

January 24, 2018

FOIA Officers, Houlton Sector
U.S. Customs & Border Protection
96 Calais Road
Hodgdon, Maine 04730

FOIA Officer
U.S. Customs & Border Protection
1300 Pennsylvania Avenue, NW Room 3.3D
Washington, D.C. 20229

Re: Request Under Freedom of Information Act
(Expedited Processing & Fee Waiver/Limitation Requested)

To Whom It May Concern:

The American Civil Liberties Union of Maine and the American Civil Liberties Union of Maine Foundation (together, “ACLU of Maine”)¹ submit this Freedom of Information Act (“FOIA”) request (“Request”) for records about U.S. Customs and Border Protection (“CBP”) investigations into the citizenship of bus passengers departing the Bangor Transportation Center. On January 16, 2018, we were informed that passengers boarding a Concord Trailways bus were asked whether they were United States citizens. By this letter, which constitutes a request pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, and the relevant implementing regulations, *see* 6 C.F.R. § 5 *et seq.*, the ACLU of Maine seeks information regarding CBP’s bus passenger investigations within the purview of the Houlton sector office. Through this request, the ACLU aims to facilitate the public’s indispensable role in checking the power of our public officials.

For the purposes of this Request, “Records” are collectively defined to include, but are not limited to: text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message); e-mails;

¹ The American Civil Liberties Union of Maine is a non-profit, 501(c)(4) membership organizations that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union of Maine Foundation is a separate 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about the civil rights and civil liberties implications of pending and proposed state and federal legislation, provide analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

images, video, and audio recorded on cell phones; voicemail messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; and memoranda of understanding. The request is limited to records created after January 1, 2017.

The ACLU of Maine seeks release of the following:

1. Records containing descriptions of CBP operations at Bangor Transportation Center or Portland Transportation Center, including the dates, times, and exact locations at which CBP agents were deployed; and the number, titles, and job ranks of CBP officers involved on each date and at each location;
2. Records from CBP or other federal agencies authorizing the operations at Bangor Transportation Center or Portland Transportation Center, or addressing the legality of stops, questioning, seizures, or searches conducted by CBP;
3. Records of Maine State or local law enforcement agency involvement with CBP, including, but not limited to, participating in any secondary screening of bus passengers;
4. Records sent by CBP to any federal, state, or local government agencies, including but not limited to U.S. Immigration and Customs Enforcement, the Federal Bureau of Investigation, U.S. Department of Homeland Security, and Maine State Police, relating to the purpose, methods, conduct, or results from the citizenship inquiries;
5. With regard to persons subjected to additional questioning beyond the initial citizenship inquiry, records showing: a) the total number of people questioned; b) the country of origin of people questioned; c) the race and/or ethnicity of people questioned; d) the criminal or immigration charges filed against the person questioned, if applicable; e) the location and duration of the person's detention, if applicable; f) the date of the person's voluntary departure from the United States, if applicable; g) the date of the person's removal from the United States, if applicable.

We request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of our Request be conducted. This includes the personal email accounts and work phones of all employees and former employees who may have sent or received emails or text messages regarding the subject matter of this Request, as well as all institutional, shared, group, duty, task force, and all other joint and/or multi-user email accounts and work phones which may have been utilized by each such employee or former employee.

Additionally, for each relevant email account identified, all storage areas must be searched, including the inbox "folder" (and all subfolders therein), sent folder, deleted folder, and all relevant archive files.

If any records responsive or potentially responsive to the Request have been destroyed, our Request includes, but is not limited to, any and all records relating or

referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

As required by the relevant case law, the agency should follow any leads it discovers during the conduct of its searches and should perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU of Maine requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU of Maine requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

Application for Expedited Processing

The ACLU of Maine requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).² There is a "compelling need" for these records, as defined in the statute, because the information requested is "urgen[tly]" needed by an organization 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)(II).

A. *The ACLU of Maine is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU of Maine is "primarily engaged in disseminating information" within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).³ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information").⁴

The ACLU of Maine regularly issues press releases to call attention to documents

² *See also* 6 C.F.R. § 5.5(e)(1).

³ *See also* 6 C.F.R. § 5.5(e)(1)(ii).

⁴ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are "primarily engaged in disseminating information." *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. U.S. Dep't of Defense*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

obtained through FOIA requests, as well as other breaking news, and ACLU of Maine attorneys are interviewed frequently for news stories about documents released through ACLU of Maine FOIA requests.

Similarly, the ACLU of Maine publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public. The ACLU of Maine also regularly publishes “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU of Maine publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclumaine.org/en/NEWS>.

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).⁵ Specifically, as discussed in Part I, *supra*, the requested records seek to inform the public about the CBP’s current practice of suspicionless questioning of bus passengers.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

Application for Waiver or Limitation of Fees

The ACLU of Maine requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure 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.” 5 U.S.C. § 552(a)(4)(A)(iii).⁶ The ACLU of Maine also requests a waiver of search fees on the grounds that the ACLU of Maine qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁵ *See also* 6 C.F.R. § 5.5(e)(1)(ii).

⁶ *See also* 6 C.F.R. § 5.11(k).

- A. *The Request 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 ACLU of Maine.*

The ACLU of Maine is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU of Maine as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters." (quotation marks omitted)).

- B. *The ACLU of Maine is a representative of the news media and the records are not sought for commercial use.*

The ACLU of Maine also requests a waiver of search fees on the grounds that the ACLU of Maine qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The ACLU of Maine meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that 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);⁷ *see also Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *Serv. Women's Action Network v. U.S. Dep't of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that "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"); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is therefore a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information."

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU of Maine's to be "representatives of the news media" as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10-15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54

⁷ *See also* 6 C.F.R. § 5.11(b)(6).

(D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).⁸

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU of Maine as a “representative of the news media.”

* * *

Pursuant to applicable statutes and regulations, the ACLU of Maine expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 6 C.F.R. § 5.5(e)(4).


If the Request is denied in whole or in part, the ACLU of Maine asks that you justify all deletions by reference to specific FOIA exemptions. The ACLU of Maine expects the release of all segregable portions of otherwise exempt material. The ACLU of Maine reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

ACLU of Maine
c/o Zachary Heiden
121 Middle Street, Suite 200
Portland, Maine 04101

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

Respectfully,



Zachary L. Heiden, Legal Director

⁸ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.