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

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| IMMIGRANT DEFENSE PROJECT, HISPANIC INTEREST COALITION OF ALABAMA, CENTER FOR CONSTITUTIONAL RIGHTS,<br><br>*Plaintiffs*,<br>v.<br><br>UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY,<br><br>*Defendants*. | DOCKET NO.: 14-CV-1578 (JPO)<br><br>**Document Electronically Filed** |

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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## PRELIMINARY STATEMENT

Plaintiffs Immigrant Defense Project ("IDP"), Hispanic Interest Coalition of Alabama ("HICA") and Center for Constitutional Rights ("CCR") (collectively "Plaintiffs"), file this Motion for Partial Summary Judgment to challenge the adequacy of searches conducted by Defendants U.S. Immigration and Customs Enforcement ("ICE") and the Department of Homeland Security ("DHS") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq*. Plaintiffs seek an order compelling Defendants to conduct adequate searches of a limited number of offices and to produce documents related to ICE's widely decried tactic of conducting enforcement and arrest operations at homes.

Plaintiffs are entitled to summary judgment and new searches because Defendants have not designed searches reasonably calculated to uncover all relevant documents. First, to demonstrate that they have adequately searched, Defendants must provide the Court and Plaintiffs with detailed descriptions of all searches conducted. But Defendants' declarations are rife with omissions necessary to evaluate adequacy of search; the insufficiency of their declarations alone entitle Plaintiffs to summary judgment.

Second, where Defendants did provide detail regarding their searches, those descriptions indicate that Defendants have not taken their search obligations seriously. Defendants have failed to utilize search terms designed to capture relevant information, failed to select appropriate custodians of records, and failed to follow up on leads to records containing responsive information. As a result, Defendants' productions are missing large swaths of information that an adequate search would have uncovered.

These failures have a direct impact on Plaintiffs' ability to inform and educate the public regarding a controversial government policy. The necessity of doing so has grown since Plantiffs filed their Request more than two years ago. In recent weeks, ICE has announced and

implemented plans to raid homes around the country in search of women and children fleeing violence in Central America, spreading fear in immigrant communities[1] and attracting the ire of public officials.[2] Defendants' inadequate searches violate the spirit and the letter of FOIA, and Plaintiffs are entitled to summary judgment.

## BACKGROUND

### *FOIA Request and Complaint*

On October 17, 2013, Plaintiffs Immigrant Defense Project ("IDP") and Hispanic Interest Coalition of Alabama ("HICA") submitted a FOIA request ("the Request") to the Department of Homeland Security ("DHS") and the Bureau of Immigration and Customs Enforcement ("ICE"). *See* Compl. at ¶ 2 , ECF No. 1-1. The Request sought records related to ICE's controversial tactic of conducting enforcement operations to arrest immigrants at residential homes, often without judicial warrants. The Request sought to obtain a range of information regarding the effect of those operations – commonly known as "home raids" – on local communities, and to that end sought information, documents, e-mails, memoranda, communications, policies, protocols, training materials, data, and misconduct complaints related to ICE's conduct of operations at homes. ECF No. 1-1. The Request also sought specific data and information regarding ICE's conduct and activities in New York and Alabama, where Plaintiffs IDP and HICA are engaged in active campaigns to advocate for immigrants affected by ICE's enforcement activities and home raids. The goal was to inform the public of the scope of

[1] *See, e.g.,* Liz Robbins, "Rumors of Immigration Raids Stoke Fears in New York," New York Times (January 6, 2016), available at http://www.nytimes.com/2016/01/07/nyregion/rumors-of-immigration-raids-stoke-fear-in-new-york.html?_r=0 (accessed February 19, 2016).
[2] *See, e.g.*, http://thehill.com/homenews/house/264948-dems-anger-over-obama-immigrant-raids; http://www.usnews.com/news/politics/articles/2016-01-12/potential-for-new-border-crisis-prompted-immigrant-raids (accessed February 19, 2016).

Defendants' enforcement operations at homes, their effect on public safety, and the manner in which Defendants hold themselves and their agents accountable for complaints of misconduct.[3]

Having received just twenty-six pages of heavily redacted training documents from one component of DHS, the Federal Law Enforcement Training Center ("FLETC"), and after exhausting the administrative process, Plaintiffs filed the instant lawsuit in the Southern District of New York on August 5, 2014. *See* Compl., ECF No. 1.

***Defendants' Productions and Subsequent Negotiations***

Pursuant to the Court's November 19, 2014 order (ECF Doc. 15), Defendants Immigration and Customs Enforcement ("ICE") and the Department of Homeland Security ("DHS") began producing documents to Plaintiffs on a monthly basis beginning on December 19, 2014. By March 2015, both Defendants had represented to Plaintiffs that they had completed production of responsive documents, DHS after just two sets of productions, and ICE after just four. After alerting Defendants that the productions omitted significant information sought and engaging in negotiations that ultimately failed, Plaintiffs sought a status conference. ECF No. 16. On August 4, 2015, the Court ordered Defendants to produce declarations regarding their searches by September 30, 2015. ECF Minute Entry, August 4, 2015.

Defendant ICE submitted three declarations describing searches done in several offices, and Defendant DHS submitted one. ECF No. 22-1-4. On October 31, 2015, Plaintiffs again

[3] To that end, Plaintiffs sought information regarding the manner in which DHS & ICE conduct home enforcement operations, including how decisions to initiate raids are made, what policies and guidelines govern ICE agents' conduct, and how DHS & ICE involve state and local entities in such actions; the number of people that have been apprehended, arrested, and/or detained from home enforcement operations since January 2009 and the impact on families and children; whether and to what extent people affected by home enforcement operations are experiencing Fourth Amendment violations and other abuses; DHS's & ICE's guidelines and practices for monitoring and enforcement of constitutional compliance; and how complaints and investigations of misconduct are handled. *See* Request, ECF No. 1-1 at 12.

wrote to the Court, describing widespread deficiencies in how the declarations describe the searches as well as deficiencies in the searches themselves. ECF No. 22. The parties again entered into negotiations over search terms and data, with Plaintiffs offering several proposals that Defendants rejected. Negotiations having failed, Plaintiffs now file the instant motion for partial summary judgment challenging the adequacy of Defendants' searches.

## ARGUMENT

Defendants have not met their legal obligations to conduct an adequate search that is "reasonably calculated to uncover *all* relevant documents." *Nat'l Day Laborer Org. Network v. ICE.*, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012), quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (emphasis added) (vacated and remanded on other grounds); *see also Grand Cent. P'ship., Inc. v. Cuomo*, 166 F.3d 474, 489 (2d Cir. 1999). Agencies bear the burden of demonstrating the adequacy of their search. *Carney v. Dep't of Justice,* 19 F.3d 807, 812 (2d Cir. 1994). This is so even when it is Plaintiffs who seek summary judgment. *Families for Freedom v. U.S. Customs & Border Protection*, 837 F. Supp. 2d 331, 336 (S.D.N.Y. 2012) (burden was on agency to demonstrate adequacy of search in case where plaintiff moved, and defendant did not cross-move, for summary judgment.). Because the very purpose of the FOIA is to "engender[] a more informed public and a more accountable government," *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 93, evaluation of the reasonableness of a search must be "consistent with congressional intent tilting the scale in favor of disclosure." *Campbell v. United States DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998)

Plaintiffs are entitled to summary judgment for two principal reasons. First, the agency declarations are grossly deficient, omitting information about custodians, search methods, and search terms, and thus cannot establish adequacy of search. Second, for offices where some search information is provided, it is clear that the searches were not reasonably calculated to

uncover all – or in some cases any – relevant documents. Indeed, Defendants' limited document production and the ample evidence of plainly missing information demonstrate that the agencies have not followed obvious leads to uncover all relevant documents. See *Halpern v. F.B.I.*, 181 F.3d 279, 288 (2d Cir. 1999) ("the agency is obliged to pursue any 'clear and certain' lead it cannot in good faith ignore.") (internal citation omitted). Plaintiffs are entitled to partial summary judgment and to an order directing Defendants to conduct adequate searches.

## I. DEFENDANTS' GROSSLY DEFICIENT DECLARATIONS CANNOT DEMONSTRATE ADEQUACY OF SEARCH.

### A. Legal Standard

As a threshold matter, to demonstrate adequacy of search, defendant agencies must provide reasonably detailed, nonconclusory descriptions of their searches, typically via agency declarations. *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d. Cir.1999); *Carney*,19 F.3d at 812 These declarations must provide "a precise description of the methods and scope of the agency's search," *Families for Freedom*, 837 F. Supp. 2d at 337, that includes, *inter alia*, offices and custodians searched, search terms used, and types of searches conducted. "In order to determine adequacy, it is not enough to know the search terms. The method in which they are combined and deployed is central to the inquiry." *Id* at 335; *see also Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96. In addition, declarations must "'identify the searched files and describe at least generally the structure of the agency's file system' which renders any further search unlikely to disclose additional relevant information." *Katzman v. CIA*, 903 F. Supp. 434, 438 (E.D.N.Y. 1995) (*quoting Founding Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986)); *Vietnam Veterans of America v. United States Dep't of Homeland Sec.* 8 F. Supp. 3d

188, 206 (D. Conn. 2014); *El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 300 (D. Conn. 2008).

Defendants' declarations[4] fall well short of this standard. Only one declaration, that of ICE's Homeland Security Investigations Office, provides any information about the structure of agency file systems. See Exh. 2, McGinnis Decl. at ¶¶ 12 n.1, 13 n.2. For many searches, Defendants failed to provide *any* information or guidance to Plaintiffs or this Court as to where and how searches were conducted. In numerous instances, the declarations entirely fail to provide required information regarding search terms used, types of files searched, or how search terms were combined. These deficiencies alone are enough to grant summary judgment to Plaintiffs. "[T]he government will not be able to establish the adequacy of its FOIA searches if it does not record and report the search terms that it used, how it combined them, and whether it searched the full text of documents." *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at at 108.

B. ICE's Deficient Declarations

ICE submitted three declarations to Plaintiffs describing searches in several component offices. *See* Search Chart at Exh. 1 (summarizing the searches described in Defendants' declarations). The first, from Paula Harrington, describes searches done in the ICE's Enforcement and Removal Operations ("ERO"). Harrington Decl., Exh. 2. The second, from Reba McGinnis, describes searches done in the Office of Homeland Security Investigations ("H.S.I."). McGinnis Decl., Exh. 3. The third, from Fernando Pineiro, describes searches done by the several ICE offices dealing with policy, professional responsibility, training and public affairs. Pineiro Decl., Exh. 4. Although all the descriptions of searches conducted by relevant

[4] Plaintiffs attach as Exhibit 1 an Search Chart summarizing the information provided in each declaration regarding conduct of the search. Defendants' declarations, also filed with the Court with Plaintiffs' October 31, 2015 letter (ECF No. 22), are attached here Exhibits 2-5.

offices are missing one or more of the required elements for an agency declaration, Plaintiffs focus here on the most egregious examples.

*(i) Enforcement and Removal Operations ("ERO")*

ERO is the component of ICE that "enforces the nation's immigration laws" and "identifies and apprehends removable aliens." Harrington Decl. ¶ 6. It is thus central to a search for information regarding ICE's conduct when arresting aliens at homes. Yet ERO performed no electronic searches at headquarters. *See* Harrington Decl. at ¶¶ 8 (a), 9 (a) (no search done of the office of Law Enforcement Systems and Analysis ("LESA")); ¶ 8 (b) (only a three-hour manual search done of the office Secure Communities and Enforcement ("Enforcement"); ¶ 8 (b) (no search done of the Office of Policy). The only electronic searches performed were of the three field offices relevant to the Request, and these were not assigned until August 18, 2015.[5]

While the declaration identifies the title of the individuals conducting the searches at the Field Offices – the local offices charged with carrying out enforcement operations at residential homes – it does not provide the custodians of information searched in the Microsoft Outlook email program or personal computers. Harrington Decl. at ¶8 (a), (b), (c). Nor does it discuss the structure of the file systems on shared or hard drives. *Id*. While search terms are provided, the declaration does not describe the types of searches conducted (for example, whether the search was Boolean or relied on key words identified in the declaration). *Id*.

*(ii) Homeland Security Investigations ("H.S.I").*

H.S.I. is responsible for "investigating domestic and international activities that arise from the illegal movement of people and goods into, within and out of the United States."

[5] These searches did not take place until almost 22 months after the Request was submitted, more than a year after the litigation was filed, and several months after ICE represented to Plaintiffs that its searches were complete.

McGinnis Decl. ¶7. Its field offices, known as Special Agent in Charge ("SAC") offices, "are responsible for the administration and management of all investigative and enforcement activities within the geographic boundaries of the office." Id. ¶ 8. H.S.I.'s declaration described searches at headquarters that discussed the databases searched and the method and scope of search. *Id.* ¶¶ 12-14, n.1-2. In contrast, the declaration is far less specific when describing the searches performed by the three SAC Offices, the local offices responsible for carrying out investigative and arrest operations. The description of the search done by the SAC Buffalo Office provides no information about types of files searched or search terms used. *Id*. ¶16. The description of the search done in the SAC New York Office provides the title of the individual searching ("a Special Agent"), but no information regarding the custodians of the Microsoft Outlook email program searched. *Id*. ¶17. While four compound search terms are provided, the declaration does not describe the types of searches conducted or make clear whether search terms were combined or connectors used. *Id*. The description of the search done in the SAC New Orleans Office provides the title of the individual searching ("the Resident Agent in Charge"), but no information regarding the custodians of the Microsoft Outlook program searched, the "employee work computers," or the structure of the office's files. *Id*. ¶18.

*(iii) Office of the Principal Legal Advisor ("OPLA")*

OPLA is responsible for "providing legal advice, training and services in cases related to the ICE Mission." Pineiro Decl. ¶ 30. It is therefore a likely source of documents responsive to the portion of Plaintiffs' Request seeking information related to training and guidance to agents and officers. ECF No. 1-1, Exh. 1 at 3-6. The description of the search of OPLA provides no information on custodians, file structures, search terms or methodology. Pineiro Decl. ¶¶ 37-38.

*(iv) Office of Training and Development ("OTD")*

OTD "supports ICE employees in the development of the knowledge, skills and abilities" related to their enforcement work. Pineiro Decl. ¶33. It is a likely source of information responsive to Plaintiffs' request for information related to training. ECF No. 1-1at 4-7. Although OTD provided a list of search terms, it provided no information about the structure of its files. Pineiro Decl. ¶42,

*(v) Remaining ICE Offices Tasked with the FOIA Request*

ICE's Office of Policy, ("ICE Policy"), Office of Public Affairs ("ICE OPA"), Office of Detention Policy and Planning ("ODPP"), and Office of State Local and Tribal Coordination ("OSLTC") were all tasked with the FOIA Request, but did not undertake searches. Pineiro Decl. ¶¶ 32-34, 42-45. The failure to conduct searches in these offices is addressed in (II) *infra*.

C. DHS's Deficient Declaration

DHS submitted one declaration, from Kevin Tyrrell, describing searches conducted by several branches of DHS dealing with training, public affairs, and complaints of misconduct. the Federal Law Enforcement and Training Center ("FLETC"), the Office of Civil Rights and Civil Liberties ("CRCL"), the United States Citizenship and Immigration Service ("USCIS"), the DHS Office of Public Affairs ("DHS OPA"), the Immigration Division of the DHS Office of Policy ("DHS Policy"), the Office of the General Counsel ("OGC"), and the Office of Intelligence & Analysis ("I&A"). Tyrrell Decl., Exh. 5. The declaration omits several categories of information essential to evaluating adequacy of search.

(i) *Federal Law Enforcement Training Center ("FLETC")*

DHS's description of the search of its training center for law enforcement agents contains no information on custodians, types of files searched, search terms used, or methodology of search. Tyrrell Decl. ¶¶ 14, 36.

*(ii) Office of Civil Rights and Civil Liberties (CRCL)*

DHS's declaration describes a "manual search" of the investigative files of CRCL that nonetheless includes a list of search terms more typical of electronic searches. Tyrrell Decl. ¶ 37. The declaration does not explain how search terms were used for a "manual search" or otherwise explain its methodology, nor does it provide information on custodians or types of files searched.

*(iii) Office of Public Affairs ("DHS OPA"), Office of Policy ("DHS Policy"), & Office of Operations Coordination ("OPS")*

DHS's declaration provides a list of seven compound terms used in electronic searches of three different offices but provides no information on custodians, file structure, or whether and how connectors were used in searches. *See* Search Chart at Exhibit 1; Tyrrell Decl. ¶¶ 38, 43, 51.

*(iv) Office of the General Counsel ("OGC")*

DHS's declaration identifies one string of terms and one compound term used in an electronic search of only one email account, that of the Associate General Counsel of the Immigration Law Division. It does not indicate whether any file systems, hard drives or archived email accounts were searched. *See* Search Chart at Exhibit 1; Tyrrell Decl. ¶ 47.

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Because Defendants have failed to meet the threshold requirement of providing search descriptions necessary for court scrutiny, they cannot demonstrate the adequacy of their searches. *See Families for Freedom*, 837 F. Supp. 2d at 337 (granting summary judgment to Plaintiffs

where agency did "not fully describe whose email archives are being searched, . . . using which search terms and methods" nor "explain exactly which files and storage systems are being searched and exactly how that search is being performed"). On this basis alone, Plaintiffs are entitled to partial summary judgment.

## II. DEFENDANTS' SEARCHES WERE NOT REASONABLY CALCULATED TO UNCOVER ALL RELEVANT DOCUMENTS.

### A. Legal Standard

The FOIA compels Defendants to "construe FOIA requests liberally," *Oglesby v. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990) and to design searches reasonably calculated to uncover all relevant documents. *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 95. "Evidence that relevant records have not been released may shed light on whether the agency's search was indeed adequate." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 835-38 (D.C. Cir. 1979) (finding a search inadequate where there were "well-defined requests and positive indications of overlooked materials").Courts have provided agencies with clear guidelines on how to construct reasonable searches.

First, Defendants may not narrowly interpret particular terms used in a FOIA request to exclude clearly responsive information or fail to use obvious terms, acronyms or spelling variants. *Amnesty Int'l USA v. C.I.A.*, 2008 WL 2519908, *1, *15 (S.D.N.Y. June 19, 2008) ("a search that is designed to return documents containing the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA' is not reasonably calculated to uncover all relevant documents.") (internal citations and quotations omitted); *Fox News Network v. U.S. Dep't of the Treasury*, 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009) (finding the failure to use obvious

acronyms inadequate); *Hasbrouck v. U.S. Customs & Border Prot., C 10-3793 RS*, 2012 WL 177563, at *1 (N.D. Cal. Jan. 23, 2012) (finding the failure to use spelling variants inadequate).

Second, agencies may not unreasonably limit the offices or custodians searched. *Int'l Counsel Bureau v. United States DOD*, 657 F. Supp. 2d 33, 38-39 (D.C. Cir. 2009) (granting plaintiffs summary judgment where an agency improperly limited its search to particular custodians and topics); *Banks v. DOJ*, 700 F. Supp. 2d 9, 15 (D.D.C. 2010) (finding a search inadequate where the defendants failed to explain why they included some custodians and excluded others).

Third, they must "follow through on obvious leads to discover requested documents." *See Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (finding a search inadequate where, *inter alia*, an agency failed to search an office identified as potentially containing responsive records and an individual with a close nexus to the record requested). This "includ[es] leads that emerge during [an agency's] inquiry." *Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (holding that the district court erred in finding FBI's search adequate when FBI failed to search for potentially responsive records alluded to in other records the FBI produced).

Defendants fail on all three counts. First, they used a slipshod and inconsistent approach to search terms and methods employed, because they excluded obviously relevant terms that were clearly identified as central to the request, used unlikely compound or plural phrases, and identified no connectors that would simplify the search. For example, the Request explicitly sought information regarding the use of administrative or judicial warrants in home operations; the use of consent to enter homes; and the targeting or identification of individuals as gang members of associates. ECF No. 1-1 at 4-6. Yet none of the 26 offices searched use the terms

"warrant," "consent," or "gang." *See* Search Chart at Exh. 1. Equally troubling, Defendants used plural or compound terms almost guaranteed to avoid uncovering relevant information, such as "quotas" rather than "quota" or, most notably, the five-word string "home enforcement operations by ICE." In only one search, that of the DHS's Office of the General Counsel, did Defendants indicate that it had used terms or connectors to focus the search. *Id*. "[S]earch results will change dramatically depending on which logical connectives — such as 'and,' 'or,' 'w/ 10,' — are used." *Families for Freedom*, 837 F. Supp. 2d at 337. Reasonable searches would have used more flexible search terms, including using Boolean operators and connectors (words within or next to other words) and at least a handful of key word synonyms (such as home, house, residence, apartment).

Second, where custodians and data locations are discussed, it is clear that Defendants selected file locations in a haphazard way that excluded large categories of relevant information. Defendants did not search the files of all custodians likely to have documents, frequently choosing only one or two individuals' files to be searched, failing to search email systems or archives, and omitting entire offices from the search, even where it was obvious that these offices possessed relevant data. For example, home raids have generated frequent press attention, yet ICE's Office of Public Affairs did not even conduct a search. Pineiro Decl. ¶ 43, Exh. 4.

Third, Defendants repeatedly did not follow up on leads, even when advised numerous times by Plaintiffs of clear avenues to collect highly relevant information. For example, Plaintiffs repeatedly alerted Defendants of their interest in documents related to a controversial series of home operations that took place in Alabama in December of 2011. *See* ECF No. 1-1 at 18-19 (Letter from Southern Poverty Law Center describing Alabama raids). Although ICE's Office of Professional Responsibility produced some reports regarding complaints of ICE's

conduct during those operations, *see, e.g.*, Exhibit 6, (ICE OPR Report of Investigation on a home raid which allegedly "terrorized families"), the New Orleans Field Office responsible for those operations did not turn up a single document or communication discussing plans, dates or arrests made during those operations, and indeed appears not to have searched the email account of anyone but a single supervisory officer. Harrington Decl. ¶ 11(b). This failure demonstrates a plainly inadequate search. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) ("the court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception").

The haphazard design of the searches is patently inadequate. Plaintiffs focus on the most egregious cases in detail below.

B. ICE's Inadequate Use of Search Terms, Custodians, and Leads

*(i) Searches Conducted by Enforcement and Removal Operations ("ERO")*

Three of ERO's local field offices – the components of ICE whose staff carry out most enforcement operations– conducted searches. No information about any specific operation conducted by ERO officers was produced to Plaintiffs.

a. **Buffalo Field Office**: ICE provided nine search terms, including plural and compound terms (such as "targets," "non-targets," and "quotas") that excluded terms crucial to the Request (such as "warrant" or "consent" or "home" or "raid"). While shared and hard drives were searched, there is no indication that custodians other than the Deputy Field Office Director conducting the search had their Microsoft Outlook accounts searched. No records were generated. Harrington Decl. ¶ 11(a).

b. **New York Field Office**: ICE provided five search terms, including plural and compound terms, that excluded crucial components of the Request (such as "warrant" or "consent" or "target"), two of which were compound ("DRO/ERO policy" and "raids"). While shared and hard drives were searched, there is no indication that custodians other than the Two Assistant Field Office Directors conducting the search had their email accounts searched. Five memoranda and no other records (such as communications or e-mails) were generated. *Id*. at ¶ 11(b).

c. **New Orleans Office**: ICE provided nine search terms, including compound terms for county names (such as "Cherokee Co." and "Chilton Co.") and two additional terms, "home enforcement" and "raids." While shared and hard drives were searched, there is no indication that custodians other than the Supervisory Detention and Deportation Officer conducting the search had their email accounts searched. No records were generated. *Id*. at ¶ 11(c).

*(ii) Searches Conducted by Homeland Security Investigations ("HSI").*

Three of HSI's local SAC offices – the components of ICE whose staff carry out enforcement operations related to criminal investigations – conducted searches. No information about any specific operation conducted by HSI agents was produced to Plaintiffs.

a. **Buffalo SAC Office**: While "all Group Supervisors and Resident Agents in Charge" conducted searches, they provided no search terms and no indication of the types of files searched. No records were generated. McGinnis Decl. ¶ 16.

b. **New York SAC Office**: ICE provided four search terms ("arrest," "residence," "statistical information," and "arrest statistics") that excluded crucial components of the Request (such as "warrant," "consent" or "home"). Only Microsoft Outlook was searched, and there is no indication that any custodians other than the one Special Agent conducting the search had their email accounts searched. Five memoranda and no other records were generated. *Id*. at ¶ 17.

c. **New Orleans SAC Office**: ICE provided one compound search term ("home enforcement operations") that excluded crucial components of the Request (such as "warrant," "consent" or "home"). While "paper files," Microsoft Outlook, and shared and hard drives were searched, there is no indication that custodians other than the Resident Agent in Charge had their email accounts or paper files searched. No records were generated. *Id*. at ¶ 11(c).

*(iii) Searches Conducted by the Office of Professional Responsibility ("OPR")*

OPR provided nine search terms, eight of which were compound terms (such as "home confinement," and "contraband seizure") that excluded crucial components of the Request (such as "warrant," "consent" or "home."). The Management & Program analyst conducting the search searched only the case management system and no email or file systems. Although OPR is responsible for "investigating allegations of employee misconduct," Pineiro Decl. ¶ 31. including complaints of misconduct received by DHS' Office of Civil Rights and Civil Liberties

("CRCL"), CRCL produced numerous complaints that have no corresponding reports of investigation that would have been generated by OPR. *See* ECF No. 16 at 3. OPR thus appears not to have followed up on leads generated by CRCL's searches.

*(iv) Offices Where No Search Was Conducted*

a. **ERO's Law Enforcement Systems and Analysis Unit**:

LESA did not conduct any searches for relevant data, claiming that it "was unable to statistically ascertain the exact location where the officer made contact with the individuals," Harrington Decl. ¶ 14. Yet ERO does code "arrest location" in its ENFORCE database. *See* Bates No. 2014ICE1578.0003217, attached as Exhibit 7. (instructing employees where to input information regarding "landmark" and "place of apprehension or seizure"). Further, a claim that a particular data point is not tracked is insufficient to show that a search was adequate, particularly when it is clear that no search was even performed. *See Serv. Women's Action Network v. Dep' of Def.*, 888 F. Supp. 2d 231, 256 (D. Conn. 2012); *Vietnam Veterans of Am. Connecticut Greater Hartford Chapter 120 v. Dep't of Homeland Sec.*, 8 F. Supp. 3d 188, 220 (D. Conn. 2014).

ERO avers that the "development of ERO strategies . . . [is achieved in part] through data collection and analysis." Harrington Decl. ¶ 8(a). Given the prominence of the home enforcement tactic at ICE, and the role of data in developing strategies, the failure to search LESA was not reasonable.

**b. Office of Public Affairs ("ICE OPA")**

Despite being tasked by ICE with a search, OPA conducted no searches, because its Management Program Analyst determined that OPA "doesn't have involvement with home enforcement operations matters." Pineiro Decl. ¶ 43. But ICE routinely issues announcements

regarding home raids and enforcement operations, and the numerous articles published about home raids -- some of which were included as exhibits to Plaintiffs' Request and administrative appeal, see ECF No. 1-1 -- were likely to have generated communications and discussions of home raid operations. The failure to search OPA was not reasonable.

**c. Office of State, Local and Tribal Coordination ("OSLTC")**

The Request sought information related to "protocols for obtaining information or data from [law enforcement agencies], district attorney offices, parole offices, departments of corrections, and probation offices." Although local law enforcement agencies routinely collaborate with ICE, the OSLTC declined to search, claiming it had no involvement with operations. Pineiro Decl. ¶ 45. But according to ICE's own website, OSLTC's mission is to build "strong partnerships with federal, state, local, tribal, law enforcement and community groups to promote public safety, national security and border integrity." *See* https://www.ice.gov/leadership/osltc (accessed February 18, 2016). The refusal to search for protocols regarding information sharing was not reasonable.

C. DHS's Inadequate Use of Search Terms, Custodians, and Leads

*(i) Office of General Counsel ("OGC")*

OGC's initial search of just one custodian's email account, and no other records, using the following key word or filter: "ICE OR home AND ("enforcement operations" OR arrests) OR "target enforcement" "ICE OR home AND ("enforcement operations" OR arrests) OR "target enforcement." Tyrrell Decl. ¶ 45. This search excluded crucial terms (such as "warrant" or "consent") and was not reasonable.

*(ii) Office of Public Affairs ("DHS OPA"), Office of Policy ("DHS Policy"), & Office of Operations Coordination ("OPS")*

As noted in (I) (B) above, for DHS OPA, DHS Policy, and OPS, DHS's declaration provides no information on custodians, file structure, or search methods. Tyrrell Decl. ¶¶ 38, 43, 51. DHS did provide seven compound search terms (such as "home enforcement operation by ICE" and "enforcement raids") that exclude obvious terms (such as "warrant" or "consent" or "raid"). *Id*.; *see also* Search Chart. Unsurprisingly, these searches turned up no records. These searches were unreasonable.

The inadequate search of DHS Policy, which oversees the Office of Immigration Statistics ("OIS"), is particularly troubling, given that it "develops, analyzes, and disseminates statistical information needed to inform policy," including data on enforcement and arrests. *See* https://www.dhs.gov/office-immigration-statistics; (accessed February 19, 2016); https://www.dhs.gov/publication/immigration-enforcement-actions-2013 (accessed February 19, 2016). Given DHS's role in promoting the home raid tactic, and the failure of DHS to produce statistics or data responsive to the Request, the limited search of DHS Policy was unreasonable.

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In sum, both ICE and DHS failed both to provide Plaintiffs and the Court with information sufficient to evaluate their searches, and failed to conduct searches reasonably calculate to discover relevant documents. For these reasons, Plaintiffs are entitled to partial summary judgment that Defendants' searches were inadequate.

## III. THE COURT SHOULD ORDER ADDITIONAL SEARCHES.

A district court may order agencies to conduct additional searches when their searches were inadequate. *See, e.g.*, *Nat'l Day Laborer Org. Networ*k, 877 F. Supp. 2d at 112 (ordering new searches, including searches of archived records, with search terms agreed upon by both parties and certain custodians chosen by plaintiffs); *Morley*, 508 F.3d at 1119-20 (ordering

defendant agency to search particular records it had failed to search); *Int'l Counsel Bureau*, 657 F. Supp. 2d at 40 (ordering an agency to re-conduct its search because its original search was inappropriately limited in scope). In addition, a court may order defendants to provide supplemental declarations where defendants have provided insufficient information or explanations, or there remains a factual dispute regarding aspects of their search. *See Morley*, 508 F.3d at 1121 (ordering supplemental explanation).

Accordingly, Plaintiffs respectfully request that this Court order Defendants to conduct additional searches and provide additional information as follows:[6]

1. Searches of ICE's ERO Field Offices and H.S.I. SAC Offices

(a) Within 30 days of the Court's order, Defendants will produce the results of new searches of email accounts (including, where relevant, archived emails), personal and shared drives, in the ERO Field Offices and H.S.I. SAC Offices for Buffalo, New York and New Orleans.

(b) Defendants will conduct these searches with specified search terms, including Boolean operators, as supplied by Plaintiffs as Exhibit 8.

(c) Defendants will conduct searches of all relevant custodians, including but not limited to supervisory officers and agents involved in conducting and supervising home enforcement operations.

[6] Plaintiffs have limited the requested relief to key offices. Plaintiffs do not concede that the Defendants' other searches were sufficient, but have limit the requested relief to only the most essential categories of documents.

2. Searches of ICE ERO's LESA and DHS's OIS

(a) Within 60 days of the Court's order, Defendants will produce the results of searches for data regarding apprehension and arrests between January 1, 2014 and December 31, 2015 in the jurisdictions identified in Plaintiffs' FOIA Request.

(b) Defendants will conduct these searches after conferring with Plaintiffs regarding the search capabilities and tracking of data in LESA and OIS, and coming to agreement regarding the parameters of the data.

3. Searches of ICE's OPR

(a) Within 60 days of the Court's order, ICE will produce (1) all investigative records, including Reports of Investigation and determinations or outcomes of investigations, for misconduct complaints uncovered and produced in this litigation by DHS's CRCL; and (2) protocols and guidelines for OPR staff investigating complaints of misconduct.

4. Searches of ICE's Office of Policy & OSLTC

(a) Within 60 days of the Court's order, Defendants will produce the results of searches for policies, guidelines or protocols regarding administrative warrants, obtaining of consent in the absence of judicial warrants, and including through ruses or deception and protocols for sharing information or otherwise collaborating with state and local law enforcement agencies.

(b) Defendants will conduct these searches after (i) providing Plaintiffs with a list of shared databases or drives and key individual custodians whose records (emails, electronic and non-electronic files) will be searched and the names and versions of the software, electronic information systems and technology on which searches

are to be run; and (ii) meeting and conferring with Plaintiffs regarding proposed search terms.

5. Searches of DHS's OGC, Office of Policy, and OPS

(a) Within 60 days of the Court's order, Defendants will produce the results of searches for policies, guidelines or protocols regarding administrative warrants, obtaining of consent in the absence of judicial warrants, and including through ruses or deception and protocols for sharing information or otherwise collaborating with state and local law enforcement agencies; .

(b) Defendants will conduct these searches after (i) providing Plaintiffs with a list of shared databases or drives and key individual custodians whose records (emails, electronic and non-electronic files) will be searched and the names and versions of the software, electronic information systems and technology on which searches are to be run; and (ii) meeting and conferring with Plaintiffs regarding proposed search terms.

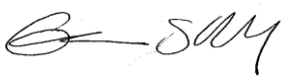
## CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Partial Summary Judgment and order a limited number of new searches.

Date: February 19, 2016

New York, New York

Respectfully submitted,



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