



February 8, 2013

VIA Email

Mr. Fernando Pineiro
FOIA Officer / Public Liaison
Office of Civil Rights and Civil Liberties
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AMERICAN CIVIL LIBERTIES
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Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

This letter is a request by the American Civil Liberties Union Foundation (“ACLU”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and under the implementing regulations of the Department of Homeland Security (“DHS”), 6 C.F.R. § 5, for records maintained by DHS’s Office of Civil Rights and Civil Liberties.

The Department of Homeland Security’s Office of Civil Rights and Civil Liberties recently released the Executive Summary of its Civil Rights/Civil Liberties Impact Assessment on Border Searches of Electronic Devices (“the CRCL Impact Assessment”) on its website. In that document, the Office of Civil Rights and Civil Liberties concluded that DHS’s policy permitting suspicionless searches of electronic devices at U.S. borders does not infringe Americans’ constitutional rights. However, the full text of the CRCL Impact Assessment, including the facts and analyses upon which the conclusions contained in the Executive Summary are based, is not available on the DHS website. *See Civil Rights & Civil Liberties Impact Assessments*, Homeland Security, <http://www.dhs.gov/civil-rights-civil-liberties-impact-assessments>. The ACLU seeks access to the complete Civil Rights/Civil Liberties Impact Assessment on Border Searches of Electronic Devices and associated records so that those whose civil liberties and privacy interests are impacted, including many American citizens who travel across borders each year with common electronic devices like cell phones and laptops, can understand the full bases for DHS’s conclusions in the CRCL Impact Assessment.

Requester ACLU Foundation is a 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 civil rights and civil liberties issues.

I. RECORDS REQUESTED

The ACLU seeks disclosure of the following records:

- The full and complete Civil Rights/Civil Liberties Impact Assessment on Border Searches of Electronic Devices prepared by DHS's Office of Civil Rights and Civil Liberties;
- All data, analyses, and records gathered or created in the course of preparation of the Civil Rights/Civil Liberties Impact Assessment on Border Searches of Electronic Devices.

II. LIMITATION OF PROCESSING FEES

The ACLU seeks a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . ."); *see also* 6 C.F.R. § 5.11(d)(1).

The ACLU is a "representative of the news media" within the meaning of the statute and regulations because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience." *Nat. Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 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"); *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 "primarily engaged in disseminating information").

Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. The ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials. Through the ACLU's public education department, such material is made available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, and law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited web site: <http://www.aclu.org>. The web site addresses civil rights and civil liberties issues in depth and contains

many thousands of documents relating to these issues. The website features information obtained through the FOIA and related commentary and analysis, including documents previously obtained from DHS regarding its policy on suspicionless searches of electronic devices at U.S. borders. *See, e.g., Government Data About Searches of International Travelers' Laptops and Personal Electronic Devices*, ACLU (Aug. 25, 2010), <http://www.aclu.org/national-security/government-data-about-searches-international-travelers-laptops-and-personal-electr>. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers by e-mail.

In addition to the national ACLU offices in New York and Washington, D.C., there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material through a variety of means including their own websites, publications, and newsletters. Moreover, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University.

The ACLU intends to disseminate the information gathered by this Request through the channels listed above, and does not seek disclosure to further a commercial interest. The ACLU is a non-profit public interest organization. Any information disclosed as a result of this FOIA will be available to the public at no cost.

III. WAIVER OF PROCESSING FEES

The ACLU additionally request a waiver of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . 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.”), and DHS regulation, 6 C.F.R. § 5.11(k)(1).

First, the disclosure of the information “is not primarily in the commercial interest of the requester,” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1)(ii), as the ACLU has no “commercial interest that would be furthered by the requested disclosure,” *id.* § 5.11(k)(3)(i). By extension, the public interest in disclosure outweighs any commercial interest. *Id.* § 5.11(k)(3)(ii).

Second, the “disclosure of the requested information is in the public interest,” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1)(i), because the

request for the CRCL Impact Assessment satisfies all four of the criteria for the public interest requirement: the CRCL Impact Assessment concerns the operations of the government, *id.* § 5.11(k)(2)(i), namely the actions of DHS agents at the borders; its disclosure has the informational value of supplying to the public the factual bases and analyses behind the Executive Summary, *id.* § 5.11(k)(2)(ii); it will contribute to the public's understanding of the civil liberties impact of border electronic device searches and DHS's view of the impact, *id.* § 5.11(k)(2)(iii); and it will have the significant benefit of educating the substantial number of Americans who travel with electronic devices, *id.* §5.11(k)(2)(iv).

This public interest in disclosure is confirmed by DHS's recognition of the "unique privacy concerns raised by the border search of electronic devices." *See* Dep't of Homeland Security, Privacy Impact Assessment for the Border Searches of Electronic Devices 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_laptop.pdf. These privacy concerns are triggered by the "sheer volume and range of types of information available on electronic devices," when compared to the "more traditional briefcase or backpack." *See id.* at 2. "Where someone may not feel that the inspection of a briefcase would raise significant privacy concerns because the volume of information to be searched is not great, that same person may feel that a search of their laptop increases the possibility of privacy risks due to the vast amount of information potentially available on electronic devices." *Id.*

DHS itself has recognized the need to "enhance public understanding of the authorities, policies, procedures, and privacy controls related to these searches." *Id.* at 3. Releasing the complete CRCL Impact Assessment will serve this ultimate goal by giving the public the information on which it can evaluate the impact of the electronic devices search policy, as well as the Office of Civil Rights and Civil Liberties' assessment of it.

As a "representative of the news media", the ACLU is well-situated to disseminate the information it gains from this request. As discussed in Section II, the ACLU has played an active role in educating the public about civil liberties issues, including by disseminating information obtained through a previous FOIA request regarding the DHS policy on suspicionless searches of electronic devices at U.S. borders. Disclosure in this case thus meets both the statutory and regulatory criteria and 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.’”).¹

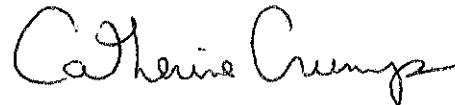
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Katherine Haas
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

If you would like to discuss this request, please contact Catherine Crump at (212) 519-7806.

Sincerely,



Catherine Crump, Staff Attorney
American Civil Liberties Union

¹ Fees are regularly waived for the ACLU. DHS did not charge fees for its production to the ACLU of documents regarding the ideological exclusion of foreign scholars. Other agencies have reached similar decisions. For example, 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 for 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 May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. 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 in August 2002.