

# **EXHIBIT C**

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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 NDLON, et al.,

5 Plaintiffs,

6 v.

10 CV 3488 (SAS)

7 ICE, et al.,

8 Defendants.

9 -----x  
August 18, 2011  
3:00 p.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 CENTER FOR CONSTITUTIONAL RIGHTS  
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Attorneys for Plaintiffs  
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23 Southern District of New York  
Attorneys for Defendants  
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JOSEPH N. CORDARO  
25 Assistant United States Attorneys

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1 THE COURT: Okay, we're ready to get started.

2 Ms. Patel good afternoon.

3 MS. PATEL: Yes, your Honor.

4 THE COURT: Ms. Kessler.

5 MS. KESSLER: Yes, your Honor.

6 THE COURT: Okay, good afternoon.

7 Mr. Are you might be are you juice below Ms.

8 THE COURT: Markowitz.

9 MR. MARKOWITZ: That's correct.

10 THE COURT: Good afternoon.

11 MR. MARKOWITZ: Good afternoon.

12 THE COURT: Ms. Lin, good afternoon. Mr. Diana, good

13 and, Ms. Craparo, good afternoon.

14 And oh, Mr. Schildcrout?

15 MR. SCHILDCROUT: That's correct. Good afternoon.

16 THE COURT: Mr. Connolly.

17 MR. CONNOLLY: Good afternoon.

18 THE COURT: And Mr. Cordaro, good afternoon.

19 MR. CORDARO: Good afternoon.

20 THE COURT: Where is Mr. Oestericher?

21 MR. CONNOLLY: Mr. Oestericher is on vacation, your

22 Honor.

23 THE COURT: Okay. I was hoping it wasn't because he

24 didn't want to come.

25 MR. CONNOLLY: Not at all.

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1 THE COURT: So I have five submissions that were  
2 received, I can't quite -- since the last conference, because  
3 the first of five were just before, and that was plaintiffs'  
4 August 11th letter with exhibits regarding the supplemental  
5 Vaughn index and at that conference I said it had just come in,  
6 I hadn't had a chance to study it, so it's one of today's five.

7 And then the government responded on August 17th. And  
8 then on August the 12th the government wrote a letter regarding  
9 the production schedule for the final production list, which  
10 we'll call FPL.

11 Then the plaintiffs responded to the Government's  
12 letter regarding the FPL production schedule on August 17th.  
13 And then on August 18th, which is today, the government replied  
14 to the plaintiffs' August 17th letter regarding the FPL  
15 production schedule.

16 So we have three issues on today's general today.  
17 First is the Milner letter briefing issue, the second is the  
18 revised Vaughn indices question; that was whether these indices  
19 are satisfactory to make the required showings; and, third, of  
20 course, is the FPL production schedule. So those are the three  
21 items I have on the agenda. Does anybody think there are --  
22 anything else should be on the agenda? No.

23 MS. PATEL: Your Honor --

24 THE COURT: Yes.

25 MS. PATEL: We believe that the exemptions issue,

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1 there is maybe two issues, other than the new revised Vaughns.  
2 There's also the outstanding issue of the October 2nd memo  
3 which was included in our letter.

4 THE COURT: Yes, yes. I guess I was treating that as  
5 Bart of the Vaughn index question.

6 Okay. Well, the easiest would be the Milner letter  
7 briefing.

8 I understand that plaintiffs in the August 12th letter  
9 ask that a new deadline for their reply be set today, if the  
10 parties have not been able to resolve the Milner issue. And I  
11 endorsed that and said I would grant an extension sine die at  
12 that point. But can somebody update me to what is the progress  
13 of the negotiations?

14 MR. CONNOLLY: I'd be happy to, your Honor. Within  
15 the last couple of days, we've received some revised versions  
16 of the stipulation and the exhibits from plaintiffs, and we  
17 have circulated those to the agencies. I've not had a chance  
18 today to speak with Mr. Schildcrout, but we spoke yesterday  
19 about some questions that the government had. We're still  
20 hopeful that we can wrap this up shortly.

21 THE COURT: Okay. So at the moment it stands with no  
22 date.

23 Okay, let's skip to the schedule issues. I don't  
24 think we have a real dispute or spend any of our time with  
25 respect to DHS and FBI. You know, we have agreed upon cutoff

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1 dates there of September 19th, I guess for DHS, September 12th  
2 for FBI. They say the production's going to be less than  
3 anticipated. One might think if it's less, it could go faster  
4 and I should push it back a week or two, but with the real  
5 quarrel about to come with respect to ICE, I think we probably  
6 are okay living with September 19th and September 12th, but  
7 with no further extensions as to DHS or FBI.

8 ~~Does anybody want to be heard further with respect to~~  
9 DHS or FBI?

10 MS. PATEL: No. That's fine, your Honor.

11 I would just, for the record, point out that for the  
12 FBI, we received a very small production

13 THE COURT: I know, I saw the numbers. It was truly  
14 minimal. It was 43 pages the first time, and then an  
15 additional 100 pages. That's all you've gotten so far that I  
16 can see; is that right?

17 MS. PATEL: That's right, your Honor. And the  
18 production there -- they were supposed to produce 5,000 pages,  
19 and we got 100. So obviously I understand the reason.

20 ~~THE COURT: It's not good, but on the other hand, the~~  
21 FBI cutoff is supposed to be September 12th which, in a certain  
22 sense, is around the corner. Yes?

23 MR. CONNOLLY: And I would just note, your Honor, that  
24 the FBI reviewed over 2,000 potentially responsive documents,  
25 and they're just getting a very lower yield of responsive

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1 documents.

2 THE COURT: The yield is clearly low. But on the  
3 other hand, it just seems like there's nothing much produced  
4 from the FBI. But I don't think there is a big quarrel with.  
5 You were just speaking for the record, is that right, Ms.  
6 Patel?

7 MS. PATEL: That's right, your Honor. And obviously  
8 if we had known previously that the yield would be this low, we  
9 may have suggested a different schedule. But of course we  
10 don't ever really know -- have very much information from the  
11 agencies about this.

12 THE COURT: I don't know that the yield means a low --  
13 suggests a quicker schedule. What takes the time is not the  
14 yield, but the amount of documents being reviewed. So what  
15 they're actually saying is there are more being reviewed than I  
16 think anticipated. I think they said they intend to review  
17 18,000 potentially responsive pages, which is actually more  
18 than they anticipated. Isn't that right?

19 MR. CONNOLLY: I believe that the 18,000 is about what  
20 we represented in the past, your Honor, and the FBI's estimate  
21 has been fairly consistent.

22 THE COURT: I thought it was 15,000. It went to  
23 18,000.

24 MR. CONNOLLY: No, I don't recall, your Honor, but  
25 certainly 18,000 is where they stand now.

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1 THE COURT: Yeah. I think the last one was 15,000,  
2 but that's okay. So to me it's an increase of 3,000, but it's  
3 not the point. The point is --

4 MS. PATEL: Yes, your Honor.

5 THE COURT: September 12 is coming fast. So as long  
6 as the government understands this is not a schedule that's  
7 going to be extended for either FBI or DHS, this was really  
8 time to complete their rather small productions, which brings  
9 us to the big one, which is ICE.

10 The Government's proposal to review 6,000 pages every  
11 two weeks, when the volume is a quarter million pages, it would  
12 be 84 weeks, it would take a year and a half. I don't intend  
13 to let this go on for a year and a half and take 84 weeks. I  
14 suspect on that one score all 950 District Judges across the  
15 country might agree, on one thing. I don't think they'd agree  
16 on anything else, but I don't think any of them would let it  
17 run a year and a half. So that's out.

18 Where we go from here I said last time what happens?  
19 I issue an order, they then ignore it, they go into contempt,  
20 then the contempt is appealed. I have no idea. Because their  
21 view is to write a letter to me saying we absolutely can't,  
22 cannot do better than 5,000 pages a week, but since the Court  
23 is so impatient, we will offer 6,000 pages -- oh, sorry, every  
24 two weeks, which comes to 84 weeks. And I just don't think any  
25 Judge is going to allow a year and a half to run a FOIA



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1 request.

2 So one thing I'm curious about is they wrote, write if  
3 they were to do this on any faster schedule, it would take over  
4 the entire ICE FOIA office. Well, what is -- how many FOIA  
5 requests is ICE dealing with, other than this one in this case,  
6 which is quite huge? Do you know what percentage of ICE FOIA  
7 requests is taken up by this case? It might be that this one  
8 ~~case is 90 percent of their time no matter how they slice it.~~  
9 Do you know the answer to that?

10 MR. CONNOLLY: I don't know the answer to that, your  
11 Honor. In the declaration that we submitted today from Ryan  
12 Law.

13 THE COURT: Yes.

14 MR. CONNOLLY: On page five there is a footnote where  
15 Mr --

16 THE COURT: Let me just turn to page five.

17 MR. CONNOLLY: Certainly.

18 THE COURT: Okay, go ahead.

19 MR. CONNOLLY: And in that footnote, Mr. Law indicates  
20 ~~that ICE currently has 1,945 other pending FOIA matters.~~

21 THE COURT: Right, but it could be an individual  
22 saying can I see my file or my deportation file, my  
23 naturalization file, my removal file. I mean, these could be  
24 very tiny requests, ten page requests.

25 MR. CONNOLLY: Some of them very well may be, your

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1 Honor. As I stand here, I don't know what percentage of them  
2 may be characterized in that way and which ones may be larger,  
3 so.

4 THE COURT: But you don't know the answer to my  
5 question, namely, what percentage of the total FOIA time or  
6 FOIA requests is this case; whether this case is already 70 or  
7 80 or 90 percent of the FOIA demand on ICE?

8 ~~MR. CONNOLLY: I don't -- I don't know with certainty,~~  
9 your Honor. It's certainly a very heavy demand on their FOIA  
10 office.

11 And as Mr. Law discussed at length with respect to,  
12 for example, the opt out production, it has been a full-time  
13 demand for the FOIA office and for ICE employees beyond the  
14 FOIA office, at times.

15 THE COURT: Right. Well, since the year and a half  
16 schedule is out of the question, the other option is the  
17 government apparently has offered the plaintiffs to try to  
18 narrow the search terms or prioritize certain demands over  
19 others or something that front loads the materials that are  
20 ~~most important to --~~ I mean that's sorts of what we already did  
21 once with the opt out production. But is there something to be  
22 done? Because while I'm not going to accept the 84 week  
23 schedule, that's out, I think it's really a quarter million  
24 pages to review, and it's really an agency that has only a  
25 limited number of people, a limited budget for FOIA matters,

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1 should you take a new tact and even narrow the requests or  
2 prioritize the terms that are most important to get up front?  
3 Because if you want everything, if you want everything for all  
4 the terms that you ever thought of -- so it won't be 84 weeks,  
5 but it will be something significant.

6 MS. PATEL: Your Honor, first of all, I would just say  
7 that we only received this declaration and this information  
8 very recently.

9 THE COURT: Like today.

10 MS. PATEL: Today, you know, an hour and a half ago.  
11 And this is the first time we're hearing this information. And  
12 it's been something I think we've said to you before, we just  
13 can't get information from the agency. We're glad that we're  
14 getting it now. They have refused to negotiate the schedule  
15 with us. And I just think that's something to keep in mind  
16 here.

17 THE COURT: Well, wait, wait, Ms. Patel. Does that  
18 mean that it would be wise to just put this off again till  
19 Monday, let's say, or Tuesday when you've had time to absorb  
20 Mr. Law's declaration and potentially negotiate again with the  
21 government? I mean, I'm seeing you every week, anyway. I can  
22 see you Monday or Tuesday of next week, whatever you want.

23 MS. PATEL: Well, I think that there are -- there's  
24 perhaps some movement that we can make today.

25 For one thing, I think that you asked -- the question

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1 posed to us is, what can you do. I mean, we do have some ideas  
2 and we could --

3 THE COURT: Okay, because is it best to talk to me  
4 about them on the record or to now react to the letter you  
5 received by sitting down yet again with the Government's  
6 attorneys? I mean, they're not ICE, they're nice fellows, sit  
7 down with them and see what you can negotiate.

8 MS. PATEL: Well, we're always ready to negotiate  
9 with --

10 THE COURT: Well, all right. You just got this  
11 letter, so there's new thoughts in there. You have new  
12 thoughts in response, and I'm always happy to see you. So you  
13 can come back as early next week as you want to, if, if you  
14 think it would be fruitful. You said you have some ideas. I'm  
15 only saying sharing the ideas with the Court on the record  
16 before trying to do that with the government isn't always the  
17 best approach.

18 MS. PATEL: I mean --

19 THE COURT: As they say, they have never heard that  
20 before.

21 MS. PATEL: You're right, your Honor. I'm not  
22 suggesting that I would give those ideas right now. I think  
23 what I would just say is that this is something that they've  
24 agreed to -- they've agreed to some kind of a reasonable  
25 schedule. Obviously, we all agree --

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1 THE COURT: Agreed to an unreasonable schedule, 84  
2 weeks.

3 MS. PATEL: That's right. In this stipulation they  
4 agreed to some kind of reasonable schedule. This is obviously  
5 not reasonable.

6 THE COURT: No.

7 MS. PATEL: This public debate is going on right now.

8 ~~THE COURT: Oh, I know. I read the papers.~~

9 MS. PATEL: I'm sure you're aware. I don't need to go  
10 into that for the Court.

11 THE COURT: I'm a devoted newspaper reader.

12 MS. PATEL: And, I mean, this is a request that's  
13 extremely urgent. I think that waiting another several weeks  
14 before --

15 THE COURT: Days, I said days. I said I would see you  
16 any day next week that you choose.

17 MS. PATEL: Okay. Your Honor, I would just --

18 THE COURT: If you think you could make progress by  
19 talking directly to the front line prosecutors, so to speak --  
20 well, not prosecutors in this case, front line government  
21 lawyers.

22 MS. PATEL: We can attempt to do that.

23 But in order for us to actually have a meaningful  
24 conversation about search terms or anything like that, we have  
25 to get information from the government, and they have said that

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1 they would not have that information for several weeks, and  
2 that --

3 THE COURT: Like what, what can't they have for  
4 several weeks?

5 MS. PATEL: The search terms that have been used by  
6 ICE to conduct the searches so far.

7 THE COURT: That could be gotten to you in eight  
8 hours.

9 MR. CONNOLLY: Your Honor, we all have the search  
10 terms. The search terms are -- there is an initial search term  
11 list that plaintiffs provided to the government as part of  
12 our -- while we were negotiating the final production list.

13 THE COURT: And have they been used by ICE?

14 MR. CONNOLLY: These are the search terms that are the  
15 basis for the searches, and we are -- we have 15 of 18 offices  
16 that have responded at this point. So we're close to  
17 completing our initial searches. In other words, ICE is going  
18 to have the documents.

19 THE COURT: So those are the terms that have been  
20 used.

21 MR. CONNOLLY: Right.

22 THE COURT: As long as it -- wait, wait.

23 MR. CONNOLLY: I'm sorry.

24 THE COURT: I didn't even hear you.

25 But, Ms. Patel, he's answered your question. Those

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1 are the -- he has provided you with the search terms that have  
2 been used.

3 MS. PATEL: We provided the defendants a list of  
4 search terms. Our understanding is that they did not -- what  
5 we're hearing is not that they uses all of those searches,  
6 they're using some combination.

7 THE COURT: That's not what I heard. Maybe true, it's  
8 not what I heard. I heard Mr. Connolly say those were the  
9 search terms that were used.

10 MS. PATEL: We have not heard anything about -- we  
11 don't know what the results of those searches terms are.

12 THE COURT: No.

13 MS. PATEL: Which ones accumulated what yield, what  
14 the problems are with the search terms.

15 THE COURT: That is correct. All I heard him say was  
16 those were the search terms that were used. I don't know which  
17 ones were sort of the strongest indicator of hits.

18 MR. CONNOLLY: And if I may, your Honor. Now that ICE  
19 has the results of those searches back, and can start to look  
20 at what those searches generated, we may be in a position now  
21 to say to plaintiffs, for example, this topic, these terms,  
22 we're getting a very large volume of records. Is this topic  
23 worth us going through all these records now or is this  
24 something that we can streamline or set aside. Those are the  
25 kinds of conversations we want to have.

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1 THE COURT: Yes, but when can you have them? She's  
2 still saying you can't --

3 MS. PATEL: We've --

4 MR. CONNOLLY: Well, we can have these, we can have  
5 these conversations about possible solutions to this issue over  
6 the next few days, as your Honor suggested. And if your Honor  
7 would like to have us back in next week, we can report on it.

8 ~~MS. PATEL: Your Honor, I'm -- we're happy to come~~  
9 back next week, while we're continuing on with this  
10 negotiation. The government has told us that they've gathered  
11 a certain amount of documents already. We just request that  
12 perhaps for those, half of them get processed in two weeks and  
13 the other half in another two weeks while we sort out the rest  
14 of the schedule.

15 THE COURT: Of the offices that have completed their  
16 search, how many documents are now gathered?

17 MR. CONNOLLY: We --

18 MS. PATEL: 27 -- oh.

19 MR. CONNOLLY: We have -- when we last saw you, your  
20 Honor, we had somewhere between 27 and 37,000 potentially  
21 responsive pages. Obviously with all of the search results  
22 that we've gotten back since the last time we were before you,  
23 that number is much greater, although as indicated in the Law  
24 declaration, these have of all kind of come back electronically  
25 at this point. We don't have a page count as to what we have



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1 yet.

2 THE COURT: But it should be well over 50,000.

3 MR. CONNOLLY: It would be well over 50,000 at this  
4 point, yes.

5 THE COURT: Maybe 100,000?

6 MR. CONNOLLY: I think it would be fair to say that  
7 we've identified at this point, and have in the ICE FOIA  
8 office, 100,000 potentially responsive pages, at least.

9 THE COURT: Okay. Let's say they have 100,000  
10 potentially responsive pages. Now, your proposal is they  
11 should do 50,000 of them within two weeks and 50,000, remaining  
12 50,000 in four weeks, because you said half and half.

13 MS. PATEL: You Honor, I was speaking to the 27,000 --

14 THE COURT: Oh.

15 MS. PATEL: -- that they've previously indicated --

16 THE COURT: Oh.

17 MS. PATEL: That it was 27 to 37, so roughly 40,000  
18 that they had said were previously gathered.

19 THE COURT: Roughly 33 is halfway between 27 and 37.  
20 So you're saying -- essentially, you're saying 16,000 pages  
21 should be reviewed and processed in two weeks, and 16,000  
22 within four weeks.

23 MS. PATEL: Yes, your Honor. I mean, this is  
24 something they started in June. I know they keep saying  
25 July 11, but we've gone over this before. It's a red herring.

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1 And if they in fact didn't start searching until July 11th,  
2 then we would be entitled to a different cutoff date.

3 THE COURT: Right. So the schedule that exists right  
4 now as you talk to each other and as we have these weekly  
5 conferences, what is the ICE production promise this minute for  
6 the next two weeks? Is there one? Did I set one?

7 MS. PATEL: No.

8 ~~THE COURT: No?~~

9 MS. PATEL: No, your Honor.

10 MR. CONNOLLY: Your Honor has not set one. I mean,  
11 we -- ICE is reviewing and processing records in anticipation  
12 of making a production on I guess the 29th or the 30th of  
13 August, which would be two weeks since the production at the  
14 beginning of this week.

15 On Monday ICE produced over 5,000 pages of responsive  
16 records, and ICE will attempt to review a volume of records  
17 again for this next production that will provide plaintiffs  
18 with additional responsive records.

19 THE COURT: I know, but that's really leaving all  
20 control in ICE's hands, not in the Court's hands at all. I  
21 mean, it's whatever ICE thinks it can accomplish. If it  
22 decides it had a bad two weeks, it can accomplish very little  
23 because it's the summer people on vacation, then it hasn't  
24 violated any orders if there aren't any orders. So I don't  
25 want to leave it in ICE's hands.

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1 How large is the FOIA office, do you know?

2 MR. CONNOLLY: Your Honor, there are 12 individuals in  
3 the ICE FOIA office who are involved in processing records for  
4 FOIA requests. Those 12 individuals, in addition to processing  
5 records for the requests, also process records for litigation  
6 if a request goes to litigation.

7 THE COURT: Well, the plaintiffs had asked for as much  
8 as 100,000 to be reviewed in four weeks. Requiring 32,000 is  
9 quite a cut from that. So I think we start now to butt heads.  
10 And I would say of the original -- between 27 and 37,000 that  
11 we were told were gathered as of the last conference, and the  
12 number that falls between that is 32,000, 16,000 of those  
13 collected pages should be reviewed and responsive material  
14 produced in two weeks, and remaining 16,000 of that group  
15 should be reviewed with documents produced within four weeks of  
16 today. So it's August 29th to review 16,000 and produce  
17 responsive document, and September 12th to review the remaining  
18 16,000 and produce whatever is responsive.

19 In the meantime, you would then meet and confer with  
20 the new information you have, and the new information you hope  
21 to get, which is the response rate per search term. Because as  
22 Mr. Connolly says, if some of those terms are yielding  
23 1 percent, but some are yielding 98, you're obviously going to  
24 learn something, and you're going want to press on the ones  
25 that have a high yield and maybe drop the ones that have a low

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1 yield. So I think the thing to do is open my calendar for next  
2 week.

3 MR. CONNOLLY: Your Honor?

4 MS. PATEL: And your Honor --

5 MR. CONNOLLY: If I may request a very small  
6 modification to the schedule your Honor just set forth. If  
7 ICE's next production deadline could be August 30th, and I  
8 believe then the following the 13th, those are Tuesdays and  
9 that would --

10 THE COURT: That's fine.

11 MR. CONNOLLY: Okay.

12 THE COURT: I'm not here to quarrel about a day. So  
13 do you want Wednesday, the 24th, or do you want Thursday, the  
14 25th?

15 MS. PATEL: 24th, your Honor.

16 THE COURT: All right. And noon, 12 noon?

17 MS. PATEL: Yes, yes, your Honor.

18 MR. CONNOLLY: That's fine for the government, your  
19 Honor.

20 MS. PATEL: If I might just mention one other thing,  
21 your Honor, regarding the schedule and the Law declaration in  
22 particular.

23 One of the things I think that we're -- that we  
24 should -- we are considering is also what can't happen here. I  
25 mean, we have had a situation in this case where we've received

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1 a declaration that turned out, you know, to where numbers were  
2 off. If you remember from the Metadata order, there was a big  
3 difference in discrepancy in the numbers, and this may be a  
4 similar type of situation. We don't really know that. But --

5 THE COURT: I'm sorry, I'm not sure what you're  
6 telling me.

7 MS. PATEL: Well, I mean, I think there are options  
8 ~~here for your Honor to consider, whether it's an investigation~~  
9 or having testimony to get some of the answers to some of your  
10 questions, and all of our questions around the way the FOIA  
11 office is working, what the work load is, the processing time  
12 and these other things --

13 THE COURT: That's why I say this certainly would be  
14 part of a contempt hearing at some point if I were to order --  
15 don't take anything from this -- but let's say I order --

16 MS. PATEL: I understand.

17 THE COURT: -- 50,000 every two weeks, and of course  
18 they would say, impossible, no can do, and not only can't do,  
19 won't do, that's it. Then we go -- you'll make a motion for  
20 contempt, and then we'll have all this evidence. But that's  
21 way down the line. So I don't know what you really want I  
22 could do now or should do now, unless you have an idea  
23 before -- let me next Wednesday tell me the ideas. If, after  
24 meeting with the government asking the question that you're  
25 asking, not getting responses, then you can say, we took you

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1 seriously, we met and conferred, we asked certain questions.  
2 They're not forthcoming, either we think your Honor should  
3 order it or you should order depositions or you should do  
4 something so we do learn the information that would help us  
5 make this a speedier process. So I'll address all that next  
6 Wednesday. But first try to do it informally and see if you  
7 can get what you need, or some of what you need or most of what  
8 you need.

9 MS. PATEL: Thank you, your Honor.

10 THE COURT: It's premature today, because I don't know  
11 what the Government's response is going to be to legitimate  
12 questions that you ask or that I ask.

13 So that takes us to what I call the Vaughn index  
14 issues. The defendants submitted a revised Vaughn index on  
15 August 8th. The plaintiffs think it's insufficient and asks  
16 that the Court release -- order the release of many documents.

17 The briefing, so to speak, on that issue is pretty  
18 extensive, so I'm not going to take up all of the challenges  
19 back and forth, but there are two that I thought we should talk  
20 about.

21 One is the attorney-client confidentiality, and the  
22 second is the so-called October 2nd memorandum, which you had  
23 mentioned earlier in terms of agenda.

24 Starting with the October 2nd memorandum, because it's  
25 a single document. I asked the defendants to submit further

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1 information about the role the documents played in the  
2 deliberative process in order to figure out whether it's  
3 properly withheld.

4 In the supplemental Vaughn, the defendants wrote only  
5 that the memo was, quote, drafted by the office of the  
6 principal legal advisor as advice to the client in response to  
7 a client request for guidance on the mandatory versus voluntary  
8 question of participation --- and ICE also represented that  
9 confidentiality of the redacted information has been  
10 maintained.

11 But that's not really what I asked the government to  
12 do. I didn't ask them what purpose it was drafted for and  
13 whether it had been maintained as confidential. I asked  
14 whether it was written to justify already existing policy or to  
15 lend support in an interagency debate about shifting the  
16 policy. If it was the former, it should be produced, and  
17 that's the whole thrust of my earlier opinion, which I now  
18 understand has not been appealed, so that part of the order  
19 stands. Is that correct, Mr. Connolly, am I correctly informed  
20 about that?

21 MR. CONNOLLY: Yes, your Honor, the Solicitor General  
22 decided not to appeal any aspect of the July 11th order.

23 THE COURT: Right. So all that means is that there is  
24 a distinction between justifying, so to speak, an already  
25 existing policy or exchanges of ideas about developing a

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1 policy, whether a policy should be shifted. And the revised  
2 Vaughn index description of this document doesn't clarify it.

3 So having given the government two chances to get this  
4 right, I think it's just time to order production of the  
5 document. If you like to be heard, Mr. Connolly, further, I  
6 would hear you, but I've twice asked to provide the information  
7 needed and I didn't get it. And it's your burden to justify  
8 any exemption. So is there anything you want to add? ---

9 MR. CONNOLLY: Your Honor, I would only say that the  
10 Government's position is that the description in the Vaughn was  
11 sufficient and in compliance with the July 11th order.

12 THE COURT: But it doesn't say anything at all more  
13 about whether it was written to justify an already existing  
14 policy or to lend support to an ongoing new policy or change of  
15 policy.

16 MR. CONNOLLY: Well, as we argued in our letter brief  
17 to the Court yesterday, even the evidence cited by plaintiffs  
18 indicates that it was drafted as part of a debate about  
19 potentially shifting policy. And we made that argument I  
20 believe on page five to six of the letter brief.

21 THE COURT: Well, the document that the plaintiff  
22 cited that reference, the October 2nd memo, seemed to show it  
23 was clearly post decisional. Because the documents the  
24 plaintiffs cite, and particularly quote by Ms. Gibson, talks  
25 about ICE's draft and revised language to describe the shift



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1 from the current voluntary formula to the 2013 formula. So  
2 she's drafting revised language to describe the shift, then the  
3 shift has already been decided, and they're no longer debating  
4 whether to shift. They're busy talking about how to describe  
5 it. That's what I can't tell. I mean, it's your burden, and I  
6 still can't tell whether that shift had been decided or was  
7 being debated. And that's the exact line, the bright line that  
8 I tried to draw in the opinion, July opinion, as to whether  
9 there's still a debate or whether now there's a justification  
10 for policy that's been adopted. And that's my problem is that  
11 given it's your burden, I don't feel you've met it. Even  
12 though I note that you're saying that even in the plaintiffs'  
13 document, defendants say that the very same documents  
14 demonstrate that -- it's a quote from your letter -- that memo  
15 was created to lend support in an interagency debate about  
16 shifting the policy. But I can't figure really it out whether  
17 they're still debating shifting or whether they're justifying a  
18 decision that's already been made to shift.

19 Does any plaintiffs' lawyer want to add something that  
20 might be helpful for the record; Mr. Diana?

21 MR. DIANA: Yes, your Honor. I think what's  
22 important, and I think this also goes to your July 11th ruling,  
23 is it's not a shift in policy. As a matter of fact, I think  
24 the, what the documents is show is the sharing of information  
25 with ICE was being done. So this was really not even a shift

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1 in policy. It was a shift in the message. I mean, it was --  
2 they were telling people it was voluntary, but it wasn't. And  
3 then they decided after the fact, well, we're now going to tell  
4 them that it's mandatory, we now need the legal justification  
5 to change that message. The policy hasn't shifted.

6 THE COURT: Well, that's the point, it hasn't --

7 MR. DIANA: Yeah.

8 THE COURT: ~~Has the policy shifted or not or are they~~  
9 discussing a shift?

10 What about this notion of 2011 versus 2013, whether  
11 there's something called shift from the voluntary formula to  
12 the 2013 formula; do you understand what that's all --

13 MR. DIANA: I mean, my understanding, your Honor, is  
14 again, it's the messaging. It was, I think if you read the  
15 documents carefully, I think it shows that there was whether  
16 you call it confusion or misrepresentations made about what the  
17 nature of the program was. And what these documents show is  
18 they were getting caught up I think in the communications  
19 aspects from a public relations standpoint, and, therefore,  
20 ~~they were shifting it.~~ And one of the things -- again, the  
21 documents show this -- they were throwing out various legal  
22 justifications for it. And, again, it went to the waiver  
23 argument that I think your Honor said was the basis for the  
24 confidentiality point, is they were stating various things like  
25 the Patriot Act and these agreements with the states. There

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1 was all kinds of legal justifications. What's clear to me in  
2 the documents is that they decided we want a sort of formal  
3 memo which will say, okay, now, this is the messaging that  
4 we're going to use, so everyone's has the same talking points,  
5 and that's what this was. And I think the cause of it, I think  
6 it falls directly within several of your Honor's rulings that  
7 they're not appealing, which was this is not a matter of  
8 policy, this is messaging, and, therefore, it's not covered as  
9 well as it's post --

10 THE COURT: I think the simplest way for me to rule is  
11 to say the government has not sustained its burden of proof to  
12 establish that they're entitled to withhold this, based on the  
13 exemption. It's that simple. It may be that if they, you  
14 know, had put forth enough information, that I could conclude  
15 that it might have fallen in, but I think they've had two  
16 opportunities to do it and I'm not yet convinced. So I order  
17 production of the October 2nd memorandum.

18 Now we turn to the attorney-client situation. With  
19 respect to that --

20 MS. KESSLER: Your Honor, one additional --

21 THE COURT: Sorry?

22 MS. KESSLER: On the October 2nd memorandum?

23 THE COURT: Yes.

24 MS. KESSLER: Is there a date by which --

25 THE COURT: That's one memorandum. How long can that

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1 take? Close of business Monday? That's --

2 MR. CONNOLLY: There are a variety of versions of that  
3 memorandum, your Honor. There's -- I think there may be as  
4 many as a dozen that would be subject to your Honor's  
5 disclosure order.

6 THE COURT: Close of business Monday; is that  
7 reasonable or unreasonable?

8 MR. CONNOLLY: We would ask for further time, your  
9 Honor. We would ask for a week until next Thursday.

10 THE COURT: Well, no, I certainly want it before the  
11 conference, I mean just to see if anything more is being done  
12 about it. So I'll say close of business Tuesday. That's the  
13 best I can do.

14 MR. CONNOLLY: Very well, your Honor.

15 THE COURT: All right, so now we're talking about the  
16 attorney-client confidentiality. I did say in that July 11th  
17 opinion that I really couldn't tell the confidentiality was  
18 maintained, and asked that the defendant make more of a showing  
19 that it was.

20 Defendant submitted a declaration from Ryan Law, whose  
21 name has already come up here, containing a blanket asserting  
22 and I quote, that ICE personnel involved in attorney-client  
23 communications that ICE withheld from plaintiffs under FOIA  
24 exemption B-5. I reviewed all such communication for the  
25 purpose of determining whether confidentiality had been

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1 maintained. Each of these personnel have responded, and  
2 confidentiality has, in fact, been maintained. Plaintiffs --  
3 close quote.

4 Plaintiffs are not particularly happy with this  
5 declaration. They say they don't provide any details regarding  
6 which ICE personnel were asked to review communications or how  
7 they determined the confidentiality has been maintained.

8 ~~I'm not sure what the alternative is to Mr. Law's~~  
9 deposition. I mean, do the plaintiffs really think that for  
10 every single document there's going to be a separate affidavit  
11 for thousands of documents one by one by one, sort of like a  
12 chain of custody tracing the history of every movement of every  
13 document through every person in an agency? Obviously, I can't  
14 have that. That would be unduly burdensome, expensive, time  
15 consuming, unnecessary.

16 So I don't really understand what the plaintiffs are  
17 suggesting, other than maybe all they want to do is be able to  
18 question Mr. Law as to what he did to reach the conclusory  
19 paragraph that he reached; that did he interview every  
20 custodian? Did he do a sampling? Did he -- I don't know. I  
21 mean, actually I like to hear from plaintiffs first what  
22 they're asking. I know what Law did, so I want to hear what  
23 the plaintiffs are asking.

24 MS. KESSLER: Your Honor, I think that that would be  
25 very helpful. One of the problems with the Law declaration is

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1 that it's quite vague, so it's not clear exactly what was done.  
2 And it's not clear even what the representation of  
3 confidentiality -- what was kept confidential; was it simply  
4 the actual documents or was it the content and analysis in  
5 those documents? Have both of those things been kept  
6 confidential or -- it's not clear because of the vague way that  
7 it's worded. And so in terms of sufficiency of meeting the  
8 burden of showing confidentiality, I think that it would be  
9 very helpful.

10 THE COURT: I took it to mean, maybe wrongly, that the  
11 documents themselves physically were not shown to people  
12 outside the parameters of the confidential relationship. I  
13 didn't take it to mean that certain phrases of the content were  
14 discussed outside the agency, but that the documents themselves  
15 were not released.

16 Mr. Connolly, is that what was meant, do you know?

17 MR. CONNOLLY: I'm not certain, as I stand here, your  
18 Honor, but that's something that could be clarified.

19 And I would just suggest that if the Court would like  
20 further information with respect to what was done, we would be  
21 happy to submit a fuller declaration from Mr. Law in describing  
22 in more detail what was done to establish the confidentiality  
23 of those documents.

24 THE COURT: That makes sense to me as a first step,  
25 because we could always talk about depositions on Wednesday or

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1 deposition. First, there should be a supplemental  
2 declaration -- and I've done this in other cases and it's  
3 worked. In other words, after two or three tries, it's been  
4 satisfactory. So maybe you should ask Law to submit a  
5 supplemental declaration that simply says how it is he was able  
6 to make the representation that each of these personnel  
7 responded that confidentiality has in fact been maintained,  
8 what they are asked to do, what did they do, how did he make  
9 this determination. He should put in a supplemental  
10 declaration trying to explain the basis for his statement, and  
11 we'll review it again on Wednesday. So that would be due close  
12 of business Tuesday.

13 MR. CONNOLLY: Thank you, your Honor.

14 MS. KESSLER: Thank you, your Honor.

15 The only other thing just to point out is that for the  
16 documents addressed on the supplemental Vaughn.

17 THE COURT: On supplemental Vaughn, yes.

18 MS. KESSLER: We received those documents on  
19 August 8th in a reproduction -- some of them.

20 THE COURT: Yes.

21 MS. KESSLER: And we're continuing to review them. We  
22 just received the production on Monday. We're continuing to  
23 review the production.

24 The main issue that we had identified was the issue  
25 with regard to the October 2nd memo. But if there are

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1 additional issues with compliance with your Honor's order,  
2 we'll certainly advise the Court.

3 THE COURT: Okay. Is there anything else today?

4 MS. KESSLER: There is one additional issue related to  
5 the Vaughn indexes.

6 THE COURT: Yes.

7 MS. KESSLER: The defendants produced two additional  
8 ~~Vaughn indices. One contained information about documents that~~  
9 ~~had already been Vaughned. The second index contained Vaughn~~  
10 ~~entries for documents that in fact have never been Vaughned and~~  
11 ~~weren't Vaughned first time, the first time around.~~

12 Since those documents were processed and produced at a  
13 time before the Court, the Court had ruled on the exemptions  
14 motion, the principles set forth in the exemptions motion were  
15 not followed when those documents were processed. So we would  
16 ask that the defendants reprocess those records in accordance  
17 with the July 11th exemptions order.

18 THE COURT: What volume are we talking about?

19 MS. KESSLER: Well, we enumerated in Exhibit K to the  
20 August 11th letter which documents we were challenging, and  
21 it's only 35.

22 THE COURT: Okay. Well, I do think that the law of  
23 the case is now set, and defense should apply that law to any  
24 reviews going forward. If this one review fell in the gap  
25 between the review and the decision coming out, it's only 35



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1 documents, surely you should look at them with the rulings in  
2 mind.

3 So those 35 documents -- you know which 35 she's  
4 talking about?

5 MR. CONNOLLY: We do, your Honor. But as we indicated  
6 in our letter brief, that plaintiffs' letter brief really  
7 didn't describe in any detail what aspects of the July 11th  
8 order they believe were not complied with. And as we  
9 reviewed --

10 THE COURT: I don't know if she knows. I think she  
11 just said based on the timing of the issuance of the order and  
12 the date of the review, we wouldn't have the benefit of the  
13 Court's ruling when we looked at those 35. All she's saying is  
14 a lawyer, if you look at those 35 again and if they fall on the  
15 one side of my order, they should be produced. If they fall on  
16 the other side, they can be withheld.

17 MR. CONNOLLY: We will conduct that review, your  
18 Honor.

19 THE COURT: I think that's right, the only answer you  
20 can give. Just be sure that it's not a gap problem. Okay?

21 MR. CONNOLLY: Yes, your Honor.

22 THE COURT: And can that also be done by close of  
23 business Tuesday? It's 35 documents. I don't know, are they  
24 lengthy in pages? I mean, I don't know these things.

25 MR. CONNOLLY: I don't know, your Honor. I think some

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1 of them are shorter, some of them are longer. We would  
2 certainly ask for more time, in that given there are a number  
3 of things that we've been ordered to do, but by close of  
4 business Tuesday?

5 THE COURT: All right, I guess it can always be on the  
6 agenda for the next conference. So by next Friday.

7 MR. CONNOLLY: Thank you, your Honor.

8 ~~THE COURT: Ms. Patel.~~

9 MS. PATEL: Just one other issue, your Honor. We're  
10 beginning to try to negotiate around adequacy of search for the  
11 opt out records and rapid production list, and we haven't -- we  
12 have not had a chance to talk, and we haven't received a  
13 response from the government in a letter that we sent to them.  
14 We would just request perhaps the Court could direct the  
15 government to respond to our letter, I don't know, within a  
16 week.

17 THE COURT: Week, a week from when?

18 MS. PATEL: From today.

19 THE COURT: Oh, I'm sure they'd like that because it's  
20 ~~after the conference.~~

21 MR. CONNOLLY: Your Honor, plaintiffs sent to  
22 government last week in the midst of our three productions that  
23 went out, a 20 page single-spaced letter detailing what they  
24 view as the inadequacy of our previous searches, the searches  
25 from -- that resulted in our productions from August 2010 to

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1 February 2011.

2 Now, we're here with a number of things going forward  
3 on your exemptions order. We have a schedule that your Honor  
4 has set for the final production that's going forward.

5 THE COURT: I got your point. So what do you propose?

6 MR. CONNOLLY: We informed the plaintiffs that we  
7 would review it in due course as we had the opportunity to get  
8 through it.

9 THE COURT: I know, but I just like a deadline. If  
10 you don't like the one she's proposing or if she even proposed  
11 one, what would you propose?

12 MR. CONNOLLY: We would propose two weeks, your Honor.

13 THE COURT: From today?

14 MR. CONNOLLY: If we could have two weeks from  
15 tomorrow to put it at the end of that week, I believe that's  
16 the 26th or, no.

17 THE COURT: No, that would be one week.

18 MR. CONNOLLY: I apologize, your Honor.

19 THE COURT: September 2nd, just before Labor Day, all  
20 right.

21 MR. CONNOLLY: Certainly, your Honor.

22 THE COURT: By September 2 to respond to their 20 page  
23 single-spaced letter. All right?

24 MR. CONNOLLY: Thank you, your Honor.

25 THE COURT: Now are we done?

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MS. PATEL: Yes, your Honor. Thank you.

THE COURT: Thank you.

MR. MARKOWITZ: Thank you, your Honor.

(Adjourned to August 24, 2011 at 12:00 noon)