JS 44 CAND (Rev. 12/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

E-filing

I. (a) PLAINTIFFS
American Civil Liberties Union of Northern California
San Francisco Bay Guardian

(b) County of Residence of First Listed Plaintiff San Francisco
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Michael T. Risher (CA Bar No. 191627),Linda Lye (CA Bar No. 215584)
American Civil Liberties Union of Northern California,INC.
39 Drumm St., San Francisco, CA 94111. Ph. 415-621-2493

DEFENDANTS
Department Of Justice
450 Golden Gate Avenue, 13th Floor
San Francisco, CA 94102-9523
County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

CV 12 4008

Attorneys *(If Known)*
U.S Attorney's Office
450 Golden Gate Avenue
San Francisco, CA 94102

MEJ

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☒ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
5 U.S.C § 552
Brief description of cause:
Action to compel timely and complete production of records under FOIA

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:
JUDGE _____ DOCKET NUMBER _____

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
(Place an "X" in One Box Only)
☒ SAN FRANCISCO/OAKLA ND ☐ SAN JOSE ☐ EUREKA

DATE 7/30/12
SIGNATURE OF ATTORNEY OF RECORD

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; *SAN FRANCISCO BAY GUARDIAN,*

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. CV 12 4008 MEJ

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, to enforce the public's right to information about the federal government's use of location tracking technology. Recent revelations have made clear that government agencies are engaged in seeking and acquiring the location information of individuals for tracking and surveillance purposes, utilizing varying technologies and varying legal standards that frequently fall short of constitutional protections designed to protect the public from intrusive government searches.

2. There has been widespread media interest and public concern related to government tracking and surveillance of location information. There is also great urgency to inform the public about governmental efforts to track and surveil individuals because members of Congress and California state legislators are currently weighing new laws related to location tracking – and information shedding lights on the government's current practices would inform those pending legislative debates. It is imperative that Northern California community members and policymakers representing this region immediately gain a full and complete understanding of how the United States Attorneys for the Northern District are seeking or obtaining location information and whether these activities comport with constitutional rights. Access to this information is necessary for a meaningful and informed public debate over these pressing public policy issues and pending legislative debates.

3. Over three months ago, on April 13, 2012, Plaintiffs American Civil Liberties Union of Northern California, a non-profit civil rights organization, and *San Francisco Bay Guardian,* an independent newspaper, submitted a FOIA request to Defendant Department of Justice ("DOJ") seeking information about the federal government's use of location tracking technology to monitor and surveil suspects. Plaintiffs also requested expedited processing, pursuant to 5 U.S.C. §522(a)(6)(E), on the grounds that there is an "urgency to inform the public about actual or alleged federal government activity" and also that this is "a matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." 28 C.F.R. §16.5(d)(1)(ii) & (iv). Acknowledging the

import and urgency of this request, the DOJ granted Plaintiffs' request for expedited processing by letter dated April 23, 2012. Since that time, however, the agency has provided Plaintiffs with *no* records or any information regarding the status of its search.

4. Plaintiffs now bring this action to obtain the information and the expedited processing to which are statutorily entitled.

PARTIES

5. Plaintiff American Civil Liberties Union of Northern California ("ACLU-NC") is an affiliate of the American Civil Liberties Union, a national, non-profit, non-partisan organization with the mission of protecting civil liberties from government incursions, safeguarding basic constitutional rights, and advocating for open government. The ACLU-NC is established under the laws of the state of California and is headquartered in San Francisco, California. The ACLU-NC has approximately 50,000 members. In support of its mission, the ACLU-NC uses its communications department to disseminate to the public information relating to its mission, through its website, newsletters, and other publications.

6. Plaintiff *San Francisco Bay Guardian* ("*The Bay Guardian*") is a corporation organized in the state of California and headquartered in San Francisco, California. It is a newspaper of general circulation and has the largest circulation of a newsweekly in Northern California, with an audited weekly distribution of 65,000. *The Bay Guardian* has been published continuously since 1966, and its primary activity is publishing or otherwise disseminating information to the public. In 2011, *The Bay Guardian* received the California Newspaper Publishers Association's General Excellence award for a weekly newspaper. In 2012, Tim Redmond, the executive editor of *The Bay Guardian*, received the Professional Journalist award from the Society of Professional Journalists, Northern California chapter.

7. Defendant Department of Justice is an agency within the meaning of 5 U.S.C. §552(f). The agency has its headquarters in Washington, D.C., and field offices all over the country, including San Francisco, California.

JURISDICTION

8. This Court has subject matter jurisdiction and personal jurisdiction over the parties pursuant to 5 U.S.C. §§552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 and 1346.

VENUE AND INTRADISTRICT ASSIGNMENT

9. Venue is proper in this district pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §§1391(e) and §1402. The plaintiffs have their principle places of business in this district.

10. Pursuant to Local Rule 3-2(c) and (d), assignment to the San Francisco division is proper because a substantial portion of the events giving rise to this action occurred in this district and division and because both Plaintiffs are headquartered in San Francisco.

FACTUAL ALLEGATIONS

The Federal Government's Use of Location Tracking Technology Is a Matter of Significant Public Interest

11. Location tracking technology enables law enforcement to capture intimate details of an individual's life, including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, the synagogue or church, the gay bar and on and on." United States v. Jones, _U.S._, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring) (quoting People v. Weaver, 12 N.Y.3d 433, 442 (N.Y. 2009)).

12. New technology dramatically reduces the normal barriers of cost and officer resources to mount comprehensive surveillance. While an individual's trip along a public road to the doctor is visible to the public (and police), the expenditure of resources to surveil an individual around the clock wherever she goes serves as a deterrent to abuse. When, by contrast, one technician can sit at the police station and monitor hundreds or even thousands of targets continuously and for indefinite periods, judicial oversight is essential to protect privacy and ensure that invasive surveillance is only conducted of those as to whom there is probable cause of criminal activity.

13. Technological developments have expanded the mechanisms by which the government can track an individual's location. GPS (global positioning system) devices can be affixed to a vehicle. Cell phones can reveal historic and real-time location information through cell site location information (which refers to the identity of the nearest cell tower), triangulation data (which involves analysis of the time and angle at which a cell phone's signal arrives at multiple cell towers), and GPS receiver hardware that may be built into the device. Other location tracking devices have come to light, such as "stingrays," which mimic a cellphone tower and convince a target cellphone to connect to it and thereby transmit information about the location of the cellphone, even if its owner is not placing a call.

14. The media has extensively covered the government's use of location tracking devices, and its efforts to do so without obtaining a warrant based on probable cause. *See, e.g.,* Robert Barnes, "Supreme Court: Warrants needed in GPS tracking," *Washington Post*, January 23, 2012; Rebecca J. Rosen, "Why the Jones Supreme Court Ruling on GPS Tracking Is Worse Than It Sounds," *The Atlantic*, January 23, 2012; Barry Friedman, "Privacy, Technology and Law," *New York Times*, January 29, 2012; Greg Stohr, "Police Use of GPS Devices to Track People Limited by U.S. Supreme Court," *Bloomberg*, January 23, 2012; Jess Bravin, "Justices Rein In Police on GPS Trackers," *Wall Street Journal*, January 24, 2012; Editorial, "Navigating the Supreme Court's GPS ruling," *Los Angeles Times*, January 25, 2012; Bob Egelko, "U.S. Supreme Court to decide major legal issues," *San Francisco Chronicle*, September 30, 2011; Editorial, "The Court's GPS Test," *New York Times*, November 5, 2011; David G. Savage, "Supreme Court: warrant required for GPS tracking," *San Francisco Chronicle*, January 24, 2012; Adam Liptak, "Court Case Asks if 'Big Brother' Is Spelled GPS," *New York Times*, September 10, 2011; Editorial, "A court test of privacy in the digital age," *San Francisco Chronicle*, January 29, 2012; Adam Liptak, "Justices Say GPS Tracker Violated Privacy Rights," *New York Times*, January 24, 2012; Julia Angwin, "FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling," *Wall Street Journal*, February 25, 2012.

15. The government's efforts to use GPS devices to engage in location tracking without a warrant were recently rebuffed by the United States Supreme Court in *United States v. Jones, supra.*

16. Following that decision, the media continued to report on the issue extensively, including the implications of the *Jones* decision for law enforcement and the fact that the *Jones* decision prompted an increased reliance by law enforcement on cell site location information. *See, e.g.,* David Kravets, "After Car-Tracking Smackdown, Feds Turn to Warrantless Phone Tracking," *Wired*, March 31, 2012; Editorial, "GPS and the Right to Privacy," *New York Times*, January 25, 2012; David Kravets, "Supreme Court Court Rejects Willy-Nilly GPS Tracking," *Wired*, January 23, 2012; Dave Bohon, "More Police Agencies Using Warrantless Cell Phone Tracking in Surveillance," *The New American*, April 5, 2012; Thomas Peracchio, "Supreme court ruling exposes many digital privacy issues," *The Examiner*, April 2, 2012; Thomas Claburn, "Supreme Court Tackles GPS Tracking Vs. Privacy," *Information Week*, January 23, 2012; Editorial, "EDITORIAL: Obama wants to track you," *Washington Times*, March 20, 2012; Emily Babay, "After GPS tracking banned by court, privacy fight turns to cell phone data," *Washington Examiner*, April 1, 2012.

17. The American Civil Liberties Union released a report shedding light on a disturbing trend across the country of law enforcement agencies obtaining cell phone location information without probable cause warrants. The ACLU report was the subject of a front page *New York Times* article, and a flurry of subsequent news articles and editorials emphasizing the importance of a warrant requirement for cell phone location information. *See* Eric Lichtblau, "Police Are Using Phone Tracking as a Routine Tool," *New York Times,* March 31, 2012; Cristian Salazar, "ACLU demands police disclose cell phone tracking," *San Francisco Chronicle*, August 4, 2011; James Temple, "How California cops grab phone data from Apple, Google, carriers," *San Francisco Chronicle*, April 3, 2012; Suzy Khimm, "ACLU: Local police departments tracking cellphones without warrants," *Washington Post*, April 2, 2012; Declan McCullagh, "How Apple and Google help police bypass iPhone, Android lock screens," *CNET*,

April 2, 2012; Athima Chansanchai, "ACLU: Police track cellphones, too," *MSNBC Technology*, April 2, 2012 (Tab 53); Bob Sullivan, "Pricey 'stingray' gadget lets cops track cellphones without telco help," *MSNBC Red Tape*, April 3, 2012; Peter Doocy, "Law enforcement under scrutiny by ACLU for tracking cell phones," *Fox News*, April 4, 2012.

18. Members of Congress representing Northern California, including Representatives Zoe Lofgren and Barbara Lee, are currently working on bipartisan efforts to pass a federal location privacy bill, the GPS Act (H.R. 2168), and state lawmakers, including State Senator Mark Leno, are working on state location privacy laws (SB 1434).

19. The information sought in Plaintiffs' FOIA request would inform the on-going societal debate as well as specific legislative debates over the government's use of location tracking technology.

Plaintiffs Submitted A FOIA Request and DOJ Granted Expedited Processing But Has Failed to Produce Any Records

20. On April 13, 2012, Plaintiffs submitted a FOIA request to the DOJ seeking information about its surveillance of the Occupy movement. A copy of Plaintiffs FOIA request (without exhibits) is appended hereto as Exhibit 1.

21. In particular, Plaintiffs FOIA request seeks:

(a) All requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008.

(b) Any template applications or orders that have been utilized by United States Attorneys in the Northern District to seek or acquire location information since January 1, 2008.

(c) Any documents since January 1, 2008, related to the use or policies of utilizing any location tracking technology, including but not limited to cell-site simulators or digital analyzers such as devices known as Stingray, Triggerfish, AmberJack, KingFish or Loggerhead.

(d) Any records related to the Supreme Court's holding in *United States v. Jones*, excluding pleadings or court opinions filed in the matter in the Supreme Court or courts below

22. Plaintiffs also requested expedited processing, pursuant to 5 U.S.C. §522(a)(6)(E), on the grounds that there is an "urgency to inform the public about actual or alleged federal government activity" and also that this is "a matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." 28 C.F.R. §16.5(d)(1)(ii) & (iv).

23. By letter dated April 17, 2012, DOJ acknowledged receipt of Plaintiffs' FOIA request. A copy of this letter is appended hereto as Exhibit 2.

24. By letter dated April 23, 2012, DOJ granted Plaintiffs' request for expedited processing. A copy of this letter is appended hereto as Exhibit 3.

25. On July 6, 2012, Plaintiffs sent a letter to the DOJ inquiring as to the status of its search. A copy of this letter is appended hereto as Exhibit 4.

26. As of the date of the filing of this complaint, Plaintiffs have not received any response to their July 6, 2012 status inquiry.

27. More than 20 working days have passed since the DOJ received Plaintiffs' FOIA request.

28. As of the date of the filing of this complaint, Plaintiffs have not received any responsive documents from the DOJ or any correspondence indicating when the DOJ might provide any documents.

29. Plaintiffs have exhausted all applicable administrative remedies.

30. DOJ has wrongfully withheld the requested records from Plaintiffs.

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FIRST CLAIM FOR RELIEF

Violation of Freedom of Information Act For Wrongful Withholding Of Agency Records

31. Plaintiffs incorporate paragraphs 1 through 30 above as if fully set forth herein.

32. Defendant DOJ has wrongfully withheld agency records requested by Plaintiffs under FOIA and has failed to comply with the statutory time for the processing of FOIA requests.

33. Plaintiffs have exhausted the applicable administrative remedies with respect to DOJ's wrongful withholding of the requested records.

34. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure of the requested documents because Defendant DOJ continues to improperly withhold agency records in violation of FOIA. The Plaintiffs will suffer irreparable injury from, and have no adequate legal remedy for, the DOJ's illegal withholding of government documents pertaining to the subject of Plaintiffs' FOIA request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that this Court:

A. Order Defendant DOJ to process immediately the requested records in their entirety;

B. Order Defendant DOJ to make the requested records in their entirety available to Plaintiffs promptly upon completion of its processing of such records;

C. Provide for expeditious proceedings in this action;

D. Enter a preliminary and permanent injunction against the DOJ ordering the relief requested herein;

E. Declare that DOJ's failure to disclose the records requested by Plaintiffs is unlawful;

F. Award Plaintiffs' their litigation costs and reasonable attorney's fees incurred in this action;

//

G. Grant such other relief as the Court may deem just and proper.

Dated: July 31, 2012

By: _____
Linda Lye

Michael Risher
Linda Lye
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
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Attorneys for Plaintiffs

Exhibit 1

April 13, 2012

Via Certified Mail

Melinda Haag
United States Attorney
Northern District of California
Federal Courthouse
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

Office of Public Affairs
United States Department of Justice
950 Pennsylvania Ave, NW, Room 1128
Washington, DC 20530

Re: Freedom of Information Act Request regarding location tracking
Expedited Processing Requested

Dear Ms. Haag,

The American Civil Liberties Union of Northern California (ACLU-NC) and *San Francisco Bay Guardian* (*Bay Guardian)* submit this expedited Freedom of Information Act (FOIA) request for records in the possession of the United States Attorneys' Office for the Northern District of California pertaining to efforts to seek or obtain location information. We submit this request pursuant to the FOIA, 5 U.S.C. § 552, implementing regulations 28 CFR §16.1 *et seq.*, and any other applicable regulations.

Recent revelations have made clear that government agencies are engaged in seeking and acquiring the location information of individuals for tracking and surveillance purposes, utilizing varying technologies and varying legal standards that frequently fall short of constitutional protections designed to protect the public from intrusive government searches. Previous ACLU Freedom of Information Act requests have revealed that the Department of Justice has maintained since at least 2007 that the government need not obtain a warrant and show probable cause to track people's location with only one exception: real-time GPS and triangulation data, and that U.S. Attorneys around the country are only encouraged to obtain a warrant based on probable cause prior to engaging in precise cell phone tracking.[1] FOIA requests have also revealed that some U.S. Attorney offices do not even comply even with this set of guidelines.[2]

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[1] Email from Brian Klebba, *GPS or "E-911-data" Warrants*, November 17, 2009, available at http://www.aclu.org/pdfs/freespeech/cellfoia_dojrecommendation.pdf.

[2] Letter from William G. Stewart II, to Catherine Crump, *Mobile Phone Tracking (Items 3-5)/DNJ*, Dec. 31, 2008, available at http://www.aclu.org/pdfs/freespeech/cellfoia_released_074132_12312008.pdf; Letter from William G. Stewart II to Catherine Crump, *Mobile Phone Tracking(Items 3-5)FLS*, Dec. 31, 2008, available at http://www.aclu.org/pdfs/freespeech/cellfoia_released_074135_12312008.pdf.

In December 2009, it was revealed that telecommunications provider, Sprint Nextel, received over 8 million demands from government agencies for access to customer location information between September 2008 and October 2009.[3] In September 2011, it was also revealed that federal authorities had utilized a "stingray" device to track a mobile device and locate an individual in a California home.[4]

Following the Supreme Court's January 23, 2012 decision in *United States v. Jones*, _U.S._, 132 S.Ct. 945 (2012), in which the Court unanimously held that it was unconstitutional to install a global positioning device (GPS) on an individual's car and utilize it to track the individual for 28 days without a warrant, the FBI was forced to turn off nearly 3,000 active GPS devices in the field. [5] On April 4, 2012, the American Civil Liberties Union released findings from a 32-state coordinated public records act request seeking the policies, procedures, and practices of state and local law enforcement agencies related to cell tracking, revealing that many government entities were violating the privacy rights of Americans by obtaining location information without a probable cause warrant.[6]

There has been widespread media interest and public concern related to government tracking and surveillance of location information. There is also great urgency to inform the public about governmental efforts to track and surveil individuals because members of Congress and California state legislators are currently weighing new laws related to location tracking – and information shedding lights on the government's current practices would inform those pending legislative debates. It is imperative that Northern California community members and policymakers representing this region immediately gain a full and complete understanding of how the United States Attorneys for the Northern District are seeking or obtaining location information and whether these activities comport with constitutional rights. Access to this information is necessary for a meaningful and informed public debate over these pressing public policy issues and pending legislative debates.

I. REQUEST FOR INFORMATION

We request disclosure of agency records[7] in your possession created since January 1, 2008,[8] pertaining to efforts to seek or obtain location information utilizing any means.

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[3] http://www.wired.com/threatlevel/2009/12/gps-data/
[4] *See* Jennifer Valentino-Devries, "'Stingray' Phone Tracker Fuels Constitutional Clash," *Wall Street Journal*, September 21, 2011 (Tab 35).
[5] FBI General Counsel Andrew Weissmann. http://news.yahoo.com/supreme-court-ruling-prompts-fbi-turn-off-3-154046722--abc-news.html
[6] http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request
[7] The term "records" as used herein includes all records preserved in written or electronic form, including but not limited to: court filings, correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, training materials, manuals, studies, text messages, social networking posts or messages. To the extent the agency chooses to redact identifying information of individuals, we request that individuals be identified with an alphanumeric code so that multiple records related to the same individual can be recognized as such.

"Location information" as used in this request means any information that helps to ascertain the location of an individual or particular electronic device that, in whole or in part, is generated or derived from the operation of an electronic device, including but not limited to a cell phone, smartphone, cell site, global positioning system, cell-site simulator, digital analyzer, stingray, triggerfish, amberjack, kingfish loggerhead, or other electronic device, including both historical and real-time information.

In particular, we seek the following:

1) All requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008.

2) Any template applications or orders that have been utilized by United States Attorneys in the Northern District to seek or acquire location information since January 1, 2008.

3) Any documents since January 1, 2008, related to the use or policies of utilizing any location tracking technology, including but not limited to cell-site simulators or digital analyzers such as devices known as Stingray, Triggerfish, AmberJack, KingFish or Loggerhead.

4) Any records related to the Supreme Court's holding in *United States v. Jones*, excluding pleadings or court opinions filed in the matter in the Supreme Court or courts below.

II. REQUEST FOR EXPEDITED PROCESSING

Requesters seek expedited processing. This request should be granted because there is widespread media interest in government surveillance methods using new technology to collect detailed, sensitive, personal information, and there is urgency to inform the public about the scope of the government's practices because of pending legislation on these very issues. The information sought in this request is necessary to contribute to that pending legislative debate.

Title 5 U.S.C. §552(a)(6)(E) provides for expedited processing of requests for information in cases in which the person requesting the records demonstrates a compelling need. Department of Justice regulations state that FOIA requests are entitled to expedited processing when information requested involves "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 CFR §16.5(d)(1)(iv). In addition, for requests by persons primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged federal government activity constitutes a "compelling need." 5 U.S.C. §552(a)(6)(E)(v)(II); 28 CFR §16.5(d)(1)(ii).

A. Widespread and exceptional media interest

[8] Requestors seek records located either at the United State Attorneys' Northern District San Francisco, Oakland or San Jose offices, or at any other location where records are stored.

The federal government's surveillance and tracking of individuals using invasive new technologies but without satisfying the Fourth Amendment's requirements for obtaining warrants based on probable cause is a matter of great public concern. Whether and to what extent the United States Attorney for the Northern District of California is seeking or obtaining location information without a probable cause warrant are matters of great public concern. There are dramatic implications for core democratic values when the federal government engage in location surveillance to spy on ordinary members of the public, critics, dissidents, and those who espouse unpopular views, without adequate judicial oversight. As demonstrated by the extensive coverage of this issue, there is widespread media interest regarding governmental collection of location information.

Location information is very sensitive information and can reveal far more than just an individual's latitude and longitude. As the United States Court of Appeals for the D.C. Circuit explained in 2010 in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010):

> "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts." *Id.* at 562.

As a result, the media has extensively covered the government's use of location tracking devices, and its efforts to do so without obtaining a warrant based on probable cause. *See, e.g.*, Robert Barnes, "Supreme Court: Warrants needed in GPS tracking," *Washington Post*, January 23, 2012 (Tab 1); Rebecca J. Rosen, "Why the Jones Supreme Court Ruling on GPS Tracking Is Worse Than It Sounds," *The Atlantic*, January 23, 2012 (Tab 2); Ariane de Vogue, "GPS Tracking Requires Warrant, Supreme Court Rules," *ABC*, January 23, 2012 (Tab 3); Barry Friedman, "Privacy, Technology and Law," *New York Times*, January 29, 2012 (Tab 4); Greg Stohr, "Police Use of GPS Devices to Track People Limited by U.S. Supreme Court," *Bloomberg*, January 23, 2012 (Tab 5); Jess Bravin, "Justices Rein In Police on GPS Trackers," *Wall Street Journal*, January 24, 2012 (Tab 6); Editorial, "Navigating the Supreme Court's GPS ruling," *Los Angeles Times*, January 25, 2012 (Tab 7); Bob Egelko, "U.S. Supreme Court to decide major legal issues," *San Francisco Chronicle*, September 30, 2011 (Tab 8); Editorial, "The Court's GPS Test," *New York Times*, November 5, 2011 (Tab 9); David G. Savage, "Supreme Court: warrant required for GPS tracking," *San Francisco Chronicle*, January 24, 2012 (Tab 10); Cristian Salazar, "ACLU demands police disclose cell phone tracking," *San Francisco Chronicle*, August 4, 2011 (Tab 11); Adam Liptak, "Court Case Asks if 'Big Brother' Is Spelled GPS," *New York Times*, September 10, 2011 (Tab 12); Editorial, "A court test of privacy in the digital age," *San Francisco Chronicle*, January 29, 2012 (Tab 13); Adam Liptak, "Justices Say GPS Tracker Violated Privacy Rights," *New York Times*, January 24, 2012 (Tab 14); Julia Angwin, "FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling," *Wall Street Journal*, February 25, 2012 (Tab 15); Joan Biskupic, "Supreme Court rules warrant needed for GPS tracking," *USA Today*, January 24, 2012 (Tab 16); Kashmir Hill, "Supreme Court Deals Blow To Government Surveillance, Saying Warrant Needed For GPS Tracking," *Forbes*, January 23, 2012 (Tab 17); Timothy B. Lee, "GPS ruling is "hard" on the FBI—and that's a feature, not a bug," *Ars Technica*, March 23, 2012 (Tab 18); Renee Hutchins, "A step

back for rights," *Baltimore Sun*, January 29, 2012 (Tab 19); Debra Cassens Weiss, "Jones Decision Spurs FBI to Disable 3,000 GPS Devices and to Consider Legality of Trash Can Trespass," *ABA Journal*, February 28, 2012 (Tab 20); Nina Totenberg, "High Court: Warrant Needed For GPS Tracking Device," *NPR*, January 23, 2012 (Tab 21); Carl Franzen, "What Does The Supreme Court Ruling Against Warrantless GPS Tracking Mean?," *Talking Points Memo*, January 23, 2012 (Tab 22); James Vicini, "Supreme Court rules police need warrant for GPS tracking," *Reuters*, January 24, 2012 (Tab 23); Bill Mears, "Justices rule against police, say GPS surveillance requires search warrant," *CNN*, January 23, 2012 (Tab 24); Mark Sherman, "Supreme Court questions warrantless GPS tracking," *Business Week*, November 8, 2012 (Tab 25); Alex Fitzpatrick, "Supreme Court: GPS Tracking Is Illegal Without Warrant," *Mashable*, January 23, 2012 (Tab 26); Kashmir Hill, "How Many GPS Trackers Is The FBI Actually Using?," *Forbes*, March 27, 2012 (Tab 27); Jim McElhatton, "Supreme Court says police need warrant for GPS tracking," *The Washington Times*, January 23, 2012 (Tab 28); Jessie J. Holland and Pete Yost, "Warrant needed for GPS tracking, high court says," *The Washington Times*, January 23, 2012 (Tab 29); Catherine Crump, "How GPS tracking threatens our privacy," *CNN*, November 7, 2011 (Tab 30); Adam Cohen, "The Government Can Use GPS to Track Your Moves," *Time*, November 25, 2010 (Tab 31); Timothy B. Lee, "Supreme Court ponders constitutionality of 24/7 GPS tracking," *Ars Technica*, November 1, 2011 (Tab 32); Joshua A. Engel, "In 'U.S. v. Jones,' Supreme Court Rules No Warrantless GPS Tracking," *Law.com*, January 23, 2012 (Tab 33); Dahlia Lithwick, "U.S. v. Jones: Supreme Court Justices Alito and Scalia brwl over technology and privacy," *Slate*, January 26, 2012 (Tab 34); Jennifer Valentino-Devries, "'Stingray' Phone Tracker Fuels Constitutional Clash," *Wall Street Journal*, November 21, 2011 (Tab 35); Lior J. Strailevitz, "Can the police keep up with Jones?," *Chicago Tribune*, January 27, 2012 (Tab 36); "Want to Use a GPS-Tracking Device? Get a Warrant, Supreme Court Tells Police," *PBS*, January 23, 2012 (Tab 37); "Can Feds track the GPS of every American?," *RT*, November 9, 2011 (Tab 38).

The government's efforts to use GPS devices to engage in location tracking without a warrant were recently rebuffed by the United States Supreme Court in *United States v. Jones, supra.* Following that decision, the media continued to report on the issue extensively, including the implications of the *Jones* decision for law enforcement and the fact that the *Jones* decision prompted an increased reliance by law enforcement on cell site location information. *See, e.g.,* David Kravets, "After Car-Tracking Smackdown, Feds Turn to Warrantless Phone Tracking," *Wired*, March 31, 2012 (Tab 39); Editorial, "GPS and the Right to Privacy," *New York Times*, January 25, 2012 (Tab 40); John W. Whitehead, "U.S. v. Jones: The Battle for the Fourth Amendment Continues," *Huffington Post*, January 24, 2012 (Tab 41); Mike Sacks, "Warrantless GPS Tracking Unconstitutional, Supreme Court Rules," *Huffington Post*, January 23, 2012 (Tab 42); David Kravets, "Supreme Court Court Rejects Willy-Nilly GPS Tracking," *Wired*, January 23, 2012 (Tab 43); Dave Bohon, "More Police Agencies Using Warrantless Cell Phone Tracking in Surveillance," *The New American*, April 5, 2012 (Tab 44); Thomas Peracchio, "Supreme court ruling exposes many digital privacy issues," *The Examiner*, April 2, 2012 (Tab 45); Thomas Claburn, "Supreme Court Tackles GPS Tracking Vs. Privacy," *Information Week*, January 23, 2012 (Tab 46); Editorial, "EDITORIAL: Obama wants to track you," *Washington Times*, March 20, 2012 (Tab 47); Emily Babay, "After GPS tracking banned by court, privacy fight turns to cell phone data," *Washington Examiner*, April 1, 2012 (Tab 48).

Most recently, the ACLU released a report shedding light on disturbing trend across the country of law enforcement agencies obtaining cell phone location information without probable cause warrants. The ACLU report was initially the subject of a front page *New York Times* article. *See* Eric Lichtblau, "Police Are Using Phone Tracking as a Routine Tool," *New York Times*, March 31, 2012 (Tab 102).

After the *New York Times* piece appeared, a flurry of news articles on the subject followed, as well as numerous editorials emphasizing the importance of a warrant requirement for cell phone location information. *See, e.g.*, Cristian Salazar, "ACLU demands police disclose cell phone tracking," *San Francisco Chronicle*, August 4, 2011 (Tab 49); James Temple, "How California cops grab phone data from Apple, Google, carriers," *San Francisco Chronicle*, April 3, 2012 (Tab 50); Suzy Khimm, "ACLU: Local police departments tracking cellphones without warrants," *Washington Post*, April 2, 2012 (Tab 51); Declan McCullagh, "How Apple and Google help police bypass iPhone, Android lock screens," *CNET*, April 2, 2012 (Tab 52); Athima Chansanchai, "ACLU: Police track cellphones, too," *MSNBC Technology*, April 2, 2012 (Tab 53); Bob Sullivan, "Pricey 'stingray' gadget lets cops track cellphones without telco help," *MSNBC Red Tape*, April 3, 2012 (Tab 54); Peter Doocy, "Law enforcement under scrutiny by ACLU for tracking cell phones," *Fox News*, April 4, 2012 (Tab 55); American Foreign Press, "Many US police use cell phones to track: study," *American Foreign Press*, April 2, 2012 (Tab 56); Gary Johnson, "Privacy: Ditch the Cell Phone or Prepare to Disrobe," *Huffington Post*, April 5, 2012 (Tab 57); Adam Levine, "The New American Pie: Breached, Tracked and Strip Searched," *Huffington Post*, April 5, 2012 (Tab 58); Josh Gerstein, "Key Patriot Act opinions may not be classified," *Politico*, March 16, 2012 (Tab 59); Editorial, "EDITORIAL: Individual cell phone privacy is compromised," *Fresno Bee*, April 11, 2012 (Tab 60); Brendan Sasso, "ACLU report: Warrantless tracking of cellphones 'pervasive and frequent'," *The Hill*, April 2, 2012 (Tab 61); James Temple, "Why cell-phone tracking should require a warrant," *San Francisco Chronicle*, April 2, 2012 (Tab 62); John Moe, "Warrantless cell phone tracking is everywhere," *Marketplace*, April 4, 2012 (Tab 63); Grant Gross, "ACLU: Most US Police Don't Seek Warrants Before Tracking Cell Phones," *PC World*, April 2, 2012 (Tab 64); Josh Smith, "ACLU: Most Police Departments Track Cellphones Without Warrants," *National Journal*, April 2, 2012 (Tab 65); Timothy B. Lee, "Documents show cops making up the rules on mobile surveillance," *Ars Technica*, April 3, 2012 (Tab 66); Jay Bookman, "The dangerous nexus of privacy, liberty and government," *Atlanta Journal Constitution*, April 2, 2012 (Tab 67); Anne Blythe, "Police scrutiny of mobile device data raises concerns," *News & Observer*, April 3, 2012 (Tab 68); Andy Greenberg, "These Are The Prices AT&T, Verizon and Sprint Charge For Cellphone Wiretaps," *Forbes*, April 3, 2012 (Tab 69); Julian Sanchez, "Cell Phone Location Surveillance: Now at a Police Dept. Near You!," *Cato*, April 2, 2012 (Tab 70); Darlene Storm, "ACLU: Cops often violate Americans' privacy by warrantless cell phone tracking," *Computerworld*, April 2, 2012 (Tab 71); Debra Cassens Weiss, "Local Police Increasingly Use Cellphone Tracking, Sometimes Without a Warrant," *ABA Journal*, April 2, 2012 (Tab 72); David Dayen, "Pervasive Cell Phone Tracking Performed Even By Local Law Enforcement," *Firedoglake*, April 2, 2012 (Tab 73); Kevin Gosztola, "ACLU: US Law Enforcement Often Track Cell Phones Without a Warrant," *Firedoglake*, April 2, 2012 (Tab 74); Jacob Sullum, "ACLU Says Police Often Obtain Cellphone Location Data Without Warrants," *Reason*, April 2,

2012 (Tab 75); Andrew Jones, "ACLU: Many local police tracking cell phones without warrants," *Raw Story*, April 2, 2012 (Tab 76); Tiffany Kaiser, "ACLU Finds U.S. Police Departments Using Cell Phone Tracking, Sometimes Warrantless," *Daily Tech*, April 4, 2012 (Tab 77); James Gaskin, "Cell phone tracking now routine police action," *IT World*, April 2, 2012 (Tab 78); Scott Daniels, "APD admits to tracking cell phones," *KRQE*, April 2, 2012 (Tab 79); Amy Gahran, "ACLU: Most police track phones' locations without warrants," *CNN*, April 3, 2012 (Tab 80); Jennifer Waters, "Your cell phone is telling your secrets," *Market Watch*, April 6, 2012 (Tab 81); Helen A.S. Popkin, "Carriers charge cops for cellphone information," *MSNBC Technology*, April 4, 2012 (Tab 82); Jeff Homan, "Technology outpaces laws, raises concerns," *Collegiate Times*, April 5, 2012 (Tab 83); Mike Fossum, "How Cops Get Into Locked iPhone," *Web Pro News*, April 4, 2012 (Tab 84); Scott Schwebke, "ACLU questions cellphone tracking policies of law enforcement," *Standard*, April 4, 2012 (Tab 85); Viviane Vo-Duc, "ACLU: Many law enforcement agencies obtain cellphone tracking information without a warrant," *Deseret News*, April 5, 2012 (Tab 86); Robert Siegel, "Phone Tracking Big Business For Cell Companies," *NPR*, April 5, 2012 (Tab 87); Fox Report, "ACLU Claims Police are Tracking Cell Phones Without a Warrant," *Fox News Insider*, April 4, 2012 (Tab 88); Michael Santo, "ACLU-obtained documents show police use of cell phone tracking becoming routine," *Examiner*, April 1, 2012 (Tab 89); Editorial, "Editorial: Cell phone privacy is on the line," *Sacramento Bee*, April 8,2012 (Tab 90); Jill Redhage, "Cellphone data draws scrutiny," *Daily Journal*, March 30, 2012 (Tab 91); Levi Sumagaysay, "Watching Big Brother: The cops and cell phones in the U.S., the U.K.'s monitoring plans," *Silicon Valley*, April 2, 2012 (Tab 92); Jack A. Smith, "BIG BROTHER'S GETTING BIGGER," *The People's Voice*, April 10, 2012 (Tab 93); Editorial, "Who's listening? Authorities engaging in cellphone tracking," *Las Vegas Review-Journal*, April 10, 2012 (Tab 94); Brian Duggan, "ACLU: Police using cellphone tracking, including RPD; Reno says court approval always obtained," *Montgomery Advertiser*, April 6, 2012 (Tab 95); Associated Press, "ACLU finds Nevada police use cellphone tracking," *Las Vegas Sun*, April 8, 2012 (Tab 96); "ACLU finds widespread warrantless cell phone tracking by local police," *Info Security*, April 3, 2012 (Tab 97); "Cop's 'ear' in your pocket: Cell phone tracking routine with US police," *RT*, April 1, 2012 (Tab 98); "ACLU: Many local police track cell phones without warrants," *Press TV*, April 2, 2012 (Tab 99); "ACLU: Cell phone tracking by police widespread," *Homeland Security News Wire*, April 4, 2012 (Tab 100); "Cell Phone Tracking Raises Eyebrows," *Fox News*, August 4, 2011 (Tab 101);

B. Urgency to inform the public

There is great urgency in shedding light on location tracking by the government. The information sought in this FOIA request would contribute to the ongoing national debate on this topic generally, as well as specific legislative debates over the legal standard that should apply when the government seeks location information.

Justice Alito in his concurring opinion in *Jones* urges legislative action, noting that "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. To date,

however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes." 132 S.Ct. at 964.

Members of Congress representing Northern California, including Representatives Zoe Lofgren and Barbara Lee, are currently working on bipartisan efforts to pass a federal location privacy bill, the GPS Act,[9] and state lawmakers, including State Senator Mark Leno, are working on state location privacy laws.[10] There is great urgency in shedding light on whether the Department of Justice is adhering to constitutional standards: The information sought herein would contribute to ongoing societal and legislative debates and help the public and Bay Area policymakers assess what new laws should be implemented to better protect the public from "warrantless surveillance." *Elec. Priv. Info. Ctr. V. Dept. of Justice,* 416 F.Supp.2d 30, 41 (D.D.C. 2006) (granting preliminary injunction requiring agency to produce information where FOIA request sought information "vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program"); *see also Elec. Frontier Fdn. V. Ofc. Of Dir. Of Natl. Intelligence,* 542 F.Supp.2d 1181, 1187 (N.D. Cal. 2008) (granting preliminary injunction requiring agency to produce information where "Congress is considering legislation that would amend the FISA and the records may enable the public to participate meaningfully in the debate over such pending legislation.").

Further, requesters ACLU-NC and *Bay Guardian* are primarily engaged in disseminating information. The ACLU-NC is an affiliate of the ACLU, a national organization that works to protect the civil liberties of all people, including the safeguarding of the basic constitutional rights to privacy, free expression, and due process of law. The ACLU-NC is responsible for serving the population of northern California. The communications department of the ACLU-NC is the division of the ACLU-NC that is responsible for disseminating information to the public about issues of concern to the ACLU-NC and to the general public.

The *Bay Guardian* is the largest circulation newsweekly in northern California, with an audited weekly distribution of 100,000. Is website (sfbg.com) receives about 350,000 page views per month. The paper is locally owned, independent, and has been published continuously since 1966.

In short, expedited processing is warranted here because there is an urgency to inform the public about actual or alleged location tracking surveillance and requesters are primarily engaged in disseminating information. *See* 5 U.S.C. §552(a)(6)(E)(v)(II); 28 CFR §16.5(d)(1)(ii). Moreover, location tracking by the government is a matter of widespread and exceptional media interest. When the government utilizes technology to spy on citizens without adequate judicial oversight, the public confidence is deeply affected. *See* 28 CFR §16.5(d)(1)(iv). In this regard, this request is very similar other FOIA requests by ACLU-NC and *Bay Guardian,* seeking information about federal government surveillance practices and as to which the Department of

[9] http://www.govtrack.us/congress/bills/112/hr2168
[10] http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1401-1450/sb_1434_bill_20120409_amended_sen_v98.html

Justice (Federal Bureau of Investigation) granted expedited processing. *See* FOPIA Request Nos. 1144839-00 & 1184877-000.[11]

III. REQUEST FOR WAIVER OF PROCESSING FEES

We request a waiver of process fees. In a recent request by requesters ACLU-NC and *Bay Guardian,* the FBI granted the fee waiver. *See* FOPIA Request No. 1144839-000. Such a waiver is appropriate here for two reasons.

First, the *Bay Guardian* and communications department of the ACLU-NC are "representative[s] of the news media." Fees associated with the processing of this request should therefore be "limited to reasonable standard charges for document duplication." 5 U.S.C. §552(a)(4)(A)(ii)(II).

As noted above, the *Bay Guardian*, is the largest circulation newsweekly in northern California, with an audited weekly distribution of 100,000. Its website receives about 350,000 page views per month. The paper is locally owned, independent, and has been continuously published since 1966. The paper covers breaking news, does detailed investigative reporting, publishes editorials and covers arts, entertainment and lifestyle issues. The *Bay Guardian* has received more than 100 state, local, and national awards for journalistic excellence. Executive Editor Tim Redmond, for example, is the recipient of the 2012 Professional Journalist award from the Society of Professional Journalists, Northern California Chapter, for his investigation of state agencies' legally questionable acquisitions of a drug used for lethal injections that is no longer produced in the United States, an investigative series based in part on documents uncovered by the *Bay Guardian* and ACLU-NC in FOIA requests to various federal agencies. The *Bay Guardian* is a member of the California Newspaper Publishers Association and the Association of Alternative Newsweeklies.

Similarly, the ACLU-NC's communication department publishes newsletters, news briefings, right to know materials, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU-NC's communications department also disseminates information through the website http://www.aclunc.org, which had 127,475 visitors in 2011. This website addresses civil liberties issues in depth and provides features on civil liberties issues on which the ACLU-NC is focused. ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events. Finally, the ACLU-NC's communications department disseminates information through newsletters which are distributed

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[11] *See also ACLU-NC, et al. v. Dept. of Defense*, 2006 WL 1469418, Case No. 06-01698 (N.D. Cal. May 25, 2006) (ordering Department of Defense to comply with request for expedited processing by ACLU-NC and *Bay Guardian*).

to subscribers by mail. Due to these extensive publication activities, the ACLU-NC is a "representative of the news media" under the FOIA and agency regulations.[12]

The records requested are not sought for commercial use.

Second, a fee waiver for duplication costs should be granted for the independent reason that disclosure of the requested information is in the public interest. *See* 5 U.S.C. §552(a)(4)(ii)(II)-(iii). It will further public understanding of government conduct, in particular, the Department of Justice's policies, practices, and methods of surveillance. The ACLU-NC's communications department is a division of a nonprofit 501(c)(3) organization, and both the ACLU-NC's communications department and the *Bay Guardian* are "representative[s] of the news media." They are well situated to disseminate information gained through this request to the public, to affected communities and to political and religious organizations.

If the fee waivers are denied, the requesters are prepared to pay fees up to $25 and request to be informed of further fees that may be charged, but reserve the right to appeal a denial of fee waivers.

* * *

If this request for information is denied in whole or in part, we ask that you justify all deletions by reference to specific provisions of the Freedom of Information Act. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information.

Thank you for your prompt attention to this matter. Please furnish all applicable records to Nicole Ozer, American Civil Liberties Union of Northern California, 39 Drumm Street, San Francisco, California, 94111, telephone 415 621 2493.

I affirm that the information provided supporting the request for expedited processing and the fee waiver is true and correct to the best of our knowledge and belief.

Sincerely,

Nicole Ozer

Nicole A. Ozer
Technology and Civil Liberties Policy Director
ACLU of Northern California

Also on behalf of
San Francisco Bay Guardian

[12] Courts have found that organizations with missions similar to that of the ACLU and that engage in similar information dissemination activities 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).

Exhibit 2

U.S. Department of Justice

United States Attorney
Northern District of California

11th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495

(415) 436-7200
FAX:(415) 436-7234

APR 23 2012

April 17, 2012

VIA U.S. MAIL

Nicole A. Ozer
Technology and Civil Liberties Policy Director
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111

Freedom of Information Request

Dear Ms. Ozer:

This letter acknowledges receipt of your request for information under the Freedom of Information Act, sent to the United States Attorney's Office of the Northern District of California, dated April 13, 2012.

We are forwarding your request to the U.S. Department of Justice, Freedom of Information/Privacy Act Unit for processing, as all Freedom of Information requests to the U.S. Attorney's Office are handled by that unit.

Very truly yours,

MELINDA HAAG
United States Attorney

LILIBETH MARGEN
Paralegal Specialist

cc: Shirley Botts
U.S. Department of Justice
Freedom of Information /Privacy Act Unit
(With Enclosure)

Exhibit 3

U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information & Privacy Staff
600 E Street, N.W., Suite 7300, Bicentennial Building
Washington, DC 20530-0001
(202) 252-6020 FAX: 252-6047 (www.usdoj.gov/usao)

APR 23 2012

Requester: Nicole A. Ozer Request No.: 12-1293

Subject: Location Tracking/CAN

The Executive Office for United States Attorneys (EOUSA) has received your Freedom of Information Act/Privacy Act (FOIA/PA) request. It has been assigned the above number. Please give us this number if you write about your request. If we need additional information, we will contact you within two weeks.

Your request will be placed in the order in which it was received for processing, unless it is a very large request (Project Request). Then, it will be placed in a separate group of Project Requests, which are also processed in the order received.

EOUSA makes every effort to process most requests within a month (20 working days). There are some exceptions, for example, Project Requests take approximately nine months to process. Requests for "all information about myself in criminal case files" are usually Project Requests. If you have made such a request, you may either write us and narrow your request for specific items, or you may expect that the processing of your request may take nine months from the date of this letter.

By making a FOIA/PA request, you have agreed to pay fees up to $25, as stated in 28 CFR § 16.3(c), unless you have requested a fee waiver. Although you appear to qualify as a requester who is not subject to search fees, please note that pursuant to 28 CFR § 16.11, if you have not been granted a fee waiver, we are required to charge duplication fees at $0.10 per page after the first 100 pages which are free. Please do not send any payment at this time! If we anticipate that fees will exceed $25 or the amount you have stated in your letter (if greater than $25), we will normally notify you of our estimate of fees. After we have received your agreement to pay for the expected fees (or you have narrowed your request to reduce fees) and we have processed your request, we will require payment for the accumulated charges before we release documents to you. Without such payment, your request file will be closed without further action.

If you wish to revise your request to try to reduce fees, you may use the attached form. If you do not wish to incur fees for your request as it is now stated, please submit this form (or your letter revising your request) to us immediately so that your request, and fees, can be limited.

Sincerely,

Susan B. Gerson
Acting Assistant Director

Form No. 001B -4/11

Requester: Nicole A. Ozer Request Number: 12-1293

CHOOSE ONE

_____ **I understand that I am entitled to the first 100 pages free.** Please process only up to 100 pages that can be released to me.

_____ I wish to withdraw my request.

_____ I wish to revise my request to try to reduce fees. Please limit my request to the following documents:

_____

_____

_____

_____

_____ _____

Name Date

Please return to:

EOUSA
FOIA/PA Staff
600 E. Street, N.W., Room 7300
Washington D.C., 20530

Nicole Ozer
#12-1293

Note: Your request is being expedited. This does not guarantee that records will be released within the statutory time limits.

Exhibit 4

July 6, 2012

Via United States mail

Susan B Gerson
Acting Assistant Director
United States Department of Justice
EOUSA
FOIA/PA STAFF
600 E. Street, N.W., Room 7300
Washington D.C., 20530

Re: Request Number 12-1293

Dear Ms. Gerson:

I write in regard to the above-referenced Freedom of Information Act request, dated April 13, 2012, on which expedited processing has been granted. Almost three months have passed from the date of our request and we have not yet received an indication as to when we can anticipate receiving any records. This delay exceeds the twenty working day period under FOIA within which the FBI is required to notify us of a determination whether it intends to comply with our request. *See* 5 U.S.C. §552(a)(6)(A)(i). We request a response at your earliest convenience. Please feel free to call me or my assistant Nishtha Jolly at 415 621 2493 if you have any questions or have any information you can provide as to the status of our request. Your assistance is greatly appreciated.

Sincerely,

Linda Lye
Staff Attorney

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG