



June 11, 2020

Via FOIAonline

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section

**Re: Request Under Freedom of Information Act
(Expedited Processing & Fee Waiver/Limitation Requested)**

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation (together, the “ACLU”),¹ and MediaJustice² submit this Freedom of Information Act request for records generated between October 1, 2017 and June 11, 2020 (the “Request”) regarding the FBI’s surveillance of Black people on the basis of a purported shared ideology using the FBI’s new terms “Racially Motivated Violent Extremists,” “Racially Motivated Extremists,” “Racially or Ethnically Motivated Violent Extremists,” and “Racially or Ethnically Motivated Extremists.” In addition, the ACLU and MediaJustice request records generated between June 20, 2019 and June 11, 2020 with older terms “Black Identity Extremists,” “Black Separatist Extremists,” “Black Nationalists,” “Black Separatists,” and “Black Supremacist Extremists.”

I. Background

On October 6, 2017, *Foreign Policy* published an article disclosing the existence of an FBI Intelligence Assessment titled “Black Identity Extremists Likely Motivated to Target Law Enforcement Officers” (the “Assessment”).³ The Assessment was disseminated to 18,000 law

¹ The American Civil Liberties Union Foundation is a 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 the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 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 MediaJustice (formerly known as “The Center for Media Justice”) is a nationally recognized organizing hub representing the media policy interests and building the cultural leadership of hundreds of social justice groups across the United States. Its mission is to create media and cultural conditions that strengthen movements for racial justice, economic equity, and human rights.

³ Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists,’* *Foreign Policy* (Oct. 6, 2017), <http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.

enforcement agencies across the country.⁴ For the over two years after it became public, the Assessment has garnered substantial and sustained public and media attention⁵—and for good reason. In the days and weeks following disclosure of the Assessment, public officials, law enforcement, advocacy groups, and news outlets have raised consistent concerns that the term “Black Identity Extremists” was created to justify surveillance of, and other government action against, Black people, including Black activists.⁶

Members of Congress have repeatedly voiced their concern about the probability that the government is spying on Black activists under the Assessment’s guidance. In November 2017, shortly after disclosure of the FBI’s “Black Identity Extremists” Assessment, Congressional Black Caucus Chairman Cedric Richmond condemned the Trump Administration for spying on Black Americans and labeling them a threat to the nation.⁷ In March 2018, legislators convened a hearing to discuss the designation, at which Representative Bass expressed concern that “Black Identity Extremists” could be applied to “all protesters” demonstrating for an end to police violence against Black people.⁸

At the end of April 2019, six months after the Senate Judiciary Committee requested more information, the FBI disclosed that it was grouping white supremacist incidents with so-called “Black Identity Extremists” under a new umbrella term “Racially Motivated Violent Extremism.”⁹ On May 2, 2019, seven members of the Senate Judiciary Committee sent a letter

⁴ Kate Irby, *White and Far-Right Extremists Kill More Cops, But FBI Tracks Black Extremists More Closely, Many Worry*, McClatchy (Jan. 25, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article196423174.html>.

⁵ See, e.g., *Martin Luther King Jr. Was Surveilled by the FBI. Today, Law Enforcement Still Tracks Black Activists*, WNYC Studios (Jan. 20, 2020), <https://www.wnycstudios.org/podcasts/takeaway/segments/martin-luther-king-jr-surveilled-fbi-tracks-black-activists>; Benjamin Fearnow, *FBI Ranks ‘Black Identity Extremists’ Bigger Threat than Al Qaeda, White Supremacists: Leaked Documents*, Newsweek (Aug. 8, 2019), <https://www.newsweek.com/fbi-leak-black-identity-extremist-threat-1453362>; Natasha Lennard, *Trump Administration Is Making It Harder to Find Out Whether It’s Fighting White Supremacist Terror*, The Intercept (June 8, 2019), <https://theintercept.com/2019/06/08/white-supremacist-domestic-terrorism-fbi-justice/>.

⁶ Winter & Weinberger, *supra* note 3.

⁷ Sam Fulwood III, *Newly Released Documents Reveal Memphis Police Have been Spying on Black Lives Matter Activists*, ThinkProgress (Aug. 1, 2018), <https://thinkprogress.org/memphis-police-spy-on-black-lives-matter-activists-facebook-916e5d188e7c/>.

⁸ *U.S. Legislators Worried By FBI Term “Black Identity Extremists,”* Al Jazeera (Mar. 20, 2018), <https://www.aljazeera.com/news/2018/03/legislators-worried-fbi-term-black-identity-extremist-180320195356667.html>.

⁹ Letter from Sen. Richard J. Durbin, Sen. Cory Booker, Sen. Sheldon Whitehouse, Sen. Amy Klobuchar, Sen. Christopher A. Coons, Sen. Richard Blumenthal, & Sen. Kamala D. Harris, to William P. Barr, Attorney General, U.S. Department of Justice & Christopher Wray, Director, Federal Bureau of Investigation (May 2, 2019) [hereinafter *May 2nd Letter to Barr & Wray*], <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20AG%20Barr%20and%20Director%20Wray%20on%20violent%20white%20supremacist%20threat,%205-2-19.pdf>; see also *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Security*, 116th Cong. 2 (May 8, 2019), (statement of Michael C. McGarrity, Assistant Director, Counterterrorism Division Federal Bureau of Investigation),

to the FBI raising concerns that the term “inappropriately combines incidents involving white supremacists and so-called ‘Black identity extremists,’ a fabricated term based on a faulty assessment of a small number of isolated incidents.”¹⁰ The senators asked the FBI if they would “rescind this change [of grouping white supremacists and so-called BIEs] and return to the long-standing practice of tracking white supremacist violence as a separate category of domestic terrorism incidents.”¹¹ On June 4, 2019, the House Oversight Subcommittee on Civil Rights and Civil Liberties held the second hearing in a series entitled: “Confronting White Supremacy,”¹² in which Michael C. McGarrity, the assistant director of the FBI’s Counterterrorism Division, testified that the term “Black Identity Extremists” no longer “exist[s]” and that the FBI has been unable to link a single killing to Black Lives Matter or similar Black activists groups.¹³

Responding to public concern over the use of the “Racially Motivated Violent Extremism” term, the U.S. Senate Committee on the Judiciary convened an FBI oversight hearing on July 23, 2019, in which committee-members demanded that Director Wray explain the FBI’s decision to jettison the “Black Identity Extremist” designation with the single, broader designation of “Racially Motivated Violent Extremism.”¹⁴ Senator Dick Durbin expressed perturbation that a growing trend in violence perpetrated by white supremacists, both domestically and internationally, “is not being taken as seriously” by the FBI.¹⁵ Despite admitting that the majority of domestic terrorism cases were connected to white supremacy,¹⁶ at

<https://docs.house.gov/meetings/HM/HM00/20190508/109406/HHRG-116-HM00-Wstate-McGarrityM-20190508.pdf>.

¹⁰ *May 2nd Letter to Barr & Wray*, *supra* note 9.

¹¹ *Id.*

¹² Michael Harriot, *The FBI Admits Black Lives Matter Was Never a Threat*, *The Root* (June 11, 2019), <https://www.theroot.com/the-fbi-admits-black-lives-matter-was-never-a-threat-i-1835417043>.

¹³ *Id.*

¹⁴ Byron Tau, *FBI Abandons Use of the Term ‘Black Identity Extremism,’* *Wall Street Journal* (July 23, 2019, 10:33 PM), <https://www.wsj.com/articles/fbi-abandons-use-of-terms-black-identity-extremism-11563921355>; *see also* *Hearing on Confronting White Supremacy (Part II): Adequacy of the Federal Response Before the S. Comm. on Civil Rights and Civil Liberties*, 116th Cong. 3 (June 4, 2019) (statement of Sen. Jaime Raskin, Chairman, S. Comm. on Civil Rights and Civil Liberties) (stating that “[m]erging White Supremacists Extremists—who were responsible for 39 murders in 2018—with [so-called] Black Supremacists Extremists, who were responsible for zero extremists murders in 2018—into a single amalgamated category called Racially Motivated Violent Extremism obscures the real threat”).

¹⁵ Press Release, Senator Dick Durbin, *Durbin Presses FBI Director Wray On Effort To Combat White Supremacist Violence* (July 23, 2019), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-presses-fbi-director-wray-on-effort-to-combat-white-supremacist-violence>.

¹⁶ Kate Benner, *Inside the Government, Addressing Domestic Terrorism Has Been Fraught*, *NY Times* (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/us/politics/domestic-terrorism.html>; Morgan Chalfant, *FBI’s Wray Says Most Domestic Terrorism Arrests This Year Involve White Supremacy*, *The Hill* (July 23, 2019), <https://thehill.com/homenews/administration/454338-fbis-wray-says-majority-of-domestic-terrorism-arrests-this-year>.

no point during the hearing did Director Wray confirm that the FBI has formally rescinded the term “Black Identity Extremist,” the Assessment that created the designation, or any related materials.

On August 8, 2019, FBI documents leaked to The Young Turks revealed that the FBI implemented a program, titled “IRON FIST” to target its resources against so-called “Black Identity Extremists.”¹⁷ The leaked documents also confirmed that the FBI did not revoke the “Black Identity Extremist” designation, but that it instead simply renamed the label to “Racially Motivated Extremism,” and then relabeled it again to “Racially Motivated Violent Extremism” which was identified as a counterterrorism priority for 2020.¹⁸ This latest leak of documents about the FBI’s targeting of Black people on the basis of a purported shared ideology has further fueled public concern that the FBI wastes resources targeting Black activists and Black-led organizations at the expense of addressing violence by white supremacists, such as mass shootings targeting people of color.¹⁹ By subsuming “BIE” under the ostensibly neutral label “Racially Motivated Violent Extremism,” the FBI is obscuring the extent to which it continues to target and surveil Black people without adequate cause.

On October 30, 2019, Representative Richmond asked FBI Director Christopher Wray to brief the House Homeland Security Committee about the current status of the BIE designation and IRON FIST, after Director Wray denied knowledge of the IRON FIST program.²⁰ Following the hearing and the FBI’s continued silence, on December 17, 2019, the Committee on Homeland Security sent a letter to Director Wray requesting “intelligence assessments or products that have been created and disseminated by the FBI that mention BIEs, Black Racially Motivated Extremists (BRME), Racially Motivated Extremists (RME) and/or Racially Motivated Extremists (RMVE) by January 31, 2020.”²¹ A month after the FBI failed to comply with the Committee on Homeland Security’s request for documents, Free Press and MediaJustice organized a Congressional briefing on March 2, 2020, urging Congress to apply more pressure

¹⁷ Ken Klippenstein, *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*, The Young Turks (Aug. 8, 2019), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>.

¹⁸ *Id.*

¹⁹ See, e.g., Igor Derysh, *Leaked Documents Show FBI Targeted Post-Ferguson “Black Identity Extremists” Over White Supremacists*, Salon (Aug. 14, 2019), <https://www.salon.com/2019/08/14/leaked-documents-show-fbi-targeted-post-ferguson-black-identity-extremists-over-white-supremacists/>; Benjamin Fearnow, *FBI Ranks ‘Black Identity Extremists’ Bigger Threat than Al Qaeda, White Supremacists: Leaked Documents*, Newsweek (Aug. 8, 2019), <https://www.newsweek.com/fbi-leak-black-identity-extremist-threat-1453362>; Anne Branigin, *Florida White Supremacist Arrested for Plot to Shoot Up Walmart; FBI Still Fixated on ‘Black Identity Extremists,’* The Root (Aug. 11, 2019), <https://www.theroot.com/florida-white-supremacist-arrested-for-plot-to-shoot-up-1837146937>.

²⁰ *Global Terrorism: Threats to the Homeland, Part II Before Committee on Homeland Security* 116th Congress (2019), <https://homeland.house.gov/activities/hearings/global-terrorism-threats-to-the-homeland-part-ii>.

²¹ Letter from Bennie G. Thompson, Chairman, Committee on Homeland Security, and Cedric Richmond, Chairman, Subcommittee on Cybersecurity, Protection, & Innovation to Christopher Wray, Director, Federal Bureau of Investigation (December 17, 2019), <https://homeland.house.gov/imo/media/doc/Black%20Identity%20Extremists%20letter.pdf>.

on the FBI for transparency around its use of these designations.²² On May 29, 2020, without providing any of the requested documents, the FBI responded to the Committee on Homeland Security’s December 17, 2019 letter, reconfirming its shift from “Black Identity Extremism” to the broader “Racially or Ethnically Motivated Violent Extremists.”²³ In its letter, the FBI noted without further explanation that “[i]n the first quarter of FY2020 . . . , all but one of [RMVE arrests] were racially or ethnically motivated violent extremists who advocated violence in furtherance of perceived superiority of the white race.”²⁴

In light of the protests across the country in response to the murders of George Floyd, Breonna Taylor, and so many others, and growing concerns that law enforcement agencies are surveilling protestors, it is vitally important that the public be informed about the FBI’s use of the terms “Black Identity Extremists,” “Racially Motivated Extremism,” and “Racially Motivated Violent Extremism,” and more broadly about FBI surveillance of Black people and Black activists.²⁵ To that end, the ACLU and MediaJustice seek release of the records described below. The public has a right to know how these terms are being used and which organizations and individuals are being targeted, and why the FBI has made repeated changes in labeling so-called “Black Identity Extremism.” Through this Request, the ACLU and MediaJustice aim to facilitate the public’s indispensable role in checking the power of our government, including impermissible profiling of activists on the basis of race, ethnicity, or First Amendment-protected speech or activity.

II. Requested Records

The ACLU and MediaJustice seek release of:

1. All records created between October 1, 2017, through and including June 11, 2020, that use the terms or abbreviations (in singular or plural form) “Racially Motivated Extremist,” and “Racially or Ethnically Motivated Extremist” (collectively “RME”) or “Racially Motivated

²² Press Release, Free Press, *COINTELPRO 2020: How the FBI Continues to Disrupt the Fight for Racial Justice in America* (Mar. 2, 2020), <https://www.freepress.net/news/press-releases/event-advisory-cointelpro-2020-how-fbi-continues-disrupt-fight-racial-justice>.

²³ Letter from Jill C. Tyson, Assistant Director Office of Congressional Affairs, Federal Bureau of Investigation to Bennie G. Thompson, Chairman, Committee on Homeland Security, and Cedric Richmond, Chairman, Subcommittee on Cybersecurity, Protection, & Innovation (May 29, 2020), https://homeland.house.gov/imo/media/doc/20200529_Thompson_Richmond_Response_incoming_20191217.pdf.

²⁴ *Id.*

²⁵ See, e.g., Wendi C. Thomas, *Police Have Been Spying On Black Reporters And Activists For Years. I Know Because I’m One Of Them.*, NiemanLab (June 11, 2020), <https://www.niemanlab.org/2020/06/police-have-been-spying-on-black-reporters-and-activists-for-years-i-know-because-im-one-of-them/>; Cindy Cohh, *Black Lives Matter, Online and in the Streets: Statement from EFF in the Wake of the Police Killings of Breonna Taylor and George Floyd*, Electronic Frontier Foundation (May 31, 2020), <https://www.eff.org/deeplinks/2020/05/black-lives-matter-online-and-streets-statement-eff-wake-breonna-taylor-george-floyd>.

- Violent Extremist” and “Racially or Ethnically Motivated Violent Extremist” (collectively “RMVE”) in reference to Black people;
2. All records created between October 1, 2017, through and including June 11, 2020, that reference “extremist” violence committed by Black people in the United States, described as “Racially Motivated Extremism” or “Racially Motivated Violent Extremism”;
 3. All records created between June 20, 2019, through and including June 11, 2020, that use any of the following terms or abbreviations in singular or plural form: “Black Identity Extremist” (“BIE”), “Black Nationalist” (“BN”), “Black Separatist” (“BS”), or “Black Supremacist Extremist” (“BSE”); and
 4. All records created between June 20, 2019, through and including June 11, 2020, that reference “extremist” violence committed by Black people in the United States, including but not limited to individuals described as “Black Identity Extremists,” “Black Nationalists,” “Black Separatists,” or “Black Supremacist Extremists.”

The FBI has an obligation to search all such field offices that are reasonably expected to possess any relevant information. *See, e.g., Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Marks v. U.S. Dep’t of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (agency not required to search all of its field offices because request did not ask for a search beyond the agency’s central files); *see also Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013).

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU and MediaJustice request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU and MediaJustice 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 that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU and MediaJustice request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).²⁶ 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.*

²⁶ *See also* 28 C.F.R. § 16.5(e).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁷ 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.²⁸

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 620,000 people. The ACLU also publishes regular updates and alerts via email to approximately 2.15 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 1.5 million social media followers (members and non-members). 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,²⁹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.³⁰

²⁷ See also 28 C.F.R. § 16.5(e)(1)(ii).

²⁸ See *ACLU v. DOJ*, 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”). 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); *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

²⁹ 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>.

³⁰ See, e.g., 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 project director Hina Shamsi).

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 for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.³¹ 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.³² 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.³³ 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.

The ACLU website includes many features on information obtained through the FOIA.³⁴

³¹ See, e.g., ACLU, 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>; ACLU, 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>; ACLU, 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>; ACLU, 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 Activity Report” Systems (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

³² See <https://www.aclu.org/blog>.

³³ See <https://www.aclu.org/multimedia>.

³⁴ See, e.g., ACLU, *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>; ACLU, *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 Killing Of Three U.S. Citizens*, ACLU (last updated Dec. 30, 2016), <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU (last updated Aug. 18, 2015), <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI*, ACLU (last

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 killing, and links to the documents themselves. 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.³⁵

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, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created a website titled “Mapping the FBI,” which provides the public and news media with information about the FBI’s investigative and intelligence collection activities.³⁶ Similarly, the ACLU has used information gathered through FOIA requests to build an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.³⁷ And the ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act³⁸; a chart of original statistics about the Defense Department’s use of National Security Letters based on its own analysis of records obtained through FOIA requests³⁹; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.⁴⁰

visited Oct. 17, 2017), <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU (last updated Apr. 18, 2013), <https://www.aclu.org/cases/bagram-foia>; *CRST FOIA*, ACLU (last visited Oct. 17, 2017), <https://www.aclu.org/national-security/crst-foia>; *ACLU V. DOJ—Lawsuit To Enforce NSA Warrantless Surveillance FOIA Request*, ACLU (last visited June 11, 2020), <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; *PATRIOT FOIA*, ACLU (last visited June 11, 2020), <https://www.aclu.org/patriot-foia>; *NSL Documents Released By DOD*, ACLU (last visited June 11, 2020), <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

³⁵ The Torture Database, <https://www.thetorturedatabase.org> (last visited June 11, 2020); *see also* Targeted Killing FOIA Database, ACLU (last visited June 11, 2020), <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

³⁶ *Mapping the FBI*, ACLU (last visited June 11, 2020), <https://www.aclu.org/issues/national-security/privacy-and-surveillance/mapping-fbi-0>.

³⁷ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (last visited June 11, 2020), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

³⁸ Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010, ACLU (last visited June 11, 2020), <https://www.aclu.org/files/pdfs/natsec/aafoia20101129/20101129Summary.pdf>.

³⁹ Statistics on NSLs Produced by Department of Defense, ACLU (last visited June 11, 2020), https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

⁴⁰ ACLU, *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>.

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. *MediaJustice is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

MediaJustice is also “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).⁴¹ MediaJustice is a nationally recognized organizing hub representing the media policy interests and building the cultural leadership of hundreds of social justice groups across the United States. MediaJustice includes a network of nearly 100 affiliates, over 75% of which are local, regional, or statewide social justice organizations based in under-represented communities, comprising the largest racial justice network for media rights, access, and representation in the United States. Its mission is to create media and cultural conditions that strengthen movements for racial justice, economic equity, and human rights.

MediaJustice has a focus on government surveillance of communities of color, particularly the unequal and historic surveillance of Black people, Muslims, migrants, and the social movements that represent them.⁴² MediaJustice disseminates information on this topic, and others, through publishing its blog⁴³; publishing reports, such as *Digital Discrimination: Big Data, Surveillance, & Racial Justice*⁴⁴; and organizing events, including virtual town halls, such as “#Right2Connect Townhall,”⁴⁵ and participating in conferences, such as the annual “Color of Surveillance” conference.⁴⁶ MediaJustice representatives are also interviewed for news stories about these issues, such as former Executive Director Malkia Cyril’s appearance on a national news program to discuss the Assessment.⁴⁷ Through these activities, MediaJustice “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.”⁴⁸

⁴¹ See also 28 C.F.R. § 16.5(e)(1)(ii).

⁴² *Digital Security and Surveillance*, MediaJustice (last accessed June 11, 2020), <https://mediajustice.org/issue/digitalsecurity/>.

⁴³ *Blog*, MediaJustice (last visited June 11, 2020), <https://mediajustice.org/news-category/blog/>.

⁴⁴ *Digital Discrimination: Big Data, Surveillance, & Racial Justice* (Apr. 28–May 1, 2014), <https://mediajustice.org/resource/digital-discrimination-big-data-surveillance-racial-justice-2014/>.

⁴⁵ *#Right2Connect Townhall*, MediaJustice (April 16, 2020), <https://mediajustice.org/news/right2connect-townhall/>.

⁴⁶ *Color of Surveillance*, Georgetown Law (last accessed June 11, 2020), <https://www.law.georgetown.edu/privacy-technology-center/events/color-of-surveillance-2019/>.

⁴⁷ See, e.g., *COINTELPRO 2? FBI Targets “Black Identity Extremists” Despite Surge in White Supremacist Violence*, Democracy Now! (Oct. 17, 2017), https://www.democracynow.org/2017/10/16/cointelpro_2_fbi_targets_black_identity.

⁴⁸ See *ACLU*, 321 F. Supp. 2d at 29 n.5.

MediaJustice also 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.

C. *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).⁴⁹ Specifically, as discussed in Part I, *supra*, release of the requested records would inform the public about the FBI’s domestic surveillance, investigations, and priorities, as well as any impermissible racial profiling.

Given the foregoing, the ACLU and MediaJustice have satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU and MediaJustice request 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).⁵⁰ The ACLU and MediaJustice also request a waiver of search fees on the grounds that the ACLU and MediaJustice each qualify 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).⁵¹

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 or MediaJustice.*

As discussed above, news 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 the FBI’s surveillance and investigations of Black activists on the basis of a purported shared ideology—an issue of profound public importance.

Neither the ACLU nor MediaJustice is filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU or MediaJustice as a result

⁴⁹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

⁵⁰ *See also* 28 C.F.R. § 16.10(k)(2).

⁵¹ *See also id.*

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 the 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 and MediaJustice are representatives of the news media and the records are not sought for commercial use.*

The ACLU and MediaJustice also request a waiver of search fees on the grounds that both the ACLU and MediaJustice qualify 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 and MediaJustice each meet the statutory and regulatory definitions of a "representative of the news media" because each 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);⁵² *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 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 and MediaJustice are each therefore a "representative of the news media" for the same reasons they are "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 and MediaJustice's 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 at 5, 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); *see also 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); *cf. Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260.

⁵² *See also* 28 C.F.R. § 16.10(b)(6).

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.”⁵³ As was true in those instances, the ACLU, as well as MediaJustice, each meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the ACLU and MediaJustice expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 28 C.F.R. § 16.5(e)(4).

If the Request is denied in whole or in part, the ACLU and MediaJustice ask that you justify all deletions by reference to specific exemptions to the FOIA. The ACLU and MediaJustice expect the release of all segregable portions of otherwise exempt material. *See* 5 U.S.C. § 552(b). The ACLU and MediaJustice reserve the right to appeal a decision to withhold any information or deny a waiver of fees.

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

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⁵³ In May 2016, the FBI granted a fee-waiver request regarding a FOIA request submitted to the DOJ for documents related to Countering Violent Extremism Programs. 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 August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division 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 March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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).

Respectfully submitted,

/s/ Mark Carter

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