

LEGAL DEPARTMENT



May 13, 2013

BY USPS MAIL

Office of Informational Programs and Services
A/GIS/IPS/RL
Department of State, SA-2
Washington, DC 20522-8100

RE: FREEDOM OF INFORMATION ACT REQUEST

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") submit this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for access to documents relating to Executive Order 12,333, 3 C.F.R. 200 (1981 Comp.) ("EO 12,333"). Specifically, we request the following records¹:

1. Any records construing or interpreting the authority of the United States Department of State ("Department") under Executive Order 12,333 or any regulations issued thereunder;
2. Any records describing the minimization procedures² used by the Department with regard to both intelligence collection and intelligence interception conducted pursuant to the Department's authority under EO 12,333 or any regulations issued thereunder; and
3. Any records describing the standards that must be satisfied for the "collection," "acquisition," or "interception" of communications, as the Department defines these terms, pursuant to the Department's authority under EO 12,333 or any regulations issued thereunder.

¹ Records include but are not limited to electronic records, letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, legal opinions, policy statements, and any other materials.

² Minimization procedures include but are not limited to rules, policies, or procedures addressing the collection, interception, handling, use, retention, and destruction of information relating to U.S. persons that is acquired in the course of intelligence activities.

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OFFICERS AND DIRECTORS
SUSAN N. HERMAN PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Request for a Fee Limitation and Public Interest Fee Waiver

The ACLU requests a waiver of search and review fees because the requested records are not sought for commercial use and because the ACLU is a “representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU’s mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. Its regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog; heavily visited websites, including an accountability microsite, <http://www.aclu.org/accountability>; and a video series.

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The ACLU therefore meets the statutory definition of a “representative of the news media” as 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); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). Indeed, the ACLU recently was held to be a “representative of the news media.” *Serv. Women’s Action Network v. Dep’t of Defense*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012); *see also Am. Civil Liberties Union of Wash. v. Dep’t of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding ACLU of Washington to be a “representative of the news media”), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

The ACLU also requests a waiver of all search, review, or duplication fees on the ground that disclosure of the requested information is in the public interest because: (1) it “is likely to contribute significantly to public understanding of the operations or activities of the government,” and (2) it “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This request clearly satisfies these criteria.

First, the requested material concerns “the operations or activities” of the Department. E.O. 12,333 is “intended to enhance human and technical collection techniques, especially those undertaken abroad, and the acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities and espionage conducted by foreign powers.” EO 12,333 § 2.2. It authorizes the intelligence community, including the Department, to collect intelligence, and it sets forth certain limitations on intelligence-gathering activities relevant to civil liberties. In its brief in a

recent case before the Supreme Court of the United States, the Government emphasized its authority to conduct surveillance of Americans' foreign contacts abroad under Executive Order No. 12,333, without conforming to various statutory restrictions. Brief for Petitioners, *Clapper v. Amnesty Int'l USA*, No. 11-1025, 2012 WL 3090949, at *45 (U.S. 2012). How the Government actually does this, and whether it appropriately accommodates the constitutional rights of American citizens and residents whose communications are intercepted in the course of that surveillance, are matters of great significance.

Moreover, the requested materials will "contribute significantly to the public understanding" of the Department's operations or activities. 5 U.S.C. § 552(a)(4)(A)(iii). Though the subject of foreign-intelligence collection is a matter of great public interest and concern, little information on how the American intelligence community construes the authority conferred by EO 12,333 and its implementing regulations is currently publicly available.

For example, in the *Clapper* brief described above, the government makes no argument beyond a handful of one-sentence assertions of its authority under EO 12,333. *See* Brief for Petitioners, *Clapper v. Amnesty Int'l USA*, No. 11-1025, 2012 WL 3090949 at *4, *33, *41, *45. Likewise, the publicly available administrative agency materials typically do little more than restate EO 12,333's limits on the intelligence community in slightly different ways or provide predictable definitions for terms left undefined in the executive order. *See, e.g.*, Dep't of Def., DOD 5240 1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons* § C2.3.12 (Dec. 1982); Nat'l Sec. Agency, *United States Signals Intelligence Directive* 18 (July 1993); Army Regulation 381-10, *U.S. Army Intelligence Procedures* § 2-2(l) (2007). Judicial treatments of EO 12,333 contribute equally little to the public understanding of the limits of intelligence-gathering powers under EO 12,333. *See, e.g.*, *United States v. Marzook*, 435 F. Supp. 2d 778 (N.D. Ill. 2006); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984).

For these reasons, we respectfully request that all fees related to the search, review, and duplication of the requested records be waived. If the search and review fees will not be waived, we ask that you contact us at the email address listed below should the estimated fees resulting from this request exceed \$100.

We request that responsive electronic records be provided electronically in their native file format, if possible. *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

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EXECUTIVE DIRECTOR

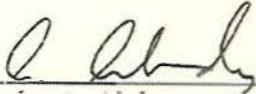
image quality in the agency's possession, and in separate, Bates-stamped files.

We also request that you provide an estimated date on which you will finish processing this request. *See* 5 U.S.C. § 552(a)(7)(B).

If this FOIA request is denied in whole or in part, please provide the reasons for the denial, pursuant to 5 U.S.C. § 552(a)(6)(A)(i). In addition, please 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 (2010).

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact us at the email address listed below. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), we expect a response regarding this request within the twenty working-day statutory time limit.

Sincerely,



A handwritten signature in black ink, appearing to read 'Alexander Abdo', is written over a horizontal line.

Alexander Abdo
Staff Attorney
National Security Project
American Civil Liberties Union

Phone: (212) 549-2517
Email: aabdo@aclu.org

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ANTHONY D. ROMERO
EXECUTIVE DIRECTOR



United States Department of State

Washington, D.C. 20520

JUN - 5 2013

Dear Requester,

RE: EO 12333 and the State Department, 1981-present

This is in response to your request dated May 13, 2013. We have assigned Case Control Number F-2013-09022 and will begin the processing of your request based upon the information provided in your communication.


The cut-off date is the date the search is initiated unless you have provided a specific timeframe.

Unusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) may arise that would require additional time to process your request.

We will notify you as soon as responsive material has been retrieved and reviewed.

Should you have any questions, you may call our FOIA Requester Service Center at (202) 261-8484 or send an email to FOIAstatus@state.gov. Please refer to the Case Control Number in any communication.

Sincerely,

Mary Therese Casto 
Chief, Requester Communications Branch

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov

Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAStatus@state.gov

Fee Waiver

Your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.



November 8, 2013

BY CERTIFIED MAIL

Chairman, Appeals Review Panel
c/o Information and Privacy Coordinator/Appeals Officer
U.S. Department of State
A/GIS/IPS/PP, SA-2
Washington, DC 20522-8100

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RE: FREEDOM OF INFORMATION ACT APPEAL

Dear Mr. Chairman,

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”) write to appeal from the constructive denial of their Freedom of Information Act request, submitted on May 13, 2013, for documents relating to Executive Order 12,333, 3 C.F.R. 200 (1981 Comp.) (“EO 12,333”). A copy of the request is attached here for reference. The ACLU received an acknowledgement of receipt dated June 5, 2013 in a letter signed by Mary Therese Casto. The request was assigned the following identification number: F-2013-09022.

Under the Freedom of Information Act, determinations about whether an agency will produce documents must be made within 20 business days. *See* 5 U.S.C. § 552(a)(6)(A)(i); 28 C.F.R. § 16.6(b). Where an agency cannot meet the statutory time limit due to unusual circumstances, the agency may extend the time limit by ten working days with written notice to the requester. 5 U.S.C. § 552(a)(6)(B). An agency denying a request in any respect must send the requester a signed letter including, among other things, a brief statement of the reasons for denial. 5 U.S.C. § 552(a)(6)(A)(i).

Because the twenty-day statutory time limit has elapsed without a substantive response, the Department of State has constructively failed to meet its legal obligation to disclose the information requested. By this appeal, we ask you to direct the timely disclosure of all records responsive to our request.

NOV 19 2013

Hackett DECLARATION
Civil Action No. 13-cv-09198
Exhibit 3

We thank you for your consideration of this appeal. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect a response regarding this appeal within twenty days. If you have any questions or concerns, please do not hesitate to contact me at the email address or telephone number indicated below.

Sincerely,



Alexander Abdo
Staff Attorney
National Security Project
American Civil Liberties Union
Phone: (212) 549-2517
Email: aabdo@aclu.org



United States Department of State

Washington, D.C. 20520

November 19, 2013

Alexander Abdo, Esq.
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400

Dear Mr. Abdo:

Thank you for your letter of November 8, 2013, concerning Freedom of Information request number F-2013-09022, in which you note that the Department of State has not yet responded to your FOIA request.

Your FOIA request is not subject to administrative appeal at this time, since no specific material has been denied in response to the request. Section (a)(6)(C) of the Act provides that a requester shall be deemed to have exhausted his administrative remedies if an agency fails to respond within the applicable time limit specified in the paragraph, which is twenty days. The requester, therefore, would not be required to appeal administratively before instituting suit in federal court. This provision does not, however, provide a basis for an administrative appeal of a request that is still being processed. Moreover, the lack of response is not the same as a response indicating that no documents were found.

I have confirmed that your request is being processed. The Department receives thousands of FOIA and PA requests a year and yours will be processed in turn. I have sent a copy of your letter to the office that has been assigned responsibility for processing your request. Your continued patience is appreciated. If you need further assistance, you may contact the FOIA Requester Service Center at (202) 261-8484 or FOIAstatus@state.gov.

Sincerely,

A handwritten signature in cursive script that reads "Lori Hartmann".

Lori Hartmann
Appeals Officer
Office of Information Programs and Services

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION, and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,
CENTRAL INTELLIGENCE AGENCY,
DEPARTMENT OF DEFENSE,
DEPARTMENT OF JUSTICE, and
DEPARTMENT OF STATE,

Defendants.

13 Civ. 9198 (AT)

STIPULATION AND ORDER REGARDING DOCUMENT SEARCHES

WHEREAS, on May 13, 2013, Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, “Plaintiffs”) made requests (the “Requests”) pursuant to the Freedom of Information Act (“FOIA”) to various government agencies, including, as relevant here, the National Security Agency (“NSA”), the Central Intelligence Agency (“CIA”), the Defense Intelligence Agency (“DIA”), the Department of Justice’s Office of Legal Counsel (“OLC”), the Department of Justice’s National Security Division (“NSD”), the Federal Bureau of Investigation (“FBI”) and the Department of State (“State”) (collectively, the “Agencies”) relating to the Agencies’ respective authorities pursuant to Executive Order (“EO”) 12,333, and activities undertaken pursuant to those authorities;

WHEREAS, over the course of the administrative processing of Plaintiffs’ FOIA requests, Plaintiffs came to agreements with NSA and OLC regarding the scope of searches that

these agencies would perform in full resolution of the relevant Requests, and these agencies thereafter began searching for and processing documents based on these agreements;

WHEREAS, on December 30, 2013, Plaintiffs filed a complaint in the instant action against the NSA, CIA, the Department of Defense (“DoD”), the Department of Justice (“DOJ”), and State (collectively, the “Defendants,” and together with Plaintiffs, the “Parties”) seeking judicial assistance in securing the Agencies’ responses to their Requests;

WHEREAS, on February 18, 2014, Plaintiffs filed an amended complaint in this action;

WHEREAS, on March 3, 2014, Defendants answered the amended complaint;

AND WHEREAS, the Parties have engaged in discussions in an attempt to reach agreement on the scope of searches that the Agencies will undertake in response to the Requests.

NOW, THEREFORE, it is hereby STIPULATED and AGREED between the Parties as follows:

1. The searches the Agencies agree to undertake that are described herein are deemed to fulfill in full the Agencies’ search obligations under the respective Requests.
2. OLC will continue to search for and process only those documents encompassed by the agreement it reached with Plaintiffs during the administrative processing of the relevant Request.
3. NSA, CIA, DIA, FBI, and State will search for and process only the following categories of documents:
 - a. Any formal regulations or policies relating to that Agency’s authority under EO 12,333 to undertake “Electronic Surveillance” (as that term is defined in EO 12,333) that implicates “United States Persons” (as that term is defined in EO 12,333), including regulations or policies relating to that Agency’s

acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.¹

- b. Any document that officially authorizes or modifies under EO 12,333 that Agency's use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, or documents that adopt or modify official rules or procedures for the Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- c. Any formal legal opinions addressing that Agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicates United States Persons, including formal legal opinions relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- d. Any formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how that Agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including its acquisition,

¹ For purposes of this Stipulation, surveillance that "implicates" United States Persons means surveillance that is reasonably believed to involve the interception, acquisition, scanning, or collection of information or communications to, from, or about a United States Person or persons even if the target of such surveillance is not a United States Person.

retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.

- e. Any formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons, one of whose sections or subsections is devoted to (1) the Agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) the Agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:

- i. Authored by the Agency's inspector general or the functional equivalent thereof;
- ii. Submitted by the Agency to Congress, the Office of the Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or
- iii. Maintained by the office of the Agency's director or head.

4. NSD will search for and process all documents responsive to the original FOIA Request submitted to it by Plaintiffs.

5. If, in the course of searching for the records described in Paragraphs 3 or 4, an Agency discovers responsive records of other Agencies, it shall refer those documents to the originating Agency for processing.

6. With respect to the categories of documents described in Paragraph 3(b) and 3(e)(ii) above, CIA will search for such materials only in the offices of the Director, Deputy

Director, and Executive Director of the CIA, as well as materials maintained at the directorate level. With respect to the categories of documents described in Paragraph 3(c) above, CIA will search for such materials only in the particular division of CIA's Office of General Counsel that is responsible for providing legal advice on complex or novel questions (the "CIA OGC Division"). With respect to the categories of documents described in Paragraph 3(d) above, CIA will search for such materials created by the CIA OGC Division or created or maintained at the directorate level.

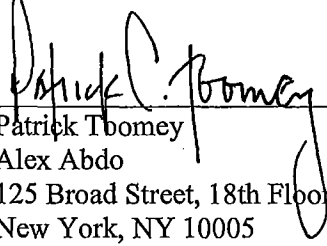
7. Date limitations.
 - a. Paragraphs 3(a)–(c). With respect to the categories of documents described in Paragraphs 3(a)–(c) above, each Agency will search for and process only documents that are currently in use or effect, or that were created or modified on or after September 11, 2001.
 - b. Paragraph 3(d). With respect to the categories of documents described in Paragraph 3(d) above, each Agency will search for and process only documents that are currently in use or effect.
 - c. Paragraph 3(e). With respect to the categories of documents described in Paragraph 3(e) above, each Agency will initially search for and process only documents created or modified on or after September 11, 2001; after the completion of the Agency's production of these documents, the parties agree to continue their discussions regarding whether searches for documents created before September 11, 2001 will be undertaken, including whether conducting such searches would be unduly burdensome to the Agencies.

8. Nothing in this Stipulation and Order, including the fact of its entry, should be taken as a concession by Defendants that Plaintiffs have "substantially prevailed" in this action in whole or in part, as that term is used in 5 U.S.C. § 552(a)(4)(E).

Dated: New York, New York
May 9, 2014

AMERICAN CIVIL LIBERTIES UNION

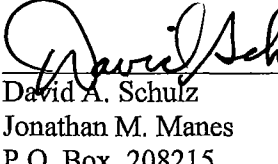
By:


Patrick Toomey
Alex Abdo
125 Broad Street, 18th Floor
New York, NY 10005
Phone: (212) 549-2500
Fax: (212) 549-2654
Email: ptoomey@aclu.org

Dated: New Haven, Connecticut
May 9, 2014

MEDIA FREEDOM AND INFORMATION
ACCESS CLINIC

By:

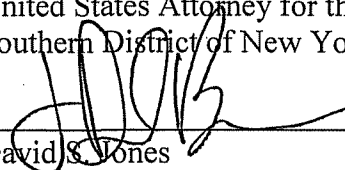

David A. Schulz
Jonathan M. Manes
P.O. Box. 208215
New Haven, CT 06520
(212) 850-6103

Counsel for Plaintiffs

Dated: New York, New York
May 9, 2014

PREET BHARARA
United States Attorney for the
Southern District of New York

By:



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jean-david.barnea@usdoj.gov

Counsel for Defendants

SO ORDERED:

The Honorable Analisa Torres
United States District Judge

Date



United States Department of State

Washington, D.C. 20520

JUN 30 2014

Case No.: F-2013-09022

Alexander Abdo
American Civil Liberties Union Foundation
National Office
125 Broad Street, 18th Floor
New York, NY 10004-2400

Dear Mr. Abdo:

I refer to your letter dated May 13, 2013, requesting the release of certain records by the Department of State under the provisions of the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, as amended by the parties' stipulation dated May 9, 2014 that was filed in *ACLU v. National Security Agency, et al.* (S.D.N.Y. No. 13-cv-09198-AT).

Based on the subject matter of your request, the Department determined that the only records systems with a reasonable likelihood of maintaining responsive records were those of the Bureau of Intelligence and Research and the Office of the Legal Adviser. The Department conducted thorough searches of these systems and located no records responsive to your request.

This concludes the Department's processing of your request. If you have any questions, you may contact Assistant U.S. Attorney J.D. Barnea at (212) 637-2679. Please be sure to refer to the case number, F-2013-09022, and the civil action number, 13-9198, in all communications about this case.

Sincerely,

A handwritten signature in black ink that reads "Susal C. Weidman".

John F. Hackett, Acting Director
Office of Information Programs and Services