



March 10, 2017

Arnetta Mallory, FOIA Initiatives Coordinator
National Security Division
U.S. Department of Justice



RE: FOIA Request to U.S. Department of Justice and relevant components regarding “resistance” against Joint Terrorism Task Force, U.S. Attorney’s Office for the Western District of Texas, and/or local Texas law enforcement terror and/or fraud related investigation, prosecution and/or arrest of Iraqi subject who claimed to have participated in attacks against American troops as an insurgent and who was known to have given false name in his refugee application

Dear Ms. Mallory:

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 certain records relating to “resistance” efforts by identified United States governmental agencies and offices to the investigation, arrest, and/or prosecution of a known Iraqi insurgent fighter (the “subject”) who had cleared refugee vetting procedures and entered the United States.

¹ 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.



To the best of Requestor's knowledge and belief, the following agencies and/or components are implicated in this FOIA Request:

1. U.S. Department of Justice (DOJ);
2. DOJ Office of the Attorney General (OAG);
3. DOJ Office of the Deputy Attorney General (ODAG)
4. DOJ National Security Division (NSD);
5. DOJ NSD Counterterrorism Section;
6. U.S. Attorney's Office (USAO) for the Western District of Texas;
7. San Antonio, Texas Office location for USAO for the Western District of Texas;
8. Federal Bureau of Investigation (FBI);
9. FBI San Antonio Division; and/or,
10. FBI Joint Terrorism Task Force (JTTF) connected to the USAO for the Western District of Texas, possibly the "Central Texas Joint Terrorism Task Force"

Background

Pursuant to DOJ FOIA regulation 28 C.F.R. §16.3(b), this Background addresses "the date, title or name, author, recipient, subject matter of the record[s]" requested, to the extent known.

According to Fox News:

"The Senate Homeland Security and Governmental Affairs Committee has asked Attorney General Jeff Sessions to find out why the terror suspect's pending arrest was allegedly spiked just over a week before the election."² Senator Ron Johnson sent a letter to DOJ, which, according to reports, included the following:

"When [Joint Terrorism Task Force] and the U.S. Attorney's office for the Western District of Texas sought to prosecute this refugee, the local law enforcement and prosecutors allegedly 'met resistance' from officials within the National Security Division's Counter Terrorism section in Washington DC."³

Incredibly, "[t]he 'resistance' allegedly occurred a few weeks before the 2016 election, and local authorities believed the lack of progress in this case was handled inadequately," Johnson wrote."⁴ According to the report, "The suspect is an Iraqi man who had entered the U.S. under a false name. His real name was not released. . . . At some point, the Iraqi entered the U.S. through the refugee program. His activities in the U.S. triggered an investigation by JTTF members, who planned to charge him with visa fraud while they investigated possible further charges."⁵

² William Lajeunesse and Malia Zimmerman, *Iraqi Insurgent Fighter Allegedly Lied About Identity, Got Through 'Extreme' Vetting*, FoxNews.com (Mar. 8, 2017), <http://www.foxnews.com/us/2017/03/08/lawmakers-probe-claim-doj-aided-iraqi-terror-suspect-days-before-november-election.html>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The report continued: “JTTF confirmed through U.S. Special Forces who encountered the suspect during operations that he claimed to have participated in attacks against American troops as an insurgent.”⁶

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 recording, 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) (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.

For purposes of this Request, the term “DOJ official” includes, but is not limited to, any person who is (1) employed by or on behalf of the U.S. Department of Justice or Federal Bureau of Investigation in any capacity; (2) contracted for services by or on behalf of the U.S. Department of Justice or Federal Bureau of Investigation in any capacity; or (3) appointed by the President of the United States to serve in any capacity at the U.S. Department of Justice, 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 September 1, 2016, to the date this Request is processed.

Pursuant to FOIA, 5 U.S.C. § 552, ACLJ hereby requests the following records:

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by **then-Attorney General Loretta Lynch and/or her staff** referencing, connected to, or regarding in any way a message, direction, instruction, order, insistence, request, suggestion, statement of direct or indirect pressure of any kind, and/or any other statement or words concerning not prosecuting, arresting, and/or pursuing any other law

⁶ *Id.*

enforcement action against the Iraqi Subject described 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, DOJ electronic mail or message accounts, non-DOJ electronic mail or message accounts, personal electronic mail or message accounts, DOJ servers, non-DOJ 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 **Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security Mary B. McCord and/or her staff** referencing, connected to, or regarding in any way a message, direction, instruction, order, insistence, request, suggestion, statement of direct or indirect pressure of any kind, and/or any other statement or words concerning not prosecuting, arresting, and/or pursuing any other law enforcement action against the Iraqi Subject described 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, DOJ electronic mail or message accounts, non-DOJ electronic mail or message accounts, personal electronic mail or message accounts, DOJ servers, non-DOJ 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-Deputy Attorney General Sally Q. Yates and/or her staff** referencing, connected to, or regarding in any way a message, direction, instruction, order, insistence, request, suggestion, statement of direct or indirect pressure of any kind, and/or any other statement or words concerning not prosecuting, arresting, and/or pursuing any other law enforcement action against the Iraqi Subject described 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, DOJ electronic mail or message accounts, non-DOJ electronic mail or message accounts, personal electronic mail or message accounts, DOJ servers, non-DOJ 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 **the chief of the DOJ NSD Counterterrorism Section and/or any other DOJ employee or official serving or working within the DOJ NSD Counterterrorism Section** referencing, connected to, or regarding in any way a message,

direction, instruction, order, insistence, request, suggestion, statement of direct or indirect pressure of any kind, and/or any other statement or words concerning not prosecuting, arresting, and/or pursuing any other law enforcement action against the Iraqi Subject described 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, DOJ electronic mail or message accounts, non-DOJ electronic mail or message accounts, personal electronic mail or message accounts, DOJ servers, non-DOJ 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, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by **any person serving or working within**

1. **DOJ;**
2. **DOJ Office of the Attorney General (OAG);**
3. **DOJ Office of the Deputy Attorney General (ODAG)**
4. **DOJ NSD;**
5. **DOJ NSD Counterterrorism Section;**
6. **U.S. Attorney's Office (USAO) for the Western District of Texas;**
7. **USAO for the Western District of Texas located in San Antonio, TX**
8. **FBI;**
9. **FBI San Antonio Division; and/or,**
10. **FBI JTTF connected to the USAO for the Western District of Texas, possibly the "Central Texas Joint Terrorism Task Force";**

that indicate the person(s) who directed, instructed, ordered, insisted, requested, suggested, applied direct or indirect pressure of any kind, and/or said or communicated in any other way that the investigation, prosecution and/or arrest of the Iraqi Subject addressed in the Background section above be delayed, interfered with, and/or discontinued, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, DOJ electronic mail or message accounts, non-DOJ electronic mail or message accounts, personal electronic mail or message accounts, DOJ servers, non-DOJ 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.

REQUESTOR DOES NOT SEEK CRIMINAL- AND/OR TERRORISM-RELATED INVESTIGATION RECORDS OF THE IRAQI SUBJECT, BUT DOES REQUEST THAT ANY REASONABLY SEGREGABLE NON-EXEMPT RECORDS BE PRODUCED, EVEN IF REDACTED AS APPROPRIATE.

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.⁷

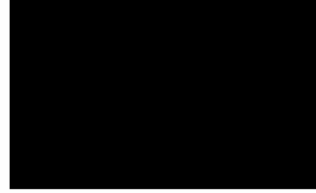

As such, if this Request is denied in whole or in part, ACLJ requests that, within the time requirements imposed by FOIA, you support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to a *Vaughn* Index.

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.

⁷PRESIDENT 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.

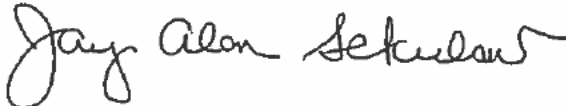
Thank you for your prompt consideration of this Request. Please furnish all applicable records and direct any responses to:

Jay Alan Sekulow, Chief Counsel
Colby M. May, Senior Counsel
Craig L. Parshall, Special Counsel
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice



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

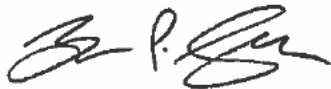
Respectfully submitted,



Jay Alan Sekulow
Chief Counsel



Colby M. May
Senior Counsel



Benjamin P. Sisney
Senior Litigation Counsel

cc: FOIA/PA Mail Referral Unit, Department of Justice
Office of Public Affairs, Department of Justice
Assistant Director, FOIA/Privacy Staff, Executive Office for United States Attorneys
Department of Justice
Office of Information Policy, Department of Justice
Records Management Division, Federal Bureau of Investigation,
Department of Justice



March 10, 2017

Arnetta Mallory, FOIA Initiatives Coordinator
National Security Division
U.S. Department of Justice



RE: FOIA Request to U.S. Department of Justice and relevant components regarding pressure on Joint Terrorism Taskforce and local Texas law enforcement to abandon Terror Prosecution and/or arrest of subject who claimed to have participated in attacks against American troops as an insurgent and who was known to have given false name in his refugee application

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 ("FOIA") Request (hereinafter "Request") to the Federal Bureau of Investigation ("FBI").

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 security and 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 include a “representative of the news media,” § (a)(4)(A)(ii)(II), and/or “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,” *id.*, 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 Fee Waiver Standards Set Forth Under DOJ Regulations Promulgated Under FOIA.

Under 28 C.F.R. § 16.10(c)(1)(i), “[r]equests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees.” And, “[n]o search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.” § 16.10(d). Moreover:

Records responsive to a request shall be furnished without charge or at a reduced rate below the rate established under paragraph (c) of this section, where a component determines, based on all available information, that the requester has demonstrated that:

- (i) Disclosure of the requested 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
- (ii) Disclosure of the information is not primarily in the commercial interest of the requester.

§ 16.10(k)(1).

The DOJ/FBI considers the following four factors in determining “whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government”:

- (i) The subject of the request must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.
- (ii) Disclosure of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public’s understanding.
- (iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area as well as the requester’s ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, components shall not make value judgments about whether the information at issue is "important" enough to be made public.

§ 16.10(k)(2)(i)-(iv).

The DOJ/FBI considers the following two factors in determining "whether disclosure of the requested information is 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.

§ 16.10(k)(3). 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 Request meets the DOJ/FBI's factors as listed above, qualifying the ACLJ for a waiver of fees, as set forth below.

§ 16.10(k)(2)(i): The subject of the Request concerns identifiable operations and activities of the Federal Government.

The ACLJ's Request seeks information and records specifically concerning U.S. Department of Justice (DOJ) (specifically, DOJ Office of the Attorney General (OAG), DOJ Office of the Deputy Attorney General (ODAG), DOJ National Security Division (NSD), and NSD Counterterrorism Section, and FBI) communication with the FBI's Joint Terrorism Task Force (JTTF), U.S. Attorney Office for Western District of Texas, and/or local law enforcement relating to the "resistance" met by these offices to the prosecution of a known Iraqi insurgent fighter (the "Subject") who had cleared refugee vetting procedures and entered the United States, and/or resulting in the cancellation of that Subject's pending arrest. Thus, all participation in such communication and/or briefings by the DOJ/FBI and its personnel, and all other DOJ/FBI actions related to this issue are relevant to shed light on these identifiable activities of the government.

§ 16.10(k)(2)(ii): Disclosure of the requested records will be meaningfully informative about government operations or activities and will be “likely to contribute” to an increased public understanding of those operations or activities.

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 DOJ/FBI. The Request will reveal records indicating why DOJ/FBI officials made certain decisions resulting in the cancellation or delay of an investigation, prosecution and/or arrest of a known terror subject who gave a false name in his refugee application. Significant is the fact that this decision to delay the investigation, prosecution and/or arrest apparently occurred just days before the U.S. Presidential election where the issues of refugee vetting and terrorism were major issues. 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 current or former government officials accountable if it is discovered that DOJ and/or FBI officials engaged in activities and/or communications and/or arrived at decisions contrary to the security and interests of the American public.

§ 16.10(k)(2)(iii): The disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The requester has expertise in the subject area as well as the ability and intention to effectively convey information to the public. It shall be presumed that a representative of the news media will satisfy this consideration.

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 security, responsible refugee vetting and the defeat of ISIS and related threats. The ACLJ is qualified to analyze and assess the adequacy and propriety of DOJ/FBI’s actions and decisions at issue.

The ACLJ intends to publicly 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.

§ 16.10(k)(2)(iv): The public's understanding of the subject in question will be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether the information at issue is "important" enough to be made public.

Releasing the records responsive to the ACLJ's Request 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 whether the DOJ/FBI complied with applicable law and regulations in delaying the arrest of a known terror subject. The records requested will provide authentic and authoritative sources for what actually happened, who was involved, and the reasons underlying these governmental activities that allowed a known terror subject remain unprosecuted and free to roam our streets.

§ 16.10(k)(3)(i): The requester has no commercial interest, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure.

As explained and described throughout this Memorandum, the ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law and the public dissemination of information by way of its numerous media platforms. The information sought by the ACLJ is in furtherance of its not-for-profit mission statement. The ACLJ has no commercial interest in the information sought or its dissemination thereof. This is especially so because the ACLJ cannot operate for a commercial purpose under its grant of 501(c)(3) tax-exempt status.

§ 16.10(k)(3)(ii): A waiver or reduction of fees is justified because the requester had no commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.

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 DOJ's attendant regulation, 28 C.F.R. § 16.5(e). As defined by statute, a "compelling need" is one "with respect to a request made by a person primarily engaged in disseminating information," where there is an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). According to 28 C.F.R. § 16.5(e)(1):

(e) Expedited processing. (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve:

....

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

....

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

§§ 16.5(e)(1)(ii), (iv). The regulation further provides:

A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. As a matter of administrative discretion, a component may waive the formal certification requirement.

§ 16.5(e)(3).

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).

Clearly, the ACLJ satisfies the requirement of being one "whose primary professional activity or occupation is information dissemination." 28 C.F.R. § 16.5(e)(3).

Also pursuant to the DOJ/FBI regulation, the requester "must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally." *Id.*

The ACLJ's Request qualifies as compelling under the second statutory definition above, as well as under the DOJ/FBI regulation, because the ACLJ has an urgency to inform the public about United States Government activity in connection with its decision to not apprehend a terror suspect. The requested information has a particular value that will be lost if

not disseminated quickly because issues related to this topic are currently being investigated by the media and the Senate Homeland Security and Government Affairs Committee, and are thus currently before the public. As one district court 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)).

The Request is based upon an urgency to inform the American public because a delay in review of the information would compromise the integrity of the public’s confidence in the nation’s law enforcement offices in connection with the decision – made just days before the 2016 U.S. Presidential election – to not prosecute or arrest a known terror subject known to have given a false name in his refugee application. The actions of some of the highest-ranking officials in the United States Government are now under close scrutiny with regard to the DOJ and FBI’s decisions concerning the decisions at issue. As referenced in the Request, which is incorporated by reference as if fully set forth herein, the press is currently investigating and beginning to report 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 not arrest suspected terrorists known to have given a false name to gain access to our nation as a refugee. These concerns are also heightened by the fact that those U.S. Government officials who made the controversial decisions were potentially influenced by political motives rather than by their duty to protect U.S. citizens from harm. The requested documents must be released *now* so that the American people can decide for themselves whether current or former government officials’ decisions were acceptable.

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

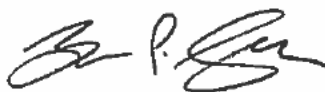
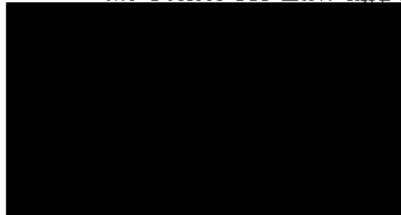
Accordingly, ACLJ respectfully submits a request for waiver of fees and expedited processing of its contemporaneously submitted FOIA Request.

III. CERTIFICATION

In satisfaction of certification requirements under 5 U.S.C. § 552(a)(6)(E)(vi) and corresponding regulations, and in support thereof, the ACLJ incorporates by reference herein all relevant facts and information as stated in the ACLJ's FOIA Request 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



Benjamin P. Sisney
Senior Litigation Counsel
American Center for Law and Justice



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.