UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

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ECF CASE

10 CV 3488 (SAS)(KNF)

[Rel. 10 CV 2705]

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO SEARCH CUT-OFF DATES FOR PLAINTIFFS' FREEDOM OF INFORMATION ACT REQUEST

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR"), and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (the "Clinic") (collectively "Plaintiffs"), hereby move this Court for an order denying ICE and FBI's[1] motion for partial summary judgment ("ICE/FBI Motion") and granting Plaintiffs' cross-motion for partial summary judgment on Plaintiffs' claims for disclosure of certain information at issue in this Freedom of Information Act ("FOIA") action arising from Plaintiffs' February 3, 2010 FOIA request ("FOIA Request"). Specifically, by this motion, Plaintiffs seek an order directing ICE and FBI to produce documents responsive to the FOIA Request[2], and created or received through January 31, 2011 or a "January 31, 2011 Search Cut-Off Date." Plaintiffs further request that the Court order ICE and FBI to produce documents responsive to all outstanding requests in this action by April 30, 2011.

I. PRELIMINARY STATEMENT

On February 3, 2010, Plaintiffs requested information related to the Secure Communities Program from Defendants. Nearly *one year later*, Defendants have moved to exclude from production any documents responsive to the FOIA Request that were created or received after March 2, 2010 (FBI) and April 30, 2010 (ICE) (the "Search Cut-Off Dates"). The primary basis

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[1] Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), Federal Bureau of Investigation ("FBI"), Executive Office of Immigration Review ("EOIR") and Office of Legal Counsel ("OLC") are collectively referred to as "Defendants."

[2] This Court previously ordered Defendants to produce all Opt-Out Records by January 17, 2011, using a cut-off date of October 15, 2010 ("Opt-Out Production"). This Court also ordered that Defendants produce all documents on the Rapid Production List ("RPL") by February 25, 2011, and that Plaintiffs submit a revised FOIA request on January 7, 2011 ("Revised FOIA Request"), which narrowed the categories of documents that remained to be produced from the FOIA Request. Plaintiffs are requesting that the January 31, 2011 Search Cut-Off Date apply to the RPL and to any documents responsive to the Revised FOIA Request, and that such documents be produced by April 30, 2011.

for ICE and FBI's arbitrary Search Cut-Off Dates is purported burden: ICE and FBI should not be required to search for documents more than once in response to the FOIA Request. ICE and FBI's plea to unilaterally limit the production of responsive documents should be rejected for at least four reasons.[3]

First, ICE and FBI have failed to meet their burden for partial summary judgment because they have failed to provide this Court with the requisite information to rule that the Search Cut-Off Dates were reasonable. ICE and FBI have not provided to this Court (and have refused for months to provide to Plaintiffs, despite repeated requests) any information about the data sources actually searched on the purported Search Cut-Off Dates. Documents responsive to the FOIA Request may be found in any number of data sources, including email servers, email archives, hard drives of employees, personal drives of employees on a network, group or department shares on a network, collaborative sites (SharePoint, Wikis, intranet and extranet), structured databases, and/or hard copy files (personal files, department files, and off-site storage files). There may be one or more offices, departments or divisions of each Defendant that store or maintain documents responsive to the FOIA Request. There also may be many employees or custodians of responsive information for ICE and FBI. If ICE and FBI want to credibly claim that there is a burden of conducting a search for responsive documents, they would need to detail the exact data source which was searched, and the date of that search. ICE and FBI have failed to do so here.

Second, the Search Cut-Off Dates are patently unreasonable. To the extent ICE and FBI have provided cursory information about the searches conducted, they selected a date when no

[3] Plaintiffs are concurrently challenging the documents or portions of documents withheld as exempt by the Defendants in a separate motion, due to be filed on February 11, 2011. Further, Plaintiffs will challenge the adequacy of Defendants' search in a separate motion, as directed by this Court.

real search of any data source with responsive information was conducted in order to trigger an unreasonably early limiting date. ICE and FBI then apply that early date across-the-board for all subsequent, more meaningful searches. For example, FBI selected March 2, 2010 because on that date it purportedly ran a primitive search in the Automated Case System ("ACS") of their Central Records System ("CRS") for one, basic term – "Secure Communities" – and (not surprisingly) there were no responsive documents in response to that wholly inadequate search. However, from FBI's perspective, even though that "search" was never likely to lead to responsive records, it provided the agency with justification to use this artificial Search Cut-Off Date in subsequent searches (refusing to disclose any real details of these supposed searches to this Court or to Plaintiffs) weeks and perhaps months later.

Third, ICE and FBI's extraordinary year-long delay in producing documents in response to the February 3, 2010 FOIA Request should require that the Search Cut-Off Dates be rejected. Even if ICE and FBI demonstrated that they conducted good faith searches of specific data sources on the Search Cut-Off Dates, the delay in production undermines the very purpose of FOIA and the use of cut-off dates. ICE and FBI should not be entitled to benefit from their own delay in searching and producing responsive documents to the severe prejudice of Plaintiffs.

Fourth, the failure to inform Plaintiffs of the Search Cut-Off Dates in a reasonable time is itself a ground to reject the Search Cut-Off Dates. Consistent with ICE and FBI's pattern of conduct in this case, ICE and FBI refuse to provide any information about the production of documents responsive to the FOIA Request unless compelled by Court order through time consuming and costly motion practice.

Notwithstanding the lack of any basis to limit the production of documents from the FOIA Request, ICE and FBI argue that there is a simple solution for Plaintiffs: file another

FOIA request. This "Alice in Wonderland" approach is contrary to the law and spirit of FOIA, and severely prejudices Plaintiffs.

Here, Plaintiffs are attempting to evaluate a controversial government program, Secure Communities, which is changing and expanding at a rapid pace. (*See* Declaration of Sarahi Uribe, dated February 9, 2010 ("Uribe Decl.") ¶¶ 2, 4, 8). By limiting the production to documents almost a year old, ICE and FBI are impeding Plaintiffs' efforts to effectively advocate about this program, and state and local government officials are denied access to timely and accurate information which they need to make decisions. (Uribe Decl. ¶¶ 5-10). In sum, policy makers, advocates, and the public need access to current information about Secure Communities to evaluate the program and formulate appropriate responses, and ICE and FBI's attempt to limit the production by imposing unreasonable Search Cut-Off Dates undermines the very purpose of FOIA. (Uribe Decl. ¶ 9 & Ex. C).

ICE and FBI's arguments are even more nonsensical given their actions in the Opt-Out Production. In the Opt-Out Production, ICE specifically redacted documents as "Unresponsive—Outside the Date Range" when it produced documents created or received after October 15, 2010. (*See, e.g.*, Declaration of Lisa R. Plush, dated February 9, 2011 ("Plush Decl."), Exs. A-C). While technically in compliance with the Court-ordered October 15, 2010 search cut-off date, such actions violate the spirit of FOIA in denying Plaintiffs' access to responsive information that is the possession of ICE and FBI.[4] Moreover, it is ironic that ICE

[4] *See, e.g.*, FOIA Memorandum for the Heads of the Executive Departments and Agencies by President Barack Obama ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."), *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/ (last visited Feb. 9, 2011); FOIA Memorandum from the Attorney General, Memorandum for the Heads of the Executive Departments and Agencies ("[T]he [DOJ] will defend a denial of a FOIA request

and FBI cite burden as the basis for establishing unreasonable Search Cut-Off Dates, yet take the more burdensome steps of redacting responsive information after they searched and found documents responsive to the FOIA Request. Finally, such actions demonstrate that if this Court determines that the Search Cut-Off Dates are unreasonable, and thus ICE and FBI will need to go back to the relevant data sources to search again for responsive documents, it may be less burdensome for ICE and FBI, and more consistent with the spirit of FOIA and the purpose of search cut-off dates, to require a later date (like January 31, 2011 rather than October 15, 2010) for the search cut-off.

II. BACKGROUND

A. Plaintiffs' FOIA Request and Complaint

This case arises under FOIA, 5 U.S.C. § 552, *et seq*. Plaintiffs, public service and educational organizations, seek the disclosure by Defendants of materials responsive to the FOIA Request regarding a government program called Secure Communities. Secure Communities is an immigration enforcement program that utilizes the information-sharing capability (referred to as "interoperability") between DHS and the Department of Justice ("DOJ") to automatically transmit fingerprints from the FBI to immigration databases upon arrest and booking by local law enforcement. Secure Communities raises grave concerns for states and local municipalities related to, among other concerns, cost, the maintenance of a positive relationship between local police and the communities they serve, and individual civil liberties. (Uribe Decl. ¶¶ 2, 3). Because no regulations have been promulgated by ICE, and because ICE has released only limited information concerning its operation, Plaintiffs filed the FOIA Request and this action to

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only if . . . disclosure is prohibited by law."), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf (last visited Feb. 9, 2011).

obtain timely and accurate information about Secure Communities and its impact on the relationship between local law enforcement and immigration enforcement in local communities.

B. Defendants' Limited Productions

1. FBI's Productions

The FBI has made three productions to Plaintiffs since February 2010. Seven months after the FOIA Request, the FBI produced 51 pages to Plaintiffs on August 13, 2010. (Declaration of David M. Hardy, dated November 12, 2010 ("First Hardy Decl.") ¶ 31). Only after Plaintiffs filed their Preliminary Injunction Motion did the FBI make a second production of 803 pages on November 18, 2010. (Plush Decl. ¶ 3). On January 17, 2011, pursuant to the Court's December 17, 2010 Order, the FBI made an additional production of 216 documents. (*Id.* ¶ 4). As of February 9, 2011, more than one year after Plaintiffs filed the FOIA Request, the FBI has produced only approximately 2,800 pages to the Plaintiffs (Declaration of David M. Hardy, dated January 26, 2011 ("Second Hardy Decl.") ¶ 15), which apparently is a small fraction of documents responsive to the FOIA Request. Pursuant to this Court's Order, the FBI should produce documents responsive to the RPL on February 25, 2011. The FBI has not given any indication as to when they will produce documents responsive to the Revised Request. Except for the Opt-Out Production, where the FBI applied the October 15, 2010 Search Cut-Off Date ordered by this Court, the FBI imposed the March 2, 2010 Search Cut-Off Date to all productions to date, and presumably will impose this limiting date for all future productions.

2. ICE's Productions

ICE has made four productions to Plaintiffs since February 2010. Six months after the FOIA Request, on August 3, 2010, ICE produced 926 pages of documents. (Declaration of Catrina Pavlik-Keenan, dated January 26, 2011 ("Second Pavlik-Keenan Decl.") ¶ 34). On September 8, 2010, ICE produced 761 pages, and on October 22, 2010, ICE Produced 19 pages.

(*Id.*). On December 6, 2010 (*i.e.*, after Plaintiffs filed the Motion for Preliminary Injunction), ICE produced 283 pages. (*Id.* ¶ 42). On January 17, 2011, pursuant to the Court's December 17, 2010 Order, ICE provided approximately 12,000 pages of purportedly responsive documents in the Opt-Out Production. (*Id.* ¶ 43).[5] Pursuant to this Court's Order, ICE should produce documents responsive to the RPL on February 25, 2011. ICE has not given any indication as to when they will produce documents responsive to the Revised Request. Except for the Opt-Out Production, where ICE applied the October 15, 2010 Search Cut-Off Date ordered by this Court, ICE imposed the April 30, 2010 Search Cut-Off Date to all productions to date, and presumably will impose such a limiting date for all future productions.

C. Defendants' Pattern of Obstruction of Information and Delay

Defendants have repeatedly delayed producing documents responsive to Plaintiffs' Request. Plaintiffs commenced this lawsuit in April 2010 and until October 2010, Defendants were supposedly "searching for other documents[,] [] were processing and producing documents responsive to other parts of the rapid production list." (Hr'g Tr. 8:14-16 (Dec. 9, 2010)). Even though Defendants purportedly have searched for documents for many months, prior to Court-ordered production of January 17, 2011, Defendants collectively only produced approximately 3,000 pages of documents.

Importantly, Defendants had promised to produce documents responsive to the RPL by July 31, 2010, only to fail to meet their own deadline.[6] (Reply Declaration of Bridget P. Kessler

[5] Defendant EOIR made its first production on January 17, 2011, nearly a year after Plaintiffs filed the FOIA Request, producing a total of four documents, and applying an October 15, 2010 search cut-off date. To date, Defendant OLC has produced no documents, in spite of purported diligent searches, and has applied a November 8, 2010 search cut-off date. Plaintiffs reserve the right to contest the adequacy of the searches.

[6] FBI and ICE's Search Cut-Off Dates may have been reasonable, at least with respect to the RPL, if Defendants had complied with their promises and produced the bulk of the documents

in Support of Plaintiffs' Motion for Preliminary Injunction, dated November 19, 2010 ("Kessler Reply Decl.") ¶¶ 3-12; *see also* Op. & Order 2-3 (Feb. 7, 2011)). Not only did Defendants inform Plaintiffs that they could complete production of the majority of documents responsive to the RPL by July 30, Defendants also stated that they would propose alternative deadlines if they were unable to meet their target. (Declaration of Bridget P. Kessler in Support of Plaintiffs' Motion for Preliminary Injunction, dated October 28, 2010 ("Kessler Decl."), Ex. H). However, Defendants not only failed to meet the July 30 deadline, they also failed to propose alternative dates to Plaintiffs. (Kessler Reply Decl. ¶¶ 3-12). By December 2010, Defendants could not even inform the Court about the percentage of the production that had been completed, and instead guessed that "perhaps" 30 percent was complete. (Hr'g Tr. 4:18-6:23 (Dec. 9, 2010)). Defendants then claimed it would take three additional months to complete 10% more of the RPL. (*Id.* at 7-8). Nevertheless, when faced with the Court's December 17, 2010 Order, Defendants were able to complete the Opt-Out Production by January 17, 2011, casting substantial doubt on the diligence of searches conducted prior to the Court's intervention.

ICE and FBI state that "the Government has made several attempts to negotiate the scope of the request with plaintiffs." (ICE/FBI Motion at 8). Unsurprisingly, ICE and FBI emphasize the quantity of their purported "attempts" rather than the quality. While Plaintiffs continue to negotiate in good faith with Defendants, Plaintiffs have been unable to make any progress without the Court's intervention. Defendants offer to negotiate, but continue to refuse to provide even basic information to allow for meaningful discussions. (Kessler Reply Decl. ¶¶ 7-12).

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responsive to the RPL in July 2010 because the documents produced would have been more timely, and thus useful for advocacy. The relief requested by Plaintiffs (a Search Cut-Off Date of January 31, 2011, with a production deadline of April 30, 2011) would simply put Plaintiffs back in the same position in terms of timeliness of production Plaintiffs would have been had Defendants not broken their promise with respect to the RPL production (responsive documents more than 3 months old).

Indeed, the lack of transparency is evidenced by the paucity of information contained in the declarations submitted for purposes of the ICE/FBI Motion.

III. SUMMARY JUDGMENT STANDARDS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and affidavits show that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 380 F. Supp. 2d 211, 215 (S.D.N.Y. 2005).

FOIA's purpose is "'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (citations omitted) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)); *see also Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 145, 147 (2d Cir. 2010) (stating that FOIA exemption consistently are given a narrow compass and all doubts are resolved in the favor of disclosure). "The statute is plainly written so as to disfavor any effort by agency officials to shirk their responsibilities to respond promptly and fully to requests for records. Furthermore, the Act clearly contemplates that courts will scrutinize closely any withholding of documents." *McGehee v. CIA*, 697 F.2d 1095, 1101, n.18 (D.C. Cir. 1983) (outlining the flaws in time-of-request cut-off policy).

When a plaintiff challenges an agency's decision to withhold information, the burden rests on the agency to justify its decision, and the reviewing court is directed to review the matter *de novo*. *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (ruling that certain records were not exempt from disclosure); *Adamowicz v. IRS*, 672 F. Supp. 2d 454, 461 (S.D.N.Y. 2009); *Defenders of Wildlife v. Dep't of Interior*, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (quoting 5 U.S.C. § 552(a)(4)(B)); *see also Tax Analysts v. IRS*, 117 F.3d 607,

619 (D.D.C. 1997). A defendant may offer affidavits to support its motion, but summary judgment is only appropriate where the affidavits describe the search process in "reasonably specific detail" and are not controverted by "contrary evidence" or "evidence of agency bad faith." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (citations omitted). Moreover, "all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester; as such, only after an agency seeking it proves that it has fully 'discharged its [FOIA] obligations' is summary judgment appropriate." *In Def. of Animals v. NIH*, 543 F. Supp. 2d 83, 93 (D.D.C. 2008) (citations omitted).

Search cut-off dates serve two purposes: (1) to "establish the agency's obligations to identify responsive documents" and (2) to "put[] the requester on notice, so that the requester may submit subsequent requests for records outside the scope of the initial request." *Dayton Newspaper, Inc. v. Dep't of Veteran Affairs*, 510 F. Supp. 2d 441, 449 (S.D. Ohio 2007) ("a cut-off date will only be 'valid when the limitation is consistent with the agency's duty to take reasonable steps to ferret out requested documents.'") (internal citations omitted). Courts use a reasonableness standard to determine whether an agency's search cut-off date is appropriate. *McGehee*, 697 F.2d at 1100-05 (an agency is not required to reorganize its documents but it has a "firm statutory duty to make *reasonable* efforts") (internal citations omitted). The defendant in a FOIA action bears the burden of justifying any temporal limitation. *Id.*

FOIA vests the Courts with broad authority to prevent unreasonable delays in disclosing non-exempt documents to the FOIA requestor. *Payne Enters. Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("The FOIA imposes no limits on courts' equitable powers in enforcing its terms"). Further, a court may require FOIA defendants to produce documents post-dating the claimed cut-off date. *Am. Civ. Liberties Union v. Dep't of Def.*, Nos. 04 Civ 4151

(AKH), 05 Civ. 9620 (AKH), 2008 WL 4755209, at *1 (S.D.N.Y. Oct. 29, 2008) (ordering the government to produce memoranda issued in May 2005, even though the search cut-off date was January 31, 2005).

IV. ARGUMENT

ICE and FBI have failed to demonstrate that no genuine issue of material fact exists with regard to the reasonableness of the Search Cut-Off Dates. Plaintiffs will show that the Search Cut-Off Dates are unreasonable because: (1) the conclusory declarations submitted by the FBI and ICE do not provide sufficient detail to establish that the Search Cut-Off Dates are reasonable; (2) the little detail included in the declarations shows that FBI and ICE, did not begin earnestly searching for responsive documents on the Search Cut-Off Dates, thus undermining their purported basis for withholding documents produced after the Search Cut-Off Dates; (3) ICE and FBI have repeatedly delayed searching for and producing documents responsive to Plaintiffs' FOIA Request; and (4) ICE and FBI failed to inform Plaintiffs of the Search Cut-Off Dates until the Preliminary Injunction papers were filed.

Further, FBI and ICE contend that a date-of-search limitation on a FOIA search is always reasonable. (ICE/FBI Motion at 6) ("[A date of search] cut-off date ensures a full search and disclosure by the agency."). This assertion ignores that a cut-off date's reasonableness is a **fact-specific** inquiry. *McGehee*, 697 F.2d at 1100 (emphasis added).

A. FBI and ICE's Search Cut-Off Dates are Unreasonable Because the Supporting Declarations Do Not Provide Sufficient Detail Regarding Each Defendant's Search Efforts

For a FOIA defendant's search cut-off date to be reasonable, the defendant must provide a comprehensive description of its search efforts. *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) (concluding that the declarations were deficient because they did not "set forth the universe of documents that

were searched and the method used, if any, to search for responsive documents"). A FOIA defendant's affidavits must be reasonably detailed, set forth search terms and types of searches performed, and declare that all files likely to contain responsive documents have been searched. *Id.* (internal citations omitted). Conclusory statements are insufficient to support summary judgment. *Id.*

1. The FBI's Failure to Provide Adequate Detail in Its Declarations Underscores the Unreasonableness of the March 2, 2010 Search Cut-Off Date

The FBI's Search Cut-Off Date is unreasonable because the Hardy Declarations do not describe the search efforts in sufficient detail. The FBI declarations use broad language, describing the searches conducted in only the vaguest of terms. (*See* First Hardy Decl.; Second Hardy Decl.). Only three search terms, "Secure Communities," "opt-out" and "opt out" are provided. *Id.* No attempts to refine the search or locate other key terms are noted (Second Hardy Decl., Ex. B), in spite of the fact that the FBI's purported initial search of March 2, 2010 failed to yield even one "potentially responsive" document. (Second Hardy Decl. ¶ 9). While Plaintiffs have repeatedly attempted to guide the Defendants in their searches, the Hardy Declarations make clear that this guidance has been ignored. Further, the declarations do not provide the detail about search terms, documents searched or custodians identified; all of this information is required to render the search reasonable. *See, e.g., Schoenman v. FBI*, Civ. A. No. 04-02202 (CKK), 2011 WL 187223, at *4-*6 (D.D.C. Jan. 21, 2011) ("To be sufficiently detailed, the agency's affidavits must at a minimum describe what records were searched, by

whom, and through what process.") (internal citations omitted);[7] *Wilderness*, 2003 WL 255971 at *5; *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.D.C. 1995).

The FBI's declaration of November 12, 2010 identified the types of responsive materials "to date" including emails, PowerPoint Presentations, Excel Spreadsheets, access data and reports and "all other documents." (First Hardy Decl. ¶ 30). This detail is the type of information Plaintiffs require for the actual search (not just the results) in order to conclude that the Search Cut-Off date is reasonable (or unreasonable). *Schoenman*, 2011 WL 187223, at *4-*6. In the absence of this essential supporting detail, the FBI has failed to sustain its burden of justifying the March 2, 2010 Search Cut-Off Date. FOIA demands more of governmental agencies seeking to prevail on a motion for summary judgment.

2. The Lack of Detail in ICE's Supporting Declarations Cannot Justify an April 30, 2010 Search Cut-Off Date

Similarly, ICE's declarations fail to provide the detail needed to justify the April 30, 2010 Search Cut-Off Date. In its first declaration, ICE provides a conclusory statement regarding the April 30, 2010 Search Cut-Off Date: "ICE commenced searching for potentially responsive documents and has established an agency search cut-off date of April 30, 2010." (First Pavlik-Keenan Decl. ¶ 26). In its second declaration, ICE justifies its use of the April 30 Search Cut-Off Date by claiming that it established this date "out of an abundance of caution[,]" while noting that this date "corresponds to the date ICE received notice of Plaintiffs' complaint in the instant litigation." (Second Pavilk-Keenan Decl. ¶ 16). Notably absent from either declaration is any mention of search terms, files searched or custodians searched. The vague assertion that ICE

[7] While the court in *Schoenman* ruled that the searches were reasonable, the defendants affidavits in that case, unlike here, contained the necessary information to determine reasonableness. *See* 2011 WL 187223, at *6.

searched for "responsive" documents[8] is an inadequate explanation. *Schoenman*, 2011 WL 187223, at *4-*6. In the absence of these critical details, ICE cannot sustain its burden of proving that its selection of April 30, 2010 as its Search Cut-Off Date was reasonable.

B. The FBI and ICE Declarations Show That Neither Defendant Commenced Earnest Searches on the Stated Search Cut-Off Dates

1. The FBI Initially Established a Date of Request Search Cut-Off Date and Failed to Take Adequate Corrective Measures After Recognizing Its Error

The FBI Search Cut-Off Date is also unreasonable because the FBI initially used a date-of-request cut-off date of February 3, 2010. (First Hardy Decl. ¶ 23). A date of request cut-off is generally unreasonable. *See McGehee*, 697 F.2d at 1100-05 (noting that an alternative procedure would utilize a "cut-off date much later than the time of the original request," and would result in "a much fuller search and disclosure."); *see also Public Citizen v. Dep't of State*, 276 F.3d 634, 640-44 (D.C. Cir. 2002) ("At the very least, we think that with minimal administrative hassle, the Department could apply a date-of-search cut-off to the [file]."). The FBI recognized the unreasonableness of this early date[9] and extended the Search Cut-Off Date to March 2, 2010.[10]

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[8] ICE does identify the subject matter of some of these materials; however, that does not assist Plaintiffs or the Court in determining what was actually searched on the disputed date. (*See* Second Pavlik-Keenan Decl. ¶ 10). ICE's first declaration also provides which offices were searched. (First Pavlik-Keenan Decl. ¶ 31). Again, this information alone is not sufficient to justify its Search Cut-Off Date.

[9] The FBI notes that the February 3, 2010 Search Cut-Off Date was an "error." (Second Hardy Decl. ¶ 9). The FBI justifies this error as an "inadvertent administrative misstep." (*Id.*). The FBI asserts that a follow-up production "actually covered a period exceeding the February 3, 2010 cut-off date." However, the agency does not explain how the obvious error was corrected, why it occurred or on what date the agency conducted the follow-up search. In this respect, not only is the search presumptively contrary to the requirements of FOIA, but the affidavit supporting the reasonableness of the March 2, 2010 Search Cut-Off Date does not provide any details on the temporal search restriction.

[10] It was necessary for Defendants' counsel to ask them to "go back and look at [the February Search Cut-Off Date]." (Hr'g Tr. 36:5-11 (Jan. 12, 2011)).

(*See* Second Hardy Decl. ¶¶ 8, 9). The FBI justifies the March 2, 2010 date by noting that a "search slip" was generated that day which "administratively established" the search. (Second Hardy Decl. ¶¶ 8-9). In light of FOIA's animating principles of governmental transparency and open-disclosure, it is unreasonable for a governmental agency to justify its decision to limit the scope of potentially responsive documents by pointing to the date on which a "search slip" was created, rather than pointing to a reasoned justification for its decision.

In its declaration, the FBI attempts to bolster its justification of the March 2, 2010 Search Cut-Off Date by noting, in passing, that the purported search conducted that day yielded no potentially responsive documents. (Second Hardy Decl. ¶ 9). FBI also argues that the March 2, 2010 Search Cut-Off Date was consistent with DOJ regulations, which provide justification for limiting the field of responsive documents to those documents created on or before the search begins. (ICE/FBI Motion at 12). However, the fact that the FBI did not produce its first documents responsive to the February 3, 2010 FOIA Request until August of 2010 (when it produced a mere five documents) (First Hardy Decl. ¶ 31) casts additional doubt on whether an earnest search began in March of 2010. If the FBI seeks to justify the March 2, 2010 date by pointing to DOJ regulations, it must be able to show that it complied with DOJ regulations. FBI failed to do so and now relies on what appears to be administrative convenience to justify its March 2, 2010 Search Cut-Off Date. Failing to provide an adequate basis for this date, the FBI's partial motion for summary judgment should be denied.

2. Gaps in ICE's Declarations Undermine the Reasonableness of ICE's Search Cut-Off Date

Not only is there insufficient detail within ICE's declarations to determine when ICE began searching in earnest for responsive documents, ICE's additional justifications for its April 30, 2010 Search Cut-Off Date lack persuasive logic. ICE purports to have started its searches

two months prior to April 30, 2010. (Second Pavlik-Keenan Decl. ¶ 7). Perhaps recognizing the difficulty of justifying an earlier date, ICE states, as previously noted, that it settled on April 30 "out of an abundance of caution[.]" (*Id.* ¶ 16). ICE elaborates on its justifications for the use of April 30, 2010, noting that it "corresponds to the date ICE received notice of Plaintiffs' complaint in the instant litigation." (*Id.*).

Notably, ICE does *not* state that it chose the April 30, 2010 Search Cut-Off Date *because* that is when it received notice of Plaintiffs' complaint; ICE merely notes that this date *corresponds* to when ICE received notice of the Complaint. ICE's failure to provide persuasive logic behind its unilateral selection of an April 30, 2010 Search Cut-Off Date leaves this Court guessing as to why this date was chosen. ICE couches its explanation in vague phrases designed to make it appear as though ICE's response to the FOIA Request was not only reasonable, but generous. Clearly, ICE did not commence a reasonable search in February 2010 as it claims; otherwise, it would have produced documents in a timely manner.[11] In the absence of a well-reasoned explanation for its selection of an April 30, 2010 Search Cut-Off Date, ICE cannot sustain its burden of demonstrating that this date is reasonable.[12]

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[11] It is also worth noting, again, that ICE describes its purported February search in broad terms, stating that it "instructed each program to conduct a search for records that would be responsive to Plaintiffs' FOIA request"[,]"contacted each of the program offices tasked with conducting a search for records and instructed each office to provide an estimate of the number of hours required to search for records and an estimate of the number of pages that may be produced . . . ." (Second Pavlik Keenan Decl. ¶¶ 7, 9). This explanation fails to justify an April 30 date of search. *See Moore v. Napolitano*, 723 F. Supp. 2d 167, 172-179 (D.D.C. 2010) (a search is not reasonable when a government official gives an order to his staff to search but does not "survey[] his staff member to determine 'the *scope* of any performed search'").

[12] Defendants do not provide declarations from EOIR or OLC. Thus, Plaintiffs are unable to assess the reasonableness of EOIR's or OLC's search cut-off dates except to note that EOIR and OLC apparently waited more than eight months after the FOIA Request to even begin a search for responsive documents. Moreover, as detailed below, these search cut-off dates are

3. ICE and FBI's Search Cut-Off Dates Are Unreasonable Because of Delay

ICE and FBI's Search Cut-Off Dates are unreasonable because of the delay in producing documents from the date of the FOIA Request. *See Or. Natural Desert Assoc. v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (stating additional information is needed to understand what the agency was doing in a three and one half month period where it did not produce documents).

ICE and FBI should not be permitted to benefit from their own dilatory tactics. As the Court noted, it is difficult to believe that Defendants have been busy searching since March 2010. (Hr'g Tr. 37:10-16 (Dec. 9, 2010)). Based on the uneven pace of production, it appears that the bulk of the searching was completed after the December 9, 2010 hearing. While a delay in production alone may be insufficient to establish bad faith, it is a factor for consideration in a court's bad faith assessment. *Hoch v. CIA*, 593 F. Supp. 675, 680-81 (D.D.C. 1984). In *Hoch*, the court ruled that delay alone was not sufficient to rule the search unreasonable.[13] However, here, the delay, on top of the lack of clarity and transparency regarding when ICE and FBI set the Search Cut-Off Dates, demand that this Court order this date unreasonable.[14]

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unreasonable because Plaintiffs were not informed of them until the January 12, 2011 court conference.

[13] Additionally, in *Hoch*, the government justified its delay because the documents were subject to the congressional and presidential commission which limited the number of potential reviewers. 593 F. Supp. at 681. No such claim has been made here.

[14] ICE and FBI contend that the regulation is sufficient to give notice of the Search Cut-Off Dates. However, the FBI's first declaration provided a different search cut-off date (First Hardy Decl.) and Plaintiffs had no reason (at that time) to distrust this declaration. Contrary to the Defendants' suggestion, Plaintiffs were not made aware of the FBI's Search Cut-Off Date until the January 12, 2011 hearing, despite repeated requests to provide this most basic information.

The Open Government Act makes clear that the Government cannot and should not benefit from delay in processing FOIA requests. *See* 5 U.S.C. § 552(a)(4)(A)(viii) ("An agency shall not assess search fees … if the agency fails to comply with any time limit under paragraph (6)"). In *Oregon Natural Desert*, the court noted that it did not know if the defendants were searching continuously from April until mid-August when it produced documents or if the actual searches took place the prior to sending the documents. *See* 419 F. Supp. 2d at 1288. If the latter is true, the court noted that the cut-off date should be updated to reflect the date of the search and defendants had to provide an adequate explanation of the time lag that occurred. *Id.* Similarly, here, ICE and FBI should be held accountable for the delay in the reviewing and processing of documents. Allowing this behavior would be contradictory to the law and the spirit of the FOIA, the goal of which is the dissemination of timely and accurate information to the public.

Defendants are well aware that the success of Plaintiffs' advocacy efforts depend, in large part, on receiving, analyzing and disseminating current information. Tellingly, Defendants do not hesitate to scold Plaintiffs for relying on information, *produced in this action*, that is not current. For example, in an August 2010 post to its website entitled *Setting the Record Straight*, Defendant ICE attempted to discredit Plaintiffs by stating Plaintiffs made "several false claims" regarding the removal of non-criminal aliens through Secure Communities, stating: "CCR's data regarding non-criminal alien removal is ***outdated***. Current data indicates the opposite of their assertion, showing that in fact ICE is increasing its focus on critical aliens." (Uribe Decl. ¶¶ 5-8 & Exs. A, B). The "current information" ICE disclosed in this August 17, 2010 release was current through July 2010. (*Id.*).

Thus, Defendants concede that Plaintiffs cannot advocate effectively with stale information, yet have thus far controlled the timeliness of the information Plaintiffs receive. Moreover, Defendants have shown that they are willing to use search cut-off dates as both a sword and a shield; hiding behind the unreasonable Search Cut-Off Dates to withhold responsive information, yet disclosing information that is current by as little as two weeks if such information suits its needs. The Court should not tolerate the use of search cut-off dates to support such dubious tactics.

C. ICE and FBI's Search Cut-Off Dates are Unreasonable Because Plaintiffs Were Not Provided Notice

Citing only dicta, ICE and FBI argue that because they were subject to publicized search cut-off regulations promulgated by their respective agencies (DHS and DOJ), there was little need to inform Plaintiffs of the Search Cut-Off Dates. (*See* ICE/FBI Motion at 12) (citing *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. CIV S-06-2845 LKK/JFM, 2008 WL 2523819, at *14 n.17 (E.D. Cal. June 20, 2008)).[15] However, even if ICE and FBI's reliance on dicta were sufficient to establish, at least as a theoretical matter, that publicized regulations are sufficient to put a requester on notice of search cut-off dates, the facts of this case prove otherwise. As ICE and FBI indicate, DHS and DOJ regulations state: "In determining which records are responsive to a request, component ordinarily will include only records in its possession as of the date the component begins its search for them. If any other date is used, the component shall inform the requester of that date." (*See* ICE/FBI Motion at 12) (citing 6 C.F.R.

[15] In the very same footnote quoted by ICE and FBI, the court notes that the issue before it was not whether the plaintiffs had received adequate notice of the search cut-off dates, but rather "who should bear the burden" of proving that search parameters are reasonable. *S. Yuba River Citizens League*, 2008 WL 2523819, at *14 n.17. Thus, ICE and FBI's reliance on this dicta for the proposition espoused is misplaced. Regardless, the presence of regulations or *S. Yuba River Citizens League* fail to explain why Defendants failed to cooperate with Plaintiffs in providing this most basic of information for months.

§ 5.4(a) (DHS); 28 C.F.R. § 16.4(a) (DOJ)). And so while a date of search cut-off date will "ordinarily" establish the temporal limits of a search, the facts of this case are hardly ordinary.

For example, ICE's Search Cut-Off Date of April 30, 2010 does not even correspond to the date ICE purportedly commenced its search, so even if ICE had disclosed the date the search began, publicized DHS regulations could not have put Plaintiffs on notice of the Search Cut-Off Date. In addition, in spite of participating in several meet and confers with Defendants' counsel in the summer and fall of 2010, Plaintiffs did not even learn of the Search Cut-Off Dates of the FBI and ICE until after Defendants' filed their response to Plaintiffs' Motion for Preliminary Injunction in November of 2010, over nine months after Plaintiffs submitted the FOIA Request. (*See* First Pavlik-Keenan Decl. ¶ 26). Moreover, and as detailed above, gaps in ICE and FBI's declarations and the numerous delays in producing responsive documents cast doubt on whether searches began, in earnest, on the dates set forth in the ICE and FBI declarations. Put simply, publicized regulations cannot put a party on notice if the producing party fails to comply, in good faith, with those regulations.

1. Plaintiffs are disadvantaged by FBI and ICE's failure to inform Plaintiffs of the Search Cut-Off Dates

Plaintiffs have been prejudiced by Defendants' failure to inform Plaintiffs of the Search Cut-Off Dates. First, had Plaintiffs known that ICE and FBI were using such early Search Cut-Off Dates, Plaintiffs may have made the decision to file another FOIA request months ago. Plaintiffs are entitled to this opportunity. *Fox News Network, LLC v. Dep't of the Treasury*, No. 08 civ. 11009 (RJH)(FM), 2010 WL 3705283, at * 8 (S.D.N.Y. Sept. 3, 2010) (using the date that the search actually commences does not prejudice requesting party because that party may easily file a follow-up request); *Dayton*, 510 F. Supp. 2d at 450. Moreover, it is contrary to the

spirit of FOIA and inefficient for Plaintiff to serve another FOIA request to Defendants when they have not began searching in earnest.

V. RELIEF

Plaintiffs respectfully request that this Court issue an order denying ICE and FBI's motion for partial summary judgment and granting Plaintiffs' cross-motion for partial summary judgment on Plaintiffs' claims for disclosure of certain information at issue in this FOIA action. Plaintiffs seek an order directing the ICE and FBI to produce documents responsive to the FOIA Request, and created or received through January 31, 2011 or a "January 31, 2011 Search Cut-Off Date". Plaintiffs further request that the Court order ICE and FBI to produce documents responsive to all outstanding requests in this action by April 30, 2011.[16]

Dated: February 9, 2011
New York, New York

Respectfully submitted,

/s/

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[16] This Court previously ordered Defendants to produce all Opt-Out Records by January 17, 2011, using a Search Cut-Off Date of October 15, 2010. This Court also ordered that Defendants produce all documents on the RPL by February 25, 2011, and that Plaintiffs submit a revised FOIA request on January 7, 2011 ("Revised FOIA Request"), which narrowed the categories of documents that remained to be produced from the FOIA Request. Plaintiffs are requesting that the January 31, 2011 Search Cut-Off Date apply to the RPL and to any documents responsive to the Revised FOIA Request, and that such documents be produced by April 30, 2011.

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