UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, FEDERAL BUREAU OF INVESTIGATION, and OFFICE OF LEGAL COUNSEL

Defendants.

----------X

ECF CASE

10 CV 3488 (SAS) (KNF)

[Rel. 10 CV 2705]

REPLY DECLARATION OF BRIDGET P. KESSLER
EXHIBITS A - S

I, BRIDGET P. KESSLER, declare pursuant to 28 U.S.C. § 1746 and subject to the penalties of perjury, that the following is true and correct:

1. I am a licensed attorney and Clinical Teaching Fellow at the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law ("IJC"), one of the three co-Plaintiffs in the above-captioned matter.

THE OPT-OUT RECORDS AND THE RAPID PRODUCTION LIST AGREEMENT

2. Plaintiffs' February 2010 FOIA request ("the Request") included a request for "Opt-Out Records." *See* Kessler Decl. Ex. A (Plaintiffs' Request, 4) (requesting "Policies, Procedures and Objectives" including *but not limited to*: "Overview Documents" ("any

procedures for state or local jurisdictions to opt-out of Secure Communities"), "State and Local Agreements," and "Secure Communities Inquiry and Response Procedures"); *Id.* at 14-15 (requesting communications "related to Secure Communities . . . .") (emphasis added).

3. On June 9, 2010, Plaintiffs met with Defendants' counsel, Assistant United States Attorney Christopher Connolly ("Mr. Connolly"), for the first time about *NDLON, et. al., v. ICE et. al.*, 10-cv-3488. Present at that meeting was myself and Peter Markowitz of IJC, Sunita Patel and Ian Head of the Center for Constitutional Rights ("CCR"). Gitanjali Gutierrez of CCR participated by phone. At that meeting, I stressed the urgent public need for information about Secure Communities and identified several high priority issues, in part, at the request of Mr. Connelly. The first and top priority that I identified was records related to opting-out. I defined opt-out as the question of whether and how states and localities limit or negotiate their participation in Secure Communities. I clarified that records related to opt-out would be responsive to Section 1(a) of Plaintiffs' FOIA Request and might include legal and policy memoranda or other documents. I also identified that records shedding light on the issue of opt-out might also be communications responsive to Section 5 of Plaintiffs' FOIA Request. I noted that the Request uses the words "opt-out," but it is possible that the issue might be referred to differently in agency documents. I also explained that there were three situations in which the discussion of opt-out was likely to arise: 1) states that have refused to sign a Secure Communities Memorandum of Agreements, 2) localities that do not want to enter Secure Communities, and 3) states or localities that sign a Secure Communities Memorandum of Agreement, but want to limit certain aspects of that state or locality's participation in the program.

4. On July 7, 2010, I participated in a phone call with Gitanjali Gutierrez and Sunita Patel of CCR, and Mr. Connolly. On that call, the parties reached an agreement about processing and production of the Plaintiffs' Rapid Production List ("RPL"), which I provided to Defendants on June 25, 2010. During the July 7, 2010 call, Plaintiffs requested that the RPL narrowing agreement and RPL deadlines be reflected in a stipulation so ordered by the court. Defendants felt it was not necessary, but Plaintiffs felt such an order was important to ensure compliance with the RPL Agreement. As a compromise, Plaintiffs agreed to memorialize the RPL Agreement in a letter outside of settlement negotiations. Kessler Decl. Ex. H (Letter Memorializing the RPL Agreement).

5. The parties' agreed that Defendants' RPL production would include records related to opt-out, including, – "[n]ational policy memoranda, legal memoranda or communication relating to the ability of states or localities to opt-out or limit their participation in S-Comm." Kessler Decl. Ex. I, Connolly Decl. Ex. F. The RPL Agreement also required production of other records potentially relevant to opt-out, including, (1) "[c]opies of executed agreements related to S-Comm," specifying two categories of agreements: "[a]greements between ICE/DHS and FBI," (2) "[a]greements between DHS/FBI and local government or local law enforcement agencies," and (3) "any records that indicate how interoperability functions, including how responses are coded and routed, Originating Agency Identifier (ORI) coding, any other coding by geography or type. . . ." *Id.*

6. On July 27, 2010 Gitanjali Gutierrez and Ian Head of CCR, Nyasa Hickey an intern at CCR, Peter Markowitz and myself, of IJC, met with Mr. Connolly and Assistant United States Attorney Joseph Cordaro ("Mr. Cordaro"), and two representatives from the ICE Office of the Principal Legal Adviser ("OPLA"), Grace Cheng, and Melissa Keppel. At that meeting,

which took place just before the RPL production scheduled for July 30, 2010, I reiterated the urgent need for records related to opt-out. I also provided guidance to ICE OPLA regarding the meaning of opt-out and the search for records related to opt-out. I mentioned that, aside from official policy memos, there would likely be emails relevant to the opt-out issue.

7. On August 31, 2010, I sent an email to Mr. Connolly about the missed RPL deadline, and sought from Defendants' a date for production of the remaining RPL records. I wrote that ICE had previously "asked for an additional two weeks beyond the agreed-upon production date of July 30, 2010, to process and produce the remaining responsive records." I noted that in a phone conversation on August 13, 2010, Mr. Connolly had told me that ICE would set a date for that production during the week of August 23, 2010, but it had been "over four weeks since the agreed upon date for production, however, and ICE has neither produced the records nor set a date for the production." That email is attached as Exhibit A.

8. On August 31, 2010 in a phone call with Mr. Cordaro and Mr. Connolly, I asked whether ICE's second RPL production would include records related to the Secure Communities opt-out procedure. Mr. Connolly confirmed in response that he would touch base with ICE on these issues for clarification, and would resolve the opt-out records issue in the second RPL production scheduled for September 8, 2010, or in an additional production. I again provided guidance about searching for records related to opt-out.

9. On September 1, 2010, on behalf of Plaintiffs, I sent an email to Mr. Connolly memorializing the guidance Plaintiffs provided to ICE OPLA on July 27, and then again by phone regarding where ICE might locate opt-out records. In the email, I noted that "ICE has an obligation not to construe our request too narrowly and a simple search for the words 'opt out' would be inadequate." That email is attached as Exhibit B.

10. On October 1, 2010, Plaintiffs sent a letter to Mr. Connolly. In an attachment to the letter, we provided an update on the status of Plaintiffs' RPL. In that document, Plaintiffs indicated that Defendants had failed to produce some records responsive to Section II of the RPL for records related to opt-out. The October 1, 2010 "Status of Plaintiffs' Rapid Production List" and "Summary of Rapid Production List Records That Defendants Have Not Produced" is attached as Exhibit C.

11. On October 11, 2010, Plaintiffs sent an email to Mr. Connolly requesting immediate production of records related to opt-out, and three other categories of unproduced records within the scope of the RPL. As a courtesy to Defendants, Plaintiffs attached to that email a document containing search guidance, which clearly states "[t]his document is for the purposes of settlement negotiations only and does not narrow or limit the scope of Plaintiffs' FOIA Request." Connolly Decl. Ex. G.

12. On October 18, 2010, Plaintiffs sent a list of Proposed Search Terms to Mr. Connolly. Plaintiffs provided these search terms for the settlement negotiations. The parties had agreed that the list of search terms would serve as a starting point to begin a conversation about narrowing the Request based on search terms. Plaintiffs sent this list of proposed search terms at the request of Defendants. The search terms related to the entire request, and therefore included, but were not limited to, search terms for records related to opt-out. The list is labeled "draft" and "for purposes of settlement negotiations only." The first page of Plaintiffs' draft proposed search terms document is attached at Exhibit D.

PLAINTIFFS' REQUESTS FOR INFORMATION FROM DEFENDANTS

13. On June 8, 2010, June 9, 2010, June 11, 2010, June 25, 2010 and July 2, 2010, Plaintiffs stated in correspondences to Defendants that we are committed to significantly

narrowing the scope of the Request, but asked that Defendants provide Plaintiffs with information regarding the status of search and processing of the Request and Defendants' database and technology capabilities. For example, Plaintiffs sent Mr. Connolly a letter regarding the parties' first settlement negotiation meeting on June 9, 2010. An addendum to that letter specifies information requested from each agency regarding status of search and processing. Attached hereto as Exhibit E is a true and correct copy of that addendum. Defendants have provided limited and vague information in response. Plaintiffs have repeatedly stated that we are committed in principle to significantly narrowing the scope of the Request, but could not do so substantially until Defendants provided Plaintiffs with more of the requested information.

ADMINISTRATIVE PROCESSING

14. Defendant Immigration and Customs Enforcement ("ICE") denied Plaintiffs' requests for expedited processing and a fee waiver in a letter dated February 23, 2010. Kessler Decl. (Ex. C). Defendants have no record of Plaintiffs' expedited processing and fee waiver appeal. Decl. of Catrina Pavlik Keenan ¶16. Plaintiffs sent a timely appeal of ICE's denial of expedited processing and a fee waiver on March 15, 2010. Kessler Decl. Ex. G. Attached as Exhibit F is a true and correct copy of the FedEx proof of delivery of Plaintiffs' appeal of ICE's expedited processing denial addressed to the Associate General Counsel (General Law), Department of Homeland Security, FOIA Appeals, Washington, D.C. 20528.

EXAMPLES OF FURTHER OPT-OUT DEBATE DEVELOPMENTS

15. Attached as Exhibit G is a true and correct copy of Letter from Sean Byrne, Commissioner, Department of Criminal Justice Information Services, New York, to Angela Fernandez, Director, Northern Manhattan Coalition for Immigrant Rights, August 23, 2010 and

the attached Email from Dan Cadman, Department of Homeland Security, to Joe Morrissey Department of Criminal Justice Services, New York, re: Secure Communities, July 23, 2010.

16. Attached as Exhibit H is a true and correct copy of Letter from Angela Fernandez, NMCIR, and Michelle Fei, Immigrant Defense Project ("IDP"), to Sean M. Byrne, Acting Commissioner, State of New York, Division of Criminal Justice Services, Re: ICE's Contradictory Information about "Secure Communities," Oct. 13, 2010.

17. Attached as Exhibit I is a true and correct copy of Memorandum Re: Secure Communities in New York from Angela Fernandez, NMCIR and Michelle Fei, IDP, to Peter Kiernan, Counsel to Governor Patterson, Nov. 11, 2010 (attachments omitted).

18. Attached as Exhibit J is a true and correct copy of Press Release, *Arlington, Santa Clara, and San Francisco: The Fight to Opt-Out of S-Comm Rages On*, http://uncoverthetruth.org/pr-arlington-santa-clara-and-san-francisco-the-fight-to-opt-out-of-s-comm-rages-on (Nov. 9, 2010).

19. Attached as Exhibit K is a true and correct copy of Memorandum from Barbara M. Donnellan, County Manager, Arlington, Virginia, to County Board Members, Re: Secure Communities Meeting with ICE, November 5, 2010 (noting that ICE agreed to "continue the dialogue with us and we look forward to working them [sic] to develop solutions that will enable federal authorities and local public safety officers to fulfill their respective missions without forsaking either).

20. Attached as Exhibit L is a true and correct copy of the first fifteen pages of signatures from the NDLON Petition, *Allow Counties & States to Opt-Out of the "Secure Communities" Program Immediately*, to Secretary Janet Napolitano, DHS, *available at* bit.ly/optoutnow (last visited Nov. 19, 2010). The petition has over 4,400 signatories from forty-

eight (48) States, the District of Columbia and Puerto Rico. Plaintiffs will provide the Court or Defendants with a full copy of the petition upon request.

21. Attached as Exhibit M is a true and correct copy of Elise Foley, *Immigration Agency Confirms Fingerprint-Sharing Program is Mandatory*, Washington Independent (Nov. 10, 2010), http://washingtonindependent.com/103117/immigration-agency-confirms-fingerprint-sharing-program-is-mandatory.

22. Attached as Exhibit N is a true and correct copy of Renee Feltz, *Insecure Communities: Feds Target NYC Immigrants for More Deportations*, The Indypendent (Nov. 17, 2010), http://www.indypendent.org/2010/11/17/insecure-communities/.

23. Attached as Exhibit O is a true and correct copy of Kirk Semple, *Confusion Over Program to Spot Illegal Immigrants*, New York Times (Nov. 9, 2010), http://www.nytimes.com/2010/11/10/nyregion/10secure.html?_r=2&hp.

24. Based on Defendant's declarations, Plaintiffs have created a chart showing the status of the search and processing of the Opt-Out Records. The chart is attached as Exhibit P.[1]

25. Since Plaintiffs' filed the instant motion on October 28, 2010, there has been widespread media coverage of the opt-out debate. Plaintiffs have compiled a list of twenty-nine (29) articles to provide the Court an example of that coverage and the widespread public interest and concern about opting-out of Secure Communities. Attached as Exhibit Q is a true and correct copy of that list of articles.

26. Attached as Exhibit R is a true and correct copy of ICE's, *Planned Nationwide Usage of the Biometric Information Sharing Capability by Fiscal Year (2009-2013)*,

[1] ICE has designated a search cut-off date of April 30, 2010. Pavlik-Keenan Decl. ¶ 21. FBI has designated a search cut-off date of February 3, 2010. Hardy Decl. ¶ 22. Plaintiffs reserve the right to dispute Defendants' search cut-off dates. Further, Defendants take the position that FBI's agreements with State Identification Bureaus are not responsive to any portion of the Request. Def. Br. 8 n. 2. Plaintiffs disagree and reserve the right to contest any and all of Defendants' determinations as to responsiveness.

http://www.ice.gov/doclib/about/offices/secure-communities/pdf/sc-dep.pdf (last visited Nov. 19, 2010).

27. Attached as Exhibit S is a true and correct copy of the Declaration of Angela Fernandez, Northern Manhattan Coalition for Immigrant Rights, Nov. 19, 2010.

Dated: New York, NY
November 19, 2010

Bridget P. Kessler