UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK; CENTER FOR CONSTITUTIONAL RIGHTS; and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; FEDERAL BUREAU OF INVESTIGATION; and OFFICE OF LEGAL COUNSEL,

Defendants.

No. 10 Civ. 3488 (SAS)
ECF Case

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANTS FEDERAL BUREAU OF INVESTIGATION AND UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO SEARCH CUT-OFF DATES FOR PLAINTIFFS' FREEDOM OF INFORMATION ACT REQUEST

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2761 / 2745
Facsimile: (212) 637-2786 / 2686
Email: christopher.connolly@usdoj.gov
joseph.cordaro@usdoj.gov

CHRISTOPHER CONNOLLY
JOSEPH N. CORDARO
Assistant United States Attorneys
- Of Counsel -

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **Page**

STATUTE

REGULATIONS

In accordance with the Court's order at the conference held on January 12, 2011, defendants Federal Bureau of Investigation ("FBI") and United States Immigration and Customs Enforcement ("ICE") respectfully submit this memorandum of law in support of their motion for partial summary judgment establishing search cut-off dates of March 2, 2010, and April 30, 2010, respectively, for plaintiffs' Freedom of Information Act ("FOIA") request dated February 3, 2010.

PRELIMINARY STATEMENT

FOIA requests have a definitive temporal scope. If the FOIA requester does not impose a limitation on his or her request, the agency may select a search "cut-off" date whereby records created after that date are deemed non-responsive to the request. The purpose of the cut-off date is to prevent a limitless series of agency searches for responsive records over an open-ended time period. In the event the FOIA requester wishes to obtain documents after the cut-off period, the requester is free to submit a follow-up request to cover the appropriate time period.

Much of the litigation over cut-off dates involves not whether agencies are authorized to use search cut-off dates (they certainly are), but whether the cut-off date is reasonable under the circumstances of the case. On several occasions, courts have ruled that a cut-off date based on the commencement of an agency's search for responsive records is reasonable. Such a cut-off date ensures a full search and disclosure by the agency, while simultaneously avoiding the unnecessary burden of re-visiting the search after the passage of each month—an important consideration when the request implicates as many responsive records as plaintiffs' request.

Both the Department of Homeland Security ("DHS"), of which ICE is a component, and the Department of Justice ("DOJ"), of which FBI is a component, have promulgated regulations concerning FOIA requests and, specifically, search cut-off dates. These regulations provide that FOIA requests ordinarily embrace only records within the possession of the agency as of the date that the search is initiated. *See* 6 C.F.R. §§ 5.4(a) (DHS); 28 C.F.R. §§ 16.4(a) (DOJ). This rule is consistent with cases sustaining an agency's use of a date-of-search cut-off, and it is the rule that FBI applied in this case. ICE, on the other hand, applied a search cut-off that was *later* than the date-of-search cut-off specified in the DHS regulation.

As discussed below, FBI responded to plaintiffs' FOIA request on March 2, 2010 and initiated a search of its Central Records System ("CRS") on the same day. Although the initial search of CRS resulted in no responsive documents, subsequent searches yielded an estimated 500,000 pages from the FBI's Criminal Justice Information Services Division ("CJIS"). To date, FBI has uploaded over 40,000 pages into its document processing system for processing in this case and has made three releases to plaintiffs totaling approximately 2,800 pages. FBI thus reasonably set March 2, 2010—the date of the CRS search—as its cut-off date.

ICE received plaintiffs' FOIA request on February 19, 2010, and, on the same day, instructed several program offices within its Office of Enforcement and Removal Operations ("ERO") to conduct a search for records that potentially would be responsive to plaintiffs' FOIA request. ICE estimated that the request could implicate millions of documents, at a cost of hundreds of thousands of dollars. Nevertheless, ICE set a search

cut-off date later than the date of the initial search: April 30, 2010—three days after the commencement of the instant action. ICE posted Secure Communities material to its online FOIA Reading Room in May and June 2010, and (unsuccessfully) negotiated with plaintiffs in an attempt to narrow plaintiffs' overbroad FOIA request. These negotiations resulted in ICE's July 9, 2010 agreement to search for materials responsive to the Rapid Production List ("RPL"), an agreement that was reached only two weeks after plaintiffs presented the RPL. ICE's first RPL release of 926 pages followed on August 3, 2010, with subsequent releases during the remainder of 2010, and a Court-ordered release of over 12,000 pages in January 2011. Given the scope of the request, ICE's April 30, 2010 cut-off was reasonable.

BACKGROUND[1]

A. Plaintiffs' FOIA Request and Complaint

On or about February 3, 2010, Plaintiffs submitted identical FOIA requests (collectively, the "Request") to each defendant, including FBI and ICE. *See* Declaration of Bridget P. Kessler ("Kessler Decl."), dated October 28, 2010, Ex. A (FOIA request

[1] The Government has not submitted a Statement Pursuant to Local Civil Rule 56.1. *See NAACP Legal Def. & Educ. Fund, Inc. v. HUD*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *1 n.1 (S.D.N.Y. Nov. 30, 2007) (finding strict compliance with Rule 56.1 unnecessary in FOIA case where "none of the relevant facts of the case are in dispute," and case "involve[s] purely legal inquiries, and resolution of those inquiries is not contingent on resolution of any factual disputes"); *see also Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting that submission of statement under former Local Rule 3(g) would be "meaningless," and that "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment") (citing *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994)), *aff'd,* 83 F.3d 41 (2d Cir. 1996). Of course, if the Court wishes the Government to submit a Rule 56.1 Statement in support of its motion, it will do so promptly.

dated Feb. 3, 2010).[2] The Request seeks production of a vast array of "any and all" records relating to Secure Communities. *See id.* ICE has estimated that the Request potentially implicates over one million potentially responsive records, at an estimated cost of hundreds of thousands of dollars. *See* Declaration of Catrina Pavlik-Keenan, dated January 26, 2011 ("Second Pavlik-Keenan Decl."), ¶ 18.

The Request also seeks a waiver of all fees associated with defendants' processing of the Request, as well as expedited processing of the Request. Kessler Decl. Ex. A at 18-20. FBI and ICE denied plaintiffs' request for a fee waiver. Declaration of David M. Hardy, dated November 12, 2010 ("First Hardy Declaration"), Ex. D; [3] Kessler Decl., Ex. C. FBI granted plaintiffs' request for expedited processing; ICE denied it. Kessler Decl. Ex. B, C. Plaintiffs allegedly appealed ICE's denial of expedited processing, though ICE has no record of receiving the appeal. Second Pavlik-Keenan Decl. ¶ 12; *see* Kessler Decl., Ex. G. On April 27, 2010, plaintiffs commenced the instant litigation.

---

[2] The Kessler Declaration was filed on October 28, 2010 (Docket # 12), with plaintiffs' motion for a preliminary injunction on records pertaining to the issue of whether states and localities may "opt out" of Secure Communities. At a hearing on December 9, 2010, the Court ordered defendants to produce "opt out" records no later than January 17, 2011, with a search cut-off date of October 15, 2010. The Government did not challenge that search cut-off date, and it is not at issue in this motion.

[3] The First Hardy Declaration was filed on November 12, 2010 (Docket # 15), in tandem with defendants' opposition to plaintiffs' motion for a preliminary injunction. This declaration is annexed as Exhibit A to the Second Declaration of David M. Hardy, dated January 26, 2011 ("Second Hardy Declaration"), filed in support of the instant motion for partial summary judgment.

B. FBI's Search Efforts

FBI's Record/Information Dissemination Section ("RIDS") is tasked with managing responses to, *inter alia*, FOIA requests. *See* Second Hardy Decl. at ¶ 2. RIDS's standard operating procedure for FOIA requests is to establish as the search cut-off date the date on which a RIDS legal administrative specialist conducts the first search for responsive records in FBI's CRS—its vast repository of documents. *See id.* at ¶ 6. This standard procedure is consistent with the DOJ regulation governing search cut-off dates, 28 C.F.R. § 16.4(a), which provides that the usual cut-off date shall be the date-of-search. *See id* at ¶ 6 n.1.

FBI acknowledged plaintiffs' multi-part FOIA request, dated February 3, 2010, by letter dated March 2, 2010. *See id.* at ¶¶ 7-8. On that same date, FBI initiated its threshold search for responsive records by using its Automated Case Support System ("ACS") to search its CRS for Secure Communities-related material. *See* First Hardy Decl. at ¶¶ 19-20. In accordance with RIDS standard operating procedures, as well as the governing regulation, 28 C.F.R. § 16.4(a), FBI established March 2, 2010, as the search cut-off date for the FOIA request. *See* Second Hardy Decl. at ¶¶ 6 n.1, 8. FBI's search of the CRS yielded no documents responsive to plaintiffs' FOIA request. *See id.* at ¶ 9; First Hardy Decl. at ¶ 21.

On April 6, 2010, RIDS issued an electronic communication ("EC") to the FBI Headquarters divisions most likely to possess records responsive to the FOIA request, including the Counterterrorism Division, Criminal Division, Criminal Justice Information Services ("CJIS"), Cyber and Inspection Divisions, Intelligence Directorate, Office of the

General Counsel, and Director's Office. *See* Second Hardy Decl. at ¶ 9; First Hardy Decl. at ¶ 22. The EC requested personnel to conduct a thorough search for potentially responsive documents created from January 1, 2007, through February 3, 2010, *i.e.*, the date of plaintiffs' request. *See* First Hardy Decl. at ¶ 22. The date-of-request cut-off was an error; the correct cut-off date was the date of search, March 2, 2010. *See* Second Hardy Decl. at ¶ 9.

In response to the EC, all offices and divisions, with the exception of CJIS, located no documents responsive to plaintiffs' FOIA request. Second Hardy Decl. at ¶ 10. CJIS located a large volume of material, including over 6,000 e-mails and 3,400 Excel spreadsheets—consisting of over 300,000 pages. *See id.* at ¶ 11. RIDS subsequently confirmed that this material covered a period extending to March 2, 2010. *See id.* at ¶ 12. In May 2010, CJIS sent RIDS two CD-roms and three DVDs containing almost nine gigabytes of information, with an estimated page count of 500,000. *See* First Hardy Decl. at ¶¶ 24-25.

The potentially responsive documents were scanned into the FBI's FOIA/Privacy Act ("FOIPA") Document Processing System ("FDPS"), which enables RIDS to process FOIA requests by converting the documents to Tagged Image File Format ("TIFF"), uploading them into FDPS, and then redacting images in accordance with FOIA exemptions. *See* First Hardy Decl. at ¶¶ 27-28. As of January 26, 2011, RIDS has uploaded over 40,000 pages into FDPS for processing in this case. Second Hardy Decl. at ¶ 14. FBI has made three releases to plaintiffs totaling over 2,800 pages. *Id.* at ¶ 15.

C. ICE's Search Efforts

The ICE FOIA Office ("ICE FOIA") received plaintiffs' FOIA request on February 19, 2010. *See* Second Pavlik-Keenan Decl., at ¶ 6. On the same day, ICE FOIA initiated a search for potentially responsive records within ERO to include the Secure Communities program office, Office of Policy, Office of Public Affairs, Office of Training and Development, Office of the Assistant Secretary, Office of Professional Responsibility, and Office of Congressional Relations. *Id.* at ¶ 7. ICE FOIA tasked the search to each office via the ICE Office of Executive Secretariat Information Management System ("OESIMS"), which is utilized by ICE to manage the receipt, tracking, and response to internal and external inquiries. *Id.*

By letter dated February 23, 2010, ICE FOIA acknowledged receipt of plaintiffs' FOIA request and notified plaintiffs that ICE was denying (i) their request for expedited processing, and (ii) their request for a fee waiver. *Id.* at ¶ 9. Plaintiffs allege that they appealed these denials by letter dated March 15, 2010; however, ICE has no record of having received this appeal. *Id.* at ¶ 13.

On February 24, 2010, ICE FOIA contacted the program offices tasked with the search and requested estimates of the number of hours required to perform searches, and of the number of documents that those searches would generate. *Id.* at ¶ 10. By letter dated March 18, 2010, the DHS Privacy Office sent a preliminary fee estimate to plaintiffs. Plaintiffs responded by letter dated April 21, 2010, that they were unwilling to pay half the estimated fees from the March 18 letter while their appeal was pending. *Id.* at ¶ 14. On April 27, 2010, plaintiffs filed the instant action. *Id.* at ¶ 15.

Meanwhile, on March 1, 2010, the Secure Communities Program Office turned over to ICE FOIA four CD-roms of potentially responsive material. *Id.* at ¶ 11. ICE nevertheless established April 30, 2010—three days after the filing of the complaint—as its search cut-off date. *Id.* at ¶ 17.

Although, as discussed *infra*, defendants were not able to reach agreement with plaintiffs concerning the scope of their FOIA request, ICE disclosed materials provided by the Secure Communities program office as a result of its searches for documents responsive to the FOIA Request. *Id.* at ¶ 22. These disclosures were posted to ICE's online FOIA Reading Room in May and June 2010. *See id.* ICE continues to update the reading room with documents pertaining to Secure Communities. *Id.* at ¶ 23.

D. Negotiations with Plaintiffs and ICE Productions

The Government has made several attempts to negotiate the scope of the request with plaintiffs. ICE estimated that its efforts would implicate over one million potentially responsive documents, thousands of hours, and initial cost estimates in the hundreds of thousands of dollars. *Id.* at ¶ 19. A narrowed request would not only result in a cost savings for ICE, but also would help plaintiffs receive the information they were seeking as expeditiously as possible. *See id.* at ¶ 21. To this end, attorneys from the United States Attorney's Office met with plaintiffs on June 9, 2010, June 25, 2010, and July 27, 2010. *Id.* at ¶¶ 24, 28, 32. ICE agency counsel also attended the July 27 meeting, which lasted more than two hours. *Id.* at ¶ 32. Plaintiffs proposed the RPL during the June 25 meeting, and on July 9, 2010, ICE agreed to conduct targeted searches and produce documents responsive to the RPL. *Id.* at ¶¶ 28, 30. ICE produced documents responsive

to the RPL on August 3, 2010 (926 pages), September 8, 2010 (761 pages), October 22, 2010 (19 pages), and December 6, 2010 (283 pages). *Id.* at ¶ 34.

At the July 27 meeting, plaintiffs presented agency counsel with the "critical data categories" which plaintiffs intend to use as the basis for their current proposal on sampling of A-files, submitted to the Court via letter on January 20, 2011. *Id.* at ¶ 33. By letter from the United States Attorney's Office dated September 16, 2010, ICE indicated that many of the requested statistics were unavailable because ICE did not collect the requested data, that the agency would have to write programs and create new documents to supply the remaining data, and that there would be a fee associated with this production. *See id.* at ¶ 35.

The parties' negotiations continued through September 2010, until the filing of plaintiffs' preliminary injunction motion seeking an order requiring defendants to produce "opt-out" records on October 28, 2010. *See id.* ¶¶ 36-41. Despite the Government's inability to convince plaintiffs to narrow their FOIA request in a meaningful way, ICE produced over 1,000 pages of material between September and December 2010. *Id.* at ¶ 34. On December 6, 2010, ICE produced 283 pages of "opt-out" records. *Id.* at ¶ 42. On January 17, 2011, pursuant to the Court's order at the December 9, 2010 hearing on plaintiffs' preliminary injunction motion, ICE produced over 12,000 pages of opt-out records. *Id.* at ¶ 43.

ARGUMENT

A. Summary Judgment Standards

Most FOIA actions are resolved on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."); *Jones-Edwards v. Appeal Bd. of Nat'l Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005) ("Summary judgment is the procedural vehicle by which most FOIA actions are resolved."). "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 and that any withheld documents fall within an exemption to the FOIA." *Carney*, 19 F.3d at 812.

On a summary judgment motion in a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (citation and internal quotation marks omitted).

B. Search Cut-off Dates

It is axiomatic that agencies need not process and disclose records that are not responsive to the FOIA request. *See, e.g.*, *Wolfe v. HHS*, 839 F.2d 768, 772 n.4 (D.C. Cir. 1988); *Ctr. for Biological Diversity v. OMB*, No. 07-04997, 2009 WL 1246690, at *5 (N.D. Cal. May 5, 2009). The scope of a FOIA request is not only defined in terms of subject matter, but also in terms of when a particular record was created. *See, e.g.*, *Dayton Newspaper, Inc. v. Dep't of Veterans Affairs*, 510 F. Supp. 2d 441, 447 (S.D. Ohio 2007) (noting that FOIA requests have a "temporal scope"). The temporal limitation of a FOIA request typically takes the form of a search "cut-off" date, whereby the agency need only search for, and produce, records in its possession as of the cut-off date. *See* 6 C.F.R. § 5.4(a) (DHS search cut-off regulation); 28 C.F.R. § 16.4(a) (DOJ search cut-off regulation). A search cut-off date prevents the request from becoming "an endless cycle of judicially mandated reprocessing." *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991).

Disputes over cut-off dates generally center on whether the agency's selected date is reasonable under the circumstances of the case. *See McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983), *vacated on other grounds on panel reh'g & reh'g en banc denied*, 711 F.2d 1076 (D.C. Cir. 1983) ("Th[e] same standard of reasonableness that has been applied to test the thoroughness and comprehensiveness of agency search procedures is equally applicable to test the legality of an agency rule establishing a temporal limit to its search effort."); *Jefferson v. Bur. of Prisons*, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) ("Thus, the proper question here is whether the cut-off date used was reasonable in light

of the specific request Plaintiff made."). The Government bears the burden of establishing the reasonableness of the agency's cut-off date. *See McGehee*, 697 F.2d at 1101.

Here, ICE and FBI were subject to search cut-off regulations promulgated by their respective agencies, DHS and DOJ. The operative language for both regulations is identical, and provides for a date-of-search cut-off:

> In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date the component begins its search for them. If any other date is used, the component shall inform the requester of that date.

6 C.F.R. § 5.4(a) (DHS); 28 C.F.R. § 16.4(a) (DOJ). While some courts have found that an agency must inform the FOIA requester of the search cut-off date, *see McGehee*, 697 F.2d at 1105; *In Defense of Animals v. Nat'l Insts. of Health*, 543 F. Supp. 2d 83, 99 (D.D.C. 2008), where, as here, the search cut-off date is publicized in federal regulations, "there is no danger that the requester would be uninformed about what cut-off date the agency would employ." *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. CIV S-06-2845 LKK/JFM, 2008 WL 2523819, at *14 n.17 (E.D. Cal. June 20, 2008).

The DHS and DOJ regulations are consistent with the case law. The District of Columbia Circuit has analyzed the search cut-off issue on two occasions and implicitly approved a date-of-search cut-off date. In *McGehee*, cited *supra*, the court proposed a procedure whereby the agency could use as a cut-off date the date that the agency "instructs each agency division that it thinks might possess relevant records to conduct

. . . a thorough search for all responsive documents in its possession, to retrieve identified records forthwith, and to submit them to the central office for evaluation by persons able to determine whether any material is exempt." *McGehee*, 697 F.2d at 1102, 1104. While the court did not mandate this procedure, it noted that a date-of-search cut-off date would "result[ ] in a much fuller search and disclosure than the [date-of-request cut-off] procedure used by the agency." *Id.*

The outcome was similar in *Public Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002). The FOIA requester challenged the agency's date-of-request cut-off policy both under the Administrative Procedures Act ("APA") because it was promulgated without notice-and-comment, and on reasonableness grounds. *Id.* at 640, 642. The court rejected the APA challenge, finding that the cut-off policy "represent[ed] a prototypical procedural rule properly promulgated without notice and comment." *Id.* at 641. Turning to the reasonableness inquiry, the court found that the date-of-request cut-off policy was unreasonable under the facts of the case, and "[a]t the very least . . . the [agency] could apply a date-of-*search* cut-off to the [last-searched component]." *Id.* at 643-44.

Several district courts have addressed the cut-off issue in the wake of *McGehee* and *Public Citizen*, and have found a date-of-search cut-off reasonable. In *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105 (D.D.C. 2005), for example, the FOIA requester sought a date-of-release cut-off date. *Id.* at 111. The court found this proposal "inherently flawed," and "inefficient and uncertain" because it would lead to "an ever-moving target for the production of documents under FOIA." *Id.* Noting that the District of Columbia Circuit "has all but endorsed the use of date-of-search as the cut-off date for

FOIA requests," and citing the agency's affidavit indicating the date that it commenced its search for responsive records, the court held that the agency reasonably used a date-of-search cut-off date for the FOIA request at issue. *Id.* (citing *Public Citizen*, 276 F.3d at 642). Similar conclusions were reached in *American Civil Liberties Union v. U.S. Dep't of Homeland Security*, --- F. Supp. 2d ---, No. 08-1100 (RBW), 2010 WL 3718944, at *6-*7 (D.D.C. Sept. 20, 2010) ("*ACLU*") (sustaining application of DHS search cut-off regulation), *Fox News Network, LLC v. U.S. Dep't of the Treasury*, --- F. Supp. 2d ---, No. 08 Civ. 11009 (RJH)(FM), 2010 WL 3705283, at *8 (S.D.N.Y. Sept. 3, 2010) (citing cases and noting that "courts have consistently held that an agency may limit its FOIA search to records created on or before the date of the commencement of the search"), *Schoenman v. FBI*, No. 04-2202 (CKK), 2009 WL 763065, at *18 (D.D.C. Mar. 19, 2009) (citing *Public Citizen* sustaining date-of-search cut-off), and *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) ("Other documents [the component] discovered were prepared after [the agency's] FOIA search began . . . and thus are not covered by the request." (citing *Public Citizen*, 276 F.3d at 644 and 43 C.F.R. § 2.21(a)).

C. FBI's Search Cut-off Date of March 2, 2010 Was Reasonable

FBI's application of a search cut-off date of March 2, 2010, to plaintiffs' FOIA request was consistent with the DOJ search cut-off regulation, 28 C.F.R. § 16.4(a), the standard operating procedure of RIDS, and the governing case law. It also was reasonable on the facts of this case.

As indicated in the Second Declaration of RIDS section chief David M. Hardy, FBI acknowledged plaintiffs' multi-part FOIA request, dated February 3, 2010, by letter dated March 2, 2010. *See* Second Hardy Decl. at ¶¶ 7-8. On the same day, FBI searched for responsive records in its CRS through ACS. *See* First Hardy Decl. at ¶¶ 19-20. ACS is an investigative tool that allows searches of CRS by search terms such as "names of individuals, organizations, companies, publications, activities, or foreign intelligence matters (or programs)." *Id.* at ¶ 20. In accordance with RIDS standard operating procedures and 28 C.F.R. § 16.4(a), FBI established the date of that initial CRS search—March 2, 2010—as the search cut-off date for the FOIA request. *See id.*

Even though FBI's initial search of CRS yielded no responsive documents, that fact, in and of itself, has no bearing on the cut-off date. In FOIA cases, "'[w]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)). "[A]n agency's search need not be perfect, but rather only need be reasonable." *Id.* (citation omitted). The same reasonableness test is applicable to the agency's search cut-off date. *See McGehee*, 697 F.2d at 1101. Here, it was entirely reasonable for FBI to begin its search with its vast CRS respository.

Moreover, once FBI was unable to locate documents within CRS, it acted reasonably to uncover responsive documents outside of CRS. On April 6, 2010, RIDS

issued its EC to divisions most likely to possess records responsive to the FOIA request, including the Counterterrorism Division, CJIS, Cyber and Inspection Divisions, Intelligence Directorate, Office of the General Counsel, and Director's Office. Second Hardy Decl. at ¶ 9; First Hardy Decl. at ¶ 22. The EC requested personnel to conduct a thorough search for potentially responsive documents created from January 1, 2007, through February 3, 2010, *i.e.*, the date of plaintiffs' request. *See* First Hardy Decl. at ¶ 23. In response to this request, CJIS located approximately 500,000 pages. And even though the search cut-off date listed on the EC—February 2, 2010—was incorrect, FBI subsequently confirmed that the CJIS material covered a period extending to the correct cut-off date: March 2, 2010. *See* Second Hardy Decl. at ¶ 12.

Since locating the 500,000 pages of potentially responsive CJIS records, FBI has uploaded over 40,000 into FDPS for review. *See* Second Hardy Decl. at ¶ 14. The review process is time-consuming, as it requires review of every page for responsiveness and exempt material. *See* First Hardy Decl. at ¶ 26. In addition, plaintiffs' refusal to narrow their FOIA request in any meaningful way has done nothing to alleviate the burden associated with this task. Nevertheless, FBI has made productions totaling over 2,800 pages. *See* Second Hardy Decl. at ¶ 15.

For the foregoing reasons, FBI's application of a cut-off date of March 2, 2010 to plaintiff's FOIA request not only comported with the operative DOJ regulation—which put plaintiffs on notice as to the cut-off date—but was reasonable under the circumstances of this case. FBI thus is entitled to partial summary judgment on the search cut-off issue.

D. ICE's Search Cut-off Date Was Reasonable

ICE's application of an April 30, 2010 search cut-off date to plaintiffs' FOIA request also was reasonable under the circumstances of this case. ICE began searching for documents responsive to plaintiffs' broad request more than two months before the search cut-off date, posted Secure Communities records on its FOIA Reading Room in May and June 2010, and made productions beginning in August 2010. *See* Second Pavlik-Keenan Decl. at ¶¶ 7, 22, 34. Rolling productions continued for the remainder of 2010 and early 2011, culminating in a Court-ordered production of approximately 12,000 pages of opt-out records on January 17, 2011. *See id.* at ¶¶ 34, 42-43.

Moreover, ICE repeatedly negotiated with plaintiffs in an attempt to narrow the FOIA request. *See id.* at ¶¶ 24-41. These negotiations resulted in ICE's July 9, 2010 agreement to produce documents responsive to the RPL. *See id.* at ¶ 30. This situation is analogous to *ACLU*, cited *supra* at 14. In that case, ICE applied a date-of-search cut-off date with respect to a portion of plaintiffs' FOIA request seeking information on deaths of individuals in ICE custody. *ACLU*, 2010 WL 3718944, at *5. Subsequent to the request, the parties negotiated search terms for locating responsive documents with the ICE Office of the Inspector General. *Id.* The district court found ICE's date-of-search cut-off date reasonable under those circumstances:

> Because the defendants and the plaintiff negotiated the search terms subsequent to the plaintiff's initial request, the plaintiff's allegations do not suggest to the Court that the defendants improperly limited the scope of their searches. The Department's policy of establishing a cutoff date for the scope of the search, which the defendants relied upon to limit the scope of their search and any necessary follow-up searches, *see* 6 C.F.R. § 5.4(a) . . . does not appear under these

> circumstances to have been unreasonably utilized to improperly limit the scope of the plaintiff's request.

Id. at *6 (citing *Defenders of Wildlife*, 314 F. Supp. 2d at 12 n.10 and *Bonner*, 928 F.2d at 1152).

Here, as in *ACLU*, ICE negotiated with plaintiffs after its April 30, 2010 search cut-off date in an attempt to narrow the request. While ICE was largely unsuccessful in that endeavor, it came to an agreement with plaintiffs regarding the RPL two weeks after they proposed it. In the meantime, ICE posted Secure Communities material directly to its public reading room in May and June 2010. These materials were generated as a result of ICE's search for documents responsive to the FOIA request. ICE's April 30, 2010 search cut-off date thus clearly was not "unreasonably utilized to improperly limit the scope of [plaintiffs'] request." *ACLU*, 2010 WL 3718944, at *6. Instead, the search cut-off date was *more* generous than the date-of-search cut-off specified in the governing DHS regulation, 6 C.F.R. § 5.4(a).

In addition, courts repeatedly have held that FOIA does not obligate agencies to conduct "unreasonably burdensome" searches for records. *See, e.g, Wolf v. CIA*, 569 F. Supp. 2d 1, 9, (D.D.C. 2008) (search of microfilm files requiring frame-by-frame review that would take an estimated 3,675 hours and cost $147,000 was an undue burden). Here, plaintiffs' FOIA request boils down to a demand for "any and all records" pertaining to Secure Communities, which fails to comply with FOIA's requirement that requests "reasonably describe" the records sought, 5 U.S.C. § 552(a)(3)(A). ICE estimated that this request could implicate over one million responsive records, thousands of hours, and

costs in the hundreds of thousands of dollars. Second Pavlik-Keenan Decl. at ¶ 19. At the December 9, 2010 preliminary injunction hearing, the Court observed that the request "was overbroad in the first place," and ordered plaintiffs to submit a revised FOIA request within 30 days. Dec. 9, 2010 Tr. Hrg. at 12:24-25, 13:22-14:1.

Accordingly, ICE's cut-off date of April 30, 2010, as well as FBI's cut-off date of March 2, 2010, were entirely reasonable under the circumstances. Given the scope of the request, a subsequent cut-off date essentially would absolve plaintiffs of their failure to comply with FOIA's "reasonably describe" requirement, and place the burden of that noncompliance squarely on the shoulders of the agency. *See Massachusetts v. HHS*, 727 F. Supp. 35, 36 (D. Mass. 1989) ("A request for all documents 'relating to' a subject . . . unfairly places the onus of non-production on the recipient of the request and not where it belongs—upon the person who drafted such a sloppy request.").

CONCLUSION

For the foregoing reasons, the Court should grant the motion of FBI and ICE for partial summary judgment on their respective search cut-off dates.

Dated: New York, New York
January 26, 2011

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants FBI and ICE

By: s/ Joseph N. Cordaro
CHRISTOPHER CONNOLLY
JOSEPH N. CORDARO
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2761 / 2745
Facsimile: (212) 637-2786 / 2686
E-mail: christopher.connolly@usdoj.gov
joseph.cordaro@usdoj.gov