

Exhibit 1

December 8, 2022



National Office
125 Broad Street,
18th Floor
New York, NY 10004
aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

Stephanie Carr
Chief, OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, D.C. 20301-1155
Fax: (571) 372-0500
Email: whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Central Intelligence Agency
Information and Privacy Coordinator
Washington, D.C. 20505
Fax: (703) 613-3007

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy,
Office of Attorney General,
and Office of Deputy
Attorney General

Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001
Fax: (202) 514-1009

Arnetta Mallory
FOIA Initiatives Coordinator
National Security Division
Department of Justice
Room 6150
950 Pennsylvania Avenue,
N.W. Washington, D.C. 20530-0001
Email: nsdfoia@usdoj.gov

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Department of Justice
Room 5511
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Email: usdoj-officeoflegalcounsel@usdoj.gov

Office of Information Programs and Services
A/GIS/IPS/RL
U.S. Department of State
Washington, D.C. 20522-8100
Fax: (202) 261-8579

Re: Request Under Freedom of Information Act Concerning the Biden Administration’s Presidential Policy Memorandum (“PPM”) and Memoranda Related to the President’s ‘Authorities to Use Force’ under Domestic and International Law (Expedited Processing & Fee Waiver/Limitation Requested)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for the Biden administration’s rules governing the use of lethal force and capture operations abroad, known as the “Presidential Policy Memorandum” (“PPM”), and any memoranda related to the president’s ‘authorities to use force’ under domestic and international law.

I. Background

In 2002, the U.S. government began conducting lethal strikes outside recognized battlefields abroad, including through the use of armed drones. What began with a single drone strike in Yemen² burgeoned into the U.S.’s full-fledged programmatic use of lethal strikes outside of recognized war zones in multiple parts of the world. Successive presidents have unilaterally claimed the authority to launch strikes without Congressional authorization in countries including Pakistan, Yemen, Libya, Somalia, Niger, and elsewhere, raising

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization 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.

² See *The War in Yemen*, New America, <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-war-in-yemen/> (last visited Dec. 7, 2022).

profoundly important constitutional separation of powers concerns.³ Administrations of both parties have now carried out many hundreds of strikes under this program, killing thousands of civilians in the process.⁴ Most recently, the U.S. has intensified its use of lethal strikes in Somalia, launching 24 alleged strikes in the country during 2022 alone.⁵

For years, the executive branch operated its lethal strike program without formal rules and outside the public eye.⁶ In May 2013, after years of promises to provide greater transparency and stricter safeguards for the program,⁷ the

³ See Hina Shamsi, *Trump Pledged to End ‘Endless Wars.’ His Executive Order Suggests Just the Opposite.*, Wash. Post (Mar. 12, 2019), <https://www.washingtonpost.com/opinions/2019/03/12/trump-pledged-end-endless-wars-his-executive-order-suggests-just-opposite/>; see also U.S. Nat’l Sec. Council, Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (2018), <https://www.justsecurity.org/wp-content/uploads/2018/03/Legal-and-Policy-Frameworks-on-US-Use-of-Force.pdf>; U.S. Nat’l Sec. Council, Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, (2020), <https://s3.documentcloud.org/documents/21639589/2021-1264-report.pdf>; Alan Blinder & Thomas Gibbons-Neff, *‘I Cry Every Day’: Families of Soldiers Killed in Niger in 2017 Are Still Waiting for Answers*, N.Y. Times (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/us/us-soldiers-killed-niger.html>.

⁴ See, e.g., *US Forces in Somalia*, Airwars, <https://airwars.org/conflict/us-forces-in-somalia/> (last visited Dec. 7, 2022) (tracking civilians casualties resulting from U.S. drone strikes in Somalia); Paul D. Shinkman, *‘Areas of Active Hostilities’: Trump’s Troubling Increases to Obama’s Wars*, U.S. News (May 16, 2017), <https://www.usnews.com/news/world/articles/2017-05-16/areas-of-active-hostilities-trumps-troubling-increases-to-obamas-wars>; Jessica Purkiss & Jack Serie, *Obama’s Covert Drone War in Numbers: Ten Times More Strikes than Bush*, Bureau of Investigative Journalism (Jan. 17, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

⁵ The Biden administration has publicly acknowledged 12 strikes in Somalia, but an independent non-governmental monitor has attributed 10 additional strikes in Somalia to the United States as well. *Strikes by US President in Somalia*, Airwars, <https://airwars.org/conflict-data/strikes-by-us-president-in-somalia/> (last visited Dec. 7, 2022) (tracking live statistics of the war in Somalia).

⁶ See, e.g., Scott Shane, *Election Spurred a Move to Codify US. Drone Policy*, N.Y. Times (Nov. 24, 2012), <https://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html>.

⁷ See President Barack Obama, Speech on Drone Policy at the National Defense University (May 23, 2013), <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html> (stating that President Obama’s “administration has worked vigorously to establish a framework that governs [the United States’] use of force against terrorists – insisting

Obama administration issued the Presidential Policy Guidance (“PPG”).⁸ Hallmarks of the PPG included high-level vetting for individual strikes and certain constraints, including limiting lethal action to individuals deemed by the executive branch to pose a “continuing, imminent threat to U.S. persons.”⁹ However, the PPG undermined those protections by expansively defining use-of-force standards¹⁰ and by permitting various exceptions for what the administration deemed “extraordinary cases.”¹¹

In 2017, the Trump administration replaced the PPG with a set of rules called the Policies, Standards, and Procedures (“PSP”), which scaled back several of the PPG’s protections for civilians.¹² In particular, the PSP ended the already broad “continuing, imminent threat to U.S. persons” requirement, loosened standards for ensuring the targeted individual was actually present, and delegated authority to regional military commands and agencies without higher-level bureaucratic or presidential review.¹³ With the PSP in place, the Trump administration more than tripled the number of strikes in Yemen and Somalia carried out the year before.¹⁴

upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance”).

⁸ White House, Presidential Policy Guidance (2013), <https://www.aclu.org/foia-document/presidential-policy-guidance?redirect=node/58033> [hereinafter “PPG”].

⁹ *Id.*

¹⁰ See Dep’t of Just., Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force (2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf>.

¹¹ PPG, *supra* note 8, at 17.

¹² White House, Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets (2021), <https://www.aclu.org/foia-document/psp-foia-document-april-30-2021> [hereinafter “PSP”]. See also Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times (Sept. 21, 2017), <https://nyti.ms/2jPwvnB>.

¹³ See Hina Shamsi, *Trump’s Secret Rules for Drone Strikes and Presidents’ Unchecked License to Kill*, Just Sec. (May 3, 2021), <https://www.justsecurity.org/75980/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill>; Charlie Savage, *Will Congress Ever Limit the Forever Expanding 9/11 War?*, N.Y. Times (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html>.

¹⁴ Jessica Purkiss, *Trump’s First Year in Numbers: Strikes Triple in Yemen and Somalia*, Bureau of Investigative Journalism (Jan. 19, 2018), <https://www.thebureauinvestigates.com/stories/2018-01-19/strikes-in-somalia-and-yemen-triple-in-trumps-first-year-in-office>.

While the PPG and PSP were initially secretly adopted and administered, previous administrations eventually released redacted versions of their lethal force rules in response to FOIA litigation brought by the ACLU and the New York Times.¹⁵

At the beginning of his term, President Biden initiated a review of the PSP and the government’s lethal-force policies, and he reportedly imposed temporary limits on the use of drone strikes outside of war zones, including by requiring White House approval for strikes instead of the PSP’s delegation of authority to regional commands and other less-senior officials.¹⁶

On October 7, 2022, the New York Times reported and a senior official acknowledged that President Biden had recently signed a final policy and an accompanying counterterrorism strategy memorandum to formalize a new set of policy rules to supplant the Trump administration’s PSP rules.¹⁷ The White House also later publicly notified Congress of these changes.¹⁸ These new rules—contained in the Presidential Policy Memorandum (“PPM”)—now govern the United States’ use of lethal force outside of conventional war zones. The PPM applies in countries like Somalia, Yemen, and—following the September 2021 U.S. withdrawal of forces—Afghanistan.

Although the PPM remains classified, senior administration officials have anonymously described the new rules to the press in ways that suggest they are the same as or similar to the PPG and PSP rules that previous administrations made public.¹⁹ All three sets of rules—the PPG, PSP, and PPM—attempt to regulate the use of lethal force outside of recognized war zones. Like the PPG, the PPM applies to individuals located “outside areas of

¹⁵ Press Release, ACLU, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/press-releases/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, ACLU, ACLU Comment on Release of Trump Administration Lethal Force Rules (May 1, 2021), <https://www.aclu.org/press-releases/aclu-comment-release-trump-administration-lethal-force-rules>.

¹⁶ Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away From War Zones*, N.Y. Times (Mar. 3, 2021), <https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html>.

¹⁷ Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. Times (Oct. 10, 2022), <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html>.

¹⁸ White House, Notification of a Change to the Legal and Policy Frameworks for the United States’ Use of Military Force and Related National Security Operations (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/11/1264-Report-Nov-15-2022-unclassification.pdf> [hereinafter “White House Notification”].

¹⁹ *Id.*

active hostilities” and takes into account “consent” to the use of force by the governments of the countries in which it applies.²⁰

Also like the PPG and PSP, the PPM creates a bureaucracy to govern the decision-making process, delineates specific standards—with exceptions also included—for use of force or capture, and includes legal and policy justifications.

With respect to the bureaucratic decision making process that governs the use of lethal force abroad, the New York Times reported that the PPM represents a return to the PPG’s “more centralized control of decisions about targeted killing operations.”²¹ Unlike the PSP, which generally gave military commanders greater “flexibility” to approve targets,²² the PPG implemented an interagency review process before a target could be approved.²³ Similarly, a senior administration official described the PPM nomination process to journalist Spencer Ackerman as akin to the PPG’s “disposition matrix,” in which the nomination “filters up from the national-security bureaucracy” to senior officials and then either to the defense secretary or the CIA director before reaching the president.²⁴

The PPM also reportedly restores some of the minimal safeguards for civilians that the PPG introduced and the PSP loosened or abandoned.²⁵ In particular, the PPM appears to reinstate the PPG’s controversial requirement that strikes may be conducted if an individual poses a “continuing, imminent threat to U.S. persons” and when capture is deemed infeasible.²⁶ The PPM also reportedly mirrors the PPG’s “near certainty” standards for when a target is present,²⁷ and that the target is assessed to be a member of a terrorist group.²⁸

²⁰ *Id.*; PPG, *supra* note 8, at 2.

²¹ White House Notification, *supra* note 18; PPG, *supra* note 8.

²² PSP, *supra* note 12 (“The following policy guidance provides the United States Government with the flexibility needed to carry out CT direct action operations abroad effectively”).

²³ PPG, *supra* note 8, at 5 (detailing “Approval Process of Certain Captures and the Long-Term Disposition of Certain Suspects”).

²⁴ Spencer Ackerman, *Joe Biden’s Disposition Matrix*, Forever Wars (Oct. 31, 2022), <https://foreverwars.ghost.io/joe-bidens-disposition-matrix-extrajudicial-drone-murder>.

²⁵ Savage, *supra* note 17.

²⁶ *Id.*

²⁷ White House Notification, *supra* note 18 (detailing “approval process of certain captures and the long-term disposition of certain suspects”).

²⁸ Savage, *supra* note 17.

(The PSP, by contrast, reportedly only required a lower standard of “reasonable certainty” for the presence of a terrorism suspect.²⁹) For civilians, the PPM reportedly maintains the PPG’s “near certainty” requirement that no civilians would be harmed in the attack—a standard that the PSP also maintained, while permitting it to be loosened for civilian adult males.³⁰ Like the PPG, the PPM also reportedly does not authorize signature strikes, where the U.S. government was authorized to kill targets matching certain behavioral profiles even when their individual identities were unknown.³¹

Like both sets of rules that came before it, the PPM contains exceptions and loopholes that are reflected in public justifications and actions. Notably, the PPM reportedly authorizes a different lethal force approval process—e.g., not requiring White House approval— and standards for strikes conducted in “collective self-defense” of U.S. or partner forces, a novel and controversial justification that the military has frequently and publicly relied upon in Somalia.³² For example, as recently as November 4, 2022, the United States Africa Command reported that it “conducted a collective self-defense strike” against Al Shabaab fighters near Cadale, Somalia.³³ Even though Somalia is “outside an area of active hostilities” like other countries covered by the PPM, the PPM applies looser “collective self-defense” rules there.³⁴ The Somali government has already recognized the application of these new PPM rules, and has reportedly requested that the Biden administration further expand its definition of “collective self-defense” to allow U.S. military operations against

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

²⁹ *Id.* Although portions of the PSP were made public, the Biden administration redacted Section 2B, the provision most likely detailing the targeting requirement. PSP, *supra* note 12, at 4.

³⁰ *Id.*

³¹ *Id.*; see also Ackerman, *supra* note 24.

³² Oona A. Hathaway & Luke Hartig, *Still at War: The United States in Somalia*, Just Sec. (Mar. 31, 2022), <https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia>; Ackerman, *supra* note 24.

³³ Press Release, U.S. Afr. Command Pub. Aff., Federal Government of Somalia Engages Terrorists with Support from U.S. Forces, (Nov. 5, 2022), <https://www.africom.mil/pressrelease/34826/federal-government-of-somalia-engages-terrorists-with-support-from-us-forces>.

³⁴ See Sarah Harrison, *What the White House Use of Force Policy Means for the War in Somalia*, Just Sec. (Oct. 20, 2022), <https://www.justsecurity.org/83642/white-house-use-of-force-policy-and-somalia>.

groups of Al Shabab militants, who might pose a threat and regardless of if they are presently firing at Somali forces.³⁵

Disappointingly, the Biden administration continues to shroud the government’s lethal force rules in secrecy, despite promising to “promot[e] greater transparency and accountability” in its National Security Strategy.³⁶ The Biden administration continues to classify the PPM when previous administrations made these very rules public. As a result, the Biden administration exacerbates the U.S.’s already secretive and unaccountable use of lethal force abroad—in countries where Congress did not authorize it.

Over four administrations, the executive branch’s use of lethal force abroad has exacted an appalling toll on Black, Brown, and Muslim civilians in multiple parts of the world. Despite these grave human rights consequences, the U.S. campaign of lethal strikes has largely evolved without meaningful Congressional or public oversight. The public has a right to know the rules yielding these disastrous consequences. To provide the American public with information about the Biden administration’s lethal strike policies, the ACLU seeks the release of the Presidential Policy Memorandum.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

II. Requested Records

The ACLU seeks the release of:

1. The Biden administration’s rules governing the government’s use of lethal force abroad, known as the “Presidential Policy Memorandum” and any documents attached thereto, as well as any summaries or descriptions of the Presidential Policy Memorandum.³⁷
2. Any memoranda since January 1, 2016 concerning the president’s ‘authorities to use force’ under domestic and international law,

³⁵ Charlie Savage et al., *Somalia Asks U.S. to Step Up Drone Strikes Against Qaeda-Linked Fighters*, N.Y. Times (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/us/politics/somalia-shabab-us-strikes.html>.

³⁶ White House, National Security Strategy (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

³⁷ The ACLU’s FOIA request should be construed to include the record containing the Biden administration’s rules governing the use of lethal force as described in Part I, even if the final version of this document bears a different title or form than that specifically requested here.

including in particular the asserted authority to use force in ‘collective self-defense.’³⁸

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU 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.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).³⁹ 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 is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within

³⁸ *See* White House Notification, *supra* 18; Press Release, U.S. Dep’t of Def., Statement from Pentagon Press Secretary Peter Cook on Airstrike in Somalia (March 7, 2016), <https://www.defense.gov/News/Releases/Release/Article/687305/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia/> (invoking ‘collective self-defense’ for the U.S.’s African Union Mission in Somalia (AMISOM) partners); Letter from Tim Kaine, U.S. Senator, to Honorable James Mattis, Sec. of Def., U.S. Dep’t of Def. (Oct. 2, 2018) (available at <https://www.scribd.com/document/390037794/Kaine-Presses-Trump-Administration-on-the-Expansive-Use-of-Collective-Self-Defense-to-Justify-Military-Action-That-Bypasses-Congress>) (citing to and expressing concerns about Defense Department’s explanation of ‘self-defense’ and ‘collective self-defense’ justifications for use of force in Niger); Press Release, U.S. Afr. Command Pub. Aff., Federal Government of Somalia Combats Terrorists with Support from U.S. Forces (Nov. 11, 2022), <https://www.africom.mil/pressrelease/34827/federal-government-of-somalia-combats-terrorists-with-support-from-us-forces> (press release noting that the U.S.’s most recent strike in Somalia was “conducted [in] collective self-defense strike against the al-Shabaab terrorists who were attacking the Somali forces”).

³⁹ *See also* 32 C.F.R. § 286.8(e) (DOD); 32 C.F.R. § 1900.34 (CIA); 28 C.F.R. § 16.5(e) (DOJ); 22 C.F.R. § 171.11(f) (DOS); 5 C.F.R. § 1303.10(d) (OMB).

the meaning of the statute. *See id.*⁴⁰ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. Dep't of Just.*, 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”).⁴¹

The ACLU regularly publishes the *ACLU* magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to 4.8 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 6.6 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,⁴²

⁴⁰ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 32 C.F.R. § 1900.34(c)(2) (CIA); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 22 C.F.R. § 171.11(f)(2) (DOS); 5 C.F.R. § 1303.10(d)(1)(ii) (OMB).

⁴¹ 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 Conf. on Civ. Rts. v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Priv. Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

⁴² *See, e.g.*, Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans' Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, Privacy International Demand Government Disclose Nature and Extent of Hacking Activities (Dec. 21, 2018), <https://www.aclu.org/press-releases/aclu-privacy-international-demand-government-disclose-nature-and-extent-hacking>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, ACLU Demands CIA Records on Campaign Supporting Haspel Nomination (May 4, 2018), <https://www.aclu.org/news/aclu-demands-cia-records-campaign-supporting-haspel-nomination>; Press Release, ACLU, Advocates File FOIA Request For ICE Documents on Detention of Pregnant Women (May 3, 2018), <https://www.aclu.org/news/aclu-advocates-file-foia-request-ice-documents-detention-pregnant-women>

and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁴³

Similarly, the ACLU 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 and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.⁴⁴ The ACLU also

www.aclu.org/news/advocates-file-foia-request-ice-documents-detention-pregnant-women; Press Release, ACLU, Civil Rights Organizations Demand Police Reform Documents from Justice Department (Jan. 4, 2018), <https://www.aclu.org/news/civil-rights-organizations-demand-police-reform-documents-justice-department>; Press Release, ACLU, ACLU Files Lawsuits Demanding Local Documents on Implementation of Muslim Ban (Apr. 12, 2017), <https://www.aclu.org/news/aclu-files-lawsuits-demanding-local-documents-implementation-trump-muslim-ban>; Press Release, ACLU, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

⁴³ See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/telecom-nsa-domestic-calling-records.html> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill (Mar. 21, 2019), <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); Cora Currier, *TSA’s Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept (Feb. 8, 2017), <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program> (quoting ACLU attorney Hugh Handeyside); Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, Associated Press (Jan. 18, 2017), <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post (Aug. 6, 2016), <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC News (June 15, 2016), <http://abcn.ws/2jy40d3> (quoting ACLU attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nathan Freed Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR (Dec. 9, 2015), <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

⁴⁴ See, e.g., ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site*, ACLU (Nov. 22, 2016), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter*

regularly publishes books, “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 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.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU’s website also serves as a clearinghouse for news about ACLU cases, including analysis about case developments and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.⁴⁵

Most, ACLU (Aug. 8, 2016), <https://www.aclu.org/news/national-security/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights*, ACLU (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333*, ACLU (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

⁴⁵ *See, e.g., ACLU v. ODNI – FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU (Apr. 2, 2019), <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ – FOIA Lawsuit Seeking Information on Federal Agencies’ Surveillance of Social Media*, ACLU (Mar. 26, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ – FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU (Apr. 23, 2019), <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; *Executive Order 12,333 – FOIA Lawsuit*, ACLU (Dec. 3, 2018), <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; *ACLU v. United States*, ACLU (Nov. 1, 2021), <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance> (ACLU motions requesting public access to FISA court rulings on government surveillance); *ACLU v. DOJ – FOIA Lawsuit Demanding OLC Opinion “Common Commercial Service Agreements”*, ACLU (Apr. 6, 2016), <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; *FOIA Request for Justice Department Policy Memos*

The ACLU website includes many features on information obtained through the FOIA. The ACLU maintains an online “Torture Database,” a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of its contents relating to government policies on rendition, detention, and interrogation.⁴⁶ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.⁴⁷

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).⁴⁸ Specifically, they pertain to the Biden administration’s rules governing the use of lethal force

on GPS Location Tracking, ACLU (Mar. 12, 2014), <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; *Florida Stingray FOIA*, ACLU (Feb. 22, 2015), <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

⁴⁶ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org> (last visited Dec. 7, 2022); *see also Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents> (last visited Dec. 7, 2022); *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database> (last visited Dec. 7, 2022); *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database> (last visited Dec. 7, 2022).

⁴⁷ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf; *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), https://www.aclu.org/files/pdfs/natsec/faafoia_20101129/20101129Summary.pdf; *Statistics on NSL’s Produced by Department of Defense*, ACLU, https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf (last visited Dec. 7, 2022).

⁴⁸ *See also* 32 C.F.R. § 286.8(e)(1)(i)(B) (DOD); 32 C.F.R. § 1900.34(c)(2) (CIA); 28 C.F.R. § 16.5(e)(1)(ii) (DOJ); 22 C.F.R. § 171.11(f)(2) (DOS); 5 C.F.R. § 1303.10(d)(1)(ii) (OMB).

abroad. As discussed in Part I, *supra*, these rules are the subject of widespread public controversy and media attention.⁴⁹

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

IV. Application for Waiver or Limitation of Fees

The ACLU 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).⁵⁰ The ACLU also requests a waiver of search fees on the grounds that the ACLU 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).

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.*

As discussed above, media accounts underscore the substantial public interest in the record sought through this Request. Given the ongoing and widespread media attention to this issue, the record sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about the Biden administration's rules governing the use of lethal force abroad is publicly available—and because the Biden administration has thus far refused to publicly release the Presidential Policy Memorandum—the record sought is certain to contribute significantly to

⁴⁹ See *supra* nn. 2–35; see also Luke Hartig, *The Biden Drone Playbook: The Elusive Promise of Restrained Counterterrorism*, Just Sec. (Oct. 17, 2022), <https://www.justsecurity.org/83586/assessing-bidens-counterterrorism-rules/>; Bonnie Kristian, *Biden Can't Have It Both Ways on Drone Strikes*, Reason (Oct. 11, 2022), <https://reason.com/2022/10/11/biden-cant-have-it-both-ways-on-drone-strikes/>; Brian Finucane, *Assessing Biden's New Policy Framework for Counterterrorism Direct Action*, Just Sec. (Oct. 11, 2022), <https://www.justsecurity.org/83501/assessing-bidens-new-policy-framework-for-counterterrorism-direct-action/>; Katie Bo Lillis, *Biden Finalizes New Rules for US Drone Strikes*, CNN (Oct. 7, 2022), <https://www.cnn.com/2022/10/07/politics/drone-strikes-counterterrorism-white-house-biden-new-rules/>; Luke Hartig, *Biden's Drone Policy Review: Recommendations for a Reset*, Just Sec. (Mar. 5, 2021), <https://www.justsecurity.org/75189/bidens-drone-policy-review-recommendations-for-a-reset/>; Jen Patja Howell, *The Lawfare Podcast: The Biden Administration's New Policy on Drone Strikes*, Lawfare (Oct. 21, 2022), <https://www.lawfareblog.com/lawfare-podcast-biden-administrations-new-policy-drone-strikes>.

⁵⁰ See also 32 C.F.R. § 286.12(l)(1) (DOD); 32 C.F.R. § 1900.13(b)(2) (CIA); 28 C.F.R. § 16.10(k)(2) (DOJ); 22 C.F.R. § 171.16(a) (DOS); 5 C.F.R. § 1303.70 (OMB).

the public's understanding.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU 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 FOIA. *See Jud. 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 is a representative of the news media and the records are not sought for commercial use.

The ACLU also requests a waiver of search fees on the grounds that the ACLU 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).⁵¹ The ACLU 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)⁵²; *see also Nat'l Sec. Archive v. Dep't of Def.*, 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. Dep't of Def.*, 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. Dep't of Just.*, 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.”

⁵¹ *See also* 32 C.F.R. § 286.12 (l)(2)(ii)(b) (DOD); 32 C.F.R. § 1900.13(i)(2) (CIA); 28 C.F.R. § 16.10(k)(2)(ii)–(iii) (DOJ); 22 C.F.R. § 171.16(a)(iii) (DOS); 5 C.F.R. § 1303.50(c) (OMB).

⁵² *See also* 32 C.F.R. § 286.12(b)(6) (DOD); 32 C.F.R. § 1900.02(h)(3) (CIA); 28 C.F.R. § 16.10(b)(6) (DOJ); 22 C.F.R. § 171.14(b)(5)(ii)(C) (DOS); 5 C.F.R. § 1303.30(j) (OMB).

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU'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. Priv. 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; *Jud. Watch, Inc. v. Dep't of Just.*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).⁵³

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a "representative of the news media."⁵⁴ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 32 C.F.R. § 286.8(e)(1) (DOD); 32 C.F.R. § 1900.34(c)

⁵³ 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 and public education activities. *See, e.g., Elec. Priv. Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conf. on Civ. Rts.*, 404 F. Supp. 2d at 260; *Jud. Watch, Inc.*, 133 F. Supp. 2d at 53–54.

⁵⁴ The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-waiver requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies' removal of "extremist" content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

(CIA); 28 C.F.R. § 16.5(e)(4) (DOJ); 22 C.F.R. § 171.11(f)(4) (DOS); 5 C.F.R. § 1303.10(d)(4) (OMB).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU 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:

Shaiba Rather
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004
T: 212.549.2500
F: 212.549.2654
srather@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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).

Sincerely,

/s/ Shaiba Rather

Shaiba Rather
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, New York 10004
T: 212.549.2500
F: 212.549.2654
srather@aclu.org