

July 27, 2010

Acting Special Agent in Charge
James C. Burrell
FBI - Boston Field Office
One Center Plaza
Suite 600
Boston, MA 02108

Re: Request Under Freedom of Information Act

Mr. Burrell:

This is a request made under the Freedom of Information Act (“FOIA”) for records pertaining to the FBI’s use of race and ethnicity to conduct assessments and investigations in local communities in Massachusetts.¹ The request is made on behalf of the American Civil Liberties Union of Massachusetts (“ACLUM”), the American-Arab Anti-Discrimination Committee of Massachusetts (“ADCMA”), the Jewish Alliance for Law and Social Action (“JALSA”), the Lawyers’ Committee for Civil Rights, Massachusetts Immigrants Rights Association (“MIRA”), Muslim American Society (“MAS”) Boston, the New England Muslim Bar Association, and Political Research Associates (“PRA”).

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.

In December 2008, the Department of Justice issued revised Attorney General Guidelines, which govern the FBI’s conduct in criminal, national security, and counter-

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. NOTE: Requests seeking identical documents have been sent to the FBI from other ACLU affiliates in states falling under the jurisdiction of the Boston FBI Field Office.

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.²

The DIOG contains troubling revelations about the FBI’s authorized use of race and ethnicity information in conducting assessments and investigations.³ Under the DIOG, the FBI is permitted to “identify locations of concentrated ethnic communities in the Field Office’s domain”⁴ and: “Collect and analyze racial and ethnic community demographics, including data about “ethnic-oriented businesses or other facilities”;⁵ Collect and analyze racial and ethnic “behaviors,” “cultural traditions,” and “life style characteristics” in local communities;⁶ and Map racial and ethnic demographics, “behaviors,” “cultural traditions,” and “life style characteristics” in local communities.⁷ (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. 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 Massachusetts.

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

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

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 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.

⁵ DIOG at 33.

⁶ DIOG at 34.

⁷ DIOG at 34.

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” 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” 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” 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” 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 Massachusetts 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 Massachusetts 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

ACLUM is entitled to a fee waiver under the FOIA statute and Department of Justice Regulations for two reasons. First, ACLUM qualifies as a representative of the news media. Second, release of the records requested is in the public interest and not in any commercial interest of the requester.

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).⁸

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 [STATE]. Release of the records requested will shed much-needed light on these troubling practices.

The ACLU of Massachusetts plans to disseminate widely to the public records disclosed as a result of this FOIA request. The ACLU of Massachusetts 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 Massachusetts regularly publishes a newsletter, “The Docket,” at least

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.

twice a year 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 widely disseminated to approximately 30,000 people. The ACLU of Massachusetts also publishes an electronic newsletter, which is distributed weekly to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 15,000 people.

The ACLU of Massachusetts 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, the ACLU of Massachusetts has published two reports in the past two years related to government surveillance and terrorism-related spying. The ACLU of Massachusetts 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.

Gathering and disseminating current information to the public is a critical and substantial component of ACLUM’s mission and work. ACLUM publishes newsletters, news briefings, reports and other printed materials that are disseminated to the public. *See* Exhibits A – C. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, at no cost. ACLUM also disseminates information through its heavily subscribed website, www.aclum.org, two blogs, <http://www.massrightsblog.org> and http://boston.com/community/blogs/on_liberty and regular posts on social media sites such as Facebook and Twitter. *See* Exhibits D – F. Our web postings address civil liberties issues in depth, provide features on civil liberties issues in the news, and contain hundreds of documents that relate to the issues addressed by ACLUM. The website includes features on information obtained through the FOIA. *See, e.g.,* www.aclum.org/ice.

Disclosure of the requested records is not in the ACLU of Massachusetts’ commercial interest. The records requested are not sought for commercial use and the ACLU of Massachusetts 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).

ACLUM is a non-profit organization whose sole purpose is the protection of civil rights and liberties for all persons in the Commonwealth of Massachusetts and, as such, has no “commercial interest” in the information.

The American-Arab Anti-Discrimination Committee is a grassroots civil rights organization based in Washington, DC which welcomes people of all backgrounds, faiths, and

ethnicities as members. The local chapter of the ADC or ADCMA is committed to empowering Arab-Americans to embrace their identity and advocate for their civil rights in the state of Massachusetts. The ADCMA works towards this objective through civil rights advocacy, educating the general American population on Arab-American culture and issues, and by building community within Arab-Americans in Massachusetts.

JALSA is a Boston based membership group working on social and economic justice issues. Preservation of constitutional rights for all Americans is a significant part of their agenda.

The Lawyers' Committee is a private, nonprofit, nonpartisan legal organization that provides pro bono legal representation to victims of discrimination based on race or national origin. The Committee's mission is to provide a safeguard for the civil, social, and economic liberties of residents in Greater Boston and throughout Massachusetts.

MIRA works to advocate for the rights and opportunities of immigrants and refugees. In partnership with its members, MIRA advances this mission through education, training, leadership development, organizing, policy analysis and advocacy.

MAS Boston is a large, community-based organization that focuses on Muslim civic engagement, developing youth leadership, and spiritual and cultural programming, and is also a non-profit.

The New England Muslim Bar Association (NEMBA) was founded in 2009 with the following objectives: to serve the educational and professional needs of Muslim lawyers, legal professionals, and law students; to serve as a legal resource for Muslim communities and others in our society; and to educate and advocate for Muslims and other people regarding their constitutional, civil and human rights. NEMBA is a non-profit organization.

Political Research Associates ("PRA") is an independent, 501(c)(3) nonprofit research center that studies antidemocratic, authoritarian, and other oppressive movements, institutions, and trends. PRA is based on progressive values, and is committed to advancing an open, democratic, and pluralistic society. PRA provides accurate, reliable research and analysis to activists, journalists, educators, policy makers, and the public at large.

News Media Status Fee Limitation Request

ACLUM is entitled to a fee waiver because it is a representative of the news media under both the FOIA statute and the Department of Justice regulations regarding FOIA fees. 5 U.S.C §551(a)(4)(A)(ii); 28 CFR 16.11(d)(1). ACLUM is a representative of the news media in that it is an organization "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public," where "news" is defined as "information that is about current

events or that would be of current interest to the public.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 CFR § 16.11(b)(6).

The ACLU of Massachusetts 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”).

ACLUM, a not-for-profit, non-partisan organization with over 22,000 members and supporters across Massachusetts, is dedicated to the principles of liberty and equality. As the Massachusetts affiliate of the national ACLU, a not-for-profit, non-partisan organization with over 500,000 members nationwide, ACLUM distributes information outside of Massachusetts.

Notably, courts have found other organizations whose missions, functions, 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

* * *

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:

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 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).

Laura Rotolo, Attorney
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110

Sincerely,

Laura Rotolo, Attorney
ACLU of Massachusetts

Merrie Najimy
President
ADCMA

Sheila Decter
Executive Director
JALSA

Norma P. D'Apolito
Executive Director
Lawyers' Committee for
Civil Rights

Sarang Sekhavat
MIRA

Bilal Kaleem
President
Muslim American Society
Boston, MA

Hinna Mushtaque
NEMBA

Thomas Cincotta
PRA