

# **EXHIBIT C**

LEGAL DEPARTMENT  
IMMIGRANTS'  
RIGHTS PROJECT



October 15, 2015

**SENT VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT**

U.S. Immigration and Customs Enforcement  
Office of Principal Legal Advisor  
U.S. Department of Homeland Security  
Freedom of Information Act Office  
500 12th Street, S.W., Stop 5009  
Washington, D.C. 20536-5009

**RE: FOIA APPEAL  
2016-ICFO-01574**

To Whom It May Concern:

Pursuant to 6 C.F.R. § 5.9, the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies at the University of California Hastings College of Law ("CGRS") appeal U.S. Immigration and Customs Enforcement's ("ICE") decision to deny us expedited processing and a fee waiver; its failure to grant us fee status as "representative[s] of the news media;" and its failure to grant CGRS fee status as "an educational or noncommercial scientific institution."

Our request seeks records pertaining to parole decisions for arriving aliens found to have a credible fear of persecution—specifically, the periodic reports and analyses created pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).<sup>1</sup> In an email dated October 13, 2015, ICE denied our requests for expedited processing and a fee waiver, completely ignored our request for fee status as a "representative of the news media," and ignored CGRS' request for fee status as an educational institution. Indeed, ICE ignored CGRS' requests altogether, referring only to the ACLU in its email.<sup>2</sup>

ICE's decisions are plainly inconsistent with the FOIA, unnecessarily delay the processing of our request, and should be immediately reversed. In particular, ICE's decision resembles its prior decisions denying fee waivers to the ACLU—decisions that were all ultimately reversed by ICE on appeal, including an appeal that was just decided last week, on October 5, 2015.<sup>3</sup>

<sup>1</sup> See FOIA Request, dated October 5, 2015 (hereinafter, "the Request"), attached as Ex. A.

<sup>2</sup> See Email from the ICE FOIA Office, dated Oct. 13, 2015, attached as Ex. B.

<sup>3</sup> See *infra* (citing, *inter alia*, 2015-ICAP-00685, 2015-ICFO-95304).

## I. The ACLU and CGRS Are Entitled to Expedited Processing

The ACLU and CGRS are entitled to expedited processing. The FOIA provides that, “with respect to a request made by a person primarily engaged in disseminating information,” a “compelling need” for expedited processing exists where there is an “urgency to inform the public concerning actual or alleged Federal Government activity.”<sup>4</sup> In its letter denying expedited processing, ICE states:

You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public’s right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.<sup>5</sup>

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This boilerplate denial is plainly incorrect.<sup>6</sup> As set forth in the Request, there is a compelling and urgent need to inform the public about the subject-matter of the Request that is distinct from the public’s interest in government activity in general.<sup>7</sup> ICE Directive 11002.1 provides that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her continued detention is not in the public interest.”<sup>8</sup> The Directive reflects the agency’s recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive’s criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for immigration law enforcement.<sup>9</sup> ICE’s apparent denial of parole based on arriving aliens’ recency of entry or

<sup>4</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); see also 6 C.F.R. § 5.5(d)(1)(ii) (same).

<sup>5</sup> Ex. B.

<sup>6</sup> Notably, ICE has used this language verbatim to respond to other recent requests for expedited processing regarding entirely different issues. See, e.g., Email from the ICE FOIA Office re. 2016-ICFO-01558, dated Oct. 13, 2015.

<sup>7</sup> See Ex. A at 2-3.

<sup>8</sup> ICE Directive 11002.1, ¶¶ 6.2, 8.3.

<sup>9</sup> See Memorandum from Jeh Johnson, Sec’y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014).

other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.<sup>10</sup> Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.<sup>11</sup>

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty. For these reasons, the government's parole practices warrant immediate review, and expedited processing should be granted.

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## II. The Fee Waiver Should Be Granted

The ACLU and CGRS are also entitled to a fee waiver. The public interest fee waiver provision of FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). The public interest fee waiver provision furthers the overall aims of FOIA: namely, “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 105 (D.D.C. 2006) (analyzing purposes of FOIA in assessing public interest fee waiver) (quoting *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1309 (D.C. Cir. 2003)). Shedding light on governmental actions that deny the fundamental liberty of persons, including arriving aliens whose continued detention is not in the public interest, advances these core purposes.

There is no serious dispute that disclosure of the records requested is “likely to contribute significantly to public understanding of the operations of the government and is not primarily in the commercial interest of the requestor.” 5 U.S.C. § 552(a)(4)(A)(iii). Notably, ICE apparently did not even consider CGRS’ request for a fee waiver under the FOIA, as its email mentions only

<sup>10</sup> See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006).

<sup>11</sup> See *RILR v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015); see also *Diaz v. Schiltgen*, 946 F. Supp. 762, 765-66 (N.D. Cal. 1996) (holding that deterrence is not an individualized reason to deny parole).

the ACLU.<sup>12</sup> Moreover, in denying the fee waiver, ICE states in boilerplate and without explanation or analysis that the Request failed to satisfy the following factors:

(4) Whether the contribution to public understanding of government operations or activities will be “significant”;

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

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Ex. B. ICE concedes that the information sought concerns “operations or activities of the government”; that the disclosure would be “meaningfully informative” about governmental operations and activities; and that information will “contribute to the understanding of the public at large,” as opposed to a narrow segment of interested persons.<sup>13</sup>

ICE’s conclusion as to the remaining factors is incorrect, as both the ACLU and CGRS easily meet them:

*First*, disclosure of the requested records would contribute significantly to the public’s knowledge of ICE’s custody practices. “In determining whether disclosure of records will contribute significantly to the public’s understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information.” *Carney v. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The “FOIA does not require that a requester be able to reach a ‘wide audience.’” *Cause of Action v. FTC*, --- F.3d ---, 2015 WL 5009388, at \*6 (D.C. Cir. 2015). Rather, “the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney*, 19 F.3d at 815.

To our knowledge, there is currently no publicly available data that provides a detailed description of ICE’s parole decisions for arriving aliens found to have a credible fear of persecution since ICE Directive 11002.1 went into effect in 2010. Accordingly, disclosure of the records requested will

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<sup>12</sup> See Ex. B.

<sup>13</sup> See Ex. B (listing factors under 6 CFR § 5.11(k)(2))

significantly enhance the public's understanding of these issues. *See Carney*, 19 F.3d at 815 (weighing favorably "evidence in the administrative record that very little has been written" regarding subject matter of request); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) (finding public interest standard met where information sought would "increase the limited information currently written regarding the subject matter of the plaintiff's FOIA request"). Moreover, as set forth *infra*, the ACLU and CGRS are clearly capable of disseminating the information disclosed in response to its Request.

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*Second*, it is perplexing, to say the least, that ICE denied a fee waiver based on an alleged commercial interest. The ACLU and CGRS obviously do *not* have a commercial interest in disclosure. *See* 6 C.F.R. § 5.11(b)(1) (defining a "[c]ommercial use request" as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation").<sup>14</sup> Indeed, ICE appears to recognize this lack of a commercial interest in treating the ACLU as a non-commercial requestor for billing purposes.<sup>15</sup>

As set forth in its Request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. Information disclosed by the ACLU as a result of the Request will be available to the public at no cost. The Request details the kinds of publications and kinds of channels—including newsletters, web pages, blogs, and news briefings—that the ACLU uses to disseminate information to the public.<sup>16</sup>

Likewise, CGRS is a nonprofit institution that works to protect the fundamental human rights of refugees, with a focus on women and children. Information disclosed by CGRS as a result of the Request will be available to the public at no cost, through the various channels described in the Request, including its public website, <http://cgrs.uchastings.edu>.<sup>17</sup>

<sup>14</sup> *See also* Office of Mgmt. & Budget, Uniform FOIA Fee Schedule & Guidelines, 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987) (interpreting "commercial use" in 5 U.S.C. § 552(a)(4)(A)(ii) as a use that "furthers the commercial, trade or profit interests of the requester").

<sup>15</sup> *See* Ex. B.

<sup>16</sup> *See* Ex. A at 4.

<sup>17</sup> *See* Ex. A at 4-5.

*Finally*, because the ACLU and CGRS have *no* commercial interest in disclosure, any public interest in disclosure is sufficiently large in comparison with that nonexistent interest.

For these reasons, a fee waiver would fulfill Congress's legislative intent when it amended the FOIA in 1987. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requestors.'" (citation omitted)); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) ("[FOIA's] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers." (internal quotation marks and citation omitted)).

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Indeed, ICE's decision to deny a fee waiver ignores the numerous cases in which courts found that nonprofits engaged in public interest advocacy, litigation, and public education, like the ACLU and CGRS, do not have "commercial interests" implicated by their FOIA requests and were granted fee waivers. *See, e.g., FedCURE*, 602 F. Supp. 2d at 201 (public interest waiver ordered for nonprofit organization that advocates for federal inmate population and their families); *Ctr. For Medicare Advocacy, Inc. v. HHS*, 557 F. Supp. 2d 221 (D.D.C. 2008) (public interest waiver ordered for nonprofit that educates and advocates for Medicare beneficiaries). As explained in the Request, the ACLU and CGRS have not been charged fees associated with FOIA requests on many occasions.<sup>18</sup> The same should be done here. Indeed, this request strongly resembles prior instances in which ICE has reversed the denial of a fee waiver to the ACLU on appeal—including an appeal that was just decided last week, on October 5, 2015.<sup>19</sup>

<sup>18</sup> See Ex. A at 7 n.15 (citing examples).

<sup>19</sup> See, e.g., Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00685, 2015-ICFO-95034 (July 6, 2015), at 2 (reversing denial of fee waiver based on factors 4, 5, and 6); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00436, 2015-ICFO-7415 (July 6, 2015), at 2 (same); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00536, 2015-ICFO-80352, at 2 (Aug. 5, 2015) (reversing denial of fee waiver based on, *inter alia*, factor 3); Letter from Catrina M. Pavlik-Keenan, FOIA Officer, ICE, re. 2011FOIA4894, at 1 (Mar. 28, 2012) (reversing fee waiver denial based on ACLU of Southern California's ability to disseminate information to the public and its putative commercial interest in the records requested). Notably, ICE reversed its fee waiver denial in 2011FOIA4894 only after the ACLU of Southern California filed suit to challenge its decision. *See Complaint, ACLU of Southern California v. U.S. Immigration and Customs Enforcement*, CV11-10148 (C.D. Cal. filed Dec. 7, 2011).

**III. In the Alternative, the ACLU and CGRS Should Be Granted Fee Status as a “Representative of the News Media,” and CGRS Should Be Granted Fee Status as an Educational Institution.**

In addition, ICE wholly ignored the ACLU and CGRS’s request for fee status as a “representative of the news media.” However, as set forth in the instant Request, there is no question that we are entitled to this fee status.<sup>20</sup>

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, nonprofit groups, and law students and law faculty—at no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU’s work. The website specifically features information obtained through FOIA.<sup>21</sup> The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; publishes information via social media platforms such as Facebook and Twitter; and works with influential creative artists in film, television, music, and comedy to educate the public.<sup>22</sup> In mid-August 2015 alone, the combined number of followers for our active social media accounts (ACLU Nationwide Facebook, @ACLU and @ACLUlive Twitter accounts, and Instagram) was 885,248. The ACLU website receives more than 38,000 unique visits and nearly 70,000 page views a day. Over the last two years, the ACLU’s blogs have averaged 12,000 visits per day, with some receiving more than 100,000 visits over that time span.

CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and informational materials free-of-charge. The Library of Congress recently selected CGRS’s website for its Web Archive Project, recognizing CGRS’s

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<sup>20</sup> See Ex. A at 4-5.

<sup>21</sup> See, e.g., ACLU, <https://www.thetorturedatabase.org/>; ACLU, PATRIOT FOIA, <https://www.aclu.org/patriot-foia>.

<sup>22</sup> See ACLU Ambassador Project, <https://www.aclu.org/feature/aclu-ambassador-project>.



site as “an important part of [its public policy] collection and the historical record.”<sup>23</sup>

These characteristics clearly make the ACLU and CGRS “representative[s] of the news media” for purpose of FOIA. See *National Security Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting a requester is a representative of the news media where it “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”) (construing 5 U.S.C. § 552(a)(4)(A)(iii)); *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10 (D.D.C. 2003) (“any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’”).

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In addition, CGRS, based at the University of California Hastings College of the Law, is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.<sup>24</sup> Thus, CGRS qualifies as an educational institution and seeks the requested information to further its scholarly aims. See 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research”); 6 C.F.R. § 5.11(b)(4) (defining “educational institution” as “an institution of professional education . . . that operates a program of scholarly research”).

For the foregoing reasons, the appeal should be granted. I look forward to receiving your prompt response.

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Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

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<sup>23</sup> See *University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project* (Sept. 15, 2015), at <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

<sup>24</sup> See Ex. A at 5 n.14 (citing examples).

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LEGAL DEPARTMENT  
IMMIGRANTS'  
RIGHTS PROJECT



October 16, 2015

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Our FOIA request (hereinafter, "the Request") seeks records regarding how the Department of Homeland Security's ("DHS") decision to prioritize recent arrivals for immigration enforcement applies to parole decisions for arriving aliens found to have a credible fear of persecution.<sup>1</sup> In an email dated October 13, 2015, ICE denied our requests for expedited processing and a fee waiver, completely ignored our request for fee status as a "representative of the news media," and ignored CGRS' request for fee status as an educational institution. Indeed, ICE ignored CGRS' requests altogether, referring only to the ACLU in its email.<sup>2</sup>

ICE's decisions are plainly inconsistent with the FOIA, unnecessarily delay the processing of the Request, and should be immediately reversed. In particular, ICE's decision resembles its prior decisions denying fee waivers to the ACLU—decisions that were all ultimately reversed by ICE on appeal, including an appeal that was just decided last week, on October 5, 2015.<sup>3</sup>

<sup>1</sup> See FOIA Request, dated October 5, 2015, attached as Ex. A.

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PLEASE RESPOND TO:  
NATIONAL OFFICE  
125 BROAD STREET, 16TH FL  
NEW YORK, NY 10004-2400  
71717 549 2660  
71717 549 2654  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN M. HERMAN  
PRESIDENT

ANTHONY D. ROBERTO  
EXECUTIVE DIRECTOR

### I. The ACLU and CGRS Are Entitled to Expedited Processing

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You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public’s right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.<sup>5</sup>

This boilerplate denial is plainly incorrect.<sup>6</sup> As set forth in the Request, there is a compelling and urgent need to inform the public about the subject-matter of the request that is distinct from the public’s interest in government activity in general.<sup>7</sup> ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), provides that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her continued detention is not in the public interest.”<sup>8</sup> The Directive reflects the agency’s recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive’s criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for

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immigration law enforcement.<sup>9</sup> ICE's apparent denial of parole based on arriving aliens' recency of entry or other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.<sup>10</sup> Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.<sup>11</sup>

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty. For these reasons, the government's parole practices warrant immediate review, and expedited processing should be granted.

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The ACLU and CGRS are also entitled to a fee waiver. The public interest fee waiver provision of FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). The public interest fee waiver provision furthers the overall aims of FOIA: namely, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 105 (D.D.C. 2006) (analyzing purposes of FOIA in assessing public interest fee waiver) (quoting *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1309 (D.C. Cir. 2003)). Shedding light on governmental actions that deny the fundamental liberty of persons, including arriving aliens whose continued detention is not in the public interest, advances these core purposes.

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Notably, ICE apparently did not even consider CGRS' request for a fee waiver under the FOIA, as its email mentions only the ACLU.<sup>12</sup> Moreover, there is no serious dispute that disclosure of the records requested is "likely to contribute significantly to public understanding of the operations of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii). In denying the fee waiver, ICE states in boilerplate and without explanation or analysis that the Request failed to satisfy the following factors:

(4) Whether the contribution to public understanding of government operations or activities will be "significant";

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(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Ex. B. ICE concedes that the information sought concerns "operations or activities of the government"; that the disclosure would be "meaningfully informative" about governmental operations and activities; and that information will "contribute to the understanding of the public at large," as opposed to a narrow segment of interested persons.<sup>13</sup>

ICE's conclusion as to factors (4)-(6) is incorrect, as both the ACLU and CGRS easily meet them:

*First*, disclosure of the requested records would contribute significantly to the public's knowledge of ICE's custody practices. "In determining whether disclosure of records will contribute significantly to the public's understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The "FOIA does not require that a requester be able to reach a 'wide audience.'" *Cause of Action v. FTC*, --- F.3d ---, 2015 WL 5009388, at \*6 (D.C. Cir. 2015). Rather, "the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney*, 19 F.3d at 815.

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<sup>12</sup> See Ex. B.

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To our knowledge, there is currently no publicly available data that provides a detailed description of the impact of DHS' law enforcement priorities on ICE's parole decisions for arriving aliens found to have a credible fear of persecution. Accordingly, disclosure of the records requested will significantly enhance the public's understanding of these issues. *See Carney*, 19 F.3d at 815 (weighing favorably "evidence in the administrative record that very little has been written" regarding subject matter of request); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) (finding public interest standard met where information sought would "increase the limited information currently written regarding the subject matter of the plaintiff's FOIA request"). Moreover, as set forth *infra*, the ACLU and CGRS are clearly capable of disseminating the information disclosed in response to the Request.

*Second*, it is perplexing, to say the least, that ICE denied a fee waiver based on an alleged commercial interest. The ACLU and CGRS obviously do *not* have a commercial interest in disclosure. *See* 6 C.F.R. § 5.11(b)(1) (defining a "[c]ommercial use request" as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation").<sup>14</sup> Indeed, ICE appears to recognize this lack of a commercial interest in treating the ACLU as a non-commercial requestor for billing purposes.<sup>15</sup>

As set forth in the Request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. Information disclosed by the ACLU as a result of the Request will be available to the public at no cost. The Request details the kinds of publications and kinds of channels—including newsletters, web pages, blogs, and news briefings—that the ACLU uses to disseminate information to the public.<sup>16</sup>

Likewise, CGRS is a nonprofit institution that works to protect the fundamental human rights of refugees, with a focus on women and children. Information disclosed by CGRS as a result of the Request will be available

<sup>14</sup> *See also* Office of Mgmt. & Budget, Uniform FOIA Fee Schedule & Guidelines, 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987) (interpreting "commercial use" in 5 U.S.C. § 552(a)(4)(A)(ii) as a use that "furthers the commercial, trade or profit interests of the requester").

<sup>15</sup> *See* Ex. B.

<sup>16</sup> *See* Ex. A at 4-5.

to the public at no cost, through the various channels described in the Request, including its public website, <http://cgrs.uchastings.edu>.<sup>17</sup>

*Finally*, because the ACLU and CGRS have *no* commercial interest in disclosure, any public interest in disclosure is sufficiently large in comparison with that nonexistent interest.

For these reasons, a fee waiver would fulfill Congress's legislative intent when it amended the FOIA in 1987. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requestors.'" (citation omitted)); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) ("[FOIA's] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers." (internal quotation marks and citation omitted)).

Indeed, ICE's decision to deny a fee waiver ignores the numerous cases in which courts found that nonprofits engaged in public interest advocacy, litigation, and public education, like the ACLU and CGRS, do not have "commercial interests" implicated by their FOIA requests and were granted fee waivers. *See, e.g., FedCURE*, 602 F. Supp. 2d at 201 (public interest waiver ordered for nonprofit organization that advocates for federal inmate population and their families); *Ctr. For Medicare Advocacy, Inc. v. HHS*, 557 F. Supp. 2d 221 (D.D.C. 2008) (public interest waiver ordered for nonprofit that educates and advocates for Medicare beneficiaries). As explained in the Request, the ACLU and CGRS have not been charged fees associated with FOIA requests on many occasions.<sup>18</sup> The same should be done here. Indeed, this request strongly resembles prior instances in which ICE has reversed the denial of a fee waiver to the ACLU on appeal—including an appeal that was just decided last week, on October 5, 2015.<sup>19</sup>

<sup>17</sup> *See Ex. A* at 5-6.

<sup>18</sup> *See Ex. A* at 7 n.16 (citing examples).

<sup>19</sup> *See, e.g.,* Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00685, 2015-ICFO-95034 (Oct. 5, 2015), at 2 (reversing denial of fee waiver based on factors 4, 5, and 6); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00436, 2015-ICFO-7415 (July 6, 2015), at 2 (same); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00536, 2015-ICFO-80352, at 2 (Aug. 5, 2015) (reversing denial of fee waiver based on, *inter alia*, factor 3); Letter from Catrina M. Pavlik-Keenan, FOIA Officer, ICE, re. 2011FOIA4894, at 1 (Mar. 28, 2012) (reversing fee waiver denial based on ACLU of Southern California's ability to disseminate information to the public and its putative commercial interest in the records requested). Notably, ICE reversed its fee waiver denial in 2011FOIA4894 only after the ACLU of Southern California filed suit to challenge its decision. *See Complaint*, ACLU



**III. In the Alternative, the ACLU and CGRS Should Be Granted Fee Status as a “Representative of the News Media,” and CGRS Should Be Granted Fee Status as an Educational Institution.**

In addition, ICE wholly ignored the ACLU and CGRS’s request for fee status as a “representative of the news media.” However, as set forth in the Request, there is no question that we are entitled to this fee status.<sup>20</sup>

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The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, nonprofit groups, and law students and law faculty—at no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU’s work. The website specifically features information obtained through FOIA.<sup>21</sup> The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; publishes information via social media platforms such as Facebook and Twitter; and works with influential creative artists in film, television, music, and comedy to educate the public.<sup>22</sup> In mid-August 2015 alone, the combined number of followers for our active social media accounts (ACLU Nationwide Facebook, @ACLU and @ACLUlive Twitter accounts, and Instagram) was 885,248. The ACLU website receives more than 38,000 unique visits and nearly 70,000 page views a day. Over the last two years, the ACLU’s blogs have averaged 12,000 visits per day, with some receiving more than 100,000 visits over that time span.

CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and

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of *Southern California v. U.S. Immigration and Customs Enforcement*, CV11-10148 (C.D. Cal. filed Dec. 7, 2011).

<sup>20</sup> See Ex. A at 4-6.

<sup>21</sup> See, e.g., ACLU, <https://www.thetorturedatabase.org/>; ACLU, PATRIOT FOIA, <https://www.aclu.org/patriot-foia>.

<sup>22</sup> See ACLU Ambassador Project, <https://www.aclu.org/feature/aclu-ambassador-project>.

informational materials free-of-charge. The Library of Congress recently selected CGRS's website for its Web Archive Project, recognizing CGRS's site as "an important part of [its public policy] collection and the historical record."<sup>23</sup>

These characteristics clearly make the ACLU and CGRS "representative[s] of the news media" for purpose of FOIA. See *National Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting a requester is a representative of the news media where it "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") (construing 5 U.S.C. § 552(a)(4)(A)(iii)); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10 (D.D.C. 2003) ("any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'").

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In addition, CGRS, based at the University of California Hastings College of the Law, is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.<sup>24</sup> Thus, CGRS qualifies as an educational institution and seeks the requested information to further its scholarly aims. See 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research"); 6 C.F.R. § 5.11(b)(4) (defining "educational institution" as "an institution of professional education . . . that operates a program of scholarly research").

For the foregoing reasons, the appeal should be granted. I look forward to receiving your prompt response.

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Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

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<sup>23</sup> See University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project (Sept. 15, 2015), <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

<sup>24</sup> See Ex. A at 6 n.15 (citing examples).

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