

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,	)	
	)	
Plaintiff,	)	<b>COMPLAINT</b>
	)	
v.	)	08 Civ
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	ECF Case
Defendant.	)	
	)	

**PRELIMINARY STATEMENT**

1. This lawsuit challenges the federal government’s improper invocation of national security to deny public access to information about a federal program that may have invaded the privacy rights of more than 100,000 people. In May 2007, the Federal Bureau of Investigation released a document that referred to an “Operation Darkening Clouds,” which the document explained was based on the review of “over 130,000 immigration records” “[d]uring the pre-invasion of Iraq.” When the plaintiff, the New York Civil Liberties Union, then filed a request under the federal Freedom of Information Act seeking documents about the operation, the FBI claimed that “[t]he existence or nonexistence of an Operation Darkening Cloud(s) is classified” and thus refused to acknowledge whether documents about the operation even existed.

2. Having already publicly acknowledged the existence of Operation Darkening Clouds and having disclosed information about that program, the FBI is not now free to invoke national security to shield the program from public disclosure under the Freedom

of Information Act. Moreover, as evidenced by two recent congressional mandates signed into law by President Bush, public disclosure of programs like Operation Darkening Clouds does not threaten national security. The plaintiff seeks a declaration that the FBI has violated the statute, an injunction requiring the agency to comply with the statute, and an award of attorneys' fees.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over the plaintiff's claims and personal jurisdiction over the defendant agency pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2).

4. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1391(e) and 1402(a)(1), as the complainant is located within the Southern District of New York.

### **PARTIES**

5. Plaintiff New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union. The NYCLU is a not-for-profit corporation that defends the civil rights and civil liberties of New Yorkers. To inform the public about government conduct affecting legal rights, the NYCLU publishes newsletters, press releases, know-your-rights handbooks, and numerous other materials. NYCLU publications are available to everyone -- including tax-exempt organizations, not-for-profit groups, law students, and academics -- for no cost or for a nominal fee. The NYCLU also disseminates information through its website -- [www.nyclu.org](http://www.nyclu.org) -- and through an electronic newsletter, which is received by thousands of subscribers.

6. Defendant United States Department of Justice (“DOJ”) is the federal agency responsible for the legal business of the United States, including the investigation and prosecution of criminal activity within the United States. The Federal Bureau of Investigation (“FBI”), a component entity of DOJ, is responsible for investigating violations of the criminal laws of the United States. DOJ is an agency within the meaning of 5 U.S.C. § 552(f).

### **STATEMENT OF FACTS**

#### **Controversial Data Mining and Congressionally Mandated Disclosure**

7. “Data mining” is computer-aided analysis of large quantities of ordinary personal data – such as phone, travel, banking, Internet, and purchase records – seeking to reveal previously unknown patterns of past activities and to predict future behavior.

8. Since September 11, 2001, the federal government has aggressively engaged in the data mining of vast quantities of information concerning individuals not suspected of any wrongdoing. In the past seven years, law enforcement and intelligence organizations have data mined a broad swath of personal information, including millions of domestic phone records and the background information of over a million domestic air travelers.

9. According to a report by the United States General Accounting Office, by May 2004 there were more than 100 planned or operational federal programs for data mining of personal information.

10. In several instances public disclosure about government data-mining programs has provoked severe backlash, and Congress has halted at least two federal data-mining programs. Media analyses have pointed out significant flaws in some data mining

programs that could result in individuals being falsely suspected of crimes or unfairly branded as security risks.

11. In response to widespread concern about government data-mining programs, the USA PATRIOT Improvement and Reauthorization Act of 2005, which President Bush signed into law in March 2006, included a provision mandating public reporting about such programs. Specifically, section 126 of the Act required the Attorney General to submit a report within one year of the law's enactment and every year thereafter concerning "any initiative of the Department of Justice that uses or is intended to develop pattern-based data-mining technology."

12. In July 2007, DOJ submitted the first required report to Congress detailing numerous data-mining programs, including six FBI programs: the System to Assess Risk (STAR) Initiative, Identity Theft Intelligence Initiative, Health Care Fraud Initiative, Internet Pharmacy Fraud Initiative, Housing Fraud Initiative, and Automobile Accident Insurance Fraud Initiative.

13. One year after requiring DOJ to report about data-mining programs, Congress passed the Federal Agency Data Mining Reporting Act of 2007, which requires all federal agencies to report periodically about their data-mining programs. President Bush signed the Act into law on August 3, 2007.

14. As evidenced by congressional enactment of the Federal Agency Data Mining Reporting Act and by section 126 of the reauthorized USA PATRIOT Act, public disclosure of the existence and nature of government data-mining programs allows for informed democratic decision-making without unnecessarily compromising agency effectiveness.

### **“Operation Darkening Clouds”**

15. In October and November of 2006, the Allard K. Lowenstein International Human Rights Project – a student organization at Yale Law School dedicated to the promotion of human rights – submitted several Freedom of Information Act (“FOIA”) requests concerning Operation Frontline, a targeted immigration-enforcement program that likely utilized data mining.

16. During subsequent litigation over the FOIA requests about Operation Frontline, the FBI officially released a Department of Homeland Security document entitled “U.S. Citizenship and Immigration Services / Fraud Detection and National Security Unit Automated Systems,” which described the widespread use of data mining technology by immigration enforcement officers. The document is prominently labeled “Unclassified/LES.” A copy of the document – including a cover letter signed by David Hardy, Section Chief, Records/Information Dissemination Division, Federal Bureau of Investigation – is attached to this complaint as Exhibit A.

17. “U.S. Citizenship and Immigration Services / Fraud Detection and National Security Unit Automated Systems” includes the following statement: “During the pre-invasion of Iraq, FDNS personnel pulled together over 130,000 immigration records which were the cornerstone for Operation Darkening Clouds (FBI) . . . .” Ex. A.

### **The NYCLU’s FOIA Request to the Federal Bureau of Investigation**

18. In light of the FBI’s specific, official disclosure of the existence of “Operation Darkening Clouds,” the NYCLU submitted a FOIA request to the FBI on May 21, 2007, seeking “any record held by the Federal Bureau of Investigation mentioning or describing any action, program, operation, or activity titled ‘Operation Darkening Cloud’ or

‘Operation Darkening Clouds.’” A copy of that request is attached to this complaint as Exhibit B.

19. On August 22, 2007, the NYCLU received a letter dated August 15, 2007 stating that the FBI “neither confirms nor denies the existence of the activity or records concerning this subject.” This letter was signed by David M. Hardy, Section Chief, Record/Information Dissemination Section, Federal Bureau of Investigation, the same official who had signed the cover letter for the release of “U.S. Citizenship and Immigration Services / Fraud Detection and National Security Unit Automated Systems.” A copy of the letter is attached to this complaint as Exhibit C.

20. On September 21, 2007, the NYCLU submitted an administrative appeal to the United States Department of Justice, appealing the denial of its request. In particular, the NYCLU noted that the FBI had “publicly acknowledged the existence of and basic scope of Operation Darkening Clouds” by releasing a document that referenced the operation in response to a different FOIA request. A copy of “U.S. Citizenship and Immigration Services / Fraud Detection and National Security Unit Automated Systems” was included with that appeal. A copy of the appeal is attached to this complaint as Exhibit D.

21. Over the next few months, the NYCLU periodically contacted the attorney at DOJ assigned to handle the FOIA appeal in an attempt to facilitate processing and discern the nature of the extensive delay.

22. In a letter dated March 26, 2007, DOJ denied the NYCLU’s administrative appeal, reiterating its position that national security required that no information about Operation Darkening Clouds be disclosed: “The existence or nonexistence of Operation Darkening Cloud(s) is classified and the FBI properly refused to confirm or deny the

existence of any such records pursuant to 5 U.S.C. § 552(b)(1), which protects classified information from disclosure under the FOIA.” A copy of the letter is attached to this complaint as Exhibit E.

23. DOJ has never attempted to recover the NYCLU’s copy of “U.S. Citizenship and Immigration Services / Fraud Detection and National Security Unit Automated Systems” as a classified document improperly labeled as unclassified and improperly disclosed to parties not possessing a proper security clearance.

24. The NYCLU has exhausted the applicable administrative remedies with respect to this FOIA request.

### **CAUSE OF ACTION**

#### **Defendant DOJ Failed to Disclose and Release Records Responsive to Plaintiff’s Request**

25. DOJ and the FBI, its component agency, have violated the NYCLU’s right to DOJ records under 5 U.S.C. § 552.

### **REQUEST FOR RELIEF**

WHEREFORE, the Plaintiff respectfully requests that this Court:

- 1) Assume jurisdiction over this matter;
- 2) Declare that the defendant’s refusal to confirm or deny the existence of Operation Darkening Clouds as a basis for denying the NYCLU’s request violates the Freedom of Information Act;
- 3) Order the defendant to disclose any and all requested records properly subject to disclosure under the Freedom of Information Act – including segregable portions of documents partially exempt – and to make copies available to the NYCLU;
- 4) Order the defendant to produce a Vaughn Index indicating the statutory basis for any redaction or withholding;
- 5) Award the NYCLU costs and reasonable attorneys’ fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and

6) Grant any other relief the Court deems appropriate.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION, by

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Dated: June 24, 2008  
New York, New York