UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK; CENTER FOR CONSTITUTIONAL RIGHTS; and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; FEDERAL BUREAU OF INVESTIGATION; and OFFICE OF LEGAL COUNSEL,

Defendants.

No. 10 Civ. 3488 (SAS)
ECF Case

MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION BY DEFENDANTS FBI AND ICE FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO SEARCH CUT-OFF DATES AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO SEARCH CUT-OFF DATES

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PRELIMINARY STATEMENT

Defendants Federal Bureau of Investigation ("FBI") and United States Immigration and Customs Enforcement ("ICE") respectfully submit this memorandum of law in further support of their motion for partial summary judgment establishing search cut-off dates of March 2, 2010, and April 30, 2010, respectively, for plaintiffs' Freedom of Information Act ("FOIA") request dated February 3, 2010, and in opposition to plaintiffs' cross-motion for partial summary judgment establishing a search cut-off date of January 31, 2011, and requiring the FBI and ICE to produce "documents responsive to all outstanding requests" by April 30, 2011.

For the reasons set forth in detail in their opening brief, the FBI's and ICE's search cut-off dates are reasonable based upon the applicable agency regulations, case law, and circumstances of this case. Plaintiffs' arguments in opposition to these search cut-off dates are unavailing insofar as they misstate the law for assessing the reasonableness of cut-off dates and urge the Court to adopt an arbitrary search cut-off date of January 31, 2011—nearly one year after plaintiffs submitted their overbroad FOIA request. Finally, plaintiffs' request for an order directing the FBI and ICE to produce "documents responsive to all outstanding requests" is improper in the context of a motion for partial summary judgment on search cut-off dates and, in any event, is premature given that the parties and the Court have never addressed the issue of plaintiffs' so-called "revised" FOIA requests.

ARGUMENT

A. The FBI and ICE Are Entitled to Summary Judgment Because Their Search Cut-Off Dates Are Reasonable in Light of Plaintiffs' Request

In their opening brief and supporting declarations, the FBI and ICE carried their burden of establishing the reasonableness of their respective search cut-off dates of March 2, 2010 and April 30, 2010. *See McGehee v. CIA*, 697 F.2d 1095, 1102, 1104 (D.C. Cir. 1983), *vacated on other grounds on panel reh'g & reh'g en banc denied*, 711 F.2d 1076 (D.C. Cir. 1983). The FBI's date corresponds to when it commenced its search for records responsive to plaintiffs' FOIA request, *see* Second Hardy Decl. ¶¶ 8-9,[1] while ICE's date falls more than two months *after* their search for responsive records began, *see* Second Pavlik-Keenan Decl. ¶ 16. These "date-of-search" cut-off dates comply with the operative Department of Justice ("DOJ") and Department of Homeland Security ("DHS") regulations, which specify that "a component ordinarily will include only records in its possession as of the date the component begins its search for them." 28 C.F.R. § 16.4(a) (DOJ); 6 C.F.R. § 5.4(a) (DHS). The use of date-of-search cut-off dates is also supported by case law: courts have routinely held that date-of-search cut-off dates are reasonable. *See, e.g., Public Citizen v. Dep't of State*, 276 F.3d 634, 643-44 (D.C. Cir. 2002); *McGehee*, 697 F.2d at 1102, 1104; *Fox News Network, LLC v. U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, No. 08 Civ. 11009 (RJH)(FM), 2010 WL 3705283, at *8 (S.D.N.Y. Sept. 3, 2010); *American Civil Liberties Union v. U.S. Dep't of Homeland Security*, --- F. Supp. 2d ---, No. 08-1100 (RBW), 2010 WL 3718944, at *6-*7

[1] Capitalized and abbreviated terms have the same meaning as in the Government's opening brief.

(D.D.C. Sept. 20, 2010); *Schoenman v. FBI*, No. 04-2202 (CKK), 2009 WL 763065, at *18 (D.D.C. Mar. 19, 2009); *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 111 (D.D.C. 2005); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004).

Moreover, the FBI's and ICE's search cut-off dates are "reasonable in light of the specific request Plaintiff[s] made." *Jefferson v. Bur. of Prisons*, 678 F. Supp. 2d 55, 60 (D.D.C. 2008); *see also McGehee*, 697 F.2d at 1101 (applying a reasonableness standard "to test the legality of an agency rule establishing a temporal limit to its search effort"). Plaintiffs' FOIA request implicates millions of pages of potentially responsive records, and would take thousands of man-hours to process and produce at a cost of hundreds of thousands of dollars. *See* Second Pavlik-Keenan Decl. ¶¶ 18-19. Consequently, the FBI, ICE, and the other defendant agencies engaged plaintiffs in months of negotiation concerning the scope of the request in an effort to ensure a more efficient and timely production of records, but plaintiffs refused to agree to any meaningful narrowing proposal. *See id.* ¶¶ 17, 19.

Nonetheless, the FBI and ICE promptly began searching for potentially responsive records. By May 2010—just two months after it had commenced its search—the FBI had identified, and begun processing, approximately 500,000 pages of potentially responsive records. Second Hardy Decl. ¶ 13. Similarly, on March 1, 2010, the Secure Communities Program Office within ICE supplied the ICE FOIA Office with four CD-ROMs of potentially responsive material. Second Pavlik-Keenan Decl. ¶ 10. In May, ICE began posting records responsive to plaintiffs' request on their FOIA Electronic

Reading Room. *Id.* ¶¶ 21-22. Both the FBI and ICE commenced production of responsive records in August, six months after receiving plaintiffs' request. *Id.* ¶ 34; First Hardy Decl. ¶ 31.[2]

The FBI's and ICE's search cut-off dates were clearly not "unreasonably utilized to improperly limit the scope of [plaintiffs'] request." *ACLU*, 2010 WL 3718944, at *6. To the contrary, faced with an overbroad request and intransigent plaintiffs, the FBI and ICE set search cut-off dates consistent with applicable regulations and case law, and began searching for, processing, and producing the voluminous amount of material implicated by plaintiffs' request. They are entitled to partial summary judgment on the issue of search cut-off dates, and plaintiffs' cross-motion should be denied.

B. Plaintiffs Fail to Demonstrate That the FBI's and ICE's Search Cut-Off Dates Are Unreasonable

Rather than oppose the FBI's and ICE's use of date-of-search cut-off dates on relevant legal or factual grounds, plaintiffs set up a series of straw-man arguments that distract from the actual issue before the Court. First, plaintiffs contend that the search cut-off dates are unreasonable because the FBI's and ICE's declarations provide insufficient detail concerning the adequacy of the agencies' search efforts. Pl.'s Opp'n at 11-14. But as the Court itself has made clear, adequacy of search is not the issue being

[2] The First Hardy Declaration was filed on November 12, 2010 (Docket #15), in support of defendants' opposition to plaintiffs' motion for a preliminary injunction. This declaration is annexed as Exhibit A to the Second Hardy Declaration, filed on January 26, 2011 in support of the instant motion for partial summary judgment.

briefed.[3] Furthermore, plaintiffs misstate the law when they claim that "[f]or a FOIA defendant's search cut-off date to be reasonable, the defendant must provide a comprehensive description of its search efforts." Pl.'s Opp'n at 11. Not one of the cases cited by plaintiffs in support of this or similar propositions *ever* suggests a correlation between the reasonableness of an agency's search cut-off date and the criteria for assessing the adequacy of the agency's search. *See Wilderness Soc'y v. U.S. Bureau of Land Mgmt.*, No. Civ. A 01CV2210, 2003 WL 255971, at *5 (D.D.C. Feb. 4, 2003) (discussing adequacy of search criteria without once mentioning the issue of search cut-off dates); *Schoenman*, 2011 WL 187223, at *4-*6 (same); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.D.C. 1995) (same). Simply put, an agency's search cut-off date and the adequacy of its search, though both subject to the same reasonableness standard, are separate issues. To the extent plaintiffs seek to challenge the adequacy of defendants' searches, they may move for partial summary judgment on that issue, thus affording defendants the opportunity to submit declarations describing their search efforts in detail. For purposes of the instant motions, however, plaintiffs cannot rely on purported deficiencies in the agencies' searches to contest the FBI's and ICE's reasonable search cut-off dates.

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[3] During the conference before the Court on December 9, 2010, the Court ordered the parties to brief a partial summary judgment motion on exemptions, but specifically indicated that the exemptions briefing "can be distinguished from the adequacy [of the] search." Dec. 9, 2010 Hr'g Tr. at 16:7-8. At the January 12, 2011 conference, the Court again indicated that "[w]e are not going to litigate the adequacy of the search," Jan. 12, 2011 Hr'g Tr. at 47:15-16, and instead directed defendants to provide plaintiffs with a letter describing their searches by January 26, 2011, *see id.* at 51:1-7. Defendants supplied plaintiffs with such a letter in accordance with the Court's order.

Plaintiffs' argument that the FBI and ICE did not undertake "earnest" searches beginning on the search cut-off dates, *see* Pl.'s Opp'n at 14-19, also lacks merit. For example, plaintiffs criticize the FBI for commencing its search on March 2, 2010 by running a search in its Central Records System ("CRS"), *see* Pl.'s Opp'n at 15, even though this is standard operating procedure for the FBI's FOIA searches, *see* Second Hardy Decl. ¶ 6, and even though, within two months of this initial search, subsequent searches of FBI offices yielded roughly 500,000 pages of potentially responsive records, *see id.* ¶ 13. It was entirely reasonable for the FBI to begin its search for records responsive to plaintiffs' request the way it begins all FOIA searches, and then to proceed with additional (and ultimately more fruitful) searches within other areas of the agency.

Nor can plaintiffs substantiate their position based upon alleged "delay" in the FBI's and ICE's production of records. *See* Pl.'s Opp'n at 17-19. Contrary to plaintiffs' assertion, there is no evidence whatsoever of bad faith on defendants' part in processing plaintiffs' FOIA request. *See id.* at 17. Any delays in the production of records were due in large part to the vast scope of the request itself, which plaintiffs refused to narrow. More fundamentally, plaintiffs' line of reasoning would require the Court to adopt something akin to the "date-of-release" cut-off date that was explicitly rejected by the court in *Edmonds*, cited *supra*. The *Edmonds* court correctly found that a date-of-release cut-off date is "inherently flawed," insofar as "[e]very postponement in the release of the documents would require the agency to perform a new search to include all documents created before the release date, which would in turn postpone the date of release once again." *Edmonds*, 383 F. Supp. 2d at 111. This is precisely the type of "endless cycle of

judicially mandated reprocessing" that search cut-off dates are meant to prevent. *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991).

C. Plaintiffs Are Not Entitled to a January 31, 2011 Search Cut-Off Date

After characterizing the FBI's and ICE's search cut-off dates—which are supported by agency regulations, case law, and the facts on the record—as "patently unreasonable," Pl.'s Opp'n at 2, plaintiffs request, without any support, that the Court impose an arbitrary search cut-off date of January 31, 2011, *see id.* at 7-8 n.6. Plaintiffs' proposed search cut-off date is nearly one year after the submission of their FOIA request, nearly 11 months after defendants began searching for and identifying hundreds of thousands of pages of potentially responsive records, nearly six months after production of responsive records commenced, and well after defendants have produced a total of over 15,000 pages of responsive material, with an additional production scheduled for February 25, 2011. In short, it is patently unreasonable.

Plaintiffs appear to suggest that such an extraordinarily late cut-off date is necessary to cure defendants' purported "delay" in producing responsive records, and to ensure that the information plaintiffs receive is "current." *See id.* at 17-19. In other words, plaintiffs seek to avoid the consequences of their own, overbroad FOIA request, which effectively asked for "any and all records" pertaining to Secure Communities, and thus required the defendant agencies to sift through hundreds of thousands of pages of potentially responsive records. These consequences, however, are plaintiffs' alone to bear. "A request for all documents 'relating to' a subject . . . unfairly places the onus of non-production on the recipient of the request and not where it belongs—upon the person

who drafted such a sloppy request." *Massachusetts v. HHS*, 727 F. Supp. 35, 36 (D. Mass. 1989). Plaintiffs cannot credibly submit a FOIA request seeking millions of pages of records, refuse to narrow the scope of that request, and then remedy the results of their request's over-breadth by requiring defendants to undertake an additional year's worth of searches—especially when the agencies have spent the better part of that year responding to plaintiffs' request. To the extent plaintiffs seek records created after the FBI's and ICE's search cut-off dates, they may file a new request.

D. Plaintiffs Are Not Entitled to "Documents Responsive to All Outstanding Requests" by April 30, 2011

Finally, plaintiffs' attempt to shoehorn into the briefing on this motion a request that ICE and the FBI "produce documents responsive to all outstanding requests in this action by April 30, 2011," *see* Pl.'s Opp'n at 21 & n.16, should be rejected. Plaintiffs fail to explain why such an order would be appropriate, especially within the context of motions for partial summary judgment on the wholly unrelated issue of search cut-off dates.

Moreover, the present contours of plaintiffs' FOIA request are unclear. Accordingly, it would be premature to set a date for production of records in response to unspecified "outstanding requests."[4] During the conference on December 9, 2010, the Court correctly characterized plaintiffs' original FOIA request as "overbroad," and suggested that the portion of the request plaintiffs "really want to get a response to" was

[4] Indeed, the Court reached the same conclusion during the January 20, 2011 conference, when it declined plaintiffs' earlier request to set a production schedule for the revised request. *See* Jan. 20, 2011 Hr'g Tr. at 26:1-27:1.

covered by the Rapid Production List ("RPL"). Dec. 9, 2010 Hr'g Tr. at 12:20-25. The Court directed plaintiffs to present defendants with "a revised FOIA request . . . which is your final request" by January 7, 2011. *Id.* at 13:24-14:7.

On January 7, 2011, plaintiffs submitted a revised FOIA request that, in sum and substance, was as broad as their original request. On January 20, 2011, plaintiffs submitted a second revised request that was equally overbroad. Neither revised request came close to heeding the Court's suggestion that plaintiffs might limit their request to the RPL. The issue of whether and to what extent either of plaintiffs' revised requests is now operative has not been addressed by the Court, and defendants have not been given the opportunity to object to the breadth of these requests. Thus, the Court must take this issue up separately, and not in the context of this motion regarding search cut-off dates.

CONCLUSION

For the foregoing reasons, and those set forth in defendants' opening memorandum, the FBI's and ICE's motion for summary judgment should be granted, and plaintiffs' cross-motion for summary judgment should be denied.

Dated: New York, New York
February 18, 2011

Respectfully submitted,

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