**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| AMERICAN IMMIGRATION COUNCIL, et al., | No. 3:12-CV-00355 (WWE) |
| Plaintiffs, | September 21, 2012 |
| v. | |
| DEPARTMENT OF HOMELAND SECURITY , | |
| Defendant. | |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DEFER CONSIDERATION OF GOVERNMENT SUMMARY JUDGMENT MOTION AND FOR LIMITED DISCOVERY**

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**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## INTRODUCTION

Defendant U.S. Department of Homeland Security ("DHS") has presented this as an easy case: in its view, Plaintiffs' FOIA request was so broad that they are entitled to no documents at all. However, the reality is that from the very beginning, Plaintiffs have sought to engage Defendant and its component, Immigration and Customs Enforcement ("ICE"), about ways to draw meaningful conclusions about the Criminal Alien Program ("CAP") from a much smaller sample of responsive records. Instead of working collaboratively to structure such sampling, Defendant moved for summary judgment briefing, asserting that there is no genuine dispute of material fact that a small, randomized sample of responsive, non-exempt records would be impossible to produce.

Defendant is mistaken; sampling is not impossible. Defendant has engaged in electronic and paper sampling in response to previous data-based FOIA requests, when its record-keeping systems were more primitive and less searchable than they are today. Even hampered by these older systems, DHS achieved satisfactory statistical results for requesters with minimal burden on the agency. Limited available evidence suggests that such sampling approaches may be available with regards to the CAP records sought in this matter. Defendant's declaration to the contrary is vague and inadequate. This is, therefore, a case in which the Court should defer consideration of the government's summary judgment motion and permit Plaintiffs to take limited discovery concerning Defendant's claim that no method of sampling is reasonably possible, in accordance with Fed. R. Civ. P. 56(d).

## FACTS AND PROCEEDINGS

The facts and proceedings in this matter are set forth in Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed herewith (Plaintiffs'

Summary Judgment Opposition), at pp. 2-9, which are hereby incorporated by reference. Relevant to the instant motion, Defendant moved for summary judgment, see Memorandum of Law in Support of Defendant's Motion for Summary Judgment, ECF No. 27-1 ("Defendant's Summary Judgment Motion"), arguing that Plaintiff's FOIA request was overly burdensome. DHS maintains in particular that sampling is not a feasible compromise that would allow public access to information while dramatically reducing the total amount of document production. Id. Plaintiffs have opposed that motion, see Plaintiffs' Summary Judgment Opposition, and hereby cross-move to defer consideration of government's motion for the reasons set forth below.

## ARGUMENT

### I. THE COURT SHOULD DEFER ADJUDICATION OF DEFENDANT'S MOTION PENDING LIMITED DISCOVERY.

Much of the government's summary judgment motion depends on a fact-intensive determination of whether a DHS search for responsive records would be unduly burdensome. As to Part V of the FOIA request in particular, in which Plaintiffs seek individual records of CAP encounters, the government's argument hinges on its allegation that it lacks the functional capacity "to identify the individuals encountered by CAP and retrieve their records," Matuszewski Decl. ¶ 23, such that it could not provide a small, randomized sample of individual records without undue burden. Id. ¶ 28. Because this factual allegation has been untested in discovery, is not supported by reasonably detailed and non-conclusory declarations, and is contradicted by extrinsic evidence, the Court should defer adjudication of the government's motion and permit limited discovery by Plaintiffs. See Fed. R. Civ. P. 56(d) (when facts essential to justify opposition are unavailable to nonmovant, Court may defer adjudication of summary judgment motion and allow appropriate discovery). This rule is based on the principle that "summary judgment [should] be refused where the nonmoving party has not had the

opportunity to discover information that is essential to his opposition." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986); see also Trammell v. Keane, 338 F.3d 155, 161 n.2 (2d Cir. 2003) ("[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery."). Under Rule 56(d) (formerly Rule 56(f)), summary judgment "may be inappropriate where the party opposing it shows . . . that he cannot at the time present facts essential to justify his opposition. The nonmoving party should not be 'railroaded' into his offer of proof in opposition to summary judgment." Trebor Sportswear Co. v. The Ltd. Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989). Although discovery is typically restricted in FOIA cases, see Judicial Watch v. Dep't of Justice, 185 F. Supp. 2d 54, 64 (D.D.C. 2002), it is crucial to proper judicial administration of the Act. See El Badrawi v. DHS, 583 F. Supp. 2d 285 (D. Conn. 2008) (ordering multiple depositions in FOIA case against DHS); Unidad Latina en Acción, No. 3:07-cv-1224-MRK (D. Conn), ECF No. 67 (Jan. 5, 2009) (Kravitz, J.) (same). "To accept [the government's] claim of inability to retrieve the requested documents . . . is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if . . . an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory." Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 (D.C. Cir. 1979).

### A. In Other FOIA Cases, DHS Has Been Able to Identify and Sample Individual Records From Even Older Record-Keeping Systems.

DHS argues that it cannot identify individual CAP records and therefore is incapable of producing a small, random sample of records in a non-burdensome manner. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, ECF 27, at 16-17; Matuszewski Decl. ¶¶ 23, 28. In other recent FOIA cases seeking large amounts of data, however, DHS has had the technical capacity to identify and retrieve a small, random sample of individual ICE

records. See, e.g., Lowenstein v. DHS, No. 3:06-cv-1889-MRK (D. Conn.), ECF No. 34 (Apr. 20, 2007), ¶ 5 (in FOIA case concerning ICE's Operation Front Line, stipulation providing that "ICE will provide Plaintiffs with a final response with respect to 300 investigative files conducted pursuant to Operation Front Line, selected randomly from 24 SAC Offices . . .") (copy attached as Exhibit B); id., ECF No. 81-2 (Sept. 9, 2008), ¶ 2 (subsequent stipulation in which ICE agreed to provide aggregated data, including "gender and nationality," "lead immigration charge (if any)," and "final disposition of the immigration cases (if any)" of subjects of 300 investigative files randomly selected in prior stipulation) (copy attached as Exhibit C); ACLU v. DHS, No. C-0604129-WHA (N.D. Cal.), ECF No. 28 (Feb. 28, 2007), ¶¶ 2-3 (in FOIA case concerning ICE's Operation Predator, stipulation providing that ICE would randomly select within four categories 1,000 removal cases each, and further that for each case randomly selected in each category, ICE would provide aggregated information regarding gender, country of origin, immigration relief sought, and dispositions in Immigration Court and on appeal) (copy attached as Exhibit D); Bronx Defenders v. DHS, No. 04-CV-8576 (HB) (S.D.N.Y.), ECF No. 22, ¶ 9 (Mar. 28, 2005) (in FOIA case concerning ICE interactions with local police, stipulation providing that ICE will randomly select "1,100 Hit Confirmation Response datasheets," review the "Remarks" field, and disclose aggregated data) (copy attached as Exhibit E).

Moreover, these cases have involved even older record-keeping systems than ICE now uses. See, e.g., Wishnie Decl., Ex. B (describing upgrades and consolidation of ICE electronic databases and enhanced search features); Wishnie Decl., Ex. C (requesting an additional appropriation in FY 2013 of $4 million to continue upgrading functionality and interoperability of ENFORCE Alien Removal Module).

The capacity of ICE to identify, retrieve, and sample its older databases is inconsistent with the assertion in this case that the agency lacks the ability, even with its upgraded and modernized electronic record-keeping systems, to establish a small, randomized sample of CAP records responsive to those parts of the Plaintiffs' FOIA request that involve large numbers of individual records, such as Part II (regarding CAP officer communications) and Part V (regarding individual CAP encounters), see Plaintiffs' FOIA Request, ECF 1-1, at 2-3. Nor is ICE's past ability to identify, retrieve, and sample older databases consistent with the government's claims, on its motion, that such sampling imposes an undue burden on the agency. At a minimum, as nonmovants, Plaintiffs are entitled to an inference that past agreements to sample older databases undermine ICE's claims in this suit that sampling would be overly burdensome. Limited discovery, not summary judgment, is appropriate.

**B. There Is Evidence That DHS Can Identify CAP Files.**

The DHS Enforcement Integrated Database (EID) is a "DHS shared common database repository for several DHS law enforcement and homeland security applications," known collectively as the "ENFORCE applications." Wishnie Decl., Ex. B, at 2. The ENFORCE applications include several modules in which CAP activities are logged, tracked, and coded.

One such application is called the ENFORCE Alien Booking Module ("EABM"). "CAP screening and identification activities are tracked in the ENFORCE Alien Booking Module, which contains information relating to individual aliens, such as the alien identification number, primary citizenship, detainer details, and the severity level of the crime committed or charged as designated by the NCIC." Wishnie Decl., Ex. D, at 17. The Matuszewski Declaration nowhere explains why, if CAP "screening and identification activities are tracked in the ENFORCE Alien Booking Module," these activities cannot be electronically identified and sampled.

A second ENFORCE application is the ENFORCE Alternative to Detention Module, which collects all of the information for people who have been granted release with supervision. Wishnie Decl., Ex. B, at 3. The data points collected include which ERO office and which ICE Headquarters authorities were notified. Thus Defendant has at least some capacity to connect a program to an office, and that office to an arrest and an individual file. See id.

Even more to the point, and contrary to the claim of Mr. Matuszewski that ICE cannot identify or retrieve records for CAP encounters, a third application, the ENFORCE Alien Removal Module ("EARM") contains a field labeled "Event Type," in which officers code an encounter as "ERO Criminal Alien Program." A partially redacted example of one such electronic EARM record, produced by ICE in response to an individual FOIA request, demonstrates this capacity. Wishnie Decl., Ex. A. In its moving papers, DHS fails to advise this Court of the CAP coding available in EARM's "Event Type" field. And it states nowhere that the agency is unable to perform an electronic search to identify the number of CAP encounters coded as such in EARM, nor that it is unable to retrieve a random sample of these electronic records.

This extrinsic evidence contradicts the statement in the Matuszewski Declaration regarding ICE's inability to identify and retrieve a small, random sample of individual CAP records without undue burden. Summary judgment is inappropriate on this basis, and limited discovery regarding the true nature and functionality of relevant ICE record-keeping systems is appropriate.

### C. The Government's Declaration Fails to Demonstrate the Adequacy and Reasonableness of Its Search Efforts.

Even without extrinsic evidence from other cases that ICE is capable of identifying and retrieving record samples from older databases; that CAP "screening and identification activities" are "tracked" in the EABM database; and that encounters are coded in the "Event Type" field in its EARM database, Defendant has failed to meet its burden of demonstrating that its search efforts were adequate and reasonable. When the government is unable to provide a supporting affidavit meeting this burden, a reviewing court may grant limited discovery. Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999).

Judges in this district have not hesitated to allow discovery in FOIA cases where DHS declarations are deficient. See El Badrawi, 583 F. Supp. 2d at 301, 303, 305, 307, 309 (Hall, J.) (ordering multiple DHS depositions where declarations failed to demonstrate adequacy of search in FOIA case); Unidad Latin en Acción v. DHS, No. 3:07-cv-1224-MRK (D. Conn.), ECF No. 67 (Jan. 5, 2009) (Kravitz, J.) ("ORDER. As explained during the on-the-record in-court conference . . . the Court grants Plaintiffs' Motion . . . insofar as it seeks to depose Ms. Catrina Pavlik-Keenan and SDDO Richard McCaffrey regarding the adequacy of the DHS search").

The affidavit supporting the government's motion for summary judgment does not establish the reasonableness of its search efforts. The government bears the burden of establishing the adequacy of its search efforts, Morley v. CIA, 508 F.3d 1108, 1115 (D.C. Cir. 2007), and providing a detailed justification for its refusal to search certain databases. El Badrawi, 583 F. Supp. 2d at 301. The district court must "expressly conclude that the search was adequate or that it satisfied the reasonableness standard." Krikorian v. Dep't of State, 984 F. 2d 461, 468 (D.C. Cir. 1993); Truitt v. Dep't of State, 897 F.2d 540 (D.C. Cir. 1990). The supporting affidavit must be "relatively detailed and nonconclusory, and submitted in good

faith." Grand Central P'ship, Inc., v. Cuomo, 166 F.3d 473, 478 (2d Cir. 1999); SafeCard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991). It must "explain in reasonable detail the scope and method of the search conducted by the agency [sufficient] to demonstrate compliance with the obligations imposed by FOIA." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982); see also National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) (conclusory and generalized allegations are unacceptable to sustain burden of nondisclosure); Schmidt v. U.S. Department of Defense, 2007 WL 196667, at *1 (D. Conn. Jan. 23, 2007) (in case arising from FOIA request limited solely to details concerning requester's personal tenure in the military, government agency submitted four separate affidavits in support of its motion for summary judgment). Affidavits are presumed in good faith, but "the good faith presumption that attaches to agency affidavits only applies when accompanied by reasonably detailed explanations of why material was withheld.'" El Badrawi, 583 F. Supp. 2d at 300-01 (quoting Halpern, 181 F.3d at 295).

If the agency elects not to search certain databases, it must provide a "detailed justification" why it has not done so. El Badrawi, 583 F. Supp. at 301. "[F]ailure to give detailed justifications for not searching these databases, and any other databases it may own or have access to, falls below the standard for 'relatively detailed and nonconclusory' affidavits required to legitimate a summary judgment ruling." Id. (quoting Grand Central P'ship, 166 F.3d at 489).

In this case, Defendant has submitted only a single affidavit, which fails to establish the reasonableness of Defendant's search efforts. Specifically, the affidavit is riddled with conclusory statements lacking factual support regarding the supposed burdensomeness of

Plaintiffs' request. Without more, these statements fail to establish that Defendant's search efforts were adequate or reasonable.

The government assumes an all-or-nothing approach to producing responsive records, contrary to what Plaintiffs requested. Plaintiffs have repeatedly suggested random sampling as an efficient method for the agency to discharge its obligations under the statute. See Wishnie Decl. ¶ 2, 8. However, the government's affidavit fails to take sampling into consideration. Instead, it provides only conclusory assertions about the sampling method, thus failing to establish the reasonableness of its search.

Specifically, while the government's affidavit makes much of the overall volume of individual CAP-related records, it makes no effort to explain why subsets of these records could not be searched, including use of the EABM and EARM as described above. The affidavit states that searching each of the "millions" of individual alien files ("A-files") nationwide to copy responsive records would take "2.4 billion total hours." Matuszewski Decl. ¶ 27. With that single enormous number, the affidavit categorically declares the search infeasible. However, a few paragraphs later, it mentions CAP's several sub-programs, each of which appears to contain a geometrically smaller number of records. See id. ¶¶ 30-32. The affidavit does not explain why the records of any one of these sub-programs could not be searched, instead asserting that sampling with regard to A-files is "unworkable" because each one of the "millions of files" would have to be reviewed to see if they contain CAP-related records before sampling could be conducted. Id. ¶ 28. The affidavit does not consider if and how, alternatively, a much smaller sample size of these A-files could be pulled first and consequently screened for CAP-related records (particularly considering the high likelihood that a given A-file will have a CAP-related record, given the 64 to 127 million such records that the affidavit itself estimates exist, id. ¶ 25).

Even according these assertions a good faith presumption, they are deficient in providing the "detailed justification" required by law when an agency neglects to search a database. El Badrawi, 583 F. Supp. at 301 (finding that agency's listing of databases without sufficiently detailed explanation as to why they were not searched rendered affidavit inadequate).

Similarly, the government's affidavit also deems Plaintiffs' request for communication records burdensome by identifying only the most onerous possible search method. It asserts that the universe to be searched is every communication of the "nearly 8,000 ERO employees" (on the basis that each ERO employee has been at least tangentially involved in CAP at some point), which would result in an "effort of over 15,000 hours." Id. ¶ 35. It neglects to mention if and how less effort could be expended if communication searches were limited to the 1,718 actual employees of CAP, or limited even further to communications by a random sample of these employees, a random selection of time periods, or employees in supervisory positions within CAP. Id. The affiant does not address random sampling or limited searches of CAP's communications records.

Because the affidavit explores only the most burdensome possible method of searching for responsive records and addresses in only the most conclusory manner Plaintiffs' repeated suggestion of random sampling, it fails to establish that Defendant made a reasonable or adequate effort to conduct a "thorough search," Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994), "complian[t] with its obligations imposed by the Freedom of Information Act." Perry, 684 F.2d at 127. The agency's affidavit demonstrates only that Defendant has looked for every possible excuse not to comply with Plaintiffs' FOIA request.

**D. The Proper Remedy for the Affidavit's Defectiveness Is Limited Discovery in the Form of a Deposition.**

Because the government's affidavit has not established the reasonableness of its search efforts or provided detailed justifications for its failure to search the databases it lists, Plaintiffs request limited discovery in the form of a deposition of declarant Matuszewski.

When agency affidavits fail to meet legal standards, "a district court will have a number of options for eliciting further detail from the government," including "permit[ting] appellant further discovery." Halpern, 181 F.3d at 295 (2d Cir. 1999). As Judge Hall has explained, "a court should not, of course, cut off discovery before a proper record has been developed: for example, when the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." El Badrawi, 583 F. Supp. 2d at 301 (quoting Exxon Corp. v. FTC, 466 F. Supp. 1088, 1094 (D.D.C. 1978)) (allowing limited discovery on the grounds that the affidavit was "patently incomplete").

In this case, discovery is necessary because the affidavit is both "patently incomplete" and "unsatisfactory" in its explanation of the agency's search efforts. The affidavit declares Plaintiffs' request burdensome without exploring alternate methods of fulfilling it, such as random sampling. Discovery, rather than the provision of supplemental declarations, is necessary because Plaintiffs lack information about the possibility of random sampling for any subset of requested documents, including individual records and communications.

The government's affidavit mentions the feasibility of random sampling only once, in a single paragraph. Matuszewski Decl. ¶ 28. The government rules out random sampling on the ground that it would first have to screen every single A-file in existence for CAP-related records. Id. It fails to address why, for example, ICE cannot perform an electronic search of the "Event

Type" field of its EARM database for all CAP encounters, and from this set select a small random sample of electronic files, nor why, if CAP activities are "tracked" in the EABM database, a small, randomized sample of these electronic records cannot easily be identified. Nor does ICE demonstrate that a smaller sample of A-files could not be drawn first and then screened, or why, in the alternative, it could not target its search to a certain subset of A-files.

Judge Hall ordered depositions as a remedy for inadequate DHS affidavits in a recent FOIA case in this district. El Badrawi, 583 F. Supp. 2d at 285, 301, 303, 305, 307, 309. Judge Kravitz did the same. Unidad Latina en Acción, 3:07-cv-1224-MRK, ECF No. 67 (Jan. 5, 2009) (ordering depositions of two ICE officials in FOIA case against DHS). Similarly, in the case at hand, the Defendant has failed to provide a detailed justification—beyond conclusory assertions of burdensomeness—why it cannot engage in random sampling of categories or subcategories of records Plaintiffs have requested. As in El Badrawi and Unidad Latina en Accion, limited discovery in this case the appropriate remedy.

Because the affidavit as written is inadequate to demonstrate the reasonableness of Defendant's search efforts, and because limited discovery is an appropriate and efficient remedy pursuant to Rule 56(d), the Court should defer the government's motion and permit Plaintiffs' to depose Mr. Matuszewski.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court order limited discovery in the form of the deposition of Jamison Matuszewski.

/s/

Respectfully submitted,

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