14 CV 583

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

DETENTION WATCH NETWORK
and CENTER FOR CONSTITUTIONAL
RIGHTS,

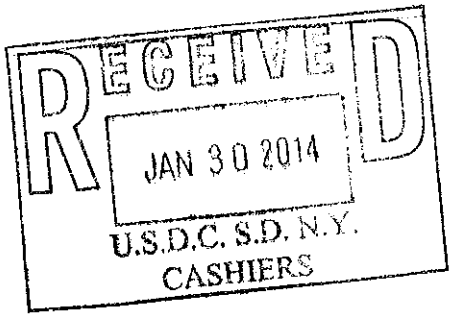
Plaintiffs,

v.

UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT and
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

----------X



COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, for declaratory, injunctive, and other appropriate relief to compel the release of agency records improperly withheld from Plaintiffs, Detention Watch Network ("DWN") and Center for Constitutional Rights ("CCR") (collectively "Plaintiffs"), by Defendants, U.S. Immigration and Customs Enforcement ("ICE") and U.S. Department of Homeland Security ("DHS").

2. DWN and CCR submitted a FOIA request to Defendants on November 25, 2013, seeking records related to a time-sensitive public policy matter: the Detention Bed Quota, also known as the Detention Bed Mandate, the Immigration Detention Quota, or the Lockup Quota. *See* November 25, 2013 FOIA Request Letter from DWN and CCR ("Plaintiffs' Request"),

attached as Exhibit A. Plaintiffs sought records, including those related to decision-making surrounding the Detention Bed Quota as well as its impact on detention policy and detention contracting decisions nationwide from June 2006 to the present.

3. Plaintiffs' Request sought expedited processing. Plaintiffs' need for information regarding the Detention Bed Quota is urgent and time-sensitive due to the upcoming appropriations cycle for Fiscal Year 2015 ("FY15"), expected to officially commence on March 4, 2014, when President Obama submits his annual budget recommendation for the upcoming fiscal year to Congress. The Detention Bed Quota garnered significant public attention in 2014, and will to continue to do so during the appropriations process for FY15.

4. The Detention Bed Quota was formally included in appropriations bills starting in Fiscal Year 2009 with a mandate of 33,400 beds, later increased to 34,000 in 2012. The Detention Bed Quota has been included by Congress in every appropriations bill since Fiscal Year 2009, including most recently in the omnibus spending bill for Fiscal Year 2014. There is currently a significant and growing debate among members of Congress and the Obama Administration regarding future quota levels and whether it should be eliminated completely.

5. The Detention Bed Quota currently conditions over $5.39 billion in funding for ICE on the maintenance of 34,000 detention beds per day. These detention beds exist for the sole purpose of civil detention of immigrants pending the outcome of their immigration cases, not incarceration for individuals who are serving sentences for criminal convictions or awaiting trial on criminal charges.

6. The Detention Bed Quota has been interpreted by ICE and both Democratic and Republican members of Congress as establishing a requirement that the agency lock up at least 34,000 immigrants per day for the agency to maintain its detention funding. *See* William Selway

& Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, Bloomberg (Sept. 24, 2013), http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html, attached as Exhibit B; *Detention Must Be Paid*, New York Times (Jan. 20, 2014), http://www.nytimes.com/2014/01/21/opinion/detention-must-be-paid.html?src=twrhp&_r=0., attached as Exhibit C.

7. It is completely unprecedented for a law enforcement agency to institute a lockup quota mandating the number of individuals who must be kept in jail. According to Representative Theodore Deutch, "[n]o other law-enforcement agencies have a quota for the number of people that they must keep in jail. Mandating ICE detain 34,000 individuals a day does not secure our borders or make us safer." *See* Exhibit B.

8. Especially unusual is that primary beneficiaries of the Detention Bed Quota are local and state jails, which experience a cash influx when taking on immigrant detainees, and private prison corporations, which spend significant sums on lobbying in Congress. *See* Exhibit B.

9. Data released by DHS on January 23, 2014 demonstrates the potential impact of a requirement that ICE detain a certain number of non-citizens. According to DHS's own reports, ICE detained 478,000 individuals in 2012, a record high during a time in which illegal border crossings were at record lows – despite increased funding and enforcement, apprehensions at the border dropped from 1.8 million in 2000 to 365,000 in 2012.

10. The large majority of these nearly half a million detainees have no criminal record and range from the elderly to pregnant women, sick and mentally ill immigrants, and asylum-seekers and refugees, many of whom are further traumatized by their placement in detention cells. Immigrants are in civil detention while waiting – often for months, even years and without

the aid of lawyers – due to civil immigration violations. Detention significantly decreases the likelihood of success in an immigration case, due to many facilities' remote and isolated locations that are difficult for attorneys and community members to access. Immigrants who do have criminal convictions, most of which are for non-violent or low-level offenses, have already served their sentences by the time they are placed in civil immigration detention.

11. The public has an urgent interest in understanding the impact of the Detention Bed Quota on detention decision-making at the federal and local level, in part in order to meaningfully participate in the Congressional appropriations process for FY15. The process is set to begin on March 4, 2014, when the President submits his budget request.

12. Defendants have failed to respond to Plaintiffs' Request, which seeks information that would illuminate the practices and policies relating to immigration detention, enforcement decisions, and the use of taxpayer money to fund detention facilities, including those run by private corporations. Such information is crucial for public debate, because almost no information is available in the public sphere regarding how ICE and DHS are using the Quota to influence decisions regarding enforcement and contracting with local jails and private prison corporations.

13. To vindicate the public's right to information about immigration detention and enforcement practices and policies, Plaintiffs seek declaratory, injunctive, and other appropriate relief to compel Defendants to immediately process Plaintiffs' Request and release records that have been unlawfully withheld.

JURISDICTION AND VENUE

14. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2).

15. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. §§1391(e) and 1402(a) as CCR resides in this district.

PARTIES

16. Plaintiff DWN is a national coalition of organizations and individuals working to expose and challenge the injustices of the U.S. immigration detention and deportation system and advocate for profound change that promotes the rights of dignity of all persons. DWN was founded in 1997 in response to the explosive growth of the immigration detention and deportation system in the United States. Today, DWN is the only national network that focuses exclusively on immigration detention and deportation issues. DWN is recognized as the "go-to" resource on detention issues by media and policymakers and known as a critical national advocate for just policies that promote an eventual end to immigration detention. As a member-led network, DWN united diverse constituencies to advance the civil and human rights of those impacted by the immigration detention and deportation system through collective advocacy, public education, communications, and field-and-network-building. DWN has a well-known website featuring the latest news, information and developments on detention policy. The office and principal place of business of DWN is located in Washington, D.C.

17. Plaintiff CCR is a non-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR's diverse dockets include litigation and advocacy around immigration detention, post-9/11 and other immigration enforcement policies,

policing, and racial and ethnic profiling. CCR is a member of immigrant rights networks nationally and provides legal support to immigrant rights movements. One of CCR's primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current immigration law issues, and other similar materials for public dissemination. These and other materials are available through CCR's Development, Communications, and Education & Outreach Departments. CCR operates a website, www.ccrjustice.org, which addresses the issues on which the Center works. The website includes material on topical civil and immigrants' rights issues and material concerning CCR's work. All of this material is freely available to the public. In addition, CCR regularly issues press releases, operates an e-mail list of over 50,000 members and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR staff members often serve as sources for journalist and media outlets, including on immigrant rights. The office and principal place of business of CCR is located in New York County, New York.

18. Defendant DHS is a Department of the Executive Branch of the United States tasked with overseeing, *inter alia*, immigration enforcement, border security, immigration detention, and immigration and citizenship benefits.

19. Defendant ICE is a component of DHS that enforces immigration and customs laws and is responsible for the detention and removal of immigrants. It has offices in all 50 states.

20. Both DHS and ICE are "agencies" within the meaning of 5 U.S.C. § 552(f)(1).

STATEMENT OF FACTS

Background on Immigration Enforcement and Detention

21. Every day, non-citizens are detained, or imprisoned, in a network of lock-up facilities. Over 250 privately owned and operated facilities, along with local and state jails, house an average of 34,000 immigrants each day at the behest of the Department of Homeland Security's Immigration and Customs Enforcement. Detained immigrants often find themselves in far-flung parts of the country, far from family or immigrant support networks, and without access to attorneys or even reliable telephones to call for assistance.

22. In 1988 and 1996 significant reforms to immigration law created and expanded what is known as "mandatory detention," removing discretion from Immigration Judges and requiring detention of non-citizens convicted of a broad range of criminal offenses, including subway turnstile jumping and shoplifting. Over the last two decades, these laws led to an explosion in immigrant detention. Moreover, without the option for judicial review of an immigrant's detention, the numbers of immigrants subject to prolonged detention skyrocketed.

23. Immigrant detainees are typically not entitled to appointed counsel to challenge their detention or their often exorbitant bonds. In New York City 68% of individuals are released on their own recognizance in the criminal justice system, compared with less than 1% in New York immigration courts, which deal with civil cases adjudicated by administrative judges. *See Insecure Communities, Devastated Families: New Data on Immigration Detention and Deportation Practices in New York City* (July 23, 2012), attached as Exhibit D. Only recently has any federal court ordered ICE to provide some particularly vulnerable detainees -- individuals with serious mental disabilities -- with appointed counsel.

24. Recently released DHS data reveals the detention population consists of asylum seekers, low level offenders, mothers and fathers and working immigrants. Immigrants, including U.S. green card holders, have been held for months, and increasingly for *years*, not

because they have been sentenced for criminal convictions or are even awaiting trial on criminal charges, but because they are awaiting the outcomes of their civil immigration cases. While in detention, vulnerable populations, such as transgender immigrants escaping persecution and survivors of sexual abuse, may be placed in solitary confinement "for their own protection." Even more troubling, immigration detention facilities have no independent oversight or legally enforceable detention standards to adequately ensure the safety of immigrants in detention.

25. In October 2009, then-Director of the Office of Detention Policy and Planning Dr. Dora Schriro recommended that ICE use its discretionary authority to release non-citizens who are not flight risks or a risk to public safety. That the current immigrant detention system allows for individuals to be detained far from their family, without the right to counsel, for *prior* criminal conduct for which they were never required to serve any time and were released from pre-trial custody shows the hypocrisy of the statutory scheme Dr. Schriro sought to address in her recommendations.

26. But ICE's own data shows that, instead, ICE is detaining more non-citizens who pose no threat to the community. 41% of ICE detainees are classified as Level 1 offenders, the lowest-risk group, and in 2009, only 11% of detainees had been convicted of violent crimes. Records show that one-third to one-half of all ICE detainees are held under discretionary and not mandatory detention. *See* Exhibit B. Thus a significant increase in detention numbers could presumably be accomplished simply by modifying the use of agency discretion. Without further information, it is unclear whether ICE officials are making decisions to enforce immigration policy, or continue detaining immigrants based solely on the Detention Bed Quota – and billions in ICE funding tied to officials meeting this quota.

27. The total number of individuals who have spent time in immigration detention within a given year has increased from 204,459 in 2001 to 478,000 in 2012. The locations where individuals are detained mushroomed to remote locations far from social networks of support, families or legal services providers. Detainees are often transferred before, or even after, an attorney has been secured in the detainee's home jurisdiction.

28. Detention conditions are abhorrent. In November of 2013 alone, three comprehensive reports were released by multiple non-profit advocacy and educational organizations, including Detention Watch Network, the Center for American Progress, and the Center for Victims of Torture, regarding the cruel and inhuman conditions in immigrant detention facilities. The reports highlighted 141 deaths in detention in the last decade; dangerous and sub-standard medical and mental health care; disturbing uses of solitary confinement of vulnerable populations, including mentally ill and transgender immigrants; maggot- and worm-infested food; lack of access to legal aid; and intentional isolation from communities and loved ones, leading to exacerbation of trauma and fear, particularly for asylum-seekers and refugees.

29. Since President Obama was elected, DHS has increased its use of local law enforcement agencies to arrest and detain non-citizens. Programs such as 287(g) and Secure Communities have been criticized for deputizing local police into immigration agents. Over the last five years, enforcement of immigration law has become a joint effort between federal, state and local law enforcement authorities. This record-breaking increase in enforcement and arrests is occurring at the same time as ICE is implementing the Detention Bed Quota. It is crucial that the public understand the connection between increased enforcement and increased detention numbers.

The Detention Bed Quota

30. The Intelligence Reform and Terrorism Prevention Act of 2004 mandated that ICE create 8,000 more beds per year from 2006 through 2010, subject to the availability of appropriated funding. This prompted a dramatic increase in detention bed funding starting in 2006.

31. The primary beneficiaries of the increased detention authority and the Detention Bed Quota are local and state jails, who experience a cash influx when contracting to detain immigrants, and private prison corporations. Corrections Corporation of America (CCA) and GEO Group Inc., are the largest private operators, together holding approximately over a third of all immigrant detainees. Both have doubled in value since mid-2010, despite problems with staffing shortages, employee turnover, cost-cutting, and dangerous conditions for inmates. CCA earned $752 million in federal contracts in 2012. It runs the sixth-largest prison system in the country behind the U.S. and four states, charging up to $200 per day for immigrant detainees.

32. The relationship between public facilities and cash incentives is no less problematic. An investigation by one news organization into a single detention center in Alabama uncovered e-mails between ICE and prison companies in which company officials demanded more detainees and ICE liaisons suggested the agency could simply find more "bodies" to fill the beds. After Alabama Members of Congress pressured ICE officials to increase detainee numbers, an e-mail by a senior ICE official stated that there would be "serious repercussions against [ICE's] budget" if the agency failed to provide detainees for the Alabama detention center. *See* Hannah Rappleye & Lisa Riordan Seville, *How One Georgia Town Gambled Its Future on Immigration Detention*, The Nation (Apr. 10, 2012), http://www.thenation.com/article/167312/how-one-georgia-town-gambled-its-future-immigration-detention#, attached as Exhibit E.

33. Advocates across the country and a few Members of Congress have made significant progress in getting more exposure of the little-known Detention Bed Quota. Most significantly, in the Spring of 2013, Representatives Theodore Deutch and Bill Foster introduced an amendment in the House to strike the Detention Bed Quota from the FY14 appropriations language. The amendment lost 232 to 190. In the following months, the Detention Bed Quota was covered by major news sources, including Reuters, NPR, the New York Times, MSNBC, the Washington Post, and Bloomberg News.

The Public Has Been Deprived of Information Regarding Implementation and Effects of the Detention Bed Quota

34. Defendants have withheld from the public even the most basic information about implementation of the Detention Bed Quota, including, but not limited to: 1) changes in enforcement or detention decision-making made in order to meet the quota; 2) data relied upon by the Obama administration in its attempts to reduce the quota; 3) the agency's reasoning for interpreting the Detention Bed Quota as a law enforcement quota and not a funding earmark; 4) daily prices paid by the agency to private prison companies for housing detainees; and 5) communications between the agency and private prison companies that have lobbied for contracts and increased appropriations.

35. Defendants have not informed the public of what policies ICE and DHS have put into place to meet the Detention Bed Quota – specifically, whether the agency is engaging in efforts to find and detain more non-citizens, or simply denying discretionary release to immigrants whom the agency would otherwise consider to present neither a danger to the community nor a flight risk.

The Public Has Been Deprived of Information Revealing Defendants' Attempts to Reduce the Quota

36. In April 2013, the Obama Administration has sought to decrease funding for the Detention Bed Quota from 34,000 to 31,800 beds, in order to allow for the use of more alternatives to detention, such as supervised release or ankle bracelets. *See* Exhibits B, C.

37. However, no information has been released to the public what reports or data the administration relied upon in making that assessment. Such information could help the public understand whether the extraordinarily high level of the Quota is contributing to wasteful spending and unnecessary discretionary detention.

38. Further, the 2014 omnibus spending bill passed by Congress and signed into law by President Obama on January 17, 2014 for FY14 again renews the Detention Bed Quota at 34,000.

Defendants Have Not Disclosed Their Reasoning for Interpreting the Appropriations Provision as a Law Enforcement Quota

39. Discussions in the Congressional Record during the passing of the Detention Bed Quota show that the framer and at least some supporters of the Quota interpreted it as an earmarking of funds and not a law enforcement quota. For example, Senator Robert Byrd, who introduced the amendment establishing funding for bed space, described it as "fully fund[ing] 33,400 detention beds and includ[ing] statutory language to maintain that level of bed space throughout the fiscal year," suggesting that the Detention Bed Quota was meant to apply to available "bed space" and not detainee numbers. *See* 155 Cong. Rec. 10557 (2009). By interpreting the appropriations provision as a quota, ICE has departed from what appears to be the original intent of the statute.

40. In April 2013, then-Secretary of DHS Janet Napolitano criticized the quota aspect of the Detention Bed Mandate as "arbitrary" and "artificial." *See* Exhibit B. The data and discussions informing her analysis have not been made available to the public.

41. Nor have Defendants provided the public with any information regarding their reasoning for interpreting the Detention Bed Quota as a national law enforcement quota – an interpretation that is not only counter to legislative intent but, by the admission of DHS's former director, arbitrary and artificial.

Defendants Have Not Disclosed the Real Costs of Contracts to Private Prison Companies for Housing Detainees

42. While ICE has disclosed some contracts with private prison corporations showing the "guaranteed minimum" price per detainee – the price ICE pays for the number of detainees it promises to provide to the prison corporation each day – these contracts have been redacted to remove information about the "variable" prices ICE pays for detainees on a daily basis.

43. Without this information, it is impossible for the public to assess the actual cost of the Detention Bed Quota.

Defendants Have Not Disclosed Communications with Private Prison Companies

44. The press has reported on extensive lobbying of Congressional appropriations committees by private prison companies both during and subsequent to the establishment of the Detention Bed Quota. *See, e.g.,* Exhibit B.

45. However, Defendants have not revealed to the public how the relationships between the agency and private prison companies influence their enforcement decisions. The extent to which decisions regarding lucrative intergovernmental service agreements ("IGSAs") with ICE and DHS are determined on the basis of local law enforcement cooperation with ICE

enforcement programs such as 287(g), the Criminal Alien Program, or Secure Communities is unknown to the public.

46. Defendants have not released information that would allow the public to determine whether profit-motivated corporations are holding agency funds hostage throughout the country in order to foment an increase in detention rates.

Plaintiffs and the Public Have an Urgent Need for Records Sought

47. There is an urgent need to inform the public of agency policies and decision-making regarding the Detention Bed Quota. Records and documents about such policies are crucial to public understanding of the ways in which the Quota increases detention costs and affects immigration enforcement decisions.

48. In addition, such records and documents should inform the upcoming appropriations debate. Congress just approved the 2014 omnibus, a spending bill to keep the government running for the rest of FY14. In it, Congress allocates nearly $3 billion in funding for ICE detention programs. House Appropriations Committee Chairman Hal Rogers highlighted the Detention Bed Quota in his summary of the 2014 omnibus, stating that this funding is intended "to sustain the statutorily mandated 34,000 detention beds – the highest detention capacity in history."

49. The appropriations debate for FY15 is already underway. President Obama announced on January 23, 2014 that he would release a proposed budget by March 4, 2014. That budget is expected to include proposed funding for the Detention Bed Quota.

50. It is paramount that the public have the requested information to meaningfully engage in the public debate surrounding the cost of detention; decisions regarding the number of beds ICE is required to occupy; and incentives by local governments to arrest and fill ICE

detention beds. Politicians on both sides of the aisle have also called attention to excessive use of immigration detention, which is directly tied to the mandate. For example, during a March 2013 House Judiciary Committee Hearing, Representative Spencer Bachus (R-Ala.) warned of an "overuse of detention by this administration," and was among 190 Members of Congress – Democrat and Republican – who voted for the amendment to eliminate the Detention Bed Quota. *See* Jude Joffe-Block, *Ice Head Answers More Questions on Detainee Release*, KPBS (Mar. 19, 2013), http://www.kpbs.org/news/2013/mar/19/ice-head-answers-more-questions-detainee-release/, attached as Exhibit F.

51. The use of local jails and correctional facilities, as well as private correctional facilities and federal Service Processing Centers, to detain non-citizens in civil immigration detention is a matter of concern to the Plaintiffs and the general public. The suggestion in recent news articles that the Detention Bed Quota is not welcomed by high-level DHS officials such as former DHS Secretary Janet Napolitano, *see* Exhibit B, but is the result of private prison corporations' lobbying certain members of the Senate and House DHS appropriations subcommittees, raises questions regarding fiscal responsibility and appropriations priorities. The public has a right to understand the motives of government officials and agencies on this important policy issue, especially in light of the upcoming appropriations and continued Comprehensive Immigration Reform debate.

52. Given the bipartisan critique of the Detention Bed Quota, the public has an urgent need to know why it is still in place. Congress debates the appropriations for the Department of Homeland Security as early as February of each calendar year. Last year, appropriations committee members began considering the FY14 budget even before the President submitted his FY14 budget proposal. It is necessary for the requested information to be made available in

advance of Congressional discussions of the appropriations debate, so that the public can engage meaningfully with the political issues surrounding the Detention Bed Mandate.

53. A law enforcement quota tied to agency funding is too unprecedented and far-reaching to implement without meaningful public disclosure and scrutiny.

54. Since Plaintiffs' Request were filed, major press outlets have been reporting and editorializing on upcoming appropriations bills, and the Detention Bed Quota issue has become the subject of increasing press scrutiny and commentary. *See, e.g.*, Editorial, *Detention Must Be Paid*, N.Y. Times (Jan. 20, 2014), http://www.nytimes.com/2014/01/21/opinion/detention-must-be-paid.html?src=twrhp&_r=1, attached as Exhibit C; Robert M. Morgenthau, *Immigrants Jailed Just to Hit a Number: A Cruel Homeland Security Quota*, N.Y. Daily News (Jan. 19, 2014), http://www.nydailynews.com/opinion/immigrants-jailed-hit-number-article-1.1583488, attached as Exhibit G; Ed O'Keefe, *The Winners and Losers of the New Spending Bill*, Washington Post (Jan. 14, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/13/the-winners-and-losers-of-the-new-spending-bill/?hpid=z1, attached as Exhibit H.

55. Accordingly, Plaintiffs' Request and the present action are necessary in order to vindicate the public's right to be informed of its government's operations, and to correct Defendants' refusal to be open, transparent, and responsive regarding the effect of the Detention Bed Quota on its policies and practices.

Plaintiffs' FOIA Requests to Defendants

56. On November 25, 2013, Plaintiffs sent Requests pursuant to FOIA, 5 U.S.C. § 552, *et seq.*, to Defendants via overnight mail and email.

57. Plaintiffs' Request seek records related to or containing: most recent copies of Executed Agreements related to detention facilities or detention beds; communications regarding

contract renewal, supplemental agreements, addendums, riders, etc. of the aforementioned agreements; agreements (formal and informal) regarding detention space, financing of detention beds, and the allocation of beds limited to certain ICE jurisdictions; certain data and statistics from 2007 to present on the detention population, enforcement prioritization, and payments to private prison corporations; communications and records related to three particular news articles; reports and memoranda reporting on the detention bed mandate and detention-related appropriations decisions exchanged between the agencies, the White House and members of Congress; records about releases from detention due to budget constraints or loss of funding; records of ICE or DHS communications with local, state or Congressional officials or law enforcement agencies related to costs, reimbursements, profits, monetary agreements for detention, contractual incentives, or the need for additional detainees; and records related to the relationship between ICE and private prison corporations including communications, memoranda, policy memos for contract bidding processes or Requests for Proposals.

58. Plaintiffs' Request sought expedited processing under 5 U.S.C. § 552 (a)(6)(E)(i)(I), citing a "compelling need" for the information because it is essential in order for the public to meaningfully engage in the public debate regarding immigration detention and ICE appropriations, as stated in paragraphs 34-55.

59. Plaintiffs' Request also sought a waiver of applicable fees under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), because "disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii). DWN and CCR are non-profit entities with no

commercial interest in the records requested, which are crucial to public understanding of DHS' and ICE's operations, as stated in paragraphs 16-17.

Agency Responses

60. On November 26, 2013, Plaintiffs confirmed delivery of their request via Federal Express to the following Defendants: DHS; the following components of DHS: Office of Policy; Office of Legislative Affairs; Office of Intergovernmental Affairs; and Office of General Counsel; and the following offices within ICE: Office of the Director and Deputy Director; Office of Detention Policy and Planning; State and Local Coordination; Office of Detention Oversight; Congressional Relations; Office of Acquisition Management; Enforcement and Removal Operations; Office of Detention Management, Enforcement and Removal Operations; and Office of the Principal Legal Advisor. These Defendants have failed to timely respond to the substance of Plaintiffs' Request. In so doing, these Defendants have also constructively denied Plaintiffs' request for expedited processing. These Defendants have not contacted Plaintiffs with regard to referring Plaintiffs' Request to any other agency or component as per 6 C.F.R. § 5.4(c).

61. Plaintiffs confirmed delivery of their Request to Defendant ICE via Federal Express on November 26, 2013, and ICE acknowledged receiving Plaintiffs' Request in two inconsistent letters dated November 27, 2013 but postmarked on December 4, 2013. *See* November 27, 2013 ICE Response Letters from Catrina M. Pavlik-Keenan, ICE Responses to FOIA Request, attached as Exhibits I and J.

62. The first letter acknowledged receipt of Plaintiffs' Request on November 27. *See* Exhibit I, "Letter 1." In Letter 1, ICE invoked a 10-day extension but stated that ICE would respond to the request "as expeditiously as possible." *See id.*

63. The second letter also acknowledged receipt of the FOIA request on November 27, but declared that the request was too broad. *See* Exhibit J, "Letter 2." In Letter 2, ICE did not deny the request but, as is required by 6 C.F.R. § 5.3(b), asked for further specificity about the nature of the request and the components of the agencies believed to control the records. *See id.* This letter stated that the request would be administratively closed if no response was received within 10 days, without citing any authority for doing so and despite the fact that the letter was postmarked 9 days later than it was dated, giving Plaintiffs only one day to meet ICE's arbitrary deadline. *See id.*

64. During the week of December 9, Plaintiffs communicated by telephone and e-mail with the ICE FOIA office to request clarification and establish that Plaintiffs did not want the case administratively closed. In the last phone communication, an ICE FOIA office representative asserted that a supervisor from the FOIA office would call back to facilitate the Request, but ICE subsequently failed to make contact with Plaintiffs.

65. Plaintiffs sent a letter to ICE dated December 19 addressing these issues. *See* December 19, 2013 Letter from Plaintiffs Responding to ICE Letters 1 and 2 ("Plaintiffs' Response Letter"), attached as Exhibit K. This letter noted that the original FOIA request named components of the agencies thought to control the records and also "reasonably described" the records sought as per 5 U.S.C. § 552(a)(3). *See* Exhibit K. First, Defendant ICE is well-aware of the Detention Bed Quota as it has been the source of significant public debate and media attention. *See id.* Second, Plaintiffs have requested specific records within a specified time period such as agreements with particular companies, data and statistics which the agency regularly collects, records related to three particular media stories, and reports exchanged between particular offices. *See* Exhibit A. Given this specificity, Defendant ICE's second response letter

(Exhibit J, "Letter 2") stated an invalid justification for failing to provide the requested records because ICE merely recited existing FOIA regulations and gave no further detail as to how the request could be made more specific. *See* 6 C.F.R. § 5.3(b) (the agency must describe "either what additional information is needed or why [the] request is otherwise insufficient"). By failing to respond to Plaintiffs' additional queries as to how the FOIA could be made more specific, ICE also failed to give Plaintiffs "an opportunity to discuss [the] request so that [Plaintiffs] may modify it to meet the requirements of [the FOIA regulations]." 6 C.F.R. § 5.3(b).

66. In a letter dated December 27, 2013, ICE responded by construing Plaintiffs' December 19 letter as an "appeal" of an "adverse determination." *See* December 27, 2013 Letter from ICE Replying to Plaintiffs' Response Letter ("ICE Reply Letter"), attached as Exhibit L. However, this characterization is inaccurate, as there had been no "adverse determination" as per 6 C.F.R. § 5.9(a)(1) and thus nothing to "appeal." The second of ICE's November 27 letters explicitly stated that "this action is not a denial of [Plaintiffs'] request" and no such denial was ever communicated to Plaintiffs. *See* Exhibit J, "Letter 2." Therefore, Plaintiffs' Response Letter (Exhibit K) is not an appeal, and ICE has failed to either deny Plaintiffs' Request or comply with it within 30 days of the original request. *See* 5 U.S.C. § 522(a)(6)(A)(i) & (B)(i) (allowing the agency 20 days plus a possible 10-day extension). Defendant ICE acknowledged receiving the request on November 27, 2013. Thus the 30-day period expired on January 10, 2014.

67. Even if Plaintiffs' Reply Letter (Exhibit K) were construed as an appeal, Defendant ICE has failed to further respond to the request within the statutory 20-day period for responding to appeals. *See* 5 U.S.C. § 522(a)(6)(A)(ii). ICE acknowledged receipt of Plaintiffs' Reply Letter (Exhibit K) on December 27, thus the purported 20-day period expired on January 24, 2014.

68. Plaintiffs have constructively exhausted administrative remedies against ICE.

69. By stating that Plaintiffs' Request would be handled behind a backlog of 1072 other requests, *see* Exhibit J, and on a first-in first-out basis, *see* Exhibit L, Defendant ICE has constructively denied Plaintiffs' request for expedited processing.

70. Requests for expedited processing do not need to be administratively exhausted. 5 U.S.C. § 552(a)(6)(E)(iii); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 355 F. Supp. 2d 98, 100 n.1 (D.D.C. 2004).

71. Plaintiffs have a statutory right to the records they seek and there is no legal basis for Defendants' failure to disclose them in full.

72. Defendants' withholding of records is unlawful both in refusing to release documents and in causing unreasonable delay in the time it takes Plaintiffs to receive documents.

FIRST CLAIM FOR RELIEF

Violation of FOIA for Failure to Disclose and Release Records Responsive to Plaintiffs' Request

73. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 71 as if repeated and incorporated herein.

74. By failing to disclose and release the requested records, Defendants have violated the public's right, advanced by the Plaintiffs, to agency records under 5 U.S.C. § 552.

SECOND CLAIM FOR RELIEF

Defendants Improperly Denied Or Have Not Responded to Plaintiffs' Request for Expedited Processing

75. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 73 as if repeated and incorporated herein.

76. Defendants have violated Plaintiffs' rights to expedited processing under 5 U.S.C. § 552(a)(6)(E) and Defendants' own regulations, 6 C.F.R. § 5.5(d)

THIRD CLAIM FOR RELIEF

Defendants Improperly Denied Plaintiffs' Request for a Fee Waiver

77. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 75 as if repeated and incorporated herein.

78. Defendants have violated Plaintiffs' rights to a fee waiver under 5 U.S.C. 552(a)(4)(A)(iii) and Defendants' own regulations, 6 C.F.R. § 5.11(k).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1) Order Defendants immediately to make a full, adequate, and expedited search for the requested records;

2) Order Defendants to engage in expedited processing in this action;

3) Enjoin Defendants from assessing fees or costs for the processing of the FOIA Request;

4) Order Defendants, upon completion of expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiffs no later than ten days after the Court's order;

5) Award Plaintiffs their costs and reasonable attorney's fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and

6) Grant each other and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: January 30, 2014
New York, New York

_____

Ghita Schwarz
Sunita Patel
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6445
Fax: (212) 614-6499
gschwarz@ccrjustice.org
spatel@ccrjustice.org

Attorneys for Plaintiffs