

Cordaro, Joseph (USANYS)

From: Connolly, Christopher (USANYS)
Sent: Tuesday, January 04, 2011 4:19 PM
To: Bridget Kessler
Cc: Cordaro, Joseph (USANYS); 'Peter Markowitz'; 'Sunita Patel'; 'Darius Charney'; phillipstarkweather@gmail.com; james.f.horton@gmail.com; 'Hannah Weinstein'; 'Cerullo, Norman'
Subject: RE: NDLO et al. v. ICE et al., No. 10 Civ. 3488 (SAS)

Bridget,

In our e-mail last Thursday, we indicated that we would respond to plaintiffs' December 22 and December 23 letters this week. We still plan to do so. As you are well-aware, the defendant agencies are focused on meeting the Court's January 17 deadline for production of the opt-out records, which plaintiffs have identified as urgent. Nonetheless, in light of your inclination to contact the Court if three of the issues raised in your letters are not resolved by the end of the day, we will respond briefly.

The agencies do not agree to plaintiffs' proposed format of production protocol. Plaintiffs identify no case law for the proposition that production of metadata and searchable files is the default in FOIA matters, and contrary to the allegation in your December 22 letter, plaintiffs never requested this production format prior to the letter. The agencies have completed identification of well over 50,000 pages of potentially responsive opt-out records, and are in the midst of processing this large volume of records for production on January 17. The agencies are in no position to recreate their searches, generate thousands of pages of unspecified metadata, and re-process many thousands of pages prior to January 17. Moreover, with respect to your new request for metadata, you make no showing that such records are relevant to your understanding of the Government's position on whether states or localities may opt-out of Secure Communities.

Likewise, your demand that the agencies submit adequacy-of-search declarations on January 17 is contrary to the Court's expectations as expressed during the December 9 conference and in the subsequent order. The Court ordered that the agencies move for summary judgment only on their claimed exemptions, so that the Court could issue a ruling that would govern future productions. Plaintiffs did not object to this procedure at the hearing, which would have been the logical time to do so. Moreover, the Court's written order, which plaintiffs drafted at the Court's direction, and which was discussed in great detail before it was submitted, clearly reflects that the partial summary judgment motion will embrace only the exemptions, which is wholly consistent with the Court's remarks at the hearing.

Finally, with respect to the search cut-off date for the remainder of the Rapid Production List, DOJ and DHS regulations provide that the search cut-off date for records ordinarily is the date the agency component begins its search for them. See 28 C.F.R. 16.4(a), 6 C.F.R. 5.4(a). Of course, the Government is abiding by the Court-imposed cut-off date with respect to the opt-out records; insofar as the remainder of the RPL is concerned, we intend to abide by the regulations, but are willing to discuss this issue with you after the Court's January 17 opt-out deadline. Moreover, as you are well aware, ICE and the FBI already specified search cut-off dates in their declarations in opposition to the plaintiffs' motion for a preliminary injunction. Nevertheless, if plaintiffs wish to challenge any search cut-off date in the future, the Government will take the position that a ruling on this issue can only be made in the context of a summary judgment motion, on a complete record.

If plaintiffs intend to contact the Court, we ask that we be given advance notice so that we may expect to receive a simultaneous copy of any letter plaintiffs send, or, if you plan to call the Court, that we may participate in the call. We look forward to receiving your revised FOIA request on January 7.

Chris Connolly