

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs, :

- v - :

UNITED STATES IMMIGRATION AND CUSTOMS :  
ENFORCEMENT, et al., :

Defendants. :

No. 10-CV-3488 (SAS)

**DECLARATION  
OF DAVID J. PALMER**

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David J. Palmer, pursuant to 28 U.S.C. § 1746, hereby declares and states as follows:

**I. INTRODUCTION**

1. I am the Deputy Associate General Counsel, Legal Counsel, in the Office of the General Counsel (“OGC”) at the U.S. Department of Homeland Security (“DHS”). I have held this position since July 2008. My responsibilities include the oversight and coordination of responses to Freedom of Information Act (“FOIA”) requests made of DHS headquarters components, and the programs they conduct, once those requests become the subject of contested litigation. I am personally familiar with DHS’s procedures for responding to FOIA requests, including search procedures.

2. As the Deputy Associate General Counsel, I am personally familiar with DHS’s procedures and actions taken in response to the FOIA request at issue in the above-captioned case. I was responsible for overseeing and coordinating the search conducted by DHS in response to this request after the filing of the complaint in the above-captioned case, and I am personally familiar with the searches conducted by DHS in response to the request.

3. I present this declaration in support of DHS's motion for partial summary judgment on the adequacy of its searches for "opt-out" and "Rapid Production List" records. The statements contained in this declaration are based on my personal knowledge, my review of relevant documents kept by DHS in the ordinary course of business, and information provided to me by other DHS employees in the course of their official duties. I incorporate by reference the declarations of Donna A. Lewis of January 14, 2011, William Holzerland of March 23, 2011, and my own declaration of November 12, 2010.

## **II. PLAINTIFFS' FOIA REQUEST AND THE INSTANT LITIGATION**

4. On or about February 3, 2010, DHS's Privacy and FOIA office received the request that is the subject of the instant litigation. The general subject matter of the request is Secure Communities, which is a comprehensive plan to identify and remove criminal aliens currently in the United States. Operation of Secure Communities is primarily the responsibility of Immigration and Customs Enforcement (ICE), a DHS component and a separate defendant in this litigation. All of ICE's operations, including Secure Communities, are conducted under the general supervision of DHS Headquarters.

5. Plaintiffs' 21 page request sought records relating to several broad categories of records: "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." It was further divided into over 150 subparts, and sought "any and all records" related to virtually every aspect of Secure Communities.

6. On or about March 3, 2010, DHS FOIA forwarded Plaintiffs' request to the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program, the Office of the General Counsel (OGC), and the Office for Civil Rights and Civil Liberties (CRCL), which were identified as

the programs or offices within DHS that were likely to possess documents responsive to plaintiffs' FOIA request. CRCL and OGC are headquarters components, and US-VISIT is administered by the National Protection and Programs Directorate, which is part of DHS headquarters.

7. US-VISIT was tasked with searching for records because it provides support to ICE in its operation of Secure Communities. Specifically, US-VISIT manages the Automated Biometric Information System (IDENT), which is a database that houses more than 130 million unique fingerprint records. The overwhelming majority of those fingerprints were provided by foreign nationals in connection with their travel to and from the United States, the procurement of immigration benefits, or immigration enforcement actions. Beginning in October 2008, IDENT became interoperable with the Department of Justice's criminal fingerprint database, the Integrated Automated Fingerprint Identification System (IAFIS). "Interoperability" refers to the ability of IDENT and IAFIS to share biometric and other data between the two databases in near-real time. This capability allows decision makers in the immigration management and border security community to simultaneously search both criminal and immigration records when screening an individual, including screening visa applicants, foreign nationals seeking admission at the ports of entry, border patrol apprehensions, and background checks by the Office of Personnel Management for individuals pursuing federal employment. Interoperability plays a role in Secure Communities. When a person is arrested by law enforcement officers in a jurisdiction in which Secure Communities' use of interoperability has been activated, that person's fingerprints are automatically checked against both IAFIS and IDENT. If there is a match to a record in IDENT, the database automatically generates and transmits a response to IAFIS, which in turn sends the information to ICE's Law Enforcement Support Center (LESC). The LESL then conducts an immigration status determination.

8. OGC provides legal support to DHS and all its components. Attorneys in components such as ICE report to the General Counsel and are part of the OGC. Additionally, OGC

headquarters attorneys provide legal support to the DHS General Counsel, the DHS components, and the agency in general. OGC was tasked with conducting a search because attorneys in several OGC headquarters sections were likely to have provided legal support either to ICE or to headquarters offices, such as US-VISIT or CRCL, on issues related to Secure Communities.

9. CRCL provides advice to the Secretary of DHS and to all DHS components on the impact that the agency's programs may have on civil rights and civil liberties. CRCL was tasked with searching for documents responsive to plaintiffs' request because it was involved in civil rights issues related to Secure Communities, and because it may have received complaints from the public regarding the operation of Secure Communities. CRCL operates a compliance unit that investigates allegations that the Department's programs have violated an individual's civil rights or civil liberties. While DHS was not aware of any such complaints at the time plaintiffs made their request, if such a complaint had been made it would have been made to the CRCL.

10. All DHS custodians were instructed to search for responsive records within their hard copy files and electronic files, the latter of which would include active email accounts, email archives (see paragraph 11 below), and other electronic files within their possession, custody, or control. These searches are discussed in further detail below.

11. DHS uses Microsoft Outlook as its electronic mail system. US-VISIT uses Microsoft Outlook 2003, while the other DHS headquarters components referred to in this declaration use Microsoft Outlook 2007. Microsoft Outlook allows DHS employees to create their own individual email archives (typically in the form of PST files), which are visible and accessible as "folders" in the employee's email systems. Users may create subject specific folders to store emails, or if they choose they may simply keep emails in chronological order without creating folders. In addition, DHS headquarters components other than US-VISIT use Symantec Enterprise Vault to automatically

store email after three months. The Enterprise Vault system is accessible from a user's desktop, and mirrors the folders created by individual users, if any.

12. It is well understood within DHS that searches for documents responsive to FOIA requests will require electronic searches of Microsoft Outlook and the Enterprise Vault. All department employees are trained on the general use of these systems and there is a toll-free service line available during business hours for employees who are unfamiliar with the way in which to conduct electronic searches on Outlook and the Enterprise Vault. Custodians who conduct searches in response to FOIA requests are told to seek assistance if they are unsure of how to conduct a search on these systems.

13. Searches on Outlook and the Enterprise Vault default to a search of the full text of emails. Users were not instructed on exactly how to conduct their electronic searches but are expected to search the full text of all documents. Attachments to emails remain joined to the emails in both Outlook and the Enterprise Vault. Neither Outlook nor the Enterprise Vault will search attachments, but DHS's experience in this case, and in most other FOIA searches, is that the subject matter of the attachments is explained in the body or the subject of the email. DHS does not use .zip files as a matter of course, and documents responsive to this request were not contained in any .zip files.

14. In my role as Deputy Associate General Counsel, I reviewed the custodians' responses and the searches they conducted. All documents generated as a result of the custodians' searches were sent to me and, together with subordinate counsel and other FOIA professionals, I reviewed those records for responsiveness. Custodians were instructed to search paper and electronic documents and files pursuant to search procedures discussed below.

**III. DHS'S SEARCH FOR RECORDS RELATED TO THE RAPID PRODUCTION LIST, INCLUDING OPT-OUT RECORDS**

15. As early as June 9, 2010, DHS, through counsel, attempted to clarify and focus the scope of plaintiffs' request but the parties could not reach an agreement. Despite this failure to reach an agreement, the DHS programs and offices described above continued searching for potentially responsive documents.

16. On June 25, 2010, plaintiffs provided defendants with a "Rapid Production List" ("RPL") that identified the categories of records they sought on a priority basis. Among the categories on the RPL were "opt-out records," i.e. records pertaining to the issue of whether states or localities may opt out or limit their participation in Secure Communities. On July 9, 2010, defendants agreed to search for, process, and produce records responsive to the RPL.

17. In October 2010, plaintiffs informed the defendant agencies that they sought one part of the RPL, "opt-out records," as their highest priority. DHS determined that the offices identified above, specifically OGC, CRCL and US-VISIT, as well as the Executive Secretariat (on behalf of the Office of the Secretary of DHS), would likely maintain records related to the Opt-Out issue and the RPL. Each of these offices was directed to initiate a separate, supplemental search for records concerning the phrase "OPT OUT" or that may have been otherwise related to a jurisdiction's ability to opt out of the Secure Communities program, and after that search was completed was directed to conduct searches for documents responsive to the remainder of the RPL.

18. The definition of opt-out records that was provided to the custodians was as follows: "For purposes of this search, 'opt out' is defined as: (1) the process by which jurisdictions may (or may not) decline or limit their participation in the Secure Communities

program; and (2) the technical capability of DHS or the FBI to honor requests by jurisdictions to decline or limit their participation in the program.”

19. Although custodians did not all use the exact same search terms, it was recommended that DHS custodians use the following search terms during the search for responsive records relating to the opt-out search: “opt-out,” “mandatory,” “voluntary,” “participation,” “opting-out,” “choosing,” “mandate,” and “opt out.” In matters in litigation such as the instant matter, it is DHS’ practice to advise custodians that they should not limit their searches to suggested search terms, but rather that they should use their knowledge of their particular record keeping systems and practices to conduct a search that they believed was likely to uncover any and all records that would be potentially responsive to Plaintiffs’ request. That advice was given in this case.

20. Custodians in the various DHS offices conducted word searches of electronic files and focused on electronic documents in folders related to Secure Communities or on paper files that were related to Secure Communities. All custodians searched their personal files. All responsive documents would be in the custodians’ personal files and not shared drives, and the shared drives would only contain duplicates of documents in the personal files. For that reason shared drives were not searched as part of either the opt-out or the RPL searches. Responses to the search were tracked by an Attorney-Advisor, who monitored their responses. The Attorney-Advisor did not monitor the use of search terms, but rather relied upon the custodians to conduct appropriate searches given the requests. After documents were gathered they were provided to the Attorney-Advisor who reviewed the search results and discussed them with each custodian to confirm that the custodian reviewed his or her files.

A. *US-VISIT's Searches*

21. Within US-VISIT, DHS determined that the Program Integration and Mission Services Division (PIMS) – the US-VISIT division responsible for planning and deploying biometric services, and which includes Business Policy and Planning, Identity Services and Project Management branches – would have responsive documents. This is the Division with direct responsibility for the activities that are implicated by plaintiffs' request, and that would possess responsive documents.

22. The individuals from PIMS who conducted the search were the Assistant Director of the PIMS division; the Deputy Assistant Director, Business Policy and Planning Branch; the Deputy Assistant Director, Identity Services Branch; the Identity Services Branch Management and Program Analyst/Portfolio Manager - Department of Justice Interoperability; the Deputy Assistant Director, Project Management Branch; and the Project Manager who oversaw the support provided to Secure Communities. DHS determined that these individuals were the persons most likely within US-VISIT to possess documents responsive to the opt-out issue and the Rapid Production List because they were working – or had worked – on issues related to Secure Communities.

23. Within US-VISIT, the records of the Deputy Director and the Chief Information Officer and Assistant Director, Information Technology Management Division (CIO/AD-ITM) were not searched for paper or electronic files because it was determined early on (via conversations with US-VISIT staff) that it was unlikely that these individuals would have responsive documents. This is especially true for the CIO/AD-ITM, who focuses on *macro*-level program issues, such as the overall architectures of the IDENT and ADIS databases, and not project-level matters or smaller efforts, such as Secure Communities. Likewise, because US-



VISIT's support for Secure Communities was handled primarily at the staff level, it was determined that the US-VISIT Deputy Director was unlikely to have any responsive documents.

24. Two OGC Attorney-Advisors assigned specifically to US-VISIT were, like the US-VISIT custodians in PIMS, identified as the custodians most likely to possess any responsive documents. This is because their specific duties included advising US-VISIT on legal issues and providing support on matters being handled by US-VISIT, including Secure Communities. In addition, the Associate General Counsel for Immigration, the Deputy General Counsel, the Chief of Staff to the General Counsel, and an additional Attorney-Advisor were also tasked with searching for responsive documents. These attorneys were all responsible for either providing general advice on immigration matters, would have reviewed the work of attorneys who were assigned to provide advice on Secure Communities, or would have provided advice specifically on Secure Communities. The individuals identified above were the only OGC personnel involved in the matters that are at issue in plaintiffs' requests for opt-out and RPL records.

25. US-VISIT custodians were given the "opt-out" definition set forth in paragraph 18 above, and were instructed to search all hard copy and electronic records. The following search terms were recommended: "opt-out," "mandatory," "voluntary," "participation," "opting-out," "choosing," "mandate," and "opt out." Employees were not told to limit their searches to these terms or to use these terms in any specified way, but rather to search for documents based on their knowledge of their involvement with Secure Communities. The exact manner in which searches were conducted was left to the discretion of the individual custodians, as they would have the best understanding of how to most effectively search their own files or the files of their group.

26. Most US-VISIT custodians conducted their searches by manually reviewing documents and emails -- usually focusing on materials within their "Secure Communities" or related folders -- and/or ran search terms that they crafted (e.g., "opt" or "opt out") to best identify responsive records within their individual file systems. As discussed in paragraph 20 above, the work of the US-VISIT custodians was reviewed by an Attorney-Advisor.

*B. CRCL's Searches*

27. CRCL's search included various sections within that office including all CRCL employees in CRCL sections that deal generally with immigration issues. These sections are the CRCL Compliance Unit, which investigates complaints alleging civil rights violations, and the Programs Section, which provides general civil rights advice on DHS programs. The CRCL search also included the CRCL's Front Office, and files maintained by the Officer for Civil Rights and Civil Liberties (the "Officer"), who is the appointee who leads CRCL. In addition to specifically tasking these sections, CRCL sent a general email to all its employees advising them of the search and requesting that any employees outside of these sections who may have had responsive documents conduct a search.

28. Only a small number of CRCL employees have worked on issues related to Secure Communities. Because of the small number of persons who worked on Secure Communities, and CRCL's limited involvement in the program during the time period relevant to this search, it was not necessary to provide CRCL with search terms other than "Secure Communities." Indeed, the Officer knew that during the relevant time period she was the *only* CRCL employee who was involved in Secure Communities, and that *all* of her documents could be found by using the term "secure communities."

29. Specifically, the Officer searched her email files for any records related to Secure Communities, including any records that discussed the opt-out issue. Her search also included a manual review of her paper files, but all the documents therein were printouts of emails or documents attached to those emails. CRCL primarily maintains its records in electronic formats. The Officer confirmed that her search uncovered all the documents in CRCL's possession that were responsive to plaintiffs' request.

*C. Office of the Secretary's Searches*

30. Records maintained by the Office of the Secretary were searched through the Executive Secretariat. This search included any documents sent to or from the Secretary. In addition, the Chief of Staff, the Deputy Chief of Staff, and the Counselor to the Secretary searched their email, electronic, and paper files. These were the only individuals who would have responsive documents and thus were the only custodians searched. The Secretary does not have an email account, so there could be no search for email sent to the Secretary. All documents sent to and from the Office of the Secretary, including the Secretary herself, are maintained by the Executive Secretariat in electronic and paper format. The Executive Secretariat conducted word searches of computer files, including electronic mail, based on the plaintiffs' requests.

31. Like the other custodians tasked with searching for opt-out records (see paragraph 18 above), the custodians listed above in paragraph 30 were given the following definition of opt-out: "For purposes of this search, 'opt out' is defined as: (1) the process by which jurisdictions may (or may not) decline or limit their participation in the Secure Communities program; and (2) the technical capability of DHS or the FBI to honor requests by jurisdictions to decline or limit their participation in the program."

32. In their search for opt-out records, these custodians used the following search terms: “opt-out,” “mandatory,” “voluntary,” “participation,” “opting-out,” “choosing,” “mandate,” and “opt out.” They were not instructed to use connectors or any other modifications of these terms, but were specifically advised that they should not limit their searches to these suggested search terms. In addition to the search terms, they were asked to use their knowledge of their record keeping systems and their involvement with Secure Communities to conduct a search that they believed was likely to uncover any and all records that would be potentially responsive Plaintiffs’ request.

33. I personally reviewed the results of the searches conducted by the Office of the Secretary. I asked each of the custodians to explain what files they searched to uncover responsive documents, and I confirmed that they had followed the instructions given, as described above in paragraphs 10-11. I was advised that all of the relevant documents were either emails or documents attached to emails, and that the searches focused primarily upon the emails contained in Microsoft Outlook and the Enterprise Vault. The use of search terms was not monitored, but rather we relied upon the custodians to conduct appropriate searches given the requests and their knowledge of the documents in question.

*C. Rapid Production List Searches*

34. After completing the search for opt-out documents, the offices and custodians described in paragraphs 6-10, 18 and 21-33 above then undertook a search for documents responsive to the Rapid Production List. Custodians were given a copy of the RPL. With the exception of CRCL, the searches and review of documents produced as a result of these searches were done in the exact same manner as the search for opt-out documents, as this search is described in paragraphs 18, 21 – 26 and 30-33 above. These programs and offices were tasked

with searching for Rapid Production List documents because it had already been determined that they would be the most likely to have documents responsive to plaintiffs' request as a whole. The number of DHS headquarters offices, programs and employees involved with Secure Communities is limited, and all of those offices, programs and employees are identified in this declaration.

35. CRCL's search for opt-out documents, as described above, captured all documents related to Secure Communities that were responsive to plaintiffs' request. CRCL did not conduct an additional search for RPL documents as documents responsive to both the opt-out issues and the RPL were identified during the search for opt-out documents.

36. While the steps taken by the remaining DHS custodians to search for documents responsive to the RPL were identical to the steps taken to search for opt-out documents, the searches differed with respect to the search terms used to find responsive documents.

37. As noted above, all DHS custodians were given a copy of the RPL. DHS custodians were not given specific search terms, but were asked to review carefully the RPL to determine if they had any documents that would be responsive. Custodians at both US-VISIT and the Office of the Secretary were asked to search for responsive documents based on their knowledge of their filing systems and their involvement in the parts of Secure Communities covered by the RPL.

38. US-VISIT employees were, based on the plaintiffs' request, able to search for specific categories of documents that would possibly be responsive to plaintiffs' request. Plaintiffs' request, for example, sought "regularly generated statistical reports" on Secure Communities and cumulative statistics compiled on Secure Communities. Gathering these reports did not require use of search terms as the custodians were aware of where responsive

documents would be located. Given the wording of the RPL, custodians were able to conduct targeted searches that did not require the use of search terms.

39. Similarly, the custodians in the Office of the Secretary were able to search for documents without relying on suggested search terms. Given the wording of the RPL, custodians were able to conduct targeted searches that did not require the use of search terms. For example, records related to the creation or revision of certain enumerated media document could be located by searching for the specific documents identified by the plaintiffs. The same is also true for plaintiffs' request for "specific enumerated records related to Secure Communities and racial profiling."

40. My review of the documents produced as a result of the US-VISIT and Office of the Secretary searches was identical to the review that had been done for the opt-out documents, as described in paragraphs 14 and 33.

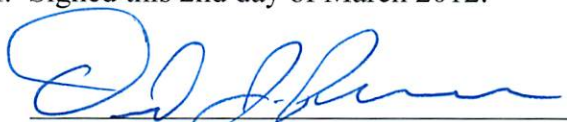
41. DHS produced all of the records it located in response to the opt-out search to the plaintiffs on January 17, 2011. This was approximately 317 pages of documents. DHS produced all of the records it located in response to the RPL on February 25, 2011. This was approximately 300 pages of documents.

42. DHS conducted a thorough search of all custodians identified as reasonably likely to have responsive opt-out and RPL records. The instructions that were given to those custodians provided the appropriate level of guidance for conducting the searches, while also allowing the custodians to bring to bear their knowledge of their own records and the nature of their involvement with Secure Communities. Furthermore, DHS attorneys and FOIA professionals reviewed the results of these searches to ensure that they were conducted in compliance with the instructions that were given. DHS's search was reasonably designed to

identify potentially responsive records, and ultimately led to the production of records responsive to both the opt-out and RPL issues.

**VI. JURAT CLAUSE**

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this 2nd day of March 2012.

  
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David J. Palmer