April 17, 2012

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

To Whom It May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Department of Defense ("DOD") implementing regulations, 32 C.F.R. § 286.1, *et seq*., the Department of State ("DOS") implementing regulations, 22 C.F.R. § 171.1, *et seq.*, the Office of the Director of National Intelligence implementing regulations, 32 C.F.R § 1700.1, *et seq.*, the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009), and the Attorney General's Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (together, the "ACLU"),[1] and the Center for Constitutional Rights ("CCR")[2] (collectively, "Requesters").

This Request seeks records relating to a U.S. military strike on a community located in the al-Majalah region[3] of the Abyan province of Yemen on December 17, 2009. According to news reports, U.S. cruise missiles loaded with cluster bombs struck the remote mountain community, targeting alleged "militants," but killing at least 21 children and 14 women. *See* Press Release, Amnesty International, Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack (June 7, 2010), http://bit.ly/ySbSkt. Since the attack, unnamed U.S. government officials, media reports, and human rights organizations have revealed that the United States launched the missiles that struck al-Majalah. *See e.g.*, Brian Ross et al., *Obama Ordered U.S. Military Strike on Yemen Terrorists*, ABC News, Dec. 18, 2009, http://abcn.ws/waUUnH; Michael Isikoff, *Yemen Cable Gives al-Qaida New 'Recruiting' Tool*, MSNBC News, Nov. 30, 2010, http://on.msnbc.com/wcToea. A leaked U.S. diplomatic cable, described a meeting on January 2, 2010, between General David Petraeus, then Commander of the U.S. Central Command, and Ali Abdullah Saleh, then president of Yemen, in which Saleh "lamented" the use of cruise missiles as "not very accurate," but Yemeni officials agreed

[1] The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the 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. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 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.

[2] The Center for Constitutional Rights is a non-profit, public interest, legal and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights.

[3] Al-Majalah is a transliteration from Arabic, and has been represented with different English spellings, including "al-Majala" and "al-Ma'jalah." This Request seeks records using any spelling or transliteration of the region's name.

to falsely claim responsibility for the al-Majalah attack. *See* Cable from U.S. Embassy Yemen, General Petraeus' Meeting with Saleh on Security Assistance, AQAP Strikes, Jan. 4, 2010 (originally published by WikiLeaks Nov. 30, 2010), *available at* http://wikileaks.org/cable/2010/01/10SANAA4.html#.

We seek information about the U.S. government's legal basis in domestic, foreign, and international law for the U.S. military strike on the al-Majalah community, information about the U.S. government's decision-making process and factual basis for ordering that strike, and information concerning any investigations or assessments of the strike by or at the behest of the U.S. government. We specifically seek records concerning the U.S. government's knowledge that civilians, including women and children, were present in the al-Majalah community, the measures taken to fulfill the United States' legal obligation to limit civilian casualties, and any measures taken by or at the behest of the United States to compensate victims' surviving family members for the loss of civilian life and property caused by the strike. Finally, we request information concerning U.S. government efforts to conceal its responsibility for the al-Majalah strike.

The Yemeni government initially claimed responsibility for the attack on the al-Majalah community. *See* Robert F. Worth, *Yemen Says Strikes Against Qaeda Bases Killed 34*, N.Y. Times, Dec. 17, 2009, http://nyti.ms/z3dB5v; Brian Ross et al., *Obama Ordered U.S. Military Strike on Yemen Terrorists*, ABC News, Dec. 18, 2009, http://abcn.ws/waUUnH ("A Yemeni official at the country's embassy in Washington insisted to ABC News Friday that the Thursday attacks were "planned and executed" by the Yemen government and police."); Press Release, Embassy of the Republic of Yemen Office of Media & Public Affairs, Press Statement (Dec. 24, 2009), http://bit.ly/ArypcH; Cable from U.S. Embassy Yemen, ROYG Looks Ahead Following CT Operations, But Perhaps Not Far Enough, Dec. 21, 2009 (originally published by WikiLeaks Dec. 4, 2010), *available at* http://wikileaks.org/cable/2009/12/09SANAA2251.html ("ROYG officials continue to publicly maintain that the operation was conducted entirely by its forces, acknowledging U.S. support strictly in terms of intelligence sharing.").

Beginning almost immediately after the strike, however, media reports quoted unnamed U.S. officials stating that the United States had launched the cruise missiles that struck al-Majalah. *See, e.g.*, Brian Ross et al., *Obama Ordered U.S. Military Strike on Yemen Terrorists*, ABC News, Dec. 18, 2009, http://abcn.ws/waUUnH ("On orders from President Barack Obama, the U.S. military launched cruise missiles early Thursday against two suspected al-Qaeda sites in Yemen, administration officials told ABC News"); *U.S. Fired on al-Qaida Targets in Yemen*, NBC News, Dec. 18, 2009, http://on.today.com/yDkGDd ("U.S. Navy warships fired missiles at suspected al-Qaida training camps in Yemen, with that government's support, Pentagon sources tell NBC News."); *U.S. Launched Missile Strikes on Al Qaeda in Yemen, Sources Say*, Fox News, Dec. 19, 2009, http://fxn.ws/zlE8cJ ("The U.S. has launched two missile strikes against Al Qaeda targets in Yemen, two U.S. officials told Fox News"); Bill Roggio, *US Launches Cruise Missile Strikes Against al Qaeda in Yemen*, Long War J., Dec. 19, 2009, http://bit.ly/5N0uQi ("The US military carried out cruise missile attacks against two al Qaeda camps in Yemen, killing several terrorist commanders and fighters as well as

civilians."). On November 30, 2010, Wikileaks released a State Department cable discussing a January 2010 meeting between General Petraeus and President Saleh, which confirmed that the United States was responsible for the strike on al-Majalah (this cable is discussed in further detail below).

On June 7, 2010, Amnesty International released images of U.S.-manufactured missile components at the site of the al-Majalah strike. The photographs show remnants of cluster bombs bearing stamps indicating their American origins. *See* Press Release, Amnesty International, Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack (June 7, 2010), http://bit.ly/ySbSkt ("These missiles are known to be held only by US forces and Yemeni armed forces are unlikely to be capable of using such a missile."). Cluster bombs are banned by a treaty signed by more than 100 countries (although not the United States or Yemen) because they can cause the indiscriminate loss of civilian life, and leave unexploded ordnance that can cause further civilian death and injury long after an attack.[4] *See* Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, 48 I.L.M. 357 (entered into force Aug. 1, 2010); *see also* Press Release, Amnesty International, Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack (June 7, 2010), http://bit.ly/ySbSkt; Press Release, Human Rights Watch, US: Investigate Counterterrorism Assistance to Yemen (Dec. 11, 2010), http://bit.ly/yCUO4N. Recently, journalist Jeremy Scahill and filmmaker Richard Rowley released a film containing direct footage taken just after the December 17, 2009 strike, which also shows missile parts stamped as American-made. *See America's Dangerous Game*, Al Jazeera, Mar. 8, 2012, http://aje.me/zR6qve. In addition, the film shows the bodies of child victims of the missile strike, and contains interviews with survivors describing the loss of other civilians' lives and destruction of their property. This Request therefore seeks records concerning the United States' legal and factual basis for the al-Majalah strike, its decision-making process for ordering the strike, its efforts to minimize civilian deaths, and its investigations into civilian deaths and efforts to compensate civilian victims.

This Request also seeks information about diplomatic efforts to cover up the United States' responsibility for the strike. A January 2010 U.S. State Department diplomatic cable obtained by WikiLeaks, published on the internet, and widely discussed in the press confirmed that the United States was responsible for the attack. The cable recounted a conversation between General David Petraeus, Yemeni President Ali Abdullah Saleh and other senior Yemeni officials, during which they discussed an apparent agreement that Yemen would help conceal U.S. involvement in missile strikes in Yemen by publicly taking responsibility for the al-Majalah attack and other American missile strikes. The cable is titled, "General Petraeus' Meeting with Saleh on Security Assistance, AQAP Strikes," and states:

> Saleh lamented the use of cruise missiles that are "not very accurate" and welcomed the use of aircraft-deployed precision-guided bombs instead. "We'll

[4] According to reports, "[t]hree civilians were killed shortly after the strike, after stepping on cluster munitions." Chris Woods, *The Civilian Massacre the US Neither Confirms Nor Denies*, Bureau of Investigative Journalism, Mar. 29, 2012, http://bit.ly/HlraKd.

> continue saying the bombs are ours, not yours," Saleh said, prompting Deputy Prime Minister Alimi to joke that he had just "lied" by telling Parliament that the bombs in Arhab, Abyan, and Shebwa were American-made but deployed by the ROYG.

Cable from U.S. Embassy Yemen, General Petraeus' Meeting with Saleh on Security Assistance, AQAP Strikes, Jan. 4, 2010 (originally published by WikiLeaks Nov. 30, 2010), *available at* http://wikileaks.org/cable/2010/01/10SANAA4.html#; *see also* Michael Isikoff, *Yemen Cable Gives al-Qaida New 'Recruiting' Tool*, MSNBC, Nov. 30, 2010, http://on.msnbc.com/wcToea.

Without information about the legal and factual basis for the United States' involvement in the al-Majalah strike the public is unable to make an informed judgment about the government's use of lethal force in a country with which the United States is not at war. The strike also raises serious questions about whether the government is abiding by its international and domestic law obligations in its counter-terrorism operations abroad, particularly with respect to its duty to minimize the loss of civilian lives when it uses lethal force. The public also has an interest in knowing whether and how the United States sought to cover up its responsibility for the al-Majalah strike and the resulting loss of civilian life.

I. Requested Records

The ACLU and CCR request all records by any or all persons or entities, including all persons acting on behalf of the United States, that in any way relate or pertain to or mention the al-Majalah community, including but not limited to the following:[5]

1. All records pertaining to the legal basis in domestic, foreign and international law upon which the United States launched the December 17, 2009 cruise missile strike against al-Majalah.

2. All records pertaining to the process by which the al-Majalah strike was planned and authorized, including the individuals who recommended, approved or authorized the strike, and what information was relied on to support the decision.

3. All records pertaining to the intended target(s) of the strike, including the identity and location of the intended target(s) and the proximity of the intended target(s) to civilians, including women and children.

[5] To the extent the information requested here overlaps with information the ACLU or CCR have sought through other, previously filed FOIA requests, please process responsive records in connection with the already-filed requests.

4. All records pertaining to civilian casualty assessments made in advance of the al-Majalah strike, including measures taken to determine the likelihood of civilian casualties and injuries, including those of minors, measures to limit civilian casualties and injuries, and the determination to carry out the strike despite a likelihood of civilian casualties and injuries.

5. All records pertaining to the assessment or evaluation of the al-Majalah strike on or after December 17, 2009, including but not limited to records regarding:

    a. Any investigation into or after-action assessment after the strike, including the number of casualties and injuries and identities and ages of the individuals killed and injured, as well as how the number of casualties and injuries and identity and ages of individuals killed and injured in the strike were determined;

    b. How the status and affiliation of individuals killed and injured was determined, i.e. whether individuals killed and injured were members of al Qaeda in the Arabian Peninsula, "supporters" of this group, members or supporters of other groups, innocent civilians, or any other status or affiliation.

    c. Any measures taken to revise legal, intelligence or operational standards, processes or procedures on the basis of any deficiencies identified in the al-Majalah operation.

6. All records regarding the compensation by or at the behest of the U.S. government of al-Majalah strike survivors and victims' family members, including any compensation claims process made available to such individuals, or any explanation why such claims process was not made available.

7. All records pertaining to agreements, understandings, cooperation or coordination between the United States and the government of Yemen regarding the strike on al-Majalah, including but not limited to records regarding:

    a. The process and reasons by which al-Majalah was selected as a target;

    b. The limits on the use of American military force in Yemen, including geographical or territorial limitations, measures that must be taken to limit civilian casualties and injuries, or measures that must be taken to assess the number of casualties and injuries and to determine the identity and status or affiliation of the individuals killed and injured;

    c. The agreement that the government of Yemen would take public responsibility for the al-Majalah strike; and

d. The extent to which and manner in which survivors and family members of victims would be compensated for their loss.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, bates-stamped files.

II. Application for Expedited Processing

The ACLU and CCR request expedited processing of this FOIA request pursuant to 5 U.S.C. § 552(a)(6)(E); 32 C.F.R. § 286.4(d)(3); 22 C.F.R. § 171.12(b); 32 C.F.R. § 1700.12. There is a "compelling need" for the requested records because the information requested is urgently needed by organizations primarily engaged in disseminating information to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2); 32 C.F.R. § 1700.12(c)(2). In addition, the records sought relate to a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2)(i). There is a compelling public interest in fully understanding the extent to which the United States is conducting military operations in countries where it is not at war, in understanding the extent of civilian casualties caused by such operations and details of the United States' continuing military presence in Yemen, and in understanding whether the United States' actions comply with its domestic and international legal obligations. Without the requested information, the public is unable to assess the government's determinations to use lethal force in situations involving high probabilities of killing innocent civilians. Indeed, the United States' efforts to cover up its involvement and shield itself from accountability significantly increase the importance and urgency of the requested records.

CCR and the ACLU are "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2); 32 C.F.R. § 1700.2(h)(4). Obtaining information about government activity, analyzing that information, and publishing and widely disseminating that information (in both its raw and analyzed form) to the press and public is a critical and substantial component of the ACLU's work and one of its primary activities. *See, e.g., Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 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 turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information" (internal citation omitted)). 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. 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 ACLU website specifically includes features on information obtained through FOIA. See, for example: http://www.aclu.org/national-security/predator-drone-foia; http://www.aclu.org/national-security/anwar-al-awlaki-foia-request; http://www.aclu.org/torturefoia; http://www.aclu.org/olcmemos/; http://www.aclu.org/mappingthefbi/; http://www.aclu.org/national-security/bagram-foia; http://www.aclu.org/safefree/torture/csrtfoia.html; http://www.aclu.org/natsec/foia/search.html; http://www.aclu.org/safefree/nsaspying/30022res20060207.html; http://www.aclu.org/patriotfoia; www.aclu.org/spyfiles; http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html; and http://www.aclu.org/exclusion. For example, the ACLU's "Torture FOIA" webpage, http://www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos it obtained through FOIA, http://www.aclu.org/safefree/general/olc_memos.html, contains commentary and analysis of the memos; an original comprehensive chart about OLC memos (see below); links to web features created by ProPublica—an independent, non-profit, investigative-journalism organization—based on information gathering, research, and analysis conducted by the ACLU; and ACLU videos created about the memos. *See Nat'l Sec. Archive*, 880 F.2d at 1386 (finding the National Security Archive to be a news-media requester because it intended to publish "document sets" whereby its staff would "cull those of particular interest . . . supplement the chosen documents with 'detailed cross-referenced indices, other finding aids, and a sophisticated computerized retrieval system' in order to make it more accessible to potential users"); *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2005) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

Dissemination of information to the public is a crucial component of CCR's work. CCR regularly publishes reports and factsheets about civil and international human rights issues, newsletters and press releases about its work, know-your-rights handbooks, and other educational materials for public consumption. These and other materials are actively disseminated and freely available to the public, including through CCR's heavily visited website, www.ccrjustice.org. CCR also operates a listserv of over 60,000 members through which it communicates information and developments pertaining to CCR's work and issues of concern, and organizes public education programs within the United States and internationally.

Furthermore, the records requested here are urgently needed to inform the national debate about actual or alleged Federal Government activity; specifically, the records sought relate to the United States' use of lethal force in Yemen, a country in which it is not at war, civilian casualties that result from "anti-terrorism" operations conducted by the U.S. military in foreign countries, and the attack on al-Majalah in particular, which resulted in the greatest loss of civilian life in a single reported U.S. attack in Yemen to date. The significant civilian casualties caused by the al-Majalah attack as well as the United States' efforts to conceal its responsibility are a matter of considerable public interest and widespread media attention. For these reasons, the records sought also relate to a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2)(i).

When the missile strike was reported and the United States' involvement leaked to the press, the incident elicited immediate public concern and generated significant media coverage. *See, e.g.*, *34 Killed in Yemen Terror Raids*, CNN, Dec. 17, 2009, http://bit.ly/yTsNFN; Robert F. Worth, *Yemen Says Strikes Against Qaeda Bases Killed 34*, N.Y. Times, Dec. 17, 2009, http://nyti.ms/xAAgP8; *US Fired on Al-Qaida Targets in Yemen*, NBC News, Dec. 18, 2009, http://on.today.com/yDkGDd; Thom Shanker & Mark Landler, *U.S. Aids Yemeni Raids on Al Qaeda, Officials Say*, N.Y. Times, Dec. 18, 2009, http://nyti.ms/x8wtUi; Brian Ross et al., *Obama Ordered U.S. Military Strike on Yemen Terrorists*, ABC News, Dec. 18, 2009, http://abcn.ws/waUUnH; *U.S. Launched Missile Strikes on Al Qaeda in Yemen, Sources Say*, Fox News, Dec. 19, 2009, http://fxn.ws/zlE8cJ; *Suspected Al-Qaida Leader in Yemen Escapes Raid*, Associated Press, Dec. 19, 2009, http://bit.ly/wgiu6d; *'US Aided' Deadly Yemen Raids*, Al Jazeera, Dec. 19, 2009, http://aje.me/yU5veQ; *U.S. Helped Yemen with Hardware, Intelligence: Report*, Reuters, Dec. 19, 2009, http://reut.rs/yIXK7d; *Obama Ordered Deadly Blitz on Yemen: US Media*, PressTV, Dec. 19, 2009, http://edition.presstv.ir/detail/114119.html; Karen DeYoung, *U.S. Helps Yemen in Attacks Against Suspected Al-Qaeda Targets*, Wash. Post, Dec. 19, 2009, http://wapo.st/x2Tvw5; Nassar Arrabyee, *Do Not Cooperate with Al Qaida: Yemen*, Gulf News, Dec. 19, 2009, http://bit.ly/w42C2N; *Report: US Helped Yemen's Strike Against Al-Qaida*, USA Today, Dec. 19, 2009, http://usat.ly/AfodrK; *Scores Dead in Offensives Against Rebels in Yemen*, Zee News, Dec. 19, 2009, http://bit.ly/zK2NgQ; *Suspected Al-Qaida Leader in Yemen Escapes Raid*, Associated Press, Dec. 19, 2009, http://bit.ly/zikkA2; *Yemeni Official: US Didn't Fire Missiles in Strike Against al-Qaida; Deputy Commander Killed*, Associated Press, Dec. 19, 2009, http://bit.ly/yJHufF; *US Backs Yemen's Raids on Qaeda: Report*, Al Arabiya News, Dec. 19, 2009, http://bit.ly/8lvjXw; *Yemeni Lawmakers Seek Clarity on Military Strikes*, Deutsche Presse-Agentur, Dec. 20, 2009, http://bit.ly/xy8YwP; *Yemen: 49 Civilians Killed in a Raid*, Ennahar Online, Dec. 20, 2009, http://bit.ly/xxDeYu; *49 Civilians Killed in Air Strike: Yemeni Official*, Agence France-Presse, Dec. 20, 2009, http://bit.ly/x5wDNp; Glenn Greenwald, *Cruise Missile Attacks in Yemen*, Salon, Dec. 21, 2009, http://bit.ly/HsZSDq; Abigail Hauslohner, *Despite U.S. Aid, Yemen Faces Growing al-Qaeda Threat*, Time, Dec. 22, 2009, http://ti.me/zAQjrA; *Report: Obama Ordered US Military Strike on Yemen*, DemocracyNow!, Dec. 23, 2009, http://bit.ly/xwLEQT; *Airstrike in Yemen Targets Terror Operatives*, Pub. Broad. Serv., Dec. 24, 2009, http://to.pbs.org/xQ9M5w; Hugh MacLeod & Nassar Arrabyee, *Yemeni*

Air Attacks on al-Qaida Fighters Risk Mobilising Hostile Tribes, Guardian, Jan. 2, 2010, http://bit.ly/xZInW3; Lee Keath, *Tensions Grow As US Heightens Role in Yemen*, Associated Press, Jan. 6, 2010, http://usat.ly/wTsGN1.

Interest in the al-Majalah strike continues to the present, with several media organizations and commentators covering it in recent weeks. *See, e.g.*, *The US Still Doesn't Want to Admit to the 44 Dead Yemenis*, emptywheel, Mar. 30, 2012, http://bit.ly/I1klsV; Chris Woods, *The Civilian Massacre the US Neither Confirms Nor Denies*, Bureau of Investigative Journalism, Mar. 29, 2012, http://bit.ly/HlraKd; *America's Dangerous Game*, Al Jazeera, Mar. 8, 2012, http://aje.me/zR6qve.

Additionally, Amnesty International's June 7, 2010 release of the images of U.S.–manufactured cluster bomb shells found at the site of the attack in al-Majalah generated renewed public interest in the incident. *See, e.g.*, Press Release, Amnesty International, Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack (June 7, 2010), http://bit.ly/ySbSkt; *US Used Cluster Bombs on Yemen Civilians: Amnesty*, Agence France-Presse, June 6, 2010, http://bit.ly/wEpTXw; *US Missile 'Used in Yemen Raid'*, BBC News, June 6, 2010, http://bbc.in/y3X9L0; Laura Kasinof, *U.S. Cluster Bombs in Yemen: The Right weapon in Al Qaeda Fight?*, Christian Science Monitor, June 7, 2010, http://bit.ly/xbJzwH; Glenn Greenwald, *An Exciting New Muslim Country to Drone Attack*, Salon, Aug. 25, 2010, http://bit.ly/yYIsXo.

The State Department diplomatic cable corroborating the United States' responsibility for and subsequent concealment of the al-Majalah attack was also the subject of intense media coverage and public scrutiny. *See, e.g.*, Justin Elliott, *WikiLeaks: U.S. Bombs Yemen in Secret*, Salon, Nov. 29, 2010, http://bit.ly/AprsH7; Radio Interview by Tony Cox with Scott Shane & Ronald Neumann, *Talk of the Nation: WikiLeaks Cables Reveal Candid Communications*, Nat'l Pub. Radio, Nov. 29, 2010, http://n.pr/gIW8mF; Michael Isikoff, *Yemen Cable Gives al-Qaida New 'Recruiting' Tool*, MSNBC News, Nov. 30, 2010, http://on.msnbc.com/wcToea; Press Release, Amnesty International, Wikileaks Cable Corroborates Evidence of US Airstrikes in Yemen (Dec. 1, 2010), http://bit.ly/zQZfn5; Nick Allen, *WikiLeaks: Yemen Covered Up US Drone Strikes*, Telegraph, Nov. 28, 2010, http://bit.ly/htZzo5; William Fisher, *U.S. Wikileaks Cables Bolster Claim of Deadly U.S. Attack in Yemen*, Inter Press Serv., Dec. 1, 2010, http://bit.ly/A6EW04; Op-Ed., Elliott Abrams, *Dictators, Democracies and WikiLeaks*, Wall St. J., Dec. 1, 2010, http://on.wsj.com/eJtLd0; Karen DeYoung, *Cables Show Obstacles with Yemeni Leader*, Wash. Post, Dec. 3, 2010, http://wapo.st/gTVo5y; *Yemen Offered U.S. "Open Door" to Al Qaeda: WikiLeaks*, Reuters, Dec. 3, 2010, http://reut.rs/ffY7GJ; Robert Booth & Ian Black, *WikiLeaks Cables: Yemen Offered US 'Open Door' To Attack Al-Qaida on its Soil*, Guardian, Dec. 3, 2010, http://bit.ly/eGvapA; Robert Booth & Ian Black, *Yemeni President 'Bizarre and Petulant', WikiLeaks Cables Claim*, Guardian, Dec. 3, 2010, http://bit.ly/h7HonG; Juliane von Mittelstaedt, *A US Hand in Yemen's Civil War*, Der Spiegel, Dec. 3, 2010, http://bit.ly/g1uVLq; Scott Shane, *Yemen Sets Terms of a War on Al Qaeda*, N.Y. Times, Dec. 3, 2010, http://nyti.ms/fnp9GR; Ellen Knickmeyer, *Yemen's Double Game*, Foreign Policy, Dec. 7, 2010, http://bit.ly/haz3J4; Jeremy Scahill, *WikiLeaking Covert Wars*, The

Nation, Dec. 9, 2010, http://bit.ly/yBYvJO; James Traub, *The Sunshine Policy*, Foreign Policy, Dec. 10, 2010, http://bit.ly/hKL10K; Eric Schmitt, *U.S. Plays Down Tensions With Yemen*, N.Y. Times, Dec. 17, 2010, http://nyti.ms/eEHEsd.

The ability to engage in meaningful public discussion about the United States' targeting of individuals suspected of terrorism for lethal attack in Yemen is impeded by the lack of adequate information about the legal and factual underpinnings of U.S. actions, and the measures taken to minimize civilian casualties. Interest in the United States' escalated use of military and intelligence agencies to conduct killings in Yemen and the secrecy with which those actions are conducted has continued to the present. *See, e.g.*, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010, http://wapo.st/dkg306; *Obama approved secret operations in Yemen*, Reuters, Jan 27, 2010, http://reut.rs/mNYMur; Jim Lobe, *U.S. Escalates War Against Al-Qaeda*, Inter Press Service, June 14, 2011, http://ipsnews.net/news.asp?idnews=56075; Scott Shane, Mark Mazzatti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. Times, Aug. 14, 2010, http://nyti.ms/90BFyW; Adam Entous, Julian E. Barnes & Margaret Coker, *U.S. Doubts Intelligence That Led to Yemen Strike*, Wall St. J., Dec. 29, 2011, http://on.wsj.com/zifBwJ; Karen DeYoung, *U.S. Plans to Step Up Aid to Yemen if Conditions Are Met*, Wash. Post, Feb. 20, 2012, http://wapo.st/w9z3Bd; Jeremy Scahill, *Washington's War in Yemen Backfires*, The Nation, Mar. 5, 2012, http://bit.ly/xaSNXO; Margaret Coker, Hakim Almasmari & Julian Barnes, *U.S., Yemen Restart Training*, Wall St. J., Mar. 6, 2012, http://on.wsj.com/ypARAZ; Ahmed Al-Haj, *Yemeni Officials: US Airstrikes Hit al-Qaida Area*, Associated Press, Mar. 11, 2012, http://bo.st/Ht0F7m; Jeremy Scahill, *Why is President Obama Keeping a Journalist in Prison in Yemen?*, The Nation, Mar. 13, 2012, http://bit.ly/Apgjgx; Chris Woods & Emma Slater, *Arab Spring Brings Steep Rise in US Attacks in Yemen*, Bureau of Investigative Journalism, Mar. 29, 2012, http://bit.ly/H01cND; Bill Roggio, *US Drone Strikes Kill 5 AQAP Fighters, 1 Civilian in Southern Yemen*, Long War J., Mar. 30, 2012, http://bit.ly/HpVw91; Hakim Almasmari, *Security Officials: Militants Target Gas Pipeline After Airstrikes Kill 6 in Yemen*, CNN, Mar. 31, 2012, http://bit.ly/H2Rc0A; Ken Dilanian & David S. Cloud, *In Yemen, Lines Blur as U.S. Steps Up Airstrikes*, L.A. Times, Apr. 2, 2012, http://lat.ms/HzWXad.

III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "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); *see also* 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17(a); 32 C.F.R. § 1700.6(b).

Given the ongoing media attention to this issue, the records sought by this request will significantly contribute to public understanding of the operations and activities of the government. Moreover, disclosure is not in the ACLU's or CCR's commercial interest.

Any information disclosed by the Requesters 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 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 and internal quotations omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

A waiver of search and review fees is warranted because the Requesters qualify as "representative[s] of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 32 C.F.R. § 286.28(e)(7); 22 C.F.R. § 171.15(c); 32 C.F.R. § 1700.6(i)(2). Accordingly, fees associated with the processing of this request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 22 C.F.R. § 171.15(c); 32 C.F.R. § 1700.6(i)(2).

CCR and the ACLU meet the statutory and regulatory definitions of a "representative of the news media" because they are "entit[ies] that gather[] information of potential interest to a segment of the public, use[their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive*, 880 F.2d at 1387 (finding that an organization that "gathers information from a variety of sources," 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 the purposes of FOIA); *cf. Am. Civil Liberties Union 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 Requesters are "representative[s] of the news media" for the same reasons they are "primarily engaged in the dissemination of information." *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *see supra*.[6] Indeed, the

[6] On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. 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 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 of Washington recently was held to be a "representative of the news media." *Am. Civil Liberties Union of Wash. v. Dep't of Justice*, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011).

* * *

Pursuant to applicable statue and regulations, we expect a 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); 22 C.F.R. § 171.12(b); 32 C.F.R. § 1700.12(b).

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.

We also request that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish all responsive records to: Nathan Freed Wessler, American Civil Liberties Union, 125 Broad Street, 18th Floor, New York, NY 10004.

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).

Sincerely,

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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. Finally, 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. In prior FOIA requests to the Department of Defense, DOD has also found CCR to qualify as an organization entitled to a fee waiver. For example, in December 2004, DOD granted a fee waiver for a CCR request for information pertaining to the secret detention of individuals in U.S. facilities overseas.