

Exhibit 1

BRENNAN
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FOR JUSTICE
TWENTY
YEARS



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at New York University School of Law

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January 17, 2018

Via Certified Mail & E-Mail

Kevin Krebs, Assistant Director, FOIA/Privacy Staff
Executive Office for United States Attorneys
Department of Justice
600 E Street, NW, Room 7300
Washington, DC 20530-0001
usao.foia.requests@usdoj.gov

Re: FOIA Request and Request for Expedited Processing & Fee Waiver

Dear Mr. Krebs,

This is a Freedom of Information Act (FOIA) request on behalf of the Brennan Center for Justice at NYU School of Law and Charles Kurzman, a professor of sociology at the University of North Carolina at Chapel Hill who researches terrorism-related issues. The Brennan Center and Prof. Kurzman seek records of terrorism-related cases in the National Caseload Data maintained by the Executive Office for United States Attorneys. We also seek expedited processing and a fee waiver.

This request is in accordance with 5 U.S.C. § 552 et seq., and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16.

Terrorism is one of the highest priorities of the Department of Justice,¹ and a subject of intense policy debate and public interest. According to recent Congressional testimony by FBI Director Christopher Wray, the federal government has made approximately 176 arrests related to domestic terrorism over the previous year.² By way of comparison, the federal government has publicly charged 145 people in recent years in terrorism cases related to the self-proclaimed “Islamic State,” according to Deputy Attorney General Rod Rosenstein.³ The Department of Justice has periodically released detailed information on several hundred international terrorism-related prosecutions, including the names of defendants.⁴

There is an urgent need to understand and analyze all terrorism-related cases in order to discern if or how the Department of Justice prosecutes instances of international terrorism differently from instances of domestic terrorism. Concern about disparate treatment of these categories of terrorism has been raised by a variety of observers,⁵ including Senator Claire McCaskill, who asked at a hearing of the Senate Committee on Homeland Security and Governmental Affairs “whether or not the level of investigation and response matches the level of threat as it relates to these two types of terrorists that want to do harm to American citizens.”⁶ The release of docket numbers for terrorism-related cases will allow the examination of criminal complaints and other

¹ *The Fiscal Year 2018 Department of Justice Budget Request: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies, H. Comm. on Appropriations*, 114th Cong. (2017) (statement for the record of Rod J. Rosenstein, Deputy Att’y Gen.), available at <http://docs.house.gov/meetings/AP/AP19/20170613/105999/HHRG-115-AP19-Wstate-RosensteinR-20170613.PDF>.

² *Threats to the Homeland: Hearing Before S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. (2017) (statement for the record of Christopher Wray, Dir., Fed. Bureau of Investigations), available at <https://www.hsgac.senate.gov/hearings/09/18/2017/threats-to-the-homeland>.

³ Rod J. Rosenstein, Deputy Att’y Gen., Remarks at the 10th Annual Utah National Security and Anti-Terrorism Conference (August 30, 2017) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-10th-annual-utah-national-security-0>).

⁴ DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS, 9/11/01 - 3/18/10, available at <https://www.hsdl.org/?view&did=25289> (updated Aug. 26, 2016); DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS, 9/11/01 – 12/31/11, available at <http://fas.org/irp/agency/doj/doj060612-stats.pdf> (updated June 6, 2012); DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION CHART OF PUBLIC/UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS 9/11/01-12/31/14, available at https://web.archive.org/web/20160906022314/http://www.sessions.senate.gov/public/_cache/files/e93b5041-ae9-4289-acd2-ee46822c402e/06.14.16-doj-nsd-list.pdf (updated August 7, 2015); DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION CHART OF PUBLIC/UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS, 9/11/01-12/31/15, [hereinafter “2015 DOJ/NSD TERRORISM-RELATED CONVICTIONS”] available at <http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Conviictions.pdf> (updated August 26, 2016).

⁵ See, e.g., Naomi Braine, *Terror Network or Lone Wolf? Disparate Legal Treatment of Muslims and the Radical Right*, PUBLIC EYE MAG., 4-10, Spring 2015, available at <https://www.politicalresearch.org/wp-content/uploads/downloads/2015/06/Public-Eye-Magazine-Spring-2015.pdf>; Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), <https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/>; Daniel Byman, *Should We Treat Domestic Terrorists the Way We Treat ISIS?*, FOREIGN AFFAIRS (Oct. 3, 2017), <https://www.foreignaffairs.com/articles/united-states/2017-10-03/should-we-treat-domestic-terrorists-way-we-treat-isis>.

⁶ *Threats to the Homeland: Hearing Before S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. (2017) (opening statement for the record of Ranking Member Sen. Claire McCaskill), available at <http://www.hsgac.senate.gov/download/opening-statement-mccaskill-2017-09-27>.

public court documents, which will permit a comparison of possible differences in terrorism prosecutions, including what activities the Department of Justice considers terrorism, what charges are brought, and what sentences are sought.

We therefore request the following records:

(1) All records in the Legal Information Office Network System (LIONS) database involving public charges that are marked with at least one of the following program categories under the heading of “Terrorism”:⁷

- 071 International Terrorism Incidents Which Impact U.S.
- 072 Domestic Terrorism
- 073 Terrorism Related Hoaxes
- 076 Terrorist Financing
- 077 Export Enforcement Terrorism-Related
- 07H Critical Infrastructure Protection

(2) For each record identified in (1), we specifically request data contained in the following four LIONS field names:

- Program Category (i.e., “PROG_CAT”)
- USAO Number (i.e., “CASEID”)⁸
- District (i.e., “DISTRICT”)⁹
- Court Number (i.e., “COURT NUMBER”)¹⁰

⁷ EXEC. OFFICE FOR U.S. ATTORNEYS, DEP’T OF JUSTICE, **ERROR! MAIN DOCUMENT ONLY.**LEGAL INFORMATION OFFICE NETWORK SYSTEM (LIONS), APPENDIX A – CODE LIST at A-77 to A-79 (June 2017), available at <https://www.justice.gov/usao/file/787346/download>; see also EXEC. OFFICE FOR UNITED STATES ATTORNEYS, DEP’T OF JUSTICE, **ERROR! MAIN DOCUMENT ONLY.**LEGAL INFORMATION OFFICE NETWORK SYSTEM (LIONS) USER’S MANUAL, RELEASE 5.4.2 at 5-11 (Aug. 2016) [hereinafter “LIONS USER’S MANUAL”], available at <https://www.justice.gov/usao/file/835096/download>.

⁸ The USAO Number (also referred to as USAOID) is a number “generated by LIONS when a matter or case is opened. It is used to track the case throughout its life, including appeals.” LIONS USER’S MANUAL, *supra* note 7, at 5-9. When combined with District, this information permits search for case information in the publicly available National Caseload Data on the website of the Executive Office for United States Attorneys. *National Caseload Data*, EXEC. OFFICE FOR U.S. ATTORNEYS, <https://www.justice.gov/usao/resources/foia-library/national-caseload-data> (last visited Jan. 16, 2018) [hereinafter “*National Caseload Data*”].

⁹ This two- or three-letter code designates the district associated with each case (for example, AK for Alaska, ALM for Alabama-Middle, ALN for Alabama-North, and ALS for Alabama-South). When combined with the USAO Number, this information permits search for case information in the publicly available National Caseload Data on the website of the Executive Office for United States Attorneys. See *National Caseload Data supra* note 8..

¹⁰ This information permits search for case documents in the Public Access to Court Electronic Records (PACER) Case Locator service maintained by the Administrative Office of the U.S. Courts. PACER, <https://www.pacer.gov> (last visited Jan. 16, 2018). Court Number is defined by the Executive Office for United States Attorneys as “the docket number assigned to the criminal action by the court.” LIONS USER’S MANUAL, *supra* note 7, at 5-13.

Fee Waiver Request

We hereby request a waiver of all search, review, and duplication fees associated with this request. The requesters are eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 6 C.F.R. §§ 5.11(d) and (k), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k)(1).

First, the requesters plan to analyze, publish, and publicly disseminate information obtained from this request. The requested records are not for commercial use and will be disclosed to the public at no cost. Second, the requesters are exempt from search and review fees as noncommercial scientific institutions, educational institutions, and representatives of the news media.

The Brennan Center is a non-profit, non-partisan public policy and law institute at the NYU School of Law that conducts research and disseminates to the public information about issues affecting justice and democracy. It is engaged in social science research and therefore meets the definition of a noncommercial scientific institution entitled to a waiver of search and review fees. As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” pursuant to 6 C.F.R. §§ 5.11(d). The Brennan Center qualifies as an educational institution because it is affiliated with the NYU School of Law, which is plainly an educational institution under the definition provided in 6 C.F.R. § 5.11(d)(1); see also *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381 (D.C. Cir. 1989). Finally, the Brennan Center qualifies for a waiver as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II) based on its track record of regularly publishing reports and papers.

Charles Kurzman is a professor of sociology at the University of North Carolina at Chapel Hill, an “educational institution” under the definition provided in 6 C.F.R. § 5.11(d)(1) entitled to a waiver of all fees. Prof. Kurzman is engaged in social science research and therefore also meets the definition of a noncommercial scientific requester entitled to a waiver of search and review fees. Furthermore, Prof. Kurzman qualifies as a “representative of the news media” because he “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.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); see also *supra*, Part III; *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11. Prof. Kurzman has a track record of analyzing similar court records involving international terrorism and publishing reports of this analysis in scholarly and mass-media outlets to increase public understanding of violent extremism. He posts his data analysis on his public website, where it is available for free. He will receive no compensation for the publication of scholarly articles that analyze the requested information. Prof. Kurzman makes this request as part of his continuing scholarly activities to contribute to academic and public understanding of terrorism and government operations to combat terrorism.

Finally, the public interest in disclosure of the requested information is considerable and the requesters are entitled to a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k)(1). Terrorism is among the highest priorities of government policy, and the requested records concern the operations or activities of the government, namely the handling of domestic terrorism cases by the United States Attorneys.

This connection to the federal government is “direct and clear, not remote or attenuated.” See 6 C.F.R. § 5.11(k)(2)(i). Disclosure is therefore in the public interest because it is likely to contribute significantly to public understanding of how the government is prosecuting cases involving domestic terrorism. See 6 C.F.R. §§ 5.11(k)(2)(ii) and (iii). For example, the requested docket numbers will facilitate the examination of each case’s criminal complaint, which contains information on the government’s investigation of the defendant. Currently available information allows only a tally of the total number of domestic terrorism cases, not an understanding of the circumstances of each domestic terrorism case. Moreover, disclosure is not primarily in the requesters’ commercial interests. See 6 C.F.R. § 5.11(k)(3). As stated above, the Brennan Center plans to make any information disclosed as a result of this request available to the public at no cost. A fee waiver would therefore fulfill Congress’s legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Statement of Sen. Leahy)).

Request for Expedited Processing

The Brennan Center and Prof. Kurzman request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and implementing regulation 6 C.F.R. § 5.5(d). There is a “compelling need” for these records because the information requested is urgently required by an academic researcher who is “primarily engaged in disseminating information” to “inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v); 6 C.F.R. § 5.5(d)(1)(ii). Furthermore, the requesters urgently require the information sought by this request in order to inform the public of federal government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii).

The urgency of the request is underscored by the ongoing nature of terrorism-related threats to public safety, the widespread public concern over these threats, and the considerable federal resources that continue to be deployed to address these threats. Indeed, on January 16, the Department of Justice released a report on individuals convicted of “international terrorism and terrorism-related offenses” in an effort to justify the President’s travel ban on individuals from predominantly Muslim countries.¹¹ This request merely seeks disclosure of similar data for individuals convicted of domestic terrorism. Systematic research and understanding of the government’s actions in this field will remain incomplete without the information specified in this request.

¹¹ DEP’T OF HOMELAND SEC & DEP’T OF JUSTICE, EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES INITIAL SECTION 11 REPORT (Jan. 2018), *available at* <https://www.justice.gov/opa/press-release/file/1026436/download>.

Response Requested in 10 days

Your attention to this request is appreciated, and we will anticipate your determination of our request within ten (10) calendar days pursuant to 28 C.F.R. 16.5(d)(4). Should you have any questions regarding this request, please contact us at your earliest convenience.

Sincerely,



Charles Kurzman
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Michael Price
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Exhibit 2

From: EOUSA-NoReply@usdoj.gov [<mailto:EOUSA-NoReply@usdoj.gov>]
Sent: Wednesday, January 24, 2018 9:31 AM
To: Andrew Lindsay <lindsaya@brennan.law.nyu.edu>
Subject: FOIA Expedited Processing Disposition Reached for EOUSA-2018-001589

Your request for Expedited Processing for the FOIA request EOUSA-2018-001589 has been denied. Additional details for this request are as follows:

- Request Created on: 01/18/2018
- Expedited Disposition Reason: Data is available online.
- Request Long Description: This is a Freedom of Information Act (FOIA) request on behalf of the Brennan Center for Justice at NYU School of Law and Charles Kurzman, a professor of sociology at the University of North Carolina at Chapel Hill who researches terrorism-related issues. The Brennan Center and Prof. Kurzman seek records of terrorism-related cases in the National Caseload Data maintained by the Executive Office for United States Attorneys. We also seek expedited processing and a fee waiver. This request is in accordance with 5 U.S.C. § 552 et seq., and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16. We request: (1) All records in the Legal Information Office Network System (LIONS) database involving public charges that are marked with at least one of the following program categories under the heading of "Terrorism": 7 • 071 International Terrorism Incidents Which Impact U.S. • 072 Domestic Terrorism • 073 Terrorism Related Hoaxes • 076 Terrorist Financing • 077 Export Enforcement Terrorism-Related • 07H Critical Infrastructure Protection (2) For each record identified in (1), we specifically request data contained in the following four LIONS field names: • Program Category (i.e., "PROG_CAT") • USAO Number (i.e., "CASEID")⁸ • District (i.e., "DISTRICT")⁹ • Court Number (i.e., "COURT NUMBER")

Exhibit 3

From: EOUSA-NoReply@usdoj.gov <EOUSA-NoReply@usdoj.gov>

Sent: Tuesday, February 6, 2018 10:01:22 AM

To: Andrew Lindsay

Subject: Final Disposition, Request EOUSA-2018-001589

EOUSA-2018-001589 has been processed with the following final disposition: Partial grant/partial denial.



U.S. Department of Justice

Executive Office for United States Attorneys

Freedom of Information and Privacy Staff

*Suite 7300, Bicentennial Building
600 E Street, NW
Washington, DC 20530*

*(202) 252-6020
FAX (202) 252-6047*

February 6, 2018

Andrew L. Lindsay
Brennan Center for Justice at New York University School of Law
120 Broadway, Suite 1750
New York, NY 10271

Re: FOIA-2018-001589

Dear Mr. Lindsay:

This responds to your request for records, dated January 17, 2018, which has been assigned the above-referenced tracking number for processing under the Freedom of Information and Privacy Acts (FOIA/PA). 5 U.S.C. §§ 552-552a; 28 CFR § 16.1, et seq. Your request sought: "LIONS databases, including codes covering through the end of December 2017."

The information you seek is located at the following website:

http://www.usdoj.gov/usao/reading_room/data/CaseStats.htm

It will not be necessary to make any further requests because we will continue to place this information on the website each month.

This is a final action on this above-numbered request. If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following website: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

You may contact our FOIA Public Liaison at the telephone number listed above for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin Krebs", is written over a light pink rectangular background.

Kevin Krebs
Assistant Director

Exhibit 4

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
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* ADMITTED IN THE DISTRICT OF COLUMBIA

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ERIC M. ROSOF

February 22, 2018

Via Certified Mail

Ms. Melanie Ann Pustay
Director, Office of Information Policy
United States Department of Justice
1425 New York Avenue, NW, Suite 11050
Washington, DC 20530-0001

Re: Freedom of Information Act Appeal and Request for Expedited
Processing—No. FOIA-2018-001589

Dear Ms. Pustay:

On behalf of the Brennan Center for Justice at NYU School of Law and Professor Charles Kurzman of the University of North Carolina at Chapel Hill (“Applicants”) we hereby submit this appeal from the response of the Executive Office for United States Attorneys (“EOUSA”) to FOIA Request No. FOIA-2018-001589 (“Request”) (**Exhibit 1**, attached).

Applicants’ Request seeks the following records:

1. All records in the Legal Information Office Network System (“LIONS”) database involving public charges that are marked with at least one of the following program categories under the heading of “Terrorism”:
 - 071 International Terrorism Incidents Which Impact U.S.

- 072 Domestic Terrorism
 - 073 Terrorism Related Hoaxes
 - 076 Terrorism Financing
 - 077 Export Enforcement Terrorism-Related
 - 07H Critical Infrastructure Protection
2. For each record identified in (1), Applicants specifically requested data contained in the following four LIONS field names:
- Program Category (i.e., “PROG_CAT”)
 - USAO Number (i.e., “CASEID”)
 - Judicial District (i.e., “DISTRICT”)
 - Court Docket Number (i.e., “COURT NUMBER”)

As explained in the Request, the release of this data—and in particular, the release of the COURT NUMBER field for terrorism-related cases—is critical to understand and analyze the Department of Justice’s (“DOJ”) treatment of domestic and international terrorism. Only by releasing the docket information in the COURT NUMBER field can the public systematically and accurately examine the criminal complaints and other public court documents filed by DOJ in cases it categorizes as involving terrorism to compare international and domestic terrorism prosecutions and assess DOJ’s priorities and practices in this regard. This data will shed light on DOJ’s efforts to combat terrorism, including what activities DOJ considers to be terrorism, what charges are brought, and what sentences are sought. As set forth in the Request, these matters are the subject of intense policy debate and public interest. Applicants are leaders in their fields and have extensive experience studying terrorism and its relationship to American democracy. The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. Among its other goals is to preserve constitutional protection in the fight against terrorism. Professor Kurzman is on the faculty at the University of North Carolina at Chapel Hill and is a co-director of the [Carolina Center for the Study of the Middle East and Muslim Civilizations](#). He has written and published numerous books and articles on terrorism, democracy, and Islam.

In an e-mail dated February 6, 2018 (**Exhibit 2**, attached) the EOUSA informed Applicants that the final disposition of their Request was “Partial grant/partial denial” and provided a letter of the same date (“Response Letter”) (**Exhibit 3**, attached) explaining that determination. The letter, from Assistant Director FOIA/Privacy Unit, Kevin Krebs, of the EOUSA, DOJ, stated only that “The information you seek is located at the following website: http://www.usdoj.gov/usao/reading_room/data/CaseStats.htm.”¹

Applicants respectfully appeal this decision. First, to the extent the denial of the Request depended on the proposition that the information requested is already publicly available, that

¹ Applicants filed the Request on January 17, 2018, seeking: (1) disclosure of the above-described information; (2) expedited processing; and (3) a fee waiver. On January 24, 2018, BCJ’s request for expedited processing was denied with the sole explanation that “Data is available online.” (**Exhibit 4**, attached.) On February 1, 2018, BCJ’s request for a fee waiver was granted. (**Exhibit 5**, attached.) As noted above, the request was denied on February 6, 2018.

proposition is incorrect. Among other records not made public is the COURT NUMBER field that contains docket numbers. Second, the denial of the Request conflicts with the clear purposes of FOIA and is contrary to controlling precedent in the D.C. Circuit. Third, the denial of the Request conflicts with DOJ's own selective disclosure of subsets of this data.

First, the EOUSA explained its denial of the Request on the sole ground that the information requested is already publicly available. That is incorrect. Although the EOUSA does make certain fields from the LIONS database publicly available at the website cited in the Response Letter, it nonetheless withholds key fields from public disclosure. In particular, the publicly available data does not include the COURT NUMBER field that would provide docket information for terrorism-related cases. This omission is critical. Without docket information, there is no way to identify all publicly filed terrorism cases and thereby analyze in a systematic and accurate manner how DOJ categorizes conduct as domestic versus international terrorism, how it charges domestic and international terrorism offenses, where and in what types of terrorism cases it succeeds or fails to achieve convictions and guilty pleas, or whether the people charged with domestic and international terrorism-related offenses share certain characteristics—among other potential lines of inquiry.

Second, the disclosure of this information advances the core purpose of FOIA and is required under controlling D.C. Circuit precedent. As explained in the Request, Applicants are seeking this information in order to study the potential differences in the way DOJ handles domestic and international terrorism, the characteristics of the people targeted in domestic and international terrorism prosecutions, and the implications of that information on domestic and foreign policy. In other words, the Request is squarely about “what the[] government is up to,” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); see also *ACLU v. U.S. Dep’t of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011) (“*ACLU I*”). These are not matters of idle curiosity or of mere personal moment: terrorism is one of DOJ’s highest priorities²; DOJ’s terrorism-related activities absorb enormous levels of government resources³; and the information Applicants seek has direct implications for some of the most central policy questions of the day—for example, who to let in and keep out of our borders, how foreign policy decisions are likely to affect public safety, and how religion intersects with terrorism-related activities. While DOJ has disclosed some information regarding cases it has categorized as involving domestic or international terrorism, it has not provided systematic and complete access to the docket numbers for publicly filed cases. Obtaining the docket information for these cases is therefore particularly important. Without it, the public cannot meaningfully evaluate the relationship between terrorism and immigration, terrorism and Islam, the success or failure of DOJ’s anti-terrorism efforts, the kinds of conduct classified as terrorism, and the kinds of terrorism vigorously prosecuted by DOJ. The public deserves to know this information.

² *Fiscal Year 2018 Department of Justice Budget Request: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies, H. Comm. on Appropriations*, 114th Cong. (2017) (statement for the record of Rod J. Rosenstein, Deputy Att’y Gen.), available at <http://docs.house.gov/meetings/AP/AP19/20170613/105999/HHRG-115-AP19-Wstate-RosensteinR-20170613.PDF>.

³ See FY 2017 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION 4-16 (Feb. 2016), available at <https://www.justice.gov/jmd/file/821341/download> (requesting over \$3.5 billion of funding for the Counterterrorism/Counterintelligence decision unit).

It is DOJ's burden to demonstrate that such information is exempt from FOIA. *ACLU I*, 655 F.3d at 5. Applicants respectfully submit it cannot legitimately do so. Against the overwhelming public interest favoring disclosure, there is no legitimate basis to withhold the docket information for these cases. To the extent the EOUSA relies on the Vaughn index associated with the LIONS database (Exhibit 6, attached) to assert exemptions under 5 U.S.C. §§ 552(b)(6) and (b)(7)(C) for docket numbers of relevant prosecutions,⁴ those exemptions do not apply. FOIA exemptions 6 and 7(C) permit agencies to withhold certain information that, e.g., "could reasonably be expected to constitute an unwarranted invasion of personal privacy." See 5 U.S.C. §§ 552(b)(7)(C). Here, the information being withheld—public docket numbers of public prosecutions—poses no risk of an unwarranted invasion of personal privacy. This information is already public. The charges are already public. And the defendants in these prosecutions have already been exposed to whatever invasion of personal privacy is attendant with charges of terrorism-related offenses. By contrast, the release of docket information, while unlikely to affect the individual defendants, is critical to the public's ability to analyze and understand the way DOJ conducts terrorism-related prosecutions.

Under controlling D.C. Circuit precedent, this information must be released for any cases resulting in a conviction or guilty plea. In 2011, the D.C. Circuit held that, for prosecutions resulting in a conviction or guilty plea, *DOJ was required to disclose docket numbers* of cases in which defendants were subject to warrantless cell phone tracking—specifically rejecting the applicability of FOIA exemptions 6 and 7(C). *ACLU I*, 655 F.3d at 16. In so holding, the D.C. Circuit concluded that the disclosure of the docket numbers "would not compromise much more" than a "de minimis" privacy interest. *Id.* at 12. By contrast, it found a "significant public interest in disclosure" because the information "shed light on government conduct" and pertained to a "topic of considerable public interest." *Id.* That holding applies with equal force to our Request and precludes the assertion of FOIA exemptions 6 or 7(C) here. Indeed, if anything, the public interest favoring disclosure is stronger here in light of the extraordinary public interest in preventing terrorism, the enormous resources devoted to combatting terrorism, and the outsize effect that terrorism-related concerns have on other policies, including immigration, national security, and anti-discrimination policies.

Although the D.C. Circuit limited its holding in *ACLU I* to prosecutions that resulted in convictions or guilty pleas, here a proper weighing of a defendant's interest in privacy with the public interest in disclosure requires releasing all of the information requested, even with respect to defendants whose prosecutions terminated in dismissals or acquittals. In *ACLU v. U.S. Dep't of Justice*, 750 F.3d 927 (D.C. Cir. 2014) ("*ACLU IP*"), the D.C. Circuit held, over a dissent, that FOIA exemption 7(C) applied to permit DOJ to withhold the docket numbers of six cases of prosecutions, otherwise similar to those at issue in *ACLU I*, but which resulted in dismissal or acquittal. The decision in *ACLU II* noted the fact that the additional disclosure would only provide *six* additional data points on top of the **214** data points already released. The court determined that the defendants' interest in privacy outweighed the public interest in disclosing those six data points. See *id.* at 935; see also *id.* at 937 (Tatel, J., concurring) (writing separately to explain why the "prior disclosure [of 214 data points] has substantially reduced the value" of

⁴ The Vaughn index asserts additional exemptions for certain fields of data in cases where an investigation is ongoing or if the criminal case is under seal. Those exemptions do not apply to our Request, which only seeks data involving public charges.

disclosing the remaining six data points). The public interest in disclosure depended in part on the purpose of the request, which was to yield information about warrantless cell phone tracking and not about the characteristics of the prosecutions themselves.

The situation here is completely different than in *ACLU II*. Based on other LIONS data made public by DOJ, Applicants understand that over 650 terrorism-related prosecutions terminated without a conviction or guilty plea, as compared to a little over 3,100 that terminated in a conviction or guilty plea. On both an absolute (650 vs. 6) and relative basis (17% vs. 3%), those numbers alone mean the public interest in the disclosure of data from cases resulting in dismissal or acquittal is significantly higher here than in *ACLU II*.⁵ But the value is more than just a matter of numbers. Here, the different characteristics of terrorism-related cases resulting in convictions/pleas versus dismissals/acquittals is important to our understanding of how DOJ prosecutes those cases. And it is all the more critical to understand given the apparent difference between the LIONS data and other sources of data on federal convictions, which appear to report a significantly higher conviction rate across federal crimes generally (92% vs. 83%).⁶ The requested docket information is necessary to ascertain whether this discrepancy is due, for example, to different ways of counting dismissals/acquittals in the LIONS database, to a difference in the way DOJ prosecutes terrorism-related offenses, or to the relative merit of those prosecutions. The differences between the data in the LIONS database and other federal statistics only underscores the need for docket information to better understand that data. Without access to docket information for all terrorism cases, the public will be unable to systematically review and analyze the underlying cases and will thus be left with a potentially inaccurate and misleading sense of terrorism prosecutions. Consequently, even under the terms of *ACLU II*, DOJ cannot withhold docket information for public terrorism-related prosecutions, regardless of whether those prosecutions terminated in a conviction/plea or an acquittal/dismissal.

Third, DOJ's own treatment of the information requested is inconsistent with its determination to withhold docket information. DOJ has already selectively released much of the information over which it asserts a privacy exemption, but in a manner that precludes systematic study. For example, DOJ has periodically disclosed both the names and the docket numbers associated with unsealed *international* terrorism-related convictions.⁷ These disclosures clearly indicate that DOJ does not consider the privacy interests of defendants in international terrorism cases to warrant depriving the public of such critical data. There is no greater privacy interest for defendants in *domestic* terrorism-related cases than for defendants in international terrorism-related cases. Yet DOJ continues to withhold that information.

Moreover, releasing this data selectively makes the need for comprehensive data even greater, as it permits politicians to cite potentially misleading statistics without confutation. For

⁵ These figures are based on Applicant's own analysis of the publicly available data. To be certain that this analysis is correct, Applicants would require the release of docket information, as requested in this appeal.

⁶ The rate of acquittals/dismissals for federal prosecutions generally is based on Applicant's analysis of tables 2A and 2B of the FISCAL YEAR 2016 UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, *available at* <https://www.justice.gov/usao/page/file/988896/download>.

⁷ *See, e.g.*, DEP'T OF JUSTICE, NAT'L SECURITY DIV. CHART OF PUBLIC/UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS 9/11/01 – 12/31/15 (Aug. 26, 2016), *available at* <http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf>.

example, in support of his travel ban on people from predominantly Muslim countries, President Trump recently cited a DOJ and DHS report that purportedly “shows that nearly 3 in 4 individuals convicted of terrorism and terrorism-related charges are foreign-born.”⁸ But the report only covered *international* terrorism-related convictions.⁹ Until DOJ releases information for *domestic* terrorism-related offenses, opponents of President Trump’s policies cannot meaningfully evaluate the accuracy of his statements.

Because the public interest in disclosure of this information clearly outweighs any pertinent privacy interest, DOJ should disclose the records identified in the Request. **In particular, DOJ should make public the COURT NUMBER field in the LIONS database for all terrorism-related cases¹⁰ in which there is a publicly filed charge and/or promptly produce the information for all such cases listed in LIONS to Applicants.** Such a disclosure is not only required under FOIA and controlling D.C. Circuit precedent, but is also consistent with DOJ’s own conduct, will advance public understanding of this critical area of law enforcement, and will promote the interests of DOJ itself by avoiding unnecessary litigation.

We thank you for your consideration of this appeal. Pursuant to 28 C.F.R. § 16.5(e), we seek expedited processing of this appeal in light of the urgency to inform the public about this critical aspect of the federal government’s activity and in light of Applicants’ mission to disseminate information on these topics. In the event that expedited processing is not granted, we nonetheless expect a response regarding this appeal within twenty days, as required by 5 U.S.C. § 552(a)(6)(A)(ii).

⁸ See @realDonaldTrump, TWITTER (Jan. 16, 2018, 3:19 PM), <https://twitter.com/realDonaldTrump/status/953406423177859073>.

⁹ DEP’T OF HOMELAND SEC. & DEP’T OF JUSTICE, EXECUTIVE ORDER 13780: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES INITIAL SECTION 11 REPORT 2 (Jan. 2018), *available at* <https://www.justice.gov/opa/press-release/file/1026436/download>.

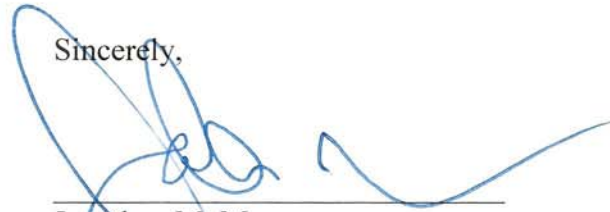
¹⁰ As set forth in the Request, the terrorism-related categories are:

- 071 International Terrorism Incidents Which Impact U.S.
- 072 Domestic Terrorism
- 073 Terrorism Related Hoaxes
- 076 Terrorism Financing
- 077 Export Enforcement Terrorism-Related
- 07H Critical Infrastructure Protection.

WACHTELL, LIPTON, ROSEN & KATZ

If you have any questions or concerns, please do not hesitate to contact us at the email address or telephone numbers indicated below.

Sincerely,



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Mischa Feldstein
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Exhibit 5

From: OIP-NoReply@usdoj.gov
To: [Feldstein, Mischa A.](mailto:Feldstein.Mischa.A)
Subject: FOIA Expedited Processing Disposition Reached for DOJ-AP-2018-002909
Date: Wednesday, February 28, 2018 8:02:54 AM

***** EXTERNAL EMAIL *****

Your request for Expedited Processing for the FOIA request DOJ-AP-2018-002909 has been denied. Additional details for this request are as follows:

- **Request Created on: 02/22/2018**
- **Expedited Disposition Reason: This acknowledges receipt of your appeal to this Office. I note that your appeal is assigned Appeal No. DOJ-AP-2018-002909. Your request for expedited handling of your appeal is denied because you have not shown an "urgency to inform the public" about an actual or alleged federal government activity and because you have failed to demonstrate that your client is "primarily engaged in disseminating information." 28 C.F.R. § 16.5(e)(1)(ii) (2017). While your client's request clearly concerns an important government activity, you have not demonstrated a time-sensitive need for these records. As to the dissemination requirement, your clients are an academic and a civil rights advocacy/research entity rather than primarily information dissemination organizations. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with Sean O'Neill by calling (202) 514-3642. If you are dissatisfied with my action on your appeal for expedited treatment of your request, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(6)(E)(iii).**
- **Request Long Description: Please see attached letter.**

Exhibit 6

From: OIP-NoReply@usdoj.gov
To: [Feldstein, Mischa A.](#)
Subject: Final Disposition, Appeal DOJ-AP-2018-002909
Date: Monday, June 4, 2018 4:06:23 PM
Attachments: [Feldstein, Michael A., DOJ-AP-2018-002909, EOUSA.pdf](#)

***** EXTERNAL EMAIL *****

DOJ-AP-2018-002909 has been processed with the following final disposition: Affirmed on Appeal.



U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

Michael A. Feldstein, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
mafeldstein@wlrk.com

Re: Appeal No. DOJ-AP-2018-002909
Request No. FOIA-2018-001589
CDT:ADF

VIA: FOIAonline

Dear Mr. Feldstein:

You appealed on behalf of the Brennan Center for Justice at the NYU School of Law and Professor Charles Kurzman from the action of the Executive Office for United States Attorneys (EOUSA) on their Freedom of Information Act request for access to certain information maintained in the Legal Information Office Network System concerning terrorism. I note that your appeal concerns EOUSA's withholding of the court number field from the publicly available data.

After carefully considering your appeal, I am affirming EOUSA's action on your clients' request. The FOIA provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. EOUSA properly withheld this information in full because it is protected from disclosure under the FOIA pursuant to:

5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

Please be advised that for each of these exemptions, it is reasonably foreseeable that disclosure of the information withheld would harm the interests protected by these exemptions.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and

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analyzed your appeal, your clients' underlying request, and the action of EOUSA in response to your clients' request.

If your clients are dissatisfied with my action on your appeal, the FOIA permits them to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your clients' right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

Sincerely,

5/31/2018

X 

Sean R. O'Neill

Chief, Administrative Appeals Staff

Signed by: OIP