO-1 pay data reporting requirements under the Paperwork Reduction Act, abruptly imposed an immediate stay. In a memo to EEOC Acting Chair Lipnic, Neomi Rao, the Administrator of OIRA, announced: “After careful consideration and consultation with the [EEOC] and in accordance with the Paperwork Reduction Act (PRA) ... the [OMB] is initiating a review and immediate stay of the effectiveness of those aspects of the EEO-1 form that were revised on September 29, 2016.”²²

Although the memo states that OMB “believe[s] that continued collection of this information is contrary to the standards of the PRA,” it provides virtually no reasoning to support that decision.²³ The memo states that “OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.”²⁴ But it provides literally no explanation of how or why it reached that conclusion. Ms. Rao also stated that the requirement was “enormously burdensome,” and the Administration “[didn’t] believe it would

¹⁹ EEOC to Collect Summary Pay Data, *supra* note 14.

²⁰ See, e.g., Emily Peck, *With Ivanka Trump’s Blessing, White House Ditches Equal Pay Rule*, Huffington Post (Aug. 30, 2017), http://www.huffingtonpost.com/entry/ivanka-trump-white-house-equal-pay_us_59a6c33be4b063ae34da471f.

²¹ See Paquette, *supra*, note 8; Betsy Klein, *Ivanka Trump supports ending Obama-era equal pay data collection rule*, CNN (Sept. 1, 2017), <http://www.cnn.com/2017/08/31/politics/white-house-ivanka-trump-equal-pay-data/index.html>.

²² See Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs to Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission (Aug. 29, 2017) [hereinafter OIRA Memo]; see also Abigail Hess, *Why Trump suspended an Obama administration wage gap initiative*, CNBC Make It (Sept. 13, 2017), <https://www.cnbc.com/2017/09/12/why-trump-suspended-an-obama-administration-wage-gap-initiative.html>.

²³ See OIRA Memo, *supra* note 22.

²⁴ *Id.*; see also Christina Cauterucci, *Ivanka Just Helped Make It Harder for “Women Who Work” to Expose Wage Discrimination*, Slate (Aug. 30, 2017), http://www.slate.com/blogs/xx_factor/2017/08/30/ivanka_trump_finally_tells_the_truth_she_care_s_more_about_business_interests.html.

actually help us gather information about wage and employment discrimination.”²⁵

Ivanka Trump released a similar statement: “Ultimately, while I believe the intention was good and agree that pay transparency is important, the proposed policy would not yield the intended results,” Ms. Trump said.²⁶

The Administration’s new position largely “tracks” that of the U.S. Chamber of Commerce in a letter it sent to OMB Director Mick Mulvaney: “This is a huge additional cost for companies of all sizes, yet has no accompanying benefit, or protections for the confidentiality of the information to be gathered under the revised government form.”²⁷

Neither the EEOC nor OMB has explained what caused the abrupt policy change. The OMB memo says nothing about what specific privacy or confidentiality issues it was concerned with, or how those issues were implicated by the EEO-1. The memo does not explain how, if at all, the EEOC was involved in the decision. And neither the EEOC nor OMB have explained what made the data go from being “a significant step forward in addressing discriminatory pay practices,” in September 2016 to something that “lack[ed] practical utility,” and was “unnecessarily burdensome,” in August 2017.

Most importantly, in contrast to the six-year public process that led to the new EEO-1 requirement, the OMB (and perhaps the EEOC) reached the decision to stay the requirement over a period of weeks or months, and entirely behind closed doors. There was no formal public process, and it is unclear whom the administration met with to reach its decision. To provide the American public with information about this abrupt change in policy, the ACLU seeks such information through this FOIA request.

II. Requested Records

The ACLU requests that the office of the Acting Chairwoman Victoria Lipnic produce the following records:

Any and all records, from January 20, 2017 to the present, in the possession of the office of the Acting Chairwoman related to reviewing, reconsidering, rescinding, revoking, or staying the EEO-1 pay data requirement, including but not limited to memoranda, correspondence, email, voicemails, calendar entries (including invitations), meeting minutes, performance reviews,

²⁵ Tedd Mann, *White House Won’t Require Firms to Report Pay by Gender, Race*, Wall St. J., (Aug. 29, 2017), <https://www.wsj.com/articles/white-house-wont-require-firms-to-report-pay-by-gender-race-1504047656>.

²⁶ See, e.g., Emily Jane Fox, *Ivanka Trump Blesses Move to Scrap Equal-Pay Initiative*, Vanity Fair (Aug. 30, 2017), <https://www.vanityfair.com/news/2017/08/ivanka-trump-equal-pay-initiative>; Peck, *supra* note 20.

²⁷ Mann, *supra* note 25.

drafts, notes, writings, electronic or computerized data compilations, studies, reports, budgets, electronic or computerized documents, transcripts, drafts, correspondence, notes of oral communications, and non-identical copies, including but not limited to copies with notations. This request includes, but is not limited to, all:

1. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories addressing actual or potential costs or burdens that would be imposed by the EEO-1 pay data collection.
2. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories addressing the actual or potential practical utility or lack thereof gained from the EEO-1 pay data collection.
3. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories addressing the actual or potential risk to privacy or confidentiality posed by the EEO-1 pay data collection.
4. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories regarding whether continued collection of EEO-1 pay data would be contrary to the standards of the Paperwork Reduction Act.
5. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories supporting the conclusion that the EEO-1 pay data collection would not actually help the EEOC or the Administration gather information about wage and employment discrimination.
6. Documents, data, reports, opinions, evaluations, memoranda, emails or advisories supporting the conclusion that the EEO-1 pay data collection would not yield the intended results, including greater pay transparency.
7. Documents, data, reports, opinions, evaluations, memoranda, emails, advisories, calendar entries (including invitations), minutes, or recommendations detailing the dates and substance of any and all consultations, meetings, or conversations between the EEOC and OMB regarding a decision to review, reconsider, rescind, revoke or stay the EEO-1 pay data collection.
8. Documents, data, reports, opinions, evaluations, memoranda, emails, advisories, calendar entries (including invitations), minutes, or recommendations detailing the dates and substance of any and all consultations, meetings, or conversations between the EEOC and any employer groups, including, but not limited to, the EEAC, Chamber of Commerce and Business Roundtable, concerning requests that the

EEOC review, reconsider, rescind, revoke or stay the EEO-1 pay data collection.

9. All communications that discuss, describe, mention or otherwise reference revoking, reconsidering, rescinding, or staying the EEO-1 pay data collection.
10. All communications, including emails and calendar entries, with employer groups, including the EEAC, Chambers of Commerce and Business Roundtable, and the office of the Acting Chairwoman regarding pay data collection.
11. All communications, including emails and calendar entries, between the office of the Acting Chairwoman and members of the Trump Administration, including Ivanka Trump and her staff, regarding pay data collection.
12. All communications, including emails and calendar entries, between the office of the Acting Chairwoman and members of Congress and/or their staff regarding pay data collection.
13. Information related to the EEO-1 pay data collection prepared for or provided to Janet Dhillon, EEOC Chair nominee, and/or her employees, representatives, or agents.
14. Information related to the EEO-1 pay data collection prepared for or provided to Daniel Gade, EEOC nominee, and/or his employees, representatives, or agents.

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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.

We request 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 EEOC 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, we request that such information be reviewed for possible discretionary disclosure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). We 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, we expect to receive notice in writing, including a description of the information withheld, the reasons for denial, and any exemptions relied upon. *See* 29 C.F.R. § 1610.10(f).

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).²⁸ There is a “compelling need” for these records, 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).²⁹ 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. Dep’t of Justice*, 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 in disseminating information”).³⁰

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil rights and civil liberties-related current events. The magazine is disseminated to over 620,000 people. The ACLU also provides regular updates and alerts on these topics via email to over 2.6 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.2 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

²⁸ *See also* 29 C.F.R. § 1610.9(f).

²⁹ *See also* 29 C.F.R. § 1610.9 (f)(1)(ii).

³⁰ 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. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

documents obtained through FOIA requests, as well as other breaking news,³¹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.³²

Similarly, ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.³³ This material is broadly circulated to the public and

³¹ 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>.

³² 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 National Security project director Hina Shamsi); Victoria Bekiempis, *Sexual Trauma Victims Lose Out on PTSD Benefits: Report*, Newsweek, Nov. 8, 2013, <http://www.newsweek.com/va-discriminates-against-survivors-military-sexual-trauma-report-2856>.

³³ See, e.g., Galen Sherwin, ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (May 27, 2016), <https://www.aclu.org/report/leaving-girls-behind>; 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*

widely available to everyone for no cost or, sometimes, for a small fee. For example, the ACLU published a report entitled *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Violence*, which analyzed data obtained from the U.S. Department of Veterans Affairs pursuant to a FOIA request.³⁴ 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 multimedia 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 website includes many features on information obtained through FOIA requests.³⁵ 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

Activity Report” Systems (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

³⁴ *See* ACLU & SWAN, *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma* (2013), <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>.

³⁵ *See, e.g.,* *SWAN v. Dep’t of Defense*, ACLU Case Page, <https://www.aclu.org/cases/service-womens-action-network-v-department-defense>; 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>.

killing, and links to the documents themselves.³⁶ 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.³⁷

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, in February 2017 the ACLU produced an analysis of documents released in response to a FOIA request about the TSA’s behavior detection program.³⁸

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

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

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).³⁹ Specifically, the requested records relate to the EEOC’s involvement in the Trump Administration’s abrupt decision to stay the EEO-1 pay data reporting requirements. As discussed in Part I, *supra*, the abrupt change in policy is the subject of widespread public controversy and media attention.⁴⁰ The records sought relate to a matter of widespread and exceptional media interest in the decision to stay the EEO-1 pay data reporting requirements and how that decision was reached.

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

³⁶ The Torture Database, <https://www.thetorturedatabase.org> (last visited Sept. 19, 2017); *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>.

³⁷ The Torture Database, <https://www.thetorturedatabase.org> (last visited Sept. 19, 2017); *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>.

³⁸ ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program (2017)*, https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

³⁹ *See also* 29 C.F.R. § 1610.9(f)(1)(ii).

⁴⁰ *See, e.g.,* Paquette, *supra* note 8; Fox, *supra* note 26; Peck, *supra* note 20; Mann, *supra* note 25; Cauterucci, *supra* note 24.

IV. Application for Waiver or Limitation of Fees

Because we ask that you respond to our request as quickly as possible, and 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) and 29 C.F.R. § 1610.15 associated with this request is less than \$500.00.

If, however, the fee exceeds \$500.00, 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).⁴¹ 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).⁴²

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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 records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the stay of the EEO-1 pay data reporting requirement is publicly available, the records sought are certain to contribute significantly to the public's understanding of how and why this decision was made.

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 records are not sought for commercial use.

The ACLU also requests a waiver of search fees on the alternative 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).⁴³ The ACLU

⁴¹ See also 29 C.F.R. § 1610.15(k).

⁴² See also 29 C.F.R. § 1610.15(d).

⁴³ See also 29 C.F.R. § 1610.15(d).

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)⁴⁴; *see also Nat’l Sec. Archive v. Dep’t of Defense*, 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. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, 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).⁴⁵

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.”⁴⁶ As was true in those instances, the ACLU meets the requirements for a

⁴⁴ *See also* 29 C.F.R. § 1610.15(b)(6).

⁴⁵ 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.

⁴⁶ 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 December 2015, the DOE granted a fee waiver request with respect to a request for documents relating to sex-segregated public schools. 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

fee waiver here. Therefore, if the fee exceeds \$500.00, it should be waived. In the event that you decide not to waive the fees if over \$500.00, please provide me with prior notice so that we can discuss arrangements.

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 29 C.F.R. § 1610.9(f)(4).

If the Request is denied in whole or in part, the ACLU asks that the agency 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.

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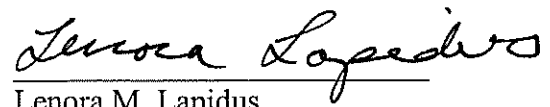
Thank you for your prompt attention to this matter. Please furnish the applicable records to:

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New York, New York 10004
T: 212.549.2676
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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).

August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ.

Respectfully,



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