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August 20, 2018

Transportation Security Administration
TSA-20, East Tower
FOIA Branch
601 South 12th Street
Arlington, VA 20598-6020

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

To Whom It May Concern:

The American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Massachusetts (together, the "ACLU"),[1] submit this Freedom of Information Act ("FOIA") request (the "Request") for records pertaining to the Transportation Security Administration ("TSA") program known as "Quiet Skies," through which federal air marshals surreptitiously monitor innocent travelers, including U.S. citizens, and record information and observations about them in agency files.

I. Background

According to documents and information uncovered by *The Boston Globe*, the Quiet Skies program targets travelers who are not under investigation by any agency or suspected of any wrongdoing.[2] TSA uses secret criteria that include travel patterns and specific behaviors to determine which travelers to target for Quiet Skies surveillance. Federal air marshals receive files with photographs and information about the targets, then secretly follow them, including by flying with them on subsequent flights.[3] While tracking and surveilling these travelers, air marshals note whether they exhibit

[1] The American Civil Liberties Union Foundation is a 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, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union's members to lobby their legislators. The American Civil Liberties Union is a separate 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.

[2] Jana Winter, "Welcome to the Quiet Skies," The Boston Globe, July 28, 2018, available at https://goo.gl/5izSnZ.

[3] *Id.*

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any of a series of enumerated behaviors—including "excessive fidgeting," "facial flushing," and "face touching"—and document other aspects of the travelers' conduct in granular detail.[4] The air marshals then submit reports on the travelers that the TSA retains in agency databases. The *Globe* reports that on average, air marshals follow and surveil approximately 35 passengers on domestic flights each day, and a total of approximately 5000 U.S. citizens have been subject to surveillance under the program since March 2018.[5]

The Quiet Skies program raises serious constitutional and privacy concerns. The criteria that TSA uses to determine which travelers to target remain secret, but the information disclosed to the *Globe* suggests that TSA may be targeting people based on their associations, which may be protected under the First Amendment.[6] Similarly, surveillance under the program may constitute unlawful profiling if TSA's targeting criteria rely on race, religion, or their proxies. And by subjecting individuals who are not reasonably suspected of any wrongdoing to extensive surveillance, TSA is needlessly invading travelers' privacy and retaining information on innocent activity. The program raises further questions regarding whether TSA has adequately notified the public of the program or provided opportunity for public comment.

The program's use of behavior detection techniques compounds these concerns. TSA officers long used such techniques to scrutinize travelers at airports for scores of behaviors that the TSA associates with stress, fear, or deception. They then referred travelers who purportedly exhibited such behaviors for additional screening at security checkpoints. Experts, legislators, and the Department of Homeland Security's Inspector General have sharply criticized this use of behavior detection techniques as lacking a valid scientific basis.[7] Moreover, documents and scientific literature that the ACLU obtained from TSA through a FOIA lawsuit reinforce that that behavior detection methods are inherently subjective and unreliable, and that many of the

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[4] *Id.*

[5] *Id.*; *see also* Jana Winter, "TSA Admits 'Quiet Skies' Surveillance Snared Zero Threats," Boston Globe, Aug. 3, 2018, available at https://goo.gl/EfVtZj.

[6] *See id.*

[7] *See, e.g.*, U.S. Gov't Accountability Off., GAO-14-159, *TSA Should Limit Future Funding for Behavior Detection Activities* (2013); Off. of Inspector Gen., OIG-13-91, *Transportation Security Administration's Screening of Passengers by Observation Techniques (REDACTED)* (2013); *TSA's SPOT Program and Initial Lessons from the LAX Shooting: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. (2013); *Behavioral Science and Security: Evaluating TSA's SPOT Program: Hearing Before the Subcomm. on Investigations & Oversight of the H. Comm. on Sci., Space & Tech.*, 112th Cong. (2011); *id.* (statement of Maria Hartwig, Assoc. Professor, Dep't of Psychology, John Jay Coll. of Criminal Justice); Sharon Weinberger, *Airport Security: Intent to Deceive?*, 465 Nature 412–415 (2010).

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behaviors the TSA has relied on are actually useless in detecting deception.[8] The documents further revealed that the TSA either overstated the scientific validity of behavior detection techniques in communications with Congress and government auditors, or did not disclose information that discredited the program's scientific validity.[9] Despite this overwhelming evidence undermining the validity of behavior detection methods, TSA is continuing to use them for Quiet Skies surveillance.

Additionally, like the TSA's behavior detection programs, the Quiet Skies program appears to be wasteful and ineffective. According to the *Globe*, TSA officials who briefed congressional staff on the program conceded that none of the approximately 5000 individuals who had been subject to surveillance under the program were ultimately deemed suspicious or merited further scrutiny.[10] Numerous federal air marshals have complained about the program for wasting public funds and focusing officers' attention on innocent travelers, with one calling it "nonsense."[11] The Air Marshal Association has criticized Quiet Skies publicly for failing to utilize "proper criteria" for allocating air marshals' resources.[12]

Despite the significant resources the TSA is expending on Quiet Skies and the constitutional concerns it raises, little information is available to the public about the program, including the policies and guidelines that govern it. The public similarly lacks knowledge of how travelers are chosen for Quiet Skies surveillance, the information TSA maintains as a result of the surveillance, how long TSA retains that information, and the potential consequences for affected individuals. Because of the controversy surrounding the program and its potential to affect the traveling public, it has generated intense and sustained media interest.[13] Lawmakers have also

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[8] ACLU Found., *Bad Trip: Debunking the TSA's 'Behavior Detection' Program* (Feb. 2017), https://goo.gl/V95hvV.

[9] *See id.* at 12-13.

[10] Winter, *supra* note 5.

[11] *See* Winter, *supra* note 2.

[12] *See id.*

[13] *See, e,g.*, John Mueller & Mark Stewart, "The TSA Has a Massive New Program That Could Spy on You. It's a Massive Waste of Money," Vox.com, Aug. 6, 2018, available at https://goo.gl/bokkW7; Robert Silk, "TSA's Quiet Skies Program Draws Fire," Travel Weekly, Aug. 5, 2018, available at https://goo.gl/k5TDVY; Winter, *supra* note 5; Will Tomer, "'Quiet Skies' and the Risk of Losing Liberty for Good," Toledo Blade, Aug. 3, 2018, available at https://goo.gl/2X8RLg; Jana Winter, "Lawmakers Demand Answers on 'Quiet Skies' Surveillance Program After Globe Report," Bos. Globe, July 31, 2018, available at https://bit.ly/2KcqFF5; Hugo Martin, "Civil Rights Groups and Lawmakers Express Concerns About a TSA Program That Tracks Domestic Travelers," L.A. Times, July 31, 2018, available at https://lat.ms/2vq5MAU; James Bovard, "Have You Gained or Lost Weight? Congrats, TSA Is Now Tracking You for Suspicious Activity," USA Today, July 31, 2018, available at https://usat.ly/2M29gkl; Kris Van Cleave, "Lawmakers Want Answers about TSA Program

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criticized the program and demanded additional information about it from TSA.[14]

To provide the public with information on the Quiet Skies program, the ACLU submits this FOIA Request.

II. Requested Records

1) All policies, guidance, procedures, bulletins, memoranda, and/or legal opinions pertaining to the Quiet Skies program, including but not limited to:

   a. Records concerning how travelers are screened and/or selected for monitoring through Quiet Skies;

   b. Records concerning the use of behavior detection techniques in monitoring travelers subject to the Quiet Skies program; and

   c. Records concerning the retention, storage, sharing, and/or deletion of information about travelers subject to the Quiet Skies program;

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That Tracked Americans," CBS News, July 30, 2018, available at https://cbsn.ws/2M357MM; Elizabeth Chuck, "TSA's 'Quiet Skies' Program Raises Legal and Civil Liberty Questions," NBC News, July 30, 2018, available at https://nbcnews.to/2LAiLLg; Molly Olmstead, "Report: Dozens of Americans Are Surveilled in Airports Each Day Through Secretive TSA Program," Slate, July 30, 2018, available at https://slate.me/2OBJIMv; Rene Marsh, "Previously Undisclosed TSA Program Tracks Unsuspecting Passengers," CNN, July 30, 2018, available at https://cnn.it/2v0HLku; David Meyer, "A Newly-Disclosed TSA Surveillance Program Monitors Air Passengers Even If They Have No Known Terrorist Ties," Fortune, July 30, 2018, available at https://for.tn/2v8LmwR; Jason Murdock, "What Is Quiet Skies? Secret In-Flight Spy Program Snoops on U.S. Citizens," Newsweek, July 30, 2018, available at https://bit.ly/2KieNB7 ; BBC News, "US Airport Security's 'Quiet Skies' Programme Tracks Passengers," July 30, 2018, available at https://bbc.in/2ApWM13 ; Nick Visser, "TSA Has Been Secretly Monitoring Travelers Who Aren't Listed On Government Watch Lists," Huffington Post, July 30, 2018, available at https://bit.ly/2M11gzO; Tamar Lapin, "The TSA Has Been Secretly Tracking You for Years," N.Y. Post, July 30, 2018, available at https://nyp.st/2NZoCX8; Missy Ryan & Ashley Halsey III, "Air Marshals Have Conducted Secret In-Flight Monitoring of U.S. Passengers for Years," Wash. Post, July 29, 2018, available at https://wapo.st/2LFZxDM; Winter, *supra* note 2.

[14] Letter from Rep. Andy Biggs, H. Comm. on Science, Space & Tech., to David Pekoske, Admin., TSA (Aug. 1, 2018), available at https://goo.gl/9kopyJ; Letter from Rep. Bennie G. Thompson, H. Comm. on Homeland Sec., & Rep. Bonnie Watson Coleman, H. Subcomm. on Transp. & Protective Sec., to David Pekoske, Admin., TSA (July 31, 2018), available at https://bit.ly/2MaQ83p; Letter from Sen. Edward J. Markey to David Pekoske, Admin., TSA (July 30, 2018), available at https://bit.ly/2OzcZHv; *see also* Winter, *supra* note 13; Martin, *supra* note 13; Van Cleave, *supra* note 13.

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2) Training and/or course materials for employees involved in the Quiet Skies program, including materials related to racial, religious, ethnic, and/or national origin profiling;

3) Records concerning evaluations, audits, analyses, or tests of the effectiveness of the Quiet Skies program;

4) Records sufficient to show the number of individuals monitored through the Quiet Skies program since January 1, 2016;

5) Records sufficient to show the races, ethnicities, and/or national origins of the individuals monitored through the Quiet Skies program since January 1, 2016;

6) Records concerning complaints, grievances, and/or concerns raised by TSA employees or other government officials related to the Quiet Skies program;

7) Records concerning investigations of and/or disciplinary action related to TSA employees involved in the Quiet Skies program, including investigations of and/or reported legal violations concerning implementation of the program;

8) All communications to or from members of Congress or their staff regarding the Quiet Skies program;

9) Records concerning the amount of funds allocated for, and/or expended on, the Quiet Skies program and its operations since January 1, 2016; and

10) Records concerning communications with media about the Quiet Skies program since July 28, 2018.

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.

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§ 552(a)(6)(E).[15] 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).[16] 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. DOJ*, 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").[17]

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,[18]

[15] *See also* 6 C.F.R. § 5.5(e).

[16] *See also* 6 C.F.R. § 5.5(e)(1)(ii).

[17] 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. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

[18] *See, e.g.*, 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;

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and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.[19]

Similarly, the 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. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.[20] 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.

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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.

[19] *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 staff attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes,* Wash. Post, Aug. 6, 2016, http://wapo.st/2jy62cW (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://abcn.ws/2jy40d3 (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 staff attorney Nathan Freed Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret,* NPR, Dec. 9, 2015, http://n.pr/2jy2p71 (quoting ACLU project director Hina Shamsi).

[20] *See, e.g.*, Hugh Handeyside, *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; Carl Takei, *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; Brett Max Kaufman, *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; Nathan Freed Wessler, *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; Ashley Gorski, *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 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.

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The ACLU website includes many features on information obtained through the FOIA.[21] For example, the ACLU's "Predator Drones FOIA" webpage, https://www.aclu.org/national-security/predator-drones-foia, contains commentary about the 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 ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA and other documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating

[21] *See, e.g.*, Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (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 the Killing of Three U.S. Citizens*, ACLU Case Page, https://www.aclu.org/national-security/anwar-al-awlaki-foia-request; *ACLU v. Department of Defense*, ACLU Case Page, https://www.aclu.org/cases/aclu-v-department-defense; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, https://www.aclu.org/mappingthefbi; *Bagram FOIA*, ACLU Case Page https://www.aclu.org/cases/bagram-foia; *CSRT FOIA*, ACLU Case Page, https://www.aclu.org/national-security/csrt-foia; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request; *Patriot FOIA*, ACLU Case Page, https://www.aclu.org/patriot-foia; *NSL Documents Released by DOD*, ACLU Case Page, https://www.aclu.org/nsl-documents-released-dod?redirect=cpredirect/32088.

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to government policies on rendition, detention, and interrogation.[22]

The 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 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.[23] Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program[24]; a summary of documents released in response to a FOIA request related to the FISA Amendments Act[25]; 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 requests[26]; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.[27]

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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). Specifically, the requested records relate to the Quiet Skies program, through which TSA

[22] *The Torture Database*, ACLU, https://www.thetorturedatabase.org; *see also Countering Violent Extremism FOIA Database*, ACLU, https://www.aclu.org/foia-collection/cve-foia-documents; *TSA Behavior Detection FOIA Database*, ACLU, https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database; *Targeted Killing FOIA Database*, ACLU, https://www.aclu.org/foia-collection/targeted-killing-foia-database.

[23] *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

[24] ACLU Found., *supra* note 8.

[25] *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf.

[26] *Statistics on NSLs Produced by Department of Defense*, ACLU (2014), https://www.aclu.org/ other/statistics-nsls-produced-dod.

[27] Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights.

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employees have surveilled, and retained information about, U.S. citizens who are not suspected of wrongdoing and are not under investigation by any agency. As discussed in Part I, *supra*, TSA has subjected thousands of travelers to Quiet Skies surveillance, but little information is available to the public regarding the nature, extent, and consequences of that surveillance.

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

IV. Application for Waiver or Limitation of Fees

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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." *See* 5 U.S.C. § 552(a)(4)(A)(iii).[28] 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. *See* 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, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to the Quiet Skies program, the records sought will significantly contribute to public understanding of a surveillance program of profound public importance. Because little specific information about the Quiet Skies program is publicly available, the records sought are certain to contribute significantly to the public's understanding of the program, its effectiveness, and its consequences, including how it affects individual privacy and liberty.

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 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." (quotation marks omitted)).

[28] *See also* 6 C.F.R. § 5.11(k).

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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. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).[29] 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." *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. DOD*, 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. DOD*, 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. DOJ*, 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. DOJ*, 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).[30]

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[29] *See also* 6 C.F.R. § 5.11(d)(1).

[30] 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 at 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.

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On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a "representative of the news media."[31] 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).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. 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:

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[31] In June 2018, U.S. Citizenship and Immigration Services granted a fee-waiver request in response to a FOIA request regarding social media surveillance. 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 the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division 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 March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

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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,

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