

July 18, 2012

VIA FACSIMILE

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4391

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
1/212.549.2500
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN B. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

To Whom It May Concern:

Pursuant to the Freedom of Information Act, the American Civil Liberties Union Foundation (“ACLU”) requests two Federal Bureau of Investigation (“FBI”) memoranda that set forth the FBI’s guidance regarding the Supreme Court’s decision in *United States v. Jones*.¹ On February 24, 2012, Andrew Weissman, the general counsel of the FBI, discussed both memoranda at a University of San Francisco Law Review Symposium entitled, “Big Brother in the 21st Century? Reforming the Electronic Communications Privacy Act.” Understanding the FBI’s guidance regarding *Jones* will shed light on privacy issues of concern to all Americans.

I. Background

In *Jones*, the Supreme Court held that attaching a GPS device to a car and tracking its movements is a search under the Fourth Amendment.² However, the Supreme Court did not resolve whether GPS tracking is the sort of search that obligates law enforcement agents to obtain a warrant based on probable cause, or whether it would be sufficient for an agent to have a reasonable belief that a search would turn up evidence of wrongdoing. Nor did it discuss how its holding would apply to other types of searches, most notably tracking the location of a cell phone. How these matters are resolved will have an extraordinary impact on the privacy rights of all Americans.

On February 24, 2012, at a University of San Francisco Law symposium, FBI general counsel Andrew Weissman recognized that *Jones* is a momentous decision that, in his words, “really changes the landscape.”³ He explained that

¹ 132 S. Ct. 945 (2012).

² *Id.* at 949.

³ Univ. of S.F. Sch. of Law, *Law Enforcement Panel (Pt. 2) - 2012 University of San Francisco Law Review Symposium*, YouTube (Mar. 2, 2012), <http://www.youtube.com/watch?v=pEBH1l1utdUo&feature=relmfu>

there is a lack of clarity regarding the impact of the decision, and faulted the Supreme Court justices because they “did not wrestle with the problems their decision creates.”⁴ In his view, “the real problem from a law enforcement perspective is that the clarity that people look for . . . doesn’t come from the decision naturally.”⁵ Mr. Weissman also explained that how *Jones* is interpreted has great practical significance. By way of illustration, he stated that in January 2012, the FBI had 3,000 GPS devices in use for its investigations.⁶

At the symposium, Mr. Weissman described two memoranda the FBI was to issue that day or the following Monday, setting out its official guidance regarding *Jones*. According to Mr. Weissman, the first memorandum focuses exclusively on the use of GPS.⁷ Mr. Weissman suggested that the memorandum would state a view on such questions such as whether *Jones* applies to other forms of transportation such as airplanes and boats, and whether it applies at the international border. The second memorandum sets forth the FBI’s views on how *Jones* applies to other evidence-gathering techniques, beyond GPS.⁸

II. The Request for Records

The ACLU seeks disclosure of the two memoranda referenced by Mr. Weissman during his February 24, 2012 speech at the University of San Francisco Law Review Symposium.

III. Limitation of Processing Fees

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“[F]ees 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 . . .”) and 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(c)(3), 16.11(d)(1) (search and review fees shall not be charged to representatives of “the news media”). As a representative of the news media, the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this request should, therefore, be limited accordingly.

The ACLU meets the definition 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

⁴ Univ. of S.F. Sch. of Law, *Law Enforcement Panel (Pt. 3) - 2012 University of San Francisco Law Review Symposium*, YouTube (Feb. 29, 2012), <http://www.youtube.com/watch?v=C5f6VDUbGXs&feature=relmfu>

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

work, and distributes that work to an audience.” *Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its public education department and web site. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes features on information obtained through the FOIA. For example, the ACLU’s “Accountability for Torture FOIA” webpage, <http://www.aclu.org/torturefoia>, contains commentary about the ACLU’s FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. *See Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”).

The ACLU also regularly publishes books,⁹ “know your rights” publications,¹⁰ fact sheets,¹¹ and educational brochures and pamphlets designed

⁹ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women’s*

to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity.

Disclosure is not in the ACLU’s commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation and internal quotations omitted)). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

IV. Waiver of All Costs

The ACLU additionally requests a waiver of all costs 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

Rights (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

¹⁰ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

¹¹ *See, e.g.,* ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-_ACLU_Fact_Sheet-_UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), available at <http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act>.

activities of the government and is not primarily in the commercial interest of the requester.”).

The requested information will “contribute significantly to public understanding.” *Id.* Disclosure of the requested information will help the American public better understand their privacy rights in the wake of the Supreme Court’s *Jones* decision. The decision in *Jones* raises extraordinarily complex legal questions of great practical import. While the FBI’s guidance regarding *Jones* is significant because of how it will impact the FBI’s own use of GPS tracking devices, it is also likely to be influential beyond the FBI itself. The FBI is one of the nation’s leading law enforcement agencies and collaborates regularly with other local, state and federal law enforcement agencies. Its guidance regarding *Jones* is therefore likely to carry great weight within the law enforcement community, and to have a significant impact on the privacy rights of Americans.

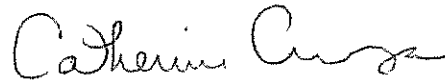
As a nonprofit 501(c)(3) organization and “representative of the news media” as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.¹²

¹² For example, in June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006.

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

Catherine Crump
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 17th floor
New York, NY 10004

Sincerely,

A handwritten signature in cursive script that reads "Catherine Crump".

Catherine Crump
Staff Attorney
American Civil Liberties Union

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION