



**-- FREEDOM OF INFORMATION APPEAL --**

January 27, 2010

Director, Office of Information Policy  
U.S. Dep't of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, DC 20530-0001

**Re: Appeal of FOIA Request Nos. 1141750-00 through 1141771-00**

Dear Sir or Madam,

This letter constitutes an appeal pursuant to 6 C.F.R. § 5.9 of the determination made on January 12, 2010 in response to request numbers 1141750-00 through 1141771-00. These requests were made jointly by the American Civil Liberties Union Foundation of Massachusetts (ACLUM) and Political Research Associates (PRA) on December 30, 2009.

Specifically, this is an appeal of the decisions to 1) deny expedited processing and 2) deny a fee waiver. The issue addressed by the request is of urgent public concern and the joint requesters meet the statutory requirements for a fee waiver.

The December 30th request letter, which included 24 specific requests for documents, sought information about the functions of the FBI Joint Terrorism Task Force and the Anti-Terrorism Advisory Council in Massachusetts. Over the past nine years, the federal government has implemented or expanded various programs that have resulted in an unprecedented degree of information sharing between federal and state law enforcement agencies and in the increased federalization of law enforcement activities, particularly in the field of anti-terrorism. Notwithstanding the scale of these changes, little information is publicly available about how these cross-agency programs function.

The new environment of information sharing and increased information gathering are of great public concern. Indeed, media coverage has focused on the risks to civil liberties posed by this new environment. The requesting organizations have a long track record of uncovering and sharing with the public vital information about government activities in the area of surveillance and intelligence-gathering, especially where these activities impact fundamental liberties.

The request seeks basic information about the workings of the federal programs described above, including how authority is divided, how information is shared, and what safeguards are in place to ensure the civil liberties of those whom it targets.

For the reasons stated below, the agency erred in denying the requesters expedited processing and a waiver of fees.

**A. This request is entitled to expedited processing because the public has a compelling urgency and widespread need to know about the government’s activities in the field of surveillance.**

In a series of identical form letters dated January 12, 2010, the FBI denied the request for expedited processing because the agency could not find a “particular urgency to inform the public about an actual or alleged federal government activity beyond the public’s right to know about government activity generally.” *See* Attachment 2.

The FOIA statute makes provisions for expedited processing when “the person requesting records demonstrates a compelling need.” 5 U.S.C. § 552(a)(6)(E)(ii). Department of Justice regulations set out four circumstances under which requests will be taken out of order and granted expedited processing. 28 C.F.R. § 16.5(d)(1). Two of those circumstances plainly apply to this request – the urgent need for the information and the widespread media interest in the subject matter.

**1. There is a demonstrated urgent need to inform the public about the government’s surveillance activities.**

According to Department of Justice regulations, a request will be given expedited processing when there is “[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.” 28 C.F.R. § 16.5(d)(1)(ii).

The records sought pertain to the scope and implementation of the FBI’s collaboration with local entities via the JTTFs. The records are urgently needed because the system of government collaboration across jurisdictions implicates core privacy concerns, yet almost nothing is known about its workings, the standards that guide it or limit this potentially-invasive information-sharing system, or whether the system is being abused. Without disclosure of the records sought, the public will remain in the dark about the nature and workings of the JTTF’s, including “suspicious activity” reporting, and cannot assess whether the program is necessary, effective, or subject to sufficient limits and oversight.

The denial of expedited processing ignored the important social and political context in which the request was made. As the federal government becomes increasingly

involved with local law enforcement activities through the JTTFs and similar efforts, public attention has focused on the subjects of JTTF investigations, especially regarding criminal prosecutions. Public interest has focused particularly on those who are targeted by JTTFs for questioning, information and possible cooperation, but who are not subjects of an investigation. See e.g. Colin Moynihan, *Activist Unmasks Himself as Federal Informant in G.O.P. Convention Case*, N.Y. TIMES, Jan 5, 2009; Denny Walsh, *Student's Path to FBI Informant*, SACRAMENTO BEE, Sept. 12, 2007; Pachuco, *Joint Terrorism Task Force Questions Professor*, March 13, 2006, <http://la.indymedia.org/news/2006/03/150016.php>.

This request aims at furthering public understanding of government conduct. Specifically, it will help the public determine the ways in which government agencies work together to share information and intelligence gathered through intra-agency initiatives involving law enforcement and other public and private entities. Recent media coverage of the growing concern about such initiatives demonstrates the public interest in the documents sought.

We have included a selection of recent media articles covering these issues in Attachment 3. See e.g. *Report: FBI paid controversial NJ blogger for help*, ASSOCIATED PRESS, November 29, 2009; Stephanie Ebbert, *Fusion Center takes aim at terror, But secrecy alarms civil libertarians*, BOSTON GLOBE, September 26, 2005; T.J. Greaney, *'Fusion center' data draws fire over assertions: Politics, banners seen as suspect*, COLUMBIA DAILY TRIBUNE, March, 14, 2009; Hilary Hylton, *Fusion Centers: Giving Cops Too Much Information?*, TIME MAGAZINE, March 9, 2009; Robert O'Harrow, Jr., *Centers Tap Into Personal Databases, State Groups Were Formed After 9/11*, WASH. POST, April 2, 2008; Ryan Singel, *Fusion Center Cash Infusion*, Wired Magazine, March 14, 2007; Brent Kendall, *FBI to Assess Actions Before Hood Shooting*, WALL. ST. J., December 9, 2009; Anderson, Jennifer, *New Council Inherits Task Force Decision*, PORTLAND TRIBUNE Dec. 21, 2004.

There is a particularly urgent need to know about actions and procedures of the JTTFs to the extent that such actions involve monitoring political activities. Members of the media and of the public have raised important and timely questions about the federal government's surveillance of political and activist groups carrying out activities protected by the Constitution. See e.g. *Activists Announce Letter to Governor Demanding Complete Investigation of Spying*, MD. NEWS, Aug. 12, 2008; David E. Kaplan, *Spies Among Us*, US NEWS AND WORLD REPORT, May 8, 2006; Erin Rosa, *Colorado Fusion Center to Step Up Intelligence Gathering During DNC*, COLO. INDEPENDENT, July 30, 2008; Bures, Frank, *City's split: fear for safety vs. fear for rights*, CHRISTIAN SCIENCE MONITOR, Oct. 17, 2001; Nakashima, Ellen, *\$1 billion FBI database will track physical characteristics of millions*, BOSTON GLOBE, Dec. 23, 2007; Lisa Myers, *Is the Pentagon Spying on Americans?* MSNBC, Dec. 14, 2005.

The requesters themselves have written extensively on federal-local cooperation, raising important privacy and civil liberties concerns. See e.g. Michelle J. Kinnucan, *Big Brother Gets Bigger: Domestic Spying & the Global Intelligence Working Group*,

AGENDA, July-Aug. 2003, available at <http://www.publiceye.org/liberty/repression/big-broth-kin.html>; Political Research Associates, *Hunt for Red Menace, Intel Collection and Sharing*, available at [http://www.publiceye.org/huntred/Hunt\\_For\\_Red\\_Menace-03.html](http://www.publiceye.org/huntred/Hunt_For_Red_Menace-03.html); Political Research Associates, *Political Spying*, available at [http://www.publiceye.org/huntred/Hunt\\_For\\_Red\\_Menace-06.html](http://www.publiceye.org/huntred/Hunt_For_Red_Menace-06.html); Michael German and Jay Stanley, *What's Wrong with Fusion Centers?*, Dec. 2007, available at [http://www.aclu.org/files/pdfs/privacy/fusioncenter\\_20071212.pdf](http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf).

In addition, as explained below in Section B, the requesters are entitled to expedited processing because they are organizations primarily engaged in disseminating information to the public.

**2. There is widespread media interest and a lack of public confidence regarding the subject matter of the request.**

According to Department of Justice regulations, requests will be granted expedited processing when they concern “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.” 28 C.F.R. § 16.5(d)(1)(iv).

Government surveillance historically has been an area that elicits fears, questions and concerns about government intrusion into the private lives of Americans and abuse of available technology for political purpose. Recent evidence indicates that JTTFs have targeted political dissidents for surveillance and harassment in the post-9/11 period, reinforcing concerns that the nation’s “homeland security” apparatus is being deployed for purposes of political repression.<sup>1</sup> The City of Portland withdrew from participation in the FBI’s JTTF because the federal agency could not guarantee that local officers participating in the agency would abide by state law prohibiting the monitoring of free speech activity without reasonable suspicion.<sup>2</sup> In Colorado, evidence came to light that Denver police officers assigned to the local JTTF had engaged in political surveillance. In response to a lawsuit, Denver police adopted a new intelligence policy in 2001 that prohibited surveillance based on political views. Yet, after Denver instituted this policy, the local JTTF apparently continued the spying.<sup>3</sup> Very little is known about how the JTTFs are functioning in Massachusetts, but the evidence from other states creates urgent

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<sup>1</sup> Civil liberties lawyer and historian Frank Donner wrote, on the topic of political repression, that the unstated yet actual primary goal of surveillance and political intelligence gathering by government law enforcement agencies and their private allies is not amassing evidence of illegal activity for criminal prosecutions, but punishing critics of the *status quo* or the state in order to undermine dissident movements for social change. Frank Donner, *The Age of Surveillance: The Aims & Methods of America's Political Intelligence System*, (New York: Vinatge Books, 1981).

<sup>2</sup> Anderson, Jennifer, “New Council Inherits Task Force Decision,” *Portland Tribune* (Dec. 21, 2004); Bures, Frank, “City’s split: fear for safety vs. fear for rights,” *Christian Science Monitor* (Oct. 17, 2001).

<sup>3</sup> Printouts made in April 2002 by the Denver Intelligence Unit contained a JTTF “Active Case List” with material from the Colorado Campaign for Middle East Peace, AFSC, Rocky Mountain Independent Media Center, and the Human Bean Company. For more documents, analysis, and information on the FBI’s JTTF surveillance of legal political organizing in Colorado, see ACLU Colorado: [http://www.aclu-co.org/docket/200406/200406\\_description.htm](http://www.aclu-co.org/docket/200406/200406_description.htm).

questions about how the government is conducting surveillance and intelligence operations here.

Local taxpayers pay the salaries of local law enforcement officials assigned to the JTTF, but are not entitled to know how these public servants spend their time under current agreements with the JTTF. For example, the Massachusetts Bay Transportation Authority has one sergeant attached to the JTTF full-time, and the Lowell Police Department has a sergeant and a detective attached to the JTTF full-time. In both cases, based on information and belief, the agreements between these agencies and the JTTF prohibit the local agent from disclosing his or her JTTF-related activities to department supervisors or even elected officials.

The increased 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 breadth and effectiveness. *See e.g.*, Naomi Klein, *Big Brother Democracy: How Free Speech and Surveillance Are Now Intertwined*, THE NATION, Aug. 28, 2006; Shelley Murphy, *False tips cost antiterror officials time and credibility*, Feb. 1, 2005; Erich Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004; John Friedman, *Spying on the Protesters*, THE NATION, Sept. 19, 2005; Matthew Rothschild, *Tales of Big Brother*, THE PROGRESSIVE, Aug. 25, 2004; Dafna Linzer, *In New York, a Turf War in the Battle Against Terrorism*, WASHINGTON POST, Mar. 22, 2008.

We have included a selection of recent media articles covering these issues in Attachment 3.

Various trade, academic and policy journals have addressed and questioned the impact of increased federal government cooperation with local law enforcement and changes in surveillance schemes. Jon Stokes, *Fusion Center Meltdown: Feds stifling open government in VA?* ARS TECHNICA, March 24, 2008; Joseph Straw, *Fusion Centers and Civil Rights*, SECURITY MANAGEMENT, August 2008; Rogers M. Smith, *Civil Liberties in the Brave New World of Antiterrorism*, 93 RADICAL HISTORY REVIEW at 170-85, Fall 2005; James Casey, M.A., *Managing Joint Terrorism Task Force Resources*, FBI ENFORCEMENT BULLETIN, November 2004, at 1-6; Roberto Lovato, *Building the Homeland Security State*, NACLA REPORT ON THE AMERICAS, Vol. 41, No. 6, Nov/Dec 2008, at 15-20; Christopher Ortiz, Nicole Hendricks & Naomi Sugie, *Policing Terrorism: The Response of Local Police Agencies to Homeland Security Concerns*, CRIMINAL JUSTICE STUDIES, Vol 20, No. 2, June 2007, at 91-109.

**B. Requesters are entitled to a fee waiver and expedited processing because they are both organizations primarily engaged in the dissemination of information and because they meet the statutory definition of members of the “news media.”**

In a series of form letters dated January 12, 2010, the FBI denied the request for a fee waiver and expedited processing because of a determination that the American Civil Liberties Union's primary activity is not the dissemination of information, nor is the organization a representative of the news media. *See* Attachment 2. This determination ignores the co-requester, PRA, the plain text of the FOIA statute and the long history of the requesting organizations of disseminating relevant and timely information to the public.

**1. The agency response failed to recognize PRA, a progressive think tank whose primary activity is the dissemination of information, as a requester.**

The agency's response ignored the fact that the request was made jointly, not only by the ACLU of Massachusetts, but also by Political Research Associates ("PRA"), an organization whose primary mission is to disseminate research and information. The agency's response fails to recognize PRA as a requester and fails to address the qualities that make PRA statutorily eligible for a fee waiver.

PRA's goal is to advance progressive thinking and action by providing the public with in-depth research, analysis, and referrals related to the major issue areas identified in its strategic plan, including civil liberties. PRA fuses journalistic reporting techniques and reliable, even-handed research to disseminate quality analytical content. Its in-depth research reports, press interviews, e-updates, library of primary and secondary materials, quarterly magazine, and website are all available to the public. PRA's researchers respond to daily telephone inquiries from journalists and advocates, supply customized information packets, offer advice on organizing strategies, and serve as nationally known public speakers for workshops and conferences.

The following is a list of PRA's publications and other ways in which it disseminates news, information and analysis to the public:

- **The Public Eye**, PRA's quarterly magazine, is read by advocates, legislators, journalists, academics, donors, and many others, with a subscription base of over 1,000 subscribers. PRA is currently running investigative stories on a range of civil liberties issues, including government misconduct related to civil liberties, informants, fusion centers, and political spying. The Public Eye's feature length analyses anchor the coverage of burning issues on our website and are picked up by numerous news aggregators, such as AlterNet.
- **PRA's website**, [www.publiceye.org](http://www.publiceye.org), which includes a dedicated "portal" page for civil liberties and other major issue areas. The civil liberties page is being designed to house a central repository for investigative research on civil liberties, domestic surveillance, racial profiling, and counterterrorism, for use by journalists, activists, the legal community, and others and will include research findings, primary documents, links to related information, and audio and video files. The site is promoted as a go-to location for advocates, activists, and journalists.

- **Print Reports:** PRA will be publishing reports based upon its civil liberties research with press conferences in several large cities. These reports will be released on the Web, as well as in print editions, to ensure broad circulation and availability and arrange cross-promotion with allied groups and bloggers. PRA regularly publishes reports, studies, and Activist Resource Kits, available at the website, [www.publiceye.org/reports.html](http://www.publiceye.org/reports.html).
- **Radio:** PRA is partnered with the National Radio Project (producer of the nationally syndicated radio show, Making Contact). PRA researchers are regularly interviewed on public radio shows, including Democracy Now and morning news shows, and promote interviews with lead and local civil liberties researchers.
- **Print articles and op-eds:** PRA writes and places stories for outside outlets, including op-eds for their local newspapers as well as Web based news aggregators, and pitch features to national magazines.
- **Books:** Books by PRA authors include:
  - *Mobilizing Resentment*, by Jean Hardisty
  - *Eyes Right! Challenging the Right Wing Backlash*, edited by Chip Berlet
  - *Too Close for Comfort: Right-Wing Populism in America*, by Chip Berlet and Matthew N. Lyons
  - *The Coors Connection*, by Russ Bellant
  - *Old Nazis, the New Right, and the Republican Party*, by Russ Bellant

The original FOIA request letter included samples of PRA's published works. See Attachment 1.

**2. The ACLU of Massachusetts is similarly entitled to a fee waiver because it is an organization that actively gathers and broadcasts news to the public.**

Gathering and disseminating current information to the public is a critical and substantial component of ACLUM's mission and work. Through its website and publications, ACLUM regularly and widely broadcasts news and information to the public. ACLUM's regular news publications include its blog, "Mass Rights Blog," which provides ongoing updates and analysis of civil liberties issues; "The Docket," a print-based publication with news analysis, which is published twice a year and distributed to thousands of persons; the "Civil Liberties Update," a comprehensive print and web-based newsletter, which highlights in great detail the civil liberties issues in the news and is distributed once a month; and appearances by ACLUM staff in print, radio and television media.

The December 30<sup>th</sup> request letter provides samples of such works. *See* Attachment 1.

Because of its long history of disseminating information to the public, the ACLU of Massachusetts and the national ACLU have been granted fee waivers on numerous occasions in the past.<sup>4</sup>

### **3. Both requesters meet the statutory definition of “news media.”**

Both Political Research Associates and the ACLU of Massachusetts qualify as members of the “news media” under the FOIA statute and Department of Justice regulations.

Both PRA and ACLUM fall clearly within the broad statutory definition of a “representative of the news media” in that they are organizations “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public,” where “news” is defined as “information that is about current events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The text of the Department of Justice regulations further clarifies that “news media” does not only apply to full-time journalists with press credentials. In a clarification of the term, the regulations state that, “[f]or example, a requester within the category in paragraph (d)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation.” 28 C. F. R. § 16.5 (c)(3).

Courts have further confirmed the broad scope of the definition of news media. In a case regarding a request made by a similar advocacy organization, the Electronic privacy Information Center, the D.C. Circuit held that “[i]t is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . [I]n fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’” *Electronic Privacy Information Ctr. v. Dep’t of Defense*, 241 F.Supp. 2d 5, 10 (D.D.C. 2003) (holding that non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA).

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<sup>4</sup> The following are examples of requests in which government agencies did not charge the ACLU or ACLUM fees associated with responding to a FOIA request: (1) Immigration and Customs Enforcement granted the ACLU of Massachusetts a waiver of all search fees for a request submitted on Jan. 25, 2007; (2) The Office of Science and Technology Policy in the Executive Office of the President told the ACLU that it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003; (3) The Federal Bureau of Investigation did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; (4) The Office of Intelligence Policy and Review did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; and (5) The Office of Information and Privacy in the Department of Justice did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.



Other organizations similar to ACLUM and PRA have also been found to meet the statutory definition of “representative of the news media” when the organization making the request is “an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” Nat’l Security Archive v. Dep’t of Defense, 880 F.2d 1381, 1387 (D.C.Cir 1989) (finding that organization was a “representative of the news media”).

Gathering, analyzing and disseminating information that is relevant and current to issues relating to civil liberties and privacy are key components of the work of both PRA and ACLUM. Both organizations continually and as part of their core functions disseminate information of public interest through internet, print, television and radio. Such information reaches thousands of members of the public including students, journalists, academics, advocates, members of government and interested readers every year.

As such, both requesters meet the statutory definition of a “representative of the news media” and are entitled to both expedited processing and a fee waiver.

### **CONCLUSION**

For the reasons stated above, we urge you to reconsider the agency’s determination and find that the requesters are entitled both to expedited processing and a waiver of fees.

We look forward to your reply to this appeal within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(ii). Please reply to this request to by contacting Laura Rótolo at the address above, (617) 482-3170 x311 or through email at [lrotolo@aclum.org](mailto:lrotolo@aclum.org).

Thank you for your prompt attention to this matter.

Sincerely,

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Laura Rótolo  
ACLUM Staff Attorney

Thomas R. Cincotta  
PRA Civil Liberties Project Director