UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMERICAN OVERSIGHT, Plaintiffs	)	No. 1:21-cv-10761-AK
vs.	)	
IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	)	

BEFORE THE HONORABLE ANGEL KELLEY
UNITED STATES DISTRICT JUDGE
MOTION HEARING

John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210

April 26, 2022
11:00 a.m.

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P R O C E E D I N G S

THE CLERK: All rise.

(The Honorable Court entered.)

THE CLERK: The United States District Court for the District of Massachusetts is now in session. Today is April 26, 2022, in the matter of American Civil Liberties Union, et al. verse Immigration and Customs Enforcement. Civil Action No. 21-10761 will now be heard before this court.

Please be seated.

11:02 THE COURT: Good morning, everyone.

MS. OEHLKE: Good morning, your Honor.

MR. KANWIT: Good morning, your Honor.

THE COURT: If you can't hear me, just let me know because sometimes I don't like this microphone right in front of my face.

Let me have you state your appearances for the record, starting with plaintiffs.

MS. OEHLKE: Krista Oehlke for plaintiffs.

THE COURT: How do I pronounce your last name?

11:02 MS. OEHLKE: Oehlke. It's a little complicated.

THE COURT: You represent?

MS. OEHLKE: The ACLU of Massachusetts, your Honor.

THE COURT: Who else?

MS. ANTHONY: Good morning, your Honor. Karen Anthony for American Oversight.

THE COURT: Okay.

MR. MCFADDEN: Good morning, your Honor. Dan McFadden, also from the ACLU of Massachusetts.

THE COURT: Good morning to all three of you. And defendant.

MR. KANWIT: Good morning, your Honor. Thomas Kanwit on behalf of defendant ICE.

THE COURT: Did you say?

MR. KANWIT: I said Tom Kanwit.

11:03 THE COURT: Kanwit. How are you?

MR. KANWIT: Good to see you, your Honor. Pleasure to appear in front of you. Mike Sady, as you may or may not know, has been appointed as immigration judge. I am appearing in this case. I've entered my appearance. I'm taking it over from Mr. Sady.

THE COURT: All right. Thank you. I did not know that. I'm not sure if I ever met him before. I don't know if he was there when I was in the office.

When did you get involved with the case, AUSA Kanwit?

11:04 MR. KANWIT: I got involved in this case two or three weeks ago. It was transferred to me. I was told there was a summary judgment hearing tomorrow.

THE COURT: Isn't that the way?

MR. KANWIT: It is the way. So I'm catching up on the details, but I think I've got the overview in hand.

THE COURT: I do have a number of questions. I was hoping that it would be someone who is most familiar with the case and who may have been involved with it.

Let me first state to all of you that this is my first case dealing with a FOIA request and it's the first time that I'm dealing with a summary judgment motion on such a case, but it actually resembles a discovery dispute to me. So I may ask a whole lot of questions because I'm unfamiliar with the terrain. So bear with me as I do that.

11:05 Let me go over what I understand to be the timeline of things. Correct me if I'm wrong about it. So there was the incident at the Newton District Court on April 2, 2018. On February 25, 2019, there was the indictment of Judge Joseph and Officer McGregor. Several months later, on November 18, 2019, there was this FOIA request. The next three months there was a dispute about whether the request requires a third-party authorization. On February 20, 2020, the principal legal adviser decides it does not require such an authorization. So that all takes place within a period of three months.

11:06 Fifteen months later, on May 10, 2021, this lawsuit is filed. At this stage, it is almost two years or 22 months since the FOIA request was made back in November 12, 2019. Once the lawsuit was filed on May 10 of 2021, there's a flurry of activity, which includes three months later the first production of documents, which was on August 9, 2021, close to

another two months later, the second production on September 30, 2021.

Is that timeline accurate?

MS. OEHLKE: Your Honor, if I could make a slight correction.

THE COURT: Sure.

MS. OEHLKE: So the indictment occurred on April 25, 2019. I believe you said February, although I may have.

THE COURT: I'm sorry. I have April 25, 2019 written here on my paper. If I did misstate that and say February, thank you for correcting the record. Anything else need to be corrected about that timeline?

MS. OEHLKE: No, your Honor, not from plaintiffs.

THE COURT: So my responsibility in this case is to determine whether or not the search that was conducted in response to this FOIA request, whether or not it was adequate and whether it was done in good faith.

MS. OEHLKE: Yes, that's correct.

THE COURT: So those are really two issues. So I want the parties to ultimately help me with this standard of good faith. I'm reading from defendant's motion, summary judgment page four of their brief. I'm looking at the second paragraph -- actually, the first full paragraph and then the second full paragraph. At the end, it says "ABC declarations are afforded a presumptive of good faith and an adequate

affidavit can be rebutted only with evidence that the agency search was not made in good faith". Then it goes on to the next paragraph.

Next paragraph, it says "under FOIA, an agency only need that it show that it has made a good faith effort to conduct the search for the requested records using methods which can be reasonably expected to produce the information requested".

I'm reading that from the government's papers. Anyone can jump in at this point in time to help me understand this good faith standard.

11:09

MR. KANWIT: Thank you, your Honor. We, of course, stand behind what we put in our brief. That is the law. What FOIA is not, which may be helpful to focus on what it is, FOIA is not civil discovery. It's a different mechanism. And it's certainly not an alternative means of gaining criminal discovery. The criminal case underlying this is entirely separate. Once the government details, through their affidavit, what it searched, how it searched, the reasons why it believed its search to be appropriate and adequate, then the burden shifts to the other side to rebut the presumption that the search was adequate.

11:10

In this case, really the entire assumption is because then Director Homan --

THE COURT: Before we get into the details of this

case, let me just try to understand some broader concepts. I'll certainly give you plenty of time to address any of the --

MR. KANWIT: Sorry if I got ahead of myself, your Honor.

THE COURT: Lawyers want to just sort of jump into their arguments. My mind processes information in a certain way. So I sort of need an answer to those questions so I can build on it. So let me just ask you to hold off on that. And I appreciate your comments that it's not civil discovery and it's not a means for an alternative discovery for criminal cases.

11:10

MR. KANWIT: Thank you.

THE COURT: Thank you. The plaintiffs, anybody want to say anything in regard to this standard?

MS. OEHLKE: Yes. I'm happy to respond to that.

THE COURT: Only that.

MS. OEHLKE: Only that. So in a FOIA case, as a first step, the government has a burden to show that it has conducted an adequate search. In order to do that, your Honor read the statement here speaking about bad faith in particular, but there's no intent that's really required here. Your Honor does not need to make a finding on intent. What your Honor needs to make a finding on is on whether the search that the agency designed was reasonably calculated to uncover the documents that would be responsive to plaintiff's request. It's our

11:11

contention here that ICE has not adequately met that burden.

THE COURT: Reasonably calculated to?

MS. OEHLKE: To uncover documents that would be responsive to the plaintiff's request, your Honor.

THE COURT: Couple questions I have. How can I conclude the search is adequate if it took two years to produce anything?

MR. KANWIT: The timing on FOIA litigation, the timing of when a response is made, is not generally taken to reflect on the adequacy of the search. The adequacy of the search has to be determined on the search that was conducted. So whether it took two weeks, two months, two years doesn't determine the adequacy. In fact, one could easily argue that a longer process is more complete and more thorough. If we had come back with 85 documents, 83 actually, in two days, I think the other side would be arguing you didn't do enough. It's typical in FOIA litigation that the search goes on.

It's also very, very common that parties making a FOIA request are dissatisfied with the agency's response and then file suit. That doesn't reflect on whether the search was adequate or not. It just reflects on the requesting party's determination that they can get more leverage through FOIA litigation.

The agency, as described in its affidavit, three of which were submitted, made an extremely detailed and thorough

search, and it was a lengthy process. Whether it came before the lawsuit was filed or not doesn't matter. There's no issue about punishing the government because we forced them to file a suit. That's not part of FOIA litigation. There would be no FOIA litigation except where a lawsuit is filed.

THE COURT: I'm going to give plaintiffs a moment to respond.

Isn't there an issue with regard to when information may have been deleted, wiped clean, destroyed? And I'm referring specifically to the text messages. And so that would suffer as a result of the delay had a search been done sooner at the time that those were available. Then that would have produced something potentially if we had more information in the affidavit about when those things, those devices, were wiped clean.

MR. KANWIT: Your Honor, immediately upon receiving the FOIA request, there's directives sent out to preserve all documents, all records that could be responsive. That freezes everything in place. I don't believe, and plaintiff has not suggested, that any of the phones were wiped after the FOIA request was made. That would be potentially a problem. I simply think that's not the case. The FOIA request --

THE COURT: But how do we know? So I agree. I don't think I saw anything with regards to that, but we also don't know when the wiping clean or this practice, you know, how

often that was done because that was only raised in the papers.

MR. KANWIT: That would not be an indication of a bad faith search. That would be broadening FOIA litigation to an investigation into whether records were properly kept under federal law or not, which would be separate. Under FOIA, the agency's actions from the time it gets the request and the search it makes are relevant. There's zero evidence in the record, and it's not our burden, there's zero evidence in the record indicating that any records were destroyed after the FOIA request was received.

11:16

THE COURT: Anyone from plaintiffs want to jump in at this point? The question was my ability to conclude that an adequate search was done when it took this long.

MS. OEHLKE: Yes, your Honor. So, first of all, I just want to clarify that it is unclear and not showing in the record here that ICE was using those two years to conduct the search, as the defendant has just stated. I also just wanted to clarify that --

THE COURT: That's why I was hoping AUSA Sady was here because maybe he was involved in orchestrating that search because it seems that, at least on paper, it appears that no activity took place until a lawsuit was filed.

11:17

MS. OEHLKE: That's correct, your Honor. I also did want to clarify that there is no evidence that the defendant ICE did freeze their phones upon our request.

Lastly, just to clarify, when a FOIA requester searches for certain categories of records and the agency -- first of all, an agency has to meet its burden to show it conducted an adequate search. It must adequately describe how it conducted that search. If the agency does not search a specific location that plaintiffs have specifically requested, here we have requested text messages, and that's available in our FOIA request, which is available at Exhibit C, then the agency must sufficiently describe why it has chose -- not
11:18 chosen, why it has not searched that category of records. That's the burden the agency has to meet here, and they have not met their burden.

THE COURT: So they never responded with respect to those text messages until these papers. Am I correct about that?

MS. OEHLKE: That's correct, your Honor. We learned a little bit about why the agency is claiming it could not search for text messages in the defendant's reply brief, particularly at page 10. I'm happy to talk a little bit more about that if
11:18 that would be useful.

THE COURT: Let me continue to process the information.

MR. KANWIT: One follow-up, and I'm trying to stick to what you're narrowly focused on. It's not just that phones are out there, government phones are out there, and they have to be

preserved the minute a FOIA request comes in. The text messages don't stick on the phones indefinitely. The declaration submitted by Mr. Clark with our papers indicates that government employees, ICE employees and the related DHS entities, use government supply Apple phones. Apple does not preserve text messages beyond 30 days. They also would not respond even if a request was made on behalf of the agency and said, hey, these are really government phones, preserve anything you haven't destroyed. Apple would say it's not your
11:19 phone. It's Director Homan's phone. And they would not honor such a request, according to Mr. Clark. So even if a request had been put in, it might not have been honored. We don't control the text messages. They're not in some separate database.

THE COURT: I get that. So they're on the phone. I apologize AUSA Kanwit. I may not have fully understood everything. I have an iPhone so I have some familiarity with how they operate. I appreciate that Apple may not have my messages and, I don't know, maybe my server, my cell phone
11:20 provider doesn't have them, but the phone does, right? And the phone can keep them beyond 30 days, can't they? I think I have some that go back many months.

MR. KANWIT: Yes. It can reside on the phone if the phone is still active and being used. I think what your Honor is looking for is when were those phones deactivated.

THE COURT: That's certainly one of the questions that I have, whether or not it was before litigation, whether it was after litigation. You mentioned that they were frozen. I think what counsel was raising is what does that mean.

MR. KANWIT: What I indicated, just to be clear, is that my understanding of the process is that when a FOIA request comes in, the agency issued a directive to all the likely holders of relevant information to preserve records as part of the FOIA response.

11:21 THE COURT: So those would be the offices, the four or five offices that manage and have the capability of searching for those documents, right?

MR. KANWIT: Yes, your Honor.

THE COURT: But the phones is separate. So they really wouldn't fall into any of those categories.

MR. KANWIT: My understanding is, and I would have to verify this because I was not --

THE COURT: I know.

MR. KANWIT: And I apologize.

11:22 THE COURT: Let's bring him back.

MR. KANWIT: I should know everything. If I'm representing the government, I should know everything that my predecessor knew. I don't and I apologize. I take responsibility for that. Just as an aside, if you have questions that are open that I'm unable to answer, I will, of

course, if allowed to, go back at a break over the afternoon and get information from my ICE contact so I can get answers to anything I don't have the answers to.

But that having been said, there is a question that the Court is raising. Can a search be adequate if after the FOIA request comes in, records are destroyed or lost? Let's assume for my purposes not bad faith, that the phones were given up when the people left the office.

THE COURT: Aren't they all gone, the individuals?

11:23 MR. KANWIT: I think all but one. In that situation, my understanding of FOIA jurisprudence is that you search what's available to be searched. You don't have a time machine. So you search everything you can search, which is what ICE did. We have gone back and forth with plaintiff's counsel many times about are the text messages searchable somewhere, and they're simply not.

THE COURT: I guess I keep coming back to if it was ICE's intention to delay, delay, delay to the point that they are destroyed, wiped clean and no longer available, is that

11:24 still good faith?

MR. KANWIT: I don't think ICE had any intention to delay, delay, delay.

THE COURT: Or not delay, delay, delay. How about just take no action?

MR. KANWIT: I think ICE took action. The record

shows that ICE took action. They made a determination that consultation had to be made. That was challenged.

THE COURT: The first three months. You're talking about the waiver of the third-party authorization.

MR. KANWIT: Right.

THE COURT: Then what did they do after that? Is there any record of that? Any emails? Are there any statements as to what was done during this period of time? I also question how can I confer presumption of good faith when she stated she started working there on August 1, eight days before the first production, and that was three months after the lawsuit was filed. So here she is being the person who says this is what we did for a search but she just got there on the job. She wasn't personally involved in the search. So she's getting this information presumably by someone else. So how do I confer good faith on that?

MR. KANWIT: Because she did what she's supposed to do in her new job, which is take over, just like I'm taking this over from Sady. If you were to question everything I say just because I wasn't here back then, that's not bad faith.

THE COURT: But what do I have on good faith?

MR. KANWIT: Right. So she made a good faith effort to find out what had been done. Her two declarations are exceptionally detailed.

THE COURT: Do we know it was her versus someone else?

MR. KANWIT: For what? I'm sorry.

THE COURT: This search.

MR. KANWIT: Well, she doesn't do the search herself. The declarant isn't the person doing the search. She's an attorney overseeing ICE's internal FOIA operations. I don't know exactly where she is in that hierarchy, but she is, I suspect, my counterpart at ICE for FOIA. So she got assigned to this FOIA request when she got to ICE, just as I've been assigned to this case. She then figured out what was going on, and when it came time to process the request -- when she gets involved, the request is being -- the search is being done and there's negotiations about refining the search that ICE entered into and agreed to do another search, agreed to increase the terms, all of that in good faith. She's figuring out how all of that stuff happened and pulls it all together in her declaration. This is kind of like if you imagine a steamship sailing from Venezuela to New York City. She doesn't jump in and start steering the ship instantly. She's got to get a handle on what this process has been. That process was going on. She describes a very extensive process.

The question I think is less about how fast it happened than what was done. Good faith is determined about what was done. Was a search adequate? Was it reasonably calculated to find responsive materials? And it was.

THE COURT: Okay. Plaintiffs, anyone want to say

something? Otherwise we can move on.

MS. OEHLKE: Yes, your Honor. I can respond to a few points.

First of all, as your Honor rightly pointed out, ICE has alleged a very extremely vague practice. That's located at paragraph 16 in particular of the Clark declaration. That vague statement there, and I'm happy to read it.

THE COURT: Let me just find it. Paragraph 16?

MS. OEHLKE: Yes, your Honor. Paragraph 16 of the
11:28 Clark declaration.

THE COURT: It's attached to what, their original papers?

MS. OEHLKE: It's attached to the reply brief of the government's.

THE COURT: That was one of the questions that I had, was whether or not the government had provided a courtesy copy of that.

You don't know the answer to that, right?

MR. KANWIT: I don't, but I know it's Mr. Sady's
11:29 practice to file whatever the Court requests. I don't know if the Court requested courtesy copies in this case.

THE COURT: Yes.

MR. KANWIT: If so, he would have filed.

THE COURT: Okay. I had to print it out.

MR. KANWIT: I apologize on behalf of Mr. Sady and the

government.

THE COURT: Go ahead.

MS. OEHLKE: So as your Honor rightly points out, there's a lot of questions about this --

THE COURT: Going to paragraph 16.

MS. OEHLKE: Yes, your Honor. That paragraph reads that it was standard practice at ICE to factory reset, securely wipe and delete all contents of mobile devices as they were taken out of service. That singular sentence on its own raises
11:29 a lot of questions. For instance, we don't have any more evidence of this practice except for this sentence here. So we don't know when this practice started, when it ended. We don't know what type of device it's applied to. The Clark declaration also cites to a policy directive, 141-03, which makes it clear that ICE personnel do use text messages to transact business.

Just to add another point here. As the government did point out, some of the custodians are still employed at ICE.

THE COURT: He said one.

11:30 MS. OEHLKE: That person would be Natalie Asher. She's still employed at ICE. So, from this vague statement we have no idea -- we're left with many questions about whether this alleged practice actually -- if it applies to her devices or it doesn't. So in light of the many questions that plaintiffs have and your Honor has expressed, we do think that

discovery is appropriate here.

There is a case that I'd like to mention, *ACLU Massachusetts vs. ICE*. That was a case that presented some similar issues as this case.

THE COURT: Is there a cite? That's probably a familiar name.

MS. OEHLKE: Sure, your Honor. The cite for that case is *ACLU Massachusetts vs. ICE*, 448 F.Supp.3d 27. I'm referring to 44 through 45. That's a D Mass. case from 2020.

11:31 THE COURT: Is that Judge Sorokin?

MS. OEHLKE: Exactly, your Honor. In that case, the government, as Judge Sorokin held, had not adequately established that it had conducted an adequate search. The government alleged a generalized practice but hadn't really described how it applied to the search in question. As a remedy, Judge Sorokin in that case ordered discovery. That's a reason why we think it would be appropriate.

THE COURT: Discovery was limited.

MS. OEHLKE: Limited discovery, your Honor, that's

11:32 correct.

THE COURT: I can't help but think -- let me back up. It's my understanding on these cases that typically they're resolved on a summary judgment motion with no discovery in advance of that. So it's just based on what search was done. Ultimately, the plaintiffs want certain documents. As AUSA

Kanwit would like me to stay focused on the FOIA litigation is on whether the search was adequate, right, and not whether or not it captured everything that made the plaintiffs --

MR. KANWIT: Well, actually, that's a perfect segue into what I want to argue. I'm going to keep it short, to your point, out of respect to the way you want to keep things parsed. The issue in this case really isn't have we searched and obtained everything they want. The primary question is, as you've identified, was a search adequate, but behind that is this overarching elephant in the room, to mix metaphors, of is there anything. All of this FOIA litigation stems from the *New York Times* article in which then Director Homan said he had discussions about what Judge Joseph did. Certainly, he was outraged by it and wanted to find somebody to prosecute. He doesn't say he texts anybody. He doesn't say he emailed anybody. He doesn't say he created any documents. Now, they're assuming that that happened, that there must have been something created.

THE COURT: Can I jump in?

MR. KANWIT: Of course. You're the judge.

THE COURT: So if that's the case and if that's what everyone believes, why not just ask him? Why doesn't the search start there? Did you have such communications and, if so, by what means?

MR. KANWIT: It's not how FOIA works is my direct

response.

THE COURT: I told you this was new to me, so these are sort of the questions that make sense to me that that's where you start. And he's going to say I sent emails or text messages or I did none of that. I called a meeting and spoke, or I didn't say that at all.

MR. KANWIT: I don't think he would deny he said it.

The first thing ICE did was wrap their electronic paws around all of the available records for the seven individuals listed, including Homan.

11:35

THE COURT: But not including the scheduler and administrative assistant.

MR. KANWIT: Honestly, your Honor, they're not going to have stuff that the individual does. And when you go to get all of the electronic stuff, the electronic recordkeeping doesn't differentiate between this is a Director Homan document that he keeps in his personal secret file and this is something his scheduler has.

THE COURT: That makes sense, that this system, what you were talking about, this wrapper around these people, that this search would have pulled up their information as well even though an individual search of their computer was not done.

11:35

MR. KANWIT: I don't know that an individual search of their computer was not done.

THE COURT: I'm referring to the scheduler and the

administrative assistant.

MR. KANWIT: No. I think the search was done through backup drives. We have to sort of like go down, dig down deep through the declarations about how ICE maintains its electronic records. My understanding is that the search was through the servers, not through individual computers, so that if a scheduler for Mr. Homan, if such a thing even exists, his assistant, whatever, had stuff, it would have been part of that system of records and that would have been grabbed if it was in any way identifiable as relating to him. If it was not identifiable as relating to him, it's by definition not relevant. What ACLU is trying to get here --

11:36

THE COURT: I may need you to clarify or supplement that point because if that is -- I don't recall reading that. And if it's there, let me know. If that is true, that makes a lot of sense.

MR. KANWIT: I think it's in the declarations, that the search was done through the electronic database rather than individual computers.

11:37

THE COURT: But that would capture the administrative assistant and scheduler. Is that in the declarations? If so, point it out to me.

MS. OEHLKE: No, your Honor. In the declaration, the Schurkamp declaration, the first one, Schurkamp states that the seven named custodians were searched through the Office of the

Chief Information Office but their schedulers and filers were not searched.

THE COURT: Right, but AUSA Kanwit is describing something slightly different, that the search of a server involving those seven individuals, and if they had generated a scheduler or administrative assistant had generated any documents on their behalf or even scheduling meetings on their behalf, that would have been captured by the search of the server. I might have missed it. I don't recall that being in there. So I just want to put a pin in that, AUSA Kanwit.

11:38

MR. KANWIT: I think paragraphs 8 and 9 of the Richard Clark declaration, he describes a process by which OCIO, which is the office that stores all electronic data, including emails, and thus the office most likely to have responsive records -- and, again, the touchstone here for the search is go likely where you're likely to get the documents, not go to where every possible place a document could exist. They collected all email communications, this is paragraph 9, of the seven individuals who are identified by the FOIA request.

11:39

So let's say, hypothetically, the assistant to Mr. Homan schedules a meeting. Let's say the meeting says "In Re: Judge Joseph, a Massachusetts state court debacle". The email from the scheduler to Mr. Homan would have been in those documents. It would have been collected when his emails were found.

Now, if the email went not to any of these seven individuals but some other person not in that hierarchal group, it is conceivable, I'm not saying this is what happened because I don't understand the system well enough, but it's conceivable if the scheduler sent it to somebody not including any of the seven individuals and set up a meeting, although why the scheduler or assistant for Mr. Homan would do that doesn't make sense to me, that might not have been captured, but we are bound by reasonableness. We're looking for the dirt here. We're looking for the stuff that says ICE was out to intimidate state court judges, right? That's the underlying gravamen of the ACLU's litigation. Now, we don't have to reduce it to that, but that's kind of where they're trying to get to. They want to see whatever discussions, whatever communications, whatever anything that could be called a document broadly defined relates to that, not to ICE in general, not to state court judges in general, not to the Newton District Court in general but to this issue about Judge Joseph and Clerk McGregor.

11:40

11:41

So that's what the FOIA request is about. ICE went to five different places to look for this stuff and they looked at everything they could get their hands on electronically for those seven individuals that were identified. Those seven individuals were picked by plaintiff, not by ICE, and they really define the parameters of this because what ACLU is

looking for is was there a high-level discussion about this case or something close to it that also refers to this underlying case, the one in the Massachusetts courts. The search went above and beyond to try to find that stuff. The question really is what would you search for? Where would you search for it that is so likely to have responsive documents but was not searched that the search is unreasonable? And they haven't pointed to anything other than text messages for that. ICE has made it clear in the declarations it can't search for the text messages.

11:42

THE COURT: Any need to respond now because if not, what I'm going to do is allow you to argue your motion and whatever organization you had in mind?

MS. OEHLKE: If I could respond very briefly.

THE COURT: Sure.

MS. OEHLKE: So it's not in dispute that the emails of the seven custodians were searched as it relates to Item No. 1 of our FOIA request, which is Exhibit C, but also Items 2 and 3 of the FOIA request, which are seeking documents of those not named custodians and are not limited by those custodians.

11:43

I also wanted to clarify that what we're arguing here in terms of what goes to the accuracy of the search that is that ICE reasonably used, and we'll get into this later, but we're arguing here that ICE used narrow search terms, failed to conduct a search of the Homeland Security Investigations Unit

and then text messages. So that's what we're worried about in this case in terms of adequacy of search.

THE COURT: All right. So you pointed to your request. You said the first one pertains to the seven. The following ones do not. Are you referring to B and C?

MS. OEHLKE: Your Honor, we're referring to page 3 of the FOIA request, Items 2 and Item 3.

THE COURT: Back to this two and three of your request. The point you were just making is it's not limited to those seven individuals?

11:45

MS. OEHLKE: That's correct, your Honor.

THE COURT: So this should have been a search of where, HSI?

MS. OEHLKE: One of our arguments is ICE should have conducted a search of components of ICE likely to turn up documents responsive to the request. And as the production reveals here in several aspects, several pages in the record indicate that, just as an example, the Homeland Securities Investigations Unit was doing a lot of activity as it relates to the investigation of Judge Joseph and Officer McGregor. So that's one example of an avenue that hasn't been searched.

11:46

THE COURT: Let me turn it over to plaintiffs for your arguments based on your motion on why the government did not do an adequate search and why I should order more.

MS. OEHLKE: Sure, your Honor. May I approach the

podium? It's a little bit easier.

THE COURT: Sure.

MS. OEHLKE: Thank you. So Krista Oehlke for plaintiffs.

Plaintiffs are respectfully requesting that this court deny ICE's motion for summary judgment, grant the limited discovery in our briefs and grant plaintiff's motion for summary judgment.

With your Honor's permission, I would like to start first with the issue of the inadequacy of the search. Then Attorney Anthony will address the exemption issue.

So this is an action under the Freedom of Information Act in which plaintiffs are seeking records from ICE concerning the role ICE played in the prosecution of Judge Joseph and Officer McGregor. Judge Joseph and Officer McGregor were both indicted for obstruction of justice for allegedly allowing a defendant to exit the rear door of the Newton District Courthouse while an ICE agent was waiting in the lobby. Now, ICE was involved in this prosecution and the public has a right to know more about it.

So ICE has a burden to show that it has conducted an adequate search and here ICE has not met that burden for three reasons. The first is ICE used unreasonably narrow search terms. Secondly, ICE failed to, as I mentioned earlier, search the Homeland Securities Investigations Unit or HSI. Finally,

ICE has refused to search for text messages, which was a category of records that plaintiffs have specifically requested.

So a number of undisputed facts point to why the plaintiffs are correct on these three issues and why summary judgment in our favor is appropriate.

The first undisputed issue is that it's not disputed that on the same day of the events at the Newton District Courthouse, ICE agency personnel began working on the issue, escalated information about Judge Joseph and Officer McGregor to the head of the agency, to Mr. Homan. Then Thomas Homan began communicating instructions to his legal staff. We know that from public reporting. I'm referring to the plaintiff's statement of facts at 64.

11:49

It's also undisputed that HSI, or the Homeland Securities Investigation Unit, was conducting an investigation of Judge Joseph. We know that from several parts of the record. That's statement of facts 52, defendant's brief at 11 through 12, defendant's reply at 10, and then all three pages of the Vaughn index.

11:50

It's also generally not disputed that all this activity eventually led up to an indictment, and this was a really important issue for the ICE agency. I'm referring specifically to Exhibit Q at 53 and 62. Even though Thomas Homan, head of the agency at the time, was working on this

issue from day one, ICE does not immediately dispute that the earliest record in the production concerning the indictment events alleged in the indictment or investigation thereof is dated March 6, 2019, which is actually 11 months after the events in question at the Newton District Courthouse.

It's also undisputed that none of the communications that were produced by ICE were sent to or from Thomas Homan, the head of the agency, working on the case. That's plaintiff's statement of facts 67. And despite the fact that there was a lot missing from this record, ICE did not conduct its search using certain search terms that plaintiff suggested. I'm referring to PSR 68 and 69.

11:51

So we have this gap here during the 11 months after the events at the Newton District Court. A lot of activity was happening and yet there are no communications that were produced in response to our request that concerned the indictment events alleged in the indictment or the investigation of the indictment.

So the reason these gaps exist is because ICE failed to use adequate search terms. ICE failed to search HSI, and ICE similarly refused to search for text messages.

11:52

With your Honor's permission, I'd like to first talk a little bit about the search term issue. So in responding to FOIA request, an agency has a burden to craft search terms that would be reasonably tailored to produce documents responsive to

the request. I'm referring to *New Orleans Worker Center*. In this case, ICE used unreasonably narrow search terms that were not reasonable to uncover documents.

To give background, different components within ICE use different search terms for this request, but the office of the Chief of Information Office, which is the office that stores all personnel's email files, that office conducted a search using the terms "Judge Shelley", "Judge Joseph" and "Judge Shelley M. Richmond Joseph", however these search terms 11:53 assume that ICE personnel knew Judge Joseph's name at the early stages of investigation and also assumes that government officials actually refer to possible defendants using their name. Even if ICE officials did know Judge Joseph's name, it does assume that they were referring to her name and email communications by her full name and her formal title.

THE COURT: I have a question about the search terms. Does it have to be the exact configuration that's in quotation or can it be some variation of it?

MS. OEHLKE: It can be some variation of it. To give 11:54 an example, the case *Judicial Watch vs. DOJ*, which is a District of D.C. case from 2019, that case is useful. It stands for the proposition that an agency has a duty to use synonyms and logical variations of words used in a request.

THE COURT: So what you're providing me is case law that supports that it should be flexible.

MS. OEHLKE: Yes, because the standard --

THE COURT: But I guess what I'm trying to figure out is, the search that they did, is it just what's in quotation and it has to appear completely like that or populate in a search or will it pick up a variation. Maybe that question is not for you but AUSA Kanwit. We'll see. Go ahead.

MS. OEHLKE: So if I'm understanding your question correctly, an agency is obligated in order to craft search terms that are reasonably tailored, as I mentioned before, to
11:55 use terms that would be sort of logical variants of the subject of the request.

So just to give another example that I think is useful here, the case *New Orleans Worker Center vs. ICE*, which I believe is also a District of D.C. case, the plaintiff was looking for documents regarding the Criminal Alien Removal Initiative, otherwise known as C-A-R-I. The agency in that case applied the search terms "Criminal Alien Removal Initiative" and "CARI", but the Court agreed with the plaintiffs in that case that other sort of logical variations
11:56 of that subject of the request should have been used.

So, in that case, the court agreed with the plaintiff that other words, search terms like "fugitive operations", "criminal aliens", "criminal fugitives", are amongst some of the search terms that the court ordered the agency to use.

To speak a little bit more about the search, ICE used

a search term "Newton District Court" but did not apply some of the search terms that plaintiffs had suggested. So any communications about a judge in Newton or a court in Newton would have --

THE COURT: Seems reasonable to me. AUSA Kanwit may try to convince me otherwise.

MS. OEHLKE: The standard is reasonable, your Honor.

Next I'd like to discuss ICE's failure to search --

THE COURT: Why -- so you're not asking for "sanctuary city".

11:57

MS. OEHLKE: Your Honor, we held a meet and confer with the government and we did ask for those terms, however, the government did not want to use those terms and we agreed on that call to ask them for a limited set of terms. So right now we're asking this Court for whatever you think is reasonable, your Honor, but more specifically here "court" within five words of "Newton" and "judge" within five words of "Newton".

THE COURT: Okay.

MS. OEHLKE: Moving to the HSI issue. So ICE's

11:57

failure to search HSI is a violation of FOIA because defendants show that HSI is likely to have documents that be responsive to plaintiff's request. According to *Johnson vs. CIA*, which is a case in the District of Massachusetts, which leads to another documents arising during a search, an agency has an obligation to expand the search and follow the leads of that information.

In this particular case, ICE actually highlights. I'm looking at, for example, the defense reply at page 10 that its search of another office, the Office of the Chief Information Office, showed that HSI possessed responsive records. Also, we know this from Exhibit Q at 53. So there's actually an email chain at page 53 of the production. It's titled "HSI Boston anticipated indictment of district judge".

In addition, the Vaughn index, all three pages, indicate that HSI was conducting an investigation of Judge Joseph and Officer McGregor.

So, therefore, it's clear that it's likely HSI is likely to have responsive records. Under *Johnson*, it is ICE's obligation to follow that lead, and it's failure to follow that is a violation of FOIA.

Finally, I'd like to turn to the issue of text messages, which is the last issue. ICE's position is that it should be categorically excused from searching for text messages. The reason ICE has given, and we reviewed this earlier, your Honor, is that during the Trump administration it was, I'm going to quote from that same sentence again, standard practice --

THE COURT: Where are you reading from?

MS. OEHLKE: Sure, your Honor. I'm looking at the Clark declaration, which the reply cites to, particularly looking at paragraph 16.

THE COURT: Okay.

MS. OEHLKE: So that sentence states that "it was standard practice at ICE to factory reset, securely wipe, destroy, and delete all contents of mobile phone devices as they were being taken out of service". However, ICE's statement here is insufficient because ICE has a burden, as we mentioned earlier, to establish an adequate search. In order to meet that burden, ICE must sufficiently describe the avenues of its search. And if it does not search a certain location
12:00 that plaintiffs have specifically requested, ICE must sufficiently explain why not. Here, ICE has not met that burden for a few reasons.

So the first reason is, I'm going to refer back to the policy directive that I was referring to earlier, that's policy directive 141-03. That policy directive basically serves to confirm that ICE personnel used text messages to conduct official business. The policy also makes clear that there is no requirement that the agency personnel copy the content of that text message and save them in any other format. So in the
12:01 government's filings, I believe they mentioned that any search of text messages somehow would have been picked up by a search of their email system, but that's not the case. There's no procedure for copying text messages.

THE COURT: But they were encouraged to report on their communications.

MS. OEHLKE: That's correct, your Honor. So they're encouraged to write a memo, perhaps summarizing the business they transacted via text message. Your Honor, we're not asking for memos of what the government thinks that they've written via text message. We're asking for the content of the text messages which is not an adequate substitute here under FOIA since text messages are agency records.

Then I also just want to talk a little bit about the practice that ICE is alleging at that paragraph 16. So that
12:02 single sentence really doesn't give us very much to work with. We're kind of left with a lot of questions. So we don't really know, for instance, I think I mentioned earlier when the practice started, when it ended. We don't know if this practice is still at play. We don't know if there are any exemptions to this practice, for instance, for criminal cases.

And then taking another -- moving to another point, even if the agency were to reveal more about this practice, we don't know how this general practice actually applies to the devices in this case, to the custodians in this case. As
12:03 mentioned earlier --

THE COURT: So what do you think is an appropriate remedy if I agree with you?

MS. OEHLKE: Your Honor, we think that, similar to the case *ACLU Massachusetts vs. ICE*, the one that Judge Sorokin presided over, we think that because there are so many

remaining factual questions on this particular issue that limited focus discovery is appropriate here.

THE COURT: Such as what?

MS. OEHLKE: So, for example, we would probably start with limited interrogatories. We would ask a little bit more about where the devices are today. We would probably ask about Natalie Asher's device. We would probably ask a few questions about this practice that we just know about through that one sentence. Then depending on what we get from there, we might 12:04 do a targeted document request for a limited number of depositions, but that sort of depends on the interrogatories. Then we would present that information to your Honor and your Honor could decide what's appropriate there. Did you have a question?

THE COURT: I did. Have you given thought to who the depositions would be of?

MS. OEHLKE: Yeah. I think depositions could be of the points of contact, the people who actually conducted the searches of each component office. It might be of people who 12:04 have knowledge of where these devices in question might be. Those could be some possible avenues. I know that was the case with *ACLU Massachusetts vs. ICE* case. There were several points of contacts referred to in the declarations were asked questions to.

Even if we did know more about this practice, your

Honor, as I mentioned before, we would have to know how this practice actually applied to the devices in this case. And we just don't know that here. The Natalie Asher example is a good one, especially given that Natalie Asher is still employed by the agency. And so as paragraph 16 states, that general practice applies to devices that are taken out of service but could conceivably -- it seems like Natalie Asher devices that have been taken out of service and she's still with the agency. So that's just some additional questions we have.

12:05 If your Honor doesn't mind, I think there's a case here that's helpful but which we do not cite to in our briefs. I have copies of the case if that would be.

THE COURT: Yes. Why don't you hand up the copy and give AUSA Kanwit a copy.

You may continue.

MS. OEHLKE: That case is helpful here because it stands for the proposition that, I'm going to quote directly from that case, that "generalized claims of destruction or nonpreservation cannot withstand summary judgment ". So in

12:06 that case, a declaration contains sort of one sentence that the log books at issue in that case that they were destroyed after every two years and the plaintiff in that case was looking for log books. So that statement in that case was just not sufficient to withstand summary judgment as it related to the request at issue. We think that, similarly, here the single

sentence we have in the Clark declaration is not enough to withstand summary judgment. I'm happy to entertain other questions on inadequate search. Otherwise happy to turn the floor over to Attorney Anthony.

THE COURT: What you've said is limited focused discovery that you are seeking, particularly with regards to this area, rather than the interrogatories, targeted document requests and deposition. Could that information be provided in a supplemental affidavit by one of the declarants or a new declarant? Could it be satisfied that way?

MS. OEHLKE: That's a good question, your Honor. I hadn't quite thought about that. I think given the similarities between the ACLU Massachusetts Judge Sorokin case and this case, it seemed like the remedy granted there given the similarities seemed appropriate here. I think there may be a couple options that your Honor could pursue given that ICE has not met its burden on this text message issue. Your Honor could grant summary judgment in our favor and order discovery to help this Court decide what appropriate relief could be or order discovery first before deciding on summary judgment and then wait to decide on summary judgment after discovery had taken its course and we present you with the information we had found.

THE COURT: If I agree with you on this issue, I may request that you identify what you believe to be lacking and

what needs to be searched so that I can make a determination of what form of discovery to take place or whether it's a supplementation of the affidavit. So just think about that if I decide in your favor on this issue.

MS. OEHLKE: That would be fine for us, your Honor.

THE COURT: AUSA Kanwit, do you want to jump on these three things before we turn to the exemption?

MR. KANWIT: I do. Thank you, your Honor.

So the notion of discovery is kind of scary with having a tail wagging on a very large dog. I'll get to that in a moment.

In terms of the search terms, the initial search terms, what they were, it was set out in the documentation. In good faith we met with the other side, had a telephone conference September 9, 2021, and there was a discussion about additional search terms. During that call five additional search terms were agreed. I'm sorry. Four. In addition to the full name of Judge Joseph, including her middle initial, we agreed to search for Shelley Joseph. Searching for just Joseph, by the way, would not reasonably be calculated to lead to responsive documents. The government agreed to search for the Newton District Court. It agreed to search for anything containing Jose Medina-Perez, who I think you know is a fugitive who was let out through the sally port in the basement. And also for Wesley McGregor. We'd already searched

for Clerk McGregor and McGregor. So there was an agreement --

THE COURT: Did you say Clerk McGregor?

MR. KANWIT: That was already searched for in my understanding. These are additional search terms.

THE COURT: Why clerk?

MR. KANWIT: Why clerk?

THE COURT: Yes.

MR. KANWIT: Because he was the clerk. Wesley McGregor was the clerk.

12:11 THE COURT: I thought he was a court officer.

MR. KANWIT: No. My understanding is he was the clerk.

MS. OEHLKE: He's the court officer, your Honor.

THE COURT: I see officer on the other things. Okay.

MR. KANWIT: Well, I'd have to go back and look at the earlier search and see what the initial terms were.

THE COURT: Don't get distracted by that. It just jumped out at me when you said clerk.

MR. KANWIT: I may have misspoken. I don't know. I'm

12:11 sorry.

So that was what was agreed upon, among many other things, in that telephone call. That was memorialized by Ms. Oehlke. That was in an email sent September 10. In that email, Ms. Oehlke said we'd like you to also do a continuity search. ICE said no. We're doing enough with the four

additional terms we've already agreed to. The two additional continuity searches that they asked for was "Court" within five words of "Newton" and "judge" within five words of "Newton".

Now, one way to look at this is how hard would it have been for ICE to do that. You can always take the position that this little additional thing's not that difficult, but it is in the context that this FOIA litigation has already taken hundreds of hours for something that we have no idea even exists. The plaintiffs have no evidence that any documents other than what was produced exist. It's all based on the acting director saying that judge should be prosecuted.

12:13

THE COURT: Let me -- you mentioned hundreds of hours of search. Who tells me that? Which one of your declarants?

MR. KANWIT: I don't recall as I stand here whether I got that from my counterpart but it's certainly reasonable based on both the Schurkamp declarations and looking at the process that was undergone to think that this is a lengthy, lengthy process. It's not something you just plug in a couple terms and you're done. Directives were sent to five different offices. Information was searched. Information was coordinated. Additional searches were done. So this was not a simple or quick process. If the Court wants to know how many additional hours it extended and it's not in the initial declaration, I can get that.

12:14

THE COURT: If they're searching servers, it does

sound like it's just a matter of punching in additional terms.

MR. KANWIT: I think that's a misconception, your Honor. That happens at some point, but that's probably two-thirds of the way through the process. First, ICE has to look at where are our responsive documents likely to be and reach out to all of those components, and then say search them, how are the records kept, this is how you do the search, these are the search terms.

THE COURT: When you said send them out to their counterparts, is that the five offices or more than the five offices?

MR. KANWIT: I don't know if it's more than the five offices. It's certainly the five offices. But it is all the places where ICE reasonably expected to find responsive documents.

In that regard, I want to address something that was addressed by plaintiff's counsel regarding HSI not being searched. HSI documents, as they were directed to any of those seven individuals, would have been found. That's how a couple of HSI documents were found. If HSI is separately investigating, that's going to be covered by the law enforcement exemption. If they had asked our office, if they had said you've got to search the U.S. Attorney's Office, we would have said, go pound sand, no way. HSI is the criminal investigative entity of ICE.

THE COURT: I think that's one of their weaker claims, but let's not go there yet. I want to give Attorney Anthony a fair opportunity to argue.

MR. KANWIT: I'll let it rest for now. I'll stay on inadequacy of search. So in terms of what else could be done, I think it's fair for the Court to ask me to go back to ICE and find out when were those phones wiped, when were they taken out of service. If they were taken out of service after the FOIA request came in, why weren't they preserved? I think that's a
12:16 reasonable question, but I don't think we should give plaintiffs free reign to spend multiple eight hour days deposing ICE personnel when the issue is about adequacy of search. I can answer that question through a supplemental declaration fairly easily. Interrogatories, depositions, we're going way beyond the pale here where there is no evidence that ICE has improperly searched, ignored areas where it should search, or failed to do a reasonable search.

They've mentioned the time period. They say HSI was investigating. Well, yes, but that doesn't mean they were
12:17 creating documents responsive to the FOIA request back then. It certainly doesn't mean any of the hierarchy in ICE was creating documents early on. Director Homan could have picked up the phone and called someone in his legal office and said, hey, what are our options here. I know we don't have prosecutorial responsibility. Can we get the U.S. Attorney in

Massachusetts to do something.

The FOIA request, number two and three, the way they're written themselves, if you look at them, it shows how distorted plaintiff's view of the way government works is because they're talking about directives from ICE to the U.S. Attorney's Office. That's just not what happened. Homan can't call up Andy Lelling and say, here's what you're going to do. And that's what those requests ask for.

THE COURT: Let me just find it. Could they say all
12:19 records of final guidance directives or instructions provided by ICE to Mr. Lelling?

MR. KANWIT: So ICE does not provide guidance, it doesn't provide directives. It does not provide instructions to the U.S. Attorney's Office. I can represent that to you as an officer of the court, as an AUSA with 30 years of experience. I can get you a declaration. That's just not what happens, so there would not be any of those documents.

For category two, all records concerning any investigations by ICE of Judge Joseph, Officer McGregor and/or
12:19 the events alleged in the indictment, how would those not be covered by the law enforcement privilege?

THE COURT: So the assumption, the correct assumption, that would fall under the exemption, the law enforcement exemption. Does that mean a search doesn't have to be done?

MR. KANWIT: No. It does not mean that a search does

not have to be done. Our position is a search was done and anything that necessarily within that was withheld under 7A appropriately. It does mean that the search doesn't have to go to the ends of the earth to try to get something that you know is going to be covered by 7A. What ICE's responsibility is is to conduct a reasonable search, and that's what we say it did. It would not be reasonable to have ICE subjected to depositions and interrogatories about how come you didn't find all the stuff on the investigation when the answer's going to be we did
12:21 find it and we withheld it.

THE COURT: Okay. Did you hit on all of them?

MR. KANWIT: I think I did.

THE COURT: What I wanted to say to you is if I do request such a list from the plaintiffs about type of discovery, I would give you the opportunity to respond briefly as to why that's not necessary or what would be, if I was so inclined to require some additional supplementation or discovery what your proposal would be.

MR. KANWIT: I think that would be a reasonable
12:21 process, your Honor, and appropriate, particularly here where I was not intimately involved sort of internally with ICE or across the aisle here. I would want the chance to say to the Court in response, hey, they already did that if that's the case or the reason why they didn't do that is because whatever. So I think that would be very helpful, your Honor.

THE COURT: Attorney Anthony.

MS. ANTHONY: Thank you, your Honor. With your Honor's permission, I believe Miss Oehlke might have a few points to respond, but if you prefer to move on to the exemptions we can do that.

THE COURT: Okay. Miss Oehlke.

MS. OEHLKE: Oehlke. It's a tough one.

MR. KANWIT: Ignore the O-E-H.

THE COURT: Sorry?

12:22 MR. KANWIT: Ignore the O-E-H.

MS. OEHLKE: Your Honor, first, I just want to make a quick clarification. I think I mentioned before in Judge Sorokin's case that plaintiffs took depositions. The plaintiffs were authorized to take interrogatories and depositions but plaintiffs ended up only doing interrogatories. So I just wanted to make that clarifying point.

I also just wanted to mention that opposing counsel did talk about our September 9 meet and confer. I just wanted to make sure that the facts were correct there. If I may refer

12:23 your Honor to Exhibit N, which is the email that the government referred to that memorializes that September 9 meet and confer, we weren't just asking for random search terms after the fact. Actually, on the phone call in September 9, ICE informed us as we were negotiating and after they had rejected five of our search terms that they did have the ability to conduct a search

using search terms and connectors, so using one search term with five words of another search term. So we said, great, now that we know you have that capability, we'll come back to you the next day with a proposal. So that's something I just wanted to clarify.

THE COURT: So that is AUSA Sady's letter to you in Exhibit N?

MS. OEHLKE: Excuse me, your Honor. It's Exhibit M, M as in Mary.

12:24 THE COURT: Okay. That makes more sense.

MS. OEHLKE: So that's what happened there.

On the issue of HSI not being searched, we think ICE's failure to search HSI is in violation of FOIA.

THE COURT: So you acknowledge that they did do a search.

MS. OEHLKE: They should have searched HSI.

THE COURT: I think what I heard is they did.

MS. OEHLKE: I want to clarify that they did not search HSI. They conducted a search of the Office of the Chief 12:24 Information Office of emails of the seven named custodians on point number one of our FOIA request. None of those custodians are HSI personnel. So any HSI records we would have inadvertently gotten would have been if an HSI individual happened to email one of those named custodians. So the government states that any communication from HSI would have

been picked up by that search, but that's simply not the case.

On the redaction issue as well, I did want to mention here we're really putting the cart before the horse here.

THE COURT: Tail wagging the dog and now the cart before the horse. Okay.

MS. OEHLKE: So ICE has not searched HSI, and so we can't decide or figure out what the exemptions would be without getting the actual documents. So that's something --

THE COURT: AUSA Kanwit, if you can identify in any of
12:26 the declarations that they did search there, my understanding is they did search but everything fell in the exemption. If that's not the case, then maybe you just need to.

MR. KANWIT: This is a fine point. I would want to talk to my counterpart at ICE. What I do understand is that a search was done of that central repository for all emails and other documents involving the seven named people. So if HSI had communicated with them or those individuals were anywhere mentioned, it would have been within those documents. Again, we turn back to what is the focus here. The focus isn't on
12:26 what HSI did to investigate. The FOIA request is about Homan going after a state court judge. If their FOIA request, if they want to reclassify the request and say we're interested in how HSI conducted their investigation, we think they shouldn't have investigated, we don't think they should be investigating it, then that's a different FOIA request and one that we would

fight tooth and nail because that's not something FOIA gets into.

So I think that counsel's correct that the way we got at it is through those individuals, but we think that's reasonably calculated to find that stuff. The other terms they wanted us to search was not reasonably calculated. Like, they want us to search for "MDC", "sanctuary city". This is in footnote three of four. They want us to search for "MDC", "sanctuary cities", "Newton" and "Boston". Those terms are not remotely reasonably calculated to lead to responsive documents and would have involved countless hours reviewing probably thousands and thousands of --

12:28

THE COURT: I think that's why they let go of some of those.

MR. KANWIT: I think they let go of it because we said we weren't going to do it.

THE COURT: But what they're still pursuing is the two additional, "court" within five of "Newton" and "judge" within five of "Newton".

12:28

MR. KANWIT: And the question is how likely is it those continuity terms would find something that those other searches did not. I propose to you it is extremely unlikely, but with the caveat that the standard for deciding FOIA summary judgment is not could the agency have done something else. The standard is was the agency search reasonable.

THE COURT: I tend to think that's reasonable, particularly at that point in time. Nobody knew Shelley Joseph's name until a few days after. There may have been some flurry of activity for "a judge in Newton" or the "Newton District Court", but I think you have that one in there. All right. I think I've heard enough on this.

Let's go to Attorney Anthony.

MS. ANTHONY: Thank you, your Honor. Katherine Anthony for the plaintiffs. I will work through this quickly now not too quickly for the court reporter. I'll do my best anyway.

12:29

So the parties remain in dispute on FOIA exemption centers around presumption, A, the law enforcement proceedings exemption. I do want to start with a foundational concept of FOIA that the agency has the burden to run an adequate search, determine which documents are responsive and then, on a document by document basis, determine which exemptions apply. So the concept that the agency can speculate that records would be exempt is not the law. So I did just want to clarify that.

12:30

With respect to the exemptions, I will start with exemption 7A. I will be very brief. The plaintiffs have been unclear about ICE's position regarding exemptions B5 and B7E. So I will just address them very briefly at the end. I'll focus primarily on exemption 7A.

With respect to the law enforcement proceedings

exemption, the agency bears the burden of establishing B7's threshold that they were compiled for law enforcement purposes. Plaintiffs don't dispute that.

With respect to 7A, it has three elements that the defendants have the burden of demonstrating: One, that there was a law enforcement proceeding, two, pending our perspective, again that plaintiff would concede those points but, three, where the heart of the dispute is defendant bears the burden showing that release of the information is to reasonably be 12:31 expected to cause clear harm with respect to the proceedings. With all exemptions, the agency has the burden to exemplify those with a reasonable exemption of why it applies to the specific records at issue in the case. Vague and conclusory statements are insufficient to meet that burden. The plaintiff's burden is that that is what ICE relies on, evading conclusory statements. Plaintiffs are not saying necessarily that the exemption categorically does not apply to these records but rather that ICE has not met its burden to demonstrate that it does apply.

12:31 Specifically, in its pleadings, ICE makes essentially four assertions that we believe are relevant to purportedly address that interference prong of B7A.

First, ICE states that "release of these records could potentially disclose information that discusses, describes or analyzes evidence". That is from paragraph 57 of the first

Schurkamp declaration. ICE cannot meet its burden by speculating. Unlike plaintiffs and the Court, ICE knows exactly what's in these documents. So for the agency to speculate as to what these records could potentially disclose is insufficient. Discuss what they could contain or disclose does not meet the agency's burden of what they would be expected to disclose if the records were released. That, I think, is a different question than the question of whether or not interference with the ongoing enforcement proceeding could be reasonably expected. That is a foundational question about what is actually in these records.

A related point --

THE COURT: So give me the example of what would not fit in the exemption and what would. Help me understand, because if they say my list of witnesses would interfere, that was publicly disclosed, or what the witnesses said in the witness statement.

MS. ANTHONY: It is not enough for the agency to say there is a pending proceeding and these records are related to that proceeding. They need to make a more specific statement as to how interference could occur. I think in some cases that is more self-evident than others.

THE COURT: Can you give me an example on both sides?

MS. ANTHONY: An attorney's witness outline, I probably would not dispute that that could interfere.

THE COURT: Give me an example where it would interfere.

MS. ANTHONY: This case is a great example of that. The record makes a little muddy what information is actually already out there. We have a very detailed indictment in this case. It's actually in the record in this FOIA proceeding. It's attached to our FOIA request.

So there's a lot of information that the government itself has already released about this proceeding, and ICE's 12:34 pleadings in this FOIA case are not specific enough for us to tell if there's additional information that has not already been disclosed.

Actually, a great example, your Honor, is, of both sides of this I think, is at paragraph 56 of Miss Schurkamp's declaration. It states in kind of a carefully constructed sentence that the HSI memo they seek to withhold contains "specific names of law enforcement personnel and/or potential witnesses interviewed in the investigation which have not been publicly released as well as information gathered from these 12:35 interviews". So plaintiff pointed out that ambiguity and ICE did not clarify it. It certainly at least raises the question of whether the latter part of that sentence, the information gathered from these interviews, has been publicly released. We asked that question in our briefs and ICE did not clarify or respond to that.

THE COURT: That all sounds like it's relevant to the prosecution, the information garnered from these interviews.

MS. ANTHONY: Certainly, your Honor. Those meet the first two prongs of 7A. It doesn't speak to the third prong, which is whether release of that information could be reasonably expected to interfere with the proceeding and if the information has already been publicly released, which frankly we don't know that. I think ICE speaks specifically to names and identities and I don't think plaintiffs would challenge
12:36 that ICE was just seeking to withhold that information. In fact, I think they also withheld it under FOIA's privacy exemptions and we did not challenge that, but these records are not just from what we can tell from the record. These documents do not just contain witness names that have not been previously publicly released.

On the latter point, the information gathered from those interviews, ICE has had the opportunity to clarify whether that was confidential or has been publicly released and didn't point to that. So plaintiffs are not saying here that
12:36 that information necessarily is public and necessarily release of it could not interfere with this proceeding. What we're saying is that ICE bears the burden to demonstrate that interference prong and they have not in this case. That's one of the reasons why.

THE COURT: I don't know what AUSA Kanwit's going to

say, but I suspect part of it could be to give a more description reveals what it is.

MS. ANTHONY: Well, I think that ICE could, without revealing more about what's in those documents, could speak more specifically to whether or not it's already public information. We did ask them to clarify that and they did not.

I think another option for the Court here, especially where we have a small set of documents, this is not a case with tens of thousands of pages, and in those scenarios where there's a relatively small number of documents some courts found in camera review is appropriate if the agency's declarations are not sufficient enough to inform the Court whether it was appropriate. So that is just one example of sort of the vague conclusory statements that we believe do not meet the agency's burden in this case.

Two other very brief examples. ICE has argued that release of these records could reasonably impact the proceeding because it could endanger the witnesses or sources or, at a minimum, expose them to intimidation or harm.

Witness intimidation has been recognized as a protectable interest under exemption 7A, however the cases interpreting that exemption have required more of just a statement of something that could technically plausibly be true in any case. The cases have required a more specific showing of why that is a reasonably expected possibility in this

specific case.

So, for example, the key case in this area is *NLRB v. Robinson*. They make clear in that case, which is about National Labor Relations Board hearings where discovery is a different animal than civil or criminal proceedings, there is limited prehearing discovery and witness lists are generally not released ahead of time. The Court recognized in that case, because of that unique nature between the witnesses and the subject of the investigation or enforcement proceeding, the power dynamic between employer and employee at issue in that case.

Another case that we cited, *K v. FCC*, the Court specifically found that the FCC had established the possibility of witness intimidation by attesting that perspective witnesses have expressed their fear to the FCC. So specific witnesses had made that possibility clear in the context of that specific proceeding.

Again, I don't think plaintiffs would challenge the withholding of identifying information, but to the extent there's further information that again potentially has already been publicly disclosed, we don't believe that ICE has met its burden.

THE COURT: If it's out there in the public, why do you need it?

MS. ANTHONY: Well, plaintiffs are seeking information

that they're entitled to under FOIA. It's not a question of why the plaintiffs need something but rather what they are legally entitled to under the statute. And they're entitled to any non-exempt records.

THE COURT: I just want to put it out there that, because it's the first time I'm hearing of it so it's just now making me think about it, an in camera review, we're probably not likely to do that. I'm sure you all know I was a state court judge during a period of time. So even now I don't see any reason, and no one has made a motion, for me to recuse myself from this proceeding and I don't see any reason to do that with what's contained in this review that you suggest could create an issue. So I'm sort of flagging that and sharing with you my thoughts. If that happens, if that's a necessary action to take, then we have to figure out how to handle it.

MS. ANTHONY: Thank you, your Honor. Understood.

Very briefly, one final point on exemption 7A. An additional assertion that the agency makes is a two part sentence. "Evidence and information about evidence in documents is pertinent and integral to potential investigations and any resulting prosecutions". That is basically a truism about the nature of evidence. The agency goes on in that sentence to say "premature disclosure of such evidence would adversely affect the government's ability to prepare for trial

and prosecute offenders". Again, those statements taken together are simply a statement that could potentially apply in any proceeding which would call into question why Congress required that third step that the agency demonstrate potential interference of these records in connection with this particular case. So plaintiffs wanted to bring that to the attention of the Court.

There's one final case, *Campbell v. AHS*, which I believe was cited in the parties' briefing 682 F.2d 256, a D.C. circuit case. The court there points this out. "If a direct relationship between an active investigation and withheld information constituted a sufficient predicate for the invocation of 7A, the court in *Robbins Tire* would not have examined special risks and premature disclosure of the particular type of records at issue in that case". I think that's the D.C. circuit's way of saying that each prong of the exemption needs to be given independent meaning before the exemptions are supposed to be construed narrowly with an eye toward the broadest possible disclosure consistent with the spirit and underlying purpose of the statute.

Very briefly. As I mentioned, I would like to address exemptions 5 and 7E. From the reply brief, defendant's reply brief, our understanding is that they no longer seek to invoke those exemptions and they're no longer at issue in this case. However, that has been a little unclear to plaintiffs. The

Schurkamp declaration, paragraph 50, and the defendant's response to plaintiff's statement of fact, paragraph 70, does concede they agreed to remove all the five redactions and provide a supplemental redaction on October 25. However, Exhibit Q to the Oehlke declaration, which is that supplemental October 25 declaration, page 60 there's a new B5 redaction on that page. So that is why plaintiffs were not clear about that.

Finally, the Vaughn index, the second entry of the Vaughn index asserts a claim of exemption 7BA playing to those records, but then it says if 7A does not apply, I assume either because the Court decides that or because if the proceeding comes to an end, the exemption no longer applies. It is a time bound exemption. ICE says that other exemptions, including B5 and B7E might still apply. If ICE wants to invoke an exemption, now would be the time for them to justify it, not at some amorphus time in the future.

12:44

12:44

THE COURT: What I'm going to do is have the parties confer on that issue. If there's some change in posture, just let us know so we don't have to spend a whole lot of time on that.

MS. ANTHONY: Understood.

THE COURT: You understand?

MR. KANWIT: Yes. That's fine.

MS. ANTHONY: Just with respect to B7E, we have a

similar confusion from the record. That's why we wanted to address it here. If the Court has no further questions for plaintiffs.

THE COURT: I don't.

MS. ANTHONY: Thank you, your Honor.

MR. KANWIT: So starting with the last issue first, that same correspondence in September 10, Exhibit M to their brief, indicates they were no longer pressing the B5 or the B7E issues because we had agreed to eliminate those redactions for the higher level people. That's memorialized in that email. So I don't think there's an issue there.

12:45

In terms of the case law, we do have an issue. The case law has got much stronger for 7A exemptions. I don't know what the date is of that DD case that was cited. Congress has made it easier for the government to assert a 7A exemption. The case law says that, basically, there's a presumption that if a 7A exemption is asserted, the Court should give deference to that assertion if it's done in a sworn declaration, which is the situation here. If we step back and put on our commonsense

12:46

lenses, they're talking about a criminal investigation of two individuals that resulted in an indictment. There's no question. The first two prongs are met.

In terms of whether it's publicly disclosed, that's not part of the statute per se. It only comes in to the extent that if there's already public disclosure of that information,

maybe there's no harm in disclosing it. But then you get into how does the document show it was obtained. Did somebody cooperate? It's not purely a content driven issue. It's also law enforcement technique and investigative procedures that could expose individuals to harassment.

I disagree with the take that we've got to put great detail out there to justify the exemption or that we have to show an individual witness saying I'm afraid. That's not what the jurisprudence says. We have a much broader brush. This is not the situation in a criminal case where the government's saying, hey, defense counsel, we've got stuff here that might be Jencks. We're not giving it to you because we're afraid for the witness. In that situation, defense counsel would be fully justified in going to the judge and saying, what the heck, at least look at it, Judge, but that is not the approach under FOIA.

THE COURT: What's the status of the case?

MR. KANWIT: It's still pending as far as I know.

THE COURT: Is it still with the Appellate Court or is it back scheduled for trial?

MR. KANWIT: Honestly, I don't know. It certainly has not been resolved. That much is clear.

THE COURT: Let's say it get resolved in the next month or so, hypothetically, by whatever means. Then what happens?

MR. KANWIT: Depends on where this FOIA litigation's at.

THE COURT: Let's say that there is some additional supplementation or targeted discovery that's still going on. Then what?

MR. KANWIT: Then it's up to you if you think you've got something that's open and pending that would allow you to enter another order or if the parties request a further order.

THE COURT: Got it.

12:48 MR. KANWIT: FOIA's not like civil discovery or criminal Brady Jencks where you have an ongoing obligation to update and update and update on into the future. That's why we bring summary judgment motions, to try to bring it to a close. It's really a question of was the search reasonable when the search was made, not could you wait another six months and play out the clock and then that claimed exemption no longer applies. I don't think the case law supports that.

The argument that was made by counsel about could potentially this, maybe that, this is really tracking in the 12:49 statute. It's phrased in a possible manner. It's not phrased to justify exemption you have to show that this is definitely going to happen, because you don't know. You don't know if there's going to be interference. So I think the phrasing really comes from the statute and the case law. It's not so much us being vague. And this is, at heart, a very simple

case. They want to know did ICE push the U.S. Attorney's Office to investigate a state court judge and the clerk or officer of the court, and did they do so in order to intimidate other judges from refusing to honor legal detainers.

From our side, what happened in state court is not relevant to the FOIA case but is entirely defensible in terms of the prosecution. Judges have to abide by the law. You can't just ignore a federal detainer.

Okay. So we have a political philosophical
12:50 difference, but the case, that's what it's about, getting that information. That is a very narrow thing. The search was broad. It was reasonable. It was fair. I think if you look at the case --

THE COURT: It does sound like summary words, like you're getting ready to summarize and sit down.

MR. KANWIT: I am.

THE COURT: I'm kidding.

MR. KANWIT: You know me very well. I do. I really rely on the case law cited in our brief because FOIA depends so
12:51 much on the context. It's a unique area of litigation. It isn't just about would it be reasonable to also do this, that, and the other thing. It's about what's the search that was made, in this case several searches, were they reasonably calculated to lead to discovery of the materials sought. Plaintiffs don't have the right to dictate search terms under

FOIA. The case law is clear.

THE COURT: So I have another question. I think this is my last question. Let's just say, hypothetically, that I decide that it was inadequate or that I need additional information so I'm asking for supplementation or I'm ordering some discovery. Does my job end then and let you parties deal with the rest of that or does this remain open?

MR. KANWIT: It's a good question. I think it depends on what you order. If, for example, you said ICE has to do a search using the continuity terms, then it would be very reasonable and rational in my view for the Court to say, ICE, go do that. I'm not suggesting you should order that. If you ordered that, it would then be reasonable and rational for you to say, plaintiffs, I've told ICE to do this third search. Whatever you get is what you get. I don't want to hear from you anymore. That would be reasonable. And if -- they could then say the search was not reasonable because you're saying if you, ICE, do this additional search, I find that to be reasonable. At least I hope that's what you would say.

Then the only question would be if the search is done and they have a legitimate issue about an exemption, they could say, ICE did the search, but we didn't get anything out of it. We don't think they're claiming 7A. We don't think it applies. I think they would have the right to come to you, as they've done today, in our cross-motions for summary judgment, search

was done. Put aside whether it was reasonable. At that point we're all going to agree it's reasonable. But their claimed exemption is not fair. I think the Court would retain jurisdiction and would have to decide that.

My view of FOIA is let's not go on forever. Let's not rack up attorneys' fees that we have months and months and months down the road. Let's get this done. I think the foundation touchstone is, under the FOIA jurisprudence, was the search reasonable, not could I order something else to be done
12:54 that would zip up the tent.

THE COURT: Okay. Did either one of you want to respond to that question about when is my job done?

MS. ANTHONY: Very briefly, your Honor. I generally agree with Attorney Kanwit, and for the record, I believe to the extent your Honor orders additional steps to be taken, supplemental search or redactions made or withholdings, our first step would certainly be to confer with the government about those and see if we could resolve those issues without coming back to your Honor. I agree with Attorney Kanwit that I
12:55 think you would retain jurisdiction of the case.

THE COURT: So how do I close the case? How do I know when it's done, that we actually close out this docket?

MR. KANWIT: That's easy. You find that the search that was done was reasonable.

THE COURT: Good try.

MR. KANWIT: It sounds facetious, but I honestly think it's the right decision here because FOIA --

THE COURT: I appreciate that, counsel. You don't have to go further.

MS. ANTHONY: Thank you, your Honor.

THE COURT: Thank you, all. I appreciate it. I enjoyed our conversation about this and your enlightening me about FOIA litigation. I feel so much more prepared about the next one. Thank you. Have a good day.

12:56 THE CLERK: All rise.

(Adjourned, 12:57 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)

I, Kristin M. Kelley, certify that the foregoing is a correct transcript from the record of proceedings taken April 26, 2022 in the above-entitled matter to the best of my skill and ability.

/s/ Kristin M. Kelley June 9, 2022

Kristin M. Kelley, RPR, CRR Date
Official Court Reporter