



December 16, 2011

Via UPS

Defense Freedom of Information Policy Office
ATTN: Mr. James Hogan
Director of Administration and Management
Office of the Secretary of Defense
1155 Defense Pentagon
Washington, DC 20301-1155

Re: Freedom of Information Act Appeal
Case Number 12-F-0113

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

Dear Mr. Hogan,

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") write to appeal the Department of Defense's denials of (1) the ACLU's request for expedited processing of Freedom of Information Act ("FOIA") Request number 12-F-0113 ("Request") and (2) the ACLU's request for a fee limitation based on its status as a representative of the news media. The ACLU also appeals from the Department of Defense's deferral of any decision on the ACLU's request for a public-interest fee waiver.

The ACLU's Request seeks records relating to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki ("al-Awlaki") and two other U.S. citizens by the United States Government. Specifically, the Request seeks six categories of information, including records pertaining to the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killing and upon which al-Awlaki was actually targeted, the process by which U.S. citizens can be designated for targeted killing, and factual basis for the killings of al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. *See* Ex. A (FOIA Request dated October 19, 2011). Chief Paul J. Jacobsmeyer's letter denying the ACLU's Request for expedited processing and a fee limitation and deferring any decision on the ACLU's request for a public-interest fee waiver is dated October 31, 2011. *See* Ex. B (Mr. Jacobsmeyer's letter dated October 31, 2011).

I. The ACLU is entitled to 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)(II); 32 C.F.R. § 286.4(d)(3)(ii).

For the reasons set out in the original Request, expedited processing is warranted here. *See* Ex. A at 7–9. Mr. Jacobsmeyer, however, denied expedited processing on the grounds that the requested records were not urgently needed and did not qualify as “breaking news” because the subject of the Request relates to “continuing news stories,” and because “the information would [not] lose its value if not processed on an expedited basis.” Ex. B at 2. Mr. Jacobsmeyer’s determination was incorrect; the request clearly meets the statutory and regulatory requirements for expedited processing.

A. The requested records are urgently needed to inform the public about federal-government activity.

The records requested are urgently needed to inform the national debate about U.S. policy with respect to targeted killings of U.S. citizens. As the ACLU’s Request demonstrates, the information requested relates to a breaking news story that dramatically focused the public’s attention on the legality, extent, and implications of the United States Government’s policy and practice of authorizing and carrying out targeted killings of U.S. citizens and others and its failure to avoid killing U.S. citizens while targeting other individuals. *See* Ex. A at 2–4, 8–9.

As the numerous news articles cited in the Request suggest, this is an issue about which the public seeks knowledge. Indeed, since the ACLU submitted this Request, there has been sustained interest in the U.S. policy of authorizing targeted killings of U.S. citizens generally, and in the killings of the three U.S. citizens discussed in the Request specifically. *See, e.g.*, Adam Entous, Evan Perez & Siobhan Gorman, *Drone Program Attacked by Human-Rights Groups*, Wall. St. J., Dec. 9, 2011, <http://on.wsj.com/vDmkqe>; Roger Cohen, Op-Ed., *Doctrine of Silence*, N.Y. Times, Nov. 28, 2011, <http://nyti.ms/uqi9Ie>; Leonard C. Goodman, *Assassinating the Rule of Law*, In These Times, Nov. 25, 2011, <http://bit.ly/sVlfOJ>; Paul D. Miller, Op-Ed., *When Will the U.S. Drone War End?*, Wash. Post, Nov. 17, 2011, <http://wapo.st/tnTGJ0>; Andrew Rosenthal, *Release the Memo!*, N.Y. Times, Nov. 11, 2011, <http://nyti.ms/swDmDB>; Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, <http://on.wsj.com/uh1AEL>; Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of his Father?*, Time, Oct. 27, 2011, <http://ti.me/vj2Eor>; Alan Gathright, *Denver-Born Teen Killed In U.S. Drone Attack*, TheDenverChannel.com, Oct. 27, 2011, <http://bit.ly/v4or1K>; Daniel

Swift, *Drone Knowns and Unknowns*, Harper's Mag., Oct. 27, 2011, <http://bit.ly/rBQjCp>; Tim Lister, *Death of U.S. Teenager in Drone Strike Stokes Debate*, CNN.com, Oct. 25, 2011, <http://bit.ly/rDnXsA>; Catherine Herridge, *Obama Administration Pressed for Accountability After Americans Killed in Anti-Terror Airstrikes*, FoxNews.com, Oct. 25, 2011, <http://fxn.ws/rIFWd8>; Editorial, *When is it Okay to Kill Americans Abroad?*, Wash. Post, Oct. 21, 2011, <http://wapo.st/rCWmkY>; Ken Dilanian, *Grieving Awlaki Family Protests Yemen Drone Strikes*, L.A. Times, Oct. 19, 2011, <http://lat.ms/vZQ0nU>.

The urgent and important nature of the requested documents has recently been highlighted in statements made by U.S. officials, including President Obama. See, e.g., David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, <http://wapo.st/u2GTMf> (“[Al-Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the enemies [sic: Yemenis], we were able to remove him from the field.”); Matt Apuzzo, *Obama Lawyers: Citizens Targeted If at War with US*, Associated Press, Dec. 1, 2011, <http://yhoo.it/tgYqPX>; Question Taken at Press Briefing, *Reported Death of Abdulrahman al-Awlaki*, U.S. Dep't of State (Oct. 25, 2011), <http://1.usa.gov/tD9jQN>. The targeted killing of al-Awlaki and other U.S. citizens has also been a topic of discussion during Republican presidential campaign debates, with candidates staking out positions about the legality of the government's actions. See CBS News/NJ Debate Transcript, Part 1, CBSNews.com (Nov. 13, 2011), <http://bit.ly/tPzdli>; CBS News/NJ Debate Transcript, Part 2, CBSNews.com (Nov. 13, 2011), <http://bit.ly/rHiRcq>.

A rapidly growing body of legal scholarship is also being produced regarding the legality of the targeted killing of al-Awlaki, but that scholarship is hobbled by a lack of information about the government's legal and factual justifications for carrying out the killing. See, e.g., Robert J. Delahunty & Christopher J. Motz, *Killing Al-Awlaki: The Domestic Legal Issues*, 1 Idaho J. L. & Pub. Pol'y (forthcoming 2012) (manuscript at 3–4), <http://ssrn.com/abstract=1963976> (“Our analysis is unavoidably somewhat tentative. This is not only because the crucial facts surrounding the U.S. government's decision to target and kill al-Awlaki, and the circumstances surrounding his death, are not fully available from open sources, but to an unknown extent remain classified. No less important is the fact that the Obama Administration has thus far declined to reveal even a redacted version of a 50-page legal memorandum reportedly prepared in 2010 by the Justice Department's Office of Legal Counsel (OLC) respecting the legality of targeting and killing al-Awlaki.”); David Husband, *The Targeted Killing of*

Al-Awlaki, Harv. Nat'l Security J., Nov. 26, 2011, <http://bit.ly/sG8lh2>; Anthony M. Shults, Note, *The "Surveil or Kill" Dilemma: Separation of Powers and the FISA Amendments Act's Warrant Requirement for Surveillance of U.S. Citizens Abroad*, 86 N.Y.U. L. Rev. 1590 (2011); Philip Dore, Comment, *Greenlighting American Citizens: Proceed With Caution*, 72 La. L. Rev. 255 (2011); Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. Conflict & Security L. 385 (2011); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 Y.B. of Int'l Humanitarian L. (M.N. Schmitt et al. eds., 2010), available at <http://ssrn.com/abstract=1754223>.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

In light of the ongoing national debate about whether and how the U.S. government may authorize and carry out targeted killings against U.S. citizens, Mr. Jacobsmeyer's statement that the Request does not "qualify[] as 'breaking news'" is surprising and incorrect. The fundamental question about how this country will deal with terrorism suspects and when it may kill its own citizens and others is critical to the public's understanding of the targeted killing program and U.S. counterterrorism practices. Information sought in the Request is essential to a full understanding of these matters. And, more to the point, details are of paramount importance *now* as U.S. officials decide when and where they are empowered to order targeted killings and whether U.S. citizens are entitled to greater procedural protections. Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki are the most recent U.S. citizens killed pursuant to the government's targeted killing program, but there is no reason to believe they will be the last. The public urgently needs access to the information sought in the Request in order to inform the ongoing debate about the wisdom and legality of the targeted killing program. *See, e.g., Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004) (finding expedited processing warranted where requested records would provide useful information for "ongoing national debate" about the Patriot Act); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (expedition of FOIA request related to voting rights warranted where "importance of this issue is paramount" and where "expedition of the[] documents could advance the current debate over the Voting Rights Act"); *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (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"); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 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” 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*, No. C 07-5278 SI, 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007) (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’” (quoting *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462659, at *4 (N.D. Cal. Nov. 29, 2006))); *Gerstein*, 2006 WL 3462658, at *7 (finding that delaying a response to a FOIA request in which a national policy debate is occurring would compromise a significant recognized interest “in enhancing public debate on potential legislative action”); *id.* at *6 (finding expedited processing mandatory where request concerned a “matter of . . . current exigency to the American public” and the “subject of an ongoing national debate”); *see also Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“stale information is of little value”).

Finally, Mr. Jacobsmeyer’s conclusion that the Request does not concern a breaking news story because “the information relates to continuing news stories” defies common sense and caselaw on the subject. Ex. B at 2. 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. *See, e.g., Am. Civil Liberties Union of N. Cal. v. Dep’t of Def.*, No. C 06-01698 WHA, 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” the argument that there was an “‘urgency to inform’ the public about the program”); *Am. Civil Liberties Union 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 the topic of the FOIA request were in finding that expedited processing was warranted).

The Request makes clear that the records requested are of critical importance to an ongoing national debate. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of “actual or alleged” activities of the government. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Notably, the

Department of Justice has separately granted expedited processing for this Request, recognizing that the information requested is matter of urgent national importance. *See* Ex. C.

B. The ACLU is primarily engaged in the dissemination of information.

As Requesters have already demonstrated, the ACLU is primarily engaged in the dissemination of information. *See* Ex. A at 7–8. Obtaining information about governmental 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.

Indeed, courts have already found that the ACLU, and other organizations with missions and information-dissemination activities similar to the ACLU’s, are “primarily engaged in disseminating information.” *See, e.g., Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 29 n.5 (finding that ACLU, as a 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” is “primarily engaged in disseminating information” (internal citation omitted)); *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”). Courts have found that the ACLU and other similar organizations are “primarily engaged in disseminating information” even though they engage in other activities—such as lobbying and litigation—in addition to their publication and information-dissemination activities.

II. ACLU is entitled to a fee limitation based on its status as a representative of the news media.

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 10–11. Mr. Jacobsmeyer concluded that the ACLU does not qualify as a “representative of the news media” because “[a]lthough the ACLU may have the means to disseminate information to the public,” its website “does not support that the ACLU’s function is publishing or

broadcasting news to the public.” Ex. B at 1. Mr. Jacobsmeyer’s conclusion is incorrect and misinterprets the standard by which an organization qualifies as a “representative of the news media.”

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); *see also* 5 U.S.C. § 552(a)(4)(A)(ii) (defining “a representative of the news media” in identical terms). 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). The ACLU plainly meets this standard.

As the Request amply explains, the ACLU disseminates information through many channels, including its website, case-dedicated webpages, blogs, press releases, books, reports, newsletters, news briefings, “know your rights” publications, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. *See* Ex. A at 7–11. The Request further explains that the ACLU’s material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, faculty, policy makers, reporters, and members of the general public for no cost or for a nominal fee. *See id.* at 7. It specifically indicates that the ACLU’s website features information obtained through FOIA, including links to released documents, analyses of that information, and charts that collect, summarize, and present information. *See id.* at 7–8.

The release of documents pursuant to past ACLU requests for records relating to the treatment of terrorism suspects has generated a significant reaction from the press, and has added substantively to the ongoing debate over U.S. government policy. To date, the ACLU has received over 150,000 pages of documents in response to such record requests, attracting prolonged and widespread attention from the public and the media.

Thus, contrary to Mr. Jacobsmeyer’s determination, the ACLU’s website more than adequately shows that it engages in publication and dissemination of news, information, and editorial content. The information that the ACLU disseminates is not limited to case developments; indeed, it distributes educational material about a particular civil-liberties issue, recent

news about the particular issue, analyses of congressional or executive-branch action on the particular issue, and more in-depth analytic and educational multimedia features on the issue. No court has ever held that an organization that otherwise engages in the kinds of publishing, editorial, and public-education activities that qualify it as a “representative of the news media” must also show that these are the organization’s sole or even primary functions. 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 the National Security Archive to be 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) (stating that “the key [is] not the organization’s ‘description,’” but rather “whether its activities qualify as those of a representative of the news media” (quoting *Nat’l Sec. Archive*, 880 F.2d at 1385)). In short, there is no requirement that a particular percentage of an organization’s efforts be dedicated to information dissemination or that dissemination of information 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, and publication 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 and 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 and public-education activities. *See Nat’l Sec. Archive*, 880 F.2d at 1386–87; *see also Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding that Judicial Watch, self-described as a “public interest law firm,” is a news-media requester); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (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).

As the Request exhaustively demonstrates, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. *See* Ex. A at 7–11.

III. The ACLU is entitled to a fee-waiver determination.

FOIA requires agencies to waive or reduce the fees associated with a request “if disclosure of the information is in the public interest because it 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); *see also* 32 C.F.R. § 286.28(d). The ACLU requested a waiver of search, review, and duplication fees based on the considerable public interest in the subject of the Request, the ongoing and widespread media attention to the matter, the fact that the Request would significantly contribute to the public’s understanding of the operations and activities of the government, and the fact that the Request was not “primarily in the commercial interest” of the ACLU. Ex. A at 10–11. Rather than address the ACLU’s request, Mr. Jacobsmeyer stated that he “determined that [the ACLU] should be placed in the ‘other’ category for fee purposes.” Ex. B at 2. He stated that the “search will be limited to two hours and will only be conducted within the Office of the Secretary of Defense and the Joint Staff” unless the ACLU committed to financing a longer search. *Id.*

The ACLU objects to the Department’s practice of attempting to secure fee commitments prior to determining whether to grant a request for a fee waiver. The Request makes clear that the records requested are of critical importance to an ongoing national debate, and, as Mr. Jacobsmeyer’s letter conceded, the information requested “relates to continuing news stories.” *Id.* There is no question that release of the records requested would be in the public interest because they would likely contribute significantly to the public

understanding of the operations or activities of the government. *See* 5 U.S.C. § 552(a)(4)(A)(iii).

Therefore, Mr. Jacobsmeyer erred in his failure to determine the ACLU's request for a public interest fee waiver prior to placing the ACLU's Request in the "other" fee category. The ACLU's request for a fee waiver should be granted because the Request plainly and incontrovertibly seeks records of immense importance to an ongoing national debate about federal government policies and practices.

IV. Conclusion

For the foregoing reasons, the ACLU is entitled to expedited processing of the Request and a fee limitation associated with being a "representative of the news media." The ACLU is also entitled to a response to its request for a public interest fee waiver.

Thank you for your consideration.

Sincerely,



Nathan Freed Wessler
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7847
Fax: (212) 549-2654

Exhibit A



October 19, 2011

Information Officer
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon, Room 2C757
Washington, D.C. 20301-1155

HQ USSOCOM
ATTN: SOCS-SJS-I/FOIA Requester Service Center
7701 Tampa Point Blvd
MacDill AFB, FL 33621-5323

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

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, D.C. 20530-0001

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Carmen L. Mallon
Chief of Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Elizabeth Farris, Supervisory Paralegal
Office of Legal Counsel
Department of Justice
Room 5515, 950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Tracy Schmalzer
Director, Office of Public Affairs
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Information and Privacy Coordinator
FOIA Office
Gate 5
1000 Colonial Farm Road
McLean, VA 22101

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President’s Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General’s Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the “ACLU”).¹

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki² (“al-Awlaki”) and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as “drones”—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). *See, e.g.,* Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. Samir Khan

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

² Al-Awlaki’s name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

("Khan"), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,³ was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter "OLC memo"). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaki*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo "concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him." Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

³ Abdulrahman al-Awlaki's first name is sometimes spelled "Abdelrahman" or "Abdul-Rahman" and his family name is sometimes spelled "al-Aulaqi." This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. *See, e.g.*, Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> (“A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen.”); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> (“The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen.”); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

Reports indicate that the OLC memo “does not independently analyze the quality of the evidence against [al-Awlaki].” Savage, *supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. *See* Mark Hosenball, *Secret Panel Can Put Americans on “Kill List”*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> (“Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination.”). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. *See* Hosenball, *supra*

("[O]fficials acknowledged that some of the intelligence purporting to show Awlaki's hands-on role in plotting attacks was patchy."). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

I. Requested Records

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
 - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
 - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
 - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
 - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
 - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
 - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki, including:
- A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
 - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
 - C. Facts indicating that there was a legal justification for killing persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
 - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
 - E. Any other facts relevant to the decision to authorize and execute the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for these records because 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. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a 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)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also 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 website specifically includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/national-security/predator-drone-foia>; <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, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. 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.⁴

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. See, e.g., Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

⁴ 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.

Strike Reflects U.S. Shift To Drones as Cheaper War Tool, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLt>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAn>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3HqbA>.

The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6l3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it “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); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU’s commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy, is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act”).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to “representatives of the news media”).

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is

“primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.⁵

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmalzer’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

⁵ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. 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 Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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

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

Nathan Freed Wessler
National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

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).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7847
Fax: (212) 549-2654

Exhibit B



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

OCT 31 2011

Ref: 12-F-0113

Mr. Nathan Freed Wessler
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Dear Mr. Wessler:

This is an interim response to your October 19, 2011, twelve page Freedom of Information Act (FOIA) request submitted on behalf of the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU"). Your request seeks, "...records pertaining to the legal authority and factual basis for the targeted killing of Anwar al Walkai ("al-Awlaki") and two other U.S. citizens by the United States Government." We note that you have also submitted this request to HQ USSOCOM and the Department of Justice. We received your request on October 26, 2011, and assigned it FOIA case number 12-F-0113.

You have also requested: (a) "Representative of the news media" fee status, 5 U.S.C. § 552(a)(4)(A)(ii), 32 C.F.R. § 286.28(e)(7); (b) a waiver or limitation of search, review and duplication fees, 5 U.S.C. § 552(a)(4)(A)(iii), 32 C.F.R. § 286.28(d); and (c) expedited processing on the basis of "compelling need" and urgent need, 5 U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3)(ii).

Concerning your request for representative of the news media status, in your request you explain that the ACLU is a membership organization that educates the public about civil liberties implications of pending and proposed legislation, lobbies legislators and mobilizes its members to lobby their legislators. That the ACLU provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the 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. Additionally, you state that 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 just one of many tactics...Every aspect of the ACLU's work in furtherance of this mission—including litigation—can fairly be described as information dissemination."

According to your website, "the ACLU is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country." Although the ACLU may have the means to disseminate information to the public, your website does not support that the ACLU's function is publishing or broadcasting news to the public.

After carefully considering your letter in the context of the governing Departmental regulation found at 32 C.F.R. § 286 and reviewing information available concerning the American Civil Liberties Union and the ACLU Foundation on your website, I do not find that the ACLU would qualify as a representative of the news media.

Accordingly, I have determined that you should be placed in the "other" category for fee purposes. The "other" fee category affords you two hours of search time and 100 pages of duplication free of charge. Subsequent processing will be assessed at the established Department of Defense (DoD) fee rates of: clerical search time--\$20 per hour; professional search time--\$44 per hour; executive search time--\$75 per hour; and document reproduction at \$0.15 per page

Your request that fees associated with the processing of the request should be limited to reasonable standard charges for document duplication, 32 C.F.R. § 286.28(e)(7), on the grounds that the ACLU qualifies as a representative of the news media, is denied. Due to the scope of your request, I anticipate that a complete search for responsive records would exceed the two free hours that you are entitled to as an "other" category requester. I ask that you make a fee commitment to support a complete search. If you do not commit to pay fees, the search will be limited to two hours and will only be conducted within the Office of the Secretary of Defense and the Joint Staff. Please respond in writing, stating the amount of fees you are willing to pay to process this request beyond two hours.

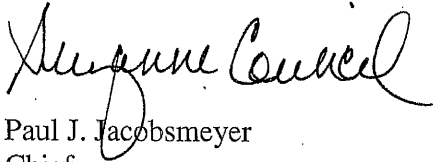
You have requested expedited processing on the basis of "compelling need" and urgent need by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. You argue that the records requested will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct". However, as to qualifying as "breaking news," the information relates to continuing news stories, as you have illustrated on pages eight and nine of your request. In addition, I do not find that the information would lose its value if not processed on an expedited basis. Therefore, your request for expedited processing is denied.

We will be unable to respond to your request within the FOIA's statutory time period as there are unusual circumstances which impact our ability to quickly process your request. Those circumstances are: the need to search for and collect records from several organizations which are geographically separated from this Office and the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue. We will additionally not be able to respond to your request with an additional 10 days. Therefore, if you would like to receive an earlier response, you may wish to narrow the scope of your request. As a matter of information, our current administrative workload is approximately 1,700 open requests.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, DC 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 12-F-0113, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

for



Paul J. Jacobsmeyer
Chief

Exhibit C



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

OCT 27 2011

Mr. Nathan Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Re: AG/12-00070 (F)
DAG/12-00071 (F)
ASG/12-00072 (F)
CLM:DRH:NCJ

Dear Mr. Wessler:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated October 19, 2011, which was received in this Office on October 20, 2011, in which you requested records created after September 11, 2001 concerning the process, legal and factual basis for the targeted killing of United States citizens, including Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

You requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv) (2011). Pursuant to Department of Justice regulations, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. at § 16.5(d)(2). The Director has determined that your request for expedited processing should be granted. Accordingly, your request has been assigned to a FOIA Specialist in this Office and records searches are being initiated in the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

The records you seek require searches in other Offices, and so your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. We have not yet completed our search for records within the scope of your request. The time needed to process your request will necessarily depend on the complexity of our records search and on the volume of any records located. In an effort to speed up our records searches, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

If you have any questions or wish to discuss the processing of your request, you may contact Natasha Jahangiri, the analyst processing this request, by telephone at the above number or you may write to her at Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison at the above telephone number to have any concerns you may have addressed.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Mallon', with a stylized flourish at the end.

Carmen L. Mallon
Chief of Staff