UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DETENTION WATCH NETWORK
and CENTER FOR CONSTITUTIONAL
RIGHTS,

ECF CASE
14-cv-583 (LGS) (RE)

Plaintiffs,

v.

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

Defendants.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION COMPELLING DEFENDANTS TO PRODUCE RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUESTS

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PRELIMINARY STATEMENT

In the four weeks since Plaintiffs filed their motion for a preliminary injunction, President Obama released his proposed budget for Fiscal Year 2015 seeking a reduction in the number of beds required by the Detention Bed Quota; twenty-eight members of Congress signed an open letter to the Office of Management and Budget urging an end to the Detention Bed Quota on grounds of fiscal responsibility and best law enforcement practices; and Plaintiff Detention Watch Network ("DWN") launched a nationwide campaign to engage the public and legislators of the moral and practical costs of an unprecedented mandate to detain 34,000 immigrants per day. Plaintiffs' need for the requested documents has thus become more urgent, as legislative debate of the Detention Bed Quota and the budget debate has already begun.

In the face of this increasing urgency, Defendants have failed to produce a single document in response to Plaintiffs' FOIA request. Nor have they even provided a timeline to Plaintiffs for when they would produce documents responsive to any part of Plaintiffs' request, despite Plaintiffs' repeated offers to prioritize documents for production and to significantly narrow their request for the purpose of resolving the motion. To justify their inaction, Defendants argue that legislation authorizing the Detention Bed Quota does not give rise to irreparable harm that courts have consistently found in cases involving impending legislation. This position has no support in case law, which consistently finds irreparable harm where agencies fail to disclose information necessary for meaningful public debate on imminent legislation.

Defendants' argument that Plaintiffs cannot succeed on the merits is likewise wrong. Based on a misleading characterization of Plaintiffs' highly detailed request, a selective discussion of the parties' negotiations, and an erroneous application of their own regulations, Defendants have sought to avoid their obligations under FOIA to disclose responsive documents

necessary for the effective functioning of democratic debate. In fact, Plaintiffs sought documents related to specific events and records clearly identified by time frame and subject matter. Further, Plaintiffs have not only relinquished large parts of their request, but also repeatedly alerted Defendants to priorities for production, offering to substantially narrow many additional portions of the request in order to resolve the instant motion. These offers have been rejected.

Finally, Defendants offer no serious rebuttal to the argument that the balance of equities tips in the Plaintiffs' favor and that the public interest will be served by injunctive relief, offering only generic statements that Plaintiffs should wait their turn without offering any estimates of how long that wait may be, and, at the eleventh hour, adding that they intend to charge Plaintiffs tens of thousands of dollars to conduct searches. Thus, absent court intervention, Defendants will continue to avoid their obligation to promptly produce records essential to matters of great public concern, and Plaintiffs and the public will be irreparably harmed by Defendants' delays.

STATEMENT OF FACTS

In their opening brief, Plaintiffs laid out a full factual picture of the urgent need to engage the public in meaningful debate about the Detention Bed Quota, a controversial provision of the annual appropriations bill that commands enormous public, media and legislative attention. Pls' Op. Br. at 5-10. Since Plaintiffs filed their motion for a preliminary injunction, budget debate has formally begun, and Plaintiffs have engaged in extensive negotiations with the Defendants via discussions with the U.S. Attorney's Office. These intervening developments are set forth below.

The Increasing Public Need for Information About the Detention Bed Quota

A controversial provision of the appropriations bill, the Quota is increasingly subject to public and legislative opposition. On February 12, 2014, 28 Congressional representatives, led by Representatives Ted Deutch and Bill Foster, released a letter to the Office of Management

and Budget, urging an end to the Quota, noting that ICE had interpreted the Quota as requiring the detention of 34,000 individuals per day and calling such a requirement not only unprecedented, but also "an unnecessary burden on the limited financial resources available to ICE." *See* Schwarz Reply Decl. Ex 1. Committee hearings on the Detention Bed Quota are already underway. Schwarz Reply Decl. Ex. 2, Supplemental Declaration. of Silky Shah at ¶ 4.

The March 4, 2014 release of the President's budget proposal for Fiscal Year 2015 illustrates the need for information about the Quota, as the budget proposal indicates that the Administration itself has begun to question the need to mandate so large a number of detention beds. The Administration's budget for Fiscal Year 2014, attempted and failed to reduce the Bed Quota from 34,000 to 31,800, and the budget for Fiscal Year 2015, proposes reducing the Detention Bed Quota from 34,000 beds to 30,539, for a savings of $184.8 million. As the Administration's proposal states, the lower level of beds "will ensure the most cost-effective use of our appropriated funding" by "placing low-risk, non-mandatory detainees in lower-cost alternatives to detention." *See* Schwarz Reply Decl. Ex. 2, Shah Supp. Decl. at ¶ 3.

Upon the release of the President's proposed budget, Plaintiff DWN launched a nationwide campaign to inform the public of the budgetary and human costs of the Quota. On March 11, 2014, DWN held a national telebriefing for media with Representative Lucille Roybal-Allard (CA-40) urging fellow legislators to eliminate the mandate from the Fiscal Year 2015 appropriations bill. Leaders from DWN's organizational members have met with Members of Congress to discuss the Quota, and meetings between DWN members and legislators are scheduled through the end of March as the appropriations hearings continue. As part of this campaign, DWN will support its national membership base with resources and planning of educational events and public rallies throughout the Spring of 2014. Shah Supp. Decl. at ¶ 5-6.

Defendants' Failure to Engage with Plaintiffs' Offers to Prioritize the Request

During discussions with Defendants' counsel, Plaintiffs relinquished any claim to data on specific detainees and repeatedly advised the Defendants of priorities within the request in order to resolve the preliminary injunction motion. *See* Schwarz Reply Decl. Exs. 3-4. For example, sought to limit the time frames for document searches for requests (b)-(c) to the periods of time when the Bed Quota was first enacted and to the years 2012-present; and listed several geographic locations that were top priorities for searches. Rather than accept these prioritized searches, Defendants insisted that Plaintiffs give up non-prioritized time frames and geographic locations altogether. Asked to provide a time line for production, Defendants refused. *See* Defs' Br., Kuehler Decl. Exs. E, F. Despite the refusal of Defendants to engage in the ordinary give-and-take of negotiations, Plaintiffs provided the Defendants with a narrowed set of requests on March 6, 2013. *See* Schwarz Reply Decl. Ex. 4. To date, Defendants have neither provided Plaintiffs with any documents nor given Plaintiffs a time line for production; indeed, on March 5, 2014, Defendants' counsel informed Plaintiffs by telephone message that despite earlier representations, only one portion of the request had been tasked for search, Schwarz Decl. ¶ 8, and on March 13, 2014, Defendants notified Plaintiffs that they intended to condition searches on Plaintiffs' agreement to pay $35,000-40,000 in fees, again refusing to accept Plaintiffs' prioritization of searches or to provide any time line for response. Schwarz Reply Decl. Ex. 5.

ARGUMENT

I. COURTS CONSISTENTLY FIND IRREPARABLE HARM IN FOIA CASES INVOLVING IMMINENT LEGISLATION

Defendants fail to find a single case in which courts have denied a motion for a preliminary injunction in cases of imminent legislation. Instead, the government's brief attempts to distinguish numerous cases cited by Plaintiffs, Pls. Br. at 12-14, by asserting, without any

specific quotations, that those cases granted relief only because the relevant "legislation would proscribe or prohibit certain actions." Defs' Br. at 13. But these cases – *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008), *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005), and *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) – do not say anything of the kind. Nowhere do these cases suggest that a finding of irreparable harm rests on whether legislation "proscrib[es] or prohibit[s] certain actions." Indeed, there is no reason for these cases to have made such a distinction, as the legislation at issue in all of them did not proscribe federal action, but rather authorized the federal government to act. The Voting Rights Act, the legislation at issue in *Gonzales*, grants powers to the federal government to regulate state-administered voting; the FISA Amendments Act of 2008, the legislation at issue in *EFF*, granted immunity to federal telecommunications companies; and the Patriot Act, the legislation at issue in *ACLU v. DOJ*, granted sweeping powers to the federal government in the areas of search and surveillance. Just as in those cases, the Detention Bed Quota included in the appropriations bill authorizes DHS and ICE to pay for a certain number of detention beds and is therefore indistinguishable from *Gonzales, EFF,* and *ACLU v. DOJ*.

Similarly, Defendants' argument that Plaintiffs' request lacks urgency because the Quota is not "new," Defs. Br. at 11, is belied by these cases. The Voting Rights Act at issue in *Gonzales* was first enacted in 1965; the Patriot Act at issue in *ACLU v. DOJ*, in 2001. The date that the legislative provision was first enacted is irrelevant; it is the increasing public attention on the effects of Quota, and the legislative momentum to attempt to eliminate it, that demonstrate the urgent need for information. Defendants' attempt to distinguish the prospective renewal of the Detention Bed Quota from other forms of imminent legislation is thus unsupported.

Unable to find cases in which courts have denied preliminary injunctions in cases of imminent legislation, Defendants rely heavily on *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 13-CV-1961 (KBJ), 2014 WL 521544 (D.D.C. Feb. 11, 2014). That reliance is misplaced. First, *EPIC* did not involve imminent legislation but rather "potential future legislation." 2014 WL 521544 at *10. There was "no looming deadline by which Congress must Act," and no "scheduled hearings, let alone committee or floor votes, that indicate action on those bills is imminent." *Id*. Further, in *EPIC* the government had granted expedited processing at the administrative stage and had promised to deliver the records by Feb. 28, 2014, a little over two weeks from the court's decision. Similarly, *Landmark Legal Found. v. EPA*, 910 F. Sup. 2d 270, 278 (D.D.C. 2012), which likewise did not involve imminent legislation, found no irreparable injury where the agency had agreed to complete processing of a request within a short period of time. Here, in contrast, DHS and ICE administratively closed Plaintiffs' request without any regulatory or statutory authority, never responded to Plaintiffs' request for expedited processing or substantively to the request as a whole, and, even after weeks of negotiations, have made no commitment to produce documents within any time frame. Indeed, Defendants, who had previously represented that they had tasked all portions of the request, advised Plaintiffs on March 5 that in fact only one portion of the request had been tasked, and now state that they will do no further processing without an agreement that Plaintiffs, two non-profit public interest organizations, pay tens of thousands of dollars. Schwarz Reply Decl. ¶ 8. *EPIC* and *Landmark Legal* simply have no bearing on the instant case.

Finally, Defendants' argument that there is no irreparable harm because Plaintiffs already have all the information they need, Defs. Br. at 12-13, is likewise meritless. The existence of legislative language and of public statements or testimony by DHS and ICE officials does not

obviate Defendants' obligations to comply with FOIA. Congress enacted FOIA precisely to provide the public with the ability to see behind the curtain of officials' public statements and government press releases. Defendants argue, in effect, that because public attention is already focused on the Quota, there is no need to disclose information that would further educate the public, such as drafts of talking points, internal analyses of budget effects on detainee releases, or communications regarding detention conditions. This tautological argument must be rejected.

The instant motion seeks withheld information crucial for public debate on imminent legislation, and Defendants have failed to produce documents or even commit to a timeline for production. Indeed, as of March 13, 2014, they have conditioned the mere tasking of searches on non-profit Plaintiffs' payment of thousands of dollars. It is therefore is clear that Defendants will not act in compliance with their obligations under FOIA without court intervention, and that irreparable harm will result absent an injunction.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

As a preliminary matter, Defendants are wrong to argue that Plaintiffs must show a "clear" likelihood of success on the merits. Defs. Br. at 6. In fact the heightened standard applies only when a moving party seeks to compel the government to act contrary to a legal mandate or national security interests. *See Sussman v. Crawford*, 488 F.3d 136, 141 (2d Cir. 2007); *Tunick v. Safir*, 209 F.3d 67, 69 (2d Cir. 2000). National security is not an issue here, and Plaintiffs simply request that the Court compel Defendants to comply with their statutory obligations. In any case, Plaintiffs' detailed descriptions of the records sought and Defendants' failure to respond appropriately or timely demonstrate that Plaintiffs meet either standard.

A. Plaintiffs Gave Highly Detailed Descriptions of the Documents Requested, and Are Entitled to the Production of Records

FOIA request binds an agency to disclose information to the extent that "'the agency is able to determine precisely what records are being requested.'" *Halpern v. FBI*, 187 F.3d 279, 288 (2d Cir.1999) (internal citations omitted). When characterizing a request as too broad or insufficiently described, agencies must do more than merely recite statutory authority. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. 1987); 6 C.F.R. 5.3. *See also Ruotolo v. Dep't of Justice*, 53 F.3d 4, 10 (2d Cir. 1995) (holding that federal agencies have "no right to 'resist disclosure because the request fails reasonably [to] describe records unless it has first made a good faith attempt to assist the requester in satisfying that requirement.") Defendants have failed to do so. *See* Pls. Op Br. at 20-22.

First, contrary to Defendants' selective quotations from Plaintiffs' Request, Plaintiffs gave highly detailed descriptions of the documents sought, and many portions of the November 25, 2013 Request, Schwarz Decl. Ex. A, seek very narrow sets of documents occurring within limited time frames or geographic locations. The Request also provided extensive citations to relevant documents that might assist Defendants in searching for responsive records, thus obliging the agencies "to pursue any 'clear and certain' lead[s] it could not in good faith ignore." *Halpern*, 181 F.3d at 288 (2d Cir. 1999). The Request thus satisfied the requirement that Plaintiffs "reasonably describe" the records sought.[1] Moreover, even if some portions of the request could be seen as insufficiently described or broad – which they are not – Defendants provide no authority excusing them from pursuing those portions of the request that established "precisely" what records were being requested. *Halpern*, 187 F.3d at 288.

[1] For example, Request (e) seeks talking points and communications related to three media reports published in 2012 and 2013; Request (f) seeks memoranda and communications related to the bed mandate from a limited number of offices; and Request (g) seeks communications and documents related to specific events in 2009-10 and 2013, namely the release of thousands of detainees due to budget constraints.

Second, contrary to Defendants' claim that Plaintiffs have refused to narrow their request, Plaintiffs immediately relinquished any claim to specific detainee data, Kuehler Decl. Ex. F, and repeatedly offered to narrow and target specific areas of their request by time frame and geography to resolve the preliminary injunction motion. *See* Schwarz Reply Decl. Exs. 3, 4. In response, Defendants took the position that unless Plaintiffs gave up large portions of their request permanently, Defendants would not accept prioritized searches. *See* Kuehler Decl. Ex. F. This is almost identically the position that the Second Circuit rejected in *Ruotolo*, where the court found "no excuse for failing to honor [the] request" to prioritize certain documents. 53 F.3d at 10. Indeed, as of March 13, 2014, Defendants had not tasked any part of Plaintiffs' request except for Request (e). "[R]efusal to make some effort" to conduct searches is not permissible. *Id*. Moreover, Defendants here have refused to provide a time frame by which documents would be produced, even if Plaintiffs relinquish significant portions of their request. Despite Defendants' unreasonable position, on March 6, 2014, Plaintiffs provided the government with a revised written request that dropped additional records. Schwarz Reply Decl. Ex. 4.

Third, Defendants' hyperbolic claim that the request "potentially implicate[s] millions" of pages is unsupported. Defendants never made an attempt to "(i) gather and review the documents; (ii) determine and communicate the scope of the documents [they] intend[s] to produce and withhold, and the reasons for withholding any documents." *Citizens for Responsibility & Ethics in Washington v. FEC,* 711 F.3d 180, 185 (D.C. Cir. 2013). Without having begun the process of searching for documents, Defendants have little basis to make a claim regarding the purported volume of the request. Further, as Plaintiffs' letter of March 6, 2014 makes clear, Plaintiffs have repeatedly advised Defendants that the priorities for immediate disclosure are far narrower than those in the request as a whole, alerting Defendants to various

time periods and geographic locations of particular importance. Schwarz Reply Decl. Ex. 4. Defendants' refusal to accept the prioritization of portions of Plaintiffs' request should preclude them from arguing that the request as a whole is too large to process quickly. Such an all-or-nothing approach has been rejected by the courts. *Ruotolo*, 53 F.3d at 10.

B. Plaintiffs Were Entitled to Expedited Processing and to A Timely Determination

Plaintiffs justified their request for expedited processing in their November 25, 2013 Request, and the Defendants failed to respond. As set forth in (I) above, Plaintiffs have an urgent need for documents related to an issue of compelling public interest.[2] Further, Plaintiffs' primary activity, like that of plaintiffs in *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005), *is* information dissemination. Legislative history establishes that information dissemination "need not be [a requester's] sole occupation," and excludes only individuals who are engaged "only incidentally in the dissemination of information." H.R. Rep. No. 104–795, at 26 (1996). Contrary to Defendants' position, courts other than the *Gonzales* court have found that expedited processing is merited in cases involving non-media organizations and individuals. *See, e.g.*, *EFF*, 542 F. Supp. 2d at 1183; *Edmonds v. FBI*, No. 02-1294, 2002 WL 32539613 (Dec. 3, 2002), *aff'd* 417 F.3d 1419 (D.C. Cir. 2005).

As Defendants concede, Plaintiffs' FOIA request stated that DWN is an umbrella network of organizations and individuals whose mission is to "expose" problems within the immigration detention and deportation system through "collective advocacy, public education,

[2] Defendants suggest a lack of urgency because Plaintiffs' November 25, 2013 request asserted that the budget debate would begin "in a matter of months," Defs. Br. at 10. But Defendants' delays have resulted in the passage of those months before searches were begun. The budget debate is underway, and multiple hearings in the Senate and House of Representatives regarding the DHS budget have already occurred during the week of March 10, 2014. Defendants should not be permitted, to decide that "a matter of months" is not an urgent enough time frame to respond to a request, delay response, and then complain about the burdens of responding quickly.

communications, and field-and-network building." Schwarz Decl. Ex. A at 5-6. Defendants do not distinguish these activities from "information dissemination," nor can they. Further, there no basis in the statute for Defendants' contention, Defs. Br. at 9 n.3, that information dissemination to the media and policy makers does not meet the standard for expedited processing, and in any event, DWN clearly asserted that "collective advocacy, public education, communications and field-and-network building" are done with "diverse constituencies," i.e. the public. Thus, like the Leadership Conference on Civil Rights, DWN's "mission is to serve as the site of record for relevant and up-to-the minute …news and information" about its core issue, immigration detention and deportation policy, and they are entitled to expedited processing. 404 F. Supp. 2d at 260. Plaintiff CCR's status as a "public interest, legal and public education organization" engaged in publication of a wide range of "materials for public dissemination," Schwarz Decl. Ex. A at 6, also place it within the standard recognized in *Gonzales*.

In any case, Defendants failed to comply with FOIA's statutory timeframes for responding to non-expedited requests. 5 U.S.C. 552(a)(6). "If the agency does not make a 'determination' within the relevant statutory time period, the requester may file suit without exhausting administrative appeal remedies." *CREW,* 711 F.3d at 185. Once the matter is properly before the court, "the timing of any further processing of an individual's request (either expeditiously or otherwise) necessarily occurs at the direction of the court—pursuant to a scheduling order, not the expedited processing provision of the FOIA." *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 296 (D.D.C. 2013), citing *Edmonds*, 417 F.3d 1419. Because Defendants failed either to rule on Plaintiffs' expedited processing request or to make a determination on Plaintiffs' Request as a whole, the matter is properly before the Court. The question of whether

the agencies should have granted expedited processing at the administrative level has no bearing on the Court's order governing the timing of production, given that irreparable harm exists now.[3]

III. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY BURDEN

The government's obligation to comply with statutory requirements is not a burden, and any burden that Defendants allege would be greatly alleviated by Plaintiffs' repeated offers to prioritize portions of the request for the purpose of resolving the instant motion, an approach accepted in *NDLON et al. v. ICE*, No. 10 CV 3488 (SAS) (Dkt 25, Dec. 17, 2010).

Defendants' claim that granting injunctive relief would generally prejudice other FOIA requesters fails to take into account the specific public interest at issue here: the need for the public to engage in meaningful debate about a controversial and imminent piece of legislation that carries enormous financial costs deprives tens of thousands of individuals of liberty every day, and the lack of transparency surrounding the effects of such a policy. *See* Pls. Op. Br. at 23-25. Defendants' generic argument that each FOIA requester should wait his or her turn cannot outweigh the public interest in meaningful debate about imminent legislation.

CONCLUSION

For all these reasons, this Court should enjoin Defendants from continuing to withhold the records sought in Plaintiffs' Request and to produce records responsive to Plaintiffs' prioritized requests within ten days.

[3] Defendants also argue that Plaintiffs, non-profit organizations, will not succeed on the merits because they are not entitled to a fee waiver. But Plaintiffs' plainly meritorious fee waiver request, to which Defendants made no administrative response, has no bearing on the instant motion or on Plaintiffs' entitlement to documents, and it is unclear why Defendants raise it. If anything, Defendants' eleventh-hour production of a letter conditioning searches on Plaintiffs' payment of $35,000-40,000 in fees, Schwarz Reply Decl. Ex. 5, demonstrates that they are unwilling to conduct responsive searches without court intervention.

Dated: March 14, 2014

Respectfully submitted,

/s/

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