

ACLU of Virginia

530 E. Main Street, Suite 310 Richmond, Virginia 23219 (804) 644-8022

July 27, 2010

Federal Bureau of Investigation Field Office
1970 East Parham Road
Richmond, VA 23228

Federal Bureau of Investigation Field Office
150 Corporate Boulevard
Norfolk, VA 23502

Re: Request Under Freedom of Information Act

To Whom It May Concern:

The American Civil Liberties Union of Virginia 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 Virginia.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.

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”;

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.

- 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 has 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 Virginia.

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.
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.

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.

⁴ DIOG at 33.

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 Virginia 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 Virginia 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.
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

⁵ DIOG at 33.

⁶ DIOG at 34.

⁷ DIOG at 34.

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 interpreted or implemented in Virginia. Release of the records requested will shed much-needed light on these troubling practices.

The ACLU of Virginia plans to disseminate widely to the public records disclosed as a result of this FOIA request. The ACLU of Virginia routinely obtains information about government activity, 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 Virginia publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 11,000 people through a mailing and at events open to the public. The ACLU of Virginia also publicizes about once per week civil liberties-related news through email using a subscriber list comprised of both ACLU members and non-members.

The ACLU of Virginia regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources. This material is broadly circulated to the public and widely available to everyone for no cost. The ACLU of Virginia also regularly publishes “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. Each year the organization publishes a review of the Virginia legislative session, updates of our litigation involving civil liberties issues, and a report of our advocacy efforts.

The ACLU of Virginia also publishes, analyzes, and disseminates information through its website (www.acluva.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 hundreds of documents relating to the issues on which the ACLU is focused. The ACLU of Virginia also operates a blog (<http://acluva.org/category/blog/>) where original editorial content reporting on and analyzing civil rights and civil liberties news is posted weekly.

In addition, the ACLU of Virginia, as a result of this FOIA request, plans to collaborate with the national ACLU to distribute the information on its heavily-visited website (www.aclu.org). The national ACLU’s website includes features on information obtained through FOIA, including a web feature called “Spy Files” (www.aclu.org/spyfiles) devoted exclusively to housing, analyzing, and disseminating records ACLU affiliates and the national ACLU have obtained through FOIA about a host of domestic surveillance programs and practices. Through the site, the ACLU also collects and disseminates analyses and reports published by ACLU affiliates and the national ACLU on domestic spying practices. The site also contains a regularly-updated list of news stories pertaining to various types of domestic surveillance. The “Spy Files” site contains a page exclusively devoted to FBI surveillance practices, including the FBI’s collection and mapping of

racial and ethnic data in local communities. Records obtained through this FOIA will be described, analyzed, and widely disseminated to the public through this “Spy Files” website.

Disclosure of the requested records is not in the ACLU of Virginia’s commercial interest. The records requested are not sought for commercial use and the ACLU of Virginia 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. *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 requester 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 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 As discussed above, the ACLU of Virginia, by itself and in conjunction with the national ACLU, routinely gathers information from a variety of sources (including from the government through FOIA, and organizes, creates web-hubs for, analyzes, publishes, and widely disseminates that information to the public.

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 activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5; *Nat’l Sec. Archive*, 880 F.2d at

* * *

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.

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

Rebecca K. Glenberg
Legal Director
ACLU of Virginia
530 East Main Street, Suite 310
Richmond, VA 23219

Sincerely,

Rebecca K. Glenberg

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).