

EXHIBIT 2



AMERICAN CIVIL LIBERTIES UNION

Northern
California

December 20, 2017

VIA U.S. MAIL AND EMAIL

Transportation Security Administration
San Francisco Field Office
395 Oyster Point Blvd., Suite 317
S. San Francisco, CA 94080

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

To Whom It May Concern:

The American Civil Liberties Union of Northern California (“ACLU”) submits this Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, request (“Request”) for records located in the San Francisco Field Office of the Transportation Security Administration. This request seeks records related to TSA’s searches of passengers’ electronic devices.

For the purposes of this Request, “Records” are collectively defined to include, but are not limited to: text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message); e-mails; images, video, and audio recorded on cell phones; voicemail messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; and memoranda of understanding.

We seek all records, from January 1, 2012 to present, regarding any of the following:

1. Policies, procedures, or protocols regarding the search of passengers’ electronic devices. This includes but is not limited to any policies, procedures, or protocols related to the “enhanced screening of electronic devices” referenced by then-Secretary of Homeland Security John Kelly in June 2017.¹

¹ <https://www.dhs.gov/news/2017/06/28/remarks-council-new-american-security-conference>

American Civil Liberties Union of Northern California

EXECUTIVE DIRECTOR Abdi Soltani • BOARD CHAIR Magan Pritam Ray

SAN FRANCISCO OFFICE: 39 Drumm St. San Francisco, CA 94111 • FRESNO OFFICE: PO Box 188 Fresno, CA 93707

TEL (415) 621-2493 • FAX (415) 255-1478 • TTY (415) 863-7832 • WWW.ACLUNC.ORG

2. Equipment, including but not limited to SIM-card readers and software manufactured by Cellebrite², used to search, examine, or extract data from passengers' electronic devices and SIM cards at the San Francisco International Airport. This request seeks records including but not limited to: documentation related to the acquisition, testing, use, maintenance, and location of such equipment; any inventories of the number of each type of equipment.³ This request includes any records in the possession of the TSA San Francisco Field Office but generated by Covenant Aviation Security.
3. Logs referencing the use or maintenance of any equipment used to search, examine, or extract data from passengers' electronic devices at the San Francisco International Airport.
4. All communications between SFO and TSA referencing the replacement, supplementation, or relocation of any piece of Transportation Security Equipment ("TSE") at SFO.⁴
5. Training of transportation security officers or contractors retained to provide security screening services, related to the search or examination of passengers' electronic devices.

Application for Expedited Processing

The ACLU expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). 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 the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II). Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU's work and are among its primary activities. *See ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to

² Examples of such devices include, but are not limited to, the UFED Touch Platform manufactured by Cellebrite: <https://www.cellebrite.com/en/press/cellebrite-introduces-ufed-touch2-platform/>.

³ According to the Government Accountability Office, TSA possesses "acquisition documentation for passenger and baggage screening technologies," including memorandums and "information regarding the number of each technology deployed in airports nationwide." <http://www.gao.gov/assets/680/674297.pdf> at 28.

⁴ According to a TSA 2015 report to Congress, "If TSA has identified the need to replace, supplement, or relocate a piece of TSE," TSA "informs the airport of the decision through a memo and follow-on communication as needed." <https://www.fbo.gov/utills/view?id=62bf59d0ee09e6681071db6c5b15d803> at 17. This request seeks any such memos, as well as any follow-up communications.

turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).⁵

The ACLU publishes a paper newsletter distributed to its members, who now number over 160,000. It regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news, and its attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.⁶ The ACLU regularly publishes in-depth

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

⁶ See, e.g., <https://www.aclunc.org/blog/justice-department-emails-show-feds-were-less-explicit-judges-cell-phone-tracking-tool>; Jennifer Valentino-Devries, *Judges Questioned Use of Cellphone Tracking Devices*, Wall Street Journal by Jennifer DeVries, March 27, 2013; Ellen Nakashima, *Little-known surveillance tool raises concerns by judges, privacy activists*, Washington Post, March 27, 2013; Rory Carroll, *ACLU challenges ‘stingray surveillance’ that allows police to track cellphones*, The Guardian, March 28, 2013; Shaun Waterman, *Can you hear me now? Feds admit FBI warrantless cellphone tracking ‘very common’*, Washington Times, March 29, 2013; Kim Zetter, *Government Fights for Use of Spy Tool That Spoofs Cell Towers*, Wired, March 29, 2013; J.D. Tuccille, *Feds Routinely Track Cell Phones Without Telling Judges*, Reason.com, March 27, 2013; Declan McCullagh, *FBI prepares to defend ‘Stingray’ cell phone tracking*, CNET News, March 27, 2013; Kevin Gosztola, *Dissenter, DOJ Hid Routine Use of ‘Stingray’ Surveillance Technology from Federal Magistrate Judges*, March 27, 2013; Cyrus Farivar, *New e-mails reveal Feds not “forthright” about fake cell tower devices*, Ars Technica, March 27, 2013; Jacob Kastrenakes, *Federal agents used Stingray phone location tracker without informing judges*, The Verge.com, March 27, 2013; Josh Peterson, *DOJ emails show feds kept judges in the dark about cellphone tracking device*, The Daily Caller, March 28, 2013; *ACLU: Feds secretly using highly invasive spying tool*. Kennebec Journal/The Washington Post, March 28, 2013; Emmanuel Dunand, *FBI being sued over powerful Stingray cellphone tracking system*, RT USA, March 28, 2013; *Daniel David Rigmaiden Case Reveals Stingray Cell Phone Tracker’s Covert Use*, Huffington Post, March 28, 2013; Ryan Gallagher, *Feds Accused of Hiding Information From Judges About Covert Cellphone Tracking Tool*, Slate.com by Ryan Gallagher, March 28, 2013; Stephen C. Webster, *ACLU: Email reveals feds misled judges to abuse wiretapping powers*, The Raw Story, March 28, 2013; *Surveillance technology comes under fire*, United Press International, Inc., March 28, 2013; *ACLU backs suppression of ‘stingray’ evidence sought by hacker*, Gantdaily.com by AHN, March 28, 2013; Danielle Walker, *Federal judge to weigh in on FBI’s “stingray” cell phone surveillance*, SC Magazine, March 29, 2013; Lain Thomson *FBI on trial for warrantless Stingray mobile spying - Cellphone spying made easy - and sloppy - by electronic signal slurper*, The Register, March 29, 2013; *Feds admit FBI warrantless cellphone tracking ‘very common.’* Press TV, March 30, 2013; Jack Taylor, *FBI hid the use of ‘Stingray’ spying technology from federal judges*, VR-Zone.com, March 31, 2013; Vanessa Blum, *Emails Detail Northern District’s Use of Controversial Surveillance*, The Recorder, April 1, 2013; Rebecca Bowe, *Fed’s use of spy tools under scrutiny due to privacy concerns*, San Francisco Bay Guardian, April 3, 2013.

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reports and other educational materials on civil liberties and civil rights issues.⁷ It publishes a website with a blog on breaking civil rights and civil liberties issues. Its website averages 22,884 visitors per week.

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).⁸ Specifically, the requested records seek to inform the public about the TSA's practices regarding the search of passengers' electronic devices. The search of electronic devices at airports is a topic that has garnered significant media attention to date and continues to be of urgent public interest.⁹

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

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).¹⁰ The ACLU also

⁷ *See, e.g.*, ACLU of Northern California, *Privacy & Free Speech: It's Good for Business* (Feb. 10, 2016), <https://www.aclunc.org/blog/new-aclu-guide-tips-tech-companies-protecting-user-privacy-and-free-speech-2016>; ACLU of Northern California, *Reproductive Health Behind Bars in California* (Jan. 19, 2016), <https://www.aclunc.org/publications/reproductive-health-behind-bars-california>; *see also* <https://www.aclunc.org/search?keys=know+your+rights> (know your rights information regarding rights of students in schools, photographers, demonstrators, LGBTQ students, police interactions, prosecutorial discretion, and sex education among other topics).

⁸ *See also* 6 C.F.R. § 5.5(e)(1)(ii)."

⁹ *See, e.g.*, Russ Thomas, "TSA implements new screening procedures in Montana," KPAX.com, <http://www.kpax.com/story/37061354/tsa-implements-new-screening-procedures-in-montana>; Joel Hruska, "TSA Will Now Screen All Electronics 'Larger Than a Cell Phone,'" *Extreme Tech*, July 26, 2017, <https://www.extremetech.com/mobile/253139-tsa-will-now-screen-electronics-larger-cell-phone-flights>; Brian Naylor, "U.S. Border Patrol Agents Step Up Cellphone Searches," *National Public Radio*, April 10, 2017, <https://www.npr.org/2017/04/10/523311433/u-s-border-patrol-agents-step-up-cell-phone-searches>; Lubana Adi, "My phone was searched at LAX, which apparently is the new normal," *Los Angeles Times*, April 7, 2017, <http://www.latimes.com/opinion/op-ed/la-oe-adi-fourth-amendment-airport-cellphone-search-20170407-story.html>; Daniel Victor, "What are your rights of border agents wants to search your phone?" *New York Times*, Feb. 14, 2017, <https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>.

¹⁰ *See also* 6 C.F.R. § 5.11(k).

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.*

News accounts underscore the substantial public interest in the records sought through this Request.¹¹ Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance.

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 the FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. *The ACLU 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). 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);¹² *see also Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. U.S. Dep’t of Defense*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. U.S. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic

¹¹ *See supra* note 7.

¹² *See also* 6 C.F.R. § 5.11(b)(6).

newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).¹³

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.” As was true in those instances, the ACLU meets the requirements for a fee waiver here.

* * *

The ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific FOIA exemptions. 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:

Theodora Simon
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111

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

Respectfully,



Theodora Simon
Investigator
ACLU of Northern California

¹³ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.