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Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

This letter constitutes a request by the American Civil Liberties Union Foundation (“ACLU”) under 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.*¹

I. Background

Recent media reports, scholarly works, and court decisions demonstrate that law enforcement agencies have increasingly used a surveillance strategy known as a “cell tower dump.” Cell tower dumps occur when law enforcement agencies obtain from wireless service providers the telephone numbers and sometimes subscriber information for every cell phone connected to a specific cell tower or towers at a certain time. A typical cell tower dump reveals the location information of hundreds or thousands of people, the majority of whom are not connected to any ongoing investigation. The FBI, for instance, received more than 150,000 phone numbers in response to one 2010 tower dump request, only one of which was connected to their investigation.²

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, and educates the public about civil rights and civil liberties issues. The American Civil Liberties Union is a separate non-profit, non-partisan, 501(c)(4) membership organization that 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.

² Ellen Nakashima, *Agencies Collected Data on Americans' Cellphone Use in Thousands of 'Tower Dumps,'* Wash. Post, Dec. 8, 2013, <http://www.washingtonpost.com/world/national-security/agencies-collected-data-on->

Requests and demands for location information from major wireless service providers have consistently increased in recent years.³ Today, law enforcement agencies “routinely” request cell tower dumps.⁴ A recent USA Today investigation into the practices of 125 police agencies across the country revealed that approximately 1 in 4 agencies have used tower dumps.⁵ According to reports from cellphone carriers themselves, at least 9,000 cell tower dumps were requested by law enforcement in 2012.⁶ In 2013, Verizon alone received 3,200 warrants or court orders compelling cell tower dumps.⁷

The enormous amount of private location data revealed by a single cell tower dump means that significant privacy and free association interests are implicated when law enforcement agencies use them routinely. The potential for abuse was made all too clear by recent events in Ukraine, where it appears that a cell tower dump allowed the government to identify attendees at an anti-government protest.⁸ In the United States, police have requested location surveillance devices that can mimic some functions of a cell tower dump in order to monitor protesters.⁹ Even without abuse of this nature, the privacy violations can be significant. As Magistrate Judge Brian L. Owsley of the Southern District of Texas explained when denying a

americans-cellphone-use-in-thousands-of-tower-dumps/2013/12/08/20549190-5e80-11e3-be07-006c776266ed_story.html.

³ See, e.g., U.S. Data, Verizon Transparency Report (2013), <http://transparency.verizon.com/us-data> (“The number of warrants and orders for location information are increasing each year.”).

⁴ Hon. Brian L. Owsley, *The Fourth Amendment Implications of the Government's Use of Cell Tower Dumps in its Electronic Surveillance*, 16 U. Pa. J. Const. L. 1, 17-23 (2013).

⁵ John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA Today, Dec. 8, 2013, <http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/>.

⁶ Ellen Nakashima, *Agencies Collected Data on Americans' Cellphone Use in Thousands of 'Tower Dumps'*, Wash. Post, Dec. 8, 2013, http://www.washingtonpost.com/world/national-security/agencies-collected-data-on-americans-cellphone-use-in-thousands-of-tower-dumps/2013/12/08/20549190-5e80-11e3-be07-006c776266ed_story.html.

⁷ U.S. Data, Verizon Transparency Report (2013), <http://transparency.verizon.com/us-data>; see also Location Demands, AT&T Transparency Report (2013), <http://about.att.com/content/csr/home/frequently-requested-info/governance/transparencyreport.html> (reporting 1,034 requests for cell tower dumps in 2013).

⁸ Andrew E. Kramer, *Russia Defers Aid to Ukraine, and Unrest Persists*, N.Y. Times, Jan. 29, 2014, <http://www.nytimes.com/2014/01/30/world/europe/ukraine-protests.html>.

⁹ John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA Today, Dec. 8, 2013, <http://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/>.

government request for a cell tower dump, when based on a standard less than probable cause, such requests constitute “a very broad and invasive search affecting likely hundreds of individuals in violation of the Fourth Amendment.” *In re Application of U.S. for an Order Pursuant to 18 U.S.C. § 2703(D) Directing Providers to Provide Historical Cell Site Location Records*, 930 F. Supp. 2d 698, 702 (S.D. Tex. 2012).

Accordingly, this request seeks records regarding the government’s use of data obtained through cell tower dumps, including any policies or procedures governing such use.

II. Records Requested

The ACLU seeks disclosure of records regarding:

1. Policies, procedures, and practices concerning the legal standard and process that governs requests for cell tower dumps, including whether a warrant or court order is required and what limits the Fourth Amendment and federal statutes impose on applications or orders for cell tower dumps;
2. Policies, procedures, and practices concerning the acquisition and use of data from cell tower dumps, including but not limited to minimization requirements on the collection of information about people not suspected of criminal activity, and restrictions on the use, retention, or destruction of data about individuals who are not suspected of wrongdoing;
3. Policies, procedures, and practices concerning providing notice to individuals whose phone numbers, location, and/or other information is obtained pursuant to a cell tower dump, but who are not indicted or prosecuted;
4. The text of any applications for a court order, based on less than probable cause, authorizing the government to obtain a cell tower dump, and of any orders granting or denying such applications;
5. The case name, docket number, and court of all criminal prosecutions, current or past, of individuals about whom data was obtained using a cell tower dump;

6. Invoices or other documentation of payment to cellphone providers for cell tower dumps.

III. Offices To Be Searched

This request is directed at the following components of the Department of Justice: Criminal Division; Executive Office for United States Attorneys; Federal Bureau of Investigation; U.S. Marshals Service; Office of Legal Counsel; and Drug Enforcement Administration.

For the Executive Office of United States Attorneys, the ACLU requests that the agency search its headquarters as well as the following United States Attorneys' offices: District of Arizona, Northern District of California, Central District of California, District of Columbia, Southern District of Florida, District of Massachusetts, District of Minnesota, Eastern District of New York, Southern District of Texas, Eastern District of Virginia, and Western District of Washington.

IV. Limitation of Processing Fees

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .") and 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(d)(1) (search and review fees shall not be charged to "representatives of the news media"). As a representative of the news media, the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this request should, therefore, be limited accordingly.

The ACLU meets the definition 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." *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work.

Specifically, the ACLU publishes a continuously updated blog, newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its public education department and web site. The ACLU web site 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 website specifically includes features on information obtained through the FOIA.¹⁰ For example, the ACLU's "Accountability for Torture FOIA" webpage, <https://www.aclu.org/accountability-torture>, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU maintains and publishes a widely read blog specifically dedicated to covering issues involving "civil liberties in the digital age,"¹¹ through which the organization disseminates news and commentary about FOIA requests similar to this one.¹² The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the

¹⁰ *See, e.g.*, <https://www.aclu.org/national-security/warrantless-electronic-communications-foia-requests>; <https://www.aclu.org/technology-and-liberty/foia-request-justice-department-policy-memos-gps-location-tracking>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.thetorturedatabase.org>; <http://www.aclu.org/mappingthefbi>.

¹¹ <https://www.aclu.org/blog/free-future>.

¹² *See, e.g.*, Nathan Freed Wessler, *New Documents Suggest IRS Reads Emails Without a Warrant*, Free Future, (Apr. 10, 2013), <https://www.aclu.org/blog/technology-and-liberty-national-security/new-documents-suggest-irs-reads-emails-without-warrant>.

Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”).

The ACLU also regularly publishes books,¹³ “know your rights” publications,¹⁴ fact sheets,¹⁵ and educational brochures and pamphlets designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity.

Disclosure is not in the ACLU’s commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch*

¹³ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women’s Rights* (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

¹⁴ Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Pregnant, Post-Partum & Breastfeeding Workers* (Oct. 2013), available at https://www.aclu.org/files/assets/kyr_pregant_breastfeeding.pdf; ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (June 2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

¹⁵ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-_ACLU_Fact_Sheet-_UPDATED-4-30-11.pdf.

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 and internal quotations omitted)). Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

V. Waiver of All Costs

The ACLU additionally requests a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”).

Disclosure of the requested information will help members of the public understand the privacy risks of carrying a cell phone. The public’s interest in the government’s ability to track one’s location through one’s cell phone is clear from the numerous articles and opinion pieces on the topic that have appeared in major national media outlets.¹⁶ However, despite general knowledge that the capability exists, the public lacks information about how the government handles the location information about hundreds or thousands of individuals it obtains through cell tower dumps. Thus, the requested information will “contribute significantly to public understanding.” 5 U.S.C. § 552(a)(4)(A)(iii).

As a nonprofit 501(c)(3) organization and “representative of the news media” as discussed in Section III, the ACLU is well-situated to disseminate information it gains from this request to the general public and to groups that protect constitutional rights. Because the ACLU meets the

¹⁶ See, e.g., Evan Puschak, *Police requesting millions of cell records*, MSNBC.com, Oct. 2, 2013, <http://www.msnbc.com/the-last-word/police-requesting-millions-cell-recor>; Eric Lichtblau, *Wireless Firms Are Flooded by Requests to Aid Surveillance*, N.Y. Times, July 8, 2012, <http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all>; Barton Gellman & Ashkan Soltani, *NSA tracking cellphone locations worldwide, Snowden documents show*, Wash. Post, Dec. 4, 2013, http://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html; Andy Greenberg, *Cell Phones Let Cops Track People For A Thousandth Of The Price, Study Finds*, Forbes, Jan. 9, 2014, <http://www.forbes.com/sites/andygreenberg/2014/01/09/cell-phones-let-cops-track-people-for-a-thousandth-of-the-price-study-finds/>.

test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.¹⁷

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

Nathan Freed Wessler
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AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Nathan Freed Wessler
Staff Attorney
American Civil Liberties Union

¹⁷ Fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in May 2012, the Bureau of Prisons granted a fee waiver to the ACLU for a FOIA request seeking documents concerning isolated confinement of prisoners in BOP custody. In March 2012, the Department of Justice Criminal Division granted a fee waiver to the ACLU for a FOIA request seeking records about the government's access to the contents of individuals' private electronic communications. In June 2011, the National Security Division of the Department of Justice 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 submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the 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.