



April 25, 2018

Defense Freedom of Information Division
1155 Defense Pentagon
Washington, DC 20301-1155

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

To Whom It May Concern:

The ACLU Foundation of Texas (“ACLU”)¹ submits this Freedom of Information Act (“FOIA”) request (“Request”) for records about the implementation of President Trump’s Memorandum for the Secretary of Defense, the Attorney General and the Secretary of Homeland Security issued on April 4, 2018 and titled “Securing the Southern Border of the United States” (the “**Presidential Memorandum**”).

The Presidential Memorandum notes that the Secretary of Defense shall request use of National Guard personnel, pursuant to section 502 of title 32, United States Code, to assist in fulfilling a mission of “securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens” into the United States.²

By this letter, which constitutes a request pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, and the relevant implementing regulations, *see* 6 C.F.R. § 5 *et seq.*, the ACLU seeks information

¹ The ACLU Foundation of Texas, a 501(c)(3) organization, is the state’s preeminent civil rights organization, dedicated to protecting and defending the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in Texas, regardless of immigration or refugee status. The ACLU provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, and provides analyses of pending and proposed legislation.

² Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, *Securing the Southern Border of the United States*, Apr. 4, 2018, available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-attorney-general-secretary-homeland-security/>.

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regarding the implementation of the Presidential Memorandum and any request for use of National Guard personnel in response to it, including the terms and conditions on which any use of National Guard personnel is premised and any training or instruction necessary for any military personnel, including National Guard units, to effectively support Department of Homeland Security (“DHS”) personnel in securing the border, as referenced in Sec. 3 of the Presidential Memorandum.

I. Background

On April 4, 2018, President Trump issued the Presidential Memorandum, which referred to the security of the United States being “imperiled by a drastic surge of illegal activity on the southern border” such that “the situation at the border has now reached a point of crisis.”

The Presidential Memorandum directs the Secretary of Defense to support DHS in securing the southern border of the United States and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into the country. This is to be fulfilled, *inter alia*, via a request to be made by the Secretary of Defense for use of National Guard personnel pursuant to section 502 of title 32, United States Code. The Presidential Memorandum also directs the Secretary of Homeland Security to work with the Secretary of Defense to provide any training or instruction necessary for any military personnel, including National Guard units, to effectively support DHS personnel in securing the border.

On the same day that the Presidential Memorandum was issued, DHS Secretary Kirstjen Nielsen appeared at a Press Briefing with White House Press Secretary Sarah Sanders, to provide further information about the Presidential Memorandum and to take questions from members of the Press Gallery.³ During that Press Briefing, Secretary Nielsen remarked that the President had “directed the National Guard personnel be deployed to the southern border” but did not provide details of the nature of the deployment (other than that it would be to “support the Border Patrol”) and observed that “[w]hile plans are being finalized, it’s our expectation that the National Guard will deploy personnel in support of CBP’s border security mission. It will take time to have the details in place, but we are beginning today and we are moving quickly.”

Secretary Nielsen also referred to her discussions with the Governors of the States of Texas, New Mexico, Arizona and California (“Border States”) and indicated that those discussions would be continuing. In response to questions from journalists at the Press Briefing, Secretary Nielsen said that the deployment of National Guard troops would be accomplished through a memorandum of agreement with the Border States and that DHS had been “very specific, state by state, locale by locale, of what CBP believes they need” for the deployment.

³ See *Press Briefing by Press Secretary Sarah Sanders and Department of Homeland Security Secretary Kirstjen Nielsen*, issued on April 4, 2018, accessed at <https://www.whitehouse.gov/briefings-statements/press-briefing-by-press-secretary-sarah-sanders-and-department-of-homeland-security-secretary-kirstjen-nielsen-040418/>

There has been significant media and public interest in the Presidential Memorandum and the proposed deployment of National Guard troops contemplated by it.⁴ However, there is limited publicly available information, and significant public uncertainty, about the terms and conditions on which the deployment is to be made, and the costs associated with the deployment.⁵ Further, the Memorandum of Agreement with the Border States, under which the deployment is to be made, has not been made public, unlike in similar National Guard deployments under previous administrations.⁶ Through this Request, the ACLU aims to facilitate the public's understanding of the implementation of the Presidential Memorandum and the deployment of National Guard troops contemplated by it, so as to enable the public to understand the nature of border security activities along Texas's southern border.

II. Requested Records

We seek release of the following Records:⁷

1. Records created on or after April 4, 2018, concerning any request by the Secretary of Defense for use of the National Guard as referred to in Section 1 of the Presidential Memorandum;
2. Records created on or after January 1, 2018, concerning any discussions or negotiations between the Secretary of Defense and / or any personnel of the Department of Defense and:
 - a. the Secretary of Homeland Security and / or any personnel of DHS; and / or

⁴ See, e.g., Julie Hirschfeld Davis, *Trump Plans to Send National Guard to the Mexican Border*, NEW YORK TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/trump-border-immigration-caravan.html>; Steve Almasy, Barbara Starr and Ryan Browne, *Texas begins operation to send National Guard troops to the border*, CNN POLITICS (Apr. 6, 2018), <https://www.cnn.com/2018/04/06/politics/national-guard-troops-border/index.html>; Editorial Board, *National Guard border deployment is political theater*, USA TODAY (Apr. 9, 2018), <https://www.usatoday.com/story/opinion/2018/04/09/national-guard-border-deployment-political-theater-editorials-debates/494421002/>; John Bacon, *Thousands of National Guard troops begin deploying along Mexican border*, USA TODAY (Apr. 10, 2018), <https://www.usatoday.com/story/news/nation/2018/04/10/heeding-trumps-call-national-guard-troops-mass-along-border/502018002/>.

⁵ See, e.g., Alicia A. Caldwell and Laura Meckler, *California Rejected Request for Guard Troops to Help Secure Border, U.S. Officials Say*, WALL STREET JOURNAL (Apr. 17, 2018), <https://www.wsj.com/articles/california-rejected-request-for-guard-troops-to-help-secure-border-u-s-officials-say-1523915514>; Nick Miroff, *California limits National Guard's border mission, risking clash with Trump*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/world/national-security/california-limits-national-guards-border-mission-risking-clash-with-trump/2018/04/16/5709cdae-41b6-11e8-8569-26fda6b404c7_story.html.

⁶ See, e.g., *Text of Operation Jump Start Memo (MOU)*, TEXAS CIVIL RIGHTS REVIEW (Feb. 6, 2006), <https://texascivilrightsreview.org/0006/02/06/text-of-operation-jump-start-memo-mou/>.

⁷ For the purposes of this Request, "Records" are collectively defined as any written or electronically stored document including but not limited to: text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message); e-mails; images, video, and audio recorded on cell phones; voicemail messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; memoranda of agreement; contracts or agreements; minutes or notes of meetings and phone calls; and memoranda of understanding.

- b. any personnel of the State of Texas and / or the Texas Military Department and / or the Governor of Texas, concerning the use or potential use of the National Guard to support DHS and / or the Department of Defense in any mission to secure the southern border of the United States.
3. Records concerning any training or instruction necessary for any military personnel, including National Guard units, to effectively support DHS personnel in securing the border, as referenced in Section 3 of the Presidential Memorandum.
4. Records recording or concerning the proposal, negotiation, documentation and / or execution of any Memorandum of Agreement between:
 - a. all or any of the Department of Defense and / or the Secretary of Defense and / or DHS and / or the Secretary of Homeland Security on the one hand; and
 - b. all or any of the State of Texas and / or the Texas Military Department and / or the Governor of Texas on the other hand, concerning the use or potential use of the National Guard to support DHS and / or the Department of Defense in any mission to secure the southern border of the United States as referenced in the Presidential Memorandum.
5. Records identifying the number of National Guard troops or personnel requested to assist in fulfilling the mission referenced in the Presidential Memorandum.
6. Records identifying the cost of employing National Guard troops or personnel to assist in fulfilling the mission detailed in the Presidential Memorandum.

To confirm, the ACLU seeks information regarding the implementation of the Presidential Memorandum from any DoD employees and offices which are involved in the implementation. DoD has an obligation to search any components or offices, including field offices, that are reasonably expected to produce any relevant information. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (agency cannot limit its search to only one record system if there are others that are likely to produce the information requested); *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (agency not required to search all of its field offices because request did not ask for a search beyond the agency's central files); *see also Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013).

We request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of our Request be conducted. Given the expedited timeline on which the relevant events and interpretations occurred, this includes the personal email accounts and work phones of all employees and former employees who may have sent or received emails or text messages regarding the subject matter of this Request, as well as all institutional, shared, group, duty, task force, and all other joint and/or multi-user email accounts and work phones which may have been utilized by each such employee or former employee. Additionally, for each relevant email account identified, all

storage areas must be searched, including the inbox “folder” (and all subfolders therein), sent folder, deleted folder, and all relevant archive files.

If any records responsive or potentially responsive to the Request have been destroyed, our Request includes, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

As required by the relevant case law, the agency should follow any leads it discovers during the conduct of its searches and should perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).⁸ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

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

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).⁹ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).¹⁰

⁸ *See also* 6 C.F.R. § 5.5(e)(1).

⁹ *See also* 6 C.F.R. § 5.5(e)(1)(ii).

¹⁰ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

Part of the organizational mission of the ACLU is to “work daily . . . in the community to defend and preserve [] individual rights and liberty.” *About Us*, ACLU TEX., <https://www.aclutx.org/en/about/about-us> (last visited Apr. 17, 2018). This part of our mission entails public education. Our organization regularly creates and disseminates works in the form of presentations, reports, articles, interviews, testimony, social media, and blog posts to educate the public about the activities of the United States government. *See generally Issues*, ACLU TEX., <https://www.aclutx.org/en/issues/> (last visited Apr. 17, 2018). The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties. *See generally Know Your Rights*, ACLU TEX., <https://www.aclutx.org/en/know-your-rights/> (last visited Apr. 17, 2018).

The ACLU publishes a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See Blogs*, ACLU TEX., <https://www.aclutx.org/en/News> (last visited Apr. 17, 2018). The ACLU regularly issues press releases to call attention to news and issues affecting the public. *See Press Releases*, ACLU TEX., <https://www.aclutx.org/en/press-releases/> (last visited Apr. 17, 2018). The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *aclutx*, YOUTUBE, <https://www.youtube.com/user/aclutx> (last visited Apr. 17, 2018). The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclutx.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

Further, the American Civil Liberties Foundation (“National ACLU”), of which the ACLU is an affiliate, regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 620,000 people. The National ACLU also publishes regular updates and alerts via email to approximately 2.1 million subscribers (both National ACLU members and non-members). These updates are additionally broadcast to 1.5 million social media followers (members and non-members). The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The National ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,¹¹ and National ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹²

Similarly, the National ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. National ACLU projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.¹³

¹¹ See, e.g., Press Release, American Civil Liberties Union, *ACLU Statement on President Trump Order Sending National Guard to Mexico Border* (Apr. 4 2018), <https://www.aclu.org/news/aclu-statement-president-trump-order-sending-national-guard-mexico-border>; Press Release, American Civil Liberties Union, *U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit* (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, *Secret Documents Describe Graphic Abuse and Admit Mistakes* (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, *U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit* (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, *Justice Department White Paper Details Rationale for Targeted Killing of Americans* (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, *Documents Show FBI Monitored Bay Area Occupy Movement* (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

¹² See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, ABC (June 15, 2016), <http://abcnews.go.com/US/newly-released-cia-documents-reveal-torture-detention-program/story?id=39873389> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nate Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR (Dec. 9, 2015), <http://www.npr.org/2015/12/09/459026249/cia-torture-report-may-remain-secret> (quoting ACLU project director Hina Shamsi).

¹³ See, e.g., ACLU, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; ACLU, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; ACLU, *Details Abound in Drone 'Playbook' — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; ACLU, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU*

The National ACLU website includes many features on information obtained through the FOIA.¹⁴ For example, the National ACLU’s “Predator Drones FOIA” webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the National ACLU’s FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the National ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.¹⁵

The National ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the National ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.¹⁶ Similarly, the National ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act¹⁷; a chart of original statistics about the Defense Department’s use of National Security Letters based on its own analysis of records obtained through FOIA requests¹⁸; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.¹⁹

Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government’s “Suspicious Activity Report” Systems (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

¹⁴ See, e.g., Nathan F. Wessler & Dyan Cortez, *FBI Releases Details of ‘Zero-Day Exploit Decisionmaking Process*, ACLU (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan F. Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, ACLU (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ-FOIA Case for Records Relating to Killing of Three U.S. Citizens*, ACLU (Dec. 30, 2016), <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU (Aug. 18, 2015), <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI*, ACLU, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU (Apr. 18, 2013), <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU, <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; *PATRIOT FOIA*, ACLU, <https://www.aclu.org/patriot-foia>; <https://www.aclu.org/nsi-documents-released-dod?redirect=cpreirect/32088>.

¹⁵ *Home*, TORTURE DATABASE, <https://www.thetorturedatabase.org>; see also *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

¹⁶ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition, and/or Surveillance*, ACLU, https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

¹⁷ *Summary of FISA Amendments Act Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

¹⁸ *Statistics on NSLs Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsi_stats.pdf.

¹⁹ Nathan F. Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, ACLU (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁰ Specifically, as discussed in Part I, *supra*, the requested records seek to inform the public about the implementation of a new Presidential Memorandum, including the deployment of National Guard troops, and the terms and conditions, and costs, associated with any such deployment.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).²¹ The ACLU also requests a waiver of search 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).

A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.

As discussed above, news accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Especially because little specific information has been made public about the terms and conditions on which any deployment of National Guard troops is to occur, the records sought are certain to contribute significantly to the public’s understanding of these issues.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in

²⁰ *See also* 6 C.F.R. § 5.5(e)(1)(ii).

²¹ *See also* 6 C.F.R. § 5.11(k).

amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. The ACLU is a representative of the news media and the records are not sought for commercial use.

The ACLU also requests a waiver of search 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). 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)(III);²² *see also Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. U.S. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. 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,” a news media requester).²³

²² *See also* 6 C.F.R. § 5.11(b)(6).

²³ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU, the National ACLU, and its affiliates, as “representative[s] of the news media.”²⁴ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific FOIA exemptions. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

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

Matthew McCarthy
ACLU Foundation of Texas
P.O. Box 8306
Houston, Texas 77288

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,



Matthew McCarthy
ACLU Foundation of Texas
P.O. Box 8306
Houston, Texas 77288

²⁴ In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted a fee-waiver request related to the same FOIA request issued to the DOJ.