

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NATIONAL DAY LABORER ORGANIZING	)	
NETWORK, <u>et al</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No.10-cv-3488 (SAS) (KNF)
U.S. IMMIGRATION AND CUSTOMS	)	
ENFORCEMENT AGENCY, <u>et al</u> ,	)	
	)	
Defendants.	)	
_____	)	

**SECOND DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 21, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 278 employees who staff a total of ten (10) FBIHQ units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to the Federal Bureau of Investigation (“FBI”) records and information pursuant to the FOIA, as amended by the OPEN Government Act of 2007; the Privacy Act; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's response to the FOIA request of plaintiffs the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, for information regarding the U.S. Department of Homeland Security (“DHS”)/U.S. Immigration and Customs Enforcement (“ICE”) agency program entitled “Secure Communities.”

(4) This declaration supplements, and hereby incorporates, my prior declaration submitted in this case. The [First] Hardy Declaration, dated November 12, 2010, provided the Court and plaintiffs with an explanation of the search for records responsive to plaintiffs’ FOIA request.

(5) The purpose of this Declaration is to provide the Court and plaintiffs with an explanation of how the FBI administratively establishes the search cut-off date for the

FOIA/Privacy Act requests it receives generally, as well as how it administratively established the search cut-off date for plaintiffs' FOIA request.

**ESTABLISHMENT OF SEARCH CUT-OFF DATE**

(6) RIDS' standard operating procedure (SOP) for administratively establishing the search cut-off date for a particular FOIA and/or a Privacy Act request is to use the date on which a Legal Administrative Specialist ("LAS") in RIDS conducts the very first search in the FBI's Central Records System ("CRS").<sup>1</sup> This search, run through the Automated Case System ("ACS") of CRS, is typically reflected in an ACS search slip which the LAS prepares, executes, and places in that particular FOIA/Privacy Act request.<sup>2</sup> On occasion, even though the ACS search slip is not generated, the LAS will place notes in the FOIPA Document Processing System ("FDPS") which reflect the date he/she first conducted a search of the CRS, as well as the results of that search.

(7) By letter dated February 3, 2010, to FBIHQ plaintiffs requested seven categories of records pertaining to Secure Communities. **(See FBI-Exhibit A – First Hardy Declaration, and FBI-Exhibit A thereto, for details of the request.)**

(8) By letter dated March 2, 2010, the FBI acknowledged plaintiffs' FOIA request and informed them that their request for expedited processing had been granted. **(See FBI-Exhibit A -- First Hardy First Declaration, ¶ 6).** That same day, RIDS prepared and executed the ACS

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<sup>1</sup> RIDS' SOP is fully consistent with the DOJ FOIA regulations, 28 C.F.R. § 16.4(a).

<sup>2</sup> **See First Hardy Declaration, ¶¶ 20-23**, for a detailed description of the FBI's search process and the specific protocols used for plaintiffs' request.

search slip for plaintiffs' FOIA request. (See FBI-Exhibit B, attached hereto).<sup>3</sup> As a result, in accordance with RIDS' SOP, the search cut-off date for plaintiffs' FOIA request was administratively established as March 2, 2010.

(9) Since the ACS search which RIDS performed on March 2, 2010 did not locate any potentially responsive records, RIDS decided to conduct an individualized search inquiry (outside of the CRS system) of certain FBI divisions and offices which were reasonably likely to have potentially responsive records. On or about April 6, 2010, RIDS issued an Electronic Communication ("EC") to "those FBIHQ divisions most likely to possess responsive records responsive to plaintiffs' FOIA request." (See FBI-Exhibit A -- First Hardy First Declaration, ¶ 22.) Due to an inadvertent administrative misstep within RIDS, the EC erroneously listed the search cut-off date as February 3, 2010 (the date of plaintiffs' request letter); rather, the correct search cut-off date of March 2, 2010 should have been listed in the EC. RIDS discovered the error subsequent to issuance of the EC, and has since corrected that error.

(10) With the exception of the Criminal Justice Information Services Division (CJIS), all offices and divisions that received the EC reported having no documents responsive to plaintiffs' FOIA request. (See FBI-Exhibit A -- First Hardy Declaration, ¶ 23.)

(11) CJIS located an exceptionally large volume of potentially responsive material, including over 6,000 email communications and over 3,400 Excel spread sheets (consisting of over 300,000 pages). Given the format, magnitude, and volume of the potentially responsive information it had found in its search, CJIS elected to forward all of the material directly to RIDS,

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<sup>3</sup> RIDS does not consider the ACS search slips it generates in response to FOIA/Privacy Act requests as responsive to those requests, as they are documents which typically are created on or after the search cut-off date. However, we are attaching the ACS search slip in this case to underscore the search cut-off date of March 2, 2010.



and have RIDS perform the important task of reviewing the material to determine whether it is, in fact, responsive to the FOIA request – both in terms of subject matter as well as date scope. The material CJIS provided RIDS in response to the EC actually covered a period exceeding the February 3, 2010 cut-off date in the EC, thereby encompassing materials created on or before March 2, 2010.

(12) Subsequent to receiving this material, RIDS both consulted with CJIS and itself reexamined the material, thereby confirming that the records which CJIS had collected did, in fact, encompass materials created on or before March 2, 2010.

(13) The complexities associated with the production of the CJIS material are explained in full in the First Hardy Declaration, ¶¶ 24-26. In summary, in May, 2010 CJIS sent RIDS five computer disks containing almost nine gigabytes of information in the aggregate. RIDS' initial estimated page count of the documents on those disks was approximately 500,000. Although many of these pages may represent material which RIDS may later determine is non-responsive to the FOIA request, RIDS is nevertheless required to review every page in order to make that determination.

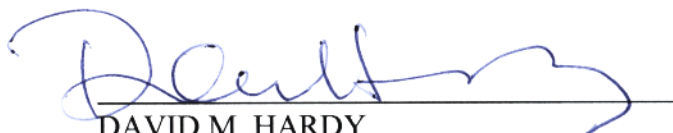
(14) As discussed in ¶¶ 27-28 of the First Hardy Declaration, the FBI uses the FOIPA Document Processing System (“FDPS”) to manage and process FOIA and Privacy Act requests. As of January 26, 2011, RIDS has uploaded over 40,000 pages into FDPS for processing in this case.

(15) As of January 26, 2011, RIDS has made three releases to plaintiffs, totaling over 2,800 pages.

(16) RIDS is continuing its efforts to review and process the material it has received from CJIS, and which encompasses the March 2, 2010 search cut-off date, with due diligence and will make its next release by the Court-ordered deadline of February 25, 2011.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that FBI-Exhibits A and B attached hereto are true and correct copies.

Executed this 26<sup>th</sup> day of January, 2011.



DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia