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Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT /
Expedited Processing Requested**

To Whom It May Concern:

AMERICAN CIVIL LIBERTIES
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RICHARD ZACKS
TREASURER

This letter constitutes a request (“Request”) by the American Civil Liberties Union and the American Civil Liberties Foundation (collectively “ACLU”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a) *et seq.*, the Department of Homeland Security (“DHS”) implementing regulations, 6 C.F.R. § 5.1 *et seq.*, the Department of Justice (“DOJ”) implementing regulations, 28 C.F.R. § 16.1 *et seq.*, and the Department of Defense (“DOD”) implementing regulations, 32 C.F.R. § 286.1 *et seq.*

Media reports indicate that the United States Army recently deployed an active military unit inside the United States under Northern Command, to be known as the CBRNE Consequence Management Response Force (“CCMRF”). *See, e.g.,* Gina Cavallaro, *3rd Infantry’s 1st BCT Trains for a New Dwell-Time Mission; Helping ‘People at Home’ May Become a Permanent Part of the Active Army*, Army Times (Sept. 30, 2008); Patti Bielling, *Joint Force Trains to Assume Duties as Chemical, Nuclear, Responders in Homeland*, U.S. Army North Public Affairs (Sept. 9, 2008). The deployment of CCMRF marks the first time an active military unit has been given a dedicated assignment to Northern Command, which was established in 2002 to assist federal homeland defense efforts and coordinate defense support of civil authorities. It raises important questions about the longstanding separation between civilian and military government within the United States—a separation that dates to the Nation’s founding and that has been reiterated in landmark statutes, most importantly, the Posse Comitatus Act, 18 U.S.C. § 1385. Moreover, the deployment raises concerns about the possibility that the program may be used to facilitate domestic surveillance by the Defense Department – concerns heightened by the government’s prior expansion of domestic surveillance activities in the name of national security.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

I. Requested Records

This Request seeks records concerning the deployment of an active military unit under Northern Command. The ACLU seeks disclosure of any and all record(s)¹ concerning:

1. The decision to deploy an active military unit in the United

¹ The term “records” as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

States under Northern Command, including but not limited to records discussing legal authority; records discussing policy; executive orders; Presidential directives; correspondence; and records discussing the potential use of the military unit.

2. The ongoing or possible use of the aforementioned military unit, including but not limited to contemplated functions; duties; surveillance activities; and relationship to existing civilian agencies or personnel or the National Guard.

Requester

The American Civil Liberties Union Foundation is a 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 the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 501(c)(4) membership organization that educates the public about 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.

AMERICAN CIVIL LIBERTIES
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Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E), 6 C.F.R. § 5.5(d)(1)(ii), 28 C.F.R. § 16.5(d), and 32 C.F.R. § 286.4(d)(3). There is a "compelling need" for these records because the information requested is urgently needed by an organization "primarily engaged in disseminating information" in order to "inform the public concerning actual or alleged Federal Government activity," 5 U.S.C. § 552(a)(6)(E)(v); *see also* 6 C.F.R. § 5.5(d)(1)(ii); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii). The records sought also relate to 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)(ii).

The ACLU is "primarily engaged in disseminating information" to the public within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v); 6 C.F.R. § 5.5(d)(1)(ii); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii). Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a 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”). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee through the ACLU’s public education department. The ACLU also 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 website specifically includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/torturefoia; www.aclu.org/spyfiles; www.aclu.org/patriot_foia/index.html; www.aclu.org/exclusion; <http://www.aclu.org/safefree/nationalsecurityletters/32088res20071014.html>; <http://www.aclu.org/safefree/detention/37083prs20081008.html>. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU produces an in-depth television series on civil liberties.² Depending on the results of this Request, the ACLU will likewise disseminate the information obtained about the deployment of the CCMRF in the United States through these kinds of publications in these kinds of channels.

Furthermore, the records sought concern actual or alleged federal government activity – specifically the Army’s use (and potential abuse) of its deployment of military force by deploying that force to perform functions by law required to be performed by civilian agencies and personnel. 6 C.F.R. § 5.5(d)(1)(ii); 28 C.F.R. § 16.5(d)(1)(ii). Additionally, the records sought pertain to a matter of widespread media interest in which there exist possible questions about the government’s conduct that affect public confidence – namely, the deployment of an active military unit within the United States in violation of the Posse Comitatus Act. 28 C.F.R. § 16.5(d)(1)(iv).

² In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. The ACLU also makes archived material available at the American Civil Liberties Union Archives at Princeton University Library. Additionally, ACLU publications are often disseminated to relevant groups across the country, which then further distribute them to their members or to other parties.

The Defense Department's announced its CCMRF deployment in early September, generating significant media attention. *See, e.g.,* Gina Cavallaro, *3rd Infantry's 1st BCT Trains for a New Dwell-Time Mission; Helping 'People at Home' May Become a Permanent Part of the Active Army*, *Army Times*, Sept. 30, 2008; *Consequence Management Response Force to Join Army Northern Command*, *Army News Service*, Sept. 15, 2008; Patti Bielling, *Joint Force Trains to Assume Duties as Chemical, Nuclear Responders in Homeland*, *U.S. Army North Public Affairs*, Sept. 9, 2008. Coverage of the announcement has led to widespread and continuing public interest, including speculation on the motivation for and reasons behind the deployment. *See, e.g.,* Larry Shaughnessy, *Army Combat Unit to Deploy Within U.S.*, *CNN.com*, Oct. 3, 2008; *NORTHCOM Launches CBRNE Response Team*, *Middle East Times*, Oct. 2, 2008; Amy Goodman, *Use of Military in Quelling Domestic Unrest a Scary Sign*, *Seattle Post-Intelligencer*, Oct. 1, 2008 (speculating that the deployment might be a response to anticipated civil unrest resulting from the recent economic downturn); Glenn Greenwald, *Why is a U.S. Army Brigade Being Assigned to the "Homeland"?*, *Salon.com*, Sept. 24, 2008 (asking whether it might be "possible to get some explanation from the Government about what the rationale is for this unprecedented domestic military deployment (at least unprecedented since the Civil War), and why it is being undertaken now"); J.D. Tuccille, *Army to Station Active-Duty Unit in U.S. for "Crowd Control"*, *Civil Liberties Examiner*, Sept. 24, 2008; *Does Anyone Find this Development Odd or Worrisome?*, *DailyKos.com*, Sept. 24, 2008; Radley Balko, *Posse Comiwhatus?*, *Reason.com*, Sept. 24, 2008; *Army Unit to Deploy in October for Domestic Operations*, *Democracy Now*, Sept. 22, 2008.

Furthermore, recent revelations about extensive and serious government abuses of surveillance, including by the Defense Department, heighten concerns about the extent of the Defense Department's role in domestic surveillance—a matter of grave public concern that has generated significant media interest in its own right. Moreover, recent whistleblower reports that the National Security Agency overstepped its authority and listened to the personal calls of thousands of U.S. citizens overseas reinforce these concerns, *see* Brian Ross, Anna Schecter, and Vic Walter, *Exclusive: Inside Account of U.S. Eavesdropping on Americans*, *ABC News*, Oct. 9, 2008, and have similarly garnered significant media attention and public interest. *See, e.g.,* Greg Miller, *Claim: Military Abused Wiretaps*, *Chicago Tribune*, Oct. 10, 2008; Joby Warrick, *U.S. Allegedly Listened in on Calls of Americans Abroad*, *Wash. Post*, Oct. 10, 2008; Scott Shane, *Panel to Study Military Eavesdropping*, *N.Y. Times*, Oct. 9, 2008; Pam Benson, *Report: U.S. Spied on Americans' Intimate Conversations Abroad*, *CNN.com*, Oct. 9, 2008; Jonathan S. Landay, *Did U.S. Government Snoop on Americans' Phone Calls?*, *Miami Herald*, Oct. 9, 2008. Indeed, since the Bush administration's warrantless surveillance

program was first revealed in 2005, *see* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, government surveillance – particularly by the Defense Department– has consistently been a subject of significant public attention. *See, e.g.*, Scott Shane, *Agency and Bush are Sued Over Domestic Surveillance*, N.Y. Times, Sept. 18, 2008; *Secret 2001 Memo Justified Warrantless Surveillance in U.S.*, FoxNews.com, Apr. 2, 2008; Dan Eggen, *NSA Spying Part of Broader Effort*, Wash. Post, Aug. 1, 2007; *Talk of the Nation: Is the Government Examining Your Bank Account?* (NPR radio broadcast Jan. 17, 2007); Editorial, *Congress Must Step in to Stop Government Snooping*, Kansas City Star, Jan. 16, 2007; Mark Mazzetti, *Cheney Defends Efforts to Obtain Records*, N.Y. Times, Jan. 15, 2007; Mark Follman, *Pentagon, CIA Expand U.S. Intel Gathering*, United Press International, Jan 14, 2007; Eric Lichtblau and Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. Times, Jan. 14, 2007; *NSA Eavesdropping Program Ruled Unconstitutional*, CNN.com, Aug. 17, 2006.

Disclosure of records pertaining to the recent deployment of an active military unit under Northern Command will enable the public to know whether the deployment is enabling the Defense Department to circumvent the limits on its authority act domestically and to gain information about individuals within this country.

Thus, records concerning the recent domestic deployment of the CCMRF under Northern Command are urgently needed to inform the public concerning an “actual or alleged federal government activity.” 6 C.F.R. § 5.5(d)(1)(ii); 28 C.F.R. § 16.5(d)(1)(ii). The records plainly also relate to a matter of widespread media interest regarding “questions about the government’s integrity, which affect public confidence.” 28 C.F.R. § 16.5(d)(1)(iv). The records sought are crucial to providing the public with a full picture of the military’s involvement in domestic affairs. The records requested are not sought for commercial use, and the ACLU plans to disseminate the information disclosed as a result of this FOIA request to the public at no cost. Accordingly, expedited processing is appropriate in this case.

Application for Waiver or Limitation of Fees

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1)(i)-(ii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d).

Numerous news accounts reflect the considerable public interest in the records we seek. *See* cited articles, *supra*. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of and between the Defense Department and other government agencies, including the FBI and Department of Homeland Security. *See* 6 C.F.R. § 5.11(k)(1)(i); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d). In addition, disclosure is not in the ACLU's 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. *See* 6 C.F.R. 5.11(k)(1)(ii); 28 C.F.R. § 16.11(k)(1)(ii); 32 C.F.R. 286.28(d). 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, § 2, 121 Stat. 2524, (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act" but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of document search and duplication fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 6 C.F.R. § 5.11(c-d); 28 C.F.R. §§ 16.11(c)(1)-(2), (d)(1). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(d), 16.11(c)(3) (search and review fees shall not be charged to "representatives of the news media"). 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 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); *cf. ACLU v. Dep't of Justice*, 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." *See Elec. Privacy Info. Ctr. v. Dep't of Defense*, 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).³

³ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, the Department of Health and Human

* * *

Pursuant to applicable regulations and statute, we expect the determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 286.4(d)(3); 28 C.F.R. § 16.5(d)(4).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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

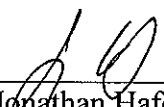
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Jonathan Hafetz
American Civil Liberties Union
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I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies – the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and 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.

Sincerely,



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