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July 14, 2021

Director, Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

Re: Freedom of Information Act (“FOIA”) Appeal, Request No. NFP-129274

To Whom It May Concern,

This letter serves as an appeal (“Appeal”) of the decision of the Federal Bureau of Investigation (“FBI”) to administratively close FOIA Request No. NFP-129274 (the “Request”). *See* 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 28 C.F.R. § 16.8. The American Civil Liberties Union, American Civil Liberties Union Foundation (together, the “ACLU”), and Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”) submitted the Request on April 15, 2021, attached hereto as **Exhibit A**.¹ The Request sought 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.

¹ 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.

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.

The FBI responded to the Request by letter dated April 29, 2021 (the “Response”), attached as **Exhibit B**. The Response states that “[t]he FBI Central Records System (CRS) is indexed according to investigatory interests, and it is not arranged in a manner that allows for the retrieval of information in the form you have requested. . . . Therefore, your request is being administratively closed.” Exhibit B at 1.

The Response violates the requirements of FOIA. *See* 5 U.S.C. § 552(a)(3). The ACLU and Advancing Justice | AAJC appeal (1) the FBI’s failure to make the records described in the Request “promptly available,” *id.* § 552(a)(3)(A), and its inadequate explanation of its failure to do so; and (2) the FBI’s lack of “reasonable efforts,” *id.* § 552(a)(3)(C), to “review, manually or by automated means, agency records for the purpose of locating those records which are responsive to” the Request, *id.* § 552(a)(3)(D). This Appeal is timely submitted within ninety (90) days of the Response. 28 C.F.R. §16.8(a).

Argument

1. The FBI must search for responsive records in the CRS. There can be no serious question that the CRS contains records responsive to the Request, given the FBI’s extensive, publicly acknowledged investigations of “Chinese technology theft” pursuant to the “China Initiative.” Exhibit A at 5 n.26. The agency has a statutory obligation to identify these records “manually or by automated means.” 5 U.S.C. § 552(a)(3)(D). This is true regardless of how the CRS is indexed. *See Rosenfeld v. U.S. Dep’t of Just.*, No. C 07-3240 MHP, 2010 WL 3448517, at *4 (N.D. Cal. Sept. 1, 2010) (“The FBI agent’s decision to index or not to index . . . does not inform the FOIA analysis.”); *Colgan v. Dep’t of Just.*, No. 14-CV-740 (TSC), 2020 WL 2043828, at *5 (D.D.C. Apr. 28, 2020) (“[A]n agency’s FOIA duties are not limited to the ‘traditional’ or ‘routine’ procedures it uses to respond to FOIA requests. The FBI must engage in a search reasonably calculated to discover and release responsive records.”).

2. The FBI must search for responsive records outside the CRS. In addition to the CRS, the agency must search other databases or repositories reasonably likely to contain responsive records, including but not limited to the Electronic Surveillance (“ELSUR”) records system and the Electronic Case File (“ECF”) records system. Where technologically possible, the FBI must electronically search the text of the documents in the relevant records systems, rather than simply searching for agency-assigned index terms, “keywords,” or other metadata.²

² *See* Jacob Donnelly, *FOIA Trial Offers Rare Look into How FBI Searches Records, Responds to Requests*, Reporters Committee for Freedom of the Press (June 18, 2015), <https://www.rcfp.org/browse-media-law-resources/news/foia-trial-offers-rare-look-how-fbi-searches-records-responds-reques>.

We note that, of the eight categories of records described in the Request, *see* Exhibit A at 5–6, all but one encompass records that are not necessarily of a “criminal investigative nature” and are “reasonably likely to reside outside the CRS.”³ *Shapiro v. DOJ*, 34 F. Supp. 3d 89, 98 (D.D.C. 2014), *aff’d by Shapiro v. DOJ*, 893 F.3d 796 (D.C. Cir. 2018). For example:

- Category 1 of the Request seeks “[f]ormal 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.” Exhibit A at 5. As just one example, a presentation to an educational institution related to a Chinese talent program would fall within this category and would likely be housed outside the CRS.
- Similarly, Category 2 of the Request seeks correspondence related to “China, talent programs, peer review, or conflicts of interests with educational institutions, scientific research institutions, or government agencies” *Id.* Correspondence related to these topics may be totally divorced from criminal investigative action; indeed, even conflicts of interest in the university or research-institute setting may well be resolved administratively, without criminal investigation.

The FBI “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Int’l Couns. Bureau v. United States Dep’t of Def.*, 101 F. Supp. 3d 48, 50–51 (D.D.C. 2015) (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Therefore, the FBI must not restrict its search to databases or locations containing records of criminal investigations.

3. In addition to conducting electronic searches, the FBI must work with knowledgeable agency personnel to manually identify responsive records. The Request seeks descriptive categories of records that may not be captured by electronic searches. For example, we understand that keyword searches of the CRS do not always search for specified terms in the *text* of CRS documents, but for tags or other metadata that the agency has chosen to associate with documents in the CRS.⁴ The Response suggests that, because of the way the CRS is indexed, such keyword searches will not, on their own, be an adequate method of identifying responsive records. Exhibit B at 1. Accordingly, in order to comply with FOIA, the FBI must confer with personnel whose work relates to the matters described in the Request in order to manually identify responsive records. *See* 5 U.S.C. § 552(a)(3)(D).

4. While it searches for other responsive records, the FBI should immediately produce the records described in categories 7 and 8 of the Request. Categories 7 and 8 of the

³ Category 6, unlike any of the other categories of requested records, is limited to “[c]riminal complaints or indictments” Exhibit A at 6.

⁴ *Id.*

Request seek “[r]ecords contained in the FBI production to the Senate Subcommittee on Investigations dated October 12, 2018,” and “[t]he FBI PowerPoint presentation titled, ‘Talent Plan Education Package Briefing,’” respectively. Exhibit A at 6. The FBI possesses these records, and it should be able to locate and produce them with relative ease.

Conclusion

For the above reasons, the ACLU and Advancing Justice | AAJC respectfully request that the FBI re-open its search for the records described in the Request and make those records promptly available. If the FBI withholds any responsive records or portions of responsive records, the ACLU and Advancing Justice | AAJC expect the FBI to explain why those withholdings are justified by specific FOIA exemptions. We expect the release of all segregable portions of otherwise-exempt material and a statement of the scope of any material withheld.

Thank you for your attention to this matter. We look forward to receiving a determination within twenty days of your receipt of this Appeal, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C. § 552(a)(6)(A)(ii). Please send the determination to:

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Respectfully submitted,

/s/ Ashley Gorski

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Exhibit A

April 15, 2021

Federal Bureau of Investigation
Michael G. Seidel
Section Chief, Record/Information Dissemination Section
200 Constitution Drive
Winchester, VA 22602

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”)¹ and Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”)² 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.³

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.⁴ As part of this campaign, the Federal Bureau

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² 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.

³ The ACLU and Advancing Justice | AAJC submitted a similar request to the FBI on March 17, 2020. That request was assigned reference number 1466706-000. By letter dated November 13, 2020, the FBI responded that it had been “unable to identify records responsive to [the] request.” The ACLU and Advancing Justice | AAJC intended to administratively appeal that determination, in light of the fact that the FBI plainly possesses responsive records—including, but not limited to, the specific FBI records identified in Categories 2(b), 3(d), 7, and 8. However, due to mail-processing errors related to the pandemic, the ACLU and Advancing Justice | AAJC were unable to appeal the FBI’s response. ACLU and Advancing Justice | AAJC accordingly submit the new FOIA request below.

⁴ See, e.g., Federal Bureau of Investigation, *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*

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-Americans.⁵ For instance, Bloomberg reports that in 2018, the NIH, “working with the FBI, started probes into some 180 researchers at more than 70 hospitals and universities, seeking undisclosed ties to China.”⁶ The NIH “sent letters to over 10,000 institutions to warn against foreign nationals stealing intellectual property[.]”⁷ In a mid-2020 presentation to a “senior advisory panel,” Michael Lauer, the NIH’s head of extramural research, stated that 82% of those under investigation by the NIH were “Asian.”⁸

News outlets report that this heightened scrutiny has caused Chinese-American scientists to lose their research funding or be fired or forced to resign from research institutions.⁹ Yet as a Princeton University professor recently explained, the majority of cases in which researchers have been arrested based on purported ties to China “focus on fraud, not espionage; the researchers in question have allegedly failed to disclose affiliations and funding from Chinese entities. These relationships are generally not illegal in and of themselves, and in some instances are actively encouraged by the American university.”¹⁰ In general, new disclosure rules, inconsistent and potentially discriminatory enforcement, and shifting norms have produced confusion and concern among Chinese-American researchers.¹¹

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,

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>.

⁵ 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”).

⁶ Peter Waldman, *Mistrust and the Hunt for Spies Among Chinese Americans*, BLOOMBERG NEWS (Dec. 10, 2019), <https://www.bloomberg.com/news/features/2019-12-10/the-u-s-government-s-mistrust-of-chinese-americans>.

⁷ Chia-Yi Hou, *Three Researchers Ousted from MD Anderson*, THE SCIENTIST (Apr. 22, 2019), <https://www.the-scientist.com/news-opinion/three-researchers-ousted-from-md-anderson-65772>.

⁸ Jeffrey Mervis, *Fifty-four Scientists Have Lost Their Jobs as a Result of NIH Probe into Foreign Ties*, SCI. MAG. (June 12, 2020), <https://www.sciencemag.org/news/2020/06/fifty-four-scientists-have-lost-their-jobs-result-nih-probe-foreign-ties>.

⁹ See, e.g., Chia-Yi Hou, *More Scientists Dismissed for Undisclosed Foreign Ties, Says NIH*, THE SCIENTIST (Jun. 28, 2019), <https://www.the-scientist.com/news-opinion/more-scientists-dismissed-for-undisclosed-foreign-ties--says-nih-66060>.

¹⁰ Rory Truex, *What the Fear of China Is Doing to American Science*, The Atlantic, Feb. 16, 2021, <https://www.theatlantic.com/ideas/archive/2021/02/fears-about-china-are-disrupting-american-science/618031/>.

¹¹ 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”).

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[.]”¹² 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.¹³

Relatedly, in November 2018, the Department of Justice (“DOJ”) announced the creation of a “China Initiative.”¹⁴ 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[.]”¹⁵ 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.”¹⁶ 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.”¹⁷

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.¹⁸ Nevertheless, the government has continued

¹² *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#>.

¹³ *Id.*

¹⁴ 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>.

¹⁵ DOJ, *Department of Justice China Initiative Fact Sheet*, available at <https://www.justice.gov/opa/page/file/1122686/download>.

¹⁶ FBI, *China: The Risk to Academia 2* (2019).

¹⁷ *Id.* at 9.

¹⁸ 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”

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 addressed . . . concerns about foreign threats to the integrity of the peer review process.”¹⁹ 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.”²⁰ 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.”²¹

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.”²² 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.”²³

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.

Accordingly, through this FOIA request, the ACLU and Advancing Justice | AAJC seek information about the government’s efforts to scrutinize, investigate, prosecute, and otherwise

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”).

¹⁹ HHS OIG Report, *supra* note 4, at 15.

²⁰ *Id.* at 19.

²¹ *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.”).

²² Waldman, *The U.S. Is Purging Chinese Cancer Researchers From Top Institutions*, *supra* note 5.

²³ *Id.*

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:

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;²⁴
 - 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.²⁵
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.²⁶

²⁴ See Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 98.

²⁵ See, e.g., Christopher Wray, Director, FBI, *Responding Effectively to the Chinese Economic Espionage Threat* (Feb. 6, 2020), <https://www.fbi.gov/news/speeches/responding-effectively-to-the-chinese-economic-espionage-threat> (presentation at the Department of Justice China Initiative Conference).

²⁶ 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 attendees at the Department of Justice China Initiative Conference 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.

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.”²⁷

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).²⁸ 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.*²⁹ 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.

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”).

²⁷ *See* Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 93.

²⁸ *See also* 28 C.F.R. § 16.5(e).

²⁹ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

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”).³⁰

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,³¹ and ACLU attorneys are interviewed frequently for news stories about documents released through ACLU FOIA requests.³²

³⁰ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” See, e.g., *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

³¹ 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>.

³² 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); 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,

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.³³ 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/org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multimedia 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. 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.³⁴

<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).

³³ 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; 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>.

³⁴ 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

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.³⁵ The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA.³⁶

Similarly, Advancing Justice | AAJC regularly releases and disseminates reports³⁷, press statements³⁸, comments³⁹, fact sheets⁴⁰, “know your rights”⁴¹ information, and other materials that educate the public⁴² on government policies and actions that impact Asian Americans and other vulnerable communities. Advancing Justice | AAJC frequently publishes blogs on

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>.

³⁵ *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 FOIA Database*, ACLU Database, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

³⁶ *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; *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.

³⁷ *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>.

³⁸ *Newsroom: Press Releases*, AAJC, <https://www.advancingjustice-aajc.org/index.php/news-media/press-releases> (last visited Mar. 3, 2020).

³⁹ *Expertise*, AAJC, <https://www.advancingjustice-aajc.org/expertise> (last visited Mar. 3, 2020).

⁴⁰ *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>.

⁴¹ *Know Your Rights*, AAJC, <https://www.advancingjustice-aajc.org/know-your-rights> (last visited Mar. 3, 2020).

⁴² *See, e.g., Newsroom: Justice in Brief Newsletters*, AAJC, <https://www.advancingjustice-aajc.org/index.php/justice-brief-newsletters> (last visited Mar. 3, 2020).

*Medium*⁴³ and a range of news publications⁴⁴, such as *The Hill*⁴⁵ and NBC⁴⁶, on various issues impacting AAPIs, and regularly provides information on their website. On matters concerning Asian American issues, Advancing Justice | AAJC staff are often interviewed for news articles⁴⁷, and provide testimonies⁴⁸ in public hearings. Through its various outreach⁴⁹ and educational efforts⁵⁰, Advancing Justice | AAJC is able to reach thousands of individuals, including their 14,436 Twitter⁵¹ followers and 10,893 Facebook⁵² followers.

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

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

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II).⁵³ 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—and perhaps students themselves—should be asked to monitor the

⁴³ *Advancing Justice | AAJC Blog*, Medium, <https://medium.com/advancing-justice-aajc> (last visited Mar. 3, 2020).

⁴⁴ *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>.

⁴⁵ *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>.

⁴⁶ *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>.

⁴⁷ *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>.

⁴⁸ *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>.

⁴⁹ *See, e.g., Get Involved: Community Partners*, AAJC, <https://www.advancingjustice-aajc.org/index.php/community-partners> (last visited Mar. 3, 2020).

⁵⁰ *See, e.g., Get Involved: Youth Leadership Summit*, AAJC, <https://www.advancingjustice-aajc.org/youth-leadership-summit> (last visited Mar. 3, 2020).

⁵¹ Advancing Justice | AAJC (@AAAJ_AAJC), Twitter, https://twitter.com/aaaj_aaajc (last visited Mar. 3, 2020).

⁵² Asian Americans Advancing Justice – AAJC (@advancingjusticeaaajc), Facebook, <https://www.facebook.com/advancingjusticeaaajc> (last visited Mar. 3, 2020).

⁵³ *See also* 28 C.F.R. § 16.5(e)(1)(ii).

movements of foreign-born students and colleagues,” calling it “antithetical to who we are.”⁵⁴ 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.”⁵⁵ 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.”⁵⁶ 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.”⁵⁷ 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.”⁵⁸ 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.⁵⁹ And a month before that, in November 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.”⁶⁰ 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

⁵⁴ 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>.

⁵⁵ 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#>.

⁵⁶ *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>.

⁵⁷ Hosenball and Brunnstrom, *supra* note 19.

⁵⁸ 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.

⁵⁹ 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 Undisclosed Chinese Grants to Two Researchers (Dec. 19, 2019), *available at* https://www.justice.gov/usao-wdmi/pr/2019_1219_VARI.

⁶⁰ Staff Report, *Threats to the U.S. Research Enterprise*, *supra* note 3, at 13.

theft of intellectual property.”⁶¹ “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.”⁶²

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.⁶³ 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.⁶⁴

IV. 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. § 552(a)(4)(A)(iii).⁶⁵ 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 or 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.

⁶¹ Gina Kolata, *Vast Dragnet Targets Thefts of Biomedical Secrets for China*, N.Y. Times, Nov. 4, 2019, <https://nyti.ms/2pDupLp>.

⁶² *Id.*

⁶³ 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>.

⁶⁴ See 28 C.F.R. § 16.5(e)(1)(ii).

⁶⁵ See also 28 C.F.R. § 16.10(k)(2).

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).⁶⁶ The ACLU and Advancing Justice | AAJC 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)⁶⁷; *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

⁶⁶ *See also* 28 C.F.R. §§ 16.10(k)(2)(ii)–(iii).

⁶⁷ *See also* 28 C.F.R. § 16.10(b)(6).

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).⁶⁸

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”⁶⁹

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).

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:

Charles Hogle
American Civil Liberties Union

⁶⁸ 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.

⁶⁹ 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-waiver 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,

/s/ Charles Hogle

Charles Hogle
American Civil Liberties Union
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Exhibit B



U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

April 29, 2021

MR. CHARLES HOGLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
18TH FLOOR
125 BROAD STREET
NEW YORK, NY 10004

Request No.: NFP-129274
Subject: China Scientific Research (On or
After January 1, 2017)

Dear Mr. Hogle:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request. Please see the paragraphs below for relevant information about your request.

Your request for the above referenced subject is not searchable in our indices. The FBI Central Records System (CRS) is indexed according to investigatory interests, and it is not arranged in a manner that allows for the retrieval of information in the form you have requested. The FOIA does not require federal agencies to answer inquiries, create records, conduct research, or draw conclusions concerning queried data. Rather the FOIA requires agencies to provide access to reasonably described, nonexempt records. Therefore, your request is being administratively closed.

For questions on how to reasonably describe your request, please email us at foipaquestions@fbi.gov. You may also visit www.fbi.gov and select "Services," "Information Management," and "Freedom of Information/Privacy Act" for additional guidance.

If you are not satisfied with the Federal Bureau of Investigation's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so it may be easily identified.

Sincerely,

A handwritten signature in black ink, appearing to read "M. G. Seidel", is positioned above the typed name.

Michael G. Seidel
Section Chief
Record/Information
Dissemination Section
Information Management Division