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December 9, 2013

Carmen M. Ortiz
United States Attorney for the District of Massachusetts
John Joseph Moakley
United States Federal Courthouse
1 Courthouse Way, Suite 9200
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Dear U.S. Attorney Ortiz:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552 submitted on behalf of the American Civil Liberties Union Foundation of Massachusetts (ACLUM). We are seeking public records regarding the Joint Terrorism Task Force that operates in Massachusetts (Massachusetts JTTF). For the reasons stated below, we also request expedited processing and a waiver of fees.

I. Documents Requested

This request seeks information about how the Massachusetts JTTF functions, how its authority is divided and shared, what safeguards are in place to ensure the civil liberties of those whom it targets, and the number and type of investigations conducted out of Massachusetts. The request also seeks specific information about the Massachusetts JTTF's involvement in the investigation into and death of a suspect, Ibragim Todashev. In particular, we respectfully request the following documents:

A. Structure of the Massachusetts JTTF

1. Records indicating the Massachusetts JTTF's purpose and organization, its membership and command structure, and its relationship with the Federal Bureau of

Investigation and the U.S. Attorney's Office for the District of Massachusetts.

2. Records indicating the number of FBI personnel assigned to the Massachusetts JTTF and, of that number, how many are (a) field agents or investigators, (b) intelligence analysts, or (c) support personnel.

3. Records identifying each federal, state, and local agency other than the FBI that participates in the Massachusetts JTTF, including records that show how many agents from each such agency are assigned to the Massachusetts JTTF.

4. All memoranda of understanding, contracts, or agreements between the Massachusetts JTTF and (a) any federal agency, (b) the Commonwealth of Massachusetts or any department, agency, authority, or official of the Commonwealth, and (c) any Massachusetts city or town or any department, agency, or official of a Massachusetts city or town addressing the assignment of personnel to the Massachusetts JTTF.

5. Records showing the number of Massachusetts JTTF personnel whose responsibilities require them to be physically present for any period of time at the Massachusetts Commonwealth Fusion Center or the Boston Regional Intelligence Center.

6. Records describing the structure of or protocols for information sharing between the Massachusetts JTTF and the Boston Regional Intelligence Center, the Commonwealth Fusion Center, the Massachusetts Bay Transportation Authority, or the Massachusetts Department of Transportation.

7. Documents showing the budget of the Massachusetts JTTF, including sources of funding from 2010 to present.

B. FBI Boston Field Office Investigations

1. All documents showing how many assessments, preliminary investigations, and full investigations the FBI Boston Field Office has conducted since 2011 and how many of those assessments/investigations led to arrests, prosecutions or convictions. If available, please provide records that break down the investigations by category, such as domestic/international terrorism, drugs, RICO, and gangs.

2. All documents showing, as of the date that the agency identifies the responsive records, the number of FBI investigations that are open, the number that are

assessments, preliminary investigations, and full investigations and the category of each open investigation.

C. Massachusetts JTTF involvement with Ibragim Todashev

1. All documents relating to Ibragim Todashev.

2. All documents relating to any investigation into the involvement of members of the Massachusetts JTTF in the death of Ibragim Todashev.

II. Request for expedited processing

ACLUM requests expedited processing under 5 U.S.C. § 552(a)(6) and 28 C.F.R. § 16.5(d). The FOIA statute and DOJ regulations allow for expedited processing when the records are urgently needed to inform the public about actual or alleged government activity and when the information relates to a matter of widespread media interest in which there exist questions about the government's integrity that affect public confidence. 5 U.S.C. § 552(a)(6); 28 C.F.R. § 16.5(d)(1)(ii) and (iv). Furthermore, ACLUM is an organization that regularly disseminates information that can help the public judge the government's integrity. In order to receive expedited processing for an issue of urgent concern, the requester must be "primarily engaged in disseminating information." *See* 28 C.F.R. §16.5(d)(1)(ii).

Those conditions are met here. There is an urgent need to inform the public about the workings of the Massachusetts JTTF, an issue that has been of widespread and exceptional media and public interest and raises questions about the government's integrity. Additionally, ACLUM is an organization primarily engaged in disseminating information.

A. There is an urgent need to inform the public about questions surrounding the Massachusetts JTTF.

There is an urgent need to inform the public about the subjects of this records request—namely, the organization and conduct of the Massachusetts JTTF, and its involvement in the investigation and death of Ibragim Todashev—because these records concern timely, newsworthy, and important questions about recent government conduct and overall government integrity. Moreover, very little information about these subjects is

otherwise available to the public. Thus, without the information sought, the public's ability to judge the actions of the Massachusetts JTTF could be severely impaired.

1. The Boston Marathon bombings and Ibragim Todashev

In the wake of the Boston Marathon bombings, cooperation between state and federal authorities has come under public scrutiny. Local news outlets, including *The Boston Globe* and *Boston Magazine*, have devoted considerable recent coverage to law enforcement and intelligence efforts following and preceding the bombings.[1] Soon after the bombings, reports surfaced that the FBI had received warnings about and had conducted an investigation into alleged bomber Tamerlan Tsarnaev, but had not shared that information with local agencies.[2] Former Boston Police Commissioner Ed Davis testified before Congress that a detective he had assigned to the JTTF was completely unaware of the investigation, adding to the public concerns about the functions of JTTFs.[3] At Congressional hearings, members of Congress and the media additionally expressed concern over the information-sharing relationship between federal law enforcement agencies and the state and local agencies.[4]

The lack of information surrounding the Massachusetts JTTF's involvement in the Boston Marathon bombing investigations has led to many unanswered questions and affected the public's confidence in federal-local law enforcement collaboration. Without

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[1] *See, e.g.*, Susan Zalkind, *Coakley Hasn't Followed Through on Promise to Families of Waltham Triple-Murder Victims*, Boston Magazine, Oct. 3, 2013, *available at* http://www.bostonmagazine.com/news/blog/2013/10/03/martha-coakley-promise-waltham-triple-murder-victim-families/; Bryan Bender, *Keating Wants FBI to Offer Answers on Bombings,* The Boston Globe, July 31, 2013, *available at* http://www.bostonglobe.com/news/politics/2013/07/31/keating-demands-more-answers-from-new-fbi-chief-boston-bombings/lTFYR6jw5Sc7KG3N0wcnJP/story.html; Alicia A. Caldwell, *Ed Davis: Boston Police Not Told FBI Had Tamerlan Tsarnaev Warning*, May 9, 2013, http://boston.cbslocal.com/2013/05/09/ed-davis-to-testify-at-congressional-hearing-on-boston-marathon-bombings/.

[2] Joe Johns, *CNN's Q and A with FBI Director Robert Mueller*, CNN, Aug. 22, 2013, http://www.cnn.com/2013/08/22/politics/fbi-mueller-interview/?hpt=po_c2.

[3] Alicia A. Caldwell, *Ed Davis: Boston Police Not Told FBI Had Tamerlan Tsarnaev Warning*, May 9, 2013, http://boston.cbslocal.com/2013/05/09/ed-davis-to-testify-at-congressional-hearing-on-boston-marathon-bombings/.

[4] Matt Viser, *Tensions Emerge Over Lack of Tsarnaev Information Shared Between FBI, Local Authorities*, The Boston Globe, May 9, 2013, *available at* http://www.boston.com/politicalintelligence/2013/05/09/tensions-emerge-over-lack-tsarnaev-information-shared-between-fbi-local-authorities/c0JqORZNBkQJomxbODmwVK/story.html (reporting that the Boston JTTF has "representatives from the Boston Police Department").

disclosure of the records sought, the public will remain in the dark about the structure and operations of the Massachusetts JTTF's involvement in the actions surrounding the Boston Marathon bombings, and will not be able to assess whether the program is effective or subject to sufficient limits and oversight.

Specifically, the request seeks information relating to the Massachusetts JTTF's involvement in the death of Ibragim Todashev, an associate of alleged Boston Marathon bomber Tamerlan Tsarnaev. Mr. Todashev was shot and killed while being questioned by an FBI agent and two members of the Massachusetts State Police, who likely were members of the Massachusetts JTTF.[5] Todashev's death and his connection to an unsolved triple-murder in Waltham, Massachusetts—to which Tsarnaev has also been linked—has led to considerable media and public interest, and have left many open questions.[6]

2. Inter-agency cooperation and the JTTFs

In addition to lacking sufficient information about the Massachusetts JTTF's possible involvement in the Todashev investigation, the public also lacks sufficient information about the Massachusetts JTTF more generally. This public records request seeks to address that problem.

For more than two decades, the federal government has implemented or expanded programs that have enhanced coordination among federal, state and local law enforcement agencies. The Joint Terrorism Task Forces are a crucial part of this expansion. Created in some districts as early as 1990, the JTTFs' mission is to "detect and investigate terrorists and terrorist groups and prevent them from carrying out terrorist acts directed against the United States."[7] Operating from the FBI's field office, the JTTF has primary responsibility for terrorism investigations and is the "operational unit that conducts field investigations of actual or potential terrorism threats."[8]

Nationwide collaboration between the FBI and local law enforcement has been the subject of sustained media interest for several years and has led to questions about its

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[5] Michael S. Schmidt, William K. Rashbaum and Richard A. Oppel Jr., *Deadly End to F.B.I. Queries on Tsarnaev and a Triple Killing*, N.Y. Times, May 22, 2013.

[6] *See, e.g.*, Zalkind, *supra* n.1; Hilary Sargent, *Asked and (un)answered: The Todashev saga continues.* Boston.com, Oct. 24. 2013, *available at* http://www.boston.com/blogs/news/local/chartgirl/2013/10/asked_and_unanswered_the_todashev_saga_continues.html.

[7] *The Department of Justice's Terrorism Task Forces,* U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, Report No. I-2005-007, June 2005, http://www.justice.gov/oig/reports/plus/e0507/final.pdf (last accessed Nov. 26, 2013).

[8] *Id.*

breadth and effectiveness.[9] For example, the 2008 updates to the FBI's Domestic Investigations Operations Guidelines (DIOG) received much media attention.[10] The guidelines, which relaxed the requirements to open investigations on individuals and groups, relate directly to the functioning of the JTTFs. The *New York Times* recently reported that during 2009-2011, the bureau opened 82,325 assessments of people and groups searching for signs of wrongdoing.[11] Agents closed out most of the assessments without finding information that justified a more intensive inquiry. In 2011, the Massachusetts JTTF alone performed 1,000 assessments.[12]

The high number of assessments relative to the number that developed into more intensive investigations raises civil liberties concerns because the FBI retains the data it collects about targets, even if the investigation leads nowhere. Mike German, a former FBI agent who now works for the ACLU, said, "[t]hese are investigations against completely innocent people that are now bound up within the F.B.I.'s intelligence system forever. Is that the best way for the F.B.I. to use its resources?"[13] In contrast, others have criticized the lack of coordination between the Massachusetts JTTF and local law enforcement as creating a threat to public safety.[14]

Discussion of JTTFs has reached Congress as well. Government officials and non-governmental advocates have testified before numerous bodies of the U.S. Congress regarding the workings and effectiveness of the JTTFs and, more broadly, the sharing of information between local, state and federal agencies.[15]

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[9] *See, e.g.*, Eric Schmitt, *Surveillance Effort Draws Civil Liberties Concern,* N.Y. Times, Apr. 28, 2009; Martine Powers, *Police Accused of Spying on Hub Antiwar Groups: No Links to Terror or Crime Apparent*, The Boston Globe, Oct. 18, 2012, at B1; Torin Monahan, "The Future of Security? Surveillance Operations at Homeland Sec. Fusion Centers," *Social Justice*, Vol. 37, No. 2, pg. 120, (2010).

[10] http://www.privacysos.org/sites/all/files/DIOG.pdf (last accessed Nov. 26, 2013). *See also* Kade Crockford, *The FBI can do what?!*, *Privacy SOS blog*, at http://privacysos.org/degraded_standards (last accessed Nov. 26, 2013).

[11] Charlie Savage, *F.B.I. Focusing on Security Over Ordinary Crime*, N.Y. Times, Aug. 23, 2011, at http://www.nytimes.com/2011/08/24/us/24fbi.html?_r=0.

[12] *See, e.g.*, Viser, *supra* n.4.

[13] Charlie Savage, *F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Show*, N.Y. Times, Mar. 26, 2011, at http://www.nytimes.com/2011/03/27/us/27fbi.html.

[14] *See, e.g.*, Viser, *supra* n.4 (reporting that the Boston JTTF has "representatives from the Boston Police Department").

[15] *See e.g., Eight Years After 9/11: Confronting Terrorist Threat to Homeland: Hearing Before Senate Comm. On Homeland Security,* 111th Cong. (Oct. 1, 2009) (testimony of Janet Napolitano, Sec. Dep't of Homeland Security); *Strategies for Terrorism Information Sharing, Hearing Before Senate Judiciary Comm.*, 111th Cong. (Apr. 21, 2009) (testimony of Caroline Frederickson, Director, ACLU Washington Legislative Office); Robert O'Harrow Jr., *DHS 'Fusion Centers' Portrayed as Pools of*

Despite public questions as to the effectiveness of the JTTFs, the task forces operate largely in secret. Little is known about their basic mechanics, their cost, the number and type of investigations they perform, or their track record. This request seeks documents that can inform public debate about this significant government program.

B. ACLUM is "primarily engaged in disseminating information."

In order to receive expedited processing for an issue of urgent concern, the requester must be "primarily engaged in disseminating information." 28 C.F.R. §16.5(d)(1)(ii). Gathering and disseminating current information to the public is a critical and substantial component of ACLUM's mission and work.

ACLUM, a non-profit, non-partisan organization with over 18,000 members and supporters across Massachusetts is dedicated to the principles of liberty and equality. As the Massachusetts affiliate of the national ACLU, a non-profit, non-partisan organization with over 500,000 members nationwide, ACLUM distributes information within and outside of Massachusetts.

ACLUM publishes newsletters, news briefings, reports and other materials that are disseminated to the public.[16] These materials are widely available to everyone, including tax-exempt organizations, journalists, students, faculty, and other interested individuals at no cost. ACLUM also disseminates information through its website (www.aclum.org), a widely read blog (http://www.privacysos.org), posts on social media sites such as Facebook and Twitter, and public speaking engagements.[17] ACLUM's web postings address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to the issues addressed by ACLUM, including features on information obtained through public records.[18]

The national ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website serves as a clearinghouse for news about ACLU issues, as well as analysis about case developments, and an archive of case-related documents. Through these pages, the ACLU provides the public with educational

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Ineptitude, Civil Liberties Intrusions, Wash. Post, Oct. 2, 2012; James Risen, *Criticism of Centers in Fight on Terror*, N.Y. Times, Oct. 3, 2012, at A17; Shaun Waterman, *Lawmakers: FBI Stonewalling on Tsarnaev*, Wash. Times, Jul. 11, 2013; Michael T. McCaul & Peter T. King, *Majority Staff Report on The National Network of Fusion Centers*, H.R. Comm. on Homeland Sec., July, 2013.

[16] *See* Exhibits 1-4.

[17] *See* Exhibits 5-11.

[18] *See, e.g.*, www.aclum.org/policing_dissent; www.aclum.org/ice.

material about civil liberties issues, recent news about related issues, analyses of Congressional or executive branch action, government documents obtained through FOIA, and in-depth analytic and educational multi-media features.[19]

An example of an ACLU feature on information obtained through the FOIA is the "Torture FOIA" webpage, https://www.aclu.org/accountability-torture, which contains commentary about the ACLU's FOIA request relating to the treatment of prisoners in Afghanistan, Guantanamo and Iraq, analysis of the documents released by the government, press releases, and an advanced search engine that allows interested individuals to sift through the 100,000 pages of documents obtained through FOIA.

Courts have found organizations with similar missions and information-dissemination activities to be "primarily engaged in disseminating information." *See, e.g., Electronic Frontier Foundation v. Office of the Director of Nat. Intelligence,* 542 F. Supp. 2d 1181, 1183 (N.D. Cal. 2008) (Electronic Frontier Foundation); *Leadership Conference on Civil Rights v. Gonzales,* 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (Leadership Conference on Civil Rights); *ACLU v. Dep't of Justice,* 321 F. Supp. 2d at 30 n.5 (D.D.C. 2004) (Electronic Privacy Information Center).

ACLUM plans to analyze and disseminate to the public the information gathered through this request at no cost.

III. Application for a Waiver or Limitation of Fees

ACLUM is entitled to a fee waiver or limitation of fees under the FOIA statute and Department of Justice Regulations for two reasons. First, release of the records requested is in the public interest and not in any commercial interest of the requester. U.S.C. § 552 (4)(A)(iii); 28 CFR § 16.11(k)(1)(i) and (ii). Second, the requester qualifies as a

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[19] For example, the ACLU's website about national security letters ("NSLs") includes: an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases; links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to commentary on NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSL; myths and facts documents; and links to information and analysis of related issues. *See* https://www.aclu.org/national-security-technology-and-liberty/national-security-letters.

representative of the news media. 5 U.S.C. § 552(a)(4)(A)(ii)(III); 28 C.F.R. § 16.11(a)(b)(1)(6).

A. The release of records is in the public interest.

Under the FOIA statute and DOJ regulations, documents shall be provided free of charge or at a reduced rate if the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and the information is not primarily in the commercial interest of the requester. 5 U.S.C. § 552 (4)(A)(iii); 28 CFR § 16.11(k)(1)(i) and (ii).

This request aims at furthering the public's understanding of government activity, namely the workings of the Massachusetts JTTF. As discussed above, there is substantial media and public interest in the workings of the MA JTTF, yet little information is publicly available. *See supra* Part II.A. The release of the requested records would provide previously-unknown information that would allow the public to better debate this important government function.

Moreover, as a non-profit organization, ACLUM has no commercial interest in the information sought. In the past, ACLUM and the national ACLU have disclosed documents obtained through FOIA free of charge and without limits.[20] Any information obtained as a result of this FOIA request will be made available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending 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.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act").

B. ACLUM is a "representative of the news media" as defined in the statute and regulations.

Under FOIA and DOJ regulations, search and review fees shall not be charged to "representatives of the news media" 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.11(d)(1). ACLUM meets the statutory and regulatory definitions of a "representative of the news media" because it "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); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5

[20] *See, e.g.*, www.aclum.org/ice; www.aclum.org/alpr.

(finding the non-profit public interest group to be "primarily engaged in disseminating information").

ACLUM is a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information." *See Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA). ACLUM disseminates information through many channels, including its websites, blogs, press releases, reports, newsletters, news briefings, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. *See supra*, part II.B. As Senator Leahy said during a debate about FOIA's fee-waiving provisions: "[A]ny person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986).

On account of the factors discussed above, agencies such as DHS, DOJ and TSA have recently waived fees for ACLUM requests. For example, citing ACLUM's statement that it would disseminate to the public certain records requested from the FBI, the Section Chief of the FBI's Records/Information Dissemination Section granted ACLUM a fee waiver in 2012.[21] Similarly, the national ACLU and other state ACLU affiliates regularly receive fee waivers on account of these factors.[22]

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[21] See Exhibit 12

[22] See Exhibit 13. For example, June 2011 (National Security Division of the Department of Justice); October 2010 (Department of the Navy); January 2009 (CIA); March 2009 (State Department); December 2008 (Department of Justice); November 2006 (Department of Health and Human Services); May 2005 (United States Department of Commerce); March 2005, April 2007, June 2006, February 2006, October 2003 (Department of State). Lastly, the ACLU of Washington recently was held to be a "representative of the news media." *ACLU of Wash. v. Dep't of Justice*, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011).

IV. Conclusion

We look forward to your reply to the Request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i).

Thank you for your prompt attention to this matter.

Sincerely,

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