

August 14, 2017

Office of Information Programs and Services (IPS)  
A/GIS/IPS/RL  
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Washington, DC 20522-8100  
Telephone: (202) 261-8484  
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**RE: FOIA Request to the U.S. State Department Regarding Former United Nations Ambassador Samantha Power's Queries or Requests to Access "Unmasked" Names or Other Personal Identifiers of Candidate/President-elect Donald Trump, His Family, and/or Advisers Incidentally Caught up in Surveillance**

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")<sup>1</sup> 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 any and all requests former To summarize, this Request seeks records pertaining to any and all requests former U.S. Permanent Representative to the United Nations, Ambassador Samantha Power ("Ambassador Samantha Power") made to National Security Agency ("NSA") officials or personnel regarding the "unmasking" of the names and/or any other personal identifying information of then candidate and/or President-elect Donald J. Trump, his family, staff, transition team members, and/or advisors who were incidentally caught up in U.S. electronic surveillance.

### **Background**

Pursuant to State Department FOIA regulation 22 C.F.R. § 171.4(b), this Background addresses "the subject, timeframe, names of any individuals involved, a contract number (if applicable),

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<sup>1</sup>The 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.

and reasons why the requester believes the Department may have records on the subject of the request.” 22 C.F.R. § 171.4(b).

According to Free Beacon:

Former United Nations Ambassador Samantha Power is believed to have made ‘hundreds’ of unmasking requests to identify individuals named in classified intelligence community reports related to Trump and his presidential transition team, according to multiple sources who said the behavior is unprecedented for an official in her position.<sup>2</sup>

As reported by Free Beacon, “[e]fforts by the former Obama administration to obtain the names of Trump allies included in raw intelligence reports have fueled speculation that subsequent leaks to the press were orchestrated by the former administration and its allies in a bid to damage the current White House and smear Trump’s most senior confidantes.”<sup>3</sup>

According to the same report, unmasking requests made by “‘one official [whose] position has *no apparent intelligence-related function*’—[are] now believed to [have been made by] Power.”<sup>4</sup> Moreover, “Little justification was provided for the request of this sensitive classified information, which government insiders described as outside the purview of a U.N. ambassador.”<sup>5</sup>

Free Beacon’s news report followed an earlier Fox News report according to which:

Susan Rice, former national security adviser under then-President Barack Obama, requested to unmask the names of Trump transition officials caught up in surveillance. The unmasked names, of people associated with Donald Trump, were then sent to all those at the National Security Council, some at the Defense Department, then-Director of National Intelligence James Clapper and then-CIA Director John Brennan – essentially, the officials at the top, including former Rice deputy Ben Rhodes.<sup>6</sup>

As reported by Fox News, “[t]he names were part of incidental electronic surveillance of candidate and President-elect Trump and people close to him, including family members, for up to a year before he took office.”<sup>7</sup> Fox News also reports that “[a]n extensive and complex paper

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<sup>2</sup>Adam Kredi, *Former U.N. Amb. Power Unmasked ‘Hundreds’ in Final Year of Obama Admin*, FREEBEACON.COM (Aug. 2, 2017), <http://freebeacon.com/national-security/former-u-n-amb-power-unmasked-hundreds-last-year-obama-admin/>.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* (quoting Letter from Congressman Devin Nunes Chairman of the Permanent Select Committee on Intelligence to Director of National Intelligence Daniel Coats (July 27, 2017), *available at* [https://intelligence.house.gov/uploadedfiles/chairman\\_letter\\_to\\_dni\\_unmasking\\_drafting\\_assistance.pdf](https://intelligence.house.gov/uploadedfiles/chairman_letter_to_dni_unmasking_drafting_assistance.pdf)).

<sup>5</sup>*Id.*

<sup>6</sup>Adam Housley, *Susan Rice Requested to Unmask Names of Trump Transition Officials, Sources Say*, FOXNEWS.COM (Apr. 3, 2017), <http://www.foxnews.com/politics/2017/04/03/susan-rice-requested-to-unmask-names-trump-transition-officials-sources-say.html>.

<sup>7</sup>*Id.*

trail for requests to the National Security Agency about the identities of people in President Trump's transition team in sensitive intelligence surveillance probably exists . . . according to information sharing procedures signed into law by the outgoing Obama Administration.”<sup>8</sup>

### **Records Requested**

For purposes of this Request, the term “record” is “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 Enterprise Institute v. Office of Science and Technology Policy*, No. 15-5128 (D.C. Cir. July 5, 2016)<sup>9</sup> (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 meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to one or more person(s).

For purposes of this Request, the term “DOS official” includes, but is not limited to, any person who is (1) employed by or on behalf of the DOS, any Mission of the United States, or any Delegation of the United States, in any capacity; (2) contracted for services by or on behalf of the DOS, any Mission of the United States, or any Delegation of the United States, in any capacity; (3) appointed by the President of the United States to serve in any capacity at or within the DOS, any Mission of the United States, or any Delegation of the United States; or (4) any such person's staff, agent or employee; all without regard to the component, bureau, or office in which that person serves.

For purposes of this Request, all sources, documents, letters, reports, briefings, articles and press releases cited in this Request are incorporated by reference as if fully set forth herein.

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

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<sup>8</sup>George Russell, *Detailed Paper Trail for Rice Unmasking Requests Likely Exists, According to Controversial Intel Sharing Document*, FOXNEWS.COM (Apr. 7, 2017), <http://www.foxnews.com/politics/2017/04/07/detailed-paper-trail-for-rice-unmasking-requests-likely-exists-according-to-controversial-intel-sharing-document.html>.

<sup>9</sup>*Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016).

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests that the DOS respond to the following numbered requests and produce all responsive records:

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DOS official or employee, where one communicant was Ambassador Samantha Power, including any communications, queries or requests made under an alias or pseudonym, and where another communicant was the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee, which references, is connected to, or which regards in any way, any communication, request, query, submission, direction, instruction, or order, whereby Samantha Power sought access to or attempted to access SIGINT reports or other intelligence products or reports containing the name(s) or any personal identifying information related to

- a) Donald Trump;
- b) Melania Trump;
- c) Michael Pence;
- d) Eric Trump;
- e) Jared Kushner;
- f) Ivanka Trump;
- g) Reince Preibus;
- h) Steve Bannon;
- i) Sebastian Gorka;
- j) Rudy Giuliani;
- k) Chris Christie;
- l) Newt Gingrich;
- m) Jeff Sessions;
- n) Sean Hannity;
- o) Michael Flynn;
- p) KT McFarland;
- q) Michael Rogers;
- r) Ron Nicol;
- s) Keith Kellogg;
- t) Michael Meese;
- u) Cindy Hayden;
- v) Jim Carafano;
- w) Ronald Burgess;
- x) David Malpass;
- y) Bill Walton;
- z) Ken Blackwell;
- aa) Myron Ebell;
- bb) Mike McKenna;
- cc) Steve Hart;
- dd) Edwin Meese;
- ee) Kay Coles James;

- ff) Beth Kaufman;
- gg) Ado Machida;
- hh) Andrew Bremberg;
- ii) Carlos Diaz Rosillo;
- jj) Danielle Cutrona;
- kk) Rick Dearborn;
- ll) Paula Stannard;
- mm) Bert Mizusawa;
- nn) Jim Carter;
- oo) Bill Chatfield;
- pp) Rob Gordon;
- qq) Michael Catanzaro;
- rr) Brian Johnson;
- ss) Gerard Robinson;
- tt) Martin Whitmer; and/or
- uu) Ken Klukoski;

whether incidentally collected or otherwise, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DOS electronic mail or message accounts, non-DOS electronic mail or message accounts, personal electronic mail or message accounts, DOS servers, non-DOS 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.

2. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DOS official or employee referencing, connected to, or regarding in any way communications, queries or requests from Ambassador Samantha Power in her capacity as a Department of State Official, including any communications, queries or requests made under an alias or pseudonym, made to the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee, requesting the “unmasking” of or access to the “unmasked” names or other personal identifying information of American citizens contained in SIGINT reports or other intelligence products or reports, including:

- a) Donald Trump;
- b) Melania Trump;
- c) Michael Pence;
- d) Eric Trump;
- e) Jared Kushner;
- f) Ivanka Trump;
- g) Reince Preibus;

- h) Steve Bannon;
- i) Sebastian Gorka;
- j) Rudy Giuliani;
- k) Chris Christie;
- l) Newt Gingrich;
- m) Jeff Sessions;
- n) Sean Hannity;
- o) Michael Flynn;
- p) KT McFarland;
- q) Michael Rogers;
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- tt) Martin Whitmer; and/or
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whether incidentally collected or otherwise, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DOS electronic mail or message accounts, non-DOS electronic mail or message accounts, personal electronic mail or message accounts, DOS servers, non-DOS 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 any DOS official where one communicant was Ambassador Samantha Power, including any communications, queries or requests made under an alias or pseudonym, and another communicant was any NSA official or employee, containing any reference to the term "Trump" or names or other personal identifying information of the following individuals:

- a) Donald Trump;
- b) Melania Trump;
- c) Michael Pence;
- d) Eric Trump;
- e) Jared Kushner;
- f) Ivanka Trump;
- g) Reince Preibus;
- h) Steve Bannon;
- i) Sebastian Gorka;
- j) Rudy Giuliani;
- k) Chris Christie;
- l) Newt Gingrich;
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- n) Sean Hannity;
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4. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DOS official or employee referencing, connected to, or regarding in any way communications, queries or requests from Ambassador Samantha Power in her capacity as a Department of State Official, including any communications, queries or requests made under an alias or pseudonym, made to the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee, regarding “minimization procedures” in connection with communications, queries or requests made by Samantha Power, including any alias or pseudonym used to identify Samantha Power, regarding the “unmasking” of or access to the “unmasked” names or other personal identifying information of American citizens contained in SIGINT reports or other intelligence products or reports, including:

- a) Donald Trump;
- b) Melania Trump;
- c) Michael Pence;
- d) Eric Trump;
- e) Jared Kushner;
- f) Ivanka Trump;
- g) Reince Preibus;
- h) Steve Bannon;
- i) Sebastian Gorka;
- j) Rudy Giuliani;



- k) Chris Christie;
- l) Newt Gingrich;
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5. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any DOS official or employee referencing, connected to, or regarding in any way communications, queries or requests from Ambassador Samantha Power made outside her official DOS capacity, including any communications, queries or requests made under an alias or pseudonym, made to the Director of the National Security Agency, the Chief of the Central Security Service, SIGINT production organization personnel, the Signals Intelligence Director, Deputy Signals Intelligence Director, or the Chief/Deputy/Senior Operations Officers of the National Security Operations Center, or any other NSA official or employee, regarding “minimization procedures” in connection with communications, queries or requests made by Samantha Power, including any alias or pseudonym used to identify Samantha Power, regarding the “unmasking” of or access to the “unmasked” names or other personal identifying information of American citizens contained in SIGINT reports or other intelligence products or reports, including:

- a) Donald Trump;
- b) Melania Trump;
- c) Michael Pence;
- d) Eric Trump;
- e) Jared Kushner;
- f) Ivanka Trump;
- g) Reince Preibus;
- h) Steve Bannon;
- i) Sebastian Gorka;
- j) Rudy Giuliani;
- k) Chris Christie;
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- m) Jeff Sessions;
- n) Sean Hannity;
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6. All records or communications, generated, forwarded, transmitted, shared, saved, sent, or received by Ambassador Samantha Power, including any records or communications made under an alias or pseudonym, whether incidentally collected or otherwise, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DOS electronic mail or message accounts, non-DOS electronic mail or message accounts, personal electronic mail or message accounts, DOS servers, non-DOS 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

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

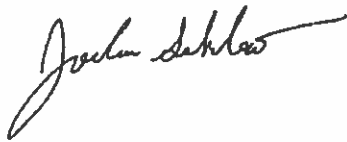
the right to appeal a decision to withhold any information sought by this request and/or to deny the separate application for expedited processing and waiver of fees.

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

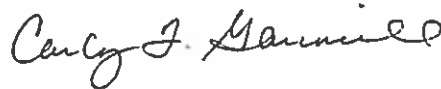
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Respectfully submitted,



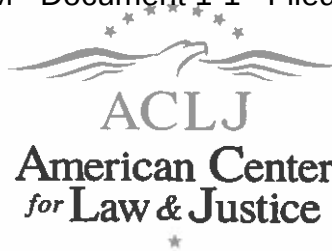
Jordan Sekulow  
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Carly F. Gammill  
Senior Litigation Counsel



Benjamin P. Sisney  
Senior Litigation Counsel



August 14, 2017

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Washington, DC 20522-8100  
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**RE: FOIA Request to the National Security Agency Regarding Former United Nations Ambassador Samantha Power's Queries or Requests to Access "Unmasked" Names or Other Personal Identifiers of Candidate/President-elect Donald Trump, His Family, and/or Advisers Incidentally Caught up in Surveillance**

**MEMORANDUM IN SUPPORT OF REQUESTED FEE WAIVER AND EXPEDITED PROCESSING**

The American Center for Law and Justice ("ACLJ") respectfully submits this Memorandum for fee waiver and expedited processing in support of its Freedom of Information Act Request ("FOIA") request to the U.S. Department of State ("DOS").

**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 certain specified categories, which include 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)(I), 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 under 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 reaches a vast audience through a variety of media outlets, including the Internet (World Wide Web page, [www.aclj.org](http://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 over 1,050 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 DOS Regulations Promulgated Under FOIA.**

Under 22 C.F.R. § 171.17(a), the DOS will reduce or waive fees normally charged for processing FOIA requests,

where it is determined that disclosure 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.

*Id.* The DOS, in making its determination, considers the following four factors under section 171.17(a)(1) regarding “whether 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”:

- (i) The subject of the request, i.e., whether the subject of the requested records concerns the operations or activities of the government;
- (ii) The informative value of the information to be disclosed, i.e., whether the disclosure is likely to contribute to an understanding of government operations or activities;
- (iii) The contribution to an understanding of the subject by the general public likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public; and
- (iv) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

§ 171.17(a)(1)(i)-(iv).

The DOS, in making its determination, considers the following two factors under section 171.17(a)(2) regarding “whether disclosure of the information is not primarily in the commercial interest of the requester”:

- (i) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,
- (ii) The primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

§ 171.17(a)(2)(i)-(ii).

As the U.S. Court of Appeals for the D.C. Circuit has noted, “Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters.’” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citing *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Sen. Leahy))).

The ACLJ's FOIA request meets the DOS's factors as listed above, qualifying the ACLJ for a waiver of fees, as set forth below.

**§ 171.17(a)(1)(i): The subject of the request concerns the operations or activities of the government.**

The ACLJ has requested information and records specifically concerning decisions made and agreements reached by U.S. Department of State (DOS) officials leading to the unmasking and dissemination of the names and personal identifiers of American citizens who were included incidentally in electronic surveillance. Moreover, it is significant that a major intelligence policy change occurred just weeks before a new presidential administration was to begin, which increased agency access to raw, unmasked information and facilitated easier dissemination. The Request seeks all records indicating what role DOS officials took at the prompting of U.S. officials, like former U.S. Permanent Representative to the United Nations, Ambassador Samantha Power, in making the decision to unmask and/or disseminate the names of then candidate and President-elect Trump, his family, and advisors, the timing thereof, with whom they communicated leading up to this decision, and related records. Within this Request, all participation in such DOS briefings, meetings and communications by the DOS leadership and personnel, and all other DOS actions related thereto, are relevant to shed light on identifiable activities of the government.

**§ 171.17(a)(1)(ii): The requested information has significant informative value and disclosure is likely to contribute to an understanding of government operations or activities.**

The ACLJ's request will contribute and provide meaningful understanding of United States Government operations or activities undertaken by and within the DOS. The Request will reveal records indicating why DOS officials made the decisions they made in this context. 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 DOS or other government agency officials engaged in activities and/or communications and/or arrived at decisions inconsistent with the desires of the American public.

**§ 171.17(a)(1)(iii): Disclosure of the requested information will significantly contribute to an understanding of the subject by the general public, and the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public.**

Releasing the requested information to the ACLJ will contribute *significantly* to the public's understanding of United States Government operations and activities. The ACLJ has researched and litigated to uphold governmental transparency and accountability. The ACLJ is qualified to analyze and assess the adequacy or propriety of DOS officials' actions and decisions at issue.

The ACLJ intends to release the information, once analyzed and assessed, to the public 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 and governmental accountability since its founding in 1990, and has since then expanded its work and notoriety on an international level, achieving credibility in a wide range of media outlets, as described above.

The ACLJ has been heavily involved in researching 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 DOS officials' actions and decisions at issue.

**§ 171.17(a)(1)(iv): Disclosure of the requested information will contribute significantly to public understanding of government operations or activities.**

Releasing the information described above will significantly contribute to the public's understanding through ACLJ review and assessment of the materials and information, and subsequent dissemination of the information to the public. Such review, assessment, and dissemination will help the public understand what actions DOS officials took in making the decisions at issue and why the decisions were made. Again, the ACLJ is well versed in disseminating relevant information concerning fundamental and constitutional freedoms, national security, and governmental and has credibility in a wide range of media outlets.

**§ 171.17(a)(2)(i): The requester has no commercial interest that would be furthered by the requested disclosure.**

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.

**§ 171.17(a)(2)(ii): The requester's primary and in fact, only, interest in disclosure of the requested information is non-commercial.**

Again, the ACLJ has *no* commercial interest in the information sought or its dissemination thereof. Rather, its interest is purely to further its not-for-profit mission. Therefore, its interest 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 DOS's attendant regulation, 22 C.F.R. § 171.12(b). 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). The DOS's regulation provides the nearly identical definition when defining a "compelling need" with regard to section II above, under 28 C.F.R. 171.12(b)(2), stating that "news media requesters," such as the ACLJ, "normally qualify":

(2) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. *News media requesters would normally qualify*; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just a particular segment or group.

(i) Urgently needed. The information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. Information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the breaking nature of the story.

(ii) Actual or alleged Federal Government activity. The information concerns some actions taken, contemplated, or alleged by or about the government of the United States, or one of its components or agencies, including the Congress.

*Id.* (emphasis added).

Pursuant to both 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 171.12(b)(2), the ACLJ is "primarily engaged in disseminating information." As detailed above under Section I(A) concerning the requester'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](http://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 more than 1,050 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 District Court for the District of Columbia found that a non-profit public interest group, not unlike the ACLJ, qualified as "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 FOIA request qualifies as compelling under the second statutory definition stated above as well as under the DOS's regulations because it has an urgency to inform the public about United States government activity in connection with its decision to unmask and share the names of American citizens incidentally caught up in electronic surveillance, and particularly why DOS officials requested that NSA officials unmask and share the names of candidate and President-elect Trump, his family, and advisors. "The information has a particular value that will be lost if not disseminated quickly," 28 C.F.R. 171.12(b)(2)(i), because these issues are currently being reported and are 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 FOIA 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 politicization of U.S. intelligence agencies and the intelligence process. As referenced in the Request, which is incorporated by reference as if fully set forth herein, the press is currently reporting on these very issues.

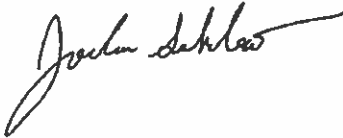
Without the immediate release of the records requested, the American public will remain in the dark with respect to its own government's decisions to unmask and share the raw intelligence information, including the names and/or personal identifiers of American citizens incidentally caught up in electronic surveillance, especially when its decision involved unmasking and sharing the names of the opposition party's candidate, his family, and advisors by a top U.S. official appointed by out-going President Obama — during and after a contentious election season. These concerns are heightened 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 NSA to swiftly disprove the harmful and damaging assumptions such 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.

\* \* \* \* \*

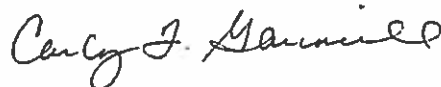
Accordingly, the ACLJ respectfully submits a request for waiver of fees and expedited processing of its contemporaneously submitted FOIA request.

### 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.



Jordan Sekulow  
Executive Director



Carly F. Gammill  
Senior Litigation Counsel



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