May 31, 2011

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Dear Freedom of Information Officer,

This letter constitutes a request under the Freedom of
Information Act, 5 U.S.C. § 552 ("FOIA"). It is submitted on behalf of the American Civil Liberties Union and the American Civil Liberties Foundation (together, the "ACLU"). 1

I. Background

This request pertains to the use by the Federal Bureau of Investigation ("FBI") of the powers enumerated in Pub. L. 107-56, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly known as the USA PATRIOT Act ("PATRIOT Act"). Specifically, this request pertains to the FBI's use and interpretation of Section 215 of the PATRIOT Act, as amended, which permits the government to apply for court orders requiring the production of "tangible things."

II. Records Requested

We request that you release to us any and all records concerning
the government's interpretation or use of Section 215, including but not limited to: legal opinions or memoranda interpreting that provision; guidelines informing government personnel how that provision can be used; records containing statistics about the use or misuse of the provision; reports provided by the executive branch to Congress relating to the executive's interpretation, use, or misuse of the provision; forms used by executive agencies in connection with the use of Section 215; and legal papers filed by the government or any other party in the Foreign Intelligence Surveillance Court, and opinions of that court, pertaining to the interpretation, use, or proposed use of Section 215.

With respect to the records described above, we seek only those records drafted, finalized, or issued after March 9, 2006. We do not ask you to disclose the names or identities of those entities or individuals

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.

who have been served with Section 215 orders or the names or identities

of those individuals or entities about whom records have been sought, but we ask that you disclose any and all records indicating the kinds or types of information that may, as a matter of policy or law, be obtained through the use of Section 215.

With respect to the form of production, see 5 U.S.C. §
552(a)(3)(B), we request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, we request 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.

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If any aspect of our request is unclear, we would welcome the opportunity to clarify it. We would also welcome the opportunity to discuss an appropriate processing schedule.

III. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. §
552(a)(6)(E); 28 C.F.R. § 16.5(d). Expedited processing is warranted because the records sought are urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity, 28 C.F.R. § 16.5(d)(1)(ii), and because 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," id. § 16.5(d)(1)(iv).

A. Expedited processing is warranted under 28 C.F.R.
16.5(d)(ii)

The records requested are needed to inform the public about
federal government activity. The records relate to the FBI's use of a highly controversial surveillance authority. Specifically, the records requested relate to the FBI's use of Section 215 and to the process the FBI has put in place to ensure that the FBI's use of Section 215 powers conforms to the requirements of the Constitution and statutory law. The records are urgently needed because of recent allegations by some members of the Senate Select Committee on Intelligence that the Justice Department has adopted an overly broad interpretation of Section 215, 2

2 See Charlie Savage, Senators Say Patriot Act Is Being Misinterpreted, N.Y. Times, May 26, 2011, available at http://www.nytimes.com/2011/05/27/us/27patriot.html;

and because there is an ongoing debate about the appropriate scope of the government's surveillance authorities. 3

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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). Disseminating 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 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 omitted)).

Cong. Rec. S3259-60 (daily ed. May 24, 2011), available at http://www.gpo.gov/fdsys/pkg/CREC-2011-05-24/pdf7CREC-2011-05-24-ptl-PgS3247-7.pdf#page=1.

3 See, e.g., Obama signs Patriot Act extension; will continue anti-terror surveillance powers, Assoc. Press, May 25, 2011, available at http://www.washingtonpost.com/politics/senate-moves-patriot-act-toward-4-year-extension-before-thursday-midnight-deadline/2011/05/25/AGnYjXBH story.html; New tea party senator gets Senate's attention, Assoc. Press, May 25, 2011, ("[Sen. Rand] Paul has delayed action on the intelligence-gathering measures, contending they should expire because the Patriot Act gives the government too much power to monitor people's lives."), available at http://www.foxnews.com/us/2011/05/25/new-tea-party-senator-gets-senates-attention/; Editorial, A chance to put protections in the Patriot Act, Wash. Post, May 25, 2011, available at http://www.washingtonpost.com/opinions/a-chance-to-put-protections-in-the-patriot-act/2011/05/25/AGsSPXBH_story.html; Felicia Sonmez, Vote on Patriot Act extension delayed as Rand Paul pushes for amendment on gun rights, Wash. Post, May 25, 2011, available at http://www.washingtonpost.com/blogs/2chambers/post/vote-on-patriot-act-extension-delayed-as-rand-paul-pushes-for-amendment-on-gun-rights/2011/05/25/AGhzDJBH blog.html; David Kravets, Lawmakers Punt Again on Patriot Act Reform, Wired.com, May 20, 2011, available at http://www.wired.com/threatleve1/2011/05/patriot-act-reform/; David Kravets, House Fails to Extend Patriot Act Spy Powers, Kristy Sidor, The Patriot Act Expiration Controversy, The Observer at Boston College, Feb. 22, 2011, available at http://www.thebcobserver.com/2011/02/22/the-patriot-act-expiration-controversy/;
Wired.com, Feb. 8, 2011, available at
http://www.wired.com/threatleve1/2011/02/patriot-act-notextended/; Charlie Savage,
Battle Looms Over the Patriot Act, N.Y. Times, Sept. 19, 2009, available at http://www.nytimes.com/2009/09/20/us/politics/20patriot.html?partner=rss&emc —rss;
Julian Sanchez, available at http://www.wired.0 T1811. 0he government to/05/pat8 176.299 .299 .299 .30

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. Its material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee. Since 2007, ACLU national projects have published and disseminated over 30 reports. Many ACLU reports include description and analysis of government documents obtained through FOIA. 4

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The ACLU also disseminates information through its website, www.aclu.org. The website addresses civil liberties issues in depth, provides features on civil liberties issues in the news, and contains hundreds of documents that relate 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, 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; government documents obtained through FOIA about the issue; and

last months, as Congress has debated reauthorization of certain PATRIOT Act provisions, including Section 215, media and public attention has intensified. 1°Many recent news stories have included allegations by members of the Senate Select Committee on Intelligence that the Department of Justice has adopted an overbroad construction of Section 215. 11While the Department of Justice claimed only to have

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used Section 215 powers 21 times in 2009 12and 96 times in 2010, 13
Senators Ron Wyden and Mark Udall, along with others, recently
proffered an amendment to address the government's "secret[] reinterpretation [of] public laws and statutes in a manner that is inconsistent with the public's understanding of these laws." 14In that same congressional session, Senator Ron Wyden stated in open Congress that he "certainly believe[s] the public will be surprised again when they learn about some of the interpretations of the PATRIOT Act," suggesting that the FBI's numbers or public statements may be misleading or incomplete. 15

IV. Application for Waiver or Limitation of Fees

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A. A waiver of search, review, and duplication fees is warranted under 28 C.F.R. § 16.11(k)(1).

The ACLU is entitled to a waiver of search, review, and
duplication fees because disclosure of the requested records 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); 28 C.F.R. § 16.11(k)(1).

The requesters are making this request specifically to further the public's understanding of the government's use of surveillance powers inside the United States. As the dozens of new articles cited above make clear, disclosure of the requested records will contribute significantly to public understanding of the operations and activities of the government. See 28 C.F.R. § 16.11(k)(1)(i). Disclosure is not in the ACLU's commercial interest. Any information disclosed by the government in response to this FOIA request will be made available to the public at no

12 See Letter to the Hon. Joseph R. Biden, Jr., Department of Justice, Office of Legislative Affairs, Apr. 30, 2011, available at http://www.fas.org/irp/agency/doj/fisa/2009rept.pdf.

13 See Letter to the Hon. Harry Reid, Department of Justice, Office of Legislative Affairs, Apr. 29, 2011, available at
http://www. fas.org/irp/agency/doj/fisa/2010rept.pdf

14 See 157 Cong. Rec. S3283 (daily ed. May 24, 2011) (SA 339, amendment of Mr. Wyden), available at http://www.goo.gov/fdsys/pkg/CREC-2011-05-24/pdf/CREC-2011-05-24-ptl-PgS3281.pdf#page=3

15 See 157 Cong. Rec. S3258-62, (daily ed. May 24, 2011), available at http://www.goo.gov/fdsys/pkg/CREC-2011-05-24/pdf/CREC-2011-05-24-ptl-PRS3247-7.pdf#page=1.

cost. A fee waiver would fulfill Congress's legislative intent in amending FOIA. See Judicial Watch Inc. v. Rossotti, 326 F.3d 1309,

published books was a "representative of the media" for purposes of FOIA). 16

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 also ask that you release 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.

Please be advised that, because we are requesting expedited processing under 28 C.F.R. §§ 16.11(d)(1)(iv) as well as 16.11(d)(1)(ii), we are sending a copy of this letter to DOJ's Office of Public Affairs. Whatever the determination of that office, we look forward to your reply within 20 business days, as the statue requires under section 552(a)(6)(A)(I).

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

Jameel Jaffer

Deputy Legal Director
American Civil Liberties Union

125 Broad St., 18thFloor
New York, NY 10004

16 On account of these factors, fees associated with responding to FOIA requests are regularly waived on the grounds that the ACLU is a "representative of the news media." 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 Department of State granted a fee waiver to the ACLU with respect to its 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 May 2005, the 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 respect 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. Also, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in August of 2004. In addition, the Office of Science and Technology Policy in the Executive Office of the President said it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003. Finally, 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.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief

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