



March 12, 2008

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Attention:

This is a request pursuant to the Freedom of Information Act (5 U.S.C. § 552) for all agency records (including, but not limited to letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, or any other materials) held by the above listed agencies pursuant to federal government's effort to acquire, analyze and share the transactional information of Americans for the purpose of intelligence gathering.¹

This request arises directly from a March 10, 2008 article in the *Wall Street Journal*. Siobhan Gorman, *NSA's Domestic Spying Grows As Agency Sweeps Up Data*, The Wall Street Journal, March 10, 2008. According to this article the National Security Agency:

now monitors huge volumes of records of domestic emails and Internet searches as well as bank transfers, credit-card transactions, travel and telephone records. The NSA receives this so-called "transactional" data from other agencies or private companies, and its sophisticated software programs analyze the various transactions for suspicious patterns. Then they spit out leads to be explored by counterterrorism programs across the U.S. government, such as the NSA's own Terrorist Surveillance

¹ For the purposes of this request transactional information refers to following:

- Email information (recipient and sender address, subject and time sent);
- Internet information (sites visited and searches conducted);
- Cell phone information (incoming and outgoing numbers, length of call and location);
- Phone information (incoming and outgoing numbers, length of call);
- Financial information (bank accounts, wire transfers and credit card use); and
- Airline information (passenger record information).

Program, formed to intercept phone calls and emails between the U.S. and overseas without a judge's approval when a link to al Qaeda is suspected.

Though this request, the ACLU seeks to understand the central role that the NSA plays as a hub for the collection, analysis and distribution of intelligence information and the role that other agencies – including the FBI, DHS and Treasury Department – play in supplying and acting on this intelligence.

We seek all records related to this role.

In addition, we specifically request records related to:

- All efforts by the NSA to acquire, share, process, or analyze transactional information for suspicious patterns or in response to particular intelligence information;
- The sharing of information derived from administrative subpoenas including National Security Letters and Treasury Department subpoenas (such as those issued pursuant to 50 U.S.C. §1702) with the NSA;
- The use of the FBI's Digital Collection System to acquire or share transactional information;
- Any efforts by private companies include telecommunications providers to assist in acquiring, sharing, processing, or analyzing transactional information;
- Any legal authority, memoranda or presidential order authorizing or providing a legal framework for any effort to acquire, share or process, or analyze transactional information or any effort to share the result of such processing or analysis; and
- Any records describing the cost and budgetary requirements associated with any effort to acquire, share or process, or analyze transactional information.

The American Civil Liberties Union (the ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to protecting the principles of liberty, freedom, and equality set forth in the Bill of Rights in the United States Constitution. For more than 80 years, the ACLU has sought to preserve and strengthen privacy and equality in American life.

The ACLU seeks both a fee waiver and expedited processing for this request.

I. Fee Waiver

We request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) & (iii). Specifically, the ACLU asserts the following request should be furnished without any charge because “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). We further assert that the ACLU is a “representative of the news media” for FOIA purposes and hence any charges should be limited to “reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. Public Interest

The test for whether a request is in the public interest is typically divided into five parts:

- whether the subject of the requested records concerns the operations or activities of the government;
- whether the disclosure is likely to contribute to an understanding of government operations or activities;
- whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public;
- whether the disclosure is likely to contribute significantly to public understanding of government operations or activities; and
- whether the requester has a commercial interest that would be furthered by the requested disclosure.

The ACLU request meets all of these criteria.

(a) Activities of the Government

The request clearly concerns the operation of the government, specifically its intelligence gathering and surveillance activities.

(b) Informational Value of the Records

There is no doubt that the requested records will have information value. The recent article in *The Wall Street Journal* revealed the existence of intelligence gathering activities of unprecedented in scope and size. Gorman, *Wall Street Journal*. While the article is revelatory, it only outlines in the broadest detail the NSA’s program for analyzing transaction information. The details of that program are almost completely shrouded in mystery. Unanswered questions literally defy enumeration but include the program’s legal basis, its scope, its functioning, its use; and its value. These records can begin to answer some of those questions

(c) Contributing to the Public Understanding

The ACLU has both the expertise and the ability to disseminate the records to the public in a way that contributes to the public's understanding. In fact the ACLU has a long history of exactly such dissemination. For example, ACLU attorneys have published a book composed mainly of FOIA documents on the government's policy on and use of torture. Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond*, Columbia University Press, 2007. The ACLU also routinely compiles FOIA documents into whitepapers which explain their significance. A whitepaper using FOIA to discuss the State Department's of RFIDs in passports can be found here: <http://www.aclu.org/privacy/spying/15778res20041126.html>. A whitepaper using FOIA documents to demonstrate law enforcement practices can be found here: <http://www.aclu.org/privacy/spying/15246pub20040520.html>.

The ACLU's release of FOIA documents and these whitepapers is widely reported in the mainstream media, demonstrating the ACLU's ability to disseminate this information to the public. Eric Umansky, *FOIA Eyes Only*, Slate Magazine, December 31, 2004 (describing the ACLU's success in releasing FOIA documents); Kim Zetter, *Feds Rethinking RFID Passport*, Wired Magazine, April 26, 2005. Please note that the fact that an organization has a demonstrated ability share information with the press it is often enough to show that that organization can disseminate it to the public. *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 856-57 (D. Colo. 1994).

The ACLU also maintains FOIA records and whitepapers at its website, www.aclu.org which receives more than a million unique visitors a month and is widely accessed forum for disseminating information to the public. In addition to the website, the ACLU Foundation publishes newsletters, frequent press releases, news briefings, right to know handbooks, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty, not to mention our 500,000 members. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail.

(d) Significance of the public's understanding

There is no doubt that the requested records have significant informational value. The most recent disclosure of the existence of a program by the NSA to acquire, share, process, or analyze transactional information was front page news in a major newspaper. Gorman, Wall Street Journal. Revelations about previously revealed portions of the program have been equally newsworthy. James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, December 16, 2005; Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006. A previous public program which attempted to perform many of the same types of analysis was the subject of widespread public and Congressional interest.

These records concern the largest domestic spying program in American history. As such it is impossible to label precisely what their informational value will be but it is certainly substantial.

(e) Commercial requestor

Finally the ACLU is not a commercial requestor. We do not have an “an interest in commerce, trade or profit” nor will we receive any financial remuneration for either directly or indirectly due to the receipt of the requested records. *Muffoleto v. Sessions*, 760 F. Supp. 268, 277-278 (E.D.N.Y. 1991).

For all of the above reasons the ACLU should be granted a full fee waiver for accessing the records described in our request.

B. Representative of the News Media

While the ACLU believes the public interest requires the granting of a fee waiver, we also note that it qualifies for a fee reduction because it qualifies as a member of the news media under the FOIA law. 5 U.S.C. §552.

Under the FOIA a member of the news media is:

any person or 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. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. 5 U.S.C. § 552 (a)(4)(A)(ii)

This definition of news media is a new one, broader than the definition under the original FOIA law. It was signed into law December 31, 2007 and it clearly encompasses the work of the ACLU. As described above (in section I (c)), the ACLU consistently uses our editorial skill to package raw materials (in this case FOIA documents) to a distinct work (the whitepapers and books). We also disseminate those works to an audience through our website, newsletters and by getting the information to traditional press outlets. There is no question that, at a minimum our efforts should qualify us to receive a fee reduction, if not an outright waiver under the public interest test.

II. Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and corresponding regulations because the records at issue are urgently needed by an organization “primarily engaged in disseminating information” in order to “inform the public concerning 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).

The ACLU is “primarily engaged in disseminating information” to the public within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v); 28 C.F.R. § 16.5 (d)(1)(ii). 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”). 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 through the ACLU’s public education department. 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 website specifically includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/torturefoia; www.aclu.org/spyfiles; www.aclu.org/patriot_foia/index.html; www.aclu.org/exclusion; <http://www.aclu.org/safefree/nationalsecurityletters/32088res20071014.html>. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU produces an in-depth television series on civil liberties.² Depending on the results of this Request, the ACLU will likewise disseminate the information obtained about government surveillance to the public through these kinds of publications in these kinds of channels.

Furthermore, the records sought concern actual or alleged federal government activity – specifically (i) the NSA’s analysis of transactional records to regarding Americans, (ii) widespread assistance by other government agencies including the FBI, Treasury and Department of Homeland Security in securing those records, and (iii) use of those records and analysis in intelligence activities.

² 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. The ACLU also makes archived material available at the American Civil Liberties Union Archives at Princeton University Library. Additionally, ACLU publications are often disseminated to relevant groups across the country, which then further distribute them to their members or to other parties.

Recent revelations by the media regarding the NSA, FBI and Treasury surveillance programs have generated voluminous media interest in how the government is using transactional and other information to surveil Americans. See, e.g. Siobhan Gorman, *NSA's Domestic Spying Grows As Agency Sweeps Up Data*, The Wall Street Journal, March 10, 2008; James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, December 16, 2005; Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006. Each new revelation has resulted in thousands of media stories. These stories have also been the source of major Congressional debate and activity including a debate over the scope of the Foreign Intelligence Surveillance Act which has been ongoing for more than two years.

As we noted in Section I these records are urgently needed to inform the public concerning and actual or alleged federal government activity and are matters of widespread public interest. The records sought are crucial to providing the public with a full picture of the government use of transactional data for surveillance. The records requested are not sought for commercial use and the ACLU plans to disseminate the information disclosed as a result of this FOIA request to the public at no cost. Accordingly, expedited processing is appropriate in this case.

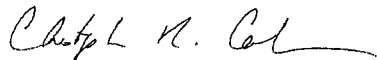
We affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Please direct all inquiries about this request and document releases to:

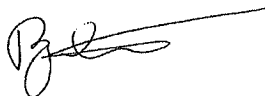
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We look forward to your reply within ten calendar days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I).

Sincerely,



Christopher Calabrese
Counsel, Technology and Liberty Program



Barry Steinhardt
Director, Technology and Liberty Program