

**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,

ECF CASE

10-CV-3488 (SAS)(KNF)

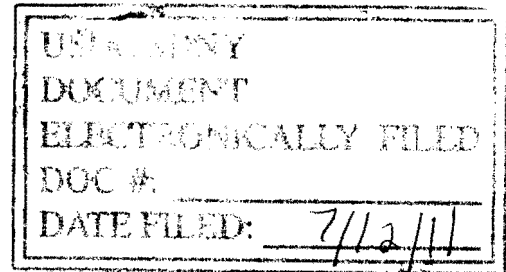
Plaintiffs,

STIPULATION AND ORDER

v.

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

Defendants.



WHEREAS, on April 27, 2010, National Day Laborer Organizing Network, Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, and Center for Constitutional Rights (collectively "Plaintiffs") filed a complaint ("the Complaint"), seeking the release of certain records by United States Immigration and Customs Enforcement ("ICE"), the United States Department of Homeland Security ("DHS"), the Federal Bureau of Investigation ("FBI"), the Executive Office for Immigration Review ("EOIR"), and the Office of Legal Counsel ("OLC"), pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA");

WHEREAS the allegations in the Complaint concern, *inter alia*, FOIA requests dated February 3, 2010 (the "FOIA Request");

WHEREAS on January 26, 2011, Defendants ICE and the FBI filed a motion for partial summary judgment with respect to search cut-off dates ("Search Cut-Off Motion");

WHEREAS on February 9, 2011, Plaintiffs filed an opposition to ICE's and the FBI's Search Cut-Off Motion and cross-moved for partial summary judgment with respect to search cut-off dates ("Search Cut-Off Cross-Motion");

WHEREAS the Court has not ruled on the Search Cut-Off Motion or Search Cut-Off Cross-Motion;

WHEREAS the FBI and EOIR have represented that they have completed their searches in response to the FOIA Request;

WHEREAS the Plaintiffs and ICE, DHS, FBI and EOIR have conferred and agreed upon a Final Production List ("FPL"), incorporated by reference and attached hereto as Exhibit A, limiting the categories of information sought by the FOIA Request and identifying particular offices and custodians who will conduct searches for responsive records;

WHEREAS on May 3, 2011 Plaintiffs provided ICE, DHS, FBI, and EOIR with a proposed list of initial search terms likely to yield records responsive to the FPL (the "Initial Search Term List");

WHEREAS on June 15, 2011 the parties entered into a Stipulation and Order regarding the format of production of all future productions ("Format of Production Stipulation"), which is incorporated by reference and attached hereto as Exhibit B;

WHEREAS the parties believe prompt resolution of this FOIA action is in the parties' best interest;

IT IS HEREBY STIPULATED AND AGREED, by and between ICE, DHS, FBI, and EOIR (the "FPL Defendants") and Plaintiffs as follows:

1. Plaintiffs, ICE, and the FBI agree to withdraw the pending Search Cut-Off Date Motion and Search Cut-Off Date Cross-Motion.
2. Production of non-exempt records responsive to the FPL shall begin on June 15, 2011, with rolling productions on a periodic basis thereafter based on a production schedule that will be negotiated in good faith by the parties.
3. FPL Defendants and Plaintiffs will negotiate in good faith a reasonable end-date for the FPL productions based on the volume of the records to be processed and produced, as well as any necessary referrals of records to non-FPL Defendant agencies. To the extent FPL Defendants determine that a referral to a non-FPL Defendant agency is necessary, FPL Defendants shall promptly notify Plaintiffs of such referrals and such referrals shall occur within a reasonable time of the determination.
4. FPL Defendants will produce non-exempt records responsive to the FPL in accordance with the terms of the Format of Production Stipulation. Inclusion of particular records or categories of records on the FPL is not a concession by FPL Defendants that such records exist or that they will not be withheld, in whole or in part, pursuant to FOIA's statutory exemptions.
5. Searches for records responsive to the FPL will be conducted as follows:
 - a. FPL Defendants will apply a date of search cut-off date to all FPL productions. Each agency's search cut-off date will be the date on which each agency commences its search for records responsive to the FPL. FPL Defendants have

represented to Plaintiffs that the agencies commenced searches for records responsive to the FPL on the following dates:

- i. FBI: May 31, 2011
 - ii. DHS: June 6, 2011
 - iii. ICE: June 10, 2011
 - iv. EOIR: June 15, 2011
- b. FPL Defendants will apply a search start-date of September 1, 2010 to all categories of the FPL.
 - c. FPL Defendants' searches for responsive records will be based upon the Initial Search Term List and the FPL. FPL Defendants will notify Plaintiffs of their search methods, whether and what search terms were used, and the reasons for any modifications in a timely manner.
 - d. FPL Defendants shall search the offices and custodians identified in the FPL.
 - e. FPL Defendants will neither withhold nor redact non-responsive and non-exempt portions of records that are otherwise responsive to the FPL, so long as those portions of the records would have been responsive to the topics in the initial FOIA Request.

6. DHS, ICE, and EOIR represented that they do not have records responsive to Section 3 of the FPL. Plaintiffs reserve the right to seek declarations from DHS, ICE, and EOIR regarding the factual basis for these representations. Plaintiffs agree not to seek discovery relating to Section 3 of the FPL.

7. FPL Defendants agree not to seek fees from Plaintiffs for any productions made pursuant to this Stipulation and Order.

8. Nothing in this Stipulation and Order shall be construed as an admission or agreement by either party on any outstanding contested issue in this litigation, including but not limited to:

- a. The validity, or invalidity, of all exemptions claimed by FPL Defendants in prior or future productions, and the adequacy, or inadequacy, of any prior or future *Vaughn* indexes. To the extent Plaintiffs object to FPL Defendants' application of FOIA's statutory exemptions to any records produced pursuant to this Stipulation and Order or any prior productions, FPL Defendants shall produce *Vaughn* indexes in conjunction with motions for summary judgment addressing only those records challenged by Plaintiffs. The parties shall meet and confer prior to the production of any *Vaughn* indexes to narrow the issues for litigation.
- b. The adequacy, or inadequacy, of FPL Defendants' past searches.
- c. The adequacy, or inadequacy, of FPL Defendants' searches for records responsive to the FPL, except that Plaintiffs shall not challenge the adequacy of FPL Defendants' searches for records responsive to sections 2(a), 2(b), 2(c), and 2(d) of the FPL, respectively, on the ground that FPL Defendants failed to search offices or custodians other than those specified in sections 2(a), 2(b), 2(c), and 2(d)(ii) of the FPL.

9. Plaintiffs shall not challenge the form and format of FPL Defendants' productions prior to June 15, 2011 on the ground that the form and format of those productions

is inadequate or does not comply with the terms contained in the Format of Production Stipulation.

10. During and following productions, FPL Defendants and Plaintiffs will continue to negotiate in good faith to resolve and to limit the issues for litigation.


11. The instant Stipulation and Order, the Rapid Production List, the Opt-Out Records as defined in Court's December 17, 2010 Order, and the Stipulation and Order dated April 7, 2011 (collectively the "Final Records Agreement") represent Plaintiffs' and FPL Defendants' final agreement with respect to the subject matter of the records to be produced by FPL Defendants in connection with this litigation. Plaintiffs agree that FPL Defendants are released from conducting searches for, or producing, in connection with this litigation, any records that are not encompassed by the Final Records Agreement.

12. FPL Defendants and Plaintiffs agree that the United States District Court for the Southern District of New York shall retain jurisdiction over any controversy or claim arising out of or relating to this Stipulation and Order.


13. FPL Defendants and Plaintiffs understand and agree that this Stipulation and Order contains the entire agreement between them, and that no statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.

14. This stipulation is for settlement purposes only and non-precedential with respect to any other FOIA case.

Dated: New York, New York
July 11 2011


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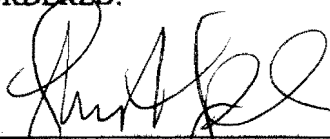
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Attorneys for ND LON

The Clerk of the Court is directed to close the pending motions [Docket Nos. 28 and 43]
SO ORDERED:



HON. SHIRA A. SCHEINDLIN
United States District Judge

7/12/11

EXHIBIT A

FINAL PRODUCTION LIST

NDLON v. ICE, 10-cv-3488

1. Policies, Procedures and Objectives

- a. Opinions, memoranda or guidance reflective of any agency position related to:
 - i. Secure Communities *and* quotas or targets.
 - ii. Secure Communities *and* database accuracy or quality control procedures.
 - iii. Secure Communities *and* detainer issuance and detainer voluntariness.¹
 - iv. Secure Communities *and* “Next Generation Initiative” or “Next Generation Identification”.
- b. Opinions, memoranda or guidance reflective of any agency position related to the process by which ICE determines which Secure Communities Offense Level to assign in individual cases, and offense level re-determination. *See* March 2, 2011 ICE Memorandum, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” by Director John Morton, available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.²
- c. Any written documentation, including emails, related to, explaining, or providing a legal basis for any agency position that Secure Communities is mandatory, whether in 2013 or not, including but not limited to final version(s) of the draft OPLA memorandum contained in the ICE January 17, 2011 Opt-Out Production entitled “Secure Communities - Mandatory in 2013” and any subsequent memos that amend or supersede that memorandum, except to the extent the responsive records would have fallen within the scope of the Opt-Out or Rapid Production List productions.
- d. Opinions, memoranda or guidance reflective of any agency position related to the nine Data Protection Strategies referred to in FBI-SC-1333-1336 and identified on pages FBI-SC-1238-1240 (Attached to Plaintiffs’ April 20, 2011 Letter to Defendants).
- e. The letter from Boston Police Commissioner to Marc Rapp dated August 5th and any communication or response to the letter referenced in ICE

¹ “Detainer voluntariness” includes, but is not limited to, the ability of local police departments to refuse to comply with detainer requests.

² The relevant portions of the memorandum dated March 2, 2011 is essentially the same as John Morton’s June 30, 2010 memo entitled “Civil Immigration Enforcement: Priorities for Apprehension and Removal of Aliens,” available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

FOIA 10-2674.0002142.2144 (Attached to Plaintiffs' April 20, 2011 Letter to Defendants).

- f. The District of Columbia paper or draft paper submitted to the CJIS Advisory Policy Board or any other agency proposing to omit simple assault domestic violence cases from being forwarded from CJIS to ICE referred to in ICE-FOIA-10-2674.0007274 and ICE-FOIA-10.2674.13418-13423 (Attached to Plaintiffs' April 20, 2011 Letter to Defendants).

2. Communications³

- a. The White House. Records containing communications with the White House, including the President of the United States and his staff and advisors, related to Secure Communities and in the possession of the custodians identified in sections 2(c) and 2(d)(ii), *infra*;
- b. United States Congress. Records containing communications with the United States Congress regarding (1) vulnerable groups, (2) United States Citizens, (3) risk-based or offense level determinations, (4) traffic violations, (5) domestic violence, (6) constitutional and statutory violations, including but not limited to, racial profiling, ethnic profiling or pre-textual arrests, and violations to privacy rights, (7) local LEA community policing or police misconduct policies, (8) sanctuary policies, quotas or targets, (9) congressional mandate, (10) errors, (11) immigration status determination procedures, (13) immigration detainer procedures, (14) pre-conviction removals, and, (15) George Gascon's (Chief of Police, City and County of San Francisco) Enhanced Public Safety (EPS) Pilot Program as they relate to Secure Communities (the "Selected Secure Communities Topics") as well as communications related to:
 - i. Briefing on Secure Communities for the U.S. House of Representatives Committee on the Judiciary in September 2010; and
 - ii. Transcript or notes from May 21, 2010, House Judiciary Committee meeting with Marc Rapp.

Each defendant agency shall search for such records in the possession of the custodians identified in sections 2(c) and 2(d)(ii). In addition, ICE shall search its Office of Congressional Relations.

- c. DHS. Records containing communications related to "Selected Secure Communities Topics" and limited to communications with the following offices or custodians:

³ All custodians and offices searched must include current and former employees, contractors or sub-contractors.

- i. DHS: Office of the Secretary, including Deputy Secretary, Office for Civil Rights and Civil Liberties, Office of General Counsel, US-VISIT or the equivalents of these titles if and as they have changed since Secure Communities has been implemented.
 - ii. ICE: Director; Deputy Director; Assistant Deputy Director; Executive Associate Director, Enforcement and Removal Operations; Executive Associate Director, Management and Administration; Assistant Deputy Director, Secure Communities; Assistant Director, Field Operations; Branch Chief, Deployment of Secure Communities; Secure Communities Regional Coordinators; Office of Principal Legal Advisor; Assistant Director, Office of Professional Responsibility; Assistant Deputy Director, Office of Professional Responsibility; Deputy Director, ICE/Secure Communities; supervisory employees with Secure Communities responsibility associated with Selected Field Offices, including ICE Field Office Directors;⁴ the Director of the Office of State, Local and Tribal Coordination (“OSLTC”), the Deputy Director of OSLTC, and the Senior Public Engagement Officer of the OSLTC, or the equivalents of these titles if and as they have changed since Secure Communities has been implemented.
- d. DOJ. Records containing communications related to “Selected Secure Communities Topics” and limited to communications with the following offices or custodians:
- i. Office of the Attorney General of the United States,
 - ii. FBI: Director, Deputy Director, Associate Deputy Director, Chief of Staff and Senior Counsel to the Director, and the Deputy Chief of Staff to the Director, Criminal Justice Information Services Division (“CJIS”), Unit Chief of the Interoperability Initiatives Unit, Office of the General Counsel, or the equivalents of these titles if and as they have changed since Secure Communities has been implemented.
- e. States. Records containing communications with state officials in New York, Washington, Florida, California, Colorado, Texas, Massachusetts, Pennsylvania, Arizona, New Mexico, New Jersey, Virginia, Illinois, North Carolina, Maryland, Wisconsin, Georgia and Washington, D.C. related to Secure Communities and the following topics only:
- i. racial profiling,

⁴ As used in this Final Production List, the term “Selected Field Offices” includes the following Immigration and Customs Enforcement Field Offices: Atlanta, Baltimore, Boston, Buffalo, Newark, New York, Philadelphia, Chicago, Phoenix, San Francisco, Los Angeles, Seattle, and Washington.

- ii. community policing
- iii. domestic violence
- iv. terrorism
- v. fiscal impact of Secure Communities, including the estimated, or projected cost, of Secure Communities on local jurisdictions and/or states; transportation costs, detention costs, live scan and technological infrastructure (upgrades or otherwise).

3. Data and Statistics⁵

- a. Cumulative data or statistics about the Secure Communities program relating to individuals classified as:
 - i. National security threat
 - ii. IDENT Watch List
 - iii. Terrorist affiliates
 - iv. VAWA Self-Petitioners
 - v. U-Visa applicants
 - vi. T-Visa applicants
 - vii. Asylum, Withholding or CAT applicants or individuals who have expressed a fear of persecution in their home country

- b. Cumulative data, statistics or analysis regarding each Secure Communities Offense Level (disaggregated by the time frames during which different definitions of the offense levels governed):
 - i. Percentage and number of people designated under each level who are so designated based upon (a) a felony conviction; (b) a misdemeanor conviction; or (c) a violation.
 - ii. Percentage and number of people designated under each of the levels who are so designated based upon (a) a traffic offense; (b) a non-violent offense; (c) possession of drug offense or (d) a property offense.

⁵ Only records containing cumulative data and statistics regularly maintained by the defendant agencies are responsive to this section. This section does not require defendants to either (1) create new records reflecting the data and statistics requested herein; or (2) produce other types of records, for example records pertaining to individuals, that plaintiffs believe could be used to generate the data and statistics requested herein.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

..... X

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

Plaintiffs,

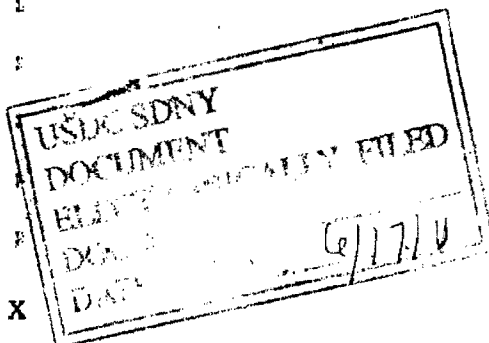
vs.

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

Defendants.

..... X

ECF CASE
10 CV 3488 (SAS)



STIPULATION AND ORDER

WHEREAS, on April 27, 2010, National Day Laborer Organizing Network, Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, and Center for Constitutional Rights (collectively "Plaintiffs") filed a complaint ("the Complaint"), seeking the release of certain documents by United States Immigration and Customs Enforcement ("ICE"), the United States Department of Homeland Security ("DHS"), the Federal Bureau of Investigation ("FBI"), the Executive Office for Immigration Review ("EOIR"), and the Office of Legal Counsel ("OLC") (collectively "Defendants"), pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA");

WHEREAS, the allegations in the Complaint concern, *inter alia*, Plaintiffs' FOIA requests dated February 3, 2010 (collectively, the "FOIA Request");

WHEREAS, on February 7, 2011, and February 14, 2011, the United States District Court for the Southern District of New York (the "Court") issued orders (the "Orders") regarding the form and format in which records responsive to the FOIA Request must be produced (Docket ## 41, 50);

WHEREAS, on February 21, 2011, Defendants filed a Notice of Appeal of the Orders to the United States Court of Appeals for the Second Circuit (Docket # 63) (the "Appeal");

WHEREAS, the parties have conferred and resolved their dispute regarding the form and format of future productions of records responsive to the FOIA Request;

WHEREAS, in light of the parties' resolution of their dispute regarding form and format of production, the Court has indicated that, upon dismissal of the Appeal, it intends to issue an order withdrawing the Orders (the "Order of Withdrawal"), and to enter this Stipulation and Order; and

WHEREAS, the parties have agreed to a dismiss the Appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure to permit the Court to enter the Order of Withdrawal and this Stipulation and Order, without prejudice to re-instatement of the Appeal if the Court does not enter the Order of Withdrawal and this Stipulation and Order;

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that records responsive to the FOIA Request henceforth shall be produced as follows:

1. Any responsive, non-exempt records shall be produced in Portable Document Format ("PDF") files. Prior to production, Defendants shall apply Optical Character Recognition ("OCR") software to each PDF file in order to render them searchable.

2. All pages within each PDF file shall be consecutively Bates numbered.

3. All PDF files shall be named using the beginning Bates number of the document.

4. A .txt ("Text") file for each PDF file shall be produced, and each Text file shall be named using the beginning Bates number of the document. Text files shall be created using Adobe Acrobat or equivalent OCR software.

5. Defendants shall exercise best efforts to maintain existing parent-child relationships – for example, a "parent" email and accessible "child" attachments to that e-mail – and produce those documents such that the parent and its corresponding children appear as consecutive PDF files within a Bates range (for example: parent, child, child). No affirmative steps shall be taken to separate a parent from its corresponding children during processing of documents or release of documents.

6. Excel spreadsheets shall be produced in accordance with the foregoing paragraphs. Hidden rows and columns within an Excel spreadsheet must be exposed prior to converting the native (.xls) file to a PDF document. The parties agree to continue to negotiate in good faith concerning the production of a sample of Excel spreadsheets in native format, in instances where Plaintiffs identify individual spreadsheets warranting further review, and such spreadsheets contain no information exempt from production under FOIA.

7. E-mail records shall be produced in accordance with the foregoing paragraphs. Defendants need not conduct a search of each individual e-mail solely to ascertain whether that e-mail contains a blind carbon copy ("BCC"); however, upon discovery that an e-mail contains a visible BCC field, Defendants shall not take any affirmative steps to conceal that BCC field, except to redact that BCC field as exempt from production under FOIA. Any such redactions shall be clearly visible on the face of the produced PDF file.

8. Defendants agree to provide Plaintiffs with information concerning the organization of documents within each production. FBI and ICE shall use best efforts to organize documents by topical areas, subject to further good faith discussions between the parties concerning the most efficient organization of productions.

9. To the extent that electronic documents have been collected or are collected on a going-forward basis in an electronic format in connection with the Plaintiffs' FOIA Request, such documents shall continue to be preserved in an electronic format.

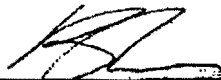
10. The parties agree that the Court shall retain jurisdiction over any controversy or claim arising out of or relating to this Stipulation and Order.

11. This stipulation is for settlement purposes only and applies solely to future productions in the above-captioned case. The stipulation not precedential with respect to any FOIA request or FOIA litigation. Entry by Defendants into this Stipulation shall not be construed as an admission or concession that the form and format of production specified herein is "readily reproducible," pursuant to 5 U.S.C. § 552(a)(3)(B), with respect to Plaintiffs' FOIA Request, or any other FOIA Request.


12. This Stipulation contains the entire agreement between the parties, and any statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of no force or effect.

13. This stipulation may be executed in counterparts. Facsimile signatures shall constitute originals.

Dated: June 15, 2011
New York, New York



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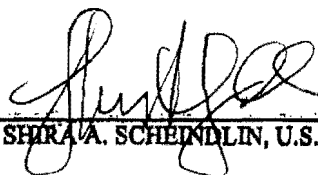


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SO ORDERED:

Dated: New York, New York
June 17, 2011



HON. SHIRA A. SCHEINDLIN, U.S.D.J.