UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs deliberately drafted the Freedom of Information Act ("FOIA") request at issue in this case as broadly as possible, lest the agency exclude anything. Plaintiffs are interested in the operations of what they acknowledge is a massive immigration program, the Criminal Alien Program ("CAP"), and they asked for every record created related to the program, and the programs that preceded it, for the past 25 years. United States Immigration and Customs Enforcement ("ICE") gave plaintiffs multiple opportunities to narrow their request, but they refused to do so and insisted they were entitled to a waiver of all fees. ICE rightly denied plaintiffs' request as unreasonably broad and burdensome, determining that it would overtake ICE's FOIA office (at the expense of reasonable requests) to respond to it. Because the FOIA was not meant to burden federal agencies and the taxpayers in this way, DHS is entitled to summary judgment.[1]

[1] We note that on October 19, 2012, ICE produced to plaintiffs the results of a two-hour search of the ICE Office of Enforcement and Removal Operations for records responsive to plaintiffs' request. *See* 6 C.F.R. § 5.11(d)((3)(ii). This search, which was conducted in

ARGUMENT

I PLAINTIFFS' FOIA REQUEST FOR ALL RECORDS RELATED TO THE CRIMINAL ALIEN PROGRAM, FROM 1986 TO THE PRESENT, IS SO BROAD THAT IT IMPOSES UNREASONABLE BURDENS ON ICE.

The overarching, fatal flaw of plaintiffs' opposition to DHS's summary judgment motion is their refusal to acknowledge what the FOIA request they wrote actually said. Plaintiffs ignore the plain, unmistakable language of their own request, instead imploring ICE and the Court to look at its "thematic focus." Pls.' Opp. at 12; *see id*. at 14, 18. FOIA requires no such thing, nor do we surmise FOIA requestors want agencies to subjectively interpret their requests in the manner plaintiffs propose. ICE did nothing wrong by taking plaintiffs' request at face value. Moreover, if plaintiffs wanted to rewrite their request, ICE provided them multiple opportunities to do so. Plaintiffs refused to alter their request in any way. Their complaints about not having adequate information to narrow their request ring hollow in the face of the detailed information they have submitted in this case and in the request itself. As plaintiffs readily admit, they deliberately drafted their request to be as expansive as possible, and kept it that way, to prevent ICE from excluding any documents they might be interested in. *See* Pls.' Opp. at 16. Plaintiffs cannot escape responsibility for the undeniable, unreasonable breadth of their own FOIA request.

Plaintiffs' FOIA request stated as follows: "*We request all records related to CAP*, as well as to the series of INS and ICE programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE

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conjunction with the preparation of the Declaration of Jamison Matuszewski in support of Defendant's Motion for Summary Judgment, produced 473 pages of documents. ICE released in full 303 pages of these documents and withheld portions of the remaining 170 pages pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E). *See* ICE Oct. 19, 2012 response ltr., attached as Ex. A.

Institutional Removal Program, and ICE National Criminal Alien Removal Plan." Nov. 29, 2011 request ltr. at 1 (Ex. 1 to Complt.) (emphasis added). Plaintiffs then set out five categories of records they considered "include[d]" in their request, specifying that the requested records "include, but are not limited to" these categories. *Id*. at 1. When plaintiffs provided further examples of the types of records they were seeking within particular categories of records, they again specified that their request included, but was not limited to, these examples. *Id*. at 1-2.

This is simply what the request says. ICE does not "*allege* that plaintiffs seek 'all' documents" related to CAP and its predecessor programs (Pls.' Opp. at 12) (emphasis added); that's undisputedly what they asked for. Plaintiffs admit, as they must, that they did not limit their request to the categories included in it. Pls.' Local Rule 56(a)(2) Statement, section I, at ¶ 5. However, plaintiffs' opposition brief reads as if their request was *not* for all records related to CAP and its predecessor programs, but rather just for the categories they provided as nonexhaustive examples of responsive records. *See, e.g.*, Pls.' Opp. at 11, 16.

Plaintiffs' opposition confirms that CAP, for which plaintiffs requested every record related to, is an "enormous" program, that "[i]ts scope is massive and expanding," that it has the potential to "interact with every municipal, county, state and federal [detention] facility in the country," and that CAP screens "every single inmate in every single federal prison and in 99.6% of county jails." Pls.' Opp. at 2-3. Plaintiffs not only asked for all records related to CAP and its predecessor programs, they sought all such records created from January 1, 1986 to the present—a twenty-five year period of time. Given the vastness of the umbrella request, it's not surprising that several of the categories plaintiffs gave as examples of responsive records—not just the one category for which they indicated they would accept sampling—are wide-ranging as

well. Category I sought "[a]ll records related to the development, implementation, and operation of CAP and its predecessors . . . ." Request at 1. This again asks for every record related to CAP's operation. Similarly broad is Category II, asking for "[a]ll records of communication, whether electronic or conventional, to or from ICE or INS related to CAP and its predecessors." And, of course, Category V's request for all records regarding any individual identified by, detained by, arrested by, or transferred to the custody of ICE, INS, or any other federal agency pursuant to or in connection with CAP and its predecessors, is massive in scope.

Significantly, plaintiffs admit the facial breadth and burdensomeness of their request. Pls.' Opp. at 21 ("a complete record search for all documents even tangentially related to CAP in 195 field and sub-field offices and 4,300 separate jails and prisons would be undeniably overbroad and burdensome"). Plaintiffs chastise the agency for reading their request literally and for not deciphering the request's "thematic focus" and narrowing it for plaintiffs. It is not, however, up to the agency to pick and choose from a FOIA request what it wishes to respond to, nor do we think plaintiffs really want to cede this responsibility to the agency. "[I]t is the *requester's responsibility* to frame requests with sufficient particularity to ensure the searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested." *James Madison Project v. CIA*, No. 1:08CV1323, 2009 WL 2777961, at * 3 (E.D. Va. Aug. 31, 2009) (internal quotation omitted) (emphasis added).

Plaintiffs turns this principle on its head by positing that a requestor may ask for every record on a vast subject, and so long as she provides some examples of responsive records, it is the agency's responsibility to interpret such a request and produce what it can. Under plaintiffs' theory, a requester could, for example, ask the Department of Housing and Urban Development

for every record related to the Section 8 housing program and say that the request includes policies, procedures, records of communications, program organization information, statistical data and resource allocation information, and records of individuals who receive subsidies under the program, much like plaintiffs did here. If such requests were permissible, they would be submitted in droves, as they are no doubt easier to formulate than properly tailored requests. But federal agencies do not have the resources to handle a mass of such requests.

One way in which plaintiffs claim ICE should have narrowed their request for them further demonstrates the fallacy of their conception of the FOIA. ICE explained in its declaration that because any ICE ERO officer can conduct CAP-related activities, because most ERO officers have at one point in their career been assigned to perform CAP operations, and because there is no standard form used to communicate about CAP, ICE would have to search, at a minimum, the email accounts and other electronic and paper files of the 7,854 current ERO officers to respond to plaintiffs' request for all communications related to CAP. Declaration of Jamison Matuszewski at ¶¶ 20, 34-35, Ex. 1 to Def.'s Mtn. for Summ. Judgment ("Matuszewski decl."). In response, plaintiffs claim ICE should have performed a limited search of the communications of the 1,718 ERO positions specifically funded for CAP operations. Plaintiffs' Cross-Mtn. to Defer Govt. Summ. Judgment Mtn. and For Ltd. Discovery at 10. However, had ICE done this (which would still have been mightily burdensome), plaintiffs would have no doubt challenged such a search as inadequate because (1) other ERO officers have performed CAP operations, and (2) plaintiffs' request is for all communications to or from ICE or INS related to CAP, not just communications of INS or ICE officers specifically designated to perform CAP operations. *See El Badrawi v. DHS*, 583 F. Supp. 2d 285, 306-07 (D. Conn. 2008)

(counsel for plaintiffs here successfully argued that ICE search that did not include record systems likely to have responsive records was inadequate).

At all times during the administrative phase of this case, plaintiffs refused to narrow their overbroad request. Plaintiffs admit refusing to narrow their request before they filed their complaint. Pls.' Local Rule 56(a)(2) Statement, section I, at ¶ 24. Plaintiffs also concede that ICE invited them to narrow their request, *id*. at ¶ 12, 23, but deny that when ICE encouraged them to contact ICE to discuss ways to narrow their request, it was offering help in doing so. *Id*. at ¶ 23. Plaintiffs claim they lacked information to narrow their request, but the categories and subcategories included in plaintiffs' request, the allegations in plaintiffs' complaint about CAP, and the documents attached to plaintiffs' opposition to the Government's summary judgment motion, all demonstrate plaintiffs' ample knowledge of CAP.[2] Plaintiffs made a conscious decision not to limit their request to specific records, opting instead to ask for all records related to CAP and its predecessor programs back to 1986. Plaintiffs explain that they did this because "they did not want their efforts at specificity to be used to exclude documents based on technical classifications." Pls.' Opp. at 16. However, the wide expanse of plaintiffs' request effectively precluded the use of ICE's computerized systems to identify records responsive to the request. As ICE's declarant Jamison Matuszewski explains in a supplemental declaration, ICE has the ability to filter data in ICE's Integrated Decision Support System (IIDS), a reporting tool, for

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[2] *National Cable Tel. Ass'n v. FCC*, 479 F.2d 183 (D.C. Cir. 1973), on which plaintiffs' rely for the proposition that they phrased their request as specifically as the public information about CAP allowed, is distinguishable. There, the court found that a request for documents supporting the FCC's proposed rulemaking concerning an increase in licensing fees requested identifiable records, despite the fact that the request did not specify the documents requested. That request was for a much more discrete, contained, and ascertainable set of records than the instant request for all records related to CAP and its predecessor programs created since 1986.

CAP encounters only for FY2010 and beyond. Supplemental Declaration of Jamison Matuszewski at ¶ 37 ("supp. decl."), attached hereto as Ex. B; *see also id*. at ¶¶ 27-31, 34-36. But plaintiffs' request for individual CAP-related records was not for recent records, or for records since CAP was instituted in its current form in 2007, but was for all records related to CAP and its predecessors back to 1986.[3]

Plaintiffs' deliberate strategy of waiting until after they filed a complaint in federal court to seek to negotiate the scope of their request with Department of Justice attorneys should be rejected. As DHS noted in its opening brief, discussions regarding the scope of a request are supposed to take place between the requestor and agency officials with knowledge of the records, not litigation counsel who lack that knowledge. Def.'s Mtn. for Summ. Judgment at 21. It serves no one's interests, including the Court's, for a FOIA requester to forestall coming to the table to narrow its overly-broad request until after it files a complaint in federal court.

Thus, plaintiffs' FOIA request stands as broad today as when it was written by plaintiffs. It is only by ignoring the plain wording of that request and mischaracterizing it as somehow limited to the categories that were explicitly provided as examples only that plaintiffs argue that ICE should have responded to "portions" of the request and distinguish the cases DHS relied upon in its motion. Pls.' Opp. at 17-23. Plaintiffs' request is in fact as broad, all encompassing, and unreasonable as the requests involved in those cases, if not more so. *See* Def.'s Mtn. for

[3] If plaintiffs were willing to narrow the timeframe for their request for Category V individual records to FY2010 and beyond, ICE would be able to determine a universe for purposes of negotiating a sample size for those records. The request would still be unreasonably broad and burdensome in its other respects, however.

Summ. Judgment at 18-20.[4]

Nor is there any exception for "weighty cases" to the requirement that a FOIA request not be so broad as to impose an unreasonable burden on the agency. Pls.' Opp. at 17 n.4. The case plaintiffs rely on for this proposition involved a narrower request than plaintiffs' and does not claim that the request was unreasonably burdensome. *ACLU v. DOJ*, 681 F.3d 61, 66 (2d Cir. 2012) (request to the CIA, DOJ, and other federal agencies sought the disclosure of records concerning treatment of detainees post-September 11, 2001). Similar to plaintiffs' argument that ICE should have read their request thematically and not literally, we doubt FOIA requestors would want agencies judging the relative importance of requests they receive and agreeing to engage in burdensome searches only when deemed sufficiently important.

II. PLAINTIFFS ARE NOT ENTITLED TO A FULL FEE WAIVER FOR THEIR UNREASONABLY BROAD REQUEST.

Plaintiffs' fee waiver argument depends on the same mischaracterization of their request that permeates their argument that the request was a proper one. Plaintiffs can only argue that disclosure of the requested records will significantly enhance the public's understanding of CAP by reading their request as limited to those records that reveal the program's policies,

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[4] Contrary to plaintiffs' argument, *New York Times Co. v. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004), is not at all analogous to this case. Pls.' Opp. at 20. As plaintiffs recount, the DOL neither granted nor denied a burdensome request but invited the requestor to narrow its request. DOL then argued that the requestor failed to exhaust its administrative remedies, and the court lacked jurisdiction. The court found that "the DOL cannot avoid court intervention by neither granting nor denying a request, but rather seeking to alter it." *Id*. at 399.

In contrast, ICE determined that plaintiffs had not submitted a perfected FOIA request because it was unreasonably broad and burdensome, and DHS has filed a motion for summary judgment on those grounds. The Government has not sought to avoid court intervention, nor has it sought to "trap plaintiffs in an administrative purgatory by inviting them to rewrite their request, but failing to provide any information about the program or records." Pls.' Opp. at 20.

procedures, structure, goals, and the like. But, as established above, the request was far broader. Plaintiffs cannot seriously argue that every record, no matter how "tangentially related to CAP" (Pls.' Opp. at 16), is likely to significantly contribute to the public's understanding of CAP. Examples of responsive records that would not meet this standard abound: an individual's alien file from the late 1980s, correspondence about a particular inmate who was screened by the CAP, the names of ICE officers assigned to a CAP team (*see* pls.' request, Category III, at subpart 1(b)), and the telephone records of a telephonic call-in center operated by CAP agents (*see id*. at subpart 1(c).

DHS did not argue, contrary to plaintiffs' understanding, that the breadth of plaintiffs' request was some independent factor to be considered in the fee analysis, or that a request that seeks "too much public knowledge and too much accountability" should be denied a fee waiver. *See* Pls.' Opp. at 33-34. Rather, it is simply a fact that disclosure of all of the records requested by plaintiffs will not significantly contribute to the public's understanding of CAP because plaintiffs' exceedingly broad request includes numerous records only "tangentially related to CAP" that could not feasibly enhance the public's understanding of the program.[5] DHS granted plaintiffs a partial fee waiver, based on its estimate that 20% of the requested records were likely

[5] Plaintiffs distort the cases we cited for this proposition (*see* Defs.' Mtn. at 25). The court's decision in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), was not based solely on the plaintiff's failure to establish the ability to process and disseminate the requested information, as plaintiffs contend. Rather, the court clearly also found that disclosure of the requested information would result in only limited public understanding of the issue because of the fact that the request asked for a large volume of information, some of its technical. Moreover, the language which we quoted from *Campbell v. DOJ*, 164 F.3d 20, 36 n.16 (D.C. Cir. 1998) is of course dictum (we did not cite the case for anything more), but plaintiffs fail to explain why the court's observation that something less than a full fee waiver might be justified when the volume of substantive documents is small in comparison to administrative information, does not apply here.

to significantly contribute to the public's understanding of CAP.[6]

Plaintiffs' argument that DHS cannot rely on this reasoning to support its denial of a full fee waiver because DHS did not raise these reasons before plaintiffs filed their complaint is meritless. Prior to the filing of the complaint, DHS denied plaintiffs' request for a full fee waiver because plaintiffs had not shown that disclosure of the requested records would significantly contribute to the public's understanding of government operations or activities. Ex. 2 to Complt. at 2. Also prior to the filing of the complaint, DHS informed plaintiffs that their "blanket request for all CAP records" was likely "to produce records that would not have any value to the public with respect to explaining the operation of the agency" and that their request "seeks decades worth of information and potentially implicates millions of pages of records." Ex. 4 to Complt. at 1. ICE's post-complaint letter is fully consistent with this reasoning.

Nor is there any merit to plaintiffs' argument that ICE should have assessed each category of plaintiffs' request to determine if it was eligible for a fee waiver. Again, plaintiffs' request was *not* for records that fell into the five categories, but for all records related to CAP and its predecessor programs created since 1986, with the five categories provided as nonexhaustive examples of responsive records. DHS regulations required plaintiffs to agree to pay their portion of the fees before ICE could begin processing plaintiffs' FOIA request. *See* Def.'s Mtn. for Summ. Judgment at 22-23. Plaintiffs chose to proceed to litigation.

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[6] This estimate, which was based on ICE's understanding of its records, was reasonable. Because ICE denied plaintiffs' request as unreasonably broad and burdensome, and because plaintiffs never narrowed their request or paid the fees required to initiate a search, ICE did not conduct a search for responsive records and cannot, therefore, justify its estimate with reference to particular records that do or do not significantly contribute to the public's understanding of CAP, as plaintiffs suggest it should. *See* Pls.' Opp. at 33.

CONCLUSION

For all the foregoing reasons and the reasons set forth in Defendant's Motion for Summary Judgment, defendant Department of Homeland Security respectfully requests that the Court enter summary judgment in its favor on all of plaintiffs' claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, a copy of the within and foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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