

March 17, 2020

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National Institutes of Health  
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Freedom of Information Officer  
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National Science Foundation  
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Alexandria, Virginia 22314

Department of Energy  
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FOIA Requester Service Center  
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Department of Commerce  
Carrie Hyde-Michaels  
Deputy Chief Freedom of Information Act Officer and Deputy Program Director of  
Departmental FOIA/Privacy Act Operations  
Office of Privacy and Open Government  
14th and Constitution Avenue NW, Mail Stop 61025  
Washington, DC 20230

Re: *Request Under Freedom of Information Act*  
Expedited processing and fee waiver/limitation requested

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”)<sup>1</sup> and Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”)<sup>2</sup> submit this Freedom of Information Act request for records pertaining to the government’s efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers believed to have connections to China.

## I. Background

Although international scientific collaboration is commonplace and a valuable source of innovation for the United States, in the past several years, the U.S. government has pushed universities and research institutions around the country to closely scrutinize scientists who may have foreign ties—especially ties to China.<sup>3</sup> As part of this campaign, the Federal Bureau of Investigation (“FBI”) has coordinated with agencies like the National Institutes of Health (“NIH”) to pursue investigations against scientists and researchers, many of whom are Chinese-

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<sup>1</sup> The American Civil Liberties Union Foundation is a 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 civil rights and civil liberties issues across the country. The American Civil Liberties Union is a separate 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.

<sup>2</sup> Asian Americans Advancing Justice | AAJC is a national, non-partisan, not-for-profit 501(c)(3) organization that works through policy advocacy, education, and litigation to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC is one of the nation’s leading experts on civil rights issues of importance to the Asian American and Pacific Islander (AAPI) community, including immigration and immigrants’ rights, census, hate incidents, language access, technology and telecommunications, and voting rights.

<sup>3</sup> See, e.g., Federal Bureau of Investigation (“FBI”), *China: The Risk to Academia* 1 (2019), available at <https://www.fbi.gov/file-repository/china-risk-to-academia-2019.pdf/view>; Staff Report, S. Comm. on Homeland Sec. & Governmental Affairs, *Threats to the U.S. Research Enterprise: China’s Talent Recruitment Plans* 5 (2019), available at <https://www.hsgac.senate.gov/imo/media/doc/2019-11-18%20PSI%20Staff%20Report%20-%20China's%20Talent%20Recruitment%20Plans%20Updated.pdf>.

Americans.<sup>4</sup> National news outlets report that this heightened scrutiny has, in some cases, caused Chinese-American scientists to lose their research funding or be fired from research institutions. According to news reports, many of these adverse actions are not based on a specific threat of espionage, but instead on scientists' failing to adequately disclose their international collaborations. Yet new disclosure rules, inconsistent and potentially discriminatory enforcement, and shifting norms have produced widespread confusion and concern among Chinese-American researchers.<sup>5</sup>

The FBI has spearheaded this scrutiny of scientists and researchers, as reflected by FBI Director Christopher Wray's many public remarks on the "China threat." For instance, during a hearing before the Senate Intelligence Committee in February 2018, Senator Marco Rubio asked Director Wray to expand on "the counterintelligence risk posed to U.S. national security from Chinese students, particularly those in advanced programs in the sciences and mathematics[.]"<sup>6</sup> Director Wray responded:

[T]he use of nontraditional collectors, especially in the academic setting, whether it's professors, scientists, students, we see in almost every field office that the FBI has around the country. . . . So one of the things we're trying to do is view the China threat as not just a whole of government threat, but a whole of society threat on their end. I think it's going to take a whole of society response by us.<sup>7</sup>

Relatedly, in November 2018, the Department of Justice ("DOJ") announced the

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<sup>4</sup> Office of Inspector General, OEI-01-19-00160, U.S. Dep't of Health and Human Services, *Vetting Peer Reviewers at NIH's Center for Scientific Review: Strengths and Limitations* 15 (2019), available at <https://oig.hhs.gov/oei/reports/oei-01-19-00160.pdf> (hereinafter "HHS OIG Report").

<sup>5</sup> See, e.g., Diana Kwon, *US-China Tensions Leave Some Researchers on Edge*, Scientist, Jun. 7, 2019, <https://www.the-scientist.com/news-opinion/how-tensions-between-the-us-and-china-affect-scientists-65986>; Peter Waldman, *The U.S. Is Purging Chinese Cancer Researchers From Top Institutions*, Bloomberg Businessweek, June 13, 2019, <https://www.bloomberg.com/news/features/2019-06-13/the-u-s-is-purging-chinese-americans-from-top-cancer-research>; Jeffrey Mervis, *NIH Probe of Foreign Ties Has Led to Undisclosed Firings—And Refunds from Institutions*, Science, June 26, 2019, <https://www.sciencemag.org/news/2019/06/nih-probe-foreign-ties-has-led-undisclosed-firings-and-refunds-institutions> (hereinafter "NIH Probe").

<sup>6</sup> *Open Hearing on Worldwide Threats: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 2 (2018), available at <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-0#>.

<sup>7</sup> *Id.*

creation of a “China Initiative.”<sup>8</sup> According to a DOJ “Fact Sheet,” one of the goals of the China Initiative is to “[d]evelop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities, and the defense industrial base) that are being coopted into transferring technology contrary to U.S. interests[.]”<sup>9</sup> In July 2019, the FBI released an advisory entitled “China: The Risk to Academia,” in which it warned that certain “Chinese scholars may serve as collectors—wittingly or unwittingly—of economic, scientific, and technological intelligence from U.S. institutions to ultimately benefit Chinese academic institutions and businesses.”<sup>10</sup> The advisory goes on to assert that “foreign adversaries have targeted” scholars with “divided loyalty to a country other than the United States” in attempting to “gain access to [universities’] research and development.”<sup>11</sup>

This broad suspicion is particularly troubling given that DOJ has, in recent years, initiated multiple serious and highly damaging prosecutions against Chinese-American scientists on what were later revealed to be faulty grounds.<sup>12</sup> Nevertheless, the government has continued to cite the threat of espionage to support a push for increased coordination between law enforcement agencies, defense agencies, and agencies involved in scientific research and grant-making. For instance, in September 2019, the Department of Health and Human Services (“HHS”) issued a report finding that one its subsidiary agencies, the NIH, “ha[d] not

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<sup>8</sup> Office of Public Affairs, *Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage* (Nov. 1, 2018), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

<sup>9</sup> DOJ, *Department of Justice China Initiative Fact Sheet*, available at <https://www.justice.gov/opa/page/file/1122686/download>.

<sup>10</sup> FBI, *China: The Risk to Academia* 2 (2019).

<sup>11</sup> *Id.* at 9.

<sup>12</sup> See, e.g., Gina Kolata, *Vast Dragnet Targets Theft of Biomedical Secrets for China*, N.Y. Times, Nov. 4, 2019, <https://nyti.ms/2pDupLp> (reporting that “the Justice Department has been forced to drop theft charges against at least four Chinese-American scientists since 2014”); Chris Fuchs, *Scientist Formerly Accused of Spying Sues Alleging FBI Agent Falsified Evidence*, NBC News, May 11, 2017, <https://www.nbcnews.com/news/asian-america/scientist-formerly-accused-spying-sues-alleging-fbi-agent-falsified-evidence-n757826>; Nicole Perloth, *Cleared of Spying for China, She Still Doesn’t Have Her Job Back*, N.Y. Times, May 17, 2018, <https://nyti.ms/2k82z3J>; Kristine Guerra, *Feds Dismiss Charges Against Former Eli Lilly Scientists Accused of Stealing Trade Secrets*, IndyStar, Dec. 5, 2014, <http://indy.st/1CNNk5k>; cf. Andrew Chongseh Kim, *Prosecuting Chinese “Spies”: An Empirical Analysis of the Economic Espionage Act*, 40 Cardozo L. Rev. 749, 753–54 (2018) (analyzing “a random sample of cases charged under the Economic Espionage Act (EEA) from 1997 to 2015” and finding that “21% of Chinese and 22% of all Asian defendants charged under the EEA are never proven guilty of espionage or any other serious crime”).

addressed . . . concerns about foreign threats to the integrity of the peer review process.”<sup>13</sup> In response, NIH stated that it was already “working closely with federal partners,” including, among others, the Department of Defense and the FBI, “to update [its] peer review vetting guidelines.”<sup>14</sup> NIH went on to confirm that it was working with “federal experts,” including the HHS Office of National Security, “to help develop a systematic, risk-based, data-driven approach to identifying peer review nominees who warrant additional scrutiny.”<sup>15</sup>

News reports indicate that the government’s intensifying focus on scientists with ties to China has adversely affected individuals pursuing research in both private industry and academia. For example, according to a recent story published by *Bloomberg Businessweek*, “[t]he FBI is telling companies, universities, hospitals—anyone with intellectual property at stake—to take special precautions when dealing with Chinese business partners and employees who might be what [the director of the FBI] calls ‘nontraditional’ information collectors.”<sup>16</sup> Along the same lines, “[v]isas for Chinese students and researchers are being curtailed, and more Chinese engineers and businesspeople, especially in the tech sector, are being detained at U.S. airports while border agents inspect and image their digital devices.”<sup>17</sup>

The public record contains little information about how federal law enforcement and scientific agencies decide whom to scrutinize, investigate, or prosecute, and on what basis. For at least two reasons, the public has a strong interest in knowing more. First, the government’s efforts in this area may significantly affect the United States’ leadership role in scientific and technological innovation. Second, government measures that single out scientific professionals or students for adverse treatment based on their race or national origin violate the law.

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<sup>13</sup> HHS OIG Report, *supra* note 4, at 15.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.*; see also Jeffrey Mervis, *NSF Hopes Jason Can Lead It Through Treacherous Waters*, *Science*, March 18, 2019, <https://www.sciencemag.org/news/2019/03/nsf-hopes-jason-can-lead-it-through-treacherous-waters> (hereinafter “*NSF Hopes*”) (reporting on National Science Foundation’s efforts to “examine how foreign influences may be warping the U.S. research enterprise”); Bill Priestap, Statement Before the S. Judiciary Comm., Subcomm. on Border Sec. & Immigration, *Student Visa Integrity: Protecting Educational Opportunity and National Security* (June 6, 2018), available at <https://www.fbi.gov/news/testimony/student-visa-integrity-protecting-educational-opportunity-and-national-security> (“[T]he more willing these schools are to engage with U.S. law enforcement as issues arise and suspicious circumstances become noticed, the more likely it is that the FBI and its partners can help to mitigate risk or minimize damage posed to these schools.”).

<sup>16</sup> Waldman, *The U.S. Is Purging Chinese Cancer Researchers From Top Institutions*, *supra* note 5.

<sup>17</sup> *Id.*

Accordingly, through this FOIA request, the ACLU and Advancing Justice | AAJC seek information about the government's efforts to scrutinize, investigate, prosecute, and otherwise take measures against scientists who are believed to have connections to China and other nations.

## II. Requested Records

Unless otherwise stated below, the ACLU and Advancing Justice | AAJC request the following records created on or after January 1, 2017 :

### A. Department of Justice and Federal Bureau of Investigation

From DOJ and the FBI, requestors seek:

1. Formal or informal guidance, training materials, briefing materials, advisories, or presentations related to China or talent programs that were provided to educational institutions, scientific research institutions, or government agencies that conduct or fund scientific research.
2. Correspondence related to China, talent programs, peer review, or conflicts of interest with educational institutions, scientific research institutions, or government agencies that conduct or fund scientific research, including but not limited to:
  - a. lists of suspected talent program members;<sup>18</sup>
  - b. FBI or other government agency requests for information or investigations; and
  - c. requests for access to individual employees' communications.
3. Memoranda, briefing materials, policies, formal or informal guidance, training materials, advisories, or presentations concerning:
  - a. China and scientific research institutions, educational institutions, grant funding, or peer review;
  - b. talent programs;
  - c. conflicts of interest or undisclosed sources of funding related to scientific research; or
  - d. the Department of Justice's China Initiative. including but not limited to its purpose, scope, progress, status, or effectiveness.

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<sup>18</sup> See Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 98.

4. Records containing statistics about the number of assessments, investigations, or prosecutions related to China, or any subset of investigations or prosecutions related to China.<sup>19</sup>
5. Records containing statistics about assessments, investigations, or prosecutions of scientists, researchers, or technologists.
6. Criminal complaints or indictments related to China and economic espionage, fraud, trade secrets, false statements, or talent programs.
7. Records contained in the FBI production to the Senate Subcommittee on Investigations dated October 12, 2018.
8. The FBI PowerPoint presentation titled, “Talent Plan Education Package Briefing.”<sup>20</sup>

## **B. National Institutes of Health**

From the NIH, requestors seek:

1. Records containing statistics related to scientists identified, “flagged,” or investigated for their purported foreign ties, including but not limited to statistics referencing China or the national origin, ethnicity, or race of the individuals.<sup>21</sup>
2. Records containing statistics related to the revocation or reduction of NIH funding to individuals or institutions, and that reference China or the national origin, ethnicity, or race of individual funding recipients.
3. Records containing statistics related to investigations or adverse action

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<sup>19</sup> See, e.g., Mark Hosenball and David Brunnstrom, *To Counter Huawei, U.S. Could Take ‘Controlling Stake’ in Ericsson, Nokia: Attorney General*, Reuters, Feb. 6, 2020, <https://reut.rs/31yMw3u> (reporting that FBI Director Christopher Wray informed conference attendees at the Center for Strategic and International Studies that “the bureau ha[s] about 1,000 open investigations of Chinese technology theft across its 56 regional offices” and “span[ning] just about every industry sector”); *The Latest: FBI Chief Wray Says China Poses a Serious Threat*, U.S. News, July 23, 2019, <https://www.usnews.com/news/politics/articles/2019-07-23/the-latest-fbi-chief-wray-says-china-poses-a-serious-threat> (reporting that “Wray told the Senate Judiciary Committee” that “the FBI has more than 1,000 investigations involving economic espionage and attempted intellectual property theft,” and that “nearly all lead back to China”).

<sup>20</sup> Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 93.

<sup>21</sup> See, e.g., Jeffrey Mervis, *NIH Reveals its Formula for Tracking Foreign Influences*, Science, Sep. 27, 2019, <https://www.sciencemag.org/news/2019/09/nih-reveals-its-formula-tracking-foreign-influences> (hereinafter “*NIH Reveals*”).

by NIH (or other U.S. agencies or institutions) against peer reviewers of grant proposals, and that reference China or the national origin, ethnicity, or race of the reviewers.

4. Records containing statistics related to cases referred to HHS for investigation or potential debarment, and that reference China or the national origin, ethnicity, or race of the individuals referred to HHS.
5. Records containing statistics related to adverse employment actions by NIH and that reference China or the national origin, ethnicity, or race of the individuals affected.
6. Records concerning the firing, resignation, or retirement of employees by U.S. institutions receiving NIH funding, or adverse action against employees by those institutions, in connection with alleged violations of NIH rules.
7. Formal or informal investigative summaries or correspondence concerning “at least 75 individuals potentially linked to foreign talent recruitment plans” who “also served as peer reviewers within the last two years.”<sup>22</sup>
8. Policies, memoranda, formal or informal guidance, training materials, briefing materials, advisories, or presentations concerning the Thousand Talents program or other foreign talent programs.
9. Formal or informal guidance, training documents, or policies provided to Scientific Review Officers for vetting peer reviewers.
10. Records identifying possible “risk factors” for vetting scientists, including but not limited to records incorporating input from HHS’s Office of National Security.<sup>23</sup>
11. Reports that NIH received in 2016 from the HHS Office of Inspector General concerning an FBI probe into an MD Anderson scientist, who was allegedly sharing grant proposals that he had been asked to review.<sup>24</sup>

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<sup>22</sup> Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 50.

<sup>23</sup> See HHS OIG Report, *supra* note 4, at 16 (recommending that NIH “leverage the expertise” of HHS’s Office of National Security to develop a “risk-based” approach to vetting); Mervis, *NIH Reveals*, *supra* note 21.

<sup>24</sup> Mervis, *NIH Probe*, *supra* note 5.

### C. National Science Foundation

From the National Science Foundation (“NSF”), requestors seek:

1. Records containing statistics related to scientists identified, “flagged,” or investigated for their foreign ties, including but not limited to statistics referencing China or the national origin, ethnicity, or race of the individuals.
2. Reports, policies, memoranda, formal or informal guidance, training materials, briefing materials, advisories, or presentations concerning both China and the scientific advisory group known as “Jason.”<sup>25</sup>
3. Briefing materials or presentations concerning China and presented by Dr. Rebecca Keiser, head of NSF’s international office, to individuals at U.S. universities.<sup>26</sup>
4. Memoranda, formal or informal guidance, training materials, briefing materials, advisories, or presentations concerning the April 2018 decision to restrict the “pool of rotators . . . to scientists who are U.S. citizens or who have applied for citizenship,” and that reference China or foreign talent programs.<sup>27</sup>
5. Memoranda, formal or informal guidance, training materials, briefing materials, advisories, or presentations concerning both China and the 2019 “issu[ance of] a policy making it clear that NSF personnel and IPAs detailed to NSF cannot participate in foreign government talent recruitment programs.”<sup>28</sup>
6. Records containing statistics related to any adverse action by NSF or other U.S. institutions against scientists, including the revocation of funding to individuals or institutions, and that reference China or the national origin, ethnicity, or race of the individuals affected.
7. Records containing statistics related to adverse employment actions by NSF and that reference China or the national origin, ethnicity, or race of the individuals affected.

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<sup>25</sup> See Mervis, *NSF Hopes*, *supra* note 15.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See Letter from France Córdoba, Director, NSF, *Dear Colleague Letter: Research Protection*, National Science Foundation (July 11, 2019), [https://www.nsf.gov/pubs/2019/nsf19200/research\\_protection.jsp](https://www.nsf.gov/pubs/2019/nsf19200/research_protection.jsp); see also Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 45.

## **D. Department of Energy**

From the Department of Energy, requestors seek:

1. Records containing statistics related to scientists identified, “flagged,” or investigated for their foreign ties, including but not limited to statistics referencing China or the national origin, ethnicity, or race of the individuals.
2. Records containing statistics related to any adverse action by the Department of Energy or other U.S. institutions against scientists, including the revocation of funding to individuals or institutions, and that reference China or the national origin, ethnicity, or race of individual funding recipients.
3. The most recent version of the “S&T Risk Matrix.”<sup>29</sup>
4. Memoranda, formal or informal guidance, training materials, briefing materials, advisories, or presentations concerning the 2019 decision to limit the ability of Department of Energy personnel, grantees, and others to participate in foreign talent programs.<sup>30</sup>
5. Records containing statistics related to adverse employment actions by Department of Energy and that reference China or the national origin, ethnicity, or race of the individuals affected.

## **E. Department of Commerce**

From the Department of Commerce, requestors seek:

1. Complaints concerning scrutiny or targeting of individuals based on Asian or Chinese ancestry, including complaints submitted to the Inspector General office.
2. Reports concerning scrutiny or targeting of individuals based on Asian or Chinese ancestry.
3. Records concerning talent programs.

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<sup>29</sup> Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 70.

<sup>30</sup> Memorandum from Dan Brouillette, Deputy Secretary of Energy, to Heads of Departmental Elements, *Department of Energy Policy on Foreign Government Talent Recruitment Programs* (Jan. 31, 2019), available at <https://www.aip.org/sites/default/files/aipcorp/images/fyi/pdf/DOE-memo-on-foreign-government-talent-recruitment-programs.pdf>.

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With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU and Advancing Justice | AAJC request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU and Advancing Justice | AAJC 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.

### III. Application for Expedited Processing

The ACLU and Advancing Justice | AAJC request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).<sup>31</sup> There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). The ACLU and Advancing Justice | AAJC are non-profit public interest groups primarily engaged in disseminating information about actual and alleged government activity, and the information is urgently needed to better understand federal agency actions against scientists believed to have connections to China and other nations.

#### **A. The ACLU and Advancing Justice | AAJC are organizations primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.**

The ACLU and Advancing Justice | AAJC are “primarily engaged in disseminating information” within the meaning of the statute. *See id.*<sup>32</sup> Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and public are critical and substantial components of requestors’ work and are among their primary activities. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).<sup>33</sup> The

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<sup>31</sup> *See also* 28 C.F.R. § 16.5(e) (DOJ, FBI); 45 C.F.R. § 5.27 (HHS); 45 C.F.R. § (612.5)(e) (NSF); 10 C.F.R. 1004.5(d)(6) (Dep’t of Energy); 15 C.F.R. 4.6(f) (Dep’t of Commerce).

<sup>32</sup> *See also* 28 C.F.R. § 16.5(e)(1)(ii) (DOJ, FBI); 45 C.F.R. 5.27(b)(2) (HHS); 45 C.F.R. 612.5(e)(2)(i)(B) (NSF); 10 C.F.R. 1004.5(d)(6) (Dep’t of Energy); 15 C.F.R. 4.6(f)(1)(iv) (Dep’t of Commerce).

<sup>33</sup> Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v.*

ACLU and Advancing Justice | AAJC regularly disseminate information.

The ACLU publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 850,000 people. The ACLU also publishes regular updates and alerts via email to over 3.9 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to 4.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,<sup>34</sup> and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.<sup>35</sup>

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*Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

<sup>34</sup> See, e.g., Press Release, ACLU, Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction (June 28, 2019), <https://www.aclu.org/press-releases/federal-court-permanently-blocks-billions-dollars-border-wall-construction>; Press Release, ACLU, New Documents Reveal NSA Improperly Collected Americans' Call Records Yet Again (June 26, 2019), <https://www.aclu.org/press-releases/new-documents-reveal-nsa-improperly-collected-americans-call-records-yet-again>; Press Release, ACLU, ACLU and Center for Media Justice Sue FBI for Records on Surveillance of Black Activists (Mar. 21, 2019), <https://www.aclu.org/press-releases/aclu-and-center-media-justice-sue-fbi-records-surveillance-black-activists>; Press Release, ACLU, New Documents Reveal Government Plans to Spy on Keystone XL Protesters (Sept. 4, 2018), <https://www.aclu.org/news/new-documents-reveal-government-plans-spy-keystone-xl-protesters>; Press Release, ACLU, ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>; Press Release, ACLU, U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, ACLU, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, ACLU, ACLU Sues for Bureau of Prisons Documents on Approval of CIA Torture Site (Apr. 14 2016), <https://www.aclu.org/news/aclu-sues-bureau-prisons-documents-approval-cia-torture-site>.

<sup>35</sup> See, e.g., Charlie Savage, *N.S.A. Gathered Domestic Calling Records It Had No Authority to Collect*, N.Y. Times, June 26, 2019, <https://nyti.ms/2Lnp0Aw> (quoting ACLU attorney Patrick Toomey); Rachel Frazin, *ACLU Sues FBI Over Black Activist Surveillance Records*, Hill, Mar. 21, 2019, <https://thehill.com/policy/national-security/fbi/435143-fbi-sued-over-black-activist-surveillance-records> (quoting ACLU attorney Nusrat Choudhury); Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screen Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program> (quoting ACLU attorney Hugh Handeyside);

The ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.<sup>36</sup> The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multimedia

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Larry Neumeister, *Judge Scolds Government over Iraq Detainee Abuse Pictures*, The Associated Press, Jan. 18, 2017, <https://www.apnews.com/865c32eebf4d457499c017eb837b34dc> (quoting ACLU project director Hina Shamsi); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About ‘Torture’ in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU attorney Nathan Freed Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

<sup>36</sup> See, e.g., ACLU, *Bad Trip: Debunking the TSA’s ‘Behavior Detection’ Program* (2017), [https://www.aclu.org/sites/default/files/field\\_document/dem17-tsa\\_detection\\_report-v02.pdf](https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf); Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA’s Torture Site* (Nov. 22, 2016), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone ‘Playbook’ – Except for the Ones That Really Matter Most* (Aug. 8, 2016), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; ACLU, *Leaving Girls Behind: An Analysis of Washington D.C.’s “Empowering Males of Color” Initiative* (2016), <https://www.aclu.org/report/leaving-girls-behind>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>.

projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://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's website also serves as a clearinghouse for news about ACLU cases, including analysis about case developments and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multimedia features.<sup>37</sup>

The ACLU website includes many features on information obtained through the FOIA. The ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA documents that allows researchers and the public to conduct sophisticated searches of its contents relating to government policies on rendition, detention, and interrogation.<sup>38</sup> The ACLU has also published a number of charts

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<sup>37</sup> *See, e.g., ACLU v. ODNI—FOIA Lawsuit Seeking Records About Government Surveillance Under the USA Freedom Act*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-odni-foia-lawsuit-seeking-records-about-government-surveillance-under-usa-freedom-act>; *ACLU v. DOJ—FOIA Lawsuit Seeking Information on Federal Agencies' Surveillance of Social Media*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-seeking-information-federal-agencies-surveillance-social-media>; *ACLU v. DOJ—FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>; *Executive Order 12,333—FOIA Lawsuit*, ACLU Case Page, <https://www.aclu.org/cases/executive-order-12333-foia-lawsuit>; *ACLU Motions Requesting Public Access to FISA Court Rulings on Government Surveillance*, ACLU Case Page, <https://www.aclu.org/cases/aclu-motions-requesting-public-access-fisa-court-rulings-government-surveillance>; *ACLU v. DOJ—FOIA Lawsuit Demanding OLC Opinion "Common Commercial Service Agreements"*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-doj-foia-lawsuit-demanding-olc-opinion-common-commercial-service-agreements>; *FOIA Request for Justice Department Policy Memos on GPS Location Tracking*, ACLU Case Page, <https://www.aclu.org/cases/foia-request-justice-department-policy-memos-gps-location-tracking>; *Florida Stingray FOIA*, ACLU Case Page, <https://www.aclu.org/cases/florida-stingray-foia>; Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, (Feb. 22, 2015), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>.

<sup>38</sup> *The Torture Database*, ACLU Database, <https://www.thetorturedatabase.org>; *see also Countering Violent Extremism FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing*

and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.<sup>39</sup>

Similarly, Advancing Justice | AAJC regularly releases and disseminates reports<sup>40</sup>, press statements<sup>41</sup>, comments<sup>42</sup>, fact sheets<sup>43</sup>, “know your rights”<sup>44</sup> information, and other materials that educate the public<sup>45</sup> on government policies and actions that impact Asian Americans and other vulnerable communities. Advancing Justice | AAJC frequently publishes blogs on *Medium*<sup>46</sup> and a range of news publications<sup>47</sup>, such as *The Hill*<sup>48</sup> and NBC<sup>49</sup>, on various issues impacting AAPIs, and regularly

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*FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

<sup>39</sup> *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), [https://www.aclu.org/sites/default/files/field\\_document/olcmemos\\_chart.pdf](https://www.aclu.org/sites/default/files/field_document/olcmemos_chart.pdf); *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU (Nov. 29, 2010), <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>; *Statistics on NSL’s Produced by Department of Defense*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/nsl\\_stats.pdf](https://www.aclu.org/sites/default/files/field_document/nsl_stats.pdf).

<sup>40</sup> *See, e.g., Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities*, AAJC (Jun. 12, 2019), <https://www.advancingjustice-aajc.org/publication/inside-numbers-how-immigration-shapes-asian-american-and-pacific-islander-communities>.

<sup>41</sup> *Newsroom: Press Releases*, AAJC, <https://www.advancingjustice-aajc.org/index.php/news-media/press-releases> (last visited Mar. 3, 2020).

<sup>42</sup> *Expertise*, AAJC, <https://www.advancingjustice-aajc.org/expertise> (last visited Mar. 3, 2020).

<sup>43</sup> *See, e.g., Factsheet: Why the Census Matters for Asian American, Native Hawaiian, and Pacific Islander Communities*, AAJC (Feb. 28, 2019), <https://www.advancingjustice-aajc.org/publication/factsheet-why-census-matters-asian-american-native-hawaiian-and-pacific-islander>.

<sup>44</sup> *Know Your Rights*, AAJC, <https://www.advancingjustice-aajc.org/know-your-rights> (last visited Mar. 3, 2020).

<sup>45</sup> *See, e.g., Newsroom: Justice in Brief Newsletters*, AAJC, <https://www.advancingjustice-aajc.org/index.php/justice-brief-newsletters> (last visited Mar. 3, 2020).

<sup>46</sup> *Advancing Justice | AAJC Blog*, Medium, <https://medium.com/advancing-justice-aajc> (last visited Mar. 3, 2020).

<sup>47</sup> *See, e.g., National Civil Rights Groups Launch 2020 Census Hotlines*, SFGate, Feb. 11, 2020, <https://www.sfgate.com/business/press-releases/article/National-Civil-Rights-Groups-Launch-2020-Census-15047989.php>.

<sup>48</sup> *See, e.g., Emily Birnbaum, Dems Put Spotlight on Diversity in Tech*, Hill, Mar. 6, 2019, <https://thehill.com/policy/technology/432765-dems-put-spotlight-on-diversity-in-tech>.

provides information on their website. On matters concerning Asian American issues, Advancing Justice | AAJC staff are often interviewed for news articles<sup>50</sup>, and provide testimonies<sup>51</sup> in public hearings. Through its various outreach<sup>52</sup> and educational efforts<sup>53</sup>, Advancing Justice | AAJC is able to reach thousands of individuals, including their 14,436 Twitter<sup>54</sup> followers and 10,893 Facebook<sup>55</sup> followers.

The ACLU and Advancing Justice | AAJC plan to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

**A. The records sought are urgently needed to inform the public about actual or alleged government activity.**

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).<sup>56</sup> Specifically, they pertain to the government’s ongoing efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers perceived to have foreign connections. As noted in Part I, *supra*, these efforts are the subject of considerable public controversy. For example, writing in the *Washington Post*, the President of Columbia University rejected “the notion that university personnel—

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<sup>49</sup> *See, e.g.*, Julian Shen-Berro & Kimmy Yam, *As Coronavirus Spreads, So Does Concern Over Xenophobia*, NBC News, Jan. 29, 2020, <https://www.nbcnews.com/news/asian-america/coronavirus-spreads-so-does-concern-over-xenophobia-n1125441>.

<sup>50</sup> *See, e.g.*, Marian Liu, *The Coronavirus and the Long History of Using Diseases to Justify Xenophobia*, Wash. Post, Feb. 14, 2020, <https://wapo.st/2VGemtV>.

<sup>51</sup> *See, e.g.*, *Testimony on “Securing the U.S. Research Enterprise From China’s Talent Recruitment Plans,”* AAJC (Dec. 5, 2019), <https://advancingjustice-aajc.org/publication/testimony-securing-us-research-enterprise-chinas-talent-recruitment-plans>.

<sup>52</sup> *See, e.g.*, *Get Involved: Community Partners*, AAJC, <https://www.advancingjustice-aajc.org/index.php/community-partners> (last visited Mar. 3, 2020).

<sup>53</sup> *See, e.g.*, *Get Involved: Youth Leadership Summit*, AAJC, <https://www.advancingjustice-aajc.org/youth-leadership-summit> (last visited Mar. 3, 2020).

<sup>54</sup> Advancing Justice | AAJC (@AAAJ\_AAJC), Twitter, [https://twitter.com/aaaj\\_aajc](https://twitter.com/aaaj_aajc) (last visited Mar. 3, 2020).

<sup>55</sup> Asian Americans Advancing Justice – AAJC (@advancingjusticeaajc), Facebook, <https://www.facebook.com/advancingjusticeaajc> (last visited Mar. 3, 2020).

<sup>56</sup> *See also* 28 C.F.R. § 16.5(e)(1)(ii) (DOJ, FBI); 45 C.F.R. § 5.27(b)(2) (HHS); 45 C.F.R. § 612.5(e)(2)(i)(B) (NSF); 10 C.F.R. § 1004.5(d)(6) (Dep’t of Energy); 15 C.F.R. §§ 4.6(f)(1)(iv), (f)(3) (Dep’t of Commerce).

and perhaps students themselves—should be asked to monitor the movements of foreign-born students and colleagues,” calling it “antithetical to who we are.”<sup>57</sup> In a public letter, the President of the Massachusetts Institute of Technology stated that subjecting “faculty members, post-docs, research staff and students” to heightened scrutiny “because of their Chinese ethnicity alone” is “corrosive” to the Institute’s “collaborative strength and open-hearted ideals.”<sup>58</sup> And in response to remarks by Senator Marco Rubio and FBI Director Christopher Wray, *see supra* Part I, Congresswoman Judy Chu observed that “the growing perception that simply being of Asian ancestry or having ties to China makes you prone to espionage has created a culture of fear that has negatively impacted the Asian American community.”<sup>59</sup> Thus, the records sought relate to a matter of widespread and exceptional public interest.

The need for these records is especially urgent because the government’s scrutiny of scientists and researchers appears to be intensifying. *Reuters* reported that during a February 6, 2020 conference at the Center for Strategic and International Studies, John Brown, the FBI’s assistant director of counterintelligence, informed attendees that the bureau “had arrested 24 people last year in China-related cases and another 19 already in 2020.”<sup>60</sup> The week before, on January 28, the FBI arrested a prominent Harvard researcher for allegedly failing to disclose sources of Chinese funding; the *New York Times* reported that the arrest “signaled a new, aggressive phase in the Justice Department’s campaign to root out scientists who are stealing research from American laboratories.”<sup>61</sup> A month before that, in December 2019, the FBI announced a \$5.5 million settlement with the Van Andel Research Institute, resolving allegations that the Institute had “failed to disclose Chinese government grants that funded” two of its researchers.<sup>62</sup> And a month before that, in November

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<sup>57</sup> Lee C. Bollinger, *No, I Won’t Start Spying On My Foreign-Born Students*, Aug. 30, 2019, <https://wapo.st/2SKTksp>; *see also* Editorial, *Diversity and International Collaboration Should Not Become Casualties of Anti-Espionage Policies*, *Nature*, July 16, 2019, <https://www.nature.com/articles/d41586-019-02180-9>.

<sup>58</sup> L. Rafael Raif, Letter to the MIT Community: Immigration Is a Kind of Oxygen, MIT News Office (June 25, 2019), <http://news.mit.edu/2019/letter-community-immigration-is-oxygen-0625#>.

<sup>59</sup> *CAPAC Members on Rubio and Wray’s Remarks Singling Out Chinese Students as National Security Threats*, Congressional Asian Pacific American Caucus (Feb. 15, 2018), *available at* <https://capac-chu.house.gov/press-release/capac-members-rubio-and-wray%E2%80%99s-remarks-singling-out-chinese-students-national-security>.

<sup>60</sup> Hosenball and Brunnstrom, *supra* note 19.

<sup>61</sup> Ellen Barry, *U.S. Accuses Harvard Scientist of Concealing Chinese Funding*, *New York Times*, Jan. 28, 2020, <https://nyti.ms/38FHqVA>; *see also* Hosenball and Brunnstrom, *supra* note 19.

<sup>62</sup> Press Release, U.S. Attorney’s Office, W.D. Mich., Department of Justice Reaches \$5.5 Million Settlement With Van Andel Research Institute to Resolve Allegations of

2019, the Senate Permanent Subcommittee on Investigations released a 105-page report in which it stated, among other things, that “[f]ederal law enforcement and other relevant agencies should identify U.S.-based entities that serve as recruitment networks, platforms, or foreign government proxies that facilitate or broker in state-sponsored talent recruitment.”<sup>63</sup> Also in November 2019, the *New York Times* reported that “[s]eventy-one institutions, including many of the most prestigious medical schools in the United States, are now investigating 180 individual cases involving potential theft of intellectual property.”<sup>64</sup> “The cases,” according to the *Times*, “began after the N.I.H., prompted by information provided by the F.B.I., sent 18,000 letters last year urging administrators who oversee government grants to be vigilant.”<sup>65</sup>

The urgent need to inform the public about the government’s efforts in this area is underscored by the significant media interest in what few aspects of those efforts have been revealed to date.<sup>66</sup> Given this media interest and lack of public information, there is a critical need to inform the public about the government’s widening efforts to scrutinize scientists and researchers. The requested records should be released now, before the government’s scrutiny of scientists and researchers further intensifies, to allow informed public debate while it may still have an impact. Expedited processing is therefore appropriate under 5 U.S.C. § 552(a)(6)(E) and the relevant implementing regulations.<sup>67</sup>

## II. Application for Waiver or Limitation of Fees

The ACLU and Advancing Justice | AAJC request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester[s].” 5 U.S.C.

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Undisclosed Chinese Grants to Two Researchers (Dec. 19, 2019), *available at* [https://www.justice.gov/usao-wdmi/pr/2019\\_1219\\_VARI](https://www.justice.gov/usao-wdmi/pr/2019_1219_VARI).

<sup>63</sup> Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 13.

<sup>64</sup> Gina Kolata, *Vast Dragnet Targets Thefts of Biomedical Secrets for China*, *N.Y. Times*, Nov. 4, 2019, <https://nyti.ms/2pDupLp>.

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g., supra* notes 45, 48; *see also* Mara Hvistendahl, *The FBI’s China Obsession*, *Intercept*, Feb. 2, 2020, <https://theintercept.com/2020/02/02/fbi-chinese-scientists-surveillance>; Eric Tucker, *US Researchers on Front Line of Battle Against Chinese Theft*, *Associated Press*, Oct. 6, 2019, <https://apnews.com/afbf4d7f4aac4745b01852571179ceb3>.

<sup>67</sup> *See* 28 C.F.R. § 16.5(e)(1)(ii) (DOJ, FBI); 45 C.F.R. § 5.27(b)(2) (HHS); 45 C.F.R. § 612.5(e)(2)(i)(B) (NSF); 10 C.F.R. § 1004.5(d)(6) (Dep’t of Energy); 15 C.F.R. §§ 4.6(f)(1)(iv), (f)(3) (Dep’t of Commerce).

§ 552(a)(4)(A)(iii).<sup>68</sup> The ACLU and Advancing Justice | AAJC also request a waiver of search fees on the grounds that the ACLU and Advancing Justice | AAJC 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)(II).

**A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU and Advancing Justice | AAJC.**

As discussed above, this Request concerns the government’s efforts to scrutinize, investigate, prosecute, and take other measures against U.S.-based scientists and researchers perceived to have ties to China or other nations. Relatively little information is publicly available about this wide-ranging initiative. Consequently, the records sought are certain to contribute significantly to the public’s understanding of the government’s efforts—including their impact on members of the scientific community, the risks of profiling based on race and ethnicity, and the consequences for valuable innovation and scientific collaboration in the United States.

The ACLU and Advancing Justice | AAJC are not filing this Request to further their commercial interest. As described above, information disclosed by the ACLU and Advancing Justice | AAJC as a result of this FOIA request will be available to the public, including the press, free of charge. The ACLU and Advancing Justice | AAJC intend to publish the records they receive on their websites and through other means of communication. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA’s fee waiver provision. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

**B. The ACLU and Advancing Justice | AAJC are representatives of the news media and the records are not sought for commercial use.**

The ACLU and Advancing Justice | AAJC also request a waiver of search fees on the grounds that the ACLU and Advancing Justice | AAJC qualify as “representatives of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II) .<sup>69</sup> The ACLU and Advancing Justice | AAJC

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<sup>68</sup> *See also* 28 C.F.R. § 16.10(k)(2) (DOJ, FBI); 45 C.F.R. § 5.54(a) (HHS); 45 C.F.R. § 612.10(k)(1) (NSF); 10 C.F.R. § 1004.9(a)(8) (Dep’t of Energy); 15 C.F.R. § 4.11(l)(1) (Dep’t of Commerce).

<sup>69</sup> *See also* 28 C.F.R. §§ 16.10(k)(2)(ii)–(iii) (DOJ, FBI); 45 C.F.R. § 5.54(b)(2)(ii) (HHS); 45 C.F.R. § 612.10(k)(2)(iii) (NSF); 10 C.F.R. § 1004.9(b)(3) (Dep’t of Energy); 15 C.F.R. § 4.11(l)(2)(iii) (Dep’t of Commerce).

meet the statutory and regulatory definitions of “representative[s] 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)<sup>70</sup>; *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. Dep’t of Justice*, No. C09–0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU and Advancing Justice | AAJC regularly turn raw materials into press releases, statements, blogs, reports, and other publications for distributions to the general public at no charge. Requestors are therefore “representative[s] of the news media” for the same reasons [they] [are] “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to those of the ACLU and Advancing Justice | AAJC to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).<sup>71</sup>

On account of these factors, fees associated with responding to FOIA requests are

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<sup>70</sup> *See also* 28 C.F.R. § 16.10(b)(6) (DOJ, FBI); 45 C.F.R. § 5.3 (HHS); 45 C.F.R. § 612.10(b)(6) (NSF); 10 C.F.R. § 1004.2(m) (Dep’t of Energy); 15 C.F.R. § 4.11(b)(6) (Dep’t of Commerce).

<sup>71</sup> Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information and public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

regularly waived for the ACLU as a “representative of the news media.”<sup>72</sup>

For the reasons above, the ACLU and Advancing Justice | AAJC meet the requirements for a fee waiver here.

\* \* \*

Pursuant to applicable statutes and regulations, the ACLU and Advancing Justice | AAJC expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii); 28 C.F.R. § 16.5(e)(4) (DOJ, FBI); 45 C.F.R. § 5.27(c) (HHS); 45 C.F.R. § 612.5(e)(3) (NSF); 10 C.F.R. § 1004.5(d)(7) (Dep’t of Energy); 15 C.F.R. § 4.6(f)(4) (Dep’t of Commerce).

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

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

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<sup>72</sup> The ACLU regularly receives FOIA fee waivers from federal agencies. For example, in June 2018, the U.S. Citizenship and Immigration Services granted a fee-waiver request regarding a FOIA request for documents relating to the use of social media surveillance. In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In June 2017, the Department of Defense granted a fee-waiver request regarding a FOIA request for records pertaining to the authorities approved by President Trump in March 2017 which allowed U.S. involvement in Somalia. In June 2017, the Department of Defense, the CIA, and the Office of Inspector General granted fee-wavier requests regarding a FOIA request for records pertaining to U.S. involvement in the torture of detainees in prisons in Yemen, Eritrea, and aboard Yemeni or Emirati naval vessels. In May 2017, CBP granted a fee-waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In June 2016, the Office of the Director of National Intelligence granted a fee-waiver request regarding a FOIA request related to policies and communications with social media companies’ removal of “extremist” content. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the Department of Justice for documents related to Countering Violent Extremism Programs.

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

Sincerely,



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