



December 4, 2009

Via UPS & Facsimile

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TREASURER

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT /**  
**Expedited Processing Requested**

To Whom It May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

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<sup>1</sup> 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 the 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, 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.

## I. Requested Record

A report, reportedly drafted by H. Marshall Jarrett, Chief Counsel and Director of the Office of Professional Responsibility ("OPR"), concerning Office of Legal Counsel attorneys who authored legal opinions employed by the Bush administration to justify the use of harsh interrogation techniques.

## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), and 28 C.F.R. § 16.5(d). There is a "compelling need" for this record because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii). In addition, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1700.2(h)(4). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public is a critical and substantial component of the ACLU's work and one of its primary activities. *See Am. Civil Liberties Union 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" (quoting *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003))).

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 300,000 people. Both of these newsletters often include descriptions and analysis of information obtained through FOIA.

The ACLU regularly publishes reports about governmental activity and civil-liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. Since 2007 alone, ACLU national projects have published and disseminated over 30 reports. Many ACLU reports include description and analysis of government documents obtained through FOIA.<sup>2</sup> The ACLU also regularly publishes books, “know your rights” publications, 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.<sup>3</sup>

The ACLU operates 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 also creates and disseminates original editorial and educational content on civil-rights and civil-liberties news through multimedia projects, including videos, podcasts, and interactive features. See <http://www.aclu.org/multimedia>. The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.” See <http://aclu.tv/>.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, <https://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 focuses. 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

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<sup>2</sup> See, e.g., *Reclaiming Patriotism*, (March 2009), available at [http://www.aclu.org/pdfs/safefree/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf); *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at [http://www.aclu.org/pdfs/safefree/the\\_excluded\\_report.pdf](http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf); *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](http://www.aclu.org/images/asset_upload_file893_29902.pdf); *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](http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf); *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](http://www.aclu.org/FilesPDFs/spies_report.pdf).

<sup>3</sup> A recent search of Amazon.com produced over 60 books published by the ACLU.

these pages, the ACLU also provides the public with educational material about the particular civil-liberties issue or problem; recent news about the issue; analyses of Congressional or executive branch action on the issue; governmental documents obtained through FOIA about the issue; and more in-depth analytic and educational multimedia features on the issue.<sup>4</sup>

The ACLU website includes many features on information obtained through the FOIA.<sup>5</sup> For example, the ACLU's "Torture FOIA" webpage, <http://www.aclu.org/accountability>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA.

The ACLU has also published a number of charts 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 has created an original chart that provides the public and news media with a comprehensive index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance. The chart describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to

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<sup>4</sup> For example, the ACLU's website about national-security-letter ("NSL") cases, <http://www.aclu.org/nsl>, includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSLs; myths-and-facts documents; and links to information and analysis of related issues.

<sup>5</sup> See, e.g., <http://www.aclu.org/accountability/released.html>; <http://www.aclu.org/accountability/olc.html>; <http://www.aclu.org/national-security/csrt-foia>; <http://www.aclu.org/national-security/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; <http://www.aclu.org/national-security/patriot-foia>; [http://www.aclu.org/national-security\\_technology-and-liberty/spy-files](http://www.aclu.org/national-security_technology-and-liberty/spy-files); <http://www.aclu.org/national-security/national-security-letters-foia>; <http://www.aclu.org/national-security/ideological-exclusion>.

the public in whole or in part.<sup>6</sup> Similarly, the ACLU produced 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.<sup>7</sup>

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The record requested is 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 record sought relates directly to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the record sought relates to the legitimacy of the legal opinions crafted by the OLC and used by the Bush administration to justify the use of harsh interrogation techniques on detainees. *See* 28 C.F.R. § 16.5(d)(1)(ii). For the same reason, the record sought also relates to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

For years, there has been widespread public and media interest in the role the OLC played in developing and approving the Bush administration's interrogation policies. *See, e.g.,* Liz Halloran, *Torture Debate Ties Washington In Partisan Knots*, NPR.com, May 20, 2009 (examining the political debate sparked by President Obama's decision to release the OLC memos regarding interrogation methods utilized by the Bush administration); Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. Times, Apr. 28, 2009 (addressing Judge Jay Bybee's statements defending OLC memos detailing interrogation techniques used by the Bush administration); Greg Miller & Josh Meyer, *Memos Reveal Harsh CIA Interrogation Methods*, L.A. Times, Apr. 17, 2009 (discussing President Obama's decision to release OLC memos regarding interrogation techniques utilized by the Bush administration); Jon Ward, *Obama Releases Memos Detailing Interrogations*, Wash. Times, Apr. 17, 2009 (reporting on President Obama's decision to release OLC memos regarding interrogation techniques utilized by the Bush administration); Mark Mazzetti & Scott Shane, *Interrogation*

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<sup>6</sup> The chart is available at [http://www.aclu.org/files/assets/olcmemos\\_chart.pdf](http://www.aclu.org/files/assets/olcmemos_chart.pdf).

<sup>7</sup> The chart is available at [http://www.aclu.org/files/assets/nsi\\_stats.pdf](http://www.aclu.org/files/assets/nsi_stats.pdf).

*Memos Detail Harsh Tactics by the CIA*, N.Y. Times, Apr. 16, 2009 (discussing the content and release of OLC memos regarding interrogation methods used by the Bush administration); Eric Lichtblau, *Obama Pick to Analyze Broad Powers of President*, N.Y. Times, Jan. 7, 2009 (discussing President Obama's nomination for head of the OLC and her opportunity to reverse the OLC's Bush-era interrogation policies); Mark Mazzetti, *C.I.A. Awaits Rules on Terrorism Interrogations*, N.Y. Times, Mar. 25, 2007 (reporting on a conflict within the Bush administration over the authorization of harsh interrogation techniques and the OLC's role in legitimizing these techniques); Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. Times, Dec. 23, 2005 (discussing John Yoo's role in the drafting of legal memos justifying harsh interrogation techniques); Dana Priest, *Justice Dept. Memo Says Torture "May be Justified,"* Wash. Post, June 13, 2004 (reporting on an OLC memo written by Alberto Gonzales in 2002); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004 (describing the OLC's role in shaping the interrogation policies of the Bush administration).

The requested OPR report is the subject of extraordinary public and media interest. See, e.g., Michael Weisskopf, *For DOJ's Ethics Cop, Decision on Memos Looms*, TIME, Aug. 11, 2009 (reporting that Attorney General Holder is expected to make a decision soon regarding the recommendations of the OPR's report); Ari Shapiro, *Did Justice Department Lawyers Violate Ethics?*, NPR.com, July 1, 2009 (discussing the imminent release of the OPR's report criticizing the legal opinions used by the Bush administration to justify harsh interrogation methods); Evan Perez, *Justice Likely to Urge No Prosecutions*, Wall St. J., May 6, 2009 (reporting that the OPR's report will not recommend criminal prosecution of those responsible for the legal arguments that sanctioned the Bush administration's interrogation methods); David Johnston & Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. Times, May 6, 2009 (reporting that the OPR's report will not recommend criminal prosecution of those responsible for the legal arguments that sanctioned the Bush administration's interrogation methods); Charlie Savage & Neil A. Lewis, *Release of Memos Fuels Push for Inquiry into Bush's Terror-Fighting Policies*, N.Y. Times, Mar. 3, 2009 (addressing the release of OLC memos detailing interrogation techniques used by the Bush administration, and discussing expectations of the OPR's report); Michael Isikoff, *Report Delayed*, Newsweek, Feb. 16, 2009 (reporting that the "eagerly anticipated" OPR's report was delayed by former Attorney General Michael Mukasey). Moreover, government officials have acknowledged that the public would benefit from the release of this record. See United Press International, *Holder:*

*Torture Report Should Be Done Soon*, UPI.com, June 18, 2009 (quoting Attorney General Holder as saying that he hopes to declassify as much of the OPR's report as possible); Mark Benjamin, *Did Bush's Attorney General Hide Internal Dissent over Torture?*, Salon.com, Feb. 18, 2009 (reporting on a request from Senators Durbin and Whitehouse for a status update on the OPR's report); Scott Shane, *Justice Dept. Readies Report on Interrogation Methods*, N.Y. Times, Feb. 17, 2009 (discussing and speculating as to the content of the OPR's report and Senators Durbin and Whitehouse's request for a status update on the report).

The release of the CIA Inspector General's report on August 24, 2009 refocused public scrutiny on the actions of the Bush administration OLC, and led to the Attorney General's launch of a criminal investigation into alleged detainee abuse perpetrated by the CIA. Since then, public interest in the requested record has grown. *See, e.g.*, Daphne Eviatar, *So Where's That OPR Report?*, Wash. Independent, Dec. 1, 2009 (reporting that the OPR report has yet to be released despite Attorney General Holder's assurances); Nan Aron, *Call on Attorney General Holder to Release the "Torture Memos" Report*, Huffington Post, Nov. 11, 2009 (discussing the OPR report and calling on the public to mobilize to ensure its release); Scott Shane, *U.S. Justice Dept. to Critique Interrogation Methods Backed by Bush Team*, N.Y. Times, Nov. 7, 2009 (reporting on the expected release and contents of the OPR's report); Peter Finn, *Interrogation Investigation Loses GOP Participants*, Seattle Times, Sept. 26, 2009 (discussing Republican backlash to Attorney General Holder's decision to re-examine allegations of detainee abuse as recommended by the OPR's report); Alex Koppelman, *Former CIA Heads Ask Obama to Stop Investigation*, Salon.com, Sept. 18, 2009 (discussing a letter from former CIA heads asking President Obama to call off Attorney General Holder's investigations into detainee abuse and mentioning the OPR's report's role in Holder's decision); Joseph Finder, *The C.I.A. in Double Jeopardy*, N.Y. Times, Aug. 29, 2009 (criticizing Attorney General Holder's decision to review CIA detainee abuse cases and to withhold the OPR's report); Anne E. Kornblut, *Obama Approves New Team to Question Terror Suspects*, Wash. Post, Aug. 24, 2009 (discussing the content and status of OPR's report and the release of the Inspector General's report); David Johnston, *Justice Dept. Report Advises Pursuing C.I.A. Abuse Cases*, N.Y. Times, Aug. 24, 2009 (analyzing the implications of the OPR's recommendation to reopen prisoner-abuse cases in light of the release of the Inspector General's report); Glenn Greenwald, *Eric Holder Announces Investigation Based on Abu Ghraib Model*, Salon.com, Aug. 24, 2009 (criticizing the limitations on Attorney General Holder's investigations into detainee abuse, and analyzing the

OPR's recommendation to reopen prisoner-abuse cases); Associated Press, *Times: Report Advises Pursuing CIA Abuse Cases*, Seattle Times, Aug. 23, 2009 (discussing OPR's recommendation to reopen prisoner-abuse cases and Attorney General Holder's negative reaction to the Inspector General report).

The Attorney General recently acknowledged that the OPR's report is "a matter of great public interest." Hearing before the S. Judiciary Comm. (Nov. 18, 2009) (statement of Eric H. Holder, Att'y Gen. of the United States), *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?id=4172> (select "Webcast"; statement begins at 212:30).

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Full release of the requested record would elucidate the role of Justice Department lawyers in crafting and authorizing the previous Administration's position on harsh interrogation techniques.

### **III. Application for Waiver or Limitation of Fees**

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1).

Numerous news accounts—as well as the Attorney General's concession—reflect the considerable public interest in the record we seek. *See* cited articles, *supra* Part II. Given the ongoing and widespread media attention to this issue, the record sought will significantly contribute to public understanding of the operations and activities of the DOJ and the government. *See* 28 C.F.R. § 16.11(k)(1)(i). Moreover, disclosure is not in the ACLU's commercial interest. 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)); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2, 121 Stat. 2524 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").



We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the record is not sought for commercial use. 28 C.F.R. § 16.11(c)(1)-(2), (d)(1). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(c)(3), (d).

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); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 29 n.5 (finding non-profit, public-interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 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 FOIA); *see supra* Part II.<sup>8</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).

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<sup>8</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month 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 Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to 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.

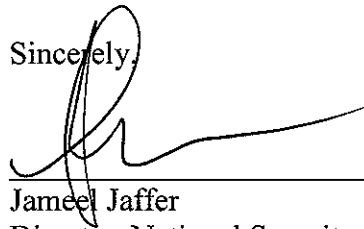
Thank you for your prompt attention to this matter. Please furnish the applicable record to:

Jameel Jaffer  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

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,



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