

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING)	
NETWORK, <u>et al</u> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civil Action No.10-cv-3488 (SAS)
U.S. IMMIGRATION AND CUSTOMS)	
ENFORCEMENT AGENCY, <u>et al</u> ,)	
)	
Defendants.)	

SIXTH DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently located in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 281 employees who staff a total of ten (10) FBIHQ units and two (2) field operational service center

units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA, as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's search efforts undertaken in response to the FOIA request made by plaintiffs the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively, "plaintiffs"), for records related to the U.S. Department of Homeland Security ("DHS")/U.S. Immigration and Customs Enforcement ("ICE") immigration enforcement strategy "Secure Communities."

(4) The FBI submits this declaration in support of its motion for partial summary judgment to provide further explanation of the FBI's search efforts for "Opt-Out" and Rapid Production List ("RPL") records, pursuant to the Court's order dated December 17, 2010. This declaration will expand upon the FBI's search efforts regarding the RPL and Opt-Out productions that were previously described in my First and Second Hardy Declarations. See [First] Hardy Declaration, dated November 12, 2010, ¶¶ 19-26, 32-33 and Second Hardy

Declaration, dated January 26, 2011, ¶¶ 6-12. This declaration supplements, and hereby incorporates by reference, both of these prior declarations.¹

SEARCH FOR RECORDS RESPONSIVE TO THE RPL

(5) By letter dated February 3, 2010 to FBIHQ, plaintiffs submitted a 21-page FOIA request seeking seven categories of records pertaining to Secure Communities: "Policies, Procedures and Objectives," "Data and Statistical Information," "Individual Records," "Fiscal Impact of Secure Communities," "Communications," "Secure Communities Program Assessment Records," and "Secure Communities Complaint Mechanisms and Oversight." (See **FBI-Exhibit A.**)

(6) Secure Communities is an initiative of DHS/ICE. The FBI's involvement in Secure Communities is part of its partnership with DHS/ICE to share information in the FBI's Integrated Automated Fingerprint Identification System ("IAFIS"). IAFIS, which is managed by the FBI's Criminal Justice Information Services Division ("CJIS"), is a biometric database that stores fingerprints and criminal history.² The sharing of information between the FBI's IAFIS and DHS's Automated Biometric Identification System ("IDENT") is known as biometric interoperability. This interoperability enables DHS/ICE to access the FBI's IAFIS system.

¹ The other three declarations previously submitted by the FBI are: January 28, 2011 Third Hardy [Vaughn] Declaration (inadvertently dated January 28, 2010) (justified the application of FOIA exemptions for the FBI's January 17, 2011 release); February 18, 2011 Fourth Hardy Declaration (explained the FBI's technological limitations of FBI's FOIPA Document Processing System "FDPS" and why FBI was unable to comply with Court's February 7 and February 15, 2011 Orders); and March 23, 2011 Fifth Hardy Declaration (provided additional details concerning the technical aspects of the FBI's FOIA response and processing systems).

² Established in 1992, CJIS serves as the focal point and central repository for criminal justice information services. CJIS manages IAFIS. See [First] Hardy Declaration, ¶¶ 14-18.

(7) In order to locate all potentially responsive documents concerning Secure Communities which were responsive to plaintiffs' FOIA request, RIDS employed two mechanisms. First, RIDS conducted its standard electronic search of the FBI's Central Records System ("CRS"). When this search failed to yield any responsive material, RIDS requested a manual search for records from those FBI divisions and offices reasonably likely to have responsive records.

A. Explanation of the FBI's Central Records System

(8) The FBI began its search for potentially responsive records with a search of the CRS, which is the customary first step in responding to FOIA requests submitted to the FBI. The CRS enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBIHQ. Records that are pertinent to a specific field office of the FBI are maintained in that respective field office. Although the CRS is primarily designed to serve as an investigative tool, the FBI utilizes the CRS to conduct searches that are likely to yield documents responsive to FOIA and Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System ("ACS").

(9) Access to the CRS is obtained through the General Indices, which are arranged in alphabetical order. The General Indices consist of index cards on various subject matters that are searched either manually or through the automated indices. The entries in the General Indices

fall into two categories:

(a) A “main” entry – A “main” entry, or “main” file, carries the name corresponding with a subject of a file contained in the CRS.

(b) A “reference” entry – A “reference” entry, sometimes called a “cross-reference,” is generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another “main” file on a different subject matter.

(10) Access to the CRS files in FBI field offices is also obtained through the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. Searches made in the General Indices to locate records concerning a particular subject, are made by searching the subject requested in the index. FBI field offices have automated indexing functions.

(11) On or about October 16, 1995, the ACS system was implemented for all field offices, Legal Attachés (“Legats”), and FBIHQ in order to consolidate portions of the CRS that were previously automated. Because the CRS cannot electronically query the case files for data, such as an individual’s name or social security number, the required information is duplicated and moved to the ACS so that it can be searched. Over 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS.

(12) ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management (“ICM”) – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin (“OO”), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices (“LOs”) – formerly known as Auxiliary Offices. When a case is opened, it is assigned a Universal Case File Number (“UCFN”), which is utilized by all FBI field offices, Legats, and FBIHQ that are conducting or assisting in the investigation. Using a fictitious file number “111-HQ-12345” as an example, an explanation of the UCFN is as follows: “111” indicates the classification for the specific type of investigation; “HQ” is the abbreviated form used for the OO of the investigation, which in this case is FBIHQ; and “12345” denotes the individual case file number for the particular investigation.

(b) Electronic Case File (“ECF”) – ECF serves as the central electronic repository for the FBI’s official text-based documents. ECF supports the universal serial concept, in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index (“UNI”) – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 111.7 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality, Social Security number, address, and/or date of event.

(13) The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent (“SA”) assigned to work on the investigation, the Supervisory SA (“SSA”) in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a “key” (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of

federal criminal statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual, e.g., “Secure Communities.”

B. FBI’s Search for Responsive Records

(14) On March 2, 2010, the RIDS used ACS to perform a search of the CRS using the term “Secure Communities.” This search did not locate any responsive records.

(15) Based on the nature of the FBI’s limited involvement in the Secure Communities program – the FBI facilitates ICE’s access to IAFIS but the FBI has no investigative role within Secure Communities – and the results of the CRS search, RIDS concluded that it needed to conduct an individualized inquiry outside of the CRS system in order to determine if the FBI had any documents responsive to plaintiffs’ FOIA request.

(16) Based on plaintiffs’ FOIA request and RIDS’s knowledge about Secure Communities upon receiving the FOIA request, RIDS prepared an internal memorandum directed to the FBI divisions and offices reasonably expected to have potentially responsive records. On April 6, 2010, this search memorandum was circulated to the following FBIHQ divisions and offices: Counterterrorism, Criminal Investigative, CJIS, Cyber, Inspection, Intelligence Directorate, the National Security Law Branch in the Office of the General Counsel, and the Office of Public Affairs within the Director’s Office.³ The search memorandum requested the front office personnel of the designated divisions to coordinate within their respective divisions

³ RIDS included most of these divisions and offices as part of the initial search in the likelihood that the Secure Communities program pertained to the FBI’s national security investigations. However, as established by subsequent searches, most of the divisions and offices subject to the search memorandum did not possess Secure Communities-related records, because they have no involvement with IAFIS-IDENT interoperability or local law enforcement records contained in IAFIS.

or offices the search for any potentially responsive documents in their possession from January 2007 through February 3, 2010, including a review of database systems and all employee e-mail.⁴

(17) In response to this search memorandum, only CJIS indicated that it had potentially responsive records to plaintiffs' FOIA request. All other divisions and offices notified RIDS that they had completed their searches and had no responsive documents. CJIS's IIU subsequently undertook a comprehensive review of its documents related to interoperability, of which the FBI's involvement with Secure Communities program is one small piece. Under CJIS's Operational Programs Branch, the Interoperability Initiatives Unit ("IIU") is responsible for all coordination and documentation of IAFIS with IDENT, as a result of DHS/ICE's Secure Communities initiative. In consultation with IIU, RIDS determined that CJIS employees store their electronic files in a variety of ways. Each employee has the ability to save files on the Unclassified and Secret systems in their Outlook email, their personal drives, and a shared drive located on the Unclassified and Secret systems.

(18) Each of the 22 employees within IIU at the time was required to search his or her paper files, e-mail and personal drives for files related to Secure Communities. If any potentially responsive files were identified, employees were instructed to place a copy of the file in a "Secure Communities" designated folder on the shared drive on the Unclassified and Secret systems created specifically as a result of the FOIA request. Additionally, CJIS conducted

⁴ Due to an inadvertent administrative error, the search memorandum incorrectly listed the search cut-off date as February 3, 2010 (the date of plaintiffs' request letter). The correct date should have been March 2, 2010 (the date of RIDS's first search of the CRS). This error turned out to be inconsequential as CJIS was the only division which located responsive records and CJIS's search was conducted through May 9, 2010. Moreover, because none of the other divisions and offices identified above identified any responsive records for the January 2007-February 3, 2010 time period, the FBI has no reason to believe that they would possess responsive records from February 4, 2010 through March 2, 2010.

searches of all other IIU operations folders on shared drives on both the Unclassified and Secret systems. Potentially responsive records were also located within the Access Integrity Unit (AIU), which is a unit within the FBI's Office of the General counsel that is imbedded within CJIS to provide legal counsel. CJIS's searches located an exceptionally large volume of potentially responsive material – two CD-Roms and three DVDs, containing approximately 9 gigabytes of potentially responsive information in the aggregate. Many of the data files were “zipped,” meaning that the true volume of the content was not evident. CJIS also sent one box of hard copies of potentially responsive documents to RIDS. (See [First] Hardy Declaration ¶¶24-29.)

(19) While RIDS was in the process of scoping the large volume of potentially responsive information it received from CJIS, on June 25, 2010 plaintiffs submitted their RPL designating ten subjects from its FOIA request that it deemed most important. (See **FBI-Exhibit B.**) Because the RPL is a subset of plaintiffs' FOIA request and because the FBI reasonably believed it had identified all potentially responsive documents to the FOIA request, the FBI did not conduct a separate search for documents responsive to the RPL. Rather, it began reviewing the potentially responsive records it had already received for materials responsive to the RPL.

(20) The FBI released five RPL-responsive documents in August 2010. Due to continued uncertainty concerning the scope of plaintiffs' FOIA request in the late summer and fall of 2010, the FBI continued its review and processing of thousands of documents identified as responsive to the FOIA request in its entirety. The FBI made a second release of 11 documents responsive to the original FOIA request on November 18, 2010. In addition, in conjunction with

its February 25, 2011 release of all documents responsive to the RPL as required by the Court's December 17, 2010 Order, the FBI released nearly all of the documents it had previously identified as responsive to plaintiffs' FOIA request.⁵ This February release consisted of approximately 5398 documents, in excess of approximately 29,000 pages that included approximately 89 Excel spreadsheets responsive to the RPL.

SEARCH FOR "OPT-OUT" RECORDS

(21) By order dated December 17, 2010, the Court directed the defendants to produce "opt-out" records by January 17, 2011, using a search cut-off date of October 15, 2010. In response to this Order, RIDS conducted a search of the e-mails and PowerPoint documents previously collected as potentially responsive to the FOIA request using the terms "opt-out" and "opt out." In addition, CJIS personnel reviewed all previously collected records, other than e-mails and PowerPoint documents, to identify responsive opt-out records. Because the Court's order required the production of records created after the cut-off date used for the FBI's initial search, the FBI conducted a new search specifically for opt-out records that were created during the time period not covered by the original search for records responsive to the FOIA request, i.e. between March 2, 2010 and October 15, 2010.

(22) This new search was conducted via a search memorandum circulated on December 15, 2010 to CJIS and two offices within the Director's Office: the Office of Public Affairs ("OPA"), and the Office of Congressional Affairs ("OCA"). The new search memorandum requested all records from February 4, 2010 (the day after Plaintiffs' FOIA

⁵ RIDS identified but did not process approximately 2700 Excel spreadsheets responsive to the original FOIA request but not responsive to the RPL.

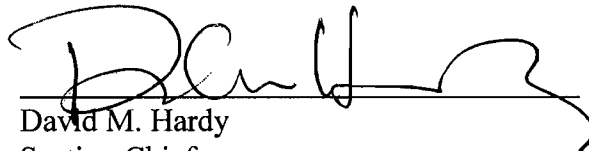
request) through October 15, 2010 (the search cut-off date established by the Court). The FBI searched within CJIS for opt-out records because CJIS maintains IAFIS, which is the primary link between the FBI and Secure Communities, and because all documents previously identified as responsive to plaintiffs' FOIA request originated within CJIS. However, in an effort to be as thorough as possible, RIDS also addressed the search memorandum to OPA and OCA due to the increased public interest in the opt-out issue at the time of the new search. OCA identified one page of responsive information. OPA did not have any responsive records.

(23) As with the search for records responsive to plaintiffs' FOIA request, RIDS coordinated its search efforts in conjunction with the subject matter experts, the IIU within CJIS. In order to identify "opt-out" records, CJIS initially searched its records using the term "opt-out" on both the Unclassified and Secret systems using the Microsoft search functionality. However, as the subject matter experts, the IIU recognized that states working with the FBI in matters related to Secure Communities would not always use the term "opt-out" in discussions with CJIS. Thus, CJIS conducted an additional manual review of its records to locate potentially responsive material. This search included a review of all potentially responsive documents created or modified between February 4, 2010 and October 15, 2010. Within IIU, responsibility is divided into four geographic regions, and each region is assigned a point of contact. Each point of contact reviewed materials in his or her possession and on the IIU shared drives, including emails, for opt-out related documents.

(24) As a result of this search, CJIS identified 2112 pages of potentially responsive records. Pursuant to the Court's December 17, 2010 Order, all responsive opt-out documents were produced to plaintiffs on January 17, 2011.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of January, 2012.



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