

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

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

Plaintiffs,

- against -

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

Defendants.

No. 10 Civ. 3488 (SAS)

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

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### **PRELIMINARY STATEMENT**

This Court has been asked to utilize one of the most drastic remedies in its arsenal when a mere request for an initial conference would have sufficed. The “opt out” records that plaintiffs seek are an unclearly-defined segment of an enormous Freedom of Information Act (“FOIA”) request to five defendant agencies, and one segment of a “Rapid Production List” (“RPL”)—itself an extremely burdensome request—that formed the basis of an interim production agreement between the parties. Plaintiffs suggest that defendants have not acted promptly in locating “opt out” records, but notably absent from plaintiffs’ brief is any discussion of the Government’s repeated attempts to reach an agreement with plaintiffs to narrow their FOIA request to a workable endeavor. Nevertheless, despite the absence of an agreement, U.S. Immigration and Customs Enforcement (“ICE”) and the Federal Bureau of Investigation (“FBI”) have produced responsive records in the wake of the RPL, some of which fall within plaintiffs’ present definition of opt-out records.

Also absent from plaintiffs’ brief is a complete picture of how and when the opt-out issue jumped to the top of plaintiffs’ priority list. It was not until October 11, 2010—over one month after defendants’ third RPL production and a mere 17 days before plaintiffs filed the instant motion—that plaintiffs demanded the opt-out records on a priority basis, in light of an October 6, 2010 statement by Secretary of the Department of Homeland Security (“DHS”) Janet Napolitano. Faced with this sudden demand, defendants agreed to shift their focus to opt-out records, and to search for, process, and produce non-exempt records on a rolling basis. Plaintiffs,

however, refused to cooperate with defendants and insisted on a deadline, which they planned to submit to the Court for so-ordering, by which all “opt-out records” would be produced. Over the next two weeks, the Government explained on several occasions that it was impossible to agree to a date certain for full production until a more comprehensive search could be conducted. Plaintiffs thereupon filed the instant motion for preliminary injunction seeking an order requiring the turnover of opt-out records within *five days*.

Putting aside the merits for a moment, plaintiffs’ motion has been a wasteful expenditure of resources for all concerned. The agencies had agreed to prioritize the opt-out issue, even though they were under no obligation to do so. The Government also was prepared to continue discussions with plaintiffs while the search was ongoing, and to explain the situation to the Court at a conference if the need arose. The motion has done little more than deflect the Government’s resources away from cooperating with plaintiffs, and toward litigating with them.

In any event, the motion should be denied. As discussed below, plaintiffs have not carried their heavy burden to satisfy any of the standards for injunctive relief. Plaintiffs cannot show a likely irreparable injury because they have not demonstrated that they or any third party will be irreversibly injured if the agencies take the necessary time to conduct a thorough search. Nor have plaintiffs shown the “clear” or “substantial” likelihood of success on the merits required for a mandatory injunction. Plaintiffs’ overbroad FOIA request does not comply with FOIA’s requirement that requests “reasonably describe” the records sought.

Plaintiffs thus cannot demonstrate that they likely will prevail on a challenge to the adequacy of defendants' searches for records responsive to the non-compliant request. Finally, the balance of equities and public interest tips heavily in favor of the Government. There is no authority for a FOIA requester to commandeer an agency's resources with an overbroad request—thereby diverting the agency from other, proper, requests—only to demand that the request be handled in a certain manner upon pain of injunction.

## **BACKGROUND**

### **A. Secure Communities**

Secure Communities is an immigration enforcement strategy that “leverages an existing information sharing capability between the U.S. Department of Homeland Security (DHS) and the Department of Justice (DOJ) [known as “interoperability”] to quickly and accurately identify aliens who are arrested for a crime and booked into local law enforcement custody.” ICE, *Secure Communities*, <http://www.ice.gov/about/offices/enforcement-removal-operations/secure-communities/index.htm> (last visited Nov. 12, 2010). Under Secure Communities, the fingerprints of individuals taken into local law enforcement custody are checked against both the FBI's Integrated Automated Fingerprint Identification System (“IAFIS”) and DHS's Automated Biometric Identification System (“IDENT”). *See* Declaration of Christopher Connolly dated Nov. 12, 2010 (“Connolly Decl.”) Ex. A (Declaration of Catrina Pavlik-Keenan dated Nov. 12, 2010 (“Pavlik-Keenan Decl.”)) ¶¶ 9-10; *id.* Ex. B (Declaration of David M. Hardy dated Nov. 12, 2010 (“Hardy

Decl.”) ¶¶ 14-18; *id.* Ex. C (Declaration of David J. Palmer dated Nov. 12, 2010 (“Palmer Decl.”)) ¶¶ 13-15. “If fingerprints match DHS records, ICE determines if immigration enforcement action is required, considering the immigration status of the alien, the severity of the crime and the alien’s criminal history.” ICE, *supra*.

## **B. Plaintiffs’ FOIA Request and Complaint**

On or about February 3, 2010, Plaintiffs submitted identical Freedom of Information Act (“FOIA”) requests (collectively, the “Request”) to each defendant. *See* Declaration of Bridget P. Kessler (“Kessler Decl.”) Ex. A (FOIA request dated Feb. 3, 2010). The 21-page Request seeks production of a vast and complicated array of records relating to Secure Communities. *See id.* The requested records are grouped into seven categories: (1) “Policies, Procedures, and Objectives”; (2) “Data & Statistical Information”; (3) “Individual Records”; (4) “Fiscal Impact of Secure Communities”; (5) “Communications”; (6) “Secure Communities Program Assessment Records”; and (7) “Secure Communities Complaint Mechanisms and Oversight.” *See id.* at 4-17. The Request potentially implicates millions of pages of responsive records. Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶ 14; *id.* Ex. B (Hardy Decl.) ¶¶ 24-30; *id.* Ex. C (Palmer Decl.) ¶¶ 12, 16.

The Request also seeks a full fee waiver and expedited processing. Kessler Decl. Ex. A at 18-20. ICE, the FBI, and DHS denied plaintiffs’ request for a fee waiver. Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶ 15; *id.* Ex. B (Hardy Decl.) ¶ 8; *id.* Ex. C (Palmer Decl.) ¶ 6. ICE, DHS, and OLC denied plaintiffs’ request for expedited processing, while the FBI granted expedited processing. *Id.* Ex. A

(Pavlik-Keenan Decl.) ¶ 15; *id.* Ex. C (Palmer Decl.) ¶ 6; *id.* Ex. D (Declaration of Paul P. Colborn (“Colborn Decl.”)) ¶ 4. Plaintiffs allege that they appealed DHS’s and ICE’s denials of expedited processing. *See* Kessler Decl. Ex. F (Letter from Bridget Kessler to DHS Associate General Counsel dated Mar. 15, 2010); *id.* Ex. G (Letter from Bridget Kessler to DHS Associate General Counsel dated Mar. 15, 2010). Plaintiffs commenced the instant litigation by filing their Complaint on April 27, 2010. Defendants answered the Complaint on July 1, 2010.

**C. The “Rapid Production List” (“RPL”) and Defendants’ Initial Productions of Records**

Defendants have engaged plaintiffs in numerous meetings and telephone conference calls concerning the scope of the Request and the ways in which the Request could be narrowed so as to allow for timely and efficient production of the records most relevant to plaintiffs’ stated goal of informing the public about Secure Communities. Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶¶ 22-30; *id.* Ex. C (Palmer Decl.) ¶ 9; *id.* Ex. E (Declaration of Crystal Rene Souza (“Souza Decl.”)) ¶ 9. In the course of these communications, beginning as early as June 9, 2010, defendants made multiple proposals for narrowing the scope of the Request, which plaintiffs have not accepted. *See id.* Ex. A (Pavlik-Keenan Decl.) ¶¶ 24-26; *id.* Ex. B (Hardy Decl.) ¶ 34; *id.* Ex. C (Palmer Decl.) ¶¶ 9-10.

On June 25, 2010, plaintiffs presented defendants with a five-page “Rapid Production List” (“RPL”), which purports to identify records that plaintiffs were seeking on an expedited basis. Connolly Decl. Ex. F (Rapid Production List with appendix dated June 25, 2010). The RPL describes ten broad categories of records,

and lists an additional 14 specific categories of records identified by plaintiffs based on their review of materials relating to Secure Communities that were already publicly available on ICE's website. *See id.* Although smaller than the Request as a whole, the RPL nonetheless potentially implicates many thousands of pages of responsive records. *See id.* Ex. A (Pavlik-Keenan Decl.) ¶ 29.

Plaintiffs were largely unwilling to agree to any of defendants' proposals for narrowing the scope of the Request in exchange for defendants' agreement to produce records responsive to the RPL; their sole concession in this regard was to agree that each defendant agency need only search for and produce documents that originated within that agency. *See* Kessler Decl. Ex. H (Letter from Christopher Connolly to Bridget Kessler dated July 9, 2010). Nonetheless, in a good-faith effort to produce records in accordance with their obligations under FOIA, defendants agreed to produce non-exempt materials responsive to the RPL. *See id.* Defendants have produced nearly 2,000 pages of records responsive to the RPL in productions on August 3, 2010; August 13, 2010; September 8, 2010; and October 22, 2010. *See* Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶¶ 32-35; *id.* Ex. B (Hardy Decl.) ¶ 31. ICE has also posted additional records that would be responsive to the RPL on its FOIA Electronic Reading Room website. *Id.* Ex. A (Pavlik-Keenan Decl.) ¶ 36.

**D. Plaintiffs' Demand for "Opt-Out Records" and the Instant Motion for Preliminary Injunction**

Among the many categories of records it describes, the Request merely asks for "Overview Documents" discussing "any procedures for state or local jurisdictions to opt-out of Secure Communities." Kessler Decl. Ex. A at 4. The RPL defines "opt-

out records” broadly as “[n]ational policy memoranda, legal memoranda or communication relating to the ability of states or localities to opt-out or limit their participation in [Secure Communities].” Connolly Decl. Ex. H at 1.

On October 6, 2010, Secretary Napolitano indicated that DHS did “not see [Secure Communities] as an opt-in, opt-out program.” *See* Shankar Vedantam, *U.S. Deportations Reach Record High*, Wash. Post. (Oct. 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html> (last visited Nov. 12, 2010). In an e-mail to defendants dated October 11, plaintiffs claimed that Secretary Napolitano’s statement “created a significant urgency” for the production of opt-out records. Connolly Decl. Ex. G (E-mail from Hannah Weinstein to Christopher Connolly dated Oct. 11, 2010). Plaintiffs warned that “if Defendants fail to produce [“opt-out records”] by October 22, 2010, Plaintiffs will be forced to seek a preliminary injunction for the production of these records.” *Id.*

Plaintiffs attached a two-page document entitled “Search Guidance for Records Related to the Ability of States or Localities to Opt-out of or Limit Participation in Secure Communities” (the “Search Guidance”) to their October 11 e-mail. *Id.*<sup>1</sup> In contrast to the Request and the RPL, the Search Guidance purported to define “opt-out records” to include, among other things, “[r]ecords containing formal and informal agreements regarding the sharing of fingerprints

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<sup>1</sup> Defendants have submitted the Search Guidance, along with a redacted version of the October 11 e-mail, pursuant to Fed. R. Evid. 408(b), which permits the use of statements made during compromise negotiations if they are offered for the purpose of “negating a contention of undue delay.”

between the FBI and State Identification Bureaus”; “[l]egal memoranda regarding Secure Communities or procedures related to Secure Communities, including, but not limited to, legal memoranda relating to interoperability (fingerprint sharing between DHS IDENT and FBI IAFIS), Secure Communities Memoranda of Agreements, Secure Communities Statements of Intent, immigration detainers, or state or local law enforcement involvement in Secure Communities”; and “[r]ecords relating to the technical operation of DHS IDENT/FBI IAFIS interoperability and response mechanisms, including, but not limited to,” five separate categories of records concerning the technological capabilities of DHS and the FBI. *Id.* At least some of these records do not fall within the broad scope of the Request.<sup>2</sup>

Defendants responded to plaintiffs’ sudden request for expedited production of opt-out records, and the Search Guidance, by indicating that defendants were willing to shift their attention to searching for and processing such records on a rolling basis, with the schedule of production to be determined by the amount and type of records defendants identified. Plaintiffs, however, demanded a date certain by which defendants would produce all of the records requested in plaintiffs’ October 11, 2010 e-mail.

Plaintiffs filed the instant motion for preliminary injunction on October 28, 2010. In their supporting brief, plaintiffs claim that:

the Request asked Defendants to disclose records related to “opt-out”—the existence or inexistence of a procedure for states and

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<sup>2</sup> For example, defendants take the position that the FBI’s various agreements with State Identification Bureaus are not responsive to any portion of the Request.

localities to decline or limit participation in Secure Communities, and the technological capacity of ICE and the FBI to honor requests to opt-out, opt-in or limit participation by ensuring that fingerprints are not transmitted from the FBI to ICE (“Opt-Out Records”).

Pl. Br. 1-2. Contrary to plaintiffs’ claim, this purported definition of “opt-out records” does not appear in the Request. Nor can it be inferred from the RPL. In fact, defendants first learned of this new definition by means of plaintiffs’ October 28, 2010 brief.

Plaintiffs ask the Court to “order [defendants to] search, process, and produce Opt-Out Records within five days of the Court’s decision; produce a *Vaughn* index<sup>3</sup> detailing claimed exemptions within ten days after production; and [order] expedited partial summary judgment briefing on any contested claimed exemptions.” Pl. Br. 23. For the reasons that follow, the motion should be denied.

## ARGUMENT

### **A. Preliminary Injunction Standard**

A preliminary injunction is an extraordinary remedy and “should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original); *see also Munaf v. Geren*, 553 U.S. 674, 689 (2008) (“A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right.”) (citations and internal quotation marks omitted); *Grand River Enter. Six Nations, Ltd. v. Pryor*,

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<sup>3</sup> A *Vaughn* index describes how the agency searched for records responsive to the FOIA request and the rationale for its assertion of FOIA exemptions, if any. *See generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

481 F.3d 60, 66 (2d Cir. 2007) (“[T]he preliminary injunction is one of the most drastic tools in the arsenal of judicial remedies.”) (citation and internal quotation marks omitted); *Tribune Co. v Abiola*, 66 F.3d 12, 16 (2d Cir. 1995) (describing injunctions as “the most intrusive sort of judicial relief”); *Medical Soc’y of the State of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977) (A preliminary injunction is an “extraordinary and drastic remedy which should not be routinely granted.”).

In order to obtain a preliminary injunction, the movant must satisfy the following four-part test recently articulated by the Supreme Court:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

*Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (citing cases); see *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S. Ct. at 376-77.

**B. Plaintiffs Have Not Shown a Likelihood of Irreparable Harm**

Plaintiffs’ motion is fatally flawed because it does not show irreparable harm absent injunctive relief. This showing “is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation and internal quotation marks omitted); see *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir.

1995) (Irreparable harm is the “*sine qua non* for preliminary injunctive relief.”). Accordingly, “the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (citation and internal quotation marks omitted). “In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied.” *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999).

“To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Freedom Holdings*, 408 F.3d at 114 (citation and internal quotation marks omitted). A mere *possibility* of harm will not suffice; plaintiffs must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 129 S. Ct. at 375 (emphasis in original).

Plaintiffs spread their irreparable harm argument over two categories: (1) purported harm to local and state officials, and (2) purported harm to plaintiffs and the general public. While they seek an injunction compelling the release of opt-out records within five days of an order of this Court, plaintiffs articulate only a nebulous irreparable harm argument that fails to establish a likely irreparable injury that they will suffer if the records are not released in that time frame.

### 1. Purported Irreparable Harm to Local and State Officials

Plaintiffs contend that absent a preliminary injunction, “public officials and the residents of the cities attempting to opt-out of Secure Communities will be forced to engage in negotiations with ICE without knowing ICE’s position on opt-out or technological capability to facilitate a request to opt-out.” Pl. Br. 17. Plaintiffs cite as examples Arlington, Virginia, Santa Clara County, California, and San Francisco, California—localities plaintiffs claim have sought to opt out of Secure Communities. *Id.* Plaintiffs make a similar argument concerning state officials. *See id.* at 3 (contending that state officials lack “clear information” about the implications of Secure Communities); *id.* at 19 (arguing that states “will suffer irreparable harm if forced to make . . . policy judgments without access to the Opt-out Records.”). As shown below, however, plaintiffs cannot obtain relief based on this purported harm.

Plaintiffs appear to base their irreparable harm argument, at least in part, on purported injuries to state and local officials. “As a general proposition, a plaintiff cannot seek a preliminary injunction on another’s behalf when he has no standing to do so.” *Carabello v. Beard*, 468 F. Supp. 2d 720, 727 (E.D. Pa. 2006) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (In the typical case, a party invoking the jurisdiction of the federal courts “bears the burden of showing that he has standing for each type of relief sought.”). Even assuming *arguendo* that plaintiffs have standing to obtain injunctive relief based on purported irreparable

harm to third parties—in light of “the basic purpose of FOIA . . . to ensure an informed citizenry,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)—plaintiffs have cited no authority that dispenses them from the need to show “actual and imminent” irreparable injury. Here, plaintiffs’ general contentions that local and state officials lack sufficient information concerning Secure Communities are speculative and unsupported by any evidence from the officials themselves. *See, e.g., Ivy Mar Co. v. C.R. Seasons, Ltd.*, 907 F. Supp. 547, 561 (E.D.N.Y. 1995) (“[B]are allegations, without more, are insufficient for the issuance of a preliminary injunction.”).<sup>4</sup>

To the extent plaintiffs rely on declarations from San Francisco Sherriff Michael Hennessey and New York City Council Member Melissa Mark-Viverito, the only urgency articulated in those declarations concerns events that already have taken place. *See* Kessler Decl. Ex. T (meeting between Sherriff Hennessey and ICE on November 8, 2010); *id.* Ex. V (New York City Council meeting on November 10, 2010). It is well settled that allegations concerning past injuries cannot support a grant of injunctive relief. *See, e.g., Deshawn E. ex rel Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (past injury does not suffice to establish injury requirement for preliminary injunction). Moreover, plaintiffs concede that ICE scheduled

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<sup>4</sup> Plaintiffs have submitted a declaration from Sarahi Uribe, *see* Kessler Decl., Ex. U, an NDLOM organizer, stating that NDLOM “has received inquiries from local groups about the implications of DHS’ recent statements about opt-out.” Pl. Br. 18. These unsupported statements are entirely speculative and insufficient to demonstrate irreparable harm. *See Hedges v. Corbisiero*, 739 F. Supp. 792, 795 (S.D.N.Y. 1989) (“[T]he inclusion of self-serving hearsay in plaintiff’s affidavit does not justify issuance of a preliminary injunction.”).

meetings not only with Sherriff Hennessey, but also with local officials from Arlington, Virginia, and Santa Clara, California, to discuss the very opt-out issue that is central to the instant motion. *See* Pl. Br. 2; Kessler Decl. Ex. U (Declaration of Sarahi Uribe), ¶¶ 16-17. And plaintiffs' own motion papers indicate that ICE responded to a query about the opt-out issue from the Santa Clara County Counsel with a four-page letter explaining the relationship between ICE and local jurisdictions. *See* Kessler Decl., Exs. M, O. Accordingly, there is no basis for the contention that local or state officials are suffering irreparable harm that will be remedied by the injunctive relief sought by plaintiffs.

## **2. Other Purported Irreparable Harm**

Plaintiffs contend that they have been “central” in disseminating information about Secure Communities to the general public, Pl. Br. 11, and that they are suffering irreparable harm because they are unable to disseminate information about the initiative, *id.* at 20. Plaintiffs also contend that the general public is suffering irreparable harm because it is uninformed about the opt-out issue. *See id.* at 10 (“The lack of clarity is inhibiting elected officials and the public from addressing the issue of opt-out through local legislation.”); *id.* at 19 (alleging irreparable harm to “New Yorkers” if “public and the Governor” do not obtain opt-out records before activation of Secure Communities). They further argue that “the expenditure of funds on Secure Communities continues and Congress is unable to conduct the oversight and review central to democracy.” *Id.* at 20. None of these arguments justify granting injunctive relief to *plaintiffs*.

To the extent plaintiffs are describing a purported harm suffered by the general public, the public interest is properly considered in its own right as the final prong of the *Winter* preliminary injunction test. *See infra* at 23-24 (arguing that an injunction is not in the public interest). Arguments concerning the public interest cannot be substituted for the requirement that plaintiffs demonstrate that they will suffer a likely irreparable injury. *See Winter*, 129 S. Ct. at 374 (“A plaintiff seeking a preliminary injunction must establish that . . . *he* is likely to suffer irreparable harm in the absence of preliminary relief . . .”) (emphasis added).

Furthermore, plaintiffs cannot show that the general public will be *irreparably* harmed if the opt-out records are not released immediately. There is no argument to the effect that the records will become stale after a certain period of time, or after a certain event—*e.g.*, an election or legislative action. This case thus differs from *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 542 F. Supp. 2d 1181 (N.D. Cal. 2008) (“*EFF*”), cited in plaintiffs’ brief. *See* Pl. Br. 18, 20. In *EFF*, plaintiffs sought records concerning efforts of certain federal agencies to push for changes to the Foreign Intelligence Surveillance Act (“FISA”). By the time plaintiffs had filed their preliminary injunction motion, the President had pressed the Senate for an immediate vote on its version of the FISA amendments and stated that the House should not leave session until a version of the bill was sent to the White House for his signature. *See EFF*, 542 F. Supp. 2d at 1186-87. Here, by contrast, plaintiffs demonstrate no similar urgency that

warrants immediate injunctive relief.<sup>5</sup> Nor have plaintiffs demonstrated that their purported inability to disseminate information on the opt-out issue is an *irreparable* injury that cannot await a complete search by defendants for responsive records.

Of course, defendants continue to search for responsive opt-out documents, and will produce any non-exempt documents as promptly as possible. Nevertheless, because plaintiffs cannot show actual, imminent irreparable injury that will occur to them absent injunctive relief, their motion should be denied.

**C. Plaintiffs Have Not Shown a “Clear” or “Substantial” Likelihood of Success on the Merits in This FOIA Litigation**

Where a party seeks a preliminary injunction “that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme,” the party must, “by a *clear showing*, carr[y] the burden of persuasion,” and must “establish a *clear or substantial* likelihood of success on the merits.” *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007) (second emphasis added). A rigorous “likelihood of success” showing is appropriate in this case for an additional reason: plaintiffs request a mandatory injunction that “alter[s] the status quo by commanding some positive act.” *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). A party seeking a mandatory injunction “must make a ‘clear’ or ‘substantial’ showing of a likelihood of success” on the merits. *Jolly v.*

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<sup>5</sup> Plaintiffs also rely on *Electronic Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30 (D.D.C. 2006) (“*EPIC*”), in which the district court granted a preliminary injunction with respect to an expedited FOIA request concerning the Government’s warrantless surveillance program. *EPIC*, however, contained an explicit finding that time was “necessarily of the essence.” *Id.* at 40-41. Here, plaintiffs cannot make any showing of the same urgency with respect to opt-out records.

*Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996). This standard is “especially appropriate when a preliminary injunction is sought against [the] government.” *D.D. ex rel V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006).

Plaintiffs have not demonstrated a likelihood of success on the merits of their FOIA action, let alone a “clear” or “substantial” one. They argue that ICE, DHS, the FBI, and OLC have failed to “make the non-exempt records ‘promptly available.’” Pl. Br. 13 (quoting 5 U.S.C. § 552(a)(3)(A)). By “non-exempt records,” plaintiffs mean *all* records concerning Secure Communities that could be responsive to their 21-page Request. Given the sheer scope of the Request, and defendants’ ongoing efforts to locate and produce responsive records, plaintiffs’ conclusory statement that the agencies have not acted “promptly” is insufficient.

At the most basic level, plaintiffs cannot establish a “clear” or “substantial” likelihood of success on the merits because their overbroad, 21-page FOIA Request does not satisfy the statutory requirement that requests “reasonably describe” the records sought. 5 U.S.C. § 552(a)(3)(A). As one district court has explained:

[I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.

*Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). “Broad, sweeping requests lacking specificity are not sufficient.” *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002). Furthermore, “an agency is not

required to undertake a search that is so broad as to be unduly burdensome.”

*Contreras v. DOJ*, --- F. Supp. 2d ---, 2010 WL 3021898, at \*3 (D.D.C. Aug. 3, 2010).

In the event this case proceeds to summary judgment motions—the usual mechanism for resolving FOIA cases, *see, e.g., Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993); *Jones-Edwards v. Appeal Bd. of Nat’l Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005)—defendants may raise the overbreadth of plaintiffs’ FOIA request as part of the calculus for determining the adequacy-of-search issue. *See Moore v. FBI*, 283 F. Appx. 397, 400 (7th Cir. 2008) (“In the end, a lack of specificity to [plaintiff’s] request may be one of many defenses that the [agency] will assert to justify nonproduction.”). Courts routinely rule in the Government’s favor when the FOIA request at issue is too broad to satisfy section 552(a)(3)(A). *See Am. Fed’n of Gov’t Employees v. U.S. Dep’t of Commerce*, 907 F.2d 203, 208-09 (D.C. Cir. 1990) (affirming grant of summary judgment for agency and finding request too broad because it “require[d] the agency to locate, review, redact, and arrange for inspection a vast quantity of material”); *Marks v. DOJ*, 578 F.2d 261, 263 (9th Cir. 1978) (affirming grant of summary judgment for agency and declaring that “broad, sweeping requests lacking specificity are not permissible”); *Mason v. Calloway*, 554 F.2d 129, 131 (4th Cir. 1977) (affirming district court’s ruling that request for “all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs” failed section 552(a)(3)(A) requirement); *Dale*, 238 F. Supp. 2d at 104-05 (dismissing FOIA complaint and finding no obligation for agency to search for records in response to

request for “any and all” documents about taxpayer); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000) (granting summary judgment to Export-Import Bank on portion of request that was “unreasonably broad”).

*Judicial Watch*, cited *supra*, is particularly illustrative. In the district court’s words, the FOIA requester demanded “all records pertaining to contacts between [two appointees to the Export-Import Bank] and ‘companies, entities, and/or persons related or doing or conducting business in any way with the People’s Republic of China.’” *Judicial Watch*, 108 F. Supp. 2d at 26. The Bank conducted no search for responsive records on the ground that the request was overbroad. *See id.* at 27. The court found that the request “d[id] not reasonably describe the records sought,” was “unreasonably broad” and “impose[d] an undue burden on the Bank.” *Id.* The court also noted that the plaintiff “declined the Bank’s repeated attempts to clarify the request” and that the Bank “acted properly” in not conducting *any* search with respect to this portion of the request. *Id.* at 28.

The FOIA Request in the instant case is even broader than the request in *Judicial Watch*. Plaintiffs’ Request includes thirteen single-spaced pages of demands essentially boiling down to all records pertaining to Secure Communities. *See* Kessler Decl. Ex. A at 4-17 (demanding, *inter alia*, “[a]ny and all Records received, maintained, or created by any governmental agency or subdivision, related to the policies, procedures or objectives of Secure Communities,” “[a]ny and all Records . . . containing data or statistics prepared, compiled, or maintained by ICE or any agency or subdivision thereof related to or pertaining to Secure

Communities,” “[a]ny and all Records related to the fiscal impact or the actual, estimated, or projected cost on state and local Secure Communities Jurisdictions and Proposed Secure Communities Jurisdictions arising from or related to Secure Communities or to individuals subject to Immigration Detainers following a Secure Communities Query,” and “[a]ny and all Records containing communications related to Secure Communities by, to, or between” any “agent, officer, employee, or subdivision” of ICE, DHS, or DOJ, state and local jurisdictions, the White House, Congress, and non-governmental organizations). This sweeping request clearly fails to comply with section 552(a)(3)(A) of FOIA. *See Massachusetts v. HHS*, 727 F. Supp. 35, 36 (D. Mass. 1989) (“A request for all documents ‘relating to’ a subject . . . unfairly places the onus of non-production on the recipient of the request and not where it belongs—upon the person who drafted such a sloppy request.”).

Moreover, plaintiffs cannot show a clear or substantial likelihood of success on the merits with respect to their request for a fee waiver. *See Kessler Decl. Ex. A* at 18-19. Judicial review of an agency’s denial of a fee waiver request under FOIA is *de novo*, and generally resolved on a summary judgment motion. *Carney v. DOJ*, 19 F.3d 807, 814 (2d Cir. 1994). Defendants have promulgated regulations governing the issuance of fee waivers, with one of the common denominators being that the “[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to the public understanding of the operations and activities of the government.” 6 C.F.R. § 5.11(k)(1)(i) (applicable to DHS and ICE); 28 C.F.R. § 16.11(k)(1)(i) (applicable to FBI, OLC, and EOIR).

Even assuming *arguendo* that certain documents in plaintiffs' Request are likely to contribute to the public understanding of Secure Communities, "[t]he information requested should not exceed the purpose for which it is used." *Van Fripp v. Parks*, No. 97 Civ. 159 (RMU), 2000 U.S. Dist. LEXIS 20158, at \*17 (D.D.C. Mar. 16, 2000). An application for a fee waiver thus should be denied where the "FOIA request . . . is far broader tha[n] its justification for a fee waiver." *Natural Res. Def. Council v. EPA*, 581 F. Supp. 2d 491, 502 (S.D.N.Y. 2008). Here, plaintiffs have not complied with FOIA's requirement that requests "reasonably describe" the records sought, *see* 5 U.S.C. § 552(a)(3)(A), and have requested a universe of records that is well beyond the public interest in obtaining information about Secure Communities. Accordingly, plaintiffs cannot justify requiring the public to pay the costs of responding to their non-compliant Request.

Under these facts and circumstances, plaintiffs cannot show a "clear" or "substantial" likelihood that they will succeed on the merits and thus are not entitled to mandatory injunctive relief.<sup>6</sup>

#### **D. The Balance of Equities Tips Decidedly in Defendants' Favor**

In considering a motion for preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the

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<sup>6</sup> Plaintiffs also complain that, to date, "[f]ew of the records produced related to the opt-out issue or the technological capacity to facilitate jurisdictions' wishes to opt-out." Pl. Br. 14. Of course, "[p]laintiffs' incredulity at the fact that no responsive documents were uncovered in response to one aspect of its search request does not constitute evidence of unreasonableness or bad faith." *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992).

granting or withholding of the requested relief.” *Winter*, 129 S. Ct. at 376 (citation and internal quotation marks omitted). Here, the balance of equities tips decidedly in favor of the Government.

As demonstrated above, plaintiffs’ purported irreparable harm is speculative at best. On the other hand, the injuries defendants would suffer if the proposed preliminary injunction were granted are concrete and substantial. As explained in the agency declarations submitted in support of this brief, plaintiffs’ shifting definition of “opt-out records” and the potentially immense number of documents that fall within this definition make searching for, processing, and producing such records complicated and time-consuming. *See* Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶¶ 37-51; *id.* Ex. B (Hardy Decl.) ¶¶ 24-28, 32-33. A five-day production deadline is simply not practicable under these circumstances.

Plaintiffs attempt to downplay this burden by suggesting that “the requested records should not be difficult to locate.” Pl. Br. 21-22. Plaintiffs further downplay the potential injuries to defendants by claiming that they are merely “requesting that Defendants fulfill the obligations under the statute.” *Id.* at 21. Yet the injunction would have the opposite effect. Plaintiffs’ proposed production deadline allows defendants insufficient time to complete consultations with other agencies that have equities in responsive records, *see* 5 U.S.C. § 552(a)(6)(B)(iii)(B), and increases the likelihood of inadvertent disclosures that fall within one or more of FOIA’s statutory exemptions, *see* 5 U.S.C. § 552(b). Moreover, nowhere does FOIA oblige defendants to produce records in the order plaintiffs prefer by a deadline

plaintiffs set. Defendants' obligation is to "promptly" produce responsive records that are "reasonably describe[d]" by plaintiffs' Request. 5 U.S.C. § 552(a)(3)(A).

Given that defendants already are in the process of searching for and processing "opt-out records" on a priority basis, an injunction requiring defendants to complete that production within five days, produce a *Vaughn* index, and then brief a partial summary judgment motion would serve only to divert resources away from defendants' searches, and away from defendants' attempts to reach an agreement with plaintiffs on narrowing the FOIA request. Such an agreement would be the first step toward a resolution of this case without dispositive motion practice. Accordingly, the balance of equities tips in favor of denying plaintiffs' motion for a preliminary injunction.

**E. The Public Interest Is Not Served by Granting Plaintiffs' Motion**

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-77 (citation and internal quotation marks omitted). This factor also weighs in favor of denying plaintiffs' motion.

As discussed above, the preliminary injunction sought by plaintiffs would hinder defendants' ability to apply appropriate FOIA exemptions, thereby harming the public interest by increasing the risk of disclosure of exempt records. *See United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 559 (D.C. Cir. 2010) ("In enacting FOIA, the Congress sought to balance the public's interest in governmental transparency against legitimate governmental and private interests

[that] could be harmed by release of certain types of information.”) (citation and internal quotation marks omitted). Moreover, requiring defendants to produce “opt-out records” on a compressed timeframe would only compound the burden on the agencies’ finite FOIA resources, which have already been strained in attempting to respond to plaintiffs’ Request, thereby hindering the processing of other FOIA requests. See Connolly Decl. Ex. A (Pavlik-Keenan Decl.) ¶¶ 26-51; *id.* Ex. B (Hardy Decl.) ¶¶ 19-28, 32-34; *id.* Ex. C (Palmer Decl.) ¶¶ 10-12, 16; *see also Long v. U.S. Dep’t of Homeland Sec.*, 436 F. Supp. 2d 38, 44 (D.D.C. 2006) (preliminary injunction would harm public interest because it would “merely place plaintiffs’ request ahead of others that are awaiting responses to their requests”). This scenario does not serve the public interest because plaintiffs have “failed to explain why the public interest can only be served by the *immediate* release of the records requested.” *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007) (emphasis in original).

**CONCLUSION**

For the foregoing reasons, Plaintiffs' motion should be denied.

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Respectfully submitted,

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