NATIONAL SECURITY
PROJECT

October 1, 2014

Transportation Security Administration
Freedom of Information Act Branch
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Re: <u>Request Under Freedom of Information Act/Expedited Processing Requested</u>

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU")[1] submit this Freedom of Information Act ("FOIA") request for records pertaining to the Transportation Security Administration's behavior detection programs.[2]

Since 2003, the TSA has used what it describes as behavior detection techniques to screen passengers for flights at U.S. airports. The TSA's use of such techniques raises serious civil liberties concerns about racial and religious profiling and has been criticized as ineffective and lacking a valid scientific basis. The TSA has investigated allegations of unlawful profiling related to behavior detection, including allegations leveled by TSA personnel, but it has not made public the results and consequences of those investigations. Despite spending approximately $200 million each year on behavior detection programs, the TSA has never demonstrated to the public that such programs effectively identify threats to aviation security. Given this lack of transparency, and given the potential impact of behavior detection

[1] The American Civil Liberties Union Foundation is a 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 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] The ACLU submits this request pursuant to the FOIA, 5 U.S.C. § 552 and the Department of Homeland Security ("DHS") implementing regulations, 6 C.F.R. § 5.1 *et seq.*

programs on millions of travelers annually, the ACLU urgently seeks information on these programs through this FOIA request.

The TSA's primary behavior detection program, Screening Passengers by Observation Techniques ("SPOT"), began in 2007. According to the TSA, the intent of the program is to screen passengers through observation of their behavior in order to identify anyone who "may pose potential transportation security risks."[3] The program employs behavior detection officers, who are instructed to visually assess people in the screening areas at airports, scanning for individuals who display "behaviors indicative of high levels of stress, fear, or deception."[4] Passengers who are identified by behavior detection officers as exhibiting those behaviors are selected for additional screening of their persons and belongings. During the additional screening process, if the officers identify further behaviors they deem suspicious, they refer the passengers to law enforcement officers for investigation and, possibly, arrest.[5]

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Government auditors have repeatedly questioned the basic premise underlying the TSA's behavior detection programs: that human behaviors reflecting deception or ill-intent can be detected reliably and objectively. In May 2010, the Government Accountability Office ("GAO") concluded that "TSA deployed SPOT nationwide before first determining whether there was a scientifically valid basis for using behavior detection and appearance indicators as a means for reliably identifying passengers as potential threats in airports."[6] The Department of Homeland Security Inspector General echoed that finding in May 2013, when it determined that "TSA cannot ensure that passengers at United States airports are screened objectively, show that the program is cost-effective, or reasonably justify the program's expansion."[7]

The GAO reexamined the SPOT program in November 2013 and issued a highly critical follow-up report finding that "available evidence does not support whether behavioral indicators can be used to identify aviation security threats."[8] Behavior detection officers interviewed by the GAO conceded that some of the indicators they were instructed to detect are subjective, and the GAO noted that rates of referral for additional screening "vary significantly across BDOs [behavior detection officers] at some

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[3] DHS, Privacy Impact Assessment for the Screening of Passengers by Observation Techniques (SPOT) Program, Aug. 5, 2008, at 2.

[4] *Id.*

[5] Government Accountability Office ("GAO"), TSA Should Limit Future Funding for Behavior Detection Activities, GAO-14-159 (Nov. 2013), at 1.

[6] GAO, Efforts to Validate TSA's Passenger Screening Behavior Detection Program Underway, but Opportunities Exist to Strengthen Validation and Address Operational Challenges, GAO-10-763 (May 2010), at 14.

[7] DHS Office of Inspector General, Transportation Security Administration's Screening of Passengers by Observation Techniques, OIG-13-91 (May 2013), at 1.

[8] GAO-14-159, *supra* note 5, at 15.

airports."[9] The GAO concluded that the subjectivity of SPOT indicators and the wide variations in referral rates "raise questions about the continued use of behavior indicators for detecting passengers who might pose a risk to aviation security."[10] The GAO recommended limiting future funding for the program.[11]

Concerns about the bases for, and effectiveness of, the SPOT program have prompted Congressional hearings, including a hearing in November 2013 before the House Subcommittee on Transportation Security. *See* "TSA's SPOT Program and Initial Lessons From the LAX Shooting," Statement of Subcommittee Chairman Richard Hudson (Nov. 14, 2013) ("To my knowledge, there has not been a single instance where a behavior detection officer has referred someone to a law enforcement officer and that individual turned out to be a terrorist."); Statement of House Homeland Sec. Chairman Michael McCaul ("I am concerned that TSA will continue to spin its wheels with this program instead of developing a more effective and efficient approach."). The House Committee on Science, Space, and Technology also held hearings on the SPOT program in April 2011. *See* House Comm. on Science, Space & Tech., Subcomm. on Invest. & Oversight, *Behavioral Science and Security: Evaluating TSA's SPOT Program* (Apr. 6, 2011). Experts who testified during the course of those hearings directly challenged the purported scientific basis for the SPOT program. *See, e.g., id.*, Statement of Prof. Maria Hartwig ("In brief, the accumulated body of scientific work on behavioral cues to deception does not provide support for the premise of the SPOT program.").

Given these findings and concerns, it is unsurprising that the SPOT program has given rise to allegations of racial and religious profiling. Such allegations have come not only from passengers, but also from numerous TSA behavior detection officers, who have reported witnessing other officers subjecting people of Middle Eastern descent or appearance, African Americans, Hispanics, and other minorities to additional questioning and screening solely on the basis of their race.[12] In August 2012, 32 behavior detection officers alleged that such profiling was rampant at Boston Logan International Airport. One of the complaining officers told reporters, "They [behavior detection officers] just pull aside anyone who they don't like the way they look — if they are black and have expensive clothes or jewelry, or if they are Hispanic."[13] Similar allegations have been leveled at behavior detection officers working at Newark Liberty International Airport and

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[9] *Id.* at 25.

[10] *Id.* at 47.

[11] *Id.*

[12] *See* Michael S. Schmidt and Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. Times (Aug. 11, 2012), available at http://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html.

[13] *Id.*

Honolulu International Airport.[14] One officer reportedly submitted an anonymous complaint stating that "the behavior detection program is no longer a behavior-based program, but it is a racial profiling program."[15]

DHS and the TSA have investigated these allegations of racial profiling, but the adequacy and extent of those investigations is unclear, and little of their results have been published. It does not appear that the investigations led to any changes in policies or practices. In the course of the GAO's recent review of racial profiling allegations—which occurred after the TSA and DHS investigations were concluded—five of 25 behavior detection officers the GAO interviewed said racial profiling was occurring based on their own observations.[16] Seven additional officers contacted the GAO independently to express concern about racial profiling that they had witnessed.[17] These complaints reinforce concerns that problems with racial and religious profiling by behavior detection officers have not been resolved. Any information retained by the TSA on the race, ethnicity, or national origin of passengers who are referred by behavior detection officers for additional screening could help substantiate or disprove allegations of racial profiling.

The SPOT program has been in place since 2007, and the TSA has utilized behavior detection techniques for more than a decade, but the public knows little about the scope, effectiveness, or scientific basis for these programs. Nor has the TSA made public the results of investigations into persistent allegations of unlawful racial profiling by behavior detection officers. Specifically, Americans remain unaware of the policies governing the work of behavior detection officers; how the TSA determines that certain behaviors reflect deception or ill-intent; how the TSA trains behavior detection officers to recognize such behaviors; what, if any, safeguards are in place to account for variations in behaviors and mannerisms among genders, ages, cultures, and other demographic groups; and whether and how often the subjective nature of behavior detection leads to impermissible profiling. It is therefore imperative that the public gain a greater understanding of the scope and implementation of the TSA's behavior detection programs.

Requested Records

1. Records concerning scientific analyses, published or unpublished studies, literature, research, or operational best practices that serve as the basis for the TSA's behavior detection programs, including but not limited to records reflecting:
   A. The scientific basis for using observable behavior to infer or detect future behavior or intent;

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[14] *See* GAO-14-159, *supra* note 5, at 57.
[15] Schmidt and Lichtblau, *supra* note 12.
[16] GAO-14-159, *supra* note 5, at 59.
[17] *Id.*

B. Whether humans can reliably, consistently, or objectively interpret observable behaviors in other humans; and
C. Whether behavior detection techniques can reliably be used to identify persons who may pose a risk to aviation security.

2. Policies, procedures, guidance, advisories, directives, memoranda, and shift briefs created since January 1, 2007[18] pertaining to:
A. The Screening of Passengers by Observation Techniques (SPOT) program, the Assessor program, and/or other Transportation Security Administration programs that utilize behavior detection techniques;
B. Methods of behavior detection and analysis utilized by the TSA;
C. The origins, uses for, and changes to the list of behavior indicators utilized by behavior detection officers;
D. The circumstances under which a passenger may be referred by a behavior detection officer for additional screening or for questioning by law enforcement officers;
E. The existence or use of quotas, targets, or other requirements for the amount of referrals by behavior detection officers for additional screening or law enforcement questioning;
F. Referral of passengers for additional screening or law enforcement questioning by behavior detection officers based on race, religion, ethnicity, and/or national origin; and
G. Evaluation and/or review of the performance of behavior detection officers or other employees who utilize behavior detection techniques.

3. Training and course materials for employees involved in behavior detection activities, including materials related to initial, continuing, and recurring training, and to racial, religious, ethnic, and/or national origin profiling.

4. Records created since January 1, 2007 concerning evaluations, tests, audits, analyses, studies, and/or assessments of:
A. The implementation, effectiveness, and/or ineffectiveness of the SPOT program, the Assessor program, or other Transportation Security Administration programs that utilize behavior detection techniques to identify potentially high-risk passengers;

[18] While the TSA's use of behavior detection predates 2007, this request focuses on behavior detection activities and programs during the period in which SPOT has been deployed at U.S. airports. The GAO reports that SPOT was formally initiated in fiscal year 2007. *See* GAO-14-159, *supra* note 5, at 1.

B. Compliance by behavior detection officers and/or other employees who utilize behavior detection techniques with policies and guidelines;
C. The criteria for evaluating behavioral detection officers for promotions; and
D. The consistency with which behavior indicators are applied within individual airports and among all airports involved in the SPOT program, the Assessor program, or other TSA programs that utilize behavior detection techniques.

5. Records created since January 1, 2007 containing data related to:
A. The number of passengers referred for additional screening or questioning by law enforcement by behavior detection officers or other employees who utilize behavior detection techniques, including incident reports entered into the Transportation Information Sharing System;
B. The number of passengers who were arrested following referral for additional screening or questioning by law enforcement by behavior detection officers or other employees who utilize behavior detection techniques; and
C. The race, religion, ethnicity, and/or national origin of passengers referred by behavior detection officers or other employees who utilize behavior detection techniques to law enforcement for additional screening or questioning.

6. Records related to the SPOT database, including but not limited to the substantive categories of information stored in the database, inclusion criteria, data retention periods, guidance documents, and audit reports.

7. Records created since January 1, 2007 concerning complaints about, investigations of, and/or disciplinary actions related to the work of behavior detection officers or the misuse of behavior detection techniques, as well as any investigations and/or reported legal violations concerning the implementation of the program.

8. Records related to allegations of racial, ethnic, religious, or national origin profiling related to the SPOT program, the Assessor program, or other TSA programs that utilize behavior detection techniques, including but not limited to investigation notes, reports, findings, and memoranda.

9. Documents, correspondence, and/or records sent to or received from local, state, or federal agencies, and/or their personnel, since January 1, 2007 regarding:

A. Referral of passengers for questioning by law enforcement officers through the SPOT program, the Assessor program, or other TSA programs that utilize behavior detection techniques;
B. The sharing of records and data on passengers referred for additional screening via the SPOT program, the Assessor program, or other TSA programs that utilize behavior detection techniques; and
C. The checking of passenger names against law enforcement or intelligence databases and/or watchlists.

10. Records created since January 1, 2007 concerning the use of behavior detection techniques by private sector personnel or contractors for screening passengers and property.

Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d). Expedited processing is warranted because the ACLU is an organization primarily engaged in disseminating information, and this request seeks records in order urgently to inform the public about actual or alleged federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); 6 C.F.R. § 5.5(d)(1)(ii).

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. *See id.* Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 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" (internal citation and quotation marks omitted)).[19]

The ACLU regularly publishes a newsletter that reports on and analyzes civil liberties-related current events. The newsletter is disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers (both ACLU

[19] Courts have found that other organizations with missions similar to the ACLU and 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) (Leadership Conference on Civil Rights); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5; *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003) (Electronic Privacy Information Center).

members and non-members) by e-mail. The electronic newsletter is disseminated to approximately 300,000 people. Both of these newsletters 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,[20] and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.[21]

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. Since 2011

[20] *See, e.g.*, Press Release, American Civil Liberties Union, *U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit*, June 23, 2014, https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit; Press Release, American Civil Liberties Union, *Justice Department White Paper Details Rationale for Targeted Killing of Americans*, Feb. 4, 2013, https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans; Press Release, American Civil Liberties Union, *Documents Show FBI Monitored Bay Area Occupy Movement*, Sept. 14, 2012, http://www.aclu.org/node/36742; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Using "Mosque Outreach" for Intelligence Gathering*, Mar. 27, 2012, http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering; Press Release, American Civil Liberties Union, *FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach,"* Dec. 1, 2011, http://www.aclu.org/ national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community; Press Release, American Civil Liberties Union, *FOIA Documents from FBI Show Unconstitutional Racial Profiling*, Oct. 20, 2011, http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling; Press Release, American Civil Liberties Union, *Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem*, Oct. 19, 2011, http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse; Press Release, American Civil Liberties Union, *ACLU Lawsuit Seeks Information from FBI on Nationwide System for Collecting "Suspicious Activity" Information*, Aug. 25, 2011, https://www.aclu.org/national-security/aclu-lawsuit-seeks-information-fbi-nationwide-system-collecting-suspicious; Press Release, American Civil Liberties Union, *New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU*, June 24, 2009, http://www.aclu.org/ national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu.

[21] *See, e.g.*, Brad Knickerbocker, *ACLU: FBI Guilty of "Industrial Scale" Racial Profiling*, The Christian Science Monitor, Oct. 21, 2011, http://www.csmonitor.com/USA/Justice/2011/1021/ACLU-FBI-guilty-of-industrial-scale-racial-profiling; Joshua E.S. Phillips, *Inside the Detainee Abuse Task Force*, The Nation, May 30, 2011, http://bit.ly/skUHD1 (quoting ACLU staff attorney Alexander Abdo); Scott Shane & Benjamin Weiser, *Dossier Shows Push for More Attacks After 9/11*, N.Y. Times, Apr. 25, 2011, http://nyti.ms/ty47ZA (quoting ACLU project director Hina Shamsi); Eric Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 21, 2011, http://nyti.ms/tgFpkd (quoting ACLU deputy legal director Jameel Jaffer).

alone, ACLU national projects have published and disseminated dozens of reports, many of which include a description and analysis of government documents obtained through FOIA requests.[22] 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* http://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* http://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, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA, and further in-depth analytic and educational multi-media features.

In the national security arena alone, the ACLU website includes many features on information obtained through the FOIA.[23] For example, the

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[22] *See, e.g.*, ACLU, Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems (Oct. 2013); ACLU, Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority (Sept. 2013), *available at* https://www.aclu.org/sites/default/files/assets/ unleashed-and-unaccountable-fbi-report.pdf; ACLU, Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by Government Contractors (June 2012), *available at* https://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf; Human Rights Watch and ACLU, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System (July 2010), *available at* https://www. aclu.org/files/assets/ usdeportation0710_0.pdf; Reclaiming Patriotism: A Call to Reconsider the Patriot Act (March 2009), *available at* https://www.aclu.org/reform-patriot-act; ACLU, The Excluded: Ideological Exclusion and the War on Ideas (Oct. 2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf; ACLU, History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement (May 2007), *available at* http://www.aclu.org/images/asset_upload_file893_29902.pdf; ACLU, No Real Threat: The Pentagon's Secret Database on Peaceful Protest (Jan. 2007), *available at* http://www.aclu.org/ pdfs/safefree/spyfiles_norealthreat_20070117.pdf; ACLU, Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You (July 2003), *available at* http://www.aclu.org/FilesPDFs/spies_report.pdf.

[23] *See, e.g.*, http://www.aclu.org/national-security/predator-drone-foia; http://www.aclu.org/national-security/anwar-al-awlaki-foia-request; https://www.aclu.org/

ACLU's "Predator Drones FOIA" webpage, https://www.aclu.org/national-security/predator-drones-foia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.[24]

The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA—the ACLU created an original chart that provides the public and news media with a comprehensive summary of index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance.[25] Similarly, the ACLU produced a summary of documents released in response to a FOIA request related to the FISA Amendments Act,[26] and a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA.[27]

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

Furthermore, the records sought are urgently needed to inform the public about this controversial federal government activity. The records sought pertain to the scope and implementation of the TSA's behavior detection programs, which implicate core discrimination and privacy concerns, but the public knows little about the basis for the programs, the training and professionalism of those who implement them, their efficacy, and the extent to which they disproportionately impact minorities. Such

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national-security/aclu-v-department-defense; http://www.aclu.org/mappingthefbi; http://www.aclu.org/national-security/bagram-foia; https://www.aclu.org/national-security/csrt-foia; http://www.aclu.org/safefree/nsaspying/30022res20060207.html; http://www.aclu.org/patriotfoia; http://www.aclu.org/spyfiles; http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html; https://www.aclu.org/national-security/ideological-exclusion.

[24] http://www.torturedatabase.org. *See also* https://www.aclu.org/national-security/aclu-v-department-defense.

[25] https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

[26] https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf.

[27] The chart is available at https://www.aclu.org/files/safefree/nationalsecurity letters/released/nsl_stats.pdf.

information is of significant and urgent value to millions of Americans who travel by air each year. Without disclosure of the records sought, members of the public will remain in the dark about the operation of the TSA's behavior detection programs, and will not be able to assess for themselves whether the programs are necessary, effective, or subject to sufficient limits and oversight.

Further underscoring the urgency of informing the public about the TSA's behavior detection programs is the strong and sustained media interest that has been devoted to what little has been revealed publicly about the programs. *See e.g.*, John Tierney, *At Airports, a Misplaced Faith in Body Language*, N.Y. Times (Mar. 23, 2014); Scott McCartney, *Subtle Signs That May Mark You an Airport Security Risk*, Wall St. J. (Jan. 22, 2014); Alison Grant, *TSA behavior detection officers' ability to detect bad actors little better than chance, GAO study says*, Cleveland Plain Dealer (Nov. 23, 2013); Aaron Cooper, *TSA defends behavior detection program*, CNN.com (Nov. 14, 2013); Mark Johanson, *TSA Behavioral Detection Officers 'Not Effective,' Waste of $200M Annually: Report*, Int'l Bus. Times (Nov. 14, 2013); Bart Jansen, *GAO: TSA's behavior detection program flawed*, USA Today (Nov. 13, 2013); Stephen Dinan, *TSA wasting money by profiling passengers' behavior, investigators say*, Wash. Times (Nov. 13, 2013); Mike Ahlers and Rene Marsh, *Government report slams TSA program to spot possible terrorists*, CNN.com (Nov. 13, 2013); Nate Anderson, *TSA's got 94 signs to ID terrorists, but they're unproven by science*, Ars Technica (Nov. 13, 2013); Alex Davies, *Government Report: The TSA's Behavior Detection Program Is An Unscientific Waste of Money*, Bus. Insider (Nov. 14, 2013); Bart Jansen, *Auditor: TSA can't justify costs of screening behavior*, USA Today (June 5, 2013); Brian Ross, *ABC Reports on TSA Behavior Detection Officers*, ABC News (Jan. 25, 2011); Brian Ross, *TSA 'Not Capable' of Detecting Moscow-Like Attack, Critics Say*, ABC News (Jan. 25, 2011).

Similarly intense media attention has been devoted to allegations of profiling associated with the TSA's behavior detection programs. *See, e.g.*, Katie Johnston, *Racial profiling controversy still roiling Logan*, Boston Globe (Nov. 15, 2013); Bart Jansen, *TSA defends behavior screening against profiling claims*, USA Today (Nov. 14, 2013); Steve Strunsky, *Report criticizes TSA behavior program linked to racial profiling*, The Star-Ledger (June 5, 2013); Aaron Cooper, Jon Noah and Kristina Sgueglia, *TSA behavior detection officers will be retrained after profiling complaints*, CNN.com (Aug. 23, 2012); *Behavior detection officers targeted Mexicans, African-Americans, and Brazilians*, L.A. Times (Aug. 23, 2012); Jessie Wright-Mendoza, *TSA Retraining Officers in Newark, Elsewhere Following Reports of Racial Profiling*, N.J. Pub. Radio (Aug. 22, 2012); Jon Noah and Kristina Sgueglia, *TSA to investigate racial profiling claims*, CNN.com (Aug. 14, 2012); *Latinos Face Racial Profiling at Boston Airport, TSA Officials Say*, FoxNews Latino (Aug. 13, 2012); *Report: Racial Profiling Rampant In TSA's Logan Airport 'Behavior Detection' Program*, CBS Boston (Aug. 12, 2012); Michael S.

Schmidt and Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. Times (Aug. 11, 2012); Jennifer Sinco Kelleher, *Allegations of racial profiling under investigation at airport in Honolulu*, The Maui News (Dec. 3, 2011).

As detailed above, the controversy surrounding the SPOT program has also prompted congressional committees to hold hearings inquiring into the scientific basis for, and effectiveness of, the program.

Given what little has been revealed to the public about the TSA's behavior detection programs or the scope, extent, and results of investigations into allegations of racial profiling by behavior detection officers, this media and congressional interest makes clear that there is an urgent need to inform the public about this federal government activity. Accordingly, expedited processing is appropriate in this case under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(d).

III. Application for Waiver or Limitation of Fees

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(d).

As discussed above, news accounts and congressional hearings underscore the substantial public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the activities, training, qualifications, and effectiveness of the more than 3,000 behavior detection officers working in U.S. airports. Very little information about the TSA's behavior detection programs is publicly available, so the records sought are certain to contribute significantly to the public's understanding of, *inter alia*, what behaviors the TSA considers reflective of deception or ill-intent, whether such behaviors can be assessed and interpreted objectively, and whether behavior detection activities are infringing on the civil rights and/or liberties of Americans.

Such disclosure is not in the ACLU's commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (citation omitted).

We also request a waiver of search fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. *See* 6 C.F.R. § 5.11(d)(1). 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); *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); *Service Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep't of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"); *ACLU v. Dep't of Justice*, 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.*, *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the 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).[28]

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

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

media."[29] As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

Pursuant to the applicable regulations and statute, we expect the determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I).

If the Request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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[29] In April 2013, the National Security Division of the Department of Justice ("DOJ") granted a fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee waiver request regarding a FOIA request for documents related to national security letters issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the Department of Justice granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The DOJ did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the DOJ Office of Information and Privacy—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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

Hugh Handeyside
National Security Project
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

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

Sincerely,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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American Civil Liberties Union Foundation
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