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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 NATIONAL DAY LABORER
3 ORGANIZING NETWORK, et al.,

4 Plaintiffs,

5 v.

10 Civ. 3488 (SAS)

6 UNITED STATES IMMIGRATION AND
7 CUSTOMS ENFORCEMENT AGENCY,
7 et al.,

8 Defendants.

Telephone Conference

9 -----x

New York, N.Y.
January 12, 2011
4:30 p.m.

11 Before:

12 HON. SHIRA A. SCHEINDLIN

District Judge

15 APPEARANCES

16 MAYER BROWN LLP
17 Attorneys for Plaintiffs
17 BY: NORMAN R. CERULLO
18 ANTHONY J. DIANA

19 CARDOZO SCHOOL OF LAW CLINICAL TEACHING FELLOW IMMIGRATION
19 JUSTICE CLINIC
20 Attorneys for Plaintiffs
20 BY: BRIDGET KESSLER

21 CENTER FOR CONSTITUTIONAL RIGHTS
22 Attorneys for Plaintiffs
22 BY: SUNITA PATEL

23 JOSEPH N. CORDARO
24 CHRISTOPHER CONNOLLY
24 U.S. Department of Justice
25 Attorneys for Defendants
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1 (Case called)

2 THE COURT: You are all with the same organization or
3 different organizations?

4 MR. CERULLO: Mayer Brown represents NDLO, your
5 Honor, a plaintiff in the matter.

6 MS. KESSLER: I'm with the Cardozo Law School
7 Immigration Justice Clinic, representing the clinic, which is a
8 plaintiff, and also NDLO.

9 MS. PATEL: I'm with the Center for Constitutional
10 Rights. We represent Center for Constitutional Rights and
11 NDLO.

12 THE COURT: And you are together?

13 MS. PATEL: Yes.

14 THE COURT: Mr. Cordaro and Mr. Connolly.

15 MR. CORDARO: Yes, your Honor.

16 THE COURT: I have two letters here, a letter dated
17 January 6th from plaintiffs and a letter dated January 11th
18 from defendants. There are disputes that have arisen despite
19 the hearing I had on December 9th which resulted in the order
20 dated December 17th, which was submitted but reviewed by both
21 sides and I signed it. That order called for the defendants to
22 produce the outstanding materials on the rapid production list,
23 if that's what it was called -- yes, rapid production list --
24 by January 17th, which is next Monday. Wrong already?

25 MR. CORDARO: Your Honor, the order actually called

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1 for the production of the opt-out records, which is a segment
2 of the rapid production list.

3 THE COURT: A segment of the material called for on
4 the rapid production list by Monday January 17th, which is now
5 around the corner. In these letters plaintiffs say there are
6 problems, three problems, that have developed and that the
7 parties can't seem to negotiate. One has to do with the form
8 of production, being a dispute about the form of documents that
9 have already been produced and the form of documents to be
10 produced on the 17th of January.

11 The second dispute has to do with whether the Court
12 should amend the December 17th order by setting what's called a
13 search cutoff date, at or when did you stop searching for
14 documents. And the last one has to do with defendants' refusal
15 to submit declarations regarding the adequacy of their search,
16 in other words, how did they search, explaining their search.

17 We need to discuss all those three issues and see if
18 we can resolve them promptly.

19 The most interesting of the three to me is the form of
20 production issue, which is briefed in great detail in these
21 letters. I am troubled by both what's been produced and the
22 government's position on what is to be produced. With respect
23 to what has already been produced, the plaintiffs say much of
24 it has been produced in an unsearchable PDF format, that
25 electronic records have been stripped of their metadata, and

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1 that paper and electronic documents have been sort of
2 disorganized and merged together with no way of sorting them
3 out.

4 The defense position, government's position, is the
5 plaintiffs didn't tell us how they wanted it, if you don't make
6 a specific request with respect to form of production, you
7 don't get a do-over. That is generally the law in discovery,
8 that if the requesting party doesn't tell the other party how
9 it wants it produced, then they sort of waive the objection, so
10 to speak, and most courts will not order a second production in
11 a different format.

12 But that doesn't take account of things such as making
13 things less searchable than they were in the ordinary way in
14 which they were stored in the first place. By producing things
15 that are stripped of their metadata or in a PDF format which
16 was not the form in which they were ordinarily maintained and
17 it is not a reasonably usable form, then it doesn't comply with
18 Rule 34 as rewritten in the December 1, 2006 amendment, with
19 which I happen to be very familiar.

20 So it sounds like there is a problem. Even if the
21 plaintiff didn't tell you how they wanted them, an unsearchable
22 PDF format is not right, and stripping metadata is not right
23 either. That said, I don't know why the plaintiffs need
24 metadata and what metadata they need. As everybody knows by
25 now, there are lots of different types of metadata and there's

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1 lots of different types of records that are produced.

2 We do know that with database type records, metadata
3 is absolutely required. If you have Excel documents, metadata
4 is absolutely necessary. With Word or WordPerfect type
5 documents, it may or may not be necessary. I don't know why
6 you want it. With email and other forms of communication, you
7 usually do want it, for fairly good reason. So it depends what
8 kind of documents.

9 The defendants seem to say there is a burden on
10 plaintiff to show what metadata they need. It's a question of
11 whether any court has addressed the metadata issue in the FOIA
12 context. But I can't do it in a broad way. There is metadata
13 and there is metadata, and it depends on what type of record.
14 Spreadsheets, as I said, are different from Word documents,
15 which are different from email. Everything differs, and I need
16 to know a lot more about it.

17 I hardly know where to begin. I guess I can start
18 with the defendant. Mr. Cordaro or Mr. Connolly, why did you
19 produce it in PDF format, and is it true that it is an
20 unsearchable format, and is it true you stripped metadata in
21 the records that have been produced?

22 MR. CORDARO: As for the records that have been
23 produced, your Honor, it is true they are in PDF format.

24 THE COURT: How are they ordinarily maintained? How
25 were they created? They weren't created in PDF.

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1 MR. CORDARO: That's right, your Honor, I would
2 venture to guess they were not created in PDF. Typically, what
3 would happen is the document would be in some data format.
4 Perhaps an email I think might be in a PST format, etc., Excel
5 spreadsheets in Excel format.

6 THE COURT: Right.

7 MR. CORDARO: The way the agency ordinarily processes
8 a FOIA request is those documents -- let me back up. A search
9 request is sent out once the FOIA request comes in, and the
10 employees gather documents that may or may not be responsive to
11 that request. Those documents are processed through a system.
12 The key there is that the government has to have some way to
13 review the documents and redact information that may be exempt
14 under section (b) of FOIA.

15 What ordinarily happens, from what I understand, is
16 that the documents may go into some program and they may have
17 to be converted into a TIFF or a PDF before that happens. Then
18 the program is what allows the attorney to go through, look at
19 it, and determine whether there are any exemptions that need to
20 be taken, how it's going to be Bates numbered, all of those
21 things that really cannot be done in a native format. Then it
22 will spit out either as a paper document or as a TIFF or a PDF.

23 THE COURT: There is a difference. One of those
24 formats can be searchable and the other can't.

25 MR. CORDARO: Correct. Well, a difference between a

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1 TIFF and a PDF?

2 THE COURT: Correct.

3 MR. CORDARO: I think the PDF can be searchable --

4 THE COURT: Correct.

5 MR. CORDARO: -- if it's run through Adobe, whereas it
6 may not be searchable under other circumstances. The TIFF is
7 not searchable.

8 THE COURT: Correct. I know all that. My point is
9 you didn't produce it in searchable PDF form.

10 MR. CORDARO: That may be true, your Honor. I don't
11 know whether it is searchable or not.

12 THE COURT: Plaintiffs say it is not searchable. I
13 trust them.

14 MR. CORDARO: If this dispute is just about
15 searchability, then the government is amenable to going back
16 and looking at these documents again. The protocol we got from
17 the plaintiffs is much broader than just searchability.

18 THE COURT: I agree. I saw it. I thought they based
19 it to some extent on your own protocols. But I want to address
20 one thing at a time. One item is searchability. Another item
21 is metadata. A third item might be labeling for authenticity.
22 Bates is only one way. With electronic documents you can use
23 hash numbers. So there are ways of doing this that I would
24 have thought you could have worked together.

25 Let's stick with one at a time. Let's stick with

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1 searchability. With respect to searchability, you say you're
2 amenable to going back and turning it into PDF searchable?

3 MR. CORDARO: This is something the agency has in fact
4 the power to do if we have the programming that can do that. I
5 suspect we may just be talking about OCR'ing here. I know the
6 plaintiffs can probably do it. We can take a look at doing
7 that ourselves.

8 I'll back up. Again, this gets back to the format of
9 production issue, which really wasn't mentioned until went into
10 these productions.

11 THE COURT: Yes, but the rules say you can't downgrade
12 searchability. That's the problem. If you look at the
13 December 2006 rules and the advisory notes, you can't make them
14 less user friendly than they were, and that is what you have
15 done. By turning them into PDFs in nonsearchable fashion, by
16 stripping metadata, you have changed them into a less
17 searchable format. That's something you can't do.

18 So even though they have failed to make a specific
19 request in which they want them to be produced, it seems to me
20 the producing party has obligations, too. If I direct you to
21 go back and make a searchable PDF, that's what you will do.

22 Let's say we are past that and I say you have to
23 re-produce it in a searchable format. Now, what about
24 metadata? You stripped it out?

25 MR. CORDARO: No, I think that is a completely

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1 different issue.

2 THE COURT: I'm aware it is a completely different
3 issue. Thank you for pointing it out.

4 MR. CORDARO: I meant in term of the statute, your
5 Honor.

6 THE COURT: I know that, too. Are you talking about
7 the rules?

8 MR. CORDARO: No, I'm actually talking about the
9 statute. I'm referring to section 552(a)(3)(B), where we talk
10 about form or format. I think the plaintiffs have assumed that
11 metadata is actually a form or format. But in the FOIA context
12 that discussion has to be a little more nuanced. Metadata
13 actually is something that clearly would have to be reviewed by
14 the agency to determine whether in fact it is exempt from
15 production.

16 THE COURT: That is absolutely the case.

17 MR. CORDARO: Just to say that it's part of the
18 document that we have requested, therefore it's a form or
19 format that should be produced --

20 THE COURT: No. It is part of the electronic record,
21 and it should be reviewed for exemption purposes.

22 MR. CORDARO: If it's requested, your Honor.

23 THE COURT: No. The record is requested as it was
24 created. You strip something out if you don't review it as
25 it's created. It's one thing to review it and say I'm claiming

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1 exemption in that metadata. But in my view the metadata is
2 part of the record requested.

3 MR. CORDARO: Your Honor, I think I would point the
4 Court back to Rule 26 and Rule 34 and then Aguilar. Rule 26
5 makes very clear that in the 26(f) conference the parties have
6 to discuss ESI, and that takes place even before the court
7 enters its initial scheduling order, theoretically.

8 THE COURT: That's true.

9 MR. CORDARO: Then Rule 34 talks about the parties'
10 initial document requests to each other. Rule 34 discusses ESI
11 in that context.

12 THE COURT: But it talks only about form of
13 production. In Rule 34 it says the plaintiffs may, if they
14 wish, request that it be produced in a particular form.

15 MR. CORDARO: Right.

16 THE COURT: It doesn't say they have to specifically
17 ask for metadata.

18 MR. CORDARO: But in Aguilar, your Honor, Judge Maas
19 made a finding that because the plaintiffs had waited so long
20 to ask for the metadata and because the searches had already
21 commenced, it demonstrated a couple of things. First, the
22 metadata really isn't relevant to the entire picture.

23 THE COURT: It may or may not be. I started out this
24 conference by saying I'm going to have to hear more from the
25 plaintiffs as to why the metadata is relevant and what metadata

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1 is relevant with respect to what kind of records.

2 MR. CORDARO: I think really, your Honor, the problem
3 we run into is that if the FOIA requester does not have to
4 request metadata, then it affects the entire way that the
5 request has to be processed. The agency then would have to be
6 sure that -- it would almost be as if you would have to produce
7 it in native format.

8 THE COURT: No. Stop. You would have to review it in
9 native format.

10 MR. CORDARO: Right. Then I guess theoretically you
11 would have to pull out the metadata and produce it some other
12 way.

13 THE COURT: Correct.

14 MR. CORDARO: That would add an onerous burden to the
15 government for every single FOIA request. I think you would be
16 talking about at least twice as much work with respect to every
17 single piece of paper, particularly when you are discussing
18 metadata such as comments by government employees, all of which
19 almost certainly would be excludable under exemption (b) (5).
20 If you are talking about system metadata, such as file paths,
21 names, etc., then you would have to take into serious
22 consideration exemption (b) (6) and whether that can be reverse
23 engineered.

24 THE COURT: Not necessarily, because you wouldn't have
25 to produce it in that format. Again, here we go. You would

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1 have to review it in that format. There may be a way to
2 produce it where it could not be reverse engineered.

3 MR. CORDARO: I only meant in the sense that if the
4 agency took exemption (b) (6) for privacy purposes. The
5 question would be if we then produced the system metadata,
6 would that be a way for the requester to get around the
7 exemption by finding the information that we redacted in the
8 first place based on personal information. That would be
9 something we would have to look at.

10 THE COURT: I would think the technology could protect
11 against that, but I don't know how.

12 MR. CORDARO: Your Honor, the government's position is
13 that without this request at the outset of the FOIA request,
14 then the government has no way of knowing if this is even going
15 to be in the case.

16 THE COURT: What you are saying is a FOIA requester
17 has to say up front, I'm requesting native format; that's the
18 only way you're willing to look at the metadata, if they use
19 the word "native" in their request?

20 MR. CORDARO: Not necessarily, your Honor. If they
21 said metadata in their request --

22 THE COURT: Then you objected as overbroad because
23 there is so much metadata and it differs so much by type of
24 record, so how could one just say I want metadata? But if they
25 actually reviewed things in the native, they would be able to

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1 pick it up. I'll hear from the plaintiffs.

2 This is kind of complicated. This is not going to be
3 easy. I didn't think so early in 2011 I would be served up
4 with another discovery opinion that I'm sure the world is
5 waiting for and you are asking for. You are asking me to
6 figure out what is required of FOIA requests.

7 MR. CORDARO: Let me make what may be an obvious point
8 based on what the Court just said. This is obviously not
9 something that can be inserted into a scheduling order. It is
10 a very complicated topic and would need a lot of briefing. I
11 think what it would boil down to is essentially the adequacy of
12 the search.

13 THE COURT: The adequacy of what?

14 MR. CORDARO: The adequacy of the search. It is those
15 two big FOIA categories. We have the adequacy of search and we
16 have the exemptions. That's usually where the battles are
17 fought in FOIA on summary judgment motions.

18 THE COURT: I don't know that this is fair. I don't
19 know that you can say it's as simple as talking about adequacy
20 of search when you admit you didn't search the metadata at all.

21 MR. CORDARO: The government's position would be, your
22 Honor, that we didn't have to, because it wasn't requested and
23 there is nothing in FOIA and there is no controlling
24 precedent --

25 THE COURT: That's right. You hit the mark. There is

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1 no controlling precedent. Somebody is going to have to explain
2 this.

3 MR. CORDARO: Fair enough, your Honor.

4 THE COURT: I'm not at all sure you're right that it's
5 just off limits. For example, the spreadsheet problem, there
6 the case law is that almost all the time the metadata is
7 needed. The spreadsheet is useless without the Excel; it's
8 useless without the metadata. So it depends on the electronic
9 record.

10 MR. CORDARO: There is also another issue that comes
11 up with this not being requested at the beginning, and that
12 would be the fee issue for FOIA cases. Metadata clearly would
13 add to the amount, the sheer amount of material.

14 THE COURT: Double the amount of review.

15 MR. CORDARO: Yes. In a typical FOIA case, that would
16 a cost the agency a lot of money. Then, I think at the
17 beginning of the case, when the agency gets the request, the
18 agency would be entitled to look at the request and say, wait a
19 minute, there is a request for metadata in here, we have to
20 look at that from a fee perspective.

21 In this case we are ten months down the road and now
22 we are getting a request for metadata finally and we haven't
23 even had a chance to think about that in terms of fees. I know
24 the plaintiffs are going to argue for a fee waiver, but we are
25 talking about a rule writ large here for FOIA cases, and that

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1 is another consideration.

2 THE COURT: What is the usual practice for fees? What
3 is the usual practice in FOIA cases for fees?

4 MR. CORDARO: The usual practice is that if the FOIA
5 plaintiff requests a fee waiver, the agency gets to decide if
6 that fee waiver is justified. There are steps in the statute
7 that have to be followed. In other words, if the requester is
8 a public interest group, if the requester is an educational
9 group, then they may be eligible for a fee waiver. But then
10 you have to look to what is being requested.

11 I think the analysis there is how much is that in the
12 public interest, is this material in the public interest. I
13 think what Congress was saying there is to the extent the
14 plaintiffs are seeking material that really is in the public
15 interest and they are eligible for a fee waiver, they probably
16 should get it because the public benefits from it.

17 But I think there is a line in the sand. Just because
18 the plaintiff is eligible for a fee waiver, if their FOIA
19 request stretches out into the netherworld and we are talking
20 about an enormous amount of documents, then I think the
21 government is entitled to make an argument that at a certain
22 point we are outside the public interest now and the public has
23 no interest in this. My argument would be that that could be
24 applicable to metadata, which is why we should know about this
25 up front.

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1 THE COURT: Let me hear from the plaintiffs on this
2 first issue of form of production, so to speak. Mr. Cerullo,
3 first of all, would you address the argument that you are ten
4 months late and should have addressed this up front.

5 MR. CERULLO: I'd love to, your Honor. Your Honor
6 should know that we put in a request in July before a single
7 page was produced to us in this FOIA action that the defendants
8 produce records in single-page format and that we also
9 requested that certain files, Excel file, be produced in their
10 native format. Obviously, if you turn an Excel spreadsheet
11 into a PDF, there are lots of hidden fields.

12 THE COURT: So you did ask for spreadsheets in native?

13 MR. CERULLO: That's correct.

14 THE COURT: That takes care of the spreadsheet issue.

15 MR. CERULLO: That's correct.

16 THE COURT: Native means metadata, so that's that.

17 With respect to the single-page format?

18 MR. CERULLO: Exactly, your Honor. We requested other
19 documents produced in single-page format.

20 THE COURT: What does that mean?

21 MR. CERULLO: Either a single-page PDF or a single-
22 page TIFF out.

23 THE COURT: The bottom line there is that didn't hint
24 at metadata.

25 MR. CERULLO: Your Honor, this July request was a

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1 request for the government to engage us in a dialogue so that
2 we wouldn't have to burden your Honor with questions like this.
3 We know it's industry standard at this point that if there is
4 going to be a production, it's in single-page format with the
5 corresponding metadata load file.

6 THE COURT: Where is that an industry standard?

7 MR. CERULLO: In virtually every civil litigation
8 across the country, when ESI is implicated, it's the industry
9 standard at this point -- Sedona says so and the federal rules
10 implicate this -- that the production be in single-page format
11 of ESI, obviously, and that a corresponding load file with
12 agreed-to metadata will be provided as well.

13 We are not requesting all metadata of every record.
14 It's in our production protocol.

15 THE COURT: In your production protocol that you just
16 gave them. This is new. This is December.

17 MR. CERULLO: That's correct. This is almost a month
18 before they were set to produce records on the 17th.

19 THE COURT: I understand that. But with the records
20 that were produced back in August and October and all that,
21 this didn't exist; this proposed protocol didn't exist then.

22 MR. CERULLO: Correct. We wish it would have, but the
23 government wouldn't engage us in a dialogue to discuss this
24 issue.

25 THE COURT: What does it mean they wouldn't engage?

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1 MR. CERULLO: We made a request.

2 THE COURT: Regarding what?

3 MR. CERULLO: A request regarding format of
4 production.

5 THE COURT: What is the request?

6 MR. CERULLO: Single-page format, spreadsheets in
7 native, and that we could begin a dialogue to discuss this in
8 more detail. That was ignored, and they began producing
9 documents.

10 THE COURT: What do you mean begin a dialogue? Did
11 you extend to Mr. Cordaro that we would like to sit down and
12 talk with you about it? Could you point me to that sentence
13 that requests a dialogue?

14 MR. CERULLO: It requested if they have any questions
15 or concerns, to please let us know.

16 THE COURT: They didn't. They thought they understood
17 your request.

18 MR. CERULLO: But they didn't produce it in that
19 format.

20 THE COURT: Which format?

21 MR. CERULLO: In single-page format or spreadsheets in
22 native.

23 THE COURT: That's true.

24 MR. CERULLO: Instead, they just produced them this
25 PDF format.

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1 THE COURT: That's true with respect to those two
2 criticisms, but it doesn't change their point about requesting
3 metadata other than with respect to spreadsheets.

4 MR. CERULLO: Like I was saying, your Honor, we had
5 hoped to have more of a dialogue with them.

6 THE COURT: You could have picked up the phone or
7 written a letter. You said if you have any questions, call me.
8 They didn't have any questions, so that was that. But they
9 didn't refuse you. You said they refused to engage in
10 dialogue. The only way you get refused is if you make an
11 offer.

12 MR. CERULLO: A type of refusal is to knock it back to
13 us and produce records in a format that was completely contrary
14 to our request.

15 THE COURT: I don't understand refusing. Refusing
16 means I make an invitation and you refuse to sit down with me.
17 I call or write you and say can we meet in the next three weeks
18 and talk about this, and they say no, we don't want to sit down
19 with you. Nothing like that happened. You said if you have
20 any questions call me, and they didn't.

21 I understand your other point, that they didn't do
22 what you asked with respect to the spreadsheets or the single-
23 page format. On that I'm hearing you. But their complaint is
24 that you didn't ask for the metadata other than with respect to
25 the spreadsheets and it would require a lot more time and money

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1 to review the metadata. Now, if I send them back to do it,
2 they say that is totally unfair and something that Judge Maas
3 rejected in the Aguilar case.

4 MR. CERULLO: Your Honor, in Aguilar the Court made a
5 point of noting that their entire production was almost
6 complete. Here they have produced not barely even 3,000 pages
7 of documents, almost nothing.

8 THE COURT: I know.

9 MR. CERULLO: Even at the last hearing counsel could
10 only basically muster a guess at 30 percent of their documents
11 in response to the rapid production list that has been
12 produced. So we are on a completely different footing than
13 Aguilar.

14 THE COURT: True. But I still have to look backward
15 and forward. The first question is do I make them redo the
16 group they have already done and what do I order for January
17 17th, which is now just days away? It's not a month anymore,
18 it's just days.

19 MR. CERULLO: Your Honor, I think at the very least,
20 what they have produced so far, which isn't very much, they
21 should produce it in single-page format and the spreadsheets in
22 native.

23 THE COURT: The way it was requested.

24 MR. CERULLO: The way it was requested. As it stands
25 now, we have giant PDFs with hundreds of pages of documents.

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1 THE COURT: I got it. In the way it was requested, I
2 should make them do that over. Now, how about January 17th?

3 MR. CERULLO: January 17th, I can't see how they can't
4 produce in accordance with our production protocol. That
5 request was timely, nearly a month before that deadline on the
6 17th, when we gave that to them on the 22nd.

7 THE COURT: Of December?

8 MR. CERULLO: Of December. There is nothing strange
9 or outlandish about the production protocol. Indeed, it is
10 governed in large part by the same method in which the
11 government requests documents from citizens. We don't request
12 all metadata. We set forth specific types of metadata that
13 would be important to us and important to plaintiffs' ability
14 and the public's ability to --

15 THE COURT: Is this the second page where you say
16 "metadata fields" and you have a bunch of bullets?

17 MR. CERULLO: That's correct, your Honor.

18 THE COURT: Those are the only metadata fields you are
19 requesting?

20 MR. CERULLO: Those are our metadata fields, yes.

21 THE COURT: Which is surely not all, because there are
22 hundreds of fields.

23 MR. CERULLO: Exactly. These are what we think would
24 be the most useful to us. We had hoped to have a dialogue with
25 the government about if they had any objections to any of

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1 these. Quite frankly, they just said no, and that's why we are
2 here.

3 THE COURT: I'd like to finish topic one because I
4 have two topics to go to after this. Mr. Cordaro, the limited
5 relief that the plaintiff now seeks where he says, looking back
6 to the pages already produced, given this colloquy we have had
7 for the last half hour, the least you should order is adhere to
8 what we did request back in July, which was native format on
9 the spreadsheets and single-page format on the PDF's. That was
10 requested, it was not objected to, and it was not done. Why
11 shouldn't I order that as a do-over?

12 MR. CORDARO: Your Honor, to start off with, I'm
13 mildly troubled that we are discussing an email here that is
14 not before the Court, was not submitted by the plaintiffs with
15 their papers. I would like to look at it.

16 THE COURT: Assuming it says what Mr. Cerullo says it
17 says, that he asked for spreadsheets in native and single-page
18 format on everything else, assuming he asked for that and you
19 never objected, why shouldn't I send you back to do what he
20 said if they timely requested it, the form of production, and
21 you didn't object?

22 MR. CORDARO: Your Honor, I don't think the burden is
23 on the government to object.

24 THE COURT: I don't think that's right. Read Rule 34.
25 I think the exactly says that. It says that the requesting

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1 party may name the form that it wants. If the producing party
2 wants to object, it may, but if it objects, it has to offer an
3 alternative format. If that's not done, then the court shall
4 order as a fallback either the form in which it is ordinarily
5 maintained or in a reasonably useful format. I bet I have that
6 rule memorized. I wrote it, so I remember it. That's what it
7 says.

8 MR. CORDARO: Actually, your Honor, I was really
9 referring to FOIA.

10 THE COURT: I can't switch back and forth like that.
11 We are talking about Rule 34. If they requested a form, if you
12 didn't object and offer a different form and if the Court
13 didn't order anything because it didn't know what was going on
14 anyway, no dispute was presented, then you have to adhere to
15 the form they requested.

16 When you see this email, have a chance to look at it,
17 as you point out -- I don't have it in front of me, apparently
18 you don't -- but if it did make the request that Mr. Cerullo
19 says, I think I should order you to go back and do it, because
20 you didn't object and didn't offer an alternative format.
21 Then we will be done with looking backward and we should look
22 forward.

23 MR. CORDARO: Your Honor, let me segregate the two
24 then. As far as Excel spreadsheets in native go, if that was
25 requested, we will go back and look at that. They did request

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1 it. That is a requestable format, and clearly we will go back
2 and look at it.

3 THE COURT: Correct.

4 MR. CORDARO: As far as single-page documents or
5 whatever we are talking about here, I'm not sure I know what
6 that means.

7 THE COURT: If you're not sure you know what that
8 means, then the burden was on you. The email, according to Mr.
9 Cerullo said if you have any questions, give me a call. If you
10 didn't understand this phrase "single-page format," which he
11 says is industry standard and everybody knows what it is, but
12 if you didn't, then the burden was on you to pick up the phone
13 and say I'm not sure what that is, what is that.

14 I have a pretty good idea just from common sense what
15 it is, and you do, too, probably. But you can't just do what
16 you want to do without following Rule 34. So I think I'm
17 required to send you back for a do-over on the productions up
18 till now, which weren't so many anyway. I think it was in the
19 range of 3,000 pages, which I remember from the December
20 conference.

21 I think we should turn to January 17th now.

22 MR. CORDARO: Your Honor, the only thing I would add
23 there is that in engaging in a FOIA analysis, if the statute is
24 specific, then that really trumps the federal rule.

25 THE COURT: I don't think so, and I don't have time to

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1 go into that further right now because we are both guessing.
2 You think so, I don't think so, I have no idea if you have
3 cases, and I don't want to stop for a 3-month briefing schedule
4 when you have been 10 months late on this.

5 Frankly, this has been one slow production. The
6 government made promises of the date on which it was going to
7 do it. If I remember from December, the government hadn't done
8 it months later, despite its own promise we will have
9 everything to you by X date. Very little has come through by X
10 date, much less the whole RPL. That didn't happen. Now we get
11 to the opt-out information, and that's supposed to happen on
12 Monday.

13 I'm sorry, but I don't have time for a further
14 discussion on what trumps what. I live under the federal
15 rules. You can comply with Rule 34 as every other litigant
16 does. For that I do have an opinion that I wrote a couple of
17 years back, SEC v. Collins & Aikman, that says that the
18 government plays by the same rules as all other litigants.

19 I'm looking to January 17th. I'm done looking back.
20 If the email says what Mr. Cerullo says it says it says, you
21 had better reply, and no alternative offer. Let's go to
22 January 17th.

23 MR. CORDARO: Very well, your Honor. Do you want me
24 to stay up?

25 THE COURT: Sure. When are you prepared to do that?

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1 He is saying there a month in advance I gave you a production
2 protocol, I told you what I thought needed to be done, your
3 only response to that apparently is no. "No" is not a helpful
4 response.

5 Spreadsheets are easy enough. Again I guess they are
6 asking for it in native format. You will look at that. The
7 same you are going to look back, you'll look forward. The
8 bigger problem is the metadata fields. He is not asking for
9 all metadata fields by any means. I know some of these
10 programs have 220 fields. We are talking about I don't know
11 how many bullets points, but it looks likes 20. So it is not
12 all that burdensome to look at.

13 MR. CORDARO: Your Honor, I respectfully disagree.
14 When you talk about FOIA, you don't look at the end product.
15 Yes, the end product is the documents. But in a FOIA case what
16 the court looks at is the search. Here, when we were just
17 talking about opt-out records, the indications I'm getting from
18 the agency is that the search embraced over 50,000 pages of
19 documents. That was done during this period from the hearing
20 to today.

21 THE COURT: Yes.

22 MR. CORDARO: I think we are looking at over 15,000
23 pages of documents produced. For the agency to go back and
24 redo the search --

25 THE COURT: That's not the point. Mr. Cerullo's point

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1 was you had this request timely. This one you don't have a
2 timeliness argument. Our hearing was December 17th. By
3 December 22nd he sent this over. You didn't look at those
4 50,000 until then, you said so yourself: We have worked really
5 hard since the hearing, we have looked at 50,000 records, we
6 are ready to produce 15,000. You did that during the very time
7 he told you what he wanted.

8 MR. CORDARO: No, that's not correct, your Honor. The
9 hearing was on December 9th. The Court's order was entered on
10 the 17th. The Court made very clear what it wanted us to do,
11 and we did not wait to get going. The search was already well
12 under way by the time we came to the 22nd, when we got this
13 request.

14 In essence what they are asking for is a do-over.
15 That's curious given that the hearing on the 9th was about the
16 urgency of the information in the opt-out records, in other
17 words, how the agency can opt out. That's what we have been
18 concentrating on as we are conducting this search.

19 All the agencies, particularly ICE, have had to move
20 heaven and earth to complete this search. Vacations were
21 canceled. I know the Court does not want to hear all this.
22 Vacations were canceled. People were brought in from different
23 areas of the agency to work on just this request because of the
24 large quantity of documents that had to be reviewed in the
25 first cut to even determine responsiveness.

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1 So to get a request like this, I would argue, after
2 the eleventh hour basically put the agency in an impossible
3 position because we are under a January 17th deadline that your
4 Honor made very clear that we have to comply with on perhaps
5 the pain of sanctions.

6 THE COURT: Right. But between the 9th and the 22nd
7 is, what, 13, 14 days, two weeks. Between the 22nd and the
8 17th is a month. What you are saying is in the first 14 days
9 you did 95 percent of the work and in the next month you did 5
10 percent. That can't be right. Most of this work, common
11 sense, was done after the 22nd.

12 MR. CORDARO: No, your Honor, that's not the case.

13 THE COURT: Then you did it all in 13 days. I don't
14 know why you didn't do it in July when you should have. If it
15 was that easy, I'm really confused why it took you a year to
16 get this done.

17 MR. CORDARO: Again, your Honor, going back to July,
18 the rapid production list had many things on it.

19 THE COURT: Let's not even count the 9th, because you
20 were in court on the 9th. Now we are starting on December 10,
21 which was a Friday. This came on the 22nd, so it isn't even
22 two weeks. It came 12 days later and you were virtually done
23 with 50,000 documents. I just don't believe it, frankly. I
24 think most of the review was done after you got that
25 communication on the 22nd. That's a month from the due date,

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1 and instead you're talking about the first 12 days.

2 MR. CORDARO: Your Honor, that's a question of review.
3 I'm talking about the initial search that generated the
4 documents that would be reviewed. The way this all broke down,
5 we had to get that done I think by the end of December, maybe
6 in some cases first week in January, to have any chance to do
7 the exemption review that we had to do to comply with the
8 Court's January 17th deadline.

9 So while I don't want to put a percentage on it as I
10 stand here, the search was already well underway and I feel
11 comfortable saying nearly completed by the time we got this
12 demand from the plaintiffs.

13 Then, just because the plaintiffs made the demand, the
14 FOIA statute is very clear that the agency only has to produce
15 the documents in the format requested if the format is readily
16 reproducible by the agency. That would have required the
17 agency to either go back and determine if, given all that was
18 going on at the time, this was even readily reproducible.

19 THE COURT: Wait. What do you mean readily
20 reproducible? It's always readily reproducible in the form in
21 which it's ordinarily kept. You actually have to change the
22 format to get it to be a PDF. It's stored in native. That's
23 how it's created. You have to make a change to convert it,
24 which you did. You pointed that out. You converted it to
25 review it. I don't understand how it's not readily

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1 reproducible as kept.

2 MR. CORDARO: Readily reproducible as kept.

3 Obviously, we wouldn't be producing these in native format, so
4 it would require extra steps in the process. I think what
5 maybe your Honor is pointing to is something that would be used
6 in a Concordance database, for instance. But there I think we
7 have to hook on after we are done generating the PDF. Then you
8 would have to go back, I believe -- and I apologize if I'm
9 talking a little bit out of my depth here -- I think you have
10 to go back and TIFF it. Then, the TIFF is pretty much useless
11 without an accompanying loading file.

12 THE COURT: Correct, the load file.

13 MR. CORDARO: The load file contains the data that
14 makes the TIFF useful that then gets shot into the Concordance
15 and makes for something.

16 For the government to create the load file would just
17 have been impossible, I think, under the time limitations that
18 we were under, let alone to go through the extra steps to
19 create the TIFF. Again, I think its coming very late in the
20 day, the government just was not in a position to do it for
21 January 17th, let alone for the rest of the requests, and we'll
22 get to that later.

23 Our position is that this should have been requested
24 at the outset for the whole request, but certainly for the
25 January 17th deadline. Everybody who is here today, your

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1 Honor, was in court on December 9th. This could have been
2 mentioned to the Court at that time. It could have been
3 brought up to us at that time. It just wasn't.

4 We all agreed on an order. To ask the Court to come
5 back as we are about to make the production and amend the order
6 strikes me as terribly burdensome and would have just ensured
7 that there was no way we could have made that deadline.

8 THE COURT: Does anybody want to respond to that
9 argument?

10 MR. CERULLO: Your Honor, I'd like to first point out
11 that after we were here with your Honor on the 9th, we went
12 back and we collectively drafted the order for your Honor's
13 approval. Within that order we said that we were going to meet
14 and confer regarding format of production. It was our hope,
15 and obviously that hope didn't pan out, that the parties would
16 be able to come to an agreement without your Honor's input.
17 That didn't happen. We sent them the protocol right after we
18 met and conferred. Actually, we brought the issue up at the
19 meet and confer.

20 THE COURT: When was the meet and confer?

21 MR. CERULLO: On the 22nd or the 21st. The very next
22 day we sent them the protocol. They said no. We are here.
23 That's the time line. We did not delay, we did not drag our
24 feet.

25 THE COURT: You didn't raise it on the 9th, is your

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1 adversary's point. They say they got started the next day
2 because you have to gather the information in order to search
3 it.

4 MR. CERULLO: Your Honor, I have been involved in way
5 too many document productions than I care to even admit. The
6 load file is created at the very end of that. It has
7 absolutely nothing to do with the searching. You can search
8 and identify and process. The creation of a load file is done
9 at the tail end. So it really has nothing to do with the
10 burden for which Mr. Cordaro is speaking of.

11 THE COURT: Yes, but. You would have to know what you
12 were going to do at the end of the day at the beginning. They
13 didn't, they say, so they did the same procedure they did for
14 the August and October productions, which is to PDF everything,
15 prepare it for their attorneys for review. That's the
16 procedure they used. Had they known from the outset what they
17 would have to do at the end, as he pointed out correctly, they
18 would start by TIFF'ing it, then preparing the load file at the
19 end.

20 So you really are saying the same thing. He is
21 saying, I didn't know that at the beginning, when I got down to
22 do this on December 10th, the day after the hearing, and got
23 started, under tight deadlines, it wasn't made known to me at
24 that point, so it was a real problem for January 17th.

25 The question is whether to treat it in the same way I

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1 just treated the August and October productions, by saying that
2 the spreadsheets have to be native and the other has to be at
3 least single-page format, or whether to at this point have them
4 go back and worry about the 20 or so metadata fields. I think
5 it is too late for that for January 17th, which is just the
6 opt-out files. There is still much more in the way of records
7 to come, right?

8 MR. CERULLO: We hope so.

9 THE COURT: I think we had better move forward because
10 the hour is late.

11 MR. CERULLO: Your Honor, can I raise one last point?
12 This is with regard to the previous productions or any
13 productions going forward. Even if they produce them in
14 single-page format, which we have obviously requested, because
15 there have been absolutely no metadata or no load files
16 provided, we don't even know when documents begin and end.
17 There is no parent or child. We don't know what is an
18 attachment. We need the basic information.

19 THE COURT: That has to be done. There is so much
20 case law on that. You can't separate the document and the
21 attachment. You can't do it. It has to be clear what was
22 attached to what. There are so many cases on that that it
23 would be irresponsible for the government to think they are
24 somehow exempt from that. That is part of the protocol.

25 I was focusing on the metadata fields. I dealt so far

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1 with the metadata fields and the spreadsheets. There it is,
2 page 1, about the identifiers that are going to be used, the
3 parent-child problem. That's about all we can do. The rest is
4 probably too late for now. That's the only one you have raised
5 that we haven't talked about, right?

6 MR. CERULLO: Right. We would request whether it be
7 for the previous productions --

8 THE COURT: They have to go back on documents with
9 attachments. That's too well known to have been missed.

10 MR. CERULLO: With respect to the opt-out production
11 as well, if the Court is inclined --

12 THE COURT: That has to be done. There's no argument.

13 I need to turn quickly to the search cutoff date issue
14 and the adequacy of the search declarations. With respect to
15 the search cutoff dates, what is the government's position?
16 You say it cuts off when?

17 MR. CORDARO: It's a different date for each agency,
18 your Honor, based on when the search commenced. That is
19 pursuant to both DOJ and DHS regulations.

20 THE COURT: When did the searches commence? It seems
21 like most of the work got done after December 9th.

22 MR. CORDARO: No, your Honor, that's not the case.
23 The agencies were making productions going back into August.

24 THE COURT: I know there were some productions in
25 August. Very little, that's the problem. That's why everybody

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1 was here screaming in December, so little had been done despite
2 promises to the contrary.

3 MR. CORDARO: Your Honor, the analysis for search
4 cutoff date is when the agency commenced its search, not when
5 documents were produced.

6 THE COURT: I understand that. But I don't think an
7 agency can say we began our search in February but, sorry, we
8 didn't give you anything until December or a year later in
9 January, and we get the benefit of a whole year passing because
10 we dragged our feet. That can't be right. That may be the
11 default rule, so to speak, that is usually in place, but that
12 would mean you're promptly conducting a search and producing
13 documents and we shouldn't be responsible for the 4 to 6 weeks
14 in between.

15 Here we got a February request, the promise was we
16 will get it to you in July, and all of a sudden in December the
17 plaintiffs are complaining bitterly that they have so little
18 produced. So to just stick with the default rule of I got the
19 request in February, I'm entitled to cut off my search there,
20 that seems to me taking advantage of your own foot dragging.

21 MR. CORDARO: No, your Honor, we actually are not
22 taking the position that we got the request in February so the
23 cutoff date is there.

24 THE COURT: I'll ask the government. What is the
25 government's position?

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1 MR. CORDARO: The government's position is that ICE
2 and DHS have set out April 30th as a cutoff date, April 30th
3 being when the litigation was started, and ICE was already
4 searching before April 30th.

5 The FBI had a February date in their declaration. We
6 have asked them to go back and look at that. Actually, they
7 have determined now that they don't have any evidence of the
8 tasker that was sent out having been sent in February. So they
9 have kicked that up to March, which is the first tasker we
10 could find detailing the search. So March 2nd is the date that
11 the FBI is using.

12 OLC and EOIR --

13 THE COURT: And what?

14 MR. CORDARO: EOIR, the Executive Office of
15 Immigration Review, are using dates of November 8th and October
16 15th respectively.

17 THE COURT: Which is which? Which is OLC?

18 MR. CORDARO: OLC is November 8th and EOIR is October
19 15th. They just ran searches again for the opt-out record.

20 THE COURT: That is no problem. The OLC and EOIR
21 dates are fine, both after October 15th. Those are not our
22 problems. The problems are going to be ICE, DHS, and FBI. Are
23 you done with the agencies or are there more?

24 MR. CORDARO: That's it, your Honor.

25 THE COURT: The problem is ICE, DHS, and FBI.

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1 MR. CORDARO: Again, your Honor, you have to look at
2 the context of the FOIA request. A FOIA request that is very
3 narrow and can be quickly satisfied that sits on someone's desk
4 for seven months before it gets handled is clearly a problem.
5 But when you're talking about the FOIA request that was given
6 here, the plaintiffs say, well, we gave you this request back
7 in February and we didn't get any documents until July or
8 August. Your Honor, that doesn't mean that the agencies
9 weren't searching for the documents.

10 THE COURT: You can't have it both ways. You come in
11 here and tell me how everybody broke their back after December
12 9th on an almost impossible basis and you had to cancel
13 vacations and do overtime to get the search done, so for the
14 first time they gather 50,000 documents, and then tell me they
15 have been busy searching since February and March. It's just
16 not true.

17 Most of this seems to have been done in December, for
18 which you are to be congratulated. The problem is in August
19 and September it was a trickle. There was just a few thousand
20 pages. You didn't even argue in December that most of it was
21 done and you were just finishing up. You knew you had to bear
22 down and do it, and you did. You said you put on all this
23 extra manpower, we really put our shoulder to the wheel under
24 the threat of sanctions, for the first time we gathered our
25 50,000.

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1 I just don't believe it was done in February and March
2 and April. No way. The government made a promise in writing
3 that it would be there in July. It was never there. The bulk
4 of it was not there. I don't think that is realistic.

5 MR. CORDARO: Your Honor, I think what we were saying
6 is that was with respect to the opt-out records.

7 THE COURT: Even if that's the case, then the cutoff
8 date for the opt-out records is surely October 15th as proposed
9 by the plaintiffs.

10 MR. CORDARO: The government didn't contest it. The
11 Court gave us an order. You told us to do the opt-out records.

12 THE COURT: You agree that the opt-out date for that
13 was October 15th?

14 MR. CORDARO: That was in the Court's order for the
15 opt-out records.

16 THE COURT: What is this contest?

17 MR. CORDARO: The rest of the RPL production.

18 THE COURT: But you haven't done the RPL.

19 MR. CORDARO: Yes, your Honor, we made productions for
20 the RPL.

21 THE COURT: I thought it was infinitesimal. That's
22 the 2 or 3,000 pages back in August and October. The bulk of
23 that is yet to come.

24 MR. CORDARO: I wouldn't characterize it as
25 infinitesimal, your Honor. Again, the emphasis here is not on

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1 the documents but on whether the agency is searching for them.

2 THE COURT: I know. But if the agency has produced,
3 let's say, 2 or 3,000 and suddenly on, I'll make this up, March
4 15th they produce 50,000, not opt-out but RPL, that tells me
5 the bulk was done way later. I can't assess that except in
6 hindsight, but that's what I think is going to happen, that the
7 smaller by far percentage was produced in August and October
8 and the bulk is yet to come, which means that most of the
9 searching has happened after October 15th.

10 MR. CORDARO: If that were to happen, your Honor, and
11 I'm not conceding that it will, but if it would, then the
12 plaintiffs or, if directed, the government could bring a
13 summary judgment motion on this issue, and then the Court would
14 have a record to make a decision that the government's chosen
15 search cutoff dates were unreasonable given what happened over
16 the life of this FOIA case. However, as we stand here today,
17 the record is completely open on that, and we haven't even had
18 a chance to justify via declarations --

19 THE COURT: Right. Now, who wants to address the ICE,
20 DHF, and FBI cutoff dates directly?

21 MS. KESSLER: Thank you, your Honor, I will. First of
22 all, in the FOIA context of justification of cutoff date, the
23 inquiry is whether it's a reasonable cutoff date. It's
24 ultimately a reasonableness inquiry.

25 THE COURT: The government doesn't disagree. It's

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1 just saying it's not ready to be briefed, we don't have a full
2 record, we can only do that after the remainder of the
3 production, and we will have to do it as a lookback. And if
4 you're right they are going to have to have a later cutoff
5 date, he is just saying it is not timely presented to the Court
6 today.

7 MS. KESSLER: That doesn't make sense for two reasons.
8 In the first place, there is an obligation on the agencies to
9 provide the requesters with information about the cutoff dates
10 that the agencies are using. Until today the agencies have not
11 provided the requesters with that information despite our
12 repeated requests for that information.

13 THE COURT: What they provided today, is that
14 adequate? They are certainly telling you the dates for the
15 different agencies.

16 MS. KESSLER: Your Honor, up until today we haven't
17 even had that much.

18 THE COURT: Now that you have that, is that adequate?

19 MS. KESSLER: No, your Honor, it is not. As I believe
20 your Honor acknowledged at the hearing on December 9th, April
21 30th was not an acceptable cutoff date for ICE or DHS, and
22 February 3rd is clearly not an acceptable cutoff date for the
23 FBI.

24 THE COURT: You mean March 2nd. We are now to March
25 2nd.

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1 MS. KESSLER: Now March 2nd does not seem that it
2 would be reasonable either.

3 THE COURT: I ruled that already?

4 MS. KESSLER: As to the opt-out records?

5 THE COURT: He is not talking about the opt-out
6 records. He is agreeing with respect to the opt-out records.

7 It is October 15th, right, Mr. Cordaro?

8 MR. CORDARO: Yes, your Honor, for the opt-out
9 records.

10 THE COURT: No problem with the opt-out records. With
11 respect to the other records.

12 MS. KESSLER: Right.

13 THE COURT: He is talking about those date apply to
14 the other records.

15 MS. KESSLER: Right. Plaintiffs' position is that
16 those dates would not be reasonable for the rapid production
17 list either.

18 THE COURT: I don't want you to argue the substance.
19 I want to know why your adversary isn't right that I can reach
20 this on a full record at the appropriate time, and if I agree
21 with the plaintiffs at that point, they will have to go back
22 for the extended period. In other words, if there is a real
23 evidentiary record to base a reasonableness analysis on, if at
24 that time I say the cutoff should have been October 15th, I'll
25 have to pick up the search from April 30th to October 15th,

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1 I'll have to go back and do it.

2 MS. KESSLER: Right. I think there are two issues
3 with that. The first is that the agencies are conducting their
4 searches and processing their records now using -- up until
5 today we didn't know, now we do know -- the cutoff dates. It
6 doesn't make any sense to have them go back and produce records
7 given particularly, as plaintiffs indicated at the last
8 hearing, the urgency behind this particular request and the
9 urgent public need for these particular records.

10 THE COURT: I don't have a basis, as your adversary
11 pointed out, to do a reasonableness analysis. That's what he
12 is saying. I don't have the information. I don't know what
13 was done when, whether they started work on it, what percentage
14 has been produced along the way, whether the work really didn't
15 start until December. I don't have a basis to draw the
16 conclusion on a fact record.

17 He is saying you will get that at some point if
18 reasonableness is challenged, and if you rule that we were
19 unreasonable and the date should have been later, we know we
20 are going to have to go back even though it is inefficient, and
21 do it again for the missing months.

22 MS. KESSLER: I understand that. Courts have also
23 found that a failure of the defendants to inform the plaintiffs
24 of the cutoff date that they are using as well as a delay,
25 general delay, in the search and processing of a FOIA request

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1 is unreasonable and have ordered supplemental searches on that
2 basis.

3 THE COURT: Even if you're right, I don't have that
4 briefing today. I'd need you to brief that, and that's going
5 to be delay in itself. I don't think I can do a reasonableness
6 change of date today. Do you want to do that? Do you want to
7 submit the brief that you just said, that courts have held this
8 and courts have held that? I don't have that in front of me.

9 MS. KESSLER: I understand that. The one issue that
10 remains --

11 THE COURT: I'm going to turn to that third issue if
12 we are done with this one. I didn't want to be done until we
13 talk about how we want to proceed. Your adversary wants to
14 proceed at a later time. He says let's finish our production
15 and then we will show you what we did when, and you'll decide
16 whether what we did was reasonable. You say there are courts
17 that have held that the delay of production itself was a reason
18 to change the cutoff date. You will have to brief that for me.
19 Do you want to have a briefing schedule quick-quick and do it?

20 MS. KESSLER: Your Honor, may have a moment to confer
21 with my co-counsel?

22 THE COURT: Please.

23 MS. KESSLER: Thank you, your Honor. It is
24 plaintiffs' position that we would want to brief that issue at
25 this time because it seems inefficient for all parties involved

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1 to wait to brief it at a later time. Of course, we would need
2 declarations regarding the agencies' justifications for the
3 reasonableness of those searches in order to do that.

4 The one side point that I wanted to make is the opt-
5 out production cutoff date of October 15th, the defendants have
6 accepted that that cutoff date is reasonable and are processing
7 based on that cutoff date.

8 THE COURT: Correct.

9 MS. KESSLER: It would seem to logically follow that
10 an October 15th date should also apply to the remainder of
11 their rapid production lists which they have. If they have
12 accepted the reasonableness of the October 15th date --

13 THE COURT: It would certainly be helpful. It would
14 be helpful to lessen my workload, but it is not the
15 government's position at this time.

16 MR. CORDARO: I think it is very important I put the
17 government's position on the record. We did not challenge the
18 Court's setting of the October 15th cutoff date for the opt-out
19 records. It was a decision we made based on the hearing and
20 the Court's order. But that does not mean we waive our rights
21 with respect to the remainder of the RPL or the FOIA request as
22 a whole.

23 THE COURT: All right. Let's get going with it then.
24 Don't you have to start, then, Mr. Cordaro, by putting in your
25 declarations of why the cutoff date you have chosen is

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1 reasonable?

2 MR. CORDARO: If it's the Court's preference, we could
3 begin.

4 THE COURT: I think it has to start with you. You
5 have to say why what you did was reasonable. Then they submit
6 their brief contesting that and handing me the law that they
7 just pointed out exists, and you can reply.

8 MR. CORDARO: That's fair enough, your Honor.

9 THE COURT: I know you have a lot to do to try and get
10 to this other problem, but so be it. If they feel you would
11 just give in on October 15th, you could do your searches in an
12 organized way instead of being sent back to do them twice. But
13 the government moves in mysterious ways. Do what you have to
14 do. When can you get those declarations in? It has to be
15 fast.

16 MR. CORDARO: I agree, your Honor. That's the part
17 I'm a little concerned about.

18 THE COURT: I think two weeks from today.

19 MR. CORDARO: We have a motion that is due on Monday.

20 THE COURT: Two weeks from today for the declarations
21 of reasonableness.

22 MR. CORDARO: Let me check.

23 THE COURT: I have to do it. Otherwise, we cannot
24 move this promptly and you are only complain when you are sent
25 back. You're going to say now you're making us do it twice,

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1 which you could avoid but don't choose to. Today is January
2 12th. Your declarations are due January 26th.

3 Assuming you get them at the close of business January
4 26th, when can you get in your brief challenging the
5 reasonableness?

6 MS. KESSLER: Two weeks after that.

7 THE COURT: February 9th.

8 How long would you like to reply?

9 MR. CORDARO: Ten.

10 THE COURT: Ten days? February 18th. Mr. Cordaro,
11 February 18th?

12 MR. CORDARO: Yes, your Honor.

13 THE COURT: Done. That's the schedule.

14 Now I had better turn to the last topic and get out of
15 here. That is the declaration where the government describes
16 the adequacy of the search. That's obviously different set of
17 declarations you think you're entitled to now, is that right,
18 Ms. Kessler?

19 MS. KESSLER: Yes, your Honor. Our understanding of
20 the Court's order at the hearing on December 9th was that it
21 was the government that would make the motion as to exemptions.

22 THE COURT: Yes, that they will.

23 MS. KESSLER: And summary judgment would be addressing
24 the issue of exemptions and would not need to at that time move
25 on the issue of adequacy of search.

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1 THE COURT: Right.

2 MS. KESSLER: But that does not mean or we did not
3 understand it to mean that the government would not need to
4 provide declarations explaining that it was the other searches
5 that were conducted.

6 THE COURT: I think their position is we are not going
7 to litigate it now, what do you need them for now?

8 MS. KESSLER: I think the reason it makes sense and
9 might be more efficient for those declarations to come all at
10 once is if the searches are inadequate and plaintiffs need to
11 raise questions about the adequacy of the search, it only makes
12 sense to do it at the same time.

13 THE COURT: How does that differ from litigating the
14 issue of the adequacy of the search, which we said we wouldn't
15 do, we would do the exemptions first? We are not going to
16 litigate the adequacy of the search. You sort of say we are
17 going to litigate it.

18 MS. KESSLER: I think either party or the plaintiffs
19 could then bring the motion as to adequacy of search.

20 THE COURT: It means whatever I said in December
21 doesn't count. I realize that what I said there did not relate
22 to declarations describing the search. That I understand. I
23 agree with the plaintiffs' position on that. I didn't say
24 anything about declarations. But I did say we wouldn't
25 litigate that issue, we would litigate the exemption issue up

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1 front.

2 MS. KESSLER: I agree. The reason the adequacy of
3 search declarations is important to plaintiffs is, first of
4 all, to understand whether the government's production is
5 sufficient. If we have any significant delay in receiving
6 those declarations, we receive them at some date as of now that
7 we don't understand when that will happen, the plaintiffs are
8 in no position to know whether the defendants have complied
9 with their production deadline.

10 THE COURT: To cut through it, Mr. Cordaro, I agree
11 with the plaintiffs somewhat. I think they have some right to
12 know now how you conducted the search, at least to know the
13 search terms used, so they have some way to assess whether what
14 they are getting complied with what they asked for. So at
15 least in a modified way I think you do have to tell them
16 something about how you conducted the search.

17 Does anybody even know the search terms that were
18 used?

19 MR. CORDARO: I, standing here, personally don't know
20 them, your Honor, but the agencies do.

21 THE COURT: I didn't mean you. I meant the
22 plaintiffs.

23 MS. KESSLER: No, your Honor.

24 THE COURT: No. You didn't negotiate search terms,
25 for example. I think you do have to come up with some

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1 information as to how the search was conducted.

2 MR. CORDARO: Your Honor, I think that we are talking
3 about some information. We just have to be clear that we are
4 not litigating this issue right now.

5 THE COURT: That's right. I'm clear on that. But I
6 think we are entitled to know how you conducted the search,
7 minimally what were the search terms -- but it may be more than
8 that -- describing in general terms how the search was
9 conducted, so here is what we searched and here are the search
10 terms we used.

11 MR. CORDARO: Ordinarily, your Honor, an adequacy of
12 search declaration, and in this case there would have to be
13 five, is a litigation tool. It's what allows the Court to make
14 a determination as to whether the government's search was in
15 fact reasonable. It's a serious document. Again, we are up
16 against serious time pressure here.

17 THE COURT: But it's not hard. Your agency knows what
18 search terms they use. It's gamesmanship at this point. These
19 days people negotiate search terms. These days people jointly
20 work out search protocols. That wasn't done here. That's
21 unusual. That's an exception. That's not the way it usually
22 is. I need to order you to do that, and I need to set a date
23 for that, too.

24 MR. CORDARO: I think what we are afraid of, your
25 Honor, is that if you order that on the 17th --

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1 THE COURT: I was not thinking of ordering it for the
2 17th, but very shortly thereafter. Frankly, I think it should
3 be the same as I just set for the other declarations, which
4 was, what? What I say?

5 MR. DIANA: January 26th.

6 MR. CORDARO: Is your Honor ordering us to produce
7 actual agency declarations on the search?

8 THE COURT: How else would you do it?

9 MR. CORDARO: That's my concern, your Honor.
10 Ordinarily, the declaration is submitted in tandem with some
11 sort of motion.

12 THE COURT: I understand.

13 MR. CORDARO: We have already agreed we are not
14 litigating it. I'm concerned that the declaration is going to
15 be turned around on us and then used by them to move for
16 summary judgment when we are kind of rushing already.

17 THE COURT: I don't think it can be used for summary
18 judgment, but maybe used to stop everything, they didn't even
19 do what we requested, they didn't even produce opt-out records,
20 they didn't do this or that. It may be that it brings us back
21 to the courtroom for complaining as to whether or not we are
22 ready for the summary judgment. So I don't know what they are
23 going to, quote, use it for. Until it is produced, I can't
24 predict that, and neither cannot plaintiffs. But they are
25 entitled to know it.

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1 I would say January 26th. Whether it's in the form of
2 a declaration, whether it is a letter from you to them that
3 says the agencies have informed me that this is how they
4 conducted the search, these were the search terms used, these
5 were the locations searched, this is how they did it, I don't
6 know how you want to do it, but frankly it is not of great
7 import to me.

8 MR. CORDARO: Fair enough, your Honor.

9 THE COURT: I think we have covered the agenda.
10 There's a lot in there, and I have to reduce some of it to a
11 ruling. In the course of this hearing, I think I've given you
12 notice of what the rulings are, and you will have to act
13 accordingly in terms of going back to the beginning in terms of
14 the databases and the single-page format and then turn to the
15 January 17th production, what can or can't be done in that time
16 frame.

17 What I didn't address was going forward production.
18 That's the one thing I didn't in terms of the metadata fields.
19 But I heard the arguments. Then we talked about a briefing
20 schedule on the search cutoff dates, and now we have
21 declarations or a letter or something describing the search,
22 and we have schedules for that. Obviously, I need the
23 transcript. Please order it. I'll try to issue something as
24 soon as I can.

25 MR. CORDARO: Thank you, your Honor. May I bring up

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1 one more point, just a clarification point? It seems to me
2 that your Honor wants us to take another look at the production
3 that has already been made for this Excel and single-page
4 issue.

5 THE COURT: That would not be done before getting
6 ready for January 17th. That will be done after. The do-over
7 on the old production follows. It's not an excuse to not meet
8 the January 17th on the opt-out reports.

9 MR. CORDARO: Thank you, your Honor.

10 THE COURT: Then you need to turn to that immediately.

11 MR. CORDARO: As far as the opt-out records go, we
12 will turn to it immediately.

13 THE COURT: I'm saying then you need to do the
14 lookback.

15 MR. CORDARO: Right, your Honor.

16 THE COURT: OK?

17 MR. CORDARO: If we determine from the agencies that
18 because of this issue now we have to go back and do the search
19 again for the Excel and the single line and that we cannot make
20 the 17th because of that --

21 THE COURT: Then you will write me or call me and we
22 will have an emergency hearing on the phone and figure out what
23 you are asking for and whether it is reasonable.

24 MR. CORDARO: Thank you, your Honor.

25 THE COURT: Did you want to say something, Ms. Patel?

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1 MS. PATEL: I was just going to ask the Court if you
2 were ordering the February production to be subject to the
3 protocol.

4 THE COURT: I don't know what the February production
5 is. What is promised for February?

6 MS. PATEL: At the end of February we are supposed to
7 receive the rest of the rapid production list.

8 THE COURT: I said that was the one thing I didn't
9 rule on today. I didn't decide what to do about the metadata
10 issue, so to speak. That I have to think about.

11 MR. DIANA: Do you want anything else from us, your
12 Honor, on that issue?

13 THE COURT: I think I need to review the transcript
14 and decide. I don't recall the whole argument. It has been an
15 hour and a quarter already. I don't know what I said when we
16 were discussing that. Take a look. You're certainly welcome
17 to submit more on the issue. There may be case law you want to
18 submit, maybe not. You heard what your adversary said.

19 Thank you for coming in on a day we were closed. It
20 was good to get this on the road. There was time pressure.

21 (Adjourned)

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