UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IMMIGRANT DEFENSE PROJECT, HISPANIC INTEREST COALITION OF ALABAMA, CENTER FOR CONSTITUTIONAL RIGHTS, *Plaintiffs*, v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, *Defendants*.	DOCKET NO.: 14-CV-6117 (JPO) **Document Electronically Filed**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants have made almost no attempt to show that the searches they undertook were reasonably calculated to uncover all relevant documents, the standard for establishing adequacy of search in a Freedom of Information Act ("FOIA") case. Months after first providing sworn declarations regarding the conduct of their searches, and in response to Plaintiffs' arguments that they made haphazard efforts to describe or conduct adequate searches responsive to Plaintiffs' Request, Defendants apparently expended significant effort to supplement and expand the descriptions of their searches. Defendants' supplemental declarations effectively concede lapses in their original submissions and toss off an untimely and erroneous critique of the substance of Plaintiffs' Request. But they do nothing to address the merits of Plaintiffs' argument regarding the gross inadequacy of Defendants' searches.

Defendants fail to meet their burden to show that the searches they undertook complied with their obligations under FOIA. In some cases, searches of offices that were indisputably involved in conducting enforcement operations at homes were so poorly designed that they failed to turn up a single document; in other cases, offices with relevant data conducted no searches at all; in still others, offices likely to turn up relevant documents failed to follow up on clear leads. Thus, even with the addition of three supplemental declarations, Defendants cannot demonstrate beyond material doubt that the searches were reasonably calculated to uncover all responsive documents, and the Court should grant summary judgment to Plaintiffs.

Further, with the hope that Defendants would undertake a small number of targeted searches of relevant offices in lieu of briefing regarding the adequacy of search, the parties engaged in lengthy and fruitless negotiations leading up to briefing. (ECF Nos. 16, 21-22, 26, 28). At the end of several months of discussions, Defendants agreed to do no new searches at all.

Given this history, should the Court find that Defendants' searches inadequate, an order that Defendants undertake new searches without any guidance from the Court, or that the parties again engage in negotiations over search terms, is likely to result in even more delay in obtaining crucial documents. Where searches conducted pursuant to FOIA are not reasonable, the Court is empowered to order Defendants to perform specific additional searches. Plaintiffs respectfully request that the Court find Defendants' searches inadequate and order ICE and DHS to undertake a small number of targeted searches in a limited number of offices with specified search terms and/or collaboratively-developed search methods.

ARGUMENT

I. Defendants Neglect Crucial Components of the Standard for Adequacy of Search

A. Searches Must Be Reasonably Calculated to Uncover All Relevant Documents

Defendants state that to prevail on summary judgment, "the government's search need only be reasonable." (Defs' Br. at 10). But the reasonableness standard is far more specific and rigorous than Defendants suggest. A defending "agency must show that it has conducted a search reasonably calculated to uncover *all relevant documents*." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (emphasis added). *See also Nat'l Day Laborer Org. Network v. ICE.*, 877 F. Supp. 2d 87, 102 (S.D.N.Y. 2012) ("FOIA … requires that 'agencies conduct a search reasonably calculated to uncover *all* relevant documents, not 'most' relevant documents") (internal citations omitted) (emphasis in original). Given that several crucial offices – including field offices that indisputably conducted home raid operations during the specified time periods – failed to produce a single record, Defendants cannot and do not contend that their searches were calculated to uncover all relevant documents.

B. Defendants' Eleventh-Hour Assertion that Plaintiffs' Request Is "Vague," "Broad," Or "Not Reasonably Described" Is Untimely and Irrelevant

Rather than demonstrate that they have designed searches reasonably calculated to uncover all relevant documents, Defendants suggest that their obligations are diminished because, as they assert for the very first time, Plaintiffs' FOIA request was "vague" and "broad." Defs' Br. at 9. This assertion, as well as the baseless suggestion that Plaintiffs failed to "reasonably describe" documents sought (Defs. Br. at 9 Supp. Pineiro Decl., ¶ 9), appears nowhere in any previous communication from Defendants. *See, e.g.*, ICE's Administrative Responses to Plaintiffs' Request (ECF No. 1, Exhibit 8) (stating that "ICE has searched for responsive records to your FOIA request and is working on processing those records"); DHS's Administrative Response to Plaintiffs' Request (ECF No. 1, Exhibit 13) (stating that DHS had undertaken searches, with no mention of Plaintiffs' failure to reasonably describe records sought); Defendant's Answer, filed on October 15, 2014 (ECF No. 11) (failing to assert that the Request had not "reasonably describe[d]" the records sought). In no previous letter or declaration have Defendants have claimed not to understand the core subjects of Plaintiffs' request: policies, practices, and data related to controversial home raids and home enforcement operations. Nor have they ever before argued, as they do now, that the Plaintiffs "presumably" sought information about the removal of 2.2 million immigrants during the Obama Administration. Defs.' Br. at 9. Attempts to distract from their flawed searches now must be rejected.

Contrary to Defendants' misleading characterization, Plaintiffs' Request gave detailed descriptions of the documents sought, defined terms, including "home enforcement operations," specified limited geographic locations, such as certain counties in Alabama, and provided extensive citations to relevant documents, such as articles about home raids and enforcement

tactics. *See* Plaintiffs' Request, ECF No.1-1. All this detail was provided to assist Defendants in searching for responsive records, thus giving the agencies guidance and leads which the agencies were "obliged to pursue." *Halpern v. F.B.I.* 181 F.3d 279, 288 (2d Cir. 1999). The Request more than satisfied the requirement that Plaintiffs "reasonably describe" the records sought.

Moreover, even if some portions of the request could be seen as insufficiently described or broad – which they are not – Defendants were obliged both to discuss any confusion with Plaintiffs and to pursue those portions of the request about which they could not credibly have had any misunderstanding. A federal agency has "no right to resist disclosure because the request fails reasonably to describe records unless it has first made a good faith attempt to assist the requester in satisfying that requirement." *Ruotolo v. Dep't of Justice*, 53 F.3d 4, 10 (2d Cir. 1995) (internal citations and quotations omitted). Far from alerting Plaintiffs of any purported problem with the Request and working together to resolve any ambiguity, Defendants did not provide any information regarding their searches to Plaintiffs until the Court ordered them to do so. (August 4, 2015 Minute Entry ordering search declarations by September 30, 2015).

Nor is there any validity to Defendants' argument that the range of documents sought in Plaintiffs' Request allowed Defendants to evade their obligations under the FOIA. Defs.' Br. at 10. Defendants cite *Hainey v. U.S. Dep't of the Interior* 925 F. Supp. 2d 34, 44 (D.D.C. 2013) for the proposition that agencies "need not honor" unreasonably burdensome FOIA requests. But as the *Hainey* Court notes, "[w]here an agency claims that a search would be unreasonable …. The burden falls on the agency to 'provide sufficient explanation as to why such a search would be unreasonable.'" *Hainey*, 925 F. Supp. 2d at 44-45 (internal citations omitted). Indeed, the defending agency in *Hainey* did exactly that, engaging in negotiations with the plaintiff which the plaintiff and, having already satisfied significant portions of the plaintiff's request,

"offer[ing] to produce a more limited range of documents in response to [one portion of] Hainey's … request." The Court ruled in the defendant's favor after "Hainey rejected that proposal." *Id*. In contrast, here it is Plaintiffs who have attempted to engage Defendants in potential resolution by proposing limited new searches of a small number of offices. But Defendants have refused to undertake these limited searches, even as they now complain that Plaintiffs have sought too "broad" a set of documents.

C. Ordering New Searches or Collaboration Regarding Search Terms Is Appropriate Where Agencies Have Failed to Conduct Adequate Searches

Defendants argue that the Court should reject Plaintiffs' proposed search terms for certain offices as well as their proposal to collaborate with Plaintiffs in designing adequate searches, because it is "within an agency's discretion to structure a search that is likely to uncover responsive documents." Defs.' Br. at 10. But the cases that Defendants cite in support involve far more thorough searches, with many more search terms used, than those conducted here. For example, in *Anderson v. U.S. Dep't of State*, 661 F. Supp. 2d 6 (D.D.C. 2009) in a search for materials that formed the basis of the Secretary of State's 2003 speech on Iraq to the United Nations, Defendants failed to uncover responsive documents despite the use of a wide range of keywords in numerous State Department components. Indeed, contrary to Defendants' suggestion, at least three components did use the keyword "Iraq" in searches, sometimes in combination with other terms. 661 F. Supp. 2d at 8. The search was found adequate because the agency provided "detailed descriptions of the records searched" and used keywords in a "reasonable" and "systematic" way. *Id*. at 12. Indeed, the Court in *Anderson* rejected Plaintiffs' proposal of additional key words only because "a search more narrowly tailored to his request had already proven unfruitful." *Id*. Agencies have the discretion to structure their searches only

insofar as the searches they design are reasonably calculated to uncover all relevant documents. But where a search is patently inadequate, courts may fashion remedies that include use of additional specified search terms and/or collaboration with Plaintiffs regarding the design of the new searches. *See* Pls.' Op. Br. 11-12 (citing numerous district court cases imposing search requirements on agencies); *Nat'l Day Laborer Org. Network*, 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). Such decisions are not "outlier[s]," Defs.' Br. at 11-12, but rather practical solutions to agencies' delays and flawed searches.

II. Defendants' Supplemental Declarations Do Not Cure the Inadequacy of the Searches

In response to Plaintiffs' challenges to the omissions in Defendants' declarations, Pls.' Op. Br. at 6-11, Defendants have submitted supplemental declarations from three government declarants, all providing additional detail about the search location and methodology. The submissions in effect concede that the initial declarations, provided to Plaintiffs on September 30, 2015, lacked sufficient detail to demonstrate adequacy of search. Had this supplemental information appeared in Defendants' initial declarations, or at any time after the Plaintiffs alerted Defendants and the Court to major gaps in those declarations on October 31, 2015 (ECF No. 21, 22), the litigants and the Court could possibly have been spared significant time and resources.

In any case, while the new declarations do in some cases provide fuller detail regarding how searches were conducted, they do not correct the unreasonable design of the searches themselves, specifically the failure to use sufficient and appropriate search terms where searches were conducted, the failure to conduct searches for relevant data, and the failure to follow up on "clear and certain" leads to further information regarding complaints of misconduct. *Halpern*,

181 F.3d at 288. Plaintiffs address Defendants' approach to each of these failures in turn, focusing only on the offices for which additional searches are sought.[1]

A. Failure to Use Sufficient and Appropriate Search Terms

ICE: E.R.O and H.S.I. Field Offices

ICE does not offer any affirmative defense of the use of unusual search terms that include compound phrases or plural words such as "home enforcement operations" or "targets" but exclude words like "warrant" or "consent." They merely state that Plaintiffs "may not dictate specific search terms." Defs.' Br. at 20. Aside from five memoranda produced by the New York Field Office, Harrington Decl. ¶ 11(c) (ECF No. 32-2), these searches uncovered no records. "[P]ositive indications of overlooked materials" strongly suggest an inadequate search. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). Having failed to justify searches that resulted in no records returned from offices that indisputably engaged in enforcement operations at residential homes, it is clear that these searches were inadequate.

DHS: Office of General Counsel ("OGC") & Office of Policy

Similarly, DHS does not offer any affirmative defense of the compound terms such as "target enforcement" used to search both OGC and the Office of Policy, the latter of which returned no records at all, strongly suggesting an inadequate search. *Valencia-Lucena*, 180 F.3d at 326. With no explanation of why the OGC could not use additional filters to narrow the results of its search or why the Office of Policy did not reassess its searches after uncovering no records at all, DHS has not met its burden to show an adequate search.

[1] Plaintiffs' Opening Brief sought an order for additional information and searches in ICE's Office of State, Local and Tribal Coordination ("OSLTC") and DHS's Office of Operations Coordination ("OPS"). Pls.' Op. Br. at 20-21. The Supplemental Declarations submitted by Fernando Pineiro ("Supp. Pineiro Decl.") and Kevin Tyrrell ("Supp. Tyrrell Decl.") provide additional information about the offices and the searches, and Plaintiffs no longer seek additional searches of those offices.

B. Failure to Produce Relevant Data

ICE: Law Enforcement Systems & Analysis ("LESA")

Defendants justify their failure to produce any data at all from LESA by stating that ICE does not track for whether operations take place in or at homes. Defs' Br. at 21. But they fail to consider alternatives such as the production of a limited date range of raw data proposed by Plaintiffs. *See Rubman v U.S. Citizenship & Immigration Serv.*, 800 F.3d 381, 391 (7th Cir. 2015) ("We certainly don't want to discourage agencies from providing raw data, database query results, or newly generated charts and tables when a FOIA request asks for them, when there are no other responsive records available, or when a requester consents to one of those formats.") Further, Defendants' objection to Plaintiffs' proposal for data searches depends not on adequacy of search principles, but on the conclusory statement that information would be exempt pursuant to FOIA Exemption 7(C). But Defendants provide no legal support for the proposition that the disclosure of addresses alone, without accompanying names, would disclose private information. Defs. Br. at 24 n.9. The failure to produce any data regarding home enforcement operations demonstrates an inadequate search.

C. Failure to Follow Up on Leads

ICE Office of Professional Responsibility ("OPR")

In defending the failure of OPR to produce reports of investigations ("ROI") that led from complaints produced by DHS's Office of Civil Rights and Civil Liberties, Defendants claim that "Plaintiffs simply speculate that OPR records must exist" and "offer no reason to believe that every DHS CRCL complaint must generate an ICE OPR report of investigation." Defs' Br. at 20. In fact, a document produced by Defendants indicates that the creation of ROI is in fact a routine step in processing complaints made to CRCL. *See* Schwarz Supp. Decl. Exhibit

6 at Bates No. DHS-004-0000050-51 (memorandum describing complaint made to CRCL of mistreatment of 16-year-old during home enforcement operation and including box to fill in information to be put in an ROI). An accompanying memorandum, addressed to the Acting Deputy Director of OPR, indicates that DHS does require that complaints received by CRCL trigger follow-up by other components. Schwarz Supp. Decl. Exhibit 6 at Bates No. DHS-004-0000054. Contrary to Defendants' suggestion, Defs. Br. at 20 n.7, the fact that DHS and ICE do searches separately does not exempt ICE from following up on leads that emerge during the course of a search. In any case, the attached memorandum describing protocols for processing civil rights complaints, Schwarz Decl. Exhibit 6, is a "positive indication" that OPR has overlooked materials such as ROI that followed the receipt of numerous CRCL complaints. *Valencia-Lucena*, 180 F.3d at 326.

III. Plaintiffs' Proposed Remedy Is Appropriate

Because "stale information is of little value," timely public awareness of government action is a "'structural necessity in a real democracy.'" *Elec. Private Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006), quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Two and a half years have passed since Plaintiffs submitted their initial request. Numerous negotiations with Defendants to obtain limited new searches of offices that had failed to perform adequate searches have failed. Where, as here, defendants have not conducted an adequate search even after significant negotiation and guidance from Plaintiffs, the Court is empowered to order specific search procedures to prevent agency delay. *See Kean v. Nat'l Aeronautics & Space Admin.*, 480 F. Supp. 2d 150, 159 (D.D.C. 2007) (ordering parties to confer and jointly propose search and documentation procedures after finding of inadequacy); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (ordering

high-level monitoring of specific searches after finding of inadequate search). Both the specific search terms and the collaborative process proposed by Plaintiffs can help ensure Defendants' prompt compliance in conducting a limited new searches with a minimum of delay.

CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Partial Summary Judgment, deny Defendants' Motion for Partial Summary Judgment, and order the searches requested by Plaintiffs in their Opening Brief.

Respectfully submitted,

Date: April 29, 2016
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/s/

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