



February 23, 2017

Jennifer L. Hudson
Director, Information Management Division
Office of the Director of National Intelligence
Washington, D.C. 20511
Facsimile: (703) 874-8910
Email: dni-foia@dni.gov

RE: FOIA Request to the Office of the Director of National Intelligence Regarding Deliberations, Review and Approval of “Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333”

Dear Sir or Ma’am:

This letter is a request (“Request”) in accordance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

The Request is made by the American Center for Law and Justice (“ACLJ”)¹ on behalf of its members. The ACLJ respectfully seeks expedited processing and a waiver of fees related to this Request as set forth in an accompanying memorandum.

To summarize, this Request seeks records pertaining to the Director of National Intelligence James R. Clapper’s input into the deliberations concerning the “Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333,” his review of those procedures, his approval of those procedures, which he executed on December 15, 2016, and his discussions with former Attorney General Loretta Lynch, who approved and executed those procedures on January 3, 2017.

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

Background

Pursuant to the Office of the Director of National Intelligence (“ODNI”) FOIA regulation 32 CFR 1700.5(a), this Background addresses the “specific information about each record sought, such as the date, title or name, author, recipient, and the subject matter of the record,” to the extent known.

According to the New York Times, “[i]n its final days, the Obama administration has expanded the power of the National Security Agency to share globally intercepted personal communications with the government’s 16 other intelligence agencies before applying privacy protections.”² On December 15, 2016, Director of National Intelligence James Clapper executed a document entitled “Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333.”³ On January 3, 2017, then-Attorney General Loretta Lynch executed this document, indicating her approval.

As reported by the New York Times, “[t]he new rules significantly relax longstanding limits on what the N.S.A. may do with the information gathered by its most powerful surveillance operations.”⁴ Authority for these new procedures derives from Executive Order 12333, last amended by President Bush in 2008, which provided:

Elements of the Intelligence Community are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures established by the head of the Intelligence Community element concerned or by the head of a department containing such element and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order, after consultation with the Director.⁵

After President Bush’s last amendment in 2008, “[i]t took another eight years to develop those rules.”⁶ The New York Times had first reported in 2014 that deliberations by Obama administration officials on developing these procedures were occurring.⁷ But, apparently, the new procedures were not completed by Director of National Intelligence Clapper and approved by Attorney General Lynch until just weeks before the end of President Obama’s tenure.

²Charlie Savage, *N.S.A. Gets More Latitude to Share Intercepted Communications*, NEW YORK TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html?_r=0.

³OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, (U) PROCEDURES FOR THE AVAILABILITY OR DISSEMINATION OF RAW SIGNALS INTELLIGENCE INFORMATION BY THE NATIONAL SECURITY AGENCY UNDER SECTION 2.3 OF EXECUTIVE ORDER 12333 (RAW SIGINT AVAILABILITY PROCEDURES), *available at* <https://www.documentcloud.org/documents/3283349-Raw-12333-surveillance-sharing-guidelines.html>.

⁴Savage, *supra* note [Error! Bookmark not defined.](#).

⁵Executive Order 12333 – United States Intelligence Activities, 46 Fed. Reg. 59941 (Dec. 4, 1981), *available at*, <https://www.archives.gov/federal-register/codification/executive-order/12333.html>; <https://www.gpo.gov/fdsys/pkg/FR-2008-08-04/pdf/E8-17940.pdf>.

⁶Savage, *supra* note [Error! Bookmark not defined.](#).

⁷*Id.*

Records Requested

For purposes of this Request, the term “record” means “any information” that qualifies under 5 U.S.C. § 552(f), and includes, but is not limited to, the original or any full, complete and unedited copy of any log, chart, list, memorandum, note, correspondence, writing of any kind, policy, procedure, guideline, agenda, handout, report, transcript, set of minutes or notes, video, photo, audio recordings, or other material. The term “record” also includes, but is not limited to, all relevant information created, stored, received or delivered in any electronic or digital format, e.g., electronic mail, instant messaging or Facebook Messenger, iMessage, text messages or any other means of communication, and any information generated, sent, received, reviewed, stored or located on a government *or private* account or server, consistent with the holdings of *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016)⁸ (rejecting agency argument that emails on private email account were not under agency control, and holding, “If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.”).

For purposes of this Request, the term “briefing” includes, but is not limited to, any in-person meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person.

For purposes of this Request, the term “ODNI official” includes, but is not limited to, any person who is (1) employed by or on behalf of the Office of the Director of National Intelligence in any capacity; (2) contracted for services by or on behalf of the Office of the Director of National Intelligence in any capacity; or (3) appointed by the President of the United States to serve in any capacity at the Office of the Director of National Intelligence, all without regard to the component or office in which that person serves.

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is November 7, 2016, to January 20, 2017.

Pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, ACLJ hereby requests that the ODNI produce the following within twenty (20) business days:

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by then-Director of National Intelligence James R. Clapper referencing, connected to, or regarding in any way section 2.3 of Executive Order 12333, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ODNI electronic mail or message accounts, non-ODNI electronic mail or message accounts, personal electronic mail or message accounts, ODNI servers, non-ODNI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or

⁸*Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016).

message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

2. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by then-Director of National Intelligence James R. Clapper referencing, connected to, or regarding in any way his review of the procedures set forth in the document entitled "Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333," which he executed on December 15, 2016, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ODNI electronic mail or message accounts, non-ODNI electronic mail or message accounts, personal electronic mail or message accounts, ODNI servers, non-ODNI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

3. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by then-Director of National Intelligence James R. Clapper referencing, connected to, or regarding in any way his input into the development of procedures set forth in the document entitled "Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333," which he executed on December 15, 2016, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ODNI electronic mail or message accounts, non-ODNI electronic mail or message accounts, personal electronic mail or message accounts, ODNI servers, non-ODNI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

4. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by then-Director of National Intelligence James R. Clapper referencing, connected to, or regarding in any way his approval of the procedures set forth in the document entitled "Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333," which he executed on December 15, 2016, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ODNI electronic mail or message accounts, non-ODNI electronic mail or message accounts, personal electronic mail or message accounts, ODNI servers, non-ODNI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to

non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

5. All records, communication or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any ODNI official referencing, connected to, or regarding in any way then-Attorney General Loretta Lynch's input, review and approval of procedures set forth in the document entitled "Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333," which she executed on January 3, 2017, and which Director of National Intelligence James Clapper executed on December 15, 2016, as referenced in the Background section above, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, ODNI electronic mail or message accounts, non-ODNI electronic mail or message accounts, personal electronic mail or message accounts, ODNI servers, non-ODNI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

CONCLUSION

As you are undoubtedly aware, President Obama's Freedom of Information Act Memorandum of January 21, 2009, declares:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era

of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.⁹

As such, if this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a *Vaughn* Index.

Moreover, as explained in an accompanying memorandum, the ACLJ is entitled to expedited processing of this Request as well as a waiver of all fees associated with it. The ACLJ reserves the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jay Alan Sekulow, Chief Counsel	sekulow@aclj.org
Colby M. May, Senior Counsel	cmmay@aclj-dc.org
Craig L. Parshall, Special Counsel	
Benjamin P. Sisney, Senior Litigation Counsel	bsisney@aclj.org
American Center for Law and Justice	
201 Maryland Ave., NE	
Washington, D.C. 20002-5703	
(202) 546-8890	
(202) 546-9309 (fax)	

I affirm that the foregoing request and attached documentation are true and correct to the best of my knowledge and belief.

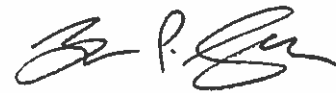
Respectfully submitted,



Jay Alan Sekulow
Chief Counsel



Colby M. May
Senior Counsel



Benjamin P. Sisney
Senior Litigation Counsel

⁹PRESIDENT BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES RE: FREEDOM OF INFORMATION ACT (Jan. 21, 2009), available at https://www.whitehouse.gov/the_press_office/FreedomofInformationAct.



February 23, 2017

Jennifer L. Hudson
Director, Information Management Division
Office of the Director of National Intelligence
Washington, D.C. 20511
Facsimile: (703) 874-8910
Email: dni-foia@dni.gov

RE: FOIA Request to the Office of the Director of National Intelligence Regarding Deliberations, Review and Approval of “Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333”

MEMORANDUM IN SUPPORT OF REQUESTED FEE WAIVER AND EXPEDITED PROCESSING

The American Center for Law and Justice (“ACLJ”) respectfully submits this Memorandum in Support of Fee Waiver and Expedited Processing of its Freedom of Information Act Request (“FOIA”) Request (hereinafter “Request”) to the Office of the Director of National Intelligence (“ODNI”).

I. FEE WAIVER REQUEST

The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ’s mission is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. The ACLJ regularly monitors governmental activity with respect to governmental accountability. The ACLJ stands for the principles of separation of powers, a strong national defense, and the sanctity of the individual liberties recognized and secured by the Constitution. The ACLJ and its globally affiliated organizations are committed to ensuring the ongoing viability of freedom and liberty in the United States and around the world. By focusing on U.S. constitutional law and international law, the ACLJ and its affiliated organizations are dedicated to the concept that freedom and liberty are universal, God-given, and inalienable rights that must be protected. Additionally, the ACLJ and its affiliated organizations support training law students from around the world in order to protect religious liberty and safeguard human rights and dignity.

The ACLJ requests a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii). Under this section, fees related to a FOIA request may be waived or reduced if the requester falls within certain specified categories, which includes a “representative of the news media.” § (a)(4)(A)(ii)(II), and/or 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.” § (a)(4)(A)(iii). The ACLJ qualifies for a fee waiver as a “representative of the news media,” § (a)(4)(A)(ii)(II), and because the information sought is “not for a commercial purpose,” § (a)(4)(A)(iii). Moreover, the ACLJ intends to widely disseminate to the public the information obtained because as explained in detail *infra*, “it is likely to contribute significantly to the public understanding of the operations or activities of the government,” § (a)(4)(A)(iii), including specifically the agency, and actors referenced in the Request.

A. The ACLJ Qualifies as a News Media Representative.

The ACLJ qualifies as a “representative of the news media,” as defined in 5 U.S.C. § 552(a)(4)(A)(ii), because the ACLJ, for the purposes explained above, “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.” *Id.* The ACLJ’s audience is generally comprised of those interested in our mission and legal activities as described above. The ACLJ reaches a vast audience through a variety of media outlets, including the Internet (World Wide Web page, www.aclj.org), radio, television, press releases, and direct mailings to our supporters.

For example, the ACLJ’s Internet site received an average of 822,000 unique visitors per month in 2015, with 22,000,000 page views. Our current email list holds 1,050,000 active names (actual list size is 2,340,690). In 2015, the ACLJ sent 278,000,000 emails.

The ACLJ’s radio audience consists of more than 1,150,000 estimated daily listeners on 873 radio stations nationwide, including SiriusXM satellite radio. Additionally, the ACLJ hosts a weekly television program, *Sekulow*, broadcast on eight networks: Cornerstone Television, Daystar Television Network, AngelOne, KAZQ, TBN, VTN, The Walk TV, and HisChannel. See <http://aclj.org/radio-tv/schedule> (listing schedule).

The ACLJ also disseminates news and information to over 1,000,000 addresses on its mailing lists. In 2015, the ACLJ sent 15,000,000 pieces of mail.

Moreover, our Chief Counsel, Jay Sekulow, has regularly appeared on various news and talk show programs to discuss the issues and events important to the ACLJ and its audiences. These include shows on FOX News, MSNBC, CNN, ABC, CBS, and NBC. In addition to television programs, Jay Sekulow has also appeared on national radio broadcasts. Beyond broadcast outlets, Jay Sekulow’s comments appear regularly in the nation’s top newspapers, in print and online editions, including but not limited to the Wall Street Journal, New York Times, Washington Times, Washington Post, L.A. Times, and USA Today. His comments also appear in major national newswire services that include, but are not limited to, Associated Press, Reuters, and Bloomberg.

B. The ACLJ's FOIA Request Meets Standards Set Forth Under ODNI Regulations Promulgated Under FOIA.

Under 32 C.F.R. § 1700.6, the ODNI will reduce or waive fees normally charged for processing FOIA requests,

[w]hen the ODNI determines: (1) As a matter of administrative discretion, the interest of the United States Government would be served, *or* (2) It is in the public interest to provide responsive records because the disclosure is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester.

§ 1700.6(b)(1)-(2) (emphasis added).

§ 1700.6(b)(2) part 1: It is in the public interest to provide responsive records because the disclosure is likely to contribute significantly to the public understanding of the operations or activities of the United States Government.

Records responsive to the ACLJ's Request will contribute to and provide meaningful understanding of United States Government operations and activities undertaken by and within the ODNI. The Request will reveal records indicating why ODNI officials made certain decisions leading to a major intelligence policy change just weeks before a new presidential administration was to begin. Responsive records will also reveal the involvement, if any, of any other governmental agencies or officials in these decisions. This information will allow the American public to hold its government officials accountable if it is discovered that ODNI officials engaged in activities and/or communications and/or arrived at decisions in a manner inconsistent with the desires of the American public.

Releasing the requested records to the ACLJ will contribute "significantly" to the public's understanding of United States Government operations and activities. The ACLJ has been heavily involved in research and litigation aimed at upholding governmental transparency and accountability *and* policies integral to a strong national defense. The ACLJ is qualified to analyze and assess the adequacy and propriety of ODNI's actions and decisions at issue.

The ACLJ intends to publically release the information, once analyzed and assessed, through its numerous media outlets. Those outlets include but are not limited to its Internet website (www.aclj.org), email list, radio programs, television programs, press releases, and regular mailing list, as described above. The ACLJ has been disseminating relevant information concerning fundamental and constitutional freedoms, national security and governmental accountability since its founding in 1990, and has since expanded its work and notoriety on an international level, achieving credibility in a wide range of media outlets, as described above.

§ 1700.6(b)(2) part 2: The requester has *no* commercial interest that would be furthered by the requested disclosure and therefore it “is not primarily in the commercial interest of the requester”

The ACLJ has no commercial interest in the information sought or its dissemination thereof. The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The information sought by the ACLJ is in furtherance of its not-for-profit mission statement. As the ACLJ does not and cannot have a commercial interest in the requested records, its interest therein cannot be founded “primarily” in a commercial interest. This is especially so because the ACLJ cannot operate for a commercial purpose under its grant of 501(c)(3) tax-exempt status.

For these reasons, the ACLJ is entitled to a fee waiver and respectfully requests that a waiver be granted.

II. EXPEDITED PROCESSING REQUEST

The ACLJ seeks expedited processing of its Request under 5 U.S.C. § 552(a)(6)(E), and the ODNI’s attendant regulation, 32 C.F.R. § 1700.12. As defined by statute, a “compelling need” is one

- (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; *or*
- (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

5 U.S.C. § 552(a)(6)(E)(v) (emphasis added). The ODNI’s regulation provides the nearly identical definition when defining the determination that must be made when qualifying a FOIA for expedited processing, under 32 C.F.R. § 1700.12(c)(1)-(2):

- (1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; *or*
- (2) An urgency to inform the public concerning an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.

Id. (emphasis added).

The ACLJ’s primary professional activity or occupation is information dissemination, though it is not the requester’s sole occupation. As detailed above, *see supra* Section I(A) (concerning the ACLJ’s qualification as a news media representative):

- (1) The ACLJ reaches a vast audience through a variety of media outlets, including the Internet (World Wide Web page, www.aclj.org), radio, television, press releases, and direct mailings to our supporters.
- (2) The ACLJ's Internet site received an average of 822,000 unique visitors per month in 2015, with 22,000,000 page views. Our current email list holds 1,050,000 active names (actual list size is 2,340,690). In 2015, the ACLJ sent 278,000,000 emails.
- (3) The ACLJ's radio audience consists of more than 1,150,000 estimated daily listeners on 873 radio stations nationwide, including SiriusXM satellite radio. Additionally, the ACLJ hosts a weekly television program, *Sekulow*, broadcast on eight networks: Cornerstone Television, Daystar Television Network, AngelOne, KAZQ, TBN, VTN, The Walk TV, and HisChannel. See <http://aclj.org/radio-tv/schedule> (listing schedule).
- (4) The ACLJ also disseminates news and information to over 1,000,000 addresses on its mailing lists. In 2015, the ACLJ sent 15,000,000 pieces of mail.
- (5) ACLJ Chief Counsel, Jay Sekulow, has regularly appeared on various news and talk show programs to discuss the issues and events important to the ACLJ and its audiences. These include shows on FOX News, MSNBC, CNN, ABC, CBS, and NBC. In addition to television programs, Jay Sekulow has also appeared on national radio broadcasts. Beyond broadcast outlets, Jay Sekulow's comments appear regularly in the nation's top newspapers, in print and online editions, including but not limited to the Wall Street Journal, New York Times, Washington Times, Washington Post, L.A. Times, and USA Today. His comments also appear in major national newswire services that include, but are not limited to, Associated Press, Reuters, and Bloomberg.

The U.S. District Court for the District of Columbia found that a non-profit public interest group, not unlike the ACLJ, qualified as a "representative of the news media" where the group disseminated an electronic newsletter and published books. *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003).

The ACLJ's Request qualifies as compelling under the second statutory definition above as well as under the ODNI's regulations because the ACLJ has an urgency to inform the public about United States Government activity in connection with its decision to significantly change and expand intelligence policy just weeks before a new presidential administration was to begin. "The information has a particular value that will be lost if not disseminated quickly," 32 C.F.R. § 1700.12(c)(2), because issues related to this topic are currently being reported and are thus currently before the public. As one district court recently explained, the required "compelling need" and "urgency to inform" are determined by three factors:

- (1) [W]hether the request concerns a matter of current exigency to the American public;
- (2) whether the consequences of delaying a response would compromise a significant recognized interest; and
- (3) whether the request concerns federal government activity.

ACLU v. United States DOJ, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (citing *Al-Fayed v. CIA*, 254 F.3d 300, 310 (2002)).

Such is the case presented by the ACLJ's Request. The ACLJ's Request is based upon an urgency to inform the American public because a delay in review of the information would compromise the ability of the American people to know about and influence current and pending U.S. Government actions concerning the former administration's last-minute expansion of access to raw intelligence information. As referenced in the ACLJ's Request, which is incorporated by reference as if fully set forth herein, the press is currently reporting on these very issues.

Without the immediate release of the records requested, the American public will remain in the dark with respect to its own government's decisions to fundamentally expand access to raw intelligence information. These concerns are also heightened by the fact that the U.S. Government officials who made the controversial decisions at issue are no longer in leadership. Moreover, due to leaking of classified information that appears to continue, a delay in releasing the information endangers national security and individual rights, and harms the public trust in government leadership. An expedited response will allow the ODNI to swiftly disprove the harmful and damaging assumptions such secretive behavior engenders, to wit, that these decisions were politically motivated. The requested documents must be released *now* so that the American people can decide for themselves whether the government's decisions were acceptable and its response is adequate.

Clearly, "the request concerns a matter of current exigency to the American public"; "the consequences of delaying a response would compromise a significant recognized interest"; and "the request concerns federal government activity." *ACLU*, 321 F. Supp. 2d at 29.

* * * * *

As noted in the ACLJ's Request, President Obama's Freedom of Information Act Memorandum of January 21, 2009, declares that accountability and openness ought to prevail with regard to FOIA requests:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be

embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.¹

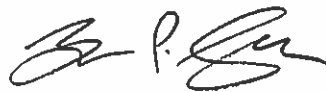
Accordingly, the ACLJ respectfully submits a request for waiver of fees and expedited processing of its contemporaneously submitted Request.

III. CERTIFICATION

In satisfaction of certification requirements under 5 U.S.C. § 552(a)(6)(E)(vi) and corresponding regulations, the ACLJ incorporates by reference herein all relevant facts and information as stated in the ACLJ's FOIA request in support thereof and certifies that the information provided and stated herein is true and correct to the best of the undersigned's knowledge and belief.



Colby M. May
Senior Counsel
American Center for Law and Justice
201 Maryland Avenue, NE
Washington, DC 20002-5703
(202) 546-8890
(202) 546-9309 fax
cmmay@aclj-dc.org



Benjamin P. Sisney
Senior Litigation Counsel
American Center for Law and Justice
201 Maryland Avenue, NE
Washington, DC 20002-5703
(202) 546-8890
(202) 546-9309 fax
bsisney@aclj.org

¹PRESIDENT BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES RE: FREEDOM OF INFORMATION ACT (Jan. 21, 2009), *available at* https://www.whitehouse.gov/the_press_office/FreedomofInformationAct.