

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street – 18th Floor
New York, NY 10004,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street – 18th Floor
New York, NY 10004,

AMERICAN CIVIL LIBERTIES UNION
OF THE DISTRICT OF COLUMBIA
915 15th Street, NW – 2nd floor
Washington, DC 20005,

Plaintiffs,

v.

No. 1:21-cv-_____

FEDERAL BUREAU OF PRISONS
320 First Street, NW
Washington, DC 20535,

UNITED STATES DEPARTMENT OF
JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
(Freedom of Information Act)

1. Plaintiffs American Civil Liberties Union, American Civil Liberties Union Foundation, and American Civil Liberties Union of the District of Columbia (together, the “ACLU”) bring this action against the Federal Bureau of Prisons (“BOP”) and the United States Department of Justice (“DOJ”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and

injunctive relief to compel compliance with the requirements of FOIA to immediately release improperly withheld agency records about the placement of people in home confinement in accordance with the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) and the administration of these placements.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B). The Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and authority to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202. The Court has personal jurisdiction over the parties. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. The American Civil Liberties Union is a nationwide non-profit organization with approximately two million members dedicated to protecting the civil liberties and civil rights of all Americans, including the rights of incarcerated people. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties and civil rights. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public is a critical and substantial component of the ACLU’s work and one of its primary activities.

4. Plaintiff American Civil Liberties Union Foundation is an affiliated non-profit organization that shares the goals of the American Civil Liberties Union and engages in litigation and public education to support those goals.

5. Plaintiff American Civil Liberties Union of the District of Columbia is the Washington, DC, affiliate of the American Civil Liberties Union.

6. Defendant Federal Bureau of Prisons is an agency of the United States Government within the meaning of the Freedom of Information Act. It has possession, custody, and control of some or all of the records that Plaintiffs seek in this action.

7. The United States Department of Justice is an agency of the United States Government within the meaning of the Freedom of Information Act. It has possession, custody, and control of some or all of the records that Plaintiffs seek in this action.

FACTS

Background

8. The COVID-19 virus continues to pose a disproportionate risk to incarcerated people in the United States, including in federal prisons. As of November 29, 2021, 123 people incarcerated in BOP custody have confirmed positive test results for COVID-19 and 41,897 have been infected with COVID-19.¹ Two hundred and sixty-seven people in BOP custody have died from COVID-19.² Sixty-four of the 98 BOP facilities remain on the highest tier of COVID precautions, and another 22 facilities are operating with moderate COVID-19 modifications.³

¹ “COVID-19 Cases,” Bureau of Prisons, <https://www.bop.gov/coronavirus/>, last visited Nov. 22, 2021.

² *See id.*

³ *See id.*

9. Reducing population density in prisons and jails is one of the most effective ways to combat the virus.⁴ Having fewer people incarcerated allows for more effective social distancing and can therefore slow the spread of the virus.⁵

10. Prior to the pandemic, under 18 U.S.C. §3624(c)(2), the BOP had authority to place incarcerated people in home confinement “for the shorter of [the last] 10 percent of the term of imprisonment of that prisoner or 6 months,” but not exceeding 12 months. In March 2020, the CARES Act expanded BOP’s authority to place people on home confinement for longer periods of time so that BOP could reduce the federal prison population and the spread of COVID-19:

During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.

CARES Act, Sec. 12003(b)(2), 134 Stat. 516, 18 U.S.C. § 3621 note. “[T]he term ‘covered emergency period’ means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.” CARES Act, Sec. 12003(a)(2).

11. Recognizing home confinement as “[o]ne of BOP’s tools to manage the prison population and keep inmates safe,” in March, 2020, Attorney General William Barr ordered the BOP to transfer certain incarcerated people to home confinement to decrease health risks.⁶ Barr

⁴ See “Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons,” Matthew J. Akiyama, et al., *New England Journal of Medicine* 382, 2075 (2020); “COVID-19 in Prisons and Jails in the United States,” Laura Hawks, et al., *Journal of American Medical Association*, 180, 1041 (2020); “Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions,” Brie A. Williams, et al., *Health Affairs* (2020).

⁵ See id.

⁶ https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf

CARES FOIA complaint ex B

described home confinement decisions as “granting an[] inmate discretionary release”⁷ and explained that incarcerated people who meet certain criteria are considered “appropriate candidates for home confinement rather than continued detention” at BOP prisons.⁸ The BOP began placing people categorized as non-violent on home confinement, mainly those who were elderly or otherwise especially vulnerable to COVID-19.⁹ In June 2020, the BOP Director and Medical Director testified in the Senate that people being moved to home confinement under the CARES Act would be on home confinement “for service of the remainder of their sentences.”¹⁰

12. Relying on these representations, people moved to home confinement have successfully reintegrated themselves into society. As of March 2021, of approximately 24,000 inmates released to home confinement since the beginning of the pandemic, only 21 were returned to prison for rule violations and only one had committed a new crime.¹¹ Many have found gainful employment, and they have reunited with spouses, children, and other loved

⁷ The Attorney General, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic, at 2 (Mar. 26, 2020) available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

⁸ The Attorney General, Increasing Use of Home Confinement at Institutions Most Affected by COVID19, at 2 (Apr. 3, 2020) available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

⁹ See Federal Bureau of Prisons, Memorandum for Chief Executive Officers re; Home Confinement (April 13, 2021), available at https://www.fd.org/sites/default/files/covid19/2021.4.13_-_bop_home_confinement_cares_memo.pdf (stating that to be eligible for home confinement under the CARES Act, BOP must verify that a person’s “current or a prior offense is not violent, a sex offense, or terrorism-related.”).

¹⁰ Dep’t of Justice, Statement of Michael D. Carvajal, Director, and Dr. Jeffrey Allen, Medical Director, Federal Bureau of Prisons, Before the U.S. Senate Committee on the Judiciary (Carvajal and Allen Statement) at 6 (June 2, 2020), available at <https://www.judiciary.senate.gov/imo/media/doc/Carvajal-Allen%20Joint%20Testimony.pdf>

¹¹ See The Hill, DOJ Faces Big Decision on Home Confinement (May 9, 2021), <https://thehill.com/homenews/administration/552447-doj-faces-big-decision-on-home-confinement>.

ones.¹² Ordering them back to prison would disrupt their lives and the lives of their loved ones. It would also destroy the laudable efforts they have made to reintegrate into society.

13. Despite BOP's representations that people released to home confinement pursuant to the CARES Act would stay at home for the remainder of their sentences, the DOJ Office of Legal Counsel (OLC) issued a Memorandum Opinion in the last days of the Trump Administration concluding that once the President lifts the emergency declaration, BOP *must* reincarcerate people who were moved to home confinement under the CARES Act and have more than the standard home confinement term left on their sentences.¹³

13. OLC's legal analysis has been criticized but remains unchanged.¹⁴ In September 2021, the Biden Administration announced that the President will consider commuting the sentences of people on home confinement who were sentenced for non-violent drug offenses and who have four years or less to serve on their sentences.¹⁵ This category does not include everyone who would be subject to reimprisonment under the OLC Memorandum Opinion.

¹² NBC News, Thousands were released from prison because of Covid. Will they have to return? (Sept. 12, 2021), <https://www.nbcnews.com/news/nbcblk/thousands-released-prison-covid-will-return-rcna1977>; Washington Post, I was sent back to jail for going to a computer class. It's time to act on home confinement (July 15, 2021),

<https://www.washingtonpost.com/opinions/2021/07/15/gwen-levi-home-confinement-prison-biden/>; Washington Post, Inmates sent home amid pandemic may have to return under Trump-era policy (April 21, 2021), https://www.washingtonpost.com/local/public-safety/federal-prisoners-pandemic/2021/04/21/5d4cc3c8-96fa-11eb-8e42-3906c09073f9_story.html

¹³ Dep't of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), available at <https://www.justice.gov/olc/file/1355886/download>.

¹⁴ See e.g., Democracy Forward et al., *Letter to the Office of Legal Counsel and Deputy Attorney General*, (February 18, 2021), available at <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>

¹⁵ Sam Stein, *Biden starts clemency process for inmates released due to Covid conditions*, Politico (September 13, 2021) available at <https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658>

14. Meanwhile, thousands of people on home confinement face uncertainty about whether they may be ordered back to prison on short notice, discouraging them from making personal, employment-related, or educational commitments and hindering their reintegration into society.

Plaintiffs' FOIA Requests and Defendants' Responses

15. Seeking to learn more about the people on home confinement who may be sent back to prison even if they comply with their release conditions, the ACLU submitted FOIA requests for information related to home confinement placements under the CARES Act between September 24, 2021, and October 8, 2021.

16. Each of the ACLU's FOIA requests sought a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that 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). These requests seek information that will help the public understand how many people are in jeopardy of reincarceration, the circumstances of these peoples' criminal cases, and the process by which the government plans to reincarcerate these people at the end of the pandemic. The information will also assist the ACLU in its ongoing efforts to persuade the government not to require people who have been placed in home confinement under the CARES Act to return to prison—efforts that have already included television and print media advertisements.¹⁶ None of this information is currently available to the public. The ACLU did

¹⁶ See https://www.youtube.com/watch?v=5Onuqtn6f_k (television advertisement); https://thewashingtonpost.pressreader.com/@Reader865537/csb_NH1ulunqn0VXxMIZBLfH-1Ly27zxBdVYhAlzLMvKepV-DK_BOflL89GyqZ2UE0vWWIEWpsrnzZdjSweSV-vejQ (Washington Post advertisement).

not file these requests to further its commercial interest. As described above, the ACLU is a noncommercial organization, and the ACLU will make significant information it obtains from these requests available to the public at no cost.

Request for Data on Placements in Home Confinement

17. On September 24, 2021, Plaintiffs submitted a FOIA Request (attached as Exhibit A) to BOP seeking the release of records providing information about people moved to home confinement under the authority of the CARES Act, including their sentences, the dates of their transfers to home confinement, and their projected release dates. The request made clear that it did not seek names, register numbers, or any other personal identifying information.

18. Plaintiffs requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), as the COVID-19 national emergency may end at any time and it is urgent that this information be obtained to assist public education and legislative efforts on the status of those placed in home confinement by the CARES Act. 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).

19. The BOP acknowledged receipt of this request on September 28, 2021 and assigned it FOIA Number 2021-06841. In its response, the BOP denied the request for expedited processing based on insufficient information to support urgency to inform the public, and designated the matter as complex.

20. Plaintiffs corresponded with Defendants on September 30 and October 1, 2021, and narrowed their request in the hope of accelerating the process of producing the requested information. (Attached as Exhibit B).

21. Plaintiffs appealed the denial of their request for expedited processing on October 12, 2021. The BOP denied this appeal on October 15, 2021.

22. No records have been produced in response to this request.

Request for DOJ Policies Implementing OLC Memorandum Opinion

23. On September 30, 2021, Plaintiffs submitted two FOIA requests to DOJ seeking the release of copies of DOJ policies implementing the OLC Memorandum Opinion from the Office of the Attorney General and the Office of the Deputy Attorney General. (Attached as Exhibits C and D). Plaintiffs requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) as the COVID-19 national emergency may end at any time and it is urgent that this information be obtained to assist public education and legislative efforts on the status of those placed in home confinement by the CARES Act.

24. DOJ acknowledged receipt of these requests on October 8, 2021, consolidated the two requests, closed one request as duplicative, and assigned the open request FOIA Number 2021-02288 In this acknowledgement DOJ denied expedited processing because ACLU is not “primarily engaged information dissemination,” and designated the matter as complex.

25. Plaintiffs appealed the denial of expedited processing on October 18, 2021. The appeal was denied on October 27, 2021.

26. No records have been produced in response to this request.

Request for BOP Policies Implementing OLC Memorandum Opinion

27. On October 8, 2021, Plaintiffs submitted a FOIA request to BOP seeking the release of final BOP policies, directives, decisions, instructions, memoranda, or other documents that were promulgated in response to, based on, cite, and/or implement the OLC Memorandum Opinion concluding that certain people BOP placed on home confinement pursuant to expanded

authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration. The request also sought the same records from the Office of the Attorney General or Department of Justice that were in BOP's custody. (Attached as Exhibit E). Plaintiffs sought expedited processing.

28. BOP acknowledged this request on October 12, 2021, designating it FOIA Number 2022-00192 and granting it expedited status. However, BOP stated that this request may still take up to six months to complete, despite being expedited.

29. No records have been produced in response to this request.

CLAIM FOR RELIEF

Violation of FOIA, 5 U.S.C. § 552

30. FOIA requires agencies of the federal government to “promptly” release records to the public upon request, unless a specific statutory exemption applies or disclosure is prohibited by law. 5 U.S.C. § 552(a)(3)(A). An agency must determine within twenty working days after receipt of a request for records whether to comply with the request and must immediately notify the requester of its determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). A requester is deemed to have exhausted its administrative remedies if the agency fails to comply with FOIA's applicable time limit provisions. 5 U.S.C. § 552(a)(6)(C)(i).

31. A requester may seek expedited processing of a request where there is a “compelling need.” 5 U.S.C. § 552(a)(6)(E). An agency must process “as soon as practicable” any request for records to which it has granted expedited processing. 5 U.S.C. § 552(a)(6)(E)(iii).

32. Defendants are agencies within the meaning of FOIA, 5 U.S.C. § 552(f) and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

33. Plaintiffs properly requested records within the possession, custody, and control of Defendants.

34. Defendants are wrongfully withholding non-exempt agency records requested by Plaintiffs by failing to produce records responsive to the ACLU's FOIA request within the time specified by FOIA.

35. Defendants' failure to process "as soon as practicable" FOIA Number 2022-00192, which was granted expedited processing, and to release non-exempt records violates FOIA, 5 U.S.C. § 552(a)(3)(A), (a)(6)(E)(iii) and Defendants' corresponding regulations.

36. Plaintiffs are therefore entitled to declaratory and injunctive relief requiring Defendants to promptly produce all non-exempt records responsive to its FOIA request and to justify the withholding of any responsive records withheld under claim of exemption.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court:

- A. Declare unlawful the Defendants' failure to comply with FOIA;
- B. Declare that Plaintiffs are entitled to disclosure of the requested records;
- C. Declare that requests Nos. 2021-06841 and 2021-02288 are entitled to expedited processing;
- D. Order Defendants to immediately process Plaintiffs' requests and disclose, in their entirety, unredacted versions of all records responsive to Plaintiffs' requests except for any portions that are specifically exempt from disclosure under FOIA;
- E. Enjoin Defendants from charging Plaintiffs search, review or duplication fees for the processing of the requests;
- F. Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiffs' requests;

G. Retain jurisdiction of this action to ensure that no agency records are wrongfully withheld;

H. Grant such other and further relief as the Court may deem just and proper.

November 29, 2021

Respectfully submitted,

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/s/ Arthur B. Spitzer
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Attorneys for Plaintiffs

* Motion for admission *pro hac vice* forthcoming.

EXHIBIT A

September 24, 2021

FOIA/PA Section
Office of General Counsel, Room 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534
Email: OGC_EFOIA@BOP.GOV

**Re: Request Under Freedom of Information Act Concerning People BOP
Moved to Home Confinement Under the Authority of the CARES Act**



(Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation, and the American Civil Liberties Union of the District of Columbia (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to the people in Bureau of Prisons (BOP) custody who BOP moved to home confinement under the authority of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

I. Background

In March 2020, the CARES Act expanded BOP’s authority to place incarcerated people on home confinement under 18 U.S.C. §3624(c)(2) in order to reduce the federal prison population and the spread of COVID-19. CARES Act Sec. 12003(b)(2). In January 2021, the Office of Legal Counsel (OLC) published a memorandum concluding that once the COVID-19 emergency period is over, BOP must reincarcerate people who were put on home confinement under CARES and have more than the standard home confinement term left on their

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, and educates the public about civil rights and civil liberties issues across the country. 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.

sentences.² When it was reported that OLC—under President Biden—would not rescind or reconsider its decision,³ significant public outcry ensued.⁴ In September 2021, President Biden directed his administration to collect the information he needs to consider granting clemency to a subset of the people who would be subject to reincarceration based on OLC’s memorandum.⁵ According to this reporting, and other accounts, the President is considering granting clemency to people who were (1) convicted of drug crimes and (2) have less than four years remaining on their sentences.⁶

To provide the American public with information about how many people are eligible for clemency under this new program and how many people may be reincarcerated at the end of the COVID-19 emergency, the ACLU seeks such information through this FOIA request.



II. Requested Records

The ACLU seeks records sufficient to show:

- (1) For each individual BOP has moved to home confinement under the authority of the CARES Act, the following information:

² U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

³ See Charlie Savage and Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

⁴ See e.g., *Unless Biden intervenes, people will needlessly be sent back to prison*, Editorial Board, Washington Post (July 25, 2021), <https://www.washingtonpost.com/opinions/2021/07/25/unless-mr-biden-intervenes-people-will-needlessly-be-sent-back-prison/>; Dan King, *Biden Must Act to Ensure Nonviolent Offenders Aren’t Sent Back to Prison*, The Bulwark (August 19, 2021), <https://www.thebulwark.com/biden-must-act-to-ensure-nonviolent-offenders-arent-sent-back-to-prison/>; Democracy Forward et al., *Letter to the Office of Legal Counsel and Deputy Attorney General*, (February 18, 2021), <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>; Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021), <https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/>

⁵ Sam Stein, *Biden starts clemency process for inmates released due to Covid conditions*, Politico (September 13, 2021), <https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658>

⁶ *Id.*; <https://twitter.com/KevinARing/status/1437218468470865922?s=20>

- a. Crime(s) of conviction;
- b. Date of conviction;
- c. Sentence;
- d. Date sentence computation began;
- e. Total prior credit time;
- f. Jurisdiction in which convicted;
- g. Home confinement/detention eligibility date absent CARES Act expanded authority (HDED);
- h. Facility in which the person was held immediately prior to home confinement;
- i. Date of transfer to home confinement; and
- j. Projected release date (PRD).



The ACLU does not seek names, register numbers, or any other personal identifying information.

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.

As noted above, we seek only records sufficient to provide the specified information; we do not seek the release of all records containing the specified information. Thus, for example, if BOP possesses a spreadsheet containing the specified information, release of that spreadsheet (with other categories of information redacted) would suffice.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).⁷ 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

⁷ *See also* 28 C.F.R. s 16.5(e).

meaning of the statute. *Id.*⁸ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. 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”).⁹

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 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,¹⁰ and



⁸ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

⁹ 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).

¹⁰ *See, e.g.*, Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans' Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities (Dec. 21, 2018), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on

ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹¹

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



Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

¹¹ See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times, June 26, 2019, <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill, Mar. 21, 2019, <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); 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); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, The Associated Press, Jan. 18, 2017, <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); 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 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 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).

of government documents obtained through FOIA requests.¹² 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.

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* <https://www.aclu.org/blog>. 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. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including 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.¹³



¹² *See, e.g.,* ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; 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), <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), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

¹³ *See, e.g.,* ACLU v. ODNI—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; ACLU v. DOJ—FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media, ACLU Case Page,

The ACLU website includes many features on information obtained through the FOIA. The 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 its contents relating to government policies on rendition, detention, and interrogation.¹⁴ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.¹⁵

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



<https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ*—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ*—FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015) <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

¹⁴ *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

¹⁵ *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; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; *Statistics on NSL’s Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

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).¹⁶ Specifically, they pertain to how many people are at risk of being reincarcerated when the President lifts the COVID-19 emergency declaration. As discussed in Part I, *supra*, there is ongoing public controversy and media attention about the prospect of people being forced back to prison even if they have complied with the terms of their home confinement and the President is now considering granting clemency to some of these people. The records sought relate to a matter of widespread and exceptional media interest in the fate of the people BOP placed in home confinement pursuant to the CARES Act.¹⁷



Further underscoring the urgency of informing the public about how many people may be granted clemency and how many people may be reincarcerated, at issue in this Request is the strong media interest in what little has been revealed publicly.¹⁸ Given this media interest and the lack of public information about how many people may be reincarcerated, there is an urgent need to inform the public about the fate of the people BOP moved to home confinement pursuant to the CARES Act. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the Department of Justice implementing regulations.¹⁹

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).²⁰ 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).

¹⁶ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹⁷ *See* note 4, *supra*.

¹⁸ *See* Kevin Ring, “It’s impossible to overstate how much the lack of transparency and communication by the administration is contributing to people’s anxiety and fear.” Twitter @KevinARing, (Sept. 13, 2021) <https://twitter.com/KevinARing/status/1437559852868546567?s=20>

¹⁹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

²⁰ *See also* 28 C.F.R. § 16.10(k)(2).

- 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, this Request concerns the number of people at risk of reincarceration at the end of the pandemic. Little information is publicly available regarding how many people may be granted clemency and how many people may be reincarcerated, so the records sought are certain to contribute significantly to the public's understanding of how the OLC memorandum and potential clemency grants by President Biden will affect the federal prison population.

The ACLU is not filing this Request to further its commercial interest. As described above, the ACLU is a noncommercial organization, and 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)).

- 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).²¹ 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. 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. 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. 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

²¹ *See also* 28 C.F.R. § 16.10(k)(2)(ii)-(iii).

²² *See also* 28 C.F.R. § 16.10(b)(6).



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. 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

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.”²⁴ As was true in those instances, the ACLU meets the requirements for a fee waiver here.



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 and 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.

²⁴ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of 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 June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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 June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a

* * *

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); 28 C.F.R. § 16.5(e)(4).

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

Emma Andersson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

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).

Sincerely,

A handwritten signature in black ink that reads "Emma Andersson". The signature is written in a cursive, flowing style.

Emma Andersson*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

**Admitted in California*

fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

EXHIBIT B

From: [Emma Andersson](#)
To: [OGC Electronic Freedom of Information](#)
Subject: RE: FOIA #2021-06841
Date: Friday, October 1, 2021 3:27:00 PM
Attachments: [image001.png](#)
[image003.png](#)

Mr. Baime,

Thank you for your responsiveness. In light of your concern below about the "combination of a-c and f," I would like to amend the request to leave out category b. Date of conviction.

Thank you for your assistance.

Emma

From: OGC Electronic Freedom of Information <ogc_efoia@bop.gov>
Sent: Thursday, September 30, 2021 3:38 PM
To: Emma Andersson <eandersson@aclu.org>
Subject: RE: FOIA #2021-06841

Ms. Andersson:

Good afternoon. These records are not retrievable by anyone in my office and need to be searched for and collected from a different directorate. While we sent requests to the appropriate directorates in BOP to search for the records, we do not know if the records are readily available or if a computer or other type of search will need to be conducted.

Please note the way your request is phrased, I anticipate some of the information may possibly be redacted since the combination of a-c and f would permit someone to identify specific individuals. If you wish to amend your request, please advise.

Respectfully,
Gene Baime
Supervisory Attorney

>>> Emma Andersson <eandersson@aclu.org> 9/30/2021 12:06 PM >>>

Hello,

Thank you for your acknowledgement letter. I appreciate your response. Prior to pursuing an administrative appeal, I'm hoping to better understand the challenges this request poses and potentially narrow the request in such a way that would reduce the burden on your agency.

Your letter asserts that "the documents responsive to your request must be searched for and collected from a field office and will require significant time to review" and states that the request is "complex" and "may take up to nine months" to process. The relevant request seeks information that we expect is readily available at the Designation & Sentence Computation Center in Texas. If there are specific categories of information that are not readily available, we may be able to amend the request to drop those categories. Can you clarify which specific categories make this request "complex" so that we can consider such an amendment? Please feel free to call me at the phone number below if easier by phone.

Thank you for your time and assistance.
Emma

Emma Andersson

Senior Staff Attorney | Criminal Law Reform Project
American Civil Liberties Union

Mobile: 347.931.6337

eandersson@aclu.org | aclu.org  

Pronouns: she/her



This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.

From: OGC_EFOIA@BOP.GOV <OGC_EFOIA@BOP.GOV>

Sent: Tuesday, September 28, 2021 2:57 PM

To: Emma Andersson <eandersson@aclu.org>

Subject: FOIA #2021-06841

Please see attached.

Respectfully,

S. Arellano

Government Information Specialist

Federal Bureau of Prisons

Office of the General Counsel

EXHIBIT C

September 30, 2021

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice, 6th Floor
441 G Street, N.W.
Washington, D.C. 20530-0001

Submitted via FOIA STAR



Re: **Request Under Freedom of Information Act Concerning Final Policies Implementing OLC Memorandum Requiring BOP to Reincarcerate People Who Were Placed on Home Confinement Under the CARES Act**

(Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation, and the American Civil Liberties Union of the District of Columbia (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for any and all final Office of the Attorney General or Department of Justice policies implementing the Office of Legal Counsel’s (OLC) memorandum concluding that certain people the Bureau of Prisons (BOP) placed on home confinement pursuant to expanded authority under the Coronavirus Aid, Relief, and Economic Security (CARES) Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.²

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, and educates the public about civil rights and civil liberties issues across the country. 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 U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

I. Background

In March 2020, the CARES Act expanded BOP's authority to place incarcerated people on home confinement under 18 U.S.C. §3624(c)(2) in order to reduce the federal prison population and the spread of COVID-19. CARES Act Sec. 12003(b)(2). In January 2021, OLC published a memorandum concluding that once the COVID-19 emergency period is over, BOP must reincarcerate people who were put on home confinement under CARES and have more than the standard home confinement term left on their sentences.³ On September 7, 2021, the United States filed a brief in federal district court stating that “[a]t present, neither the Attorney General nor the Bureau has acted on this advice by setting forth a policy to govern CARES Act home confinement placements after the end of the COVID-19 emergency.”⁴

Since it was reported that OLC—under President Biden—would not rescind or reconsider its decision,⁵ significant public outcry has ensued.⁶ To provide the American public with information about how BOP plans to reincarcerate thousands of people when the pandemic ends, the ACLU seeks the relevant materials through this FOIA request.



³ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁴ *Martinez-Brooks v. Garland*, Defendants' Brief In Support of Their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), No. 21-11307 (BRM)(JSA) (D. N.J. Sept. 7, 2021) at 9.

⁵ See Charlie Savage and Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

⁶ See e.g., John Yang, *Inmates released to home confinement during pandemic fear 'devastating' reincarceration*, PBS News Hour (September 21, 2021) <https://www.pbs.org/newshour/show/inmates-released-to-home-confinement-during-pandemic-fear-devastating-reincarceration>; *Unless Biden intervenes, people will needlessly be sent back to prison*, Editorial Board, Washington Post (July 25, 2021) <https://www.washingtonpost.com/opinions/2021/07/25/unless-mr-biden-intervenes-people-will-needlessly-be-sent-back-prison/>; Dan King, *Biden Must Act to Ensure Nonviolent Offenders Aren't Sent Back to Prison*, The Bulwark (August 19, 2021), <https://www.thebulwark.com/biden-must-act-to-ensure-nonviolent-offenders-arent-sent-back-to-prison/>; Democracy Forward et al., *Letter to the Office of Legal Counsel and Deputy Attorney General*, (February 18, 2021), <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>; Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021) <https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/>.

II. Requested Records

The ACLU seeks the following records:

- (1) Any and all final Office of the Attorney General or Department of Justice policies, directives, decisions, instructions, memoranda, or other documents that were promulgated in response to, based on, cite, and/or implement the OLC memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.⁷



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. *Id.*⁹ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU’s work and

⁷ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁸ *See also* 28 C.F.R. s 16.5(e).

⁹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

are among its primary activities. *See ACLU v. 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

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 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,¹¹ and



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

¹¹ *See, e.g.,* Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans’ Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities (Dec. 21, 2018), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding

ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹²

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.¹³ The ACLU also



Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

¹² See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times, June 26, 2019, <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill, Mar. 21, 2019, <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); 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); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, The Associated Press, Jan. 18, 2017, <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); 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 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 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).

¹³ See, e.g., ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; 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),

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.

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* <https://www.aclu.org/blog>. 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. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including 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.¹⁴



<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), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

¹⁴ *See, e.g., ACLU v. ODNI—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ—FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; *Executive Order 12,333—FOIA Lawsuit*, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court

The ACLU website includes many features on information obtained through the FOIA. The 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 its contents relating to government policies on rendition, detention, and interrogation.¹⁵ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.¹⁶

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



Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ—FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015) <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

¹⁵ *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <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 (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; *Statistics on NSL’s Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

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).¹⁷ Specifically, they pertain to how BOP plans to reincarcerate thousands of people when the President lifts the COVID-19 emergency declaration. As discussed in Part I, *supra*, there is ongoing public controversy and media attention about the prospect of people being forced back to prison even if they have complied with the terms of their home confinement and the President is now considering granting clemency to some of these people. The records sought relate to a matter of widespread and exceptional media interest in the fate of the people BOP placed in home confinement pursuant to the CARES Act.¹⁸



Further underscoring the urgency of informing the public about how thousands of people may be reincarcerated, at issue in this Request is the strong media interest in the government’s plans to implement OLC’s controversial memorandum.¹⁹ Given this media interest and the lack of full public record about the process by which many people may be reincarcerated, there is an urgent need to for the public to access the requested documents. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the Department of Justice implementing regulations.²⁰

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).

¹⁷ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹⁸ *See* note 4, *supra*.

¹⁹ *See* Kevin Ring, “It’s impossible to overstate how much the lack of transparency and communication by the administration is contributing to people’s anxiety and fear.” Twitter @KevinARing, (Sept. 13, 2021) <https://twitter.com/KevinARing/status/1437559852868546567?s=20>

²⁰ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

²¹ *See also* 28 C.F.R. § 16.10(k)(2).

- 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, this Request concerns how the government plans to reincarcerate people at the end of the pandemic. The records sought are certain to contribute to the public's understanding of how people on home confinement will be treated when the President lifts the emergency declaration.

The ACLU is not filing this Request to further its commercial interest. As described above, the ACLU is a noncommercial organization, and 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)).

- 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).²² 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)²³; *see also Nat'l Sec. Archive v. 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. 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. 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

²² *See also* 28 C.F.R. § 16.10(k)(2)(ii)-(iii).

²³ *See also* 28 C.F.R. § 16.10(b)(6).



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. 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).²⁴

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.”²⁵ As was true in those instances, the ACLU meets the requirements for a fee waiver here.



²⁴ 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 and 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.

²⁵ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of 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 June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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 June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a

* * *

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); 28 C.F.R. § 16.5(e)(4).

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

Emma Andersson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

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).

Sincerely,

A handwritten signature in black ink that reads "Emma Andersson". The signature is written in a cursive, flowing style.

Emma Andersson*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

**Admitted in California*

fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

EXHIBIT D

September 30, 2021

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice, 6th Floor
441 G Street, N.W.
Washington, D.C. 20530-0001

Submitted via FOIA STAR



Re: **Request Under Freedom of Information Act Concerning Final Policies Implementing OLC Memorandum Requiring BOP to Reincarcerate People Who Were Placed on Home Confinement Under the CARES Act**

(Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation, and the American Civil Liberties Union of the District of Columbia (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for any and all final Bureau of Prisons (BOP), Office of the Attorney General, Office of the Deputy Attorney General, or Department of Justice policies implementing the Office of Legal Counsel’s (OLC) memorandum concluding that certain people the BOP placed on home confinement pursuant to expanded authority under the Coronavirus Aid, Relief, and Economic Security (CARES) Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.²

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, and educates the public about civil rights and civil liberties issues across the country. 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 U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

I. Background

In March 2020, the CARES Act expanded BOP's authority to place incarcerated people on home confinement under 18 U.S.C. §3624(c)(2) in order to reduce the federal prison population and the spread of COVID-19. CARES Act Sec. 12003(b)(2). In January 2021, OLC published a memorandum concluding that once the COVID-19 emergency period is over, BOP must reincarcerate people who were put on home confinement under CARES and have more than the standard home confinement term left on their sentences.³ On September 7, 2021, the United States filed a brief in federal district court stating that “[a]t present, neither the Attorney General nor the Bureau has acted on this advice by setting forth a policy to govern CARES Act home confinement placements after the end of the COVID-19 emergency.”⁴

Since it was reported that OLC—under President Biden—would not rescind or reconsider its decision,⁵ significant public outcry has ensued.⁶ To provide the American public with information about how BOP plans to reincarcerate thousands of people when the pandemic ends, the ACLU seeks the relevant materials through this FOIA request.



³ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁴ *Martinez-Brooks v. Garland*, Defendants' Brief In Support of Their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), No. 21-11307 (BRM)(JSA) (D. N.J. Sept. 7, 2021) at 9.

⁵ See Charlie Savage and Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

⁶ See e.g., John Yang, *Inmates released to home confinement during pandemic fear 'devastating' reincarceration*, PBS News Hour (September 21, 2021) <https://www.pbs.org/newshour/show/inmates-released-to-home-confinement-during-pandemic-fear-devastating-reincarceration>; *Unless Biden intervenes, people will needlessly be sent back to prison*, Editorial Board, Washington Post (July 25, 2021) <https://www.washingtonpost.com/opinions/2021/07/25/unless-mr-biden-intervenes-people-will-needlessly-be-sent-back-prison/>; Dan King, *Biden Must Act to Ensure Nonviolent Offenders Aren't Sent Back to Prison*, The Bulwark (August 19, 2021), <https://www.thebulwark.com/biden-must-act-to-ensure-nonviolent-offenders-arent-sent-back-to-prison/>; Democracy Forward et al., *Letter to the Office of Legal Counsel and Deputy Attorney General*, (February 18, 2021), <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>; Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021) <https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/>.

II. Requested Records

The ACLU seeks the following records:

- (1) Any and all final Office of the Attorney General, Office of the Deputy Attorney General, or Department of Justice policies, directives, decisions, instructions, memoranda, or other documents that were promulgated in response to, based on, cite, and/or implement the OLC memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.⁷
- (2) Any and all final BOP policies, directives, decisions, instructions, memoranda, or other documents that were promulgated in response to, based on, cite, and/or implement the OLC memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.⁸



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).⁹ 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*

⁷ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁸ *Id.*

⁹ *See also* 28 C.F.R. s 16.5(e).

government activity.

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. *Id.*¹⁰ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. 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”).¹¹

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 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,¹² and



¹⁰ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹¹ 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).

¹² *See, e.g.,* Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans’ Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities (Dec. 21, 2018), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on

ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹³

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



Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

¹³ See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times, June 26, 2019, <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill, Mar. 21, 2019, <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screening 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); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, The Associated Press, Jan. 18, 2017, <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); 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 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 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).

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.¹⁴ 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.

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* <https://www.aclu.org/blog>. 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. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including 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.¹⁵



¹⁴ *See, e.g.*, ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; 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), <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), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

¹⁵ *See, e.g.*, *ACLU v. ODNI—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU Case Page,

The ACLU website includes many features on information obtained through the FOIA. The 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 its contents relating to government policies on rendition, detention, and interrogation.¹⁶ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.¹⁷

The ACLU plans to analyze, publish, and disseminate to the public information gathered through this Request. The records requested are not sought



<https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ—FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ—FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015) <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

¹⁶ *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

¹⁷ *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; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; *Statistics on NSL’s Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

for commercial use and the Requesters plan to disseminate 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).¹⁸ Specifically, they pertain to how BOP plans to reincarcerate thousands of people when the President lifts the COVID-19 emergency declaration. As discussed in Part I, *supra*, there is ongoing public controversy and media attention about the prospect of people being forced back to prison even if they have complied with the terms of their home confinement and the President is now considering granting clemency to some of these people. The records sought relate to a matter of widespread and exceptional media interest in the fate of the people BOP placed in home confinement pursuant to the CARES Act.¹⁹



Further underscoring the urgency of informing the public about how thousands of people may be reincarcerated, at issue in this Request is the strong media interest in the government's plans to implement OLC's controversial memorandum.²⁰ Given this media interest and the lack of full public record about the process by which many people may be reincarcerated, there is an urgent need to for the public to access the requested documents. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the Department of Justice implementing regulations.²¹

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).²² The ACLU also requests a waiver of search fees on the

¹⁸ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹⁹ *See* note 4, *supra*.

²⁰ *See* Kevin Ring, "It's impossible to overstate how much the lack of transparency and communication by the administration is contributing to people's anxiety and fear." Twitter @KevinARing, (Sept. 13, 2021) <https://twitter.com/KevinARing/status/1437559852868546567?s=20>

²¹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

²² *See also* 28 C.F.R. § 16.10(k)(2).

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, this Request concerns how the government plans to reincarcerate people at the end of the pandemic. The records sought are certain to contribute to the public’s understanding of how people on home confinement will be treated when the President lifts the emergency declaration.

The ACLU is not filing this Request to further its commercial interest. As described above, the ACLU is a noncommercial organization, and 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)).

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).²³ 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)²⁴; *see also Nat’l Sec. Archive v. 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. 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. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of

²³ *See also* 28 C.F.R. § 16.10(k)(2)(ii)–(iii).

²⁴ *See also* 28 C.F.R. § 16.10(b)(6).



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. 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).²⁵

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.”²⁶ As was true in those instances, the ACLU meets the requirements for a fee waiver here.



²⁵ 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 and 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.

²⁶ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of 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 June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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,

* * *

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); 28 C.F.R. § 16.5(e)(4).

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



Emma Andersson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

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).

Sincerely,

A handwritten signature in black ink that reads "Emma Andersson". The signature is written in a cursive style and is positioned above the typed name and contact information.

Emma Andersson*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

**Admitted in California*

Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies' removal of "extremist" content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

EXHIBIT E

October 8, 2021

FOIA/PA Section
Office of General Counsel, Room 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 20534
Email: OGC_EFOIA@BOP.GOV

Re: Request Under Freedom of Information Act Concerning Final Policies Implementing OLC Memorandum Requiring BOP to Reincarcerate People Who Were Placed on Home Confinement Under the CARES Act



(Expedited Processing & Fee Waiver Requested)

To Whom It May Concern:

The American Civil Liberties Union, the American Civil Liberties Union Foundation, and the American Civil Liberties Union of the District of Columbia (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for any and all final Bureau of Prisons (BOP) and Office of the Attorney General or Department of Justice policies implementing the Office of Legal Counsel’s (OLC) memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the Coronavirus Aid, Relief, and Economic Security (CARES) Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.²

I. Background

In March 2020, the CARES Act expanded BOP’s authority to place incarcerated people on home confinement under 18 U.S.C. §3624(c)(2) in order to

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, and educates the public about civil rights and civil liberties issues across the country. 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 U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

reduce the federal prison population and the spread of COVID-19. CARES Act Sec. 12003(b)(2). In January 2021, OLC published a memorandum concluding that once the COVID-19 emergency period is over, BOP must reincarcerate people who were put on home confinement under CARES and have more than the standard home confinement term left on their sentences.³ On September 7, 2021, the United States filed a brief in federal district court stating that “[a]t present, neither the Attorney General nor the Bureau has acted on this advice by setting forth a policy to govern CARES Act home confinement placements after the end of the COVID-19 emergency.”⁴

Since it was reported that OLC—under President Biden—would not rescind or reconsider its decision,⁵ significant public outcry has ensued.⁶ To provide the American public with information about how BOP plans to reincarcerate thousands of people when the pandemic ends, the ACLU seeks the relevant materials through this FOIA request.



II. Requested Records

³ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁴ *Martinez-Brooks v. Garland*, Defendants’ Brief In Support of Their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), No. 21-11307 (BRM)(JSA) (D. N.J. Sept. 7, 2021) at 9.

⁵ See Charlie Savage and Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. Times (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

⁶ See e.g., John Yang, *Inmates released to home confinement during pandemic fear ‘devastating’ reincarceration*, PBS News Hour (September 21, 2021) <https://www.pbs.org/newshour/show/inmates-released-to-home-confinement-during-pandemic-fear-devastating-reincarceration>; *Unless Biden intervenes, people will needlessly be sent back to prison*, Editorial Board, Washington Post (July 25, 2021) <https://www.washingtonpost.com/opinions/2021/07/25/unless-mr-biden-intervenes-people-will-needlessly-be-sent-back-prison/>; Dan King, *Biden Must Act to Ensure Nonviolent Offenders Aren’t Sent Back to Prison*, The Bulwark (August 19, 2021), <https://www.thebulwark.com/biden-must-act-to-ensure-nonviolent-offenders-arent-sent-back-to-prison/>; Democracy Forward et al., *Letter to the Office of Legal Counsel and Deputy Attorney General*, (February 18, 2021), <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>; Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021) <https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/>.

The ACLU seeks the following records:

- (1) Any and all final BOP policies, directives, decisions, instructions, memoranda, or other documents that were promulgated in response to, based on, cite, and/or implement the OLC memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.⁷
- (2) Any and all final Office of the Attorney General or Department of Justice policies, directives, decisions, instructions, memoranda, or other documents in BOP's custody that were promulgated in response to, based on, cite, and/or implement the OLC memorandum concluding that certain people BOP placed on home confinement pursuant to expanded authority under the CARES Act must be reincarcerated when the President lifts the COVID-19 emergency declaration.⁸



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).⁹ 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.*

⁷ U.S. Department of Justice, Home Confinement of Federal Prisoners After the COVID-19 Emergency (January 15, 2021), <https://www.justice.gov/olc/file/1355886/download>.

⁸ *Id.*

⁹ *See also* 28 C.F.R. s 16.5(e).



The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. *Id.*¹⁰ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. 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”).¹¹

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 5.9 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,¹² and

¹⁰ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹¹ 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).

¹² *See, e.g.,* Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans’ Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities (Dec. 21, 2018), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018),

ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.¹³

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



<https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women>; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, 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, ACLU, 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, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

¹³ See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times, June 26, 2019, <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill, Mar. 21, 2019, <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); 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); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, The Associated Press, Jan. 18, 2017, <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); 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 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 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).

regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.¹⁴ 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.

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* <https://www.aclu.org/blog>. 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. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including 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.¹⁵



¹⁴ *See, e.g.*, ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; 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), <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), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

¹⁵ *See, e.g.*, *ACLU v. ODNI—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government>

The ACLU website includes many features on information obtained through the FOIA. The 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 its contents relating to government policies on rendition, detention, and interrogation.¹⁶ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.¹⁷

The ACLU plans to analyze, publish, and disseminate to the public information gathered through this Request. The records requested are not sought



surveillance-under-usa-freedom-act; *ACLU v. DOJ*—FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ*—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; Executive Order 12,333—FOIA Lawsuit, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ*—FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; FOIA Request for Justice Department Policy Memos on GPS Location Tracking, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; Florida Stingray FOIA, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015) <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

¹⁶ *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

¹⁷ *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; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; *Statistics on NSL’s Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf.

for commercial use and the Requesters plan to disseminate 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).¹⁸ Specifically, they pertain to how BOP plans to reincarcerate thousands of people when the President lifts the COVID-19 emergency declaration. As discussed in Part I, *supra*, there is ongoing public controversy and media attention about the prospect of people being forced back to prison even if they have complied with the terms of their home confinement and the President is now considering granting clemency to some of these people. The records sought relate to a matter of widespread and exceptional media interest in the fate of the people BOP placed in home confinement pursuant to the CARES Act.¹⁹



Further underscoring the urgency of informing the public about how thousands of people may be reincarcerated, at issue in this Request is the strong media interest in the government's plans to implement OLC's controversial memorandum.²⁰ Given this media interest and the lack of full public record about the process by which many people may be reincarcerated, there is an urgent need to for the public to access the requested documents. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the Department of Justice implementing regulations.²¹

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).²² The ACLU also requests a waiver of search fees on the

¹⁸ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

¹⁹ *See* note 4, *supra*.

²⁰ *See* Kevin Ring, "It's impossible to overstate how much the lack of transparency and communication by the administration is contributing to people's anxiety and fear." Twitter @KevinARing, (Sept. 13, 2021) <https://twitter.com/KevinARing/status/1437559852868546567?s=20>

²¹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

²² *See also* 28 C.F.R. § 16.10(k)(2).

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, this Request concerns how the government plans to reincarcerate people at the end of the pandemic. The records sought are certain to contribute to the public’s understanding of how people on home confinement will be treated when the President lifts the emergency declaration.

The ACLU is not filing this Request to further its commercial interest. As described above, the ACLU is a noncommercial organization, and 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)).

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).²³ 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)²⁴; *see also Nat’l Sec. Archive v. 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. 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. 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

²³ *See also* 28 C.F.R. § 16.10(k)(2)(ii)–(iii).

²⁴ *See also* 28 C.F.R. § 16.10(b)(6).



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. 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).²⁵

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.”²⁶ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

²⁵ 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 and 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.

²⁶ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of 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 June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. 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 June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with



* * *

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); 28 C.F.R. § 16.5(e)(4).

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

Emma Andersson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: (347) 931-6337
eandersson@aclu.org

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).

Sincerely,

A handwritten signature in black ink that reads "Emma Andersson". The signature is written in a cursive, flowing style.

Emma Andersson*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
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**Admitted in California*

social media companies' removal of "extremist" content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.