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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
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2
3 NATIONAL DAY LABORER
3 ORGANIZATION NETWORK, ET AL.,

4
4 Plaintiffs,

5 v. 10 CV 3488 (SAS)

6 U.S. IMMIGRATION, CUSTOM &
7 ENFORCEMENT, ET AL.,

8
8 Defendants.

9 -----x

9 New York, N.Y.
10 December 9, 2010
10 2:15 p.m.

11 Before:

12 HON. SHIRA A. SCHEINDLIN,
13
13 District Judge

14 APPEARANCES

15 CENTER FOR CONSTITUTIONAL RIGHTS
16 Attorneys for Plaintiffs NDLO
16 BY: SUNITA PATEL

17 CARDOZO IMMIGRATION JUSTICE CLINIC
18 Attorneys for Plaintiffs NDLO
18 BY: BRIDGET KESSLER

19 U.S. ATTORNEY'S OFFICE - SDNY
20 Attorneys for Defendant ICE
20 BY: CHRISTOPHER CONNOLLY
21 JOSEPH N. CORDARO

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1 (Case called)

2 THE COURT: Please, be seated.

3 Ms. Patel, Ms. Kessler, Mr. Horton, Mr. Cerullo,
4 Mr. Schildcrout, and Ms. Tuffin.

5 Mr. Connolly and Mr. Cordaro.

6 Okay. This is a motion for preliminary injunction
7 that the plaintiffs have brought. It seems like it's a result
8 of really failed negotiations and/or the failure of defendants
9 to meet their own timeframe. I've looked at the papers and I
10 am somewhat confused. I mean, defendants agreed to get this
11 done back in July and here we are in December and other than, I
12 don't know, a couple thousand pages that were produced between
13 September and October there hasn't been much in the way of
14 compliance even though there was an agreement on July 7, 2010
15 that the parties reached. And a letter from Mr. Connolly who
16 is here today, to Ms. Kessler in which Mr. Connolly said
17 defendants will produce the bulk of responsive non exempt
18 materials by Friday, July 30. In the event that defendants
19 identify responsive non exempt material that cannot be produced
20 by July 30, they will provide plaintiff with a description of
21 those materials and will propose an alternate date for
22 production by Monday, July 26. Plaintiff attorneys agrees each
23 defendant agency must only search for and produce responsive
24 documents originating from that agency. This limitation will
25 apply both to the rapid production list and to the remainder of

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1 plaintiff's Freedom of Information Act request.

2 As far as I understand it, having written that letter,
3 Mr. Connolly, there was then little or no compliance.

4 On top of that in reading defendant's opposition,
5 defendants make the argument that complying with this lawyer
6 request in five days would kind of be absurd. It's millions of
7 documents impossible to review, impossible to collect, very
8 expensive but that's not what the plaintiffs are seeking. You
9 are sort of tilting the windmill or knocking down a strawman
10 because they have been saying for a while now, yes, our whole
11 foyer request was large but, get going. We are narrowing it to
12 this rapid production list and then we are further summarizing
13 it in this other thing, this search guidance document.

14 And then you attack that and say that's new. We've
15 never seen that before but that's not a new request. That was
16 supposed to summarize or point you to the immediate areas that
17 need attention and so then you write me about the whole
18 request.

19 So my first take on this is that there hasn't been
20 good negotiation and good effort to comply because the defense
21 says we will comply when we can and when we get around to it
22 and when we're able but you don't really tell me or hem when
23 that is. It's just that you have got to trust us. We're
24 trying we will. It's been a year. They've brought this
25 request in February. They brought this lawsuit in April.

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1 They've negotiated with you in June. You wrote the letter in
2 July. Why am I hearing this in December? So basically,
3 Mr. Connolly, basically the questions are for you.

4 MR. CONNOLLY: Okay. Thank you, your Honor.

5 The rapid production list was intended to be an
6 interim production agreement that the parties entered into
7 while continuing negotiations over the scope of the request

8 THE COURT: Okay.

9 MR. CONNOLLY: The request as a whole is 21 pages.

10 THE COURT: Well, let's put that one aside. Have you
11 complied with the rapid production list?

12 MR. CONNOLLY: We have produced over two thousand
13 pages.

14 THE COURT: I know about the two thousand pages. It's
15 right in the papers but that isn't my question. Have you yet
16 completed compliance with the rapid production list?

17 MR. CONNOLLY: We have not completed.

18 THE COURT: Okay. And in your letter you said you
19 would do the bulk of it by July 30. If you can't do it all by
20 then you provide the plaintiffs with a description of materials
21 and propose an alternate date for production by Monday, July 26
22 and I am here on December 9. So why didn't you do what you
23 said you were going to do? Why didn't you propose an alternate
24 date when, specifically, you complete the production with
25 respect to the rapid production list?

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1 MR. CONNOLLY: Your Honor --

2 THE COURT: Don't go back to the 21 pages because I am
3 not talking about that.

4 MR. CONNOLLY: Understood.

5 THE COURT: Thank you.

6 MR. CONNOLLY: We have produced a substantial portion
7 of what would be responsive to the rapid production list.

8 THE COURT: What do you think is substantial? What
9 percent would you call it?

10 MR. CONNOLLY: I can't really speak --

11 THE COURT: I certainly can't cause I don't know what
12 the selection is. Is it ten percent, 50, 70?

13 MR. CONNOLLY: In terms of, there are 24 separate
14 categories of records identified in the rapid production list.

15 THE COURT: Okay.

16 MR. CONNOLLY: I can't off the top of my head say how
17 many of those we had produced documents in response to.

18 THE COURT: Well, then you are not prepared for
19 today's oral argument. This is a serious matter when the
20 plaintiffs move for preliminary injunction it's a serious
21 matter to be in a federal courtroom. I certainly would have
22 expected that you would be ready to answer my very simple
23 question as to what percent of what you agreed, produce your
24 own signature back on July 7 telling them you'd do it by July
25 30. How successful have you been? Have you produced half of

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1 it?

2 MR. CONNOLLY: I am not sure if we've produced half,
3 your Honor.

4 THE COURT: Do you need an hour to come back and tell
5 me? I need an answer. I need to know what --

6 MR. CONNOLLY: If I could have just a moment, your
7 Honor?

8 THE COURT: Sure.

9 (Pause)

10 MR. CONNOLLY: Your Honor, thank you.

11 Again, it's difficult for us to put a percentage on
12 this right now. We're here on a preliminary injunction.

13 THE COURT: I know why we're here and I know who gets
14 to ask the questions. I know who is supposed to give the
15 answers. I ask the questions you are supposed to be able to
16 answer. So I need to understand how much you say you've
17 complied with. It's not a mathematical certainty. I'm not
18 dealing in chemistry or anything like that. I am just trying o
19 get a sense of how far along you are in what you said you would
20 accomplish back in July.

21 MR. CONNOLLY: With respect to the entire rapid
22 production list, as I stand here I would say that we've
23 completed, perhaps, 30 percent.

24 THE COURT: Good. When are you able to complete the
25 other 70 percent that you originally thought you would be able

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1 to do by July 30?

2 MR. CONNOLLY: Well, prior to plaintiff's filing of
3 the instant motion, we were in negotiations that included
4 negotiations over completion of the rest of the rapid
5 production list. Now plaintiff's present motion deals with the
6 issue of a certain category that was listed in the rapid
7 production list which are the opt-out records. Since
8 plaintiff's identified the opt-out records as their top
9 priority in an e-mail on October 11, the defendant agencies
10 agreed to search for process and produce those records on a
11 priority basis. We made our first production on Monday. We
12 anticipate rolling productions going forward with at least some
13 production within the next couple of weeks and we anticipate
14 that with respect to the opt-out records we should have that
15 completed by the end of February. This is a large --

16 THE COURT: That's still three more months a year
17 after the request, months after the July 30 promise. Let's
18 see, seven months after the July 30 promise, 12 months after
19 the requests were made. It seems far too long to me to talk
20 about the end of February for only one of the, what is it six
21 categories or something.

22 MR. CONNOLLY: Four. Now but there were ten
23 categories, then there were 14 additional in the supplement.

24 THE COURT: Right.

25 MR. CONNOLLY: Your Honor?

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1 THE COURT: That would be one of the 24 according to
2 you.

3 MR. CONNOLLY: Or one of the ten.

4 THE COURT: That's just not acceptable. Three more
5 months for ten percent of rapid production list which is itself
6 a subset of FOIA request. I think the government's dragging
7 its feet.

8 MR. CONNOLLY: Your Honor, to try to give you a sense
9 of a little bit of what we're dealing with this terms of
10 responding just to the request for opt-out records, since our
11 search commencing in early to mid October on a priority basis
12 for these documents.

13 THE COURT: What were you doing from April to October?

14 MR. CONNOLLY: We were searching for other documents.
15 We were processing and producing documents responsive to other
16 parts of rapid production list.

17 THE COURT: You weren't producing much. You got
18 around two thousand pages from February. I think the
19 government's dragging its feet.

20 MR. CONNOLLY: Your Honor, ICE alone has identified
21 over fifteen thousand pages of material that's potentially
22 responsive to the opt-out issue.

23 THE COURT: Okay. Mr. Connolly, you may have drawn
24 the wrong judge if you think that I think that fifteen thousand
25 documents is a large set of, I have cases with millions of

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1 records and I know all about search techniques. I am very
2 advanced on search techniques. Fifteen thousand is a tiny set
3 of documents.

4 MR. CONNOLLY: Understood, your Honor. That tiny set
5 of what would be response --

6 THE COURT: But it could be search by the end of the
7 week with the proper technology with proper knowledge of how to
8 search. It's not hard. The government -- and I've written of
9 this on other's opinions, is just another litigant in the
10 courtroom. It is not entitled to special treatment. It's
11 treated like any other litigant has to comply with the rules
12 civil procedure, so you does the government. It doesn't take a
13 year, I assume.

14 Who is going to speak for the plaintiffs first?
15 Ms. Patel, I assume you won't be satisfied for three months
16 from today for one of the subsets?

17 MS. PATEL: Certainly not.

18 THE COURT: So we need to get further than that. We
19 really need your last best offer, so to speak. There is no way
20 I am going to give you till the end of the of February just for
21 the opt-out --

22 MR. CONNOLLY: Okay.

23 THE COURT: Just not going to happen.

24 MR. CONNOLLY: Again, your Honor, if I pay confer for
25 a moment.

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1 THE COURT: Sure. Please.

2 (Pause)

3 MR. CONNOLLY: Thank you, your Honor.

4 The government would be prepared to produce the
5 records responsive to the opt out issue within 45 days of
6 today. Keeping in mind, of course, that there are searches
7 ongoing and there may be further documents that are identified
8 and we would, of course, be happy to keep the Court updated.

9 THE COURT: Even if that were acceptable, and I am not
10 at all sure it is, that's one out of ten. What are you doing
11 about the other nine? And that's just the rapid production
12 list.

13 MR. CONNOLLY: Well, your Honor, we have been in
14 months worth of negotiations with plaintiffs over the scope of
15 the FOIA request in its entirety.

16 THE COURT: Well, I didn't want to return to that.

17 MR. CONNOLLY: Understood, your Honor. And where we
18 had been in those negotiations was that we were discussing a
19 way to, I guess, incorporate the remainder of the rapid
20 production list into a comprehensive stipulation. Of course,
21 the government is happy --

22 THE COURT: When you say the comprehensive
23 stipulation, I was looking for a date.

24 MR. CONNOLLY: I am talking about a comprehensive
25 stipulation in the scope of the request. Now when we can

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1 finish the rest of the rapid production list. As I stand here
2 today, your Honor, again, it would be speculative for me to say
3 when the agencies could produce --

4 THE COURT: I am sorry. It's past that. It's not
5 speculative. There has to be a fixed date. That's what's been
6 wrong with this all along. I don't know if the plaintiffs have
7 sought the court's help but you need a court ordered date. If
8 you can't meet a court ordered date like any other litigant you
9 face sanctions. I know you say certain documents are going to
10 be exempt. That has to be litigated. You are not the judge.
11 If you want to say there's an exemption, I think you asked for
12 motion practice for that too. The schedule is set to litigate
13 the issue and exemptions, so the lawyers will be working on
14 motions. The agencies are working on collections and getting
15 things out. But I can't have an answer that says I'm sorry I
16 can't tell you today, judge, when I can comply. There has to
17 be a date. So if, it's not that the 45 days right now is
18 acceptable but if it is it's 45 days for them, then it's 90 for
19 the entire set so then it's the end of February for the entire
20 rapid production list. That's it. With consequences to follow
21 for any further failure.

22 MR. CONNOLLY: Understood, your Honor.

23 THE COURT: That's the rapid production list. That's
24 45 and 90. That's the end of the matter. And during that time
25 we're going to be briefing and talking about exemptions. Now,

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1 I don't know what to do about the rest of the FOIA request.
2 The rapid production list is only what percent entire FOIA
3 request, Ms. Patel?

4 MS. PATEL: You know it is a small portion of the
5 request. And just to clarify for the Court, we, and also just
6 to, in defendant's defense in some ways we are seeking right
7 now a date certain on the, not the entirety of the rapid
8 production list. We welcome, your Honor's court ordered date
9 on the entire list, we do. We urgently need all the records.
10 The opt-out records in particular if we don't have them soon we
11 are going to be facing imminent harm and we would like the
12 court to order December 23rd as the production date for the
13 opt-out records.

14 THE COURT: I was asking a different question. I
15 think I was asking you what percentage the rapid production
16 list was of the entire FOIA request.

17 MS. PATEL: It's a little unclear just because there
18 is so much about the program that's unknown. I would say, I
19 mean, maybe ten percent of the requests are in good --

20 THE COURT: Are you prepared to cut back to that and
21 make that the FOIA request maybe you don't need the other 90
22 percent. Maybe the rapid production list is the FOIA request
23 that you really want to get a response to and want to litigate
24 and you don't need the other 90. It was overbroad in the first
25 place.

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1 MS. PATEL: There is a set of data and statistics in
2 particular and those sections of the FOIA request the
3 government in this particular needs our help and guidance on it
4 and we are in ongoing negotiations on that. One of the reasons
5 we brought this before the Court's right's now is just because
6 of the urgency, the opt-out issue right now.

7 THE COURT: Don't just have preliminary injunction. I
8 have a law suit. I have the FOIA lawsuit, don't I?

9 MS. PATEL: Yes, your Honor.

10 THE COURT: I am managing the entire thing, not just
11 the preliminary injunction request. I still think the time to
12 revise the FOIA request down to what you really need that is
13 the rapid production list plus, apparently, the statistical
14 questions that you asked in the FOIA request but to revamp the
15 FOIA request so I never is have to hear about the 21 pages and
16 all the rest of it. You just decide what it really is and then
17 I can manage the entire lawsuit.

18 MS. PATEL: Yes, your Honor, I think what, perhaps,
19 what we could do is we're in negotiations about setting another
20 negotiation date and we could maybe do a conference in 30 days
21 to discuss.

22 THE COURT: I was hoping we wouldn't have discussions.
23 I would think we would just get a scheduling order. The less
24 discussion the better. Seems to me that we should do a revised
25 FOIA request within the next 30 days which is your final

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1 request. And then we'll meet directly thereafter and if there
2 is other than the exemption scheduling there can be a schedule
3 in order complying with the revised FOIA request. Can you do
4 one in 30 days?

5 MS. PATEL: Yes, your Honor.

6 THE COURT: Great. So the revised FOIA request, let's
7 say, is due January 7; is that acceptable?

8 MS. PATEL: Yes, your Honor.

9 THE COURT: Okay. Then I am going to give you a
10 conference date -- did I say January? It is January. So
11 January, little time to negotiate after they get it. Let's try
12 to have a conference on Thursday, January 20; is that okay for
13 everybody?

14 MS. PATEL: Can I have a moment to confer?

15 (Pause)

16 MS. PATEL: Yes, your Honor.

17 THE COURT: That would be.

18 MR. CONNOLLY: Fine for the government.

19 THE COURT: So Thursday, January 20 at four o' clock.

20 Now, other than the big disagreement you are having
21 right now between 45 days and essentially thirteen days or
22 something, putting that to one side for a minute, how about
23 responding to all of the rapid production list by the end of
24 February as a dead deadline, all?

25 MS. PATEL: That would be fine with plaintiffs.

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1 THE COURT: So by the end of February that would be
2 precisely February 25th. The response to the rapid production
3 list as currently constituted with the exception, of course, of
4 litigating exception. Now with respect to litigating
5 exception, who has the burden of moving forward, the party
6 claiming the exemption?

7 MS. PATEL: So just to clarify for the rapid
8 production list and the end of February that's fine. That's
9 just to clarify that does not, that excludes the opt-out.

10 THE COURT: Yes. I said we're putting that to the
11 side.

12 MS. PATEL: Yes, your Honor.

13 THE COURT: We are going to have a big debate on the
14 23rd of December versus 45 days.

15 Now, for the exemptions you have the burden of making
16 the motions, Mr. Connolly.

17 MR. CORDARO: May I be heard?

18 THE COURT: Yes.

19 MR. CORDARO: It is the government that is the movant
20 when summary judgment motion is litigated before the Court and
21 usually the two issues are the advocacy of the search and --
22 excuse me -- the exemption. Ultimately, government does bear
23 the ultimate burden.

24 THE COURT: I would think you are.

25 MR. CORDARO: However, it is not unheard of, your

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1 Honor, for the FOIA litigant to make the first motion it has
2 been done before. I don't know if there's a burden on who
3 makes the motion, but ultimately when it comes to arguing the
4 exemption before the Court that the government --

5 THE COURT: I think it's your burden. So I think if
6 you want to assert an exception you need to make the motion.
7 And I think that can be distinguished from the adequacy to
8 search. I know one of the requests in the preliminary
9 injunction motion is for the sworn affidavit. We'll get to
10 that too but for this motion on exemptions we're ready to do
11 it. You know what exceptions you are asserting now. You have
12 on this thing since April. So when are you ready to make the
13 motion?

14 MR. CORDARO: Your Honor, I think that as far as -- if
15 I may, your Honor, is the Court referring specifically to the
16 opt-out record to the rapid production or the list as a whole?

17 THE COURT: Are there at this particular exemption the
18 opt-out request versus the other nine categories or the
19 exemptions are still the same. You are saying here they're
20 types of records by category, not a specific record, not a
21 letter dated January 1, 2009 but the entire category "X" we're
22 saying is exempt. Exemptions are by category I would assume.

23 MR. CORDARO: Yes, your, Honor. It is a document by
24 document inquiry so to the extent the government just for
25 example is going to assert that that particular document is

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1 exempt under FOIA exempts B5 because it might be subject to the
2 deliberative process privilege. We would have to examine the
3 entirety of the documents which was what was behind my question
4 because if we're talking only about the opt-out record, then
5 litigation over the exemption I imagine would be key to
6 whatever deadlines your Honor selects as appropriate for the
7 opt-out records.

8 THE COURT: We are not going to repeat this exercise
9 over and over again by category or by concept. While you are
10 saying it's a document by document inquiry the Court will still
11 give you a lot of guidance in its ruling, assume as to whether
12 it considers certain types of document to fall under the
13 particular exemption, so you don't re-litigate that over and
14 over again, you agree?

15 MR. CORDARO: I could, yes, your Honor.

16 THE COURT: We wouldn't litigate the same issue one
17 thousand times for a thousand documents. The documents are
18 grouped. You are saying these kind of a document involve
19 deliberative process or national court or whatever the exempt
20 is. So --

21 MR. CORDARO: Certainly, the Court is saying that
22 whatever your ruling is, let's say it's on exemption B5 your
23 first ruling is going to set forth the philosophy that will
24 govern the government's assertion of exemption and any other
25 subsequent.

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1 THE COURT: Correct.

2 MR. CORDARO: And I guess then, perhaps, the thing to
3 do is then to key, if this is acceptable to the Court, so that
4 the Court doesn't have to do it repeatedly to, perhaps, have
5 the, to the extent there's litigation over the exemption to
6 have it done after the opt-out records are produced. In this
7 way the government can assert whatever exemption it is going to
8 assert over those opt-out records and then the Court's ruling,
9 obviously, would bind the parties with respect to not only the
10 opt-out records but then would set forth the clear philosophy
11 to be followed with respect to any other records going to be
12 produced.

13 THE COURT: I think we are a pretty much in agreement
14 except for the word "after". I think it has to be simultaneous
15 with production. Your are saying here is what I am producing.
16 Here is what I am objecting to but I am not producing because I
17 am claiming certain exceptions and here is my brief. Otherwise
18 we're going to be into 2012 before we notice and that's what's
19 bad already.

20 MR. CORDARO: I think we are of the same mind.

21 THE COURT: Whatever the deadline is for producing it
22 the deadline for moving to assert exemption.

23 MR. CORDARO: That's fine with the government, your
24 Honor. We were concerned there was going to be some litigation
25 while the production was ongoing.

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1 THE COURT: Now once you get their brief with respect
2 to the exception how long do you need to respond?

3 MS. PATEL: I think two weeks, 15 days would be
4 sufficient.

5 THE COURT: I would say two weeks also then to reply?

6 MR. CORDARO: One week, your Honor.

7 THE COURT: Okay. So it sounds like you've got
8 everything done at this conference. Everything else is figured
9 out. You now the date is February 25th for all the rapid
10 production lists. We know we're getting amended FOIA requests
11 in. We know we have a conference for January 20. We know the
12 briefing schedule. The only thing we don't know is whether
13 your offer of 45 days is what it's going to be or the
14 plaintiff's request for December 23 which as I said is only 14
15 calendar days away.

16 So what is the irreparable harm so to speak between
17 December 23 and the government's last and best offer which is
18 now about January 24, so it's about a month difference. We're
19 down to 30 days difference. I mean, I realize you are not
20 happy and understandably so. You were promised material early
21 July that's not here. So I know that's not a happy thing but
22 what is the practical difference now between December 23 and
23 January 24?

24 MS. PATEL: Well, your Honor, just stepping back for a
25 moment there is raging debit right now about the opt-out issue.

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1 THE COURT: I've read all the papers.

2 MS. PATEL: And so even since the time we've filed our
3 reply there have been new factual issues that have arisen and
4 so if we can think about the harm and what we're calling at
5 least in four ways. One is for states that have not signed
6 agreements.

7 THE COURT: They're all going to be on break from
8 Christmas to New Years the rest of it. Have you ever seen the
9 legislature work over Christmas and New Years.

10 MS. PATEL: It is by agreement with the federal
11 government and unfortunately this program has been operating
12 behind closed doors.

13 THE COURT: I understand that. What is practically
14 going to get done at the end of December or early January?

15 MS. PATEL: One is those states. The second thing is
16 that --

17 THE COURT: I am saying that those states are not
18 going to be acting during that period. Everybody goes on
19 holiday.

20 MS. PATEL: We're prepared to put on a witness who
21 will be able to testify about the activities of state
22 legislature that will be starting session in January and why
23 the information being produced by the end of the month would,
24 is necessary in order to start off in the path whether it's
25 legislative sessions or carve-outs around the agreements.

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1 There is a real need not just in states where the agreements
2 haven't been signed but also where the agreements have been
3 signed. For those states and those localities who are starting
4 to plan for how to gear up for January for the new oncoming
5 administration to figure out how they should act appropriately.

6 The third category is local jurisdictions that have
7 tried to opt-out and they've met with resistance. Everyone is
8 trying to figure out what they can do and they need those
9 records in order to make those decisions.

10 And, finally, there is the harm to the public and to
11 the plaintiff.

12 THE COURT: I don't doubt that harm. I just don't
13 know why it's time sensitive as between December 23 and January
14 24. There is an end here. The government is on notice that if
15 January 24 is set, for example, and not met, sanctions will
16 occur because it's been raging on too long. It's 11 months
17 from the request and many months since the negotiation
18 agreement, so it's serious now.

19 So I'd like to know the different between December 23
20 and January 24. So talking about the public's right. I
21 understand the public's interest, I really do, but I don't
22 understand precisely what would happen n those 30 days which is
23 the difference we're down to between that and your offer, so to
24 speak.

25 MS. PATEL: Well, your Honor, I would propose that we

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1 put on very short testimony from our witness to discuss that
2 exact question.

3 THE COURT: That exact question, why those 30 days are
4 crucial?

5 MS. PATEL: Yes, your Honor.

6 THE COURT: All right. Very short testimony.

7 MS. PATEL: And Norm Cerullo, my co-counsel from Mayor
8 Brown is going to present testimony.

9 THE COURT: Limited to that testimony. I don't really
10 have time for anything else.

11 MR. CERULLO: I'll be quick. Can I question her from
12 right from here, your Honor?

13 SARAHI URIBE,

14 called as a witness by the Plaintiffs,

15 having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. CERULLO:

18 Q. Ms. Uribe, where do you work?

19 A. I work at the National Day Laborer Organizing Network.

20 Q. What is that?

21 A. It is a national network of member organizations in 17
22 different states whose purpose is to advance the civil rights
23 of day laborers and their top priority is the collaboration
24 between advocating against the relationship between police and
25 ICE collaboration and the Secure Communities Program.

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Uribe - Direct

1 Q. And it is referred as to NDLON?

2 A. Correct.

3 Q. And what is your -- what is NDLON's relationship to the
4 instant litigation?

5 A. We're plaintiffs.

6 MR. CERULLO: Okay. Just to let the record reflect
7 that Ms. Uribe has previously submitted a declaration in this
8 action submitted with our opening papers which is an exhibit to
9 the Kessler declaration.

10 Q. Ms. Uribe, have there been recent developments with respect
11 to the opt-out issue, specifically, with respect to states that
12 have not signed memorandums of agreement to sign on the secure
13 communities program?

14 A. Yes.

15 Q. And what are those developments?

16 A. Well, the state of Washington is in heated negotiations
17 right now with whether they will sign and there's indications
18 that they are not interested in signing. However, there was a
19 recent article that came out in the Seattle Times that
20 indicated that even if they didn't sign the program would be
21 activated in Washington state.

22 Q. And why is that important?

23 A. Well, it essentially undermines the fact that there is an
24 opt-out. It's ground breaking information that has
25 implications on the entire program and the entire scale of

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Uribe - Direct

1 advocacy efforts across the country and also local listing
2 decision makers.

3 Q. Do you have an understanding as to how many states have not
4 yet signed MOAs?

5 A. According to David -- co-director of the Secure Communities
6 Program as of a few weeks ago there were 13 states that hadn't
7 signed.

8 Q. Do you know when those states will be activated under the
9 Secure Communities?

10 A. I don't know. Given the rate of implementation of this
11 program it is very likely that they can sign any day, even in
12 the next few weeks and we're very concerned about that because
13 those jurisdictions, those states are going into programs
14 without knowing the full information and that's a pattern that
15 has shown itself throughout the implementation of this program
16 two years now.

17 Q. Do you have an understanding as to how many states have
18 signed MOAs around the time the FOIA press was issued?

19 A. 14 states.

20 Q. How many have now signed MOAs you've testified to?

21 A. 35 states.

22 Q. And is it also your understanding that there are states
23 that have not signed -- I'm sorry -- that have signed MOAs?

24 A. Yes.

25 Q. And what is your understanding as to recent developments in

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1 that category of states?

2 A. Well, since we found out that ICE is refusing to honor
3 opt-out requests a number of those states are starting to do
4 statewide advocacy because they believe that now that the
5 decision makers at the state level is not at the local level.

6 Q. And how are advocates' ability to advocate on behalf of
7 this issue hampered by the government's refusal to produce the
8 opt-out records?

9 A. Well, it's December and a lot of us are actually planning
10 on what we're going to do in this upcoming legislative session.
11 We're very worried that we are going into these meetings not
12 knowing what we're asking for and who we're asking it from.
13 There is going to be a meeting, for example, in December 21
14 between Sheriff Hennessy of San Francisco and local advocates.

15 And on this issue there has been as early as last week
16 there was a hearing in Santa Clara, California on this issue.
17 And it's, we're in the thick of it. We're trying to figure out
18 what's going to happen next. And we don't have all the
19 information we need and we don't want to waste time by going
20 down the wrong path again because we don't have all the
21 information on the opt-out.

22 Q. So can you describe the harm that would befall NDLOM
23 states, other advocacy groups, localities if these documents
24 are not produced until January 23?

25 A. Well, as I mentioned, we won't be able to have an informed

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Uribe - Direct

1 debate. We'll be wasting our time and our limited resources
2 not knowing fully what is the opt-out policy. We would
3 potentially be crafting resolutions again or legislation again
4 that would be rendered meaningless because we don't have all of
5 the opt-out information. And we don't know what is the
6 deployment plan. We don't know between now and then another
7 state is going to fall to a program that has a record of not
8 sharing information with the public.

9 Q. And in your declaration you stated roughly paragraphs 13 to
10 20 that there were meetings taking place in localities such as
11 Santa Clara, California, San Francisco, Arlington, Virginia
12 specifically about their ability to opt-out of the Secure
13 Communities, was that an exhaustive list of meetings that were
14 taking place?

15 A. Absolutely not.

16 Q. So are there future and upcoming similar meetings like
17 that?

18 A. Yes. Throughout the country a lot of these states that
19 sign MOAs are not part of the public debate and were not able
20 to -- then MOAs were signed and since then there are a number
21 of public officials and residents of those places that want to
22 engage and are trying to figure out how statewide meetings
23 planned for this month on what is the way forward.

24 Q. Once the state signs a memorandum of agreement are they
25 able to get out of it after that, do you know?

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Uribe - Direct

1 A. Well, see that's the troubling part because January
2 Napolitano, the Department of Homeland Security secretary said
3 recently that this is an, isn't an opt-in/opt-out kind of
4 program. And as recently as a few weeks ago the co-director
5 the Secure Communities Program said that states could
6 absolutely opt-out and then there's the Seattle Times article
7 that's basically questioning whether an opt-out exists at all.
8 So I don't know whether states can fully opt-out of the
9 program. The government hasn't produced a document that states
10 the current policy on opt-out. And, in fact, two nights ago I
11 was speaking to the board, the county board member who
12 introduced the resolution in Arlington and they said they
13 hadn't received a formal letter outlining what the opt-out
14 process after they this sent tire formal really request tore
15 removed from the program.

16 MR. CERULLO: Your Honor, that's all I have at this
17 time.

18 THE COURT: Mr. Cordaro?

19 MR. CORDARO: I would like to ask a couple questions,
20 if I may.

21 CROSS-EXAMINATION

22 BY MR. CORDARO:

23 Q. Good afternoon, Ms. Uribe. You made reference to meetings
24 that took place involving the Santa Clara County Council and
25 the San Francisco Sheriff, Michael Hennessey; is that correct?

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Uribe - Cross

1 A. Correct.

2 Q. And in those meetings involved ICE, did they not?

3 A. Correct.

4 Q. And those meetings took place between November of 2010,
5 correct?

6 A. I believe it was around that time.

7 Q. And the purpose of those meetings was to discuss the
8 possibility that states or localities could opt out of Secured
9 Communities, correct?

10 A. I believe so.

11 Q. Now, you also testified that you are seeking the current
12 policy on opt-out, correct?

13 A. That is correct.

14 Q. And by that you mean the current policies of federal
15 government on opt-out at large, correct?

16 A. I mean ICE's policy on the Secured Communities Program
17 opt-out.

18 Q. You realize of course this a FOIA action, do you know?

19 A. Correct.

20 Q. And it's not the purpose of a FOIA action for the
21 government to enact or set policy, correct?

22 MR. CERULLO: Objection, your Honor. She is not a
23 lawyer.

24 THE COURT: I didn't know that but you understand that
25 right, what he just? You said the FOIA action is to get public

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Uribe - Cross

1 records, right?

2 THE WITNESS: Right. I would assume that the
3 government would have a record on what is the opt-out process
4 two years into the program.

5 Q. That's an assumption?

6 A. That is what I believe.

7 MR. CORDARO: No further questions.

8 THE COURT: Anything further for the witness?

9 MR. CERULLO: No, your Honor.

10 THE COURT: Thank you. All set.

11 So the long and short of it is I think the government
12 is, I've said several times in this hearing, has been dragging
13 its feet, should have gotten these materials to the plaintiffs
14 long ago. The public doesn't have a right of access to
15 publicly available material, unless they are covered by
16 exemption. It is time to get it done. However, I must say I
17 am not convinced that there's a material difference between
18 December 23 and a date in January.

19 But I don't think the government should be in any way
20 rewarded for its rather slow attention to this matter and while
21 it may seem like a very small difference, I am going to move
22 the date to January 17th and that's it. I realize that crosses
23 holidays but it should have been done a long time ago. So the
24 opt-out records are due no later than January 17, the remainder
25 by February 25 and all the other dates have been set. I think

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Uribe - Cross

1 we're done.

2 What is it?

3 MS. PATEL: Your Honor, we just had one issue of the
4 dates in which the government is searching. It's unclear to us
5 what date the government is using to search.

6 THE COURT: What time period?

7 MS. PATEL: Yes, that's right.

8 THE COURT: I don't know. What time period do you
9 think they should be using?

10 MS. PATEL: I think t should be when they initiate the
11 search now. Ms. Kessler is going to speak to this issue.

12 MS. KESSLER: Sure. Generally, in FOIA cases the
13 cut-off date for the end of the searches is the date that the
14 search was conducted. So they have to keep searching up until
15 the first time that they start searching for the documents, a
16 date of search cut-off date in other words. And --

17 THE COURT: Well, if they began searching last June or
18 July is that when it cuts off? Is that what you are saying?

19 MS. KESSLER: Well, your Honor, I believe we have to
20 rely on the agency declarations for the dates that they started
21 searching.

22 THE COURT: What do they say?

23 MS. KESSLER: Three of the agency declarations don't
24 state a cut-off date and don't indicate the date that the
25 searches were commenced and the other two agencies, the date of

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0C9AANDLC Uribe - Cross

1 search is not clear.

2 THE COURT: None of them are clear?

3 MS. KESSLER: Right. There are two agencies that have
4 indicated, the FBI and ICE are the two agencies that have
5 indicated a cut-off date that they're using.

6 THE COURT: Which is what?

7 MS. KESSLER: The FBI has indicated that they are
8 using the cut-off date of February 3rd which is a date of
9 request cut-off date which is unacceptable.

10 THE COURT: That's not acceptable. February 3rd is
11 not acceptable.

12 MS. KESSLER: And the Immigration and Customs
13 Enforcement, ICE, has indicated that it is using the cut-off
14 date of April 30th which seems to be an arbitrary date and not
15 linked to any searches that are mentioned.

16 THE COURT: Yeah. I don't think the government should
17 benefit from its own delay. It sounds like it doesn't really
18 think it began to do this search until early October. That's
19 what I heard earlier in this argument. So I think the cut-off
20 date is if anything, October 15th for all agencies.

21 MS. KESSLER: Thank you, your Honor.

22 THE COURT: Anything further? All right. See you in
23 January.

24 Now, the government must take these dates seriously.
25 If you submit a proposed order with just these two dates I will

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Uribe - Cross

1 sign it. It should be clear and unambiguous, so very simply,
2 straightforward, clear order, this is what is due on what
3 dates.

4 MS. PATEL: Yes, your Honor.

5 THE COURT: Thank you.

6 (Adjourned)

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