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Re: Request Under Freedom of Information Act Concerning the National Security Agency's Use of Artificial Intelligence (Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU")¹ submit this request (the "Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and its

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

implementing regulations.² The Request seeks records from the National Security Agency (“NSA”), Department of Defense (“DOD”), and Office of the Director of National Intelligence (“ODNI”) (collectively, the “Agencies”) pertaining to the NSA’s use of Artificial Intelligence (“AI”) and its impact on Americans’ civil rights and civil liberties.

I. Background

Almost three years ago, the National Security Commission on Artificial Intelligence (“NSCAI”) issued a sweeping report that made clear U.S. intelligence agencies and the military are integrating AI into some of the government’s most profound decisions.³ The government is using AI to help determine who the government surveils, who it places on watchlists, who it subjects to intrusive searches and questioning at the border, and who it labels a “risk” or “threat” to national security.⁴ In many of these areas, the deployment of AI appears to be well underway. But despite transparency commitments by intelligence agencies, the public knows little about how these AI applications are impacting Americans.

The NSA describes itself as a leader among the U.S. intelligence agencies racing to deploy AI. According to officials, the NSA has used AI “for a very long time” to support its intelligence-gathering activities, and today it is one of many spy agencies seeking “ubiquitous AI integration in each stage of the intelligence cycle.”⁵ The NSA and other agencies may use these tools to select new surveillance targets, to perform natural language processing of intercepted voice calls and text, and to analyze the vast amounts of communications they collect every day—often ensnaring people in the United States.⁶ Indeed, although the NSA generally seeks

² See 32 C.F.R. § 286 (Department of Defense); 32 C.F.R. § 1700.1 (Office of the Director of National Intelligence).

³ Nat’l Sec. Comm’n on A.I., Final Report (2021) (“NSCAI Final Report”), <https://perma.cc/FQ5H-ZGEH>.

⁴ *Id.* at 143–45.

⁵ NSA, *GEN Nakasone Offers Insight into Future of Cybersecurity and SIGINT* (Sep. 21, 2023), <https://perma.cc/97GE-4ULZ>; NSCAI Final Report at 110.

⁶ See NSCAI Final Report at 108-18; *Artificial Intelligence: Next Frontier is Cybersecurity*, NSA.gov (July 23, 2021), <https://perma.cc/7RYU-RR48>; Jay Stanley, *Will ChatGPT Revolutionize Surveillance?* ACLU (Apr. 19, 2023), <https://perma.cc/Q4X7-WJ5L>. NSA officials have publicly described the agency’s use of AI tools to detect threats to critical infrastructure, to develop “self-healing networks” in the face of cybersecurity vulnerabilities, to summarize large amounts of information or raw intelligence, and to perform “speaker identification and speech-to-text

to collect foreign intelligence, the mass surveillance it conducts under Section 702 of the Foreign Intelligence Surveillance Act (“FISA”) and other authorities routinely sweeps up the sensitive communications and data of Americans.⁷

On August 6, 2021, the DOD and NSA announced a joint Inspector General evaluation to “assess the National Security Agency’s integration of artificial intelligence into signals intelligence operations.”⁸ Although the Inspectors General issued a report describing the results of their joint evaluation on October 17, 2022, the DOD and NSA have not released that report to the public, even in a declassified form.⁹

Similarly, over the past year, NSA officials have repeatedly described the completion of strategic studies about the agency’s use of AI—including an AI roadmap, a five-year plan, and assessments of how technologies like generative AI will impact the NSA’s intelligence-gathering activities. For example, in September 2023, former NSA Director Gen. Paul Nakasone said the agency had recently completed a “roadmap for AI/ML,” which addresses how generative AI and machine learning will be used for NSA missions.¹⁰ The National Defense Authorization Act for Fiscal Year 2023 mandated such a “roadmap and implementation plan for cyber

processing.” *An Interview with Paul M. Nakasone*, Joint Force Quarterly Issue 92 at 4 (Jan. 2019), https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-92/jfq-92_4-9_Nakasone-Interview.pdf; Justin Doubleday, *NSA working on new AI ‘roadmap’ as intel agencies grapple with recent advances*, Federal News Network (July 14, 2023 6:17 PM), <https://perma.cc/X2VC-8XU2>; Matt Kapko, *3 areas of generative AI the NSA is watching in cybersecurity*, Cybersecurity Dive (May 1, 2023), <https://perma.cc/7L4G-Q2T6>; Carolyn Shapiro, *The Intelligence Community Is Developing New Uses for AI*, FedTech (Oct. 4, 2022), <https://perma.cc/66P5-P6A6>.

⁷ See, e.g., Dustin Volz, *FBI Conducted Potentially Millions of Searches of Americans’ Data Last Year, Report Says*, Wall Street J. (Apr. 29, 2022), <https://www.wsj.com/articles/fbi-conducted-potentially-millions-of-searches-of-americans-data-last-year-report-says-11651253728>.

⁸ DOD & NSA Inspectors General, *Mem. for the DNI re: Announcement of Joint Evaluation*, U.S. DOD Media Releases (Aug. 6, 2021), <https://perma.cc/ZA8N-FYN6>. This project originally began as a DOD evaluation in August 2020, but for reasons that remain unclear that project was terminated and reannounced a year later as a “joint evaluation” with the National Security Agency Office of Inspector General.

⁹ Department of Defense Office of Inspector General, *Joint Evaluation of the Nat’l Sec. Agency’s Integration of A.I. (DODIG-2023-007)*, DOD-OIG Reports (Oct. 17, 2022), <https://perma.cc/A4L3-EC4K>.

¹⁰ Lauren C. Williams, *NSA ‘Recently Completed’ AI Strategic Study, Director Says*, Defense One (Sept. 6, 2023), <https://perma.cc/EQB4-XDVC>.

adoption of artificial intelligence,” and required that the roadmap identify “currently deployed, adopted, and acquired artificial intelligence systems, applications, ongoing prototypes, and data.”¹¹ Likewise, in September 2023, Nakasone reported that the NSA had recently concluded a “60-day study” evaluating generative AI’s impacts on the agency.¹² But, again, the agency has not disclosed these roadmaps, plans, or studies to the public, even in declassified form.

This secrecy is at odds with the agencies’ public commitment to transparency when it comes to AI. The Office of the Director of National Intelligence (“ODNI”), which oversees the NSA and more than a dozen other intelligence agencies, has touted transparency as a core principle in its Artificial Intelligence Ethics Framework for the Intelligence Community.¹³ Yet ODNI and the agencies have provided strikingly little information to the public about the AI systems they are deploying to conduct surveillance and analyze vast amounts of private data.

The government’s lack of transparency is especially concerning given the danger that many AI systems pose for people’s civil rights and civil liberties. Just as in areas like law enforcement, using algorithmic systems to gather and analyze intelligence can compound privacy intrusions and perpetuate discrimination. AI systems may amplify biases that are embedded in the datasets used to train those systems, and they may have higher error rates when applied to people of color and marginalized communities because of flaws in the algorithms or underlying data. AI-driven surveillance may be used to guide or expand government activities that have long been used to unfairly scrutinize communities of color. For example, built-in bias or flawed intelligence algorithms may lead to additional surveillance and investigation of individuals, exposing their lives to wide-ranging government scrutiny under FISA or other authorities. Yet little is known about the efficacy of the NSA’s AI tools, or what safeguards for civil rights and civil liberties are in place.

This Request seeks records related to the NSA’s integration of AI into its intelligence-gathering and cybersecurity activities. The release of the requested

¹¹ James M. Inhofe Nat’l Def. Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, § 1554, 136 Stat. 2396, 527–29 (2022), <https://perma.cc/SXP8-4APA>.

¹² Martin Matishak, *NSA, Cyber Command Recently Wrapped Studies on AI Use, Director Says*, The Record from Recorded Future News (Sept. 5, 2023), <https://perma.cc/F4ZT-PNTB>.

¹³ ODNI, *A.I. Ethics Framework for the Intel. Community, Version 1.0*, Intel.gov (2020), <https://perma.cc/9EYV-AHM8>.

documents is necessary to empower the public with information on how the government is using AI against them.

II. Records Requested

The ACLU requests the following records:

1. The Inspector General report on the DOD’s and NSA’s “Joint Evaluation of the National Security Agency’s Integration of Artificial Intelligence,” issued on or around October 17, 2022, and any records describing responses to the report or its recommendations.¹⁴
2. All roadmaps, strategic plans, implementation plans, studies, inventories, and reports concerning the NSA’s use of AI or machine learning that were created on or after **January 1, 2023**, including but not limited to the following:
 - a. The “roadmap and implementation plan for cyber adoption of artificial intelligence,” which was mandated by the National Defense Authorization Act for Fiscal Year 2023;¹⁵
 - b. The “AI roadmap” described by former NSA Deputy Director George Barnes on or around July 14, 2023;¹⁶
 - c. The “roadmap for AI/ML” and the “strategic study” described by former NSA Director Gen. Paul Nakasone on or around September 6, 2023;¹⁷
 - d. The “five-year plan” described by NSA Director Gen. Paul Nakasone on or around September 5, 2023;¹⁸

¹⁴ See, e.g., *Mem. for the DNI re: Announcement of Joint Evaluation*, *supra* note 8; *Joint Evaluation of the National Security Agency’s Integration of Artificial Intelligence*, *supra* note 9.

¹⁵ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, *supra* note 11.

¹⁶ Doubleday, *supra* note 6.

¹⁷ Williams, *supra* note 10.

¹⁸ Matishak, *supra* note 12.

- e. The “60-day study” evaluating generative AI’s impacts on the NSA described by former NSA Director Gen. Paul Nakasone on or around September 5, 2023;¹⁹
3. All reports, assessments, studies, audits, analyses, or presentations concerning the risks or impacts posed by the NSA’s use or proposed use of AI or machine learning for privacy, civil liberties, or civil rights that were created on or after **January 1, 2022**—including but not limited to such records created or maintained by the NSA Office of Civil Liberties and Privacy, ODNI Office of Civil Liberties, Privacy, and Transparency, and NSA or DOD Office of the Inspector General.

We request that responsive electronic records be provided electronically in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, we request 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 in separate, Bates-stamped files.

III. Request for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).²⁰ 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 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).²¹ 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. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding a non-profit public interest

¹⁹ *Id.*

²⁰ *See also* 32 C.F.R. § 286.8(e) (DOD); 32 C.F.R. § 1700.12 (ODNI).

²¹ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 32 C.F.R. § 1700.12(c)(2) (ODNI).



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”).²²

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to millions of subscribers (both ACLU members and non-members), and it broadcasts those updates to millions of its social media followers as well. 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 documents obtained through FOIA requests, as well as other breaking news,²³ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.²⁴

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone at no cost or, sometimes, for a small fee. ACLU national projects regularly publish and

²² 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 Conf. on C.R. v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Priv. Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

²³ See, e.g., Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://perma.cc/GTV5-QSSF>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://perma.cc/DYQ7-LEEY>; Press Release, ACLU, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://perma.cc/428B-NRK9>; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://perma.cc/JVY6-B6D4>; Press Release, ACLU, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://perma.cc/ZC5N-P8WF>.

²⁴ See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times (June 26, 2019), <https://perma.cc/HV6L-E6XV> (quoting ACLU deputy project director Patrick Toomey); Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, The Intercept (Feb. 8, 2017), <https://perma.cc/XC6A-NR8T> (quoting former ACLU attorney Hugh Handeyside).

disseminate reports that include a description and analysis of government documents obtained through FOIA requests.²⁵ 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 multi-media 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’s website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.²⁶

²⁵ *See, e.g.*, ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (February 2017), <https://perma.cc/V4NP-HY3N>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site*, ACLU (Nov. 22, 2016), <https://perma.cc/5HBM-EXTR>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most*, ACLU (Aug. 8, 2016), <https://perma.cc/L7T4-Y7KF>; ACLU & ACLU-DC, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (May 2016), <https://perma.cc/R54W-7R2Z>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), <https://perma.cc/4J8G-FE43>.

²⁶ *See, e.g.*, *ACLU v. ODNI – FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU, <https://perma.cc/S5CQ-NSEX>; *ACLU v. DOJ – FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media*, ACLU, <https://perma.cc/SSC3-RZ7L>; *ACLU v. DOJ – FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU, <https://perma.cc/MU8F-7HNT>; *Executive Order 12,333 – FOIA Lawsuit*, ACLU, <https://perma.cc/2JDR-L3WP>; *ACLU v. United States*, ACLU, <https://perma.cc/EAU6-248R> (ACLU motions requesting public access to FISA court rulings on government surveillance); *ACLU v. DOJ – FOIA Lawsuit Demanding OLC Opinion “Common*

The ACLU website includes many features on information obtained through the FOIA. 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 its contents relating to government policies on rendition, detention, and interrogation.²⁷ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.²⁸

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 requesters plan 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.

The records sought are urgently needed to inform the public about actual or alleged federal government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁹ Specifically, the requested records related to the NSA’s use of AI and its impact on Americans’ civil rights and civil liberties. The use of AI by federal agencies, including the Department of Defense, is already the subject of widespread public debate and media attention, and has resulted in congressional hearings and demands for greater oversight.³⁰ Pursuant to executive order, the Biden administration is also in

Commercial Service Agreements,” ACLU, <https://perma.cc/Y52H-33YE>; *FOIA Request for Justice Department Policy Memos on GPS Location Tracking*, ACLU, <https://perma.cc/A5TC-8WA2>.

²⁷ *The Torture Database*, ACLU, <https://perma.cc/6B93-LQ4R>; *see also Countering Violent Extremism FOIA Database*, ACLU, <https://perma.cc/5NK6-MMT8>; *TSA Behavior Detection FOIA Database*, ACLU, <https://perma.cc/QY7Y-RHBV>; *Targeted Killing FOIA Database*, ACLU, <https://perma.cc/M8EQ-H39W>.

²⁸ *See, e.g., Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), <https://perma.cc/Y8R3-ZXLN>; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://perma.cc/V85K-NLGJ>.

²⁹ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 32 C.F.R. § 1700.12(c)(2) (ODNI).

³⁰ *See, e.g., Williams, supra note 10; Matishak, supra note 12; Doubleday, supra note 6; Mila Jasper, Lawmakers, Experts, Industry Highlight Need for Ethics After Defense Commission Releases Final AI Report*, Nextgov (Mar. 16, 2021), <https://perma.cc/R9ED-396R>; Tom Simonite, *What’s This? A Bipartisan Plan for AI and National Security*, Wired (July 30, 2020),

the process of drafting a National Security Memorandum on AI that will govern the development and deployment of AI by defense and intelligence agencies, including the NSA.³¹ That process is slated to conclude by July 2024. Basic information about the NSA’s use of AI is urgently needed to allow members of the public to participate in the development of appropriate safeguards governing these society-altering systems. Without access to information about the impact and efficacy of the NSA’s integration of AI into its intelligence-gathering activities, neither the public nor their representatives in Congress can fully participate in deliberations about whether and how the use of AI should be permitted.

The requested records therefore 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(e)(1)(iv), and to a “breaking news story of general public interest” that concerns “actual or alleged Federal government activity.” 32 C.F.R. § 286.4(d)(3)(ii).

IV. Application for Waiver or Limitation of Fees

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).³² 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).

<https://www.wired.com/story/bipartisan-plan-ai-national-security/>; *Game Changers: Artificial Intelligence (Parts I, II & III)*, Hearing Before the Subcomm. on Information Technology of the H. Comm. on Oversight and Government Reform, 115th Cong. (2018).

³¹ White House, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* Exec. Ord. No. 14110, 88 Fed. Reg. 707 § 4.8 (October 30, 2023), <https://perma.cc/4VQR-JXW6>.

³² 32 C.F.R. § 286.12(l)(1) (DOD); 32 C.F.R. § 1700.6(b)(2) (ODNI).

- 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 limited information about the NSA's integration of AI is publicly available, the records sought are certain to contribute significantly to the public's understanding of how AI is being deployed and its impact on peoples' civil liberties and rights.

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." (internal 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 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). 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)³³; *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and

³³ *See also* 32 C.F.R. § 286.12(b)(6) (DOD); 32 C.F.R. § 1700.2(h)(4) (ODNI).

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. Priv. 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).³⁴

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.”³⁵ As

³⁴ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and/or public education activities. *See, e.g., Elec. Priv. Info. Ctr.*, 241 F. Supp. 2d at 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conf. on C.R.*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

³⁵ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump allowing U.S. military involvement in Somalia. In June 2017, the Department of Defense and the CIA granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, ODNI granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content.



was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within ten (10) calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 286.8(e)(1) (DOD); C.F.R. § 1700.12(b) (ODNI).

If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We also ask that you release all segregable portions of otherwise exempt material in accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this Request are classified, please identify those documents, including a date and document number, where possible, so we may begin the process of requesting a Mandatory Declassification Review under the terms of Executive Order 13,526. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

I certify that the foregoing information provided in support of the Request for expedited processing is true and correct to the best of my knowledge and belief.

Executed on March 7, 2024.

Sincerely,

/s/ Shaiba Rather
Shaiba Rather
Patrick Toomey
American Civil Liberties Union
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