



June 12, 2009

Mr. James Hogan
 Defense Freedom of Information Policy Office
 1155 Defenses Pentagon
 Washington, D.C. 20301-1155

Re: FOIA Appeal, Request #09-F-0890

Dear Mr. Hogan,

Requesters American Civil Liberties Union and American Civil Liberties Foundation (collectively, "ACLU") write to appeal the Office of Freedom of Information's determination to deny the ACLU's request for expedited processing of FOIA Request #09-F-0890 ("Request") and to deny the ACLU's request for a fee limitation based on its status as a representative of the news media. The Request seeks records pertaining to the detention and treatment of prisoners at the Bagram Theater Internment Facility. *See* Ex. A (FOIA Request dated April 23, 2009). Chief Will Kammer's letter denying the ACLU's expedited processing and the fee limitation requests is dated May 6, 2009. *See* Ex. B (Mr. Kammer's Letter dated May 6, 2009).¹

News Media Requester Status

A waiver of search and review fees is warranted here because the ACLU is a "representative of the news media" and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7). *See* Ex. A at 7-8, 16-17. Notably, other federal agencies have determined that the ACLU is a representative of the news media with respect to other FOIA requests. *See* Ex. C (March 2009 determination by the State Department that the ACLU is a "representative

¹ The ACLU's separate request for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.28(d) (its request for a "public interest" fee waiver) has not yet been decided. On June 1, 2009 the ACLU submitted a letter to Mr. Kammer that explained the ACLU's desire to have the "public interest" fee waiver determination to be made on the basis of all of the records it has requested, not only a two-hour search, and that indicated the ACLU's willingness to pay fees subject to its right to appeal or contest in court any Defense Department determination to charge fees. Accordingly, the ACLU appeals only the expedited processing and news media representative fee limitation determinations here.

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of the news media”); Exh. D (December 2008 determination by the Department of Justice that the ACLU is a “representative of the news media”); Exh. E (May 2005 determination by the Department of Commerce that ACLU is a “representative of the news media”).

Mr. Kammer concluded that the ACLU did not qualify as a “representative of the news media” because it does not “publish[] or disseminat[e] information as its primary activity.” Exh. B at 1. Mr. Kammer based this conclusion on one sentence from the ACLU website about how the ACLU engages in litigation and lobbying activities, in addition to its substantial publishing, public education, and information dissemination activities. *Id.* First, Mr. Kammer confuses the “primarily engaged in disseminating information” expedited processing standard with the “representative of the news media” fee waiver standard. The D.C. Circuit has ruled that any “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” qualifies as a “representative of the news media” under FOIA’s fee waiver provisions. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). As discussed further below, the ACLU plainly meets this standard.

Second, that the ACLU is engaged in litigation and lobbying activities *as well as* significant publication and dissemination of news, information, and editorial content does not disqualify it as a “representative of the news media.” Although organizations that qualify as news media requesters *also* qualify as organizations that are primarily engaged in disseminating information for the purposes of expedited processing, *see, e.g., ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004), no court has ever held that an organization that otherwise engages in the kinds of publishing, editorial, and public education activities that make it a “representative of the news media” must also show that this is the organization’s *sole or even primary activity*. Rather, the organization must simply be actively engaged in “gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience.” *Nat’l Sec. Archive*, 880 F.2d at 1387; *id.* at 1386 (finding National Security Archive a news media representative even though it engaged in many other activities that did not “establish an entitlement to preferred status”); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 12 (D.D.C. 2003) (“the key” is not “the organization’s description” but rather “whether its activities qualify as those of a representative of the news media”) (internal citations omitted). In short, there is no requirement that a particular percentage of an organization’s efforts be dedicated to publishing and information dissemination or that it be the organization’s *only* activity.

Indeed many of the organizations that courts have found to be “representatives of the news media” – and whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s – engage in a wide variety of litigation and congressional advocacy. For example, the D.C. courts have found that the Electronic Privacy Information Center (“EPIC”) is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information/public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5. EPIC, like the ACLU, is an advocacy organization that employs multiple strategies, including litigation, public education, and legislative and political advocacy to accomplish its policy goals. *See EPIC Annual Report 2007-2008*, 2008 Elec. Privacy Info. Ctr. at 1, available at http://epic.org/epic/annual_reports/2007.pdf (describing itself as a public interest research center that engages in activities such as “policy research, public education, conferences, litigation, publications, and advocacy”). EPIC, like the ACLU, frequently serves as counsel and writes amicus briefs in federal litigation. *Id.* at 13-15. EPIC, like the ACLU, devotes substantial resources to advocating before Congress and the executive branch. *Id.* at 9-11, 16-18. In 2006 and 2007, EPIC’s staff testified or submitted comments to Congress on at least seven occasions and filed comments with federal agencies on at least 11 occasions. *Id.* Similarly, the D.C. Circuit has found that the National Security Archive is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information/public education activities. *See Nat’l Security Archive*, 880 F.2d at 1387; *see also Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” is a news media requester); *see also Cf. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public education functions).

In any event, even if the ACLU were required to show that publishing and disseminating information was a primary activity, the ACLU meets that standard and, thus, Mr. Kammer’s determination to the contrary was incorrect. As discussed more fully below, obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities.

Although the ACLU is perhaps most well-known for its litigation activities, it is far more than a large public interest law firm. The ACLU's principal mission is not to litigate important civil rights and civil liberties cases, but to preserve and defend the guarantees of the Bill of Rights and civil rights laws, using litigation as one just one of many major tactics. Every aspect of the ACLU's work in furtherance of this mission – including litigation – can fairly be described as information dissemination. Indeed, public education and dissemination of information is a key component of the ACLU's litigation efforts themselves; litigation is a highly effective vehicle for educating the press and public about a particular civil liberties problem. Most ACLU cases have dedicated webpages in which the ACLU publishes and disseminates information about the case itself (i.e. case developments, analyses of case developments, a comprehensive archive of court filings, judicial opinions), which, even standing alone, is a significant endeavor to publish and disseminate news. However, case webpages do not just disseminate information about case developments; these webpages also have educational material about the particular civil liberties issue or problem, recent news about the particular issue, analyses of congressional or executive branch action on the particular issue, government documents obtained through FOIA about the particular issue, and more in-depth analytic and educational multi-media features on the issue. For example, the ACLU's website about its national security letter ("NSL") cases, www.aclu.org/nsl, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSL; myths and facts documents; and links to information and analysis of related issues.²

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is

² For a sampling of other similar case pages with case information, reporting of news on the issue, blogs, and original analytic and educational content see: <http://www.aclu.org/lgbt/relationships/californiamarriage.html> (same-sex marriage case page); <http://www.aclu.org/safefree/rendition/index.html> (extraordinary rendition case page); <http://www.aclu.org/immigrants/detention/hutto.html> (immigration detention conditions case page).

distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 300,000 people. Both of these newsletters often include descriptions and analysis of information obtained from the government through FOIA, as well as information about cases, government policies, pending legislation, abuses of constitutional rights, and polling data. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 13-14 (finding EPIC a representative of the news media under DoD 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”); *Ctr. for Pub. Integrity v. Dep’t of Health & Human Serv.s*, 2007 WL 2248071 *5 (D.D.C. Aug. 3, 2007) (finding CPI a news media requester because its journalist members “write and post an online newsletter” and post information obtained through FOIA in that newsletter); 32 C.F.R. § 286.28(e)(7)(i) (“The term “representative of the news media” refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. . . . [including] publishers of periodicals . . .”).

The ACLU regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and 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. *See Elec. Privacy Infor. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC a news media requester because it “researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this “news” through the sale of its books to the public.”); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to publish “document sets” on “topic[s] of current interest”).³ Since 2007 alone, ACLU national projects have published over 25 reports in which they have gathered information and “use[d] [their] editorial skills to turn the raw materials into a distinct work, and distribute[d] that work to an audience.” *Id.* at 1387.⁴ Many ACLU reports include description and

³ In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

⁴ *See, e.g., Mental Illness and the Death Penalty* (May 2009), available at http://www.aclu.org/pdfs/capital/mental_illness_may2009.pdf;

analysis of government documents obtained through FOIA. *See, e.g.,*

Human Rights Begin at Home (April 2009), available at http://www.udhr60.org/human_rights_full.pdf; *Reclaiming Patriotism*, (March 2009), available at http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; *Missing the Mark: Alternative Schools in the State of Mississippi* (Feb. 2009), available at http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf; *A Looming Crisis* (Dec. 2008), available at http://www.aclum.org/lockingupkids/pdf/looming_crisis_web.pdf; *De Facto Disenfranchisement* (Oct. 2008), available at http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf; *A Violent Education: Corporal Punishment of Children in US Public Schools* (Aug. 2008), available at http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf; *Fusion Center Update* (July 2008), available at http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf; *Enacting a Reasonable Federal Shield Law* (July 2008), available at http://www.aclu.org/images/asset_upload_file113_35870.pdf; *Locking Up Our Children* (May 2008), available at http://www.aclu.org/pdfs/racialjustice/locking_up_our_children_web_ma.pdf; *Pandemic Preparedness: The Need for a Public Health—Not a Law Enforcement / National Security—Approach* (Jan. 2008), available at http://www.aclu.org/images/asset_upload_file399_33642.pdf; *Race & Ethnicity in America: Turning a Blind Eye to Injustice* (Dec. 2007), available at http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf; *What's Wrong With Fusion Centers?* (Dec. 2007), available at http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf; *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; *Reclaiming Our Rights: Declaration of First Amendment Rights and Grievances* (Sept. 2007), available at http://www.aclu.org/images/asset_upload_file955_36822.pdf; *Even Bigger, Even Weaker: The Emerging Surveillance Society: Where Are We Now?* (Sept. 2007), available at http://www.aclu.org/pdfs/privacy/bigger_weaker.pdf; *Working in the Shadows: Ending Employment Discrimination for LGBT Americans* (Sept. 2007), available at http://www.aclu.org/pdfs/lgbt/enda_20070917.pdf; *Broken Promises: Two Years After Katrina* (Aug. 2007), available at http://www.aclu.org/pdfs/prison/brokenpromises_20070820.pdf; *The Persistent Problem of Racial Disparities in the Federal Death Penalty* (June 2007), available at http://www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf; *Conditions of Confinement in Immigration Detention Facilities* (June 2007), available at http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf; *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at http://www.aclu.org/images/asset_upload_file893_29902.pdf; *Disavowed: The Government's Unchecked Retaliation Against National Security Whistleblowers* (May 2007), available at http://www.aclu.org/pdfs/safefree/disavowed_report.pdf; *A Blueprint for Meeting the Needs of Girls in TYC Custody* (May 2007), available at http://www.aclu.org/images/asset_upload_file373_29875.pdf; *Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy* (Apr. 2007), available at http://www.aclu.org/images/asset_upload_file576_29402.pdf; *Criminalizing the Classroom* (March 2007), available at http://www.nyclu.org/files/criminalizing_the_classroom_report.pdf; *Publish and Perish: The Need for a Federal Reporters' Shield Law* (Mar. 2007), available at http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf; *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf.

Reclaiming Patriotism, (Mar. 2009), available at http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf; *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at http://www.aclu.org/images/asset_upload_file893_29902.pdf; *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf; *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003), available at http://www.aclu.org/FilesPDFs/spies_report.pdf.

The ACLU also regularly publishes books, “know your rights” publications, 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. Some of the more recent books published by the ACLU include: Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press, April 1, 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).⁵ Some of the more recent “know your rights” publications include: *Know Your Housing Rights: For Survivors of Domestic Violence* (Feb. 2008), available at <http://www.aclu.org/womensrights/violence/33978pub20080206.html>; *Know Your Rights! - Students Wallet Card* (June 2007), available at <http://www.aclu.org/lgbt/youth/30427pub20070615.html>. Some of the more recent ACLU fact sheets include: *The Truth About Torture* (Apr. 2009), available at http://www.aclu.org/images/torture/asset_upload_file501_33165.pdf; *Guantánamo Fact Sheet* (Nov. 2008), available at http://www.aclu.org/pdfs/safefree/closegitmo/gitmo_factsheet.pdf; *Torture & Secrecy* (Dec. 2008), available at http://www.aclu.org/images/torture/asset_upload_file585_38059.pdf; *America's Surveillance Society* (Nov. 2009), available at http://www.aclu.org/images/asset_upload_file381_37802.pdf.⁶ These

⁵ A search of Amazon.com conducted on June 5, 2009 produced over 60 books published by the ACLU.

⁶ For many more ACLU fact sheets on various civil liberties topics see: http://www.aclu.org/safefree/relatedinformation_fact_sheets.html, http://www.aclu.org/lgbt/relatedinformation_fact_sheets.html, http://www.aclu.org/privacy/relatedinformation_fact_sheets.html, http://www.aclu.org/womensrights/relatedinformation_fact_sheets.html.

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 EPIC to be a news media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties); *Nat'l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester where it had previously published only one book); *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference on Civil Rights to be “primarily engaged in the dissemination of information” because it “disseminate[d] information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice.”).

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <http://blog.aclu.org/>. The ACLU also 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* <http://www.aclu.org/multimedia/index.html>.

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. *See, e.g., Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch a news media requester because it disseminated information to the press and public through its website).

The ACLU website specifically includes features on information obtained through the FOIA, including: www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; www.aclu.org/exclusion. For example, the ACLU’s “Torture FOIA” webpage, www.aclu.org/torturefoia, contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents,

http://www.aclu.org/reproductiverights/relatedinformation_fact_sheets.html, and http://www.aclu.org/intlhumanrights/relatedinformation_fact_sheets.html.

an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos it obtained through FOIA, http://www.aclu.org/safefree/general/olc_memos.html, contains commentary and analysis of the memos, an original comprehensive chart about OLC memos (see below); links to web features created by ProPublica, an independent, non-profit investigative journalism organization based on information gathering, research, and analysis conducted by the ACLU; and ACLU videos created about the memos. *See Nat'l Security Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to public "document sets" whereby Archive staff would "cull those of particular interest . . . supplement the chosen documents with detailed cross-referenced indices, other finding aids, and a sophisticated retrieval system in order to make it more accessible to potential users") (internal citations omitted); *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d at 53-54 (finding Judicial Watch a news media requester because it posted documents obtained through FOIA on its website).

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The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources – including information obtained from the government through FOIA – the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-Era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part. The chart is available at http://www.aclu.org/safefree/general/olcmemos_chart.pdf. Similarly, the ACLU produced a chart of original statistics about the Defense Department's use of NSLs based on its own analysis of records obtained through FOIA. That chart is available at http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf. *See Nat'l Sec. Archive*, 880 F.2d at 1387 (explaining that National Security Archive was a news media requester because it obtained "documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedic work that it will then offer to the public"); *id.* (explaining that National Security Archive was a news media requester because it "gather[ed] information from a variety of sources; exercise[d] a significant degree of editorial discretion in deciding

what documents to use and how to organize them; devise[d] indices and finding aids; and distribute[d] the resulting work to the public.”).

The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.” See <http://aclu.tv/>. The Freedom Files is a series of half-hour documentaries that feature true stories about real people to highlight vital civil liberties issues, and include commentary and analysis from experts on particular civil liberties problems; some also include explanation and analysis of information the ACLU has obtained through FOIA. See <http://aclu.tv/episodes>. In addition to distribution through the ACLU’s website, The Freedom Files series aired on Court TV, Link TV, and PBS stations nationwide. With each episode, the ACLU distributed issue fact sheets, reports, and FAQs. See <http://aclu.tv/educate>. Season two of The Freedom Files came with a Teacher’s Guide as well. See <http://aclu.tv/teachersguide>.

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In sum, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. The ACLU plainly qualifies as a “representative of the news media” for FOIA fee waiver purposes. As Senator Leahy said during debate about FOIA’s fee waiver provisions: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’” 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986).⁷

Expedited Processing

Expedited processing is warranted where the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity. See 5 U.S.C. 552(a)(6)(E)(v); 32 C.F.R. § 286.4(d)(3)(ii). It is noteworthy that both the Department of Justice and the Department of State have granted the ACLU’s request for expedited processing for a FOIA request *identical* to this one. See Exh. F (May 2009 determination by Department of Justice that ACLU entitled to expedited processing of request identical to this Request); Exh. G (May 2009 determination by Department of State that ACLU entitled to expedited processing of request identical to this Request). The Department of Defense is the only agency that has denied expedited processing of this Request.

⁷ The ACLU plans to analyze, 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

For the reasons set out in the original Request, expedited processing is warranted here. *See* Exh. A at 6-16. Mr. Kammer, however, denied expedited processing on two grounds. First, he concluded that the ACLU was not primarily engaged in disseminating information because it not only disseminates information to the public but also engages in litigation and lobbying activities. Exh. B at 1. Second, Mr. Kammer concluded that the requested records were not “urgently needed” because “the information [would not] lose its value if not processed on an expedited basis,” and because the “broad and sustained media coverage” about Bagram, U.S. detention policy, and the treatment of detainees in U.S. custody abroad “belie[d the ACLU’s] contention that the request information relates to a breaking news story.” Exh. B at 3. Notwithstanding Mr. Kammer’s determination, the Request clearly meets statutory and regulatory requirements for expedited processing.

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The ACLU is Primarily Engaged in the Dissemination of Information

The ACLU is primarily engaged in the dissemination of information. *See* Exh. A at 7-8. As discussed above, obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities. *See supra* at 3-10.

Courts have found organizations with missions similar to the ACLU and which engage in information dissemination activities similar to the ACLU to be “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference – whose mission is “to serve as the site of record for relevant and up-to-the minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws . . .” to be “primarily engaged in the dissemination of information”); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (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” (internal citation omitted)). These organizations have been found to be “primarily engaged in disseminating information” even though they engage in litigation and lobbying activities *in addition* to their publication and information dissemination activities. *See supra* at 2-3. Dissemination of information need not be the organization’s *sole* activity. *See id.* Mr. Kammer’s determination to the contrary was incorrect. Exh. B at 1.

Notably, other agencies routinely grant the ACLU's requests for expedited processing of FOIA requests, therefore recognizing the ACLU is primarily engaged in disseminating information. *See* Exh. F & G; Exh. H (December 2008 determination by Department of Justice that ACLU entitled to expedited processing); Exh. I (October 2008 determination by the National Security Agency that ACLU entitled to expedited processing); Exh. J (July 2006 determination by Department of the Army that ACLU entitled to expedited processing); Exh. K (March 2006 determination by the Defense Intelligence Agency that ACLU entitled to expedited processing); Exh. L (March 2006 determination by the Department of Justice Civil Division that ACLU entitled to expedited processing); Exh. M (January 2006 determination by the Department of Justice's Office of Information and Privacy that ACLU entitled to expedited processing).

The Requested Records are Urgently Needed to Inform the Public
About Federal Government Activity

There is an urgent need to inform the public about the detention and treatment of, as well as the status review process afforded, prisoners at Bagram. *See* Exh. A at 8-16. The records requested here are urgently needed to inform the national debate about U.S. policy with respect to the detention and treatment of suspected terrorists and individuals designated as enemy combatants. The Executive branch, Congress, and the public are already in the throes of resolving not only how to close Guantanamo and what to do with detainees held there, but what to do with suspected terrorists and combatants held at other off-shore detention facilities, and what to do with suspected terrorists and combatants captured in the future. It is vital that the debate about these serious and complex national questions be as informed as possible.

Information about the Bagram detention facility – which currently houses a large but unknown number of individuals captured not only in Afghanistan but from various places *outside* of Afghanistan – is a central to this debate. The most difficult detention policy questions (both what to do with people currently being detained and what to do with people captured in the future) cannot be resolved without an informed understanding of Bagram. *See* Exh. A at 8-10 (citing articles discussing the role of Bagram in the detainee policy debate); *id.* at 10 (citing editorials calling for policy change at Bagram); *see also* Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, Jun. 3, 2009 (remarking that President Obama “didn't mention Bagram at all” in his May 21st speech about detention policy but that human rights lawyers say “Bagram will play a critical role in shaping the Obama administration's detainee policy”); *id.* (“Other legal experts said Obama's decision to leave Bagram out of his May 21 speech won't remove his need to confront the

legal problems posed by the site.”); *Special Report With Bret Baier: ‘Special Report’ Panel on Obama’s Trip Overseas* (Fox News television broadcast June 8, 2009) (panelist on news program stating “[a]nd the hypocrisy is that detention without trial, even if you close Gitmo, is happening in Afghanistan at the Bagram Air Base”);⁸ Jack Goldsmith, *The Detainee Shell Game*, Wash. Post, May 31, 2009; (op-ed noting that: “A little-noticed consequence of elevating standards at Guantanamo is that the government has sent very few terrorist suspects there in recent years. Instead, it holds more terrorists -- without charge or trial, without habeas rights, and with less public scrutiny -- at Bagram Air Base in Afghanistan.”); Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (“The Bagram prison – where about 600 people, mostly Afghans, are being held indefinitely and without charges – is a delicate issue for the Obama administration at a time when it is struggling to come up with a plan for detainees in the prison at Guantánamo Bay, Cuba, which it intends to close.”); Tim Reid, *Guantánamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“It is Bagram, not Guantánamo, that should trouble the world’s conscience.”); Editorial, *War and Justice*, Wash. Post, May 23, 2009 (discussing President Obama’s failure to address Bagram in his May 21st speech about detention policy and stating: “The United States is detaining foreign suspects in this Afghan prison without judicial oversight, and the administration has argued in court for the continuing right to do so....If it was wrong for the Bush administration to use Guantanamo Bay to evade judicial oversight in such cases, it can’t be right for the Obama administration to use Bagram to the same end.”); Eric Schmitt and Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. Times, May 23, 2009 (“How the United States is dealing with terrorism suspects beyond those already in the prison at Guantánamo Bay, Cuba, was a question Mr. Obama did not address in the speech he gave Thursday about his antiterrorism policies. . . . Some suspects are being imprisoned without charges at a United States air base in Afghanistan”); Daniel Hemel, *More Rights at Gitmo Than Bagram*, Letter to the Editor, Wall St. J., May 13, 2009; Joe Garofoli, *100 days: Half-Truths and Contradictions*, San Francisco Chron., Apr. 29, 2009 (“Bagram Airbase in Afghanistan holds more prisoners than Guantanamo and prisoners there have few rights.”).

However, there is currently a dearth of publicly-available information about Bagram. See Tim Reid, *Guantanamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“[T]he grossly underreported story is a US-run jail that Mr. Obama does not want the world to focus on - the makeshift prison on the US airbase at Bagram, Afghanistan. There, more than 600 prisoners, many held for years and all without charge and indefinitely, are packed into conditions far worse than

⁸ Transcript available at http://www.foxnews.com/prINTER_friendly_story/0,3566,525443,00.html.

Guantánamo. They have virtually no access to lawyers. Journalists and human rights groups are barred.”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 at A02 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 2, 2009 (“United States officials have never provided a full accounting of the prison population”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held [at Bagram]”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”); see also Exh. A at 3, 9-10. Without the release of basic information such as who is being detained at Bagram, for how long, where they were captured, and on what authority and basis they are being held, and without the release of information about the process that is afforded these prisoners to challenge their detention, the public debate about how to reform U.S. detention policy will be woefully unformed.

The critical detention policy debate is happening *now* and it will reach its climax in the coming months. Mr. Kammer’s conclusion that the information requested here would not “lose its value if not processed on an expedited basis,” Exh. B at 3, entirely overlooks the importance of the requested records to illuminating an urgent public debate that is quickly coming to a head. By the time the Defense Department processes the 2,110 open requests in the queue before this Request, Exh. B at 4, it is highly likely that the executive branch (and Congress) will have already reached a policy resolution on these issues. See *Elec. Frontier Found. v. Office of Dir. of Nat’l Intelligence, et al.*, 542 F. Supp. 2d 1182, 1186 (N.D. Cal. 2008) (granting preliminary injunction for expedited processing of FOIA request where the requested information was “essential to inform the public debate over the possible FISA amendments [legislation]” and where “the requested information [would] be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced after Congress amends the law”); *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 2007 WL 4208311, *7 (finding “irreparable harm can exist in FOIA cases . . . because ongoing public and congressional debates about issues of vital national importance cannot be restarted or wound back” (internal quotation marks omitted)); *Gerstein v. CIA*, 2006 WL 3462658, *7 (N.D. Cal. Nov. 29, 2006) (finding delaying response to a FOIA request in which national policy debate occurring would compromise a significant recognized interest “in enhancing public debate on potential legislative action”); see also *Payne Enterprises v. United States*, 837 F.2d 486, 495 (D.C. Cir. 1988) (“stale information is of little value”).

The executive branch is already in the midst of resolving these questions. On May 21st, President Obama gave an hour-long speech specifically about U.S. policy with respect to Guantanamo and detention policy more generally. *See, e.g.*, William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 23, 2009; Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009; Peter Finn, *Obama Endorses Indefinite Detention Without Trial for Some*, Wash. Post, May 22, 2009; *Washington News: Obama, Cheney Lay Out Views On Post-9/11 Policies*, U.S. News & World Report, May 22, 2009; Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. Times, May 21, 2009; Peter Baker, *News Analysis: Obama Faces Pitfalls on Detainees*, May 21, 2009; Sheryl Gay Stolberg, *Obama Is Said to Consider Preventive Detention Plan*, N.Y. Times, May 20, 2009; *see also* Joseph Williams, *Obama Keeps Tribunals, Draws Ire*, Boston Globe, May 16, 2009; Amanda Ruggeri, *Obama Restarts Bush-Era Military Tribunals*, U.S. News & World Report, May 15, 2009. The executive branch task force reviewing detainee policy is expected to announce its findings and proposals in July. *See* Exh. A at 4, 9; *see also* Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009 (“A White House task force reviewing detention policy is set to make recommendations in late July.”). The question of what to do with prisoners at Bagram – again, both those who are already there and those who may be held there in the future – is a key piece of the debate. *See* Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, June 3, 2009 (reporting human rights advocate's statement that “Bagram is certainly going to be the focus of concerns for the administration” and that “whatever recommendations [the detainee task force] makes are going to be driven by the present state of affairs at Bagram.

Courts have held that expedited processing is warranted where the requested records will inform an important national debate that is happening contemporaneously with the FOIA request. *See, e.g.*, *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 (finding expedited processing warranted where requested records would provide useful information for “ongoing national debate” about the Patriot Act); *Gerstein*, 2006 WL 3462658 at *6 (finding expedited processing request must be granted where request concerned “matter of . . . current exigency to the American public” and concerned “subject of an ongoing national debate”); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (expedition of FOIA related to voting rights warranted where “importance of th[is] issue is paramount” and where “expedition of the[] documents could advance the current debate over the Voting Rights Act”); *see also Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 41 (granting preliminary injunction for expedited processing where “obtaining in a timely fashion information

[was] vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program").

Debate on these issues is taking place in Congress as well, and is likely to intensify significantly after the release of the executive branch's proposal on detainee policy next month. President Obama has expressed his desire to work with Congress to craft new detention-related legislation. *See, e.g.*, William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 22, 2009; William Glaberson, *Despite Plan, Guantánamo Trials Still Problematic*, N.Y. Times, May 18, 2009 ("senior administration officials said they planned to ask Congress for additional reforms of the military commission system"). Congressional hearings on detention policy have already been occurred. *See The Legal, Moral, and National Security Consequences of 'Prolonged Detention': Hearing Before the Subcomm. On the Constitution of the Comm. On the Judiciary*, 111th Cong. (June 9, 2009); *see also* Mark Murray, *Boehner: Obama 'Importing' Terrorists*, MSNBC.com, June 9, 2009 (reporting that Republicans in Congress were critical of the Obama administration's decision to bring Guantanamo detainee to U.S. for criminal trial in U.S. federal court); Indira A.R. Lakshmanan, *Democrats Aren't Yielding to Obama*, June 9, 2009; *Fate of Guantánamo Detainees Weighs Heavily on Spending Bills*, CQPoliotics.com, June 4, 2009; Frank James, *Congress' Dems Still Irked By Obama On Gitmo, Tribunals*, NPR.org, June 3, 2009; David D. Kirkpatrick and David M. Herszenhorn, *Guantánamo Closing Hands Republicans a Wedge Issue*, N.Y. Times, May 23, 2009; Margaret Talev and David Lightman, *Guantánamo Closure is a Tough Sell for President*, Miami Herald, May 21, 2009; *GOP Attacks Obama Over Guantanamo Bay Plan*, United Press Int'l, May 17, 2009.

Courts have frequently held that expedited processing is warranted where the information requested would inform a debate occurring or imminently expected in Congress. *See, e.g.*, *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186 (granting preliminary injunction for expedited processing of FOIA request because "irreparable harm exists where Congress is considering legislation that would amend the [Foreign Intelligence Surveillance Act] and the records may engage the public to participate meaningfully in that debate"); *Elec. Frontier Found.*, 2007 WL 4208311 at *7 (granting preliminary injunction for expedited processing of a FOIA request where information needed so that "plaintiff, Congress, and the public may participate in the debate over the pending legislation [to amend the Foreign Intelligence Surveillance Act] on an informed basis"); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding expedited processing warranted and urgency element satisfied where release of requested information could have "vital impact" on imminent legislative debate about amendment or reauthorization of parts of the Voting Rights Act); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 29

(finding expedited processing warranted where requested records concerned issue “of immediate public interest in view of the ongoing debate regarding the renewal and/or amendment of the Patriot Act” in Congress).

Ongoing court cases about the rights of Bagram detainees also continue to generate attention and have intensified public debate about U.S. detention policy. See MSNBC.com, June 3, 2009 (reporting that Judge “Bates’ ruling has fueled criticism of the Obama administration, in the United States and abroad” for its Bagram policies); Daphne Eviatar, *Judge Allows Government to Appeal (and Delay) Bagram Detainee Case*, Wash. Independent, June 3, 2009; Nedra Pickler, *Judge Holds Bagram Detainee Cases Pending Appeal*, Assoc. Press, June 2, 2009; Josh Gerstein, *W.H. Gets Breathing Room on Detainees*, Politico.com, June 1, 2009; Ruben Navarrette Jr., *Obama Cutting and Pasting Bush Policies*, San Francisco Chronicle, May 20, 2009 (criticizing Obama administration’s position in Bagram litigation). The debate about whether prisoners at Bagram should be entitled to file *habeas* petitions in U.S. courts has made it particularly urgent for the public to understand what kind of administrative process Bagram prisoners are given to challenge the basis for their detention, whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. See Exh. A at 8-12; see also Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (reporting on a Bagram detainee whom an Army Captain believes may be improperly detained as a case of mistaken identity and a *habeas* petition that will be filed on his behalf in U.S. courts); Spencer Ackerman, *McChrystal’s Full Letter to Levin on Detainees*, Wash. Independent, June 2, 2009.

Finally, the request also seeks records about the mistreatment of prisoners at Bagram, a matter of urgent public concern in its own right. Separate and apart from the looming national debate about whom the U.S. should be detaining around the world, on what basis, and with what process, the nation remains embroiled in a fundamental debate about the torture and mistreatment of detainees held in U.S. custody. More specifically, there is a vibrant public debate about whether those who authorized the torture of detainees held in U.S. custody should be investigated and prosecuted for alleged misconduct and how the nation can most accurately obtain a full accounting of detainee mistreatment since September 11. The release of the requested records will help inform this urgent and vital debate. See Exh. A at 12-16; see also Walter Pincus, *Army Report Shows How Rules That Don’t Work Are Ignored*, Wash. Post, June 9, 2009 (reporting on mistreatment of detainees at Bagram); Karen DeYoung and Ann Scott Tyson, *McChrystal to Face Questions on Plans for Afghanistan*, Wash. Post, June 2, 2009 (reporting on how members of

Congress probed McChrystal's knowledge of detainee abuse); Stan Grant, *Ex-Taliban Claims Abuse at Gitmo, Bagram*, CNN.com, May 24, 2009; Chris Good, *Obama's Evolving Opposition To A Truth Commission*, TheAtlantic.com, May 22, 2009; Alex Gibney, *Killing Wussification*, TheAtlantic.com, May 21, 2009 (discussing torture at Bagram); Liz Halloran, *Torture Debate Ties Washington In Partisan Knots*, NPR.org, May 20, 2009; Scott Shane, *Advocacy Groups Seek Disbarment of Ex-Bush Administration Lawyers*, N.Y. Times, May 18, 2009; Daphne Eviatar, *Hearing Lays Groundwork for Torture Prosecutions*, Wash. Independent, May 14, 2009; *Enhanced Interrogations' Don't Work, Ex-FBI Agent Tells Panel*, CNN.com, May 13, 2009; Spencer Ackerman, *FBI Agent's Account of Interrogations Conflicts with Report*, Wash. Independent, May 12, 2009; Walter Pincus, *U.S. Military Personnel Were Split on Past Interrogations, Report Says*, Wash. Post, May 12, 2009; Michael Isikoff, 'We Could Have Done This the Right Way,' Newsweek, May 4, 2009 (same); Bobby Ghosh, *A Top Interrogator Who's Against Torture*, Time, Apr. 24, 2009; Ali Soufan, *My Tortured Decision*, N.Y. Times, Apr. 23, 2009 (FBI interrogator Ali Soufan's first-hand account of his interrogation of Abu Zubaydah and his disagreements with the CIA over the use of "enhanced interrogation techniques").

The national importance of the detention and treatment policy debate, which underscores the urgency of releasing these records before the debate ceases, is evidenced by the widespread media attention to these issues generally, Exh. A at 11-16, and Bagram specifically, Exh. A at 8-11; *see also supra* at 12-18. Mr. Kammer's concluded that the "broad and sustained media coverage" about Bagram, U.S. detention policy, and the treatment of detainees in U.S. custody abroad, somehow negated the urgency of the ACLU's request. Exh B at 3. This conclusion, however, not only defies common sense but also the case law on this issue. Widespread media interest on these topics only *underscores* the importance of this issue to the public and *supports* the ACLU's entitlement to expedited processing under the "urgency to inform" standard here. *See, e.g., ACLU of N. Cal. v. Dep't of Def.*, 2006 WL 1469418 at *6, 7 (N.D. Cal. May 25, 2006) (stating that "[i]f anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of a FOIA request" and holding that "intense [media] scrutiny" about DoD's TALON database "validated" argument that there was an "urgency to inform the public about the program") (internal citations omitted); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 29 (citing to news articles demonstrating "widespread public concern" about the government's surveillance activities under the Patriot Act in concluding expedited processing of FOIA request warranted); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (noting how numerous "news reports and magazine articles" on topic of FOIA request were in finding expedited processing warranted). In any event, although many news

stories have reported on the *treatment* of detainees at Bagram, many stories emphasize the *lack* of publicly-available details about the policies and rules that govern the U.S. government's detention of hundreds of people at Bagram; who, precisely, is being held there, for how long, and on what basis; where and under what circumstances these prisoners were captured; and whether the prisoners have a meaningful opportunity for challenging their detention. *See supra* at 13-14; *see also* *ACLU of N. Cal. v. Dep't of Def.*, 2006 WL 1469418 at *6, 7 (finding an urgency to inform the public even where numerous press articles on a topic where "there were still important, unanswered questions" and where "valuable, time-sensitive information apparently remained unknown at the time of plaintiffs' request").

Again, Bagram is a key part of the national debate about detention policy. The requested records are urgently needed to inform the public about who is being held at Bagram, on what basis, with what kind of process, and under what conditions. The requested records are urgently needed to inform the public about whether Bagram is simply "another Guantanamo."

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In light of the above, we respectfully request that you reconsider Mr. Kammer's decision to deny the ACLU's request for a limitation of fees based on its status as a representative of the news media and its request for expedited processing. We look forward to your prompt response.

Sincerely,



Melissa Goodman
Staff Attorney
ACLU's National Security Project