Exhibit G

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor
New York, New York 10007

September 23, 2011

BY E-MAIL
Sunita Patel, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

Re: *National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency et al.*, No. 10 Civ. 3488 (SAS)

Dear Ms. Patel:

Pursuant to the Court's direction during the conference on August 24, 2011, we write in response to plaintiffs' letter dated August 8, 2011 (the "August 8 Letter" or "Aug. 8 Ltr."), which purports to identify inadequacies in defendants' searches for Opt-Out and Rapid Production List ("RPL") records produced in the above-referenced matter between August 2010 and February 2011.

The August 8 Letter raises numerous alleged deficiencies in defendants' searches. Specifically, it posits additional offices and custodians that plaintiffs allege should have conducted searches but did not, *see* Aug. 8 Ltr. at 2-9, 16, lists documents or categories of documents that plaintiffs claim are responsive but were "missing" from defendants' productions, *see id.* at 9-13, 16-19, and describes documents that defendants have already informed plaintiffs do not exist, *see id.* at 14. The August 8 Letter also demands that defendants provide plaintiffs with "information about the agencies' file structures and information systems," as well as "the actual search terms used by each office, including variation[s] used by only certain custodians." *See id.* at 15-16, 19.

As a threshhold matter, the issue of the adequacy of defendants' searches is appropriately resolved on a motion for summary judgment, pursuant to which defendants would submit reasonably detailed declarations to establish the adequacy of their searches. *See, e.g., Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Such affidavits would be entitled to a presumption of good faith, *see, e.g., id.*; *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and plaintiffs would be entitled to discovery only if they could "make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations," *Carney*, 19 F.3d at 812.

In this respect, plaintiffs mischaracterize defendants' January 26, 2011 letter (the "January 26 Letter" or "Jan. 26 Ltr.") by claiming that defendants agreed that "if Plaintiffs

challenged the adequacy of the search for the Opt-Out Records, Defendants would provide a more comprehensive description of the searches." Aug. 8 Ltr. at 1. To the contrary, consistent with the case law cited above, defendants indicated that "[i]n the event the adequacy of defendants' search for opt-out records is *litigated*, defendants will submit *declarations* providing comprehensive descriptions of each agency's search." Jan. 26 Ltr. at 1 n.1 (emphasis added). Thus, if plaintiffs wish to litigate the adequacy of defendants' searches, we ask that they inform defendants so that we may submit a pre-motion conference letter to the Court, and thereafter move for summary judgment. Defendants' motion for summary judgment would be supported by declarations describing the agencies' searches in reasonable detail and providing, *inter alia*, information concerning the agencies' information systems and the search methods and/or search terms used by various custodians.[1]

Of course, litigating the adequacy of defendants' searches now would require the agencies, particularly ICE, to transition their already scarce resources away from processing the Final Production List ("FPL") records and redesignate them to address adequacy of search matters. This would delay plaintiffs' receipt of the FPL records. It would also risk having the Court adjudicate the adequacy of defendants' searches twice — once now and again after defendants have completed their FPL productions. To avoid this inefficiency and ensure that plaintiffs receive the FPL records as quickly as possible, all adequacy of search issues should be litigated at the same time — after defendants have completed their processing of the FPL.

In any event, defendants' searches were adequate. The issues plaintiffs raise in the August 8 Letter are insufficient to demonstrate any inadequacy. An agency's search is adequate if it is reasonable. A search is reasonable if it is "'reasonably designed to identify and locate responsive documents.'" *Garcia v. DOJ, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) (quoting *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 566 (S.D.N.Y. 1989)). Adequacy thus turns on "'whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (quoting *Safecard*, 926 F.2d at 1201). In other words, to satisfy its obligations under FOIA, an agency "need not have conducted a perfect search." *Reynolds v. United States*, 350 Fed. Appx. 474, 475 (2d Cir. 2009). This comports with the general principle that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000) (quotations omitted).

With respect to plaintiffs' claims that defendants should have searched certain offices or custodians, some of the offices and custodians that plaintiffs identify were, in fact, searched, and

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[1] Defendant OLC completed its search for records responsive to plaintiffs' original FOIA request and identified just two responsive records, both of which were referred to ICE. OLC's substantive records are stored in two types of electronic systems — a shared central storage system for final work product and the computer accounts of individual attorneys — both of which were searched.

to the extent other offices or custodians were not searched, this was because the agencies reasonably determined that they were unlikely to possess records responsive to the issues implicated by the Opt-Out and RPL productions. This is sufficient to sustain the agency's burden of establishing an adequate search. *See, e.g., Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that an adequate search is one that includes those systems of records reasonably believed likely to contain responsive documents); *Am.-Arab Anti-Discrimination Comm. v. DHS*, 516 F. Supp. 2d 83, 88 (D.D.C. 2007) ("a search [that] would be futile . . . is unnecessary"); *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 10-11 (D.D.C. 2004) (rejecting plaintiff's claim that a search was inadequate because the agency only searched certain individuals within an office). For example, contrary to plaintiffs' claims, ICE conducted searches of appropriate custodians within Enforcement and Removal Operations ("ERO") (including the then-ERO Director), the Office of State, Local and Tribal Coordination ("OSLTC"), and the Office of Policy, and also searched the records of every employee and contractor in the Secure Communities Program Management Office ("SC PMO"). Likewise, DHS searched those custodians within the Office of Public Affairs ("OPA") and Office of the General Counsel ("OGC") who were identified as having involvement with the issues implicated by the Opt-Out and RPL productions.

Plaintiffs' arguments that certain other custodians should have been searched are insufficient because they rely on speculation. *See Safecard*, 926 F.2d at 1201 ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them."); *cf. Grand Cent. P'ship*, 166 F.3d at 489 (on summary judgment, a plaintiff cannot establish agency bad faith "by purely speculative claims about the existence and discoverability of other documents"). For example, plaintiffs claim that ICE's Law Enforcement Support Center ("LESC") "was likely to have been aware of the decision about whether Secure Communities deployment would be voluntary or mandatory." Aug. 8 Ltr. at 2. In fact, the LESC is merely responsible for the technical receipt and processing of biometric information, and was not involved in Secure Communities policy discussions, including discussions of "opt-out" policy. As such, it was reasonable for ICE to conclude that it was unlikely that LESC would have records responsive to the issues implicated by the Opt-Out or RPL productions. Similarly, plaintiffs allege that the FBI's Office of Law Enforcement Coordination ("OLEC") "must have responded to Secure Communities-related queries." *Id.* at 9. Yet the FBI's Criminal Justice Information Services division ("CJIS"), which manages the FBI's IAFIS system (and whose custodians were searched for the FBI's productions), does not work through OLEC, but rather communicates directly with state and local law enforcement.

Plaintiffs also cannot demonstrate the inadequacy of defendants' searches by pointing to documents that are allegedly "missing." The case law is clear that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) ("[T]here is no requirement that an agency [locate] *all* responsive documents." (emphasis in original)); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994) ("In

judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed."); *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 105 (D.D.C. 2009) ("The principal issue is not whether the agency's search uncovered responsive documents, but whether the search was reasonable."). Put simply, "the focus of the adequacy inquiry is *not* on the results." *Hornbostel v. Dep't of the Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003) (emphasis added), *aff'd*, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

As with plaintiffs' claims regarding custodians, their claims regarding "missing" documents rely in large part on speculation that other types of documents might exist. *See, e.g.*, Aug. 8 Ltr. at 10 (speculating that "[t]here must have been discussions related to the preparations for" an April 2009 Congressional hearing), 13 (speculating on the existence of more documents than the "few records . . . produced from DHS and ICE which discuss the technical side of implementing Secure Communities"). Other allegations are simply incorrect. For example, plaintiffs claim that because "ICE did not produce any correspondence from earlier than July 2009," it "might have unjustifiably failed to search for records created before July 2009 when searching for the Opt Out Records." *Id.* at 11. In fact, consistent with plaintiffs' original FOIA request, ICE applied a search start date of October 1, 2007 to its searches for Opt-Out and RPL records. In another instance, plaintiffs criticize ICE's failure to produce "[r]ecords referencing Chief of Police George Gascon of the City of San Francisco and his proposed Enhanced Public Safety (EPS) Pilot Program." *Id.* at 12-13. Had such documents been uncovered as part of ICE's search for Opt-Out Records, they would have been produced to the extent they were non-exempt. But plaintiffs specifically requested such records in the Final Production List ("FPL"). Thus, to the extent such records are identified in ICE's FPL searches and are non-exempt, they will be produced.

Finally, plaintiffs list, without further explanation, three documents that they have previously requested, but that defendants have already explained to plaintiffs do not exist. However, even if such documents do or did at one time exist, "[n]othing in the law requires the agency to document the fate of documents it cannot find." *Roberts v. DOJ*, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 28, 1993). Moreover, plaintiffs have requested these exact documents in the FPL. Thus, to the extent defendants locate any such documents, they will produce them to the extent they are non-exempt.

Defendants produced approximately 50,000 pages of responsive records in the Opt-Out and RPL productions, and identified and reviewed tens of thousands of additional potentially responsive records as a result of their searches. The sheer breadth of this review and production supports defendants' position that their searches were adequate, and in both the instant letter and the January 26 Letter, defendants have provided plaintiffs with information sufficient to support the adequacy of their searches. Moreover, given the current procedural posture of this case — with defendants making regular productions of records responsive to the FPL, and the parties engaged in Court-ordered "Friends of the Court" meetings to set the parameters and schedule for the remaining FPL productions — litigating the adequacy of defendants' searches for Opt-Out and RPL records now would be an unnecessary distraction. Plaintiffs' own delay in raising

adequacy of search issues with respect to these documents (*i.e.*, between six months and one year after the productions in question were made) belies any claim that this issue is "time sensitive." Aug. 8 Ltr. at 19. To the extent plaintiffs wish to litigate the adequacy of defendants' searches, they should wait until defendants have finished their productions so that all adequacy of search issues can be litigated at once.

Nonetheless, to the extent plaintiffs seek to litigate the adequacy of defendants' Opt-Out and RPL searches now, please notify us so that, consistent with defendants' burden of defending their searches, we may write a pre-motion conference letter to the Court.

Sincerely,

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