UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANT DEFENSE PROJECT, POST-DEPORTATION HUMAN RIGHTS PROJECT, RACHEL ROSENBLOOM, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF STATE, Defendants.	11 Civ. 3235 (JSR)

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

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PRELIMINARY STATEMENT

This memorandum is submitted in support of partial summary judgment on the inadequacy of the Defendants' search for records pursuant to Plaintiffs' Freedom of Information Act ("FOIA") requests. Although Defendants have identified a number of documents, they have made several errors in their searches. First, Defendants failed to search in reasonable locations where relevant documents are likely to be found. Second, Defendants failed to use appropriate, agency-specific search terms to conduct their search. Third, where Plaintiffs' requests offer illustrative examples of cases for which Defendants would have relevant documents, Defendants confined their search to those examples despite the broader scope of the underlying request. Fourth, Defendants neither searched databases that could provide targeted results nor adequately explained the capacity of those databases. Instead they rely on self-serving and conclusory assertions that the relevant cases are "rare" and that any search would be burdensome. Plaintiffs seek an order requiring Defendant agencies Department of State ("DOS"), Department of Justice ("DOJ"), and Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") to conduct a more adequate search.

SUMMARY OF FACTS

I. PLAINTIFFS' REQUESTS

As this Court is aware, the FOIA requests in this case were prompted by the Office of the Solicitor General's ("OSG") statement to the Supreme Court in *Nken v. Holder*, 129 S. Ct. 1749 (2009), that the government maintains a policy and practice of according individuals who prevail in their cases effective relief, including by facilitating their return and restoring the immigration status they previously held. The Supreme Court's adoption of the OSG's definitive statement of

policy and practice had predictable ramifications, resulting in lower courts' reliance on this finding to deny individuals' requests for stays of removal. *See e.g., Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 (5th Cir. 2010) (explaining that, after *Nken*, "the burden of removal alone does not by itself constitute irreparable injury for purposes of granting a stay of removal"); *Villajin v. Mukasey*, No. 08-0839, 2009 WL 1459210 (D. Ariz. May 26, 2009) (observing that "if Petitioner ultimately succeeds on the merits of her claims, she can be reunited with her children"); *Desire v. Holder*, No. 08-1329, 2009 U.S. Dist. LEXIS 116561, at *4 (D. Ariz. Dec. 14, 2009) (quoting *Nken* ("aliens who prevail in their petitions for review 'can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal'")). *See also Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (observing that possibility of deportation does not alone constitute irreparable harm because petitioners "can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal"). This FOIA suit seeks documents about the government's past policies and procedures for individuals who win their petition for review in federal courts, as well as motions to reopen before the Board of Immigration Appeals ("BIA") or the Immigration Judge ("IJ"), after they are deported. Exs. A, H, X.

The original FOIA requests filed on December 19, 2009 were directed to three agencies: the Department of State ("DOS"), the Department of Justice ("DOJ"), and the Department of Homeland Security ("DHS"). *Id.* Each request had nine parts. Part 1 was phrased broadly to encompass "any and all documents related to [agency] efforts to facilitate the return to the U.S. of individuals who were removed from the United States by the DHS or through voluntary departure or self-deportation and (a) whose removal order was subsequently vacated or reversed by any United States federal court and/or (b) whose immigration cases have subsequently been

reopened by an Immigration Judge or the BIA, and for whom DHS acted to facilitate the individual's return to the U.S." *Id.*

In Part 2, Plaintiffs asked for a list of cases for the years 2002 through 2009 where the person's removal was overturned by a federal court or the immigration case was reopened by an IJ or the BIA. Plaintiffs also asked for the subset of cases in which the person was removed, self-deported or voluntarily-departed and remained outside of the United States when the decision was overturned or case reopened; the individual returned to the United States; the agency arranged for or otherwise assisted with the return; and the individual was not represented by counsel. *Id.*

In addition, Plaintiffs sought documents related to the category of individuals specified in Part 1 with regard to the following types of information: "procedures utilized by the [agency] to arrange for the return to the United States"; "[agency] protocols and procedures for responding to requests for assistance returning to the United States"; "materials used in training [agency] officers . . . on how to respond to request for assistance in returning to the United States"; "materials utilized in training [agency] officers . . . on how to arrange for the return to the United States"; "forms used to process the cases"; "[agency] procedures for arranging for transportation to the U.S."; and "coordination between [DHS, DOJ, and DOS], including any Embassies or Consular offices, to arrange for the return to the U.S." *Id.*

On January 29, 2010, Plaintiffs submitted an amended FOIA request by e-mail, reflecting suggestions from communications with DOS FOIA Officer John Parker. The substance of the request, however, remained the same—Plaintiffs sought records relating to the agency's efforts in individual cases of return as well as any intra- or inter-agency procedures, protocols, training, or forms that relate to these individuals in the process of return. Ex. B.

On February 2, 2011, Plaintiffs submitted an additional FOIA request to DOJ. This request repeated the original December 17, 2009 request and added two additional requests for: (1) records concerning communications about individuals who were removed from the United States and later prevailed in their cases between the Office of Immigration Litigation ("OIL") and DHS, OIL and the OSG, and OIL and opposing counsel in removal proceedings; and (2) records related to *Nken* and the statements made in *Nken* about the government facilitating the return of individuals to the United States. Ex. Q. In connection with the first request for OIL communications, Plaintiffs listed several specific cases as examples of situations where an individual was returned. *Id.* at 2–3. The request, however, was broadly phrased in terms of communications regarding any successful immigrant. *Id.*

II. AGENCY RESPONSES

A. Department of State

When Plaintiffs filed their Complaint on May 12, 2011, DOS had not submitted a written response to Plaintiffs nor identified a single responsive record. Pls.'s Compl. ¶¶ 64-67. Upon Plaintiffs' request to set a deadline for descriptions of the searches that have been conducted at all the agencies except U.S. ICE, DOS submitted a declaration from Sheryl Walter on January 23, 2012. Ex. C.

The January 23rd declaration from Ms. Walter describes the components where DOS conducted its search and the search terms that were employed. *Id.* While a number of potentially responsive documents were identified, *Id.* ¶¶ 12, 17, 25, 33, no records were produced at that time. Ex. KK. In a subsequent letter on January 27, 2012, Ms. Walter stated that, other than portions of the Foreign Affairs Manual ("FAM"), the agency concluded that none of the

documents retrieved through the search were responsive to Plaintiffs' request. Ex. D. DOS produced its first and only set of responsive records at that time, releasing 33 pages of excerpts from the FAM relating to a sample transportation letter, correspondence protocols, certain immigrant visas, and parole. Ex. E.

By letter on March 15, 2012, Plaintiffs' counsel expressed concerns regarding the adequacy of the searches conducted within DOS. Ex. HH. These included the lack of explanation as to why DOS deemed irrelevant the potentially responsive documents identified through the search and the failure of the agency to search in any of the embassies and consulates abroad. Plaintiffs suggested a possible narrowing of their request through a search of five overseas posts. Further, Plaintiffs noted concerns that the agency had used search terms that did not correspond to agency jargon, and in particular that the agency's search had not used the standard agency term "transportation letter," as referenced in agency materials such as the FAM. *Id.*

By letter on April 6, 2012, Defendants' counsel responded that DOS would not conduct additional searches in response to Plaintiffs' FOIA request and that it considered the suggestion of looking at the proposed five overseas posts an "amendment of the FOIA request." Ex. G, at 3. On April 11, 2012, Defendants' counsel submitted a second DOS declaration from Brian Hunt regarding the search conducted within the Office of Visa Services in the Bureau of Consular Affairs. Ex. F.

B. Department of Justice

Plaintiffs' FOIA request to DOJ was initially tasked to the Federal Bureau of Prisons and Office of Justice Programs. Ex. J. When no responsive records were found in these components, Plaintiffs' counsel suggested that the FOIA request be forwarded to more appropriate components, including the Office of the Solicitor General and the Civil Division. Exs. K, L, M.

Plaintiffs' request was subsequently forwarded to the OSG office and the Civil Division. Exs. O, P. At issue in this motion are agency responses to the requests directed to the Civil Division.

Prior to the filing of the Complaint in this case, the Civil Division produced two documents: the Office of Immigration Litigation's ("OIL") instructions to attorneys for adverse case decisions, Ex. I, and a list of 4,874 cases in which the government lost cases in the courts of appeals, Ex. N. The OIL instructions solely concern the possibility of appealing a case to the Supreme Court. Ex. I. In response to Plaintiffs' second FOIA request, Defendants produced 438 pages of e-mail correspondence and attached documents. Exs. S, T.

By declaration dated January 23, 2012, DOJ FOIA officer James M. Kovakas described the DOJ's search for records pursuant to Plaintiffs' FOIA request. Mr. Kovakas stated that the Civil Division's CASES database does not allow a search for information as to whether a party to the litigation has been removed from the United States, self-deported, or departed under an order of voluntary departure. From this, Mr. Kovakas determined that any responsive records the Civil Division may have would reasonably be expected to be in OIL's litigation case files. He also determined that it would be unlikely that records responsive to the request would be maintained in any other office in the Civil Division. Ex. R, ¶ 6. Mr. Kovakas does not include a description of the CASES system and does not state whether that database includes information on whether the Civil Division opposed a stay or whether the court granted a stay. Nonetheless, Mr. Kovakas stated that a search of the CASES database resulted in a report of "approximately 7500 OIL adverse decisions for the appropriate time period."[1] Mr. Kovakas also stated that it

[1] Mr. Kovakas states that the report was released as a 159-page CASES report with 7,500 cases in spreadsheet format to Plaintiffs' counsel. Ex. R, ¶ 8. Plaintiffs actually received a 147-page report, containing 4,831 cases. In later correspondence, Defendants' counsel offered several speculative reasons for the discrepancy, but did not produce the report with 7,500 cases. Ex. V.

would be too burdensome to search through these cases files for relevant documents because the list of adverse decision cases is over-inclusive and the files are voluminous. Ex. R.

Mr. Kovakas' declaration described the search conducted at OIL pursuant to Plaintiffs' renewed and supplemented request. He stated that the request was forwarded to three attorneys in OIL who might have relevant records or information regarding *Nken v. Holder* as well as to OIL's Appellate team. *Id.* In addition, the Deputy Director of OIL instructed five attorneys to search for documents related to the specific cases identified as illustrative examples in Plaintiffs' request. *Id.* The declaration does not describe how these attorneys conducted their searches, how they keep their files, or whether they searched both paper and electronic files.

On March 15, 2012, Plaintiffs' counsel wrote to Defendants' counsel challenging the adequacy of DOJ's search. Ex. HH. Defendants' counsel responded on April 6, 2012, informing Plaintiff's counsel that they had considered Plaintiffs' request for further searches but determined that further searches were not warranted. Ex. V.

C. Immigration and Customs Enforcement, Department of Homeland Security

Prior to the filing of the Plaintiffs' Complaint, ICE initially identified and produced 587 pages from the Office of the Principal Legal Advisor ("OPLA"). Ex. Z. In response to Plaintiffs' appeal of the adequacy of the search, ICE remanded Plaintiffs' FOIA request to additional offices for more searches, Exs. AA and BB, and identified approximately 2,650 additional pages of potentially responsive records. Ex. CC. Subsequently, Plaintiffs filed their Complaint in federal court on May 12, 2011.

Since June 2011, Plaintiffs' counsel and Defendants' counsel have engaged in discussions regarding possible search methodologies that would discharge ICE's obligation to conduct an adequate search. Ex. KK. In particular, Plaintiffs' counsel suggested that ICE could

conduct a more targeted search for responsive documents about the category of individuals named in Part 1 of Plaintiffs' FOIA request through a cross match of two sets of data: (1) cases in which the individual prevailed on a petition for review before federal courts or on a motion to reopen before the BIA or the IJ, and (2) cases in which the individual was removed or departed under an order of voluntary departure. Ex. KK. As to the already identified OPLA records, Defendants agreed to a production schedule for the 2,650 pages of responsive documents. Ex. DD.

Over the past eight months, Plaintiffs expressed willingness to help ICE in developing an appropriate search methodology through a targeted database search. Ex. KK. Meanwhile, Defendant ICE proceeded to conduct other searches within OPLA and the LEPU. Ex. EE. The only written information provided by Defendant regarding ICE's search conducted to date is contained in the ICE declaration by Ryan Law, dated April 2, 2012. According to Mr. Law's declaration, there remain approximately 10,000 to 15,000 pages of potentially responsive records from ICE's supplemental search of OPLA to be reviewed for responsiveness. *Id.* In addition, Mr. Law states that there are 1,000 pages of potentially responsive records found in a supplemental search of ICE's 24 Enforcement and Removal Operations ("ERO") Field Offices. *Id.* However, Mr. Law does not provide a description of the file systems that were searched or search methods (including search terms) that were employed.

ARGUMENT

I. STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is merited when there is no genuine dispute as to any material fact and the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate . . . ." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (internal citations omitted). The only issue in this motion is whether Defendant agencies' searches were inadequate.

"FOIA was enacted to promote honest and open government and to assure the existence of an informed citizenry to hold the governors accountable to the governed." *Grand Cent. P'ship*, 166 F.3d 473, 478 (2d Cir. 1999) (internal citations omitted). Specifically, FOIA requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). It is well established that "an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The agency's efforts must be judged against FOIA's "most basic premise," "a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999); *see also Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) ("The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure."). "Reasonableness must be evaluated in the context of each particular request." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010) (citing *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

In determining whether an agency has satisfied its burden of proof of disclosure, courts may rely on agency affidavits or declarations. *See Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) ("The peculiarities inherent in FOIA litigation, with the responding agencies often in sole possession of requested records and with information searches conducted only by agency personnel, have led federal courts to rely on government affidavits to determine whether the statutory obligations of the FOIA have been met. Accordingly, in adjudicating the adequacy of the agency's identification and retrieval efforts, the trial court may be warranted in relying upon agency affidavits . . . .") (internal quotations omitted). However, affidavits must satisfy exacting standards. "Reliance on affidavits to demonstrate agency compliance with the mandate of the FOIA does not, however, require courts to accept glib government assertions of complete disclosure or retrieval. Rather, to ground a grant of summary judgment on the basis of agency protestations of compliance, the supporting affidavits must be relatively detailed and nonconclusory and must be submitted in good faith." *Id.* (internal citations omitted). Accord. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488−89 (2d Cir. 1999).

II. THE DEPARTMENT OF STATE FAILED TO CONDUCT AN ADEQUATE SEARCH

A. DOS Failed to Search in Locations Reasonably Likely to Contain Relevant Documents

An agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Although an agency is not required to "search every record system," *id.*, the agency must demonstrate that it searched all records systems that are likely to turn up the information requested. *See Campbell,* 164 F.3d at 28 ("[A]n agency 'cannot limit its search to only one record system if there are

others that are likely to turn up the information requested.'"). The agency must set forth in an affidavit or declaration why a search of some record systems, but not others, would lead to the discovery of responsive documents. *Oglesby*, 920 F.2d at 68.

FOIA Request Part 1 to DOS asked for "all documents related to Department of State efforts to facilitate the return to the U.S. of individuals" who had been removed and whose removal orders were vacated or reversed or whose immigration cases have been reopened by an immigration judge or the BIA. Ex. B. Request 5 asked for "any documents related to coordination between the Department of State and DHS or the Department of Justice to arrange for the return to the U.S. of the category of individuals identified in request (1)." *Id.*

Embassies and consulates abroad are a logical location for finding documents related to the State Department's role in returning those who have been deported and later win their cases. By definition, those deported are outside the United States. The embassies and consulates in those locations are the first point of contact for persons abroad. Furthermore, the embassies are the issuing office for transportation letters, which are often a requirement for many people to return to the United States. [See infra, Sec. B; see also Complaint, Exhibit G, ¶ 11-13 (obstacles to obtaining boarding letter eventually resolved as a result of communications between ICE officer and consulate in Nigeria); Exhibit H (Sonia Lin) ¶ 5-6, 14, 25, 27 (difficulties in communicating with embassy to obtain transportation letter); Exhibit J (Marie Mark), Exhibit 2 (letter explaining that FAM authorizes consular officers to issue travel letters)]. In fact, the DOS admits the clear role that embassies and consulates play, stating that "return is facilitated by individual overseas posts" on an ad hoc basis with DHS coordination. Ex. F, ¶ 6.

Here, the State Department was also duly put on notice that embassies and consulates would likely have responsive documents. *See El Badrawi v. Dep't of Homeland Security*, 583 F.

Supp. 2d 285, 302 (D. Conn. 2008) ("[D]efendant Department of State's (DOS) description of its search is insufficient because it does not address the possibility of the existence of responsive records at the American Embassy in Beirut, despite the fact that 'DOS was on notice that the Embassy in Beirut is likely to contain responsive records.'") In addition to the examples listed above, Plaintiffs' Complaint also recounts a series of efforts by David Gerbier and subsequently his counsel to contact persons in the embassy in Haiti during the seven years between his deportation and his eventual return to the United States. *See* Pls.'s Compl. Ex. J (Declaration of Marie Mark) ¶ 3 (Mr, Gerbier went to the embassy three times when he was pro se); ¶5 (letter from counsel to the Embassy);¶ 7 (response from the citizenship services unit at the embassy in Port-au-Prince).[2]

Thus, any reasonable search for documents related to DOS efforts to facilitate return or documents related to coordination between the DOS and other agencies would logically include a search of embassies or consulates—or at a minimum, a subset of such offices—where requests for return would have been initiated or requests for travel documents coordinated. When Plaintiffs' counsel indicated that embassies and consulates were overlooked, and proposed a reasonable subset of five overseas posts, the Defendants' counsel stated that DOS had no obligation to search the embassies. Ex. G at 3. The only explanation that Plaintiffs are left with is Ms. Walter's declaration, dated January 23, 2012, which simply concludes that "IPS further determined that it would be unlikely that any other components would have responsive documents." Ex. C ¶ 8.

[2] The original request to the DOS sent on December 17, 2009 also made specific references to U.S. Embassies and Consular offices. Ex. A ¶ 1, 4-7.

B. DOS Failed to Use Search Terms Reasonably Calculated to Obtain Responsive Documents

Agencies are prohibited from reading FOIA requests too narrowly in order to withhold documents. *See Amnesty Int'l USA v. CIA*, No 07-5435, 2008 U.S. Dist. LEXIS 47882, at *37 (S.D.N.Y. June 19, 2008) ("[A]n agency may not read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester.") (internal quotations omitted). Thus, even if Plaintiffs did not literally identify the correct agency terminology in its request, DOS must construe Plaintiffs' request liberally and use appropriate agency terminology to uncover all relevant documents. *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) ("Even though Plaintiffs did not use the correct terminology, i.e., 'attention grasp,' the accompanying definition was sufficient to put the CIA on notice of the documents Plaintiffs requested.").

Defendants have acknowledged during the course of this litigation that the DOS, at a minimum, plays the essential role of issuing letters that will allow persons who have been deported to board aircraft to return to the United States. Ex. JJ ("After ICE has decided to facilitate your return to the United States, you must possess a passport and appropriate transportation documentation to travel to the United States. A transportation/ boarding letter is a document issued by a U.S. Embassy or Consulate abroad, allowing you to board a commercial aircraft or maritime vessel to come to the United States."). This role is critical because airlines face penalties if they transport people who are not entitled to come to the United States. Ex. E. There is, therefore, no question that for any case where an individual's return requires air travel, the State Department will have documents recording the issuance of a transportation document. Nonetheless, DOS failed to identify any such documents in individual cases nor any instructions

with respect to those documents for persons who have been removed. Ex. D (finding no responsive documents other than the excerpts from the FAM).

By letter dated March 15, 2012, Plaintiffs identified a logical and obvious reason for DOS's failure to identify responsive documents. The FAM pages produced by Defendants use the term "transportation letter," Ex. E, instead of any of the terms that DOS used in its search, Ex. C, ¶ 11, 15, 24. Failure to use agency-specific jargon in its search may hide documents that Defendants well know are responsive, but that Plaintiffs would be unable to pinpoint at the outset. Plaintiffs therefore requested that DOS perform its search using the appropriate agency terminology. Ex. HH.

Defendants' response rejecting a search based on appropriate terminology completely misses the point. They characterize Plaintiffs' counsel's suggestion as a request to "conduct additional searches based on leads generated by responsive documents." Ex. G at 2. But the relevant inquiry is whether or not the agency has met its obligation in the first place to conduct an adequate search by using appropriate and reasonable search terms, in light of the particular circumstances of this request. Using "travel document" and "boarding letter" to search within DOS may in fact be unreasonable if agency officers are trained to refer to this document as a "transportation letter" or "transportation document." Unlike what Defendants imply, the "four corners of the request" to DOS squarely identified Plaintiffs' interest in these documents, regardless of whether they are called "travel document," "boarding letter," "boarding document," "transportation letter," or "transportation document."

Defendants also state that transportation letters are not marked or filed in a way that would make them identifiable. *Id.* But Defendants do not deny that such letters are issued upon request of DHS and that those requests would come through e-mails or cables that could be

searched using appropriate terminology. As Defendants acknowledge, the adequacy of a search is determined by "the appropriateness of the methods used to carry out the search." *Id.* (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). A method that uses terms other than the agency jargon is simply not appropriate.

C. DOS Failed to Provide Any Explanation Why Over 2,000 Retrieved Hits Were Not Relevant

The Second Circuit has held that a good faith presumption does not automatically attach to agency affidavits, clarifying that the presumption "only applies when accompanied by reasonably detailed explanations of why material was withheld." *Halpern*, 181 F.3d at 295. In this case, the DOS failed to provide a reasonably detailed explanation as to why a large number of hits generated from searches using relevant search terms were ultimately deemed nonresponsive and Defendants stopped their review of these documents.

By declaration, Ms. Walter stated that potentially responsive documents were identified as a result of searches conducted within the Central File (over 2,000 hits), Ex. C¶ 12, the Bureau of Population, Refugees, and Migration and Refugee (unknown number of hits), *Id.* ¶ 17, and the Office of the Legal Adviser/Bureau of Consular Affairs (one hit), *Id.* ¶ 25. However, in a subsequent letter, Ms. Walter summarily states that none of the documents in a subset of 400 documents from the Central File, nor any of the identified documents from the PRM or the Office of the Legal Adviser, were deemed relevant. When Plaintiffs requested further explanation why hits generated from relevant search terms were deemed irrelevant, Defendants' counsel stated that the agency used "general and overly inclusive search terms which would necessarily retrieve many non-responsive documents," and again summarily states that the documents were "assessed for responsiveness through comparison to plaintiff's FOIA request" and that "the records retrieved were non-responsive." Ex. G. But a logical conclusion from an

overly inclusive search is that it would produce both responsive and non-responsive documents, not that it would produce no responsive documents at all. The Defendants have offered insufficient details for Plaintiffs to evaluate whether this determination was correctly made.

III. THE DEPARTMENT OF JUSTICE FAILED TO CONDUCTED AN ADEQUATE SEARCH

A. DOJ Failed to Conduct a Search Reasonably Likely to Identify Responsive Documents Containing Communications between DOJ, DHS and DOS

Under FOIA, the agency must demonstrate "beyond a material reasonable doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve*, 639 F. Supp. 2d 384, 393 (S.D.N.Y. 2009) (same). This duty includes looking in the places where documents might be found as well as using a search methodology that is reasonably calculated to identify responsive documents. *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("To fulfill the adequate search requirements of the [FOIA], the government should identify the searched files and recite facts which enable the district court to satisfy itself that all appropriate files have been searched"); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 535 F. Supp. 2d 157, 162 (D.D.C. 2008) (concluding that agency's declaration complied with FOIA requirements as it detailed how "all files likely to contain responsive materials were searched, by whom they were searched, and in what manner."); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 405 F. Supp. 2d 3, 3 (D.D.C. 2005) (concluding that agency conducted an adequate search, because its declarations "set forth the terms and nature of. . . [the] search, and perhaps even more significantly, they state[d] that the locations most likely to contain responsive documents were extensively searched). Defendant also bears the burden of providing an adequate description of

their files and their search methodology. *Jefferson v. Bureau of Prisons*, No. 05-848, 2006 WL 3208666, at *7 (D.D.C. Nov. 7, 2006) (concluding that agencies' declarations were inadequate because they did not "describe the systems of records each agency maintains, detail[] the method of retrieving records, or aver[] that the agency identified and searched all files reasonably likely to contain responsive records"). Defendant's search of DOJ records for "any documents related to coordination between DOJ and DHS and/or the State Department to arrange for the return to the U.S. of category of individuals [who have prevailed in their cases]" fails these tests.

DOJ's search statement identifies two places where documents about communications might be available: (1) through the CASES system, which records all DOJ cases; and (2) through the e-mails and files of individual attorneys. Ex. R ¶ 2. First, with respect to CASES, Defendant DOJ imply that the only way they could use that data system to identify relevant cases would be to look at every case in which the agency lost in the circuit courts, and then manually search through the case files. Ex. R ¶ 10. But Mr. Kovakas fails to offer a description of CASES that supports its assumption that any inquiry would be so burdensome. There may be other ways to economize on a search. For example, it is possible that CASES records whether the individual sought a stay and whether it was granted. If so, it would be possible to look directly at cases in which a stay was denied and the person later prevailed. Absent a basic description of the data system and how it works, Defendant DOJ has not met its burden in showing that a search through CASES would not be effective. *See Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551–52 (finding declaration inadequate if "it fails to describe in any detail what records were searched, by whom, and through what process"); *see also Oglesby*, 920 F.2d at 68 (holding that a detailed affidavit is necessary "to allow the district court to determine if the search was adequate in order to grant summary judgment").

Second, as Defendant DOJ recognizes, responsive documents might be within the e-mails or the case files of attorneys at OIL. However, Mr. Kovakas offers no description of any search methodology of these files. Instead, he states that individual attorneys were asked to look for responsive documents; that some remembered relevant cases; and that a deputy director instructed lawyers to look specifically at the cases that had been provided as illustrative examples by Plaintiffs. Ex. R ¶ 12, 16-17. But the purpose of FOIA is not to get only what outsiders already know, but to find requested documents that are known only to the government. A proper search would have used search terms that more generally uncovered the rules and methods for returning individuals, and could have used search terms suggested in Plaintiffs' March 15 letter. Ex. HH. Although Defendants have some discretion in selecting a search methodology, they cannot simply leave the methodology to the discretion of individual employees and what they happen to remember.

Instead of performing a search of OIL attorneys' emails for responsive documents, Defendant DOJ has rested on the assertion that OIL's role in a case ends when it notifies DHS of the outcome of the case. From the e-mails Defendant DOJ has produced, with respect to cases provided by Plaintiffs as illustrations, it is clear that this is not true. Exs. S, T. Furthermore, as Plaintiffs' counsel explained to Defendants' counsel, the American Immigration Law Foundation ("AILF") practice advisory, which has been extensively distributed to immigration practitioners, advises attorneys to contact opposing counsel to facilitate return. Ex. II. The AILF practice advisory was the only practice advisory, until the creation of ICE's FAQ, that provided information for individuals and their attorneys on how to return to the United States after prevailing in their immigration case. Defendants' counsel's only answer is that there is no reason to believe that immigration practitioners actually email OIL with requests to return because it is

unproven whether practitioners who receive the AILF practice advisory "read and understand it" or "follow... the guidance set forth." Ex. V. OIL has produced no evidence that these emails do not occur. On the contrary, where Plaintiffs have identified specific illustrative cases, it is clear that there are many such e-mails of lawyers seeking to obtain the return of their clients. Defendants have therefore failed to provide an adequate reason for refusing to perform a search of e-mail records that could produce responsive documents. *Garcia*, 181 F. Supp. 2d at 368; *Jones-Edwards v. Appeal Bd. of Nat. Sec. Agency Cent. Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005).

B. DOJ Failed To Conduct a Search Reasonably Likely To Identify Responsive Documents Containing Communications About *Nken*

As with the search for OIL communications, Defendant DOJ failed to provide an adequate description of its files and search methodology for documents concerning *Nken.* Mr. Kovakas simply states that three attorneys who "might have relevant records regarding *Nken v. Holder*" were instructed to search their files and to "advise whether they had any notes or factual information supporting the government's assertion in *Nken* that the government facilitates the return of aliens who prevail on their review petitions." Ex. R ¶ 11. Defendant DOJ provides no explanation of what search terms were used, what databases were searched, whether electronic and paper files were searched, or how these attorneys store their files. Further, Defendant provides no rationale for why the request to search was limited to these three attorneys. Mr. Kovakas states that two of these attorneys did find potentially responsive emails after conducting a search of their electronic files, however no information is given on the method or result of the third attorney's search.

Past experience in this litigation underscores the importance of a transparent search methodology. Plaintiffs note that with respect to the OSG, the initial e-mails identified by the

government in this litigation were incomplete. In fact, it appears that the OSG did not conduct a full search of relevant communications until after this Court's decision on February 7, 2012. After a subsequent search, the government submitted additional materials to the Court, including emails from an additional OSG attorney that showed information available to the OSG at the time it filed its brief in *Nken*.

Plaintiffs also note that these documents are no doubt embarrassing to some in the government. As a result, it is especially important that there be a neutral methodology for identifying relevant documents. Once again, the *Nken* OSG e-mails are instructive. The later-identified e-mails includes a request from the OSG for specific information about what happened to six individuals whose stays were denied and who later prevailed before the court of appeals. Ex. W. This request highlights the OSG's recognition of the importance of the facts they were presenting to the Supreme Court and the weakness of the evidence they had previously received from DHS to support their factual assertion. In fact, when the chart was completed by DHS after the OSG's brief was filed in *Nken*, it showed that in one of the three cases in which the person had been removed, the IJ concluded that "addressing [redacted form of relief] is meaningless as respondent's stay of removal was denied by 11th Circuit and the respondent has been removed." *Id*. This statement clearly ran counter to the position of the government that removal following denial of a stay would have no impact on a case. It may well be that the OIL e-mails have similar statements that would prove embarrassing to the government by showing that certain facts about the "policy" of return were known to the government lawyers at that time. The embarrassing nature of this case demands an objective methodology for finding documents, rather than a vague assertion that a limited number of attorneys searched their files.

IV. ICE HAS FAILED TO UNDERTAKE AN APPROPRIATELY TARGETED SEARCH

An appropriate search should locate relevant documents in a manner that respects FOIA's paramount interest in timely release to the public of material that is not subject to exemptions. *See* 5 U.S.C. § 552(a)(3)(A) ("each agency . . . shall make the records promptly available to any person"); 5 U.S.C. § 552(a)(6) (establishing timelines to ensure timely response). In this case, Plaintiffs' counsel has consistently urged Defendants' counsel since June 2011 to guide ICE in adopting a targeted search methodology that would locate records in the cases in which a person was deported and subsequently prevailed in his or her case. Ex. KK. A straightforward way to accomplish such a search would be to cross match the cases where the immigrant has prevailed on appeal or on a motion to reopen with cases in which the individual was deported. Such a cross-match would significantly narrow the scope of the search by directly identifying the universe of relevant cases, and eliminate the need to conduct sweeping and overly inclusive searches that may not ultimately result in producing relevant documents. A search of a representative sample of those cases would then be a reasonable limitation on the total scope of ICE's search for information responsive to Part 1 of Plaintiffs' FOIA request. In light of Customs and Border Protection (CBP) documents that show that CBP retains discretion over parole entries, the need for uncovering what happens in individual cases becomes all the more important. Ex. FF.

Instead of conducting a search designed to identify cases of people who were deported and then prevailed—the specific category of individuals that Plaintiffs' FOIA sought information about--Defendant ICE proceeded to conduct unspecified searches of its legal offices and field offices that have together identified approximately 11,000 to 16,000 pages of potentially relevant documents. Ex. EE ¶¶ 31, 32. It is unclear how many, if any, of these documents will be deemed

responsive.[3] Defendant ICE has also identified 135 files from the Law Enforcement Parole Unit ("LEPU"), Ex. EE, that Plaintiffs understand are solely of persons who were granted parole, and thus would not contain information regarding those who sought return but were denied parole, Ex. KK.

Rather than sort through over thousands of pages of documents based on an unspecified search that may or may not identify responsive documents, Defendants should be required to conduct a search that is appropriate and targeted to the information requested. Such a targeted search is within Defendants' capacity because all immigrants in removal proceedings are coded by alien registration numbers ("A-numbers") and these codes would likely be available to both DHS and DOJ as a common identifier. Ex. KK. These A-numbers are also readily available to the public. Every case before the BIA is assigned a docket number, and this is often the respondent's A-number. Similarly when cases subsequently go before the court of appeals, this docket number is still available through Westlaw. Ex. KK. By cross-matching data to find those cases in which an immigrant was deported and subsequently prevailed on appeal or a motion to reopen, Defendants could directly examine the relevant documents.

If, as the DOJ declaration claims, the "vast majority" of persons petitioning to the courts of appeals remain in the United States during appellate review, Ex. R ¶ 6, it is likely that searching the results from any cross-match will yield significantly fewer documents than the 16,000 hits that have been retrieved thus far from these other searches, which have not been adequately detailed. Such a search would be reasonable and appropriate. In contrast, an unspecified search that has led to many pages of documents may turn up many records that are not responsive and merely delay the identification of documents that are in fact responsive.

[3] As with the DOS documents, Ex. E, ICE may decide to review only a subset of the retrieved documents and may just as well conclude that none of the 16,000 pages will be responsive.

Although agencies have substantial leeway in designing searches, the search must nonetheless be appropriate and not create substantial delay. At a minimum, Defendant ICE should be ordered to provide a detailed accounting of their file systems and the search methodology that has been utilized thus far.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Partial Summary Judgment and order the Defendants DOS, DOJ, and ICE to conduct an adequate search and provide a more detailed statement of their searches.

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Respectfully submitted,

/s/

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