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July 27, 2010

Federal Bureau of Investigation
Philadelphia Field Office
William J. Green, Jr. Building
600 Arch Street, 8th Floor
Philadelphia, PA 19106

Re: Request Under Freedom of Information Act

To Whom It May Concern:

The American Civil Liberties Union of Pennsylvania submits this Freedom of Information Act (“FOIA”) request for records pertaining to the FBI’s use of race and ethnicity to conduct assessments and investigations in local communities in Pennsylvania.¹ Specifically, this request seeks records concerning the FBI’s implementation of its authority to collect information about and “map” racial and ethnic demographics, “behaviors,” and “life style characteristics” in local communities in order to assist the FBI’s “domain awareness” and “intelligence analysis” activities. Federal Bureau of Investigation, *Domestic Intelligence and Operations Guide*, December 16, 2008, 32-34.²

In December 2008, the Department of Justice issued revised Attorney General Guidelines, which govern the FBI’s conduct in criminal, national security, and counter-intelligence assessments and investigations. That same month, the FBI issued its “Domestic Intelligence Operations Guide” or “DIOG,” an internal guide to implementing the Attorney General Guidelines. The DIOG was not made publicly available until September 2009, when the FBI released the guide in heavily-censored form. In January 2010, however, the FBI released through FOIA a less-censored version of the DIOG.

¹ This FOIA request is submitted pursuant to the FOIA, 5 U.S.C. § 552 and the Department of Justice implementing regulations, 28 C.F.R. § 16.1.

² Available at http://www.muslimadvocates.org/latest/profiling_update/community_alert_seek_legal_adv.html.

The DIOG contains troubling revelations about the FBI's authorized use of race and ethnicity information in conducting assessments and investigations. Under the DIOG, the FBI is permitted to "identify locations of concentrated ethnic communities in the Field Office's domain" and:

- Collect and analyze racial and ethnic community demographics, including data about "ethnic-oriented businesses or other facilities";
- Collect and analyze racial and ethnic "behaviors," "cultural traditions," and "life style characteristics" in local communities; and
- Map racial and ethnic demographics, "behaviors," "cultural traditions," and "life style characteristics" in local communities.

DIOG at 32-34.

The FBI's potential "mapping" of local communities and local businesses based on race and ethnicity, as well as its ability to target "ethnic communities" for special collection and mapping of information based on so-called racial and ethnic "behaviors" or "characteristics," raises grave civil rights and civil liberties concerns.³ Although the DIOG that seems to authorize this activity have now been in effect for more than a year and a half, the public knows nothing about how the FBI has implemented this troubling authority in Pennsylvania.

Requested Records

1. Legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to the types of racial and ethnic information – including demographics, behaviors, cultural traditions, and life-style characteristics – the FBI can or cannot collect information about, map, or otherwise use in the course of assessments and investigations pursuant to the authorities described in the DIOG.
2. Records created since December 16, 2008 describing or listing the types of racial and ethnic information – including demographics, behaviors, cultural traditions, and life-style characteristics – the FBI Field Office has collected information about or mapped pursuant to the authorities described in the DIOG.
3. Legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to the collection of information about and/or mapping of "ethnically-oriented" businesses or other "ethnically-oriented" facilities pursuant to the authorities described in the DIOG.
4. Records created since December 16, 2008 describing or listing the types of "ethnically-oriented" businesses or other "ethnically-oriented" facilities the FBI Field Office has collected information about or mapped pursuant to the authorities described in the DIOG.

³ Indeed, in 2007 when it came to light that the L.A.P.D. planned to implement a similar plan to map L.A.'s Muslim community, the public outcry was so great that that the plan was abandoned immediately. See Richard Winton and Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. Times, Nov. 15, 2007.

5. Legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to the specific types of “[f]ocused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community”⁴ about which the FBI may collect information or map pursuant to the authorities described in the DIOG.
6. Records created since December 16, 2008 describing or listing the types of “[f]ocused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community”⁵ the FBI Field Office has collected information about or mapped pursuant to the authorities described in the DIOG.
7. Legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to the specific types of “behavioral and cultural information about ethnic or racial communities that is reasonably likely to be exploited by criminal or terrorist groups that hide within those communities”⁶ about which the FBI may collect information or map pursuant to the authorities described in the DIOG.
8. Records created since December 16, 2008 describing or listing the types of “behavioral and cultural information about ethnic or racial communities that is reasonably likely to be exploited by criminal or terrorist groups that hide within those communities”⁷ the FBI Field Office has collected information about or mapped pursuant to the authorities described in the DIOG.
9. Legal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to how the FBI is authorized to use the racial and ethnic data it collects pursuant to the authorities described in the DIOG.
10. Records created since December 16, 2008 concerning the number of communities in Pennsylvania about which the FBI Field Office has collected information or mapped racial and ethnic demographics, behaviors, cultural traditions, and life-style characteristics pursuant to the authorities described in the DIOG.
11. Records created since December 16, 2008 listing or describing which communities in Pennsylvania about which the FBI Field Office has collected information or mapped racial and ethnic demographics, behaviors, cultural traditions, and life-style characteristics pursuant to the authorities described in the DIOG.

⁴ DIOG at 33.

⁵ DIOG at 33.

⁶ DIOG at 34.

⁷ DIOG at 34.

12. Maps created since December 16, 2008 based on racial and ethnic data collected – including demographics, behaviors, cultural traditions, and life-style characteristics – pursuant to the authority described in the DIOG.

“Public Interest” Fee Waiver Request

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest 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.” *See* 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.11(k)(1).

The records sought here will significantly contribute to public understanding of the FBI’s collection and mapping of racial and ethnic data in local communities. *See* 28 C.F.R. § 16.11(k)(1)(i). Very little is currently known about how the authorities described in the DIOG concerning the collection and mapping of racial and ethnic data have been interpreted or implemented in Pennsylvania. Release of the requested records will shed much-needed light on these troubling practices.

The ACLU of Pennsylvania plans to disseminate widely the public records disclosed as a result of this FOIA request. The ACLU of Pennsylvania routinely obtains information about government activity (including through FOIA), analyzes that information, and widely publishes and disseminates that information to the press and to the public in a variety of ways. For example, the ACLU of Pennsylvania publishes a newsletter at least 2 times a year that reports on and analyzes civil liberties-related current events; this newsletter may include description and analysis of information obtained through FOIA. The newsletter is widely disseminated to approximately 18,000 people. The ACLU of Pennsylvania also publishes electronic alerts, which are distributed to approximately 15,000 subscribers (both ACLU members and non-members) by e-mail.

The ACLU of Pennsylvania regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. For example, using the Commonwealth of Pennsylvania’s Right to Know Law, the ACLU of Pennsylvania requested information on profanity citations issued by Pennsylvania State Troopers in violation of the First Amendment. Using this information, The ACLU of Pennsylvania initiated a lawsuit and brought media attention to the issue. The ACLU of Pennsylvania also regularly publishes booklets, “know your rights” publications, 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 of Pennsylvania has produced a Students’ Rights Handbook as well as pamphlets on community members’ rights with police and immigration agents.

The ACLU of Pennsylvania also publishes, analyzes, and disseminates information through its heavily visited website, www.aclupa.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 documents relating to the issues on which the ACLU is focused. The ACLU of Pennsylvania also operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted. See <http://www.aclupa.blogspot.com/>.

Disclosure of the requested records is not in the ACLU of Pennsylvania's commercial interest. The records requested are not sought for commercial use and the ACLU of Pennsylvania plans to disseminate the information disclosed as a result of this FOIA request to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA in 1986. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (citation omitted).

News Media Status Fee Limitation Request

We also request a waiver of document reproduction fees on the grounds that the ACLU of Pennsylvania qualifies as a "representative of the news media" and the records are not sought for commercial use. 28 C.F.R. § 16.11(d). The ACLU of Pennsylvania meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); see also *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that "gathers information from a variety of sources," exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); cf. *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information").⁸

Notably, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU's to be "representatives of the news media." See, e.g., *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA); *Nat'l Security 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).⁹

⁸ Fees associated with responding to FOIA requests are regularly waived for the ACLU, and a number of agencies have determined that the ACLU is a "representative of the news media for the purposes of FOIA, including the Departments of Justice, State, and Commerce. In December 2008, the Department of Justice found that the ACLU was a "representative of the news media" for the purposes of FOIA in the context of a request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

⁹ Courts have founds these organizations to be "representatives of the news media" even though they engage in litigation and lobbying activities beyond their dissemination of information/public education

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

Should our request for a waiver of document search, review, and duplication fees be denied in whole or in part, please inform the undersigned before engaging in any activity that would result in a charge greater than \$150.

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

Sara Mullen
ACLU of Pennsylvania
P.O. Box 40008
Philadelphia, PA 19106.

Sincerely,



Valerie Burch
Staff Attorney
ACLU of Pennsylvania

activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54; *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public education functions).