



August 10, 2010

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Kevin Fryslie
Special Agent in Charge
Federal Bureau of Investigation
Anchorage Division Office
101 E. 6th Ave.
Anchorage, AK 99501

**Re: *Freedom of Information Act Request*
*FBI DIOG: Racial & Ethnic Mapping***

Dear SAIC Fryslie:

It was good speaking with you last week, and we look forward to working with your office regarding this FOIA Request.

As we discussed, the American Civil Liberties Union of Alaska Foundation (ACLU) is submitting 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 Alaska.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

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.

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 concerning information about the 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 potential "mapping" of local communities and local businesses based on race and ethnicity, as well as the ability to target "ethnic communities" for special collection and mapping of information based on so-called racial and ethnic "behaviors" or "characteristics," raises grave constitutional rights and civil liberties concerns.³

The DIOG that seems to authorize such "mapping" activity has now been in effect for more than a year-and-a-half. We presume that such activity has not occurred in Alaska. If it has, we believe it is important for Alaskans to know whether how the FBI implemented this authority.

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³ For example, in 2007 when it came to light that the Los Angeles Police Department planned to "map" L.A.'s Muslim community, the public outcry was so great that the plan was abandoned immediately. See Richard Winton and Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. Times, Nov. 15, 2007.

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.
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.

⁴ DIOG at 33.

⁵ DIOG at 33.

⁶ DIOG at 34.

Requested Records (continued)

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 Alaska 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 any and all communities in Alaska 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

The ACLU requests 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 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 Alaska. Release of the records requested will shed much-needed light on these troubling practices.

⁷ DIOG at 34.

The ACLU of Alaska plans to disseminate widely to the public the records disclosed as a result of this FOIA request. We routinely obtain information about government activity (including through FOIA), analyze that information, and widely publish and disseminate that information to the press and to the public in a variety of ways. For example, the ACLU publishes an electronic newsletter that reports on and analyzes civil liberties-related current events; this newsletter often includes description and analysis of information obtained through FOIA. The newsletter is distributed at least monthly to subscribers (both ACLU members and non-members) by e-mail and is widely disseminated to nearly 2,000 people.

Additionally, the ACLU boasts nearly 4,000 members, activists, and contributors throughout Alaska, many of whom rely on our organization to access information obtained through FOIA requests.

The ACLU 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. The ACLU also regularly publishes books, “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. In March 2010, the ACLU of Alaska published *Rethinking Alaska’s Corrections Policy: Avoiding an Everyday Crisis*. This publication contains a survey of interviews with over 150 prisoners in the state of Alaska, assesses current practices within correctional facilities, and strategizes on how the prison system can balance prisoners’ rights with the state’s prerogative to maintain safety and security within prisons.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.akclu.org. The website addresses constitutional rights and civil liberties issues and news in depth, provides access to the ACLU of Alaska’s current litigation efforts, and contains myriad documents relating to the issues on which the ACLU is focused. For example, later this month, the ACLU will release the updated *Prisoners’ Rights Guide* on its website. This Guide has been available to pre-trial detainees and prisoners in the State of Alaska for the past seven years and serves to educate many within the prison system on their civil rights and civil liberties. The website also includes features on information obtained through FOIA and Public Records Act requests and provides general information on such requests as well as how to request records from federal agencies. Finally, the ACLU of Alaska creates and disseminates original editorial and educational content on constitutional rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features.

Disclosure of the requested records is not in the ACLU’s commercial interest. The records requested are not sought for commercial use and the ACLU of Alaska 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’ 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 ACLU of Alaska 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 Def.*, 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 24, 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 Def.*, 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 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).⁹

Procedural Status

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.

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 at 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).

Please furnish all applicable records to:

Jeffrey Mittman
ACLU of Alaska Foundation
1057 W. Fireweed Lane, Suite 207
Anchorage, AK 99503

Thank you again for your prompt attention to this matter. Your cooperation is, as always, greatly appreciated.

If for any reason you, or a member of the Field Office Staff, wish to contact us regarding this Request, please do not hesitate to call me at (907) 263-2002, or email at jmittman@akclu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "J.A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey A. Mittman
Executive Director
ACLU of Alaska Foundation