GUARDIAN
THE SAN FRANCISCO BAY GUARDIAN

ASIAN LAW CAUCUS

MEMBER OF
ASIAN AMERICAN CENTER
FOR ADVANCING JUSTICE

July 27, 2010

Via Certified Mail, Return Receipt Requested

Federal Bureau of Investigation – San Francisco
450 Golden Gate Avenue, 13th Floor
San Francisco, CA 94102-9253

Federal Bureau of Investigation – Sacramento
4500 Orange Grove
Sacramento, CA 95841

Re: Request Under Freedom of Information Act

To Whom It May Concern:

The American Civil Liberties Union of Northern California (including the ACLU Foundation of Northern California) ("ACLU-NC"), the Asian Law Caucus ("ALC"), and the *San Francisco Bay Guardian* ("*Guardian*") (collectively "Requestors") submit 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 California counties including and to the north of Inyo, Monterey, Kings and Tulare ("northern California").[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]

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[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 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 northern California.

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 Offices have 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.

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 Offices have 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 Offices have 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 Offices have 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 northern California about which the FBI Field Offices have collected information or

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[4] DIOG at 33.
[5] DIOG at 33.
[6] DIOG at 34.
[7] DIOG at 34.

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 northern California about which the FBI Field Offices have 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 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 northern California. Release of the records requested will shed much-needed light on these troubling practices.

The Requestors plan to disseminate widely to the public records disclosed as a result of this FOIA request. The ACLU-NC's communications department is a division of a nonprofit 501(c)(3) organization, and both the ACLU-NC's communications department and the *Guardian* are "representative[s] of the news media." The Asian Law Caucus is also a nonprofit 501(c)(3) organization. They are well situated to disseminate information gained through this request to the public, to affected communities, to organizations that protect immigrants' rights, and to political and religious organizations. The Requestors 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 including the following:

The ACLU-NC's communications department publishes newsletters, news briefings, right-to-know documents, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU-NC's communications department also disseminates information through the website, http://www.aclunc.org, which had 142,000 visitors who viewed 472,000 pages in 2009. This website addresses civil liberties issues in depth and provides features on civil liberties issues on which the ACLU-NC is focused.

ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events. Finally, the ACLU-NC's communications department disseminates information through a newsletter, which is distributed to subscribers by mail. Due to these extensive publication activities, the ACLU-NC is a "representative of the news media" under the FOIA and agency regulations.

ALC regularly publishes a newsletter which is sent to a mailing list of approximately 4000 members and supporters. The newsletters are also available online at ALC's website. In addition to the newsletter, ALC communicates with its members and supporters through an e-mail listserv of approximately 2,100 members. ALC publishes approximately one to two in-depth reports or issue briefs per year.[8] ALC also maintains a frequently-visited website, http://www.asianlawcaucus.org, which contains in-depth information about legal and civil rights and policies of special interest to the Asian and Pacific Islander community, and makes ALC's newsletters and reports available online. It receives an average of 1,196 hits per week. In addition, ALC specifically targets monolingual and underserved communities that traditional news media organizations may not reach. Most of ALC's materials and presentations are provided in multiple languages and many are reproduced verbatim by ethnic media outlets, including ethnic newspapers, radio and television stations, for wider distribution.

The *Guardian* is the largest circulation newsweekly in northern California, with audited weekly distribution of 120,000 copies. The paper is locally owned, independent, and has been continuously published since 1966. The paper covers breaking news, does detailed investigative reporting, publishes editorials and covers arts, entertainment, and lifestyle issues. The *Guardian* has received more than 100 state, local and national awards for journalistic excellence. The *Guardian* is a member of the California Newspaper Publishers Association and the Association of Alternative Newsweeklies.

Disclosure of the requested records is not in the Requestors' commercial interest. The records requested are not sought for commercial use and the ACLU-NC and ALC plan 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).

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[8] For example, ALC published a recent report on Customs and Border Protection practices and two issue briefs regarding language access and chemical hazards in the nail salon industry. Other publications by ALC include "Sound Barriers: Asian Americans and Language Access in Elections 2004," detailing problems faced by Asian American voters discovered through poll monitoring conducted by ALC and its partner organizations; "Equal Justice, Unequal Access: Immigrants and America's Legal System" describing barriers legal services faced by immigrants; and "Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law," evaluating the implementation of a state worker protection law. All are available online at http://www.asianlawcaucus.org.

News Media Status Fee Limitation Request

We also request a waiver of document reproduction fees on the grounds that the Requestors qualify as "representatives of the news media" and the records are not sought for commercial use. 28 C.F.R. § 16.11(d). The *Guardian* is a newsweekly. The ACLU of Northern California and ALC also meet the statutory and regulatory definitions of a "representative of the news media" because they are "entit[ies] 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").[9]

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).[10]

* * *

If this 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. If the fee waivers are denied, the requesters are prepared to pay fees up to $25, and

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[9] 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.

[10] 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).

request to be informed of further fees that may be charged, but reserve the right to appeal a denial of fee waivers.

Thank you for your prompt attention to this matter. Please furnish all applicable records to Julia Harumi Mass, American Civil Liberties Union of Northern California, 39 Drumm Street, San Francisco, California 94111, telephone (415) 621-2493.

Sincerely,

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