UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION, OF MASSACHUSETTS; and AMERICAN OVERSIGHT, Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	Civil Action No. 1:21-cv-10761-AK

OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY AND RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is a Freedom of Information Act case. It is not a Federal Records Act case, and it is certainly not a case about whether a state court judge is obligated to honor a lawful federal detainer or not.[1]

Regardless of how one feels about ICE officers arresting state defendants in state court, a state judge is not free to disregard an ICE detainer and to conspire with others to circumvent that

[1] Given Plaintiffs' hyperbole regarding the underlying subject matter of their FOIA request, it is worth recounting the incident that led to all of this. A state court judge unlawfully went off record during a criminal proceeding involving a defendant as to whom ICE had lodged a lawful federal detainer and then facilitated the defendant in evading an ICE officer who was at the courthouse to enforce the detainer. *See* Ellen Barry, When the Judge Became the Defendant, N.Y. Times, Nov. 16, 2019, https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html?smid=nytcore-ios-share. A federal grand jury found probable cause that the judge conspired to obstruct justice.

lawful document. The dismissal is not a vindication of the judge.[2] There is no evidence cited by Plaintiffs in support of their wild speculation that ICE officials sought an indictment of the judge to coerce other state judges into doing what ICE wanted. *See* Memorandum in Support of Motion for Discovery at 4. Moreover, what Plaintiffs are investigating is irrelevant to the FOIA litigation; all that matters is the FOIA request itself and whether a reasonable search was made.

II. CORE FACTS

Plaintiffs have attempted to narrate the FOIA case events as if ICE deliberately and nefariously destroyed responsive documents. That is not the case. A brief chronology may assist the Court:

02/23/18	DHS Policy Directive 141-03 (Electronic Records Management Updates for Chat, Text, and Instant Messaging) that was issued on February 23, 2018 explicitly forbids ICE from using technology platforms (i.e. chats, apps, SMS etc.) as repositories for retaining federal records as a matter of practice.) [Schurkamp decl. ¶ 14] DHS Directive 141-03 also notes that, "All internal DHS chat/messaging systems (i.e., Lync, Skype, or other tools) must display a banner/disclaimer prohibiting the system to be used to formally transact agency business or to document the activities of the organization. However, if business is transacted using one of these platforms, individuals must take appropriate steps to establish and maintain a separate record of the communication. *Id.*, at ¶¶ 15, 16.
07/25/18	Thomas Homan left ICE [2nd Supp. Clark decl.]
02/26/19	Thomas Homan's cell deactivated [Supplemental Clark decl. ¶ 14]
04/26/19	Ronald Vitiello left ICE [2nd Supp. Clark decl.]
06/21/19	Thomas Blank left ICE [2nd Supp. Clark decl.]
11/19/19	FOIA request sent to ICE [Schurkamp decl. ¶ 5] ICE acknowledged receipt via email same day. *Id.,* ¶ 6. Request seeks documents from 03/15/18 –

[2] The indictment was dismissed contingent upon Judge Joseph referring herself to the state judicial ethics committee. A deferred prosecution agreement was reached with the court officer, Wesley MacGregor.

04/25/19.

05/21/20 Thomas Blank's cell deactivated [Supplemental Clark decl. ¶ 14]

06/27/20 Tracy Short left ICE [2nd Supp. Clark decl.]

08/29/20 Matthew Albence left ICE [2nd Supp. Clark decl.]

09/03/20 Matthew Albence's cell deactivated [Second Supplemental Clark decl.(Supplement Clark at ¶ 14 saying 2/20 was incorrect)]

12/16/20 Ronald Vitiello's cell deactivated [Supplemental Clark decl. ¶ 14]

01/01/21 Jon Feere's cell returned to custodian [Supplemental Clark decl. ¶ 14]

01/20/21 Jon Feere left ICE [2nd Supp. Clark decl.]

02/19/21 Tracey Short's cell deactivated [Supplemental Clark decl. ¶ 14]

05/20/21 Complaint was received by ICE.

06/04/21 ICE FOIA office tasked OCIO to search for all communications (including emails, email attachments, calendar invitations, text messages, memoranda, or other communication) relating to the named individuals. *Id.,* ¶ 24. As of this date, only Natalie Asher was still employed by ICE.

08/09/21 ICE FOIA produced 66 pages of responsive documents to Plaintiffs. *Id.,* ¶ 30.

09/02/21 ICE FOIA tasked additional search to ICE's Office of the Executive Secretariat. *Id.*, ¶ 39.

08/31/21 ICE FOIA tasked Office of the Chief of Staff to search. No records were located. *Id.*, ¶ ¶ 44, 45.

09/09/21 ICE telephone conf. with P; ICE agreed to conduct additional searches using mutually agreed-upon terms. *Id.*, at ¶ 31.

10/06/21 Additional records from new searches produced to Plaintiffs from OCIO and OES searches. *Id.*, at ¶ 41.

12/31/21 Ms. Asher left ICE.

12/31/21 Nathalie Asher's cell returned to custodian. [Supplemental Clark decl. ¶ 14]

10/12/22 ICE lifted exemption 7(A) and produced 388 pages of records.

The important facts to note are that one device was deactivated *before* the FOIA request was made (Homan's); while two other devices are likely to have been wiped clean prior to the FOIA request being issued because these employees left ICE before the FOIA request was issued (Vitiello and Blank). Two of the seven cellular devices at issue were not deactivated, in one case ever and in another case not until the device had been thoroughly searched (Feere's and Asher's devices respectively). Not a single cellular telephone was deactivated or wiped clean *after* the complaint was received.[3] Not one device had data deleted *after* the FOIA tracker/tasking went out to ICE sub-components. While four of the seven targeted devices were deactivated after the initial FOIA request, the sub-component of ICE that had possession of the devices had no knowledge of the FOIA request until June 4, 2021, at the earliest, because ICE handles FOIA requests on a first come, first served basis. It is also worth noting that ICE sent out the FOIA tasking within two weeks of receiving the lawsuit.

III. ARGUMENT

A. ICE Conducted a Reasonable Search

In Plaintiffs' brief on discovery, they make the unsupported claim that "[i]n this FOIA case, ICE took the unusual position that it should be excused from searching an entire category of records because they were destroyed by ICE's personnel." That is simply inaccurate. ICE has

[3] Defendant suggests that the Court keep in mind that ICE employees are told not to conduct agency business via text messages and to create some type of back up documentation if they nonetheless do so. Employees are free to delete text messages on an ongoing basis if the messages do not relate to agency business or if they have created a proper record. Upon leaving, employees are expected and instructed to remove all data, including text messages, prior to turning their cell phones in (again, with the caveat about making a lasting record of any agency-related messages). And, in a third and final phase, ICE deactivates former employee cell phones just before turning them over to a third party vendor for repurposing. *See* generally Richard Clark declarations attached hereto.

conducted multiple broad and reasonable searches, including looking for text messages on the cellular devices it still had (the Feere and Asher phones), as well as in electronic records where back up documentation of text messages might exist. *See* Schurkamp declaration, attached to Defendant's Motion for Summary Judgment. ICE did not ask to be excused from searching for documents that no longer exist. If Plaintiffs are suggesting that ICE has refused to search specific phones for text messages, that is also not so. ICE *cannot* search the phones that have been deactivated as (a) ICE was no longer in possession of the phones after deactivation; and (b) there is no preservation of text messages after deactivation so even if ICE retained possession there would be nothing to search. Simply put, ICE cannot search for something on a device it does not have and it cannot search for something that does not exist.[4] Plaintiffs assert that Defendant has destroyed documents without differentiating between responsive documents and non-responsive documents. While it is possible that the process of turning in cell phones (half of which happened before the FOIA request was issued) resulted in the deletion of some content on those devices, there is no evidence whatsoever that any of that content was responsive to the FOIA request and there is unequivocal evidence that the deactivation occurred before the sub-component that had the phones even knew about the FOIA request.

It is important to note that this is not really a dispute about the search made by ICE, it is a dispute about *when* ICE made that search and about ICE's recordkeeping. The timing of the

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[4] As stated in Richard Clark's prior declaration, "ICE has no means by which to systematically search mobile phones for text messages. ICE expects employees to move relevant text messages from their phones to a more appropriate system which meets federal records keeping requirements. [Upon termination of employment] [t]here would no longer be any copies of text messages within the telephone carriers or mobile device equipment providers infrastructure." Clark decl. 2/9/22, ¶ 18. Once a phone is deactivated, there are no texts on it.

search is a legitimate issue in FOIA litigation; however, an agency's recordkeeping is not.[5]

Plaintiffs have insinuated that ICE has somehow acted in bad faith in response to their request despite Defendant's multiple and extensive searches. First, as the declarations filed previously with the Court establish, ICE has made multiple diligent searches in a rigorous and good-faith effort to locate responsive documents. Absent a court order or some compelling circumstance, FOIA requests are generally handled on a first in, first out priority.[6] The delay in responding to the FOIA request in this case is, in fact, the unfortunate reality of ICE's FOIA workload. Similar to the backlog in processing visa applications on behalf of U.S. Citizenship and Immigration Services or the State Department, what appears to be unreasonable in a specific case must be considered as part of a virtual tsunami of other FOIA requests.

FOIA does not require that the receiving agency drop all other FOIA requests, much less

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[5] *See, e.g., Houser v. HHS*, 486 F. Supp. 3d 104, 114–15 (D.D.C. 2020)(absent evidence of improper destruction of documents, court need not go beyond affidavits). It is also important to note that the FOIA request was received approximately three months before the COVID pandemic began. As the Court is well aware, the pandemic reduced the available workforce everywhere. *See* Dep't of Justice, Summary of Annual FOIA Reports for Fiscal Year 2022 at 2, located at FY 21 DHS Annual FOIA Report.pdf. Moreover, DHS, including ICE, receives an enormous volume of FOIA requests, with the total increasing every year. Beginning in fiscal year ("FY") 2018, the ICE FOIA Office experienced a substantial and dramatic increase in the number of FOIA requests received by ICE compared to previous years. In FY 2015, the ICE FOIA Office received 44,748 FOIA requests; 63,385 FOIA requests were received in FY 2016. The number of requests received briefly decreased in FY 2017 to 47,893 but was then followed by a spike of 70,267 FOIA requests in FY 2018. In FY 2019, that number climbed to a total of 123,370 requests (which is nearly **500 new requests every working day**) received and in FY 2020 the ICE FOIA Office received 114,475 FOIA requests. Between FY 2017 and FY 2020, the ICE FOIA Office experienced approximately a 240% increase in FOIA requests. See Exhibit 1 to Defendant's Motion for Reconsideration, Declaration of Fernando Pineiro, at ¶ 5-6.

[6] *See, e.g., Open America v. Watergate Special Prosecution Force,* 547 F.2d 605 (D.C. Cir. 1976)(FOIA "due diligence" requirement may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of exceptional need or urgency).

all non-FOIA activity, and instantly process a new FOIA request. Nor does the statute require a federal agency to issue a "litigation hold" immediately upon receiving a request. *Houser v. U.S. Dep't of Health & Hum. Servs*., 486 F. Supp. 3d 104, 114 (D.D.C. 2020)(absent a showing that the government has improperly destroyed agency records, not important that a litigation hold was not issued). Therefore, as between ICE's overall FOIA workload and the outbreak of COVID-19, as well as the "first in, first processed" approach to requests, the delay between when the FOIA request was made and when ICE took steps to find responsive documents was entirely reasonable.

The touchstone for evaluating an agency's response to a FOIA request is whether it made a good faith effort to search for the requested records, using methods which can be reasonably expected to produce the information requested.[7] It does not have to show that it made a perfect search or that it ensured that every last document was preserved.[8]

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[7] *Nation Magazine v. U.S. Customs Serv*., 71 F.3d 885, 890 (D.C. Cir. 1995); *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *Stalcup v. CIA*, 768 F.3d 65, 74 (1st Cir. 2014) (noting that resolution of search claim 'turns on whether the agency made a good faith, reasonable effort using methods which can be reasonably expected to produce the information requested"; *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993) (noting that crucial search issue is whether agency's search was reasonably calculated to discover the requested documents).

[8] *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Veterans Affs*., 828 F. Supp. 2d 325, 335 (D.D.C. 2011)(noting defendant's position that no case holds that agencies must preserve, restore, and search evidence whenever a pending FOIA request seeks electronic records); *Hornbostel v. U.S. Dep't of the Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), aff'd, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015) (finding agency search is "not unreasonable simply because it fails to produce all relevant material"); *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) ("the factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant"); *In re Wade*, 969 F.2d at 249 n.11 (same); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d. 479, 498 (S.D.N.Y. 2010) (noting that discovery of two additional responsive documents in an area that the CIA determined would

As stated by Richard Clark, absent an employee creating a non-text record of his or her text messages, "[t]he only means through which ICE can access an employee's text messages is with the cooperation of the employee or through a forensic analysis of the specific device." Clark decl. 2/9/22, ¶ 12. This, of course, applies only to those devices still in ICE's possession. ICE searched the Asher device but was unable to access the Feere device or get his cooperation. Moreover, as regards the reasonableness of a search, agency declarations are entitled to a presumption of good faith.[9] Consequently, the failure of a search to produce particular documents, or mere speculation that as yet uncovered documents might exist, does not undermine the adequacy of a search nor prevent entry of judgment for the agency.[10]

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probably not lead to uncovering responsive documents does not render the CIA's search inadequate); *Blanck v. FBI*, No. 07-0276, 2009 WL 728456, at *7 (E.D. Wis. Mar. 17, 2009); *Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("perfection is not the standard by which the reasonableness of a FOIA search is measured"); *Garcia v. DOJ*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("[t]he agency is not expected to take extraordinary measures to find the requested records").

[9] *Houser v. HHS*, 486 F. Supp. 3d 104, 114 (D.D.C. 2020)(affidavits are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents,"), *quoting SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Chilingirian v. EOUSA*, 71 F. App'x 571, 572 (6th Cir. 2003) (*citing U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)); *Carney*, 19 F.3d at 812 (holding that "affidavits submitted by an agency are accorded a presumption of good faith"; *Havemann*, 629 F. App'x at 539; *Coyne v. United States*, 164 F. App'x 141, 142 (2d Cir. 2006); *Peltier v. FBI*, No. 03-905, 2005 WL 735964, at *4 (W.D.N.Y. Mar. 31, 2005) (same); *Butler v. SSA*, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004), (same), *aff'd on other grounds*, 146 F. App'x 752, 753 (5th Cir. 2005).

[10] *Kucernak v. FBI*, 129 F.3d 126, 126 (9th Cir. 1997) ("[m]ere allegations that the government is shielding or destroying documents does [sic] not undermine the adequacy . . . of the search") (unpublished table decision); *Lasko v. DOJ*, No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010); *Assassination Archives Research Ctr. v. CIA*, No. 18-5280, 2019 WL 691517, at *1 (D.C. Cir. Feb. 15, 2019) (finding search adequate notwithstanding search did not locate several records requester speculated existed); *Clemente v. FBI*, 867 F.3d 111, 118 (D.C. Cir. 2017)(same); *Pub. Emp. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water*

B. <u>There Is No Evidence That Any Phones Had Responsive Documents</u>

There is absolutely no evidence that any of cell phones of the individuals that were referenced in the FOIA request had responsive documents on them at any time. Plaintiffs are assuming that there must have been text messages responsive to the FOIA requests on the phones at some time. Not only is there zero evidence of that, there is good reason to think it is simply not the case.

First, the only evidence of ***any*** communications is a single New York Times article in which one ICE official, then Acting Director Thomas Homan, said he heard about the incident from another (now former) ICE employee, Thomas Albence, and that Homan asked his staff what they could do about the state court judge's actions, including talking to a United States Attorney.[11] There is absolutely nothing in the article which indicates that text messages were part of these communications. It is more likely that these communications were either in person

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Comm'n, 740 F.3d 195, 200 (D.C. Cir. 2014) (noting that "an agency's failure to turn up every responsive document in an initial search is not necessarily evidence of bad faith"); *Steinberg*, 23 F.3d at 552; *Attkisson v. DOJ,* 205 F. Supp. 3d 92, 95 (D.D.C. 2016) (same); *Pinson v. DOJ*, 61 F. Supp. 3d 164, 179 (D.D.C. 2015) (finding that "the fact that additional documents responsive to [the] requests may exist, or that the agency's searches have been imperfect, does not mean that the searches were inadequate"); *Kintzi v. Office of the Att'y Gen*., No. 08-5830, 2010 WL 2025515, at *6 (D. Minn. May 20, 2010) ("No evidence before the court indicates that the document [plaintiff] seeks exists. Therefore, the court determines that the [agency] conducted a reasonable search and properly denied [the] request."); *Kromrey v. DOJ*, No. 09-376, 2010 WL 2633495, at *1 (W.D. Wis. June 25, 2010) ("While plaintiff alleges that there must be more records, he has produced no evidence that there are any additional records, nor does he dispute the fact that the FBI conducted a search reasonably designed to yield documents responsive to his request"), *aff'd*, 423 F. App'x 624 (7th Cir. 2011); *Clemente v. FBI*, 741 F. Supp. 2d 64, 79 (D.D.C. 2010) (same); *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 405 F. Supp. 2d 3, 5 (D.D.C. 2005) (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was subject of its request); *Flowers v. IRS*, 307 F. Supp. 2d 60, 67 (D.D.C. 2004).

[11] *See* note 1 *supra*.

or by telephone, in which case there would be no document to produce. In any event, while Plaintiffs have the right to *ask* the agency to look to see if such text messages exist, it does not have a basis to assert that they in fact existed, much less for insinuating that they existed but were destroyed.

Second, as set out in the prior declarations of Richard Clark, it was and is ICE's policy that its employees not use text messaging to conduct agency business. *See, e.g.,* Clark decl., 2/9/22 at ¶¶ 13-15. This is precisely because text messages are not permanently retained by either the cellular provider or the agency, so federal recordkeeping regulations require that impermanent means of communication not be used or, if used notwithstanding the policy discouraging such use, they must be reduced to some form of more permanent record, i.e., a memorandum to the file. There were no such records of text messages responsive to the FOIA request found during ICE's search. Therefore, the assumption that text messages relating to the state court judge or her courtroom officer existed at some point in time requires an assumption that the employee violated ***two*** ICE policies: one against the use of text messaging for official agency business and the other requiring the creation of a permanent record of any such text messages.

Under FOIA, the burden is on a plaintiff to show sufficient facts to justify discovery. As is stated below, it is not enough to argue that records *might* have once existed and *may* have been destroyed.

C. <u>Most of The Phones Should Have Been Wiped Before the FOIA Request</u>

Not only are ICE employees instructed to avoid creating text messages regarding official business (and not to use government phones for personal business) in the first place, they are also instructed to wipe all content from their cell phones upon completing their ICE employment. As

stated by Richard Clark, ICE discourages employees from utilizing text messages for the creation of records and provides instructions to employees on how to appropriately retain text messages, in the event that they inadvertently do. Clark decl., 2/9/22 at ¶ 13. "Given the overarching policy that discourages the creation of records via text message, coupled with instructions on how to appropriately preserve them should they coincidentally be created, federal records would only exist on employee phones for a brief and transitory amount of time." *Id.*, ¶ 15.

Three of the seven employees named in the FOIA request left ICE ***before*** the FOIA request was received. Thomas Homan left on July 25, 2018; Ronald Vitiello left on April 26, 2019; and Thomas Blank left on June 21, 2019. The FOIA request was received on November 19, 2019. *See* Schurkamp declaration to Motion for Summary Judgment, ¶ 5; Second Supplemental declaration of Richard Clark attached hereto at ¶ 6. Thus, as to these three employees, based on ICE policies, it must be assumed that there were no responsive documents at the time the FOIA request was received.

One former ICE employee, Nathalie Asher, remained with the agency longer than the others but is also no longer employed by ICE. *Id.* Her cell phone has not been wiped and was searched but had no responsive documents. Second Supplemental Clark decl. ¶¶ 6, 16. There can be no basis for discovery regarding her phone as there is no issue regarding possible destruction of responsive documents. A fifth ICE employee, Jon Feere, apparently brought a cell phone that was issued to him by another government component to his ICE service. It is unclear whether Mr. Feere complied with agency policy (by avoiding using text messages for official duties and by wiping the phone clean when he left), but, in any event, ICE has done nothing to remove any content on Mr. Feere's phone. Instead, ICE attempted to gain access to his phone without success. *Id.*, at ¶ 18.

Of the seven targeted employees, therefore, only four left ICE *after* the FOIA request was received. These are Jon Feere and Nathalie Asher (whose phones have not been altered by ICE); Matthew Albence; and Tracy Short. *See* Second Supplemental Declaration of Richard Clark, at ¶ 6. Five of the seven phones were deactivated, but this was *before* the FOIA request was sent out to the sub-component that had them. *Id.*

D. None of the Target Phones Were Deactivated Prior to Litigation

As stated in the declaration of Fernando Pineiro (attached to the Motion for Reconsideration), ICE used to receive approximately 50,000 FOIA requests per year but now receives around 120,000 requests per year (a more than 240% increase, or almost two and one half times the prior volume). It would be both impractical and impossible for ICE to issue document holds on all FOIA requests as soon as they come in. This is because the FOIA requests must be processed so as to determine what documents are being sought, for what time period, and where those documents are likely to be located. This level of analysis requires time.[12] No federal government agency, including ICE, can be expected to issue document hold requests to all of its sub-components based on the filing of a FOIA request. *See, generally,* Declaration of Fernando Pineiro.

Instead, trained FOIA processors review the requests on a first come, first served basis. Document requests to appropriate sub-components are then issued once the analysis is complete (regarding the likely record holders, the dates, etc.). This is standard practice at ICE and across the federal government.

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[12] While some FOIA requests undoubtedly are narrower than others, most are complex and even the simpler ones require analysis to determine where to look for the documents.

It is important to note, again, that **not one phone was deactivated *after* the complaint was filed.** *See* Second Supplemental Clark decl. at ¶¶ 6, 10. The agency processed the FOIA request to the best of its ability given the overwhelming volume of FOIA requests it receives. And it took no steps to destroy responsive documents. What it did was process the request in the normal course of business. While this resulted in target phones being deactivated after the FOIA requests was received, that was purely a function of the agency's inability to process the requests sooner given the volume of FOIA requests that it receives on a daily basis (approximately 500 per business day in 2019). As stated, three of the phones should have been wiped by the departing employee before the FOIA request was received, long before deactivation, and long before the complaint was filed. Six of the seven employees left before the complaint was filed and all of the phones that were deactivated (5 of the 7) were deactivated *prior* to the complaint. Therefore, a true litigation hold would have had no impact as litigation had not begun prior to deactivation.[13]

E. <u>No Records Were Destroyed with the FOIA Request in Mind</u>

Plaintiffs have made inflammatory statements, including "why did ICE order the deletion of text messages and other mobile device data in 2017?" Memorandum in Support at 1. There is no evidence in the record that there was a specific order for the destruction of texts or other data from the target phones in 2017; indeed, the FOIA request was not made until November of 2019.

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[13] Generally, a lack of timeliness does not preclude summary judgment for an agency in a FOIA case. *Papa v. U.S.*, 281 F.3d 1004 (9th Cir.2002) (production of all nonexempt material, "however belatedly," moots FOIA claims); *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir.1996) (rejecting claim of bad faith where agency took over two years to answer FOIA request); *Carney v. U.S. Dep't of Just.,* 19 F.3d 807, 812-13 (2d Cir. 1994); *Hornbostel v. U.S. Dept. of Interior*, 305 F.Supp.2d 21, 25 (D.D.C.,2003).

So there is absolutely no rationale for discovery as to an order made two years before the FOIA requests in this case. This overreaching speaks volumes about Plaintiffs' approach to this litigation.[14]

The target cell phones were not deactivated in response to the FOIA litigation. Plaintiffs have not, and cannot, show otherwise. In fact, the reality is that the phones were deactivated in the normal course of ICE business as regards to employees leaving. Plaintiffs are trying to retroactively narrow the very broad scope of their FOIA requests to bolster the argument that ICE knew Plaintiffs were interested in text messages on the cellular telephones of the named individuals and that the alleged failure to preserve the contents of the phones is bad faith. This ignores the reality that (a) ICE cannot respond to every new FOIA request immediately; and (b) ICE in this case made a reasonable and good faith search- actually, multiple searches; and (c) the phones that were deactivated were deactivated prior to the sub-component's receipt of the FOIA tracker.

As is demonstrated in the declarations filed with the Court, ICE does not have a central, overarching infrastructure capable of preserving text messages. *See, e.g.,* Clark decl., 2/9/22 *passim*. ICE does not have the technical ability to search its employees' text messages. *Id.* The only way is by a manual review of the actual cellular telephone *if* the messages still exist on the phone. In this case, there is no evidence that any responsive messages *ever* existed on the targeted telephones, and certainly no evidence that such messages exist now (even if ICE had all

[14] If Plaintiffs are referring to an ICE policy, they should say so. But, in any event, a challenge to a policy in existence two years before the FOIA request in this case cannot be made via FOIA litigation.

the phones, which it does not). FOIA does not require an agency to search records that it cannot search. *Wilson v. DOJ*, 270 F.Supp.3d 248, 255 (D.D.C. 2017) (rejecting argument that agency violates FOIA when, because of technical inability, it does not search a particular file); *Lockett v. Wray*, 271 F.Supp.3d 205, 210 (D.D.C. 2017) (summary judgment for agency where agency had inability to conduct requested search); *Moore v. Nat'l DNA Index. Sys.*, 662 F.Supp.2d 136, 139 (D.D.C. 2009) (where the requested search is "literally impossible for the defendants to conduct," not searching satisfies FOIA's requirement to conduct a search reasonably calculated to uncover responsive documents).

Plaintiffs' argument that ICE had an obligation to preserve the phones simply because it received a FOIA request is, at base, an argument about ICE's document retention policies. It is not cognizable in a FOIA action such as this. *See* Dkt. 1; *see also, e.g., Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 154 (1980) ("Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records"); *Conti v. U.S. Dep't of Homeland Sec.*, No. 12 CIV. 5827 AT, 2014 WL 1274517, at *14 (S.D.N.Y. Mar. 24, 2014)("DHS has no obligation to preserve its records according to the rules of civil discovery"), *citing Landmark Legal Found. v. E.P.A.*, 272 F.Supp.2d 59, 66–67 (D.D.C.2003) .[15]

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[15] The *Landmark* case is distinguishable from the present case because in *Landmark* the agency violated an injunction issued by the court. *See Ferrigno v. U.S. Dep't of Homeland Sec.*, No. 09 CIV. 5878 RJS, 2011 WL 1345168, at *5 (S.D.N.Y. Mar. 29, 2011). As stated in *Forsham v. Harris*, 445 U.S. 169, 186 (1980), "FOIA imposes no duty on the agency to create records." There is no duty on an agency to copy the contents of a cellular telephone of a departing employee based upon the chance that the contents might be responsive to a FOIA request. Critical here is that at the time the target telephones were taken out of service, the FOIA

F. Plaintiffs Have Not Shown a Need for Discovery

Discovery is the exception, not the rule, in FOIA cases. *See, e.g., CareToLive v. FDA*, 631 F.3d 336, 345-46 (6th Cir. 2011) ("Claims under the [FOIA] are typically resolved without discovery on the basis of the agency's affidavits."); *Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (noting that discovery is limited in FOIA cases); *Maynard v. CIA*, 986 F.2d 547, 567 (1st Cir. 1993); *Gillin v. IRS*, 980 F.2d 819, 823 (1st Cir. 1992) (*per curiam*).

As stated in *Reich v. U.S. Dep't of Energy*, 784 F. Supp. 2d 15, 22-23 (D. Mass.), on reconsideration, 811 F. Supp. 2d 542 (D. Mass. 2011), "[t]he Court may grant a motion for discovery pursuant to Fed.R.Civ.P. 56(d) if the moving party puts forward sufficient evidence to show that the requested discovery is necessary, feasible, and can be outcome-determinative," *citing and quoting in part McGahey v. Harvard Univ. Flexible Benefits Plan*, 260 F.R.D. 10, 11 (D.Mass. 2009). The district court also said that "FOIA imposes a stringent burden on parties moving for discovery." *Id., citing Wheeler v. C.I.A.*, 271 F.Supp.2d 132 (D.D.C.2003), and *Giza v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 748, 751 (1st Cir.1980). The court in *Reich* denied plaintiff's discovery requests because the agency affidavits were "reasonably detailed" and "submitted in good faith" and plaintiff presented no evidence that declarants "misled the court or had any motivation to do so"). That is precisely the case here.[16]

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tracker/inquiry had not been disseminated due to the FOIA backlog. Therefore, there was no reason for the sub-component holding the devices to suspect that the phone contents required preservation, particularly since the agency's policy is that text messages should not be used to conduct official agency business and, if they are, those messages should be separately preserved. This is a general responsibility of the individual employee, however, and it goes to ICE's record preservation practices and not to the adequacy of its FOIA search.

[16] *See also Heily v. Dep't of Commerce*, 69 F. App'x 171, 174 (4th Cir. 2003) (per curiam) ("It is well-established that discovery may be greatly restricted in FOIA cases"); *Justice*

Plaintiffs raise numerous rhetorical questions, but the answers to them will not result in the production of documents. And that is what FOIA is about. Plaintiffs claim that they need discovery to determine why ICE issued an order two years before their FOIA request was made. As stated, that does not remotely justify discovery. Plaintiffs have questioned whether any data exists on the five devices that were deactivated. Memorandum in Support at 1. As made clear in the attached Second Supplemental Declaration of Richard Clark, ICE could not search those devices because they were no longer in its possession when the FOIA request was tasked out to OCIO. *See* Second Supplemental Decl. at ¶¶ 10, 12. Therefore, discovery as to that question will also not lead to the production of documents.

Plaintiffs also question how ICE can claim that the devices were deactivated when the employees left ICE employment when the actual dates of deactivation were sometimes months later. *Id.*, at 1-2. But this represents a basic misunderstanding of Richard Clark's declarations. What Mr. Clark has said is that employees are instructed to wipe all data off their phones prior to turning them in at the end of their employment. And, at some subsequent time, the phone is deactivated with the cellular carrier. *Id.*, at ¶ 10. That is when ICE turns the phone over to a vendor for repurposing. Thus, properly understood, ICE's process involves three events. First, when an employee leaves, they are responsible for removing all text messages, emails, etc. Second, at some point, in anticipation of turning a batch of phones over to its vendor, ICE

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v. IRS, 798 F. Supp. 2d 43, 47 (D.D.C. 2011) (noting that discovery is "disfavored" in FOIA actions), *aff'd,* 485 F. App'x 439 (D.C. Cir. 2012); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions"); *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994)("discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face").

contacts the carrier and deactivates the service to that phone.[17] Lastly, ICE turns the physical phone over to a vendor and no longer has possession or control.[18]

In terms of the specific discovery proposed by Plaintiffs, Defendant responds as follows:

1. Interrogatory addressing the dates of each named custodian's employment at ICE;
   Response: Defendant has provided the only date that matters, i.e., the date when each employee left ICE;

2. Their position(s) during that time;
   Response: The positions are not relevant as Plaintiffs chose the seven employees at issue in their FOIA requests; moreover, this is both publicly known and known to Plaintiffs;

3. Identify (e.g., by serial number or other unique identifier) the government-issued mobile devices used by each named custodian during their employment at ICE;
   Response: FOIA does not require this level of detail but instead requires only that the agency demonstrate that it made a reasonable search, which ICE's declarations establish. Moreover, there is nothing that Plaintiffs can do with this information as ICE does not have five of the seven phones and has either searched or attempted to search the other two;

4. Clarify the timeline for the issuance, return, and deactivation of the relevant devices, as well as the deletion and/or preservation of any data contained on them;
   Response: This information has been provided in the Second Supplemental declaration of Richard Clark; again, FOIA does not require a "chain of custody" or forensic recitation of search results, but only reasonably detailed affidavits.

5. Clarify whether ICE has actually examined the relevant devices that were purportedly deactivated, and, if so, the nature of that examination and whether any data was ultimately located on the device;
   Response: This has been provided in the Second Supplemental declaration of Richard Clark; moreover, FOIA does not require that an agency provide "the nature of its examination" of its document locations;

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[17] It is not unreasonable that the agency does not terminate service with its carrier more promptly. Instead, for efficiency purposes, ICE waits until it has a batch of devices and process those devices in a group versus one device at a time. Second Supp. Clark decl., ¶ 12.

[18] FOIA requires an agency search, and produce, only those documents or records which are in its control. As described above, five of the seven phones were no longer in ICE's control when the FOIA request was tasked out to OCIO.

6. Identify the categories of data retained on Nathalie Asher's mobile device (which ICE says was retained and is accessible), and the scope of any searches of that data to date;

Response: This has largely been provided in the Second Supplemental declaration of Richard Clark, where Clark affirms, under oath, that the device was searched for responsive documents and none were found.

7. Provide copies of policies, procedures, and instructions concerning the deletion or preservation of mobile device information in effect from 2015 to 2021, to the extent not already produced;

Response: This goes way beyond what FOIA requires or courts have ordered. It also seeks documents outside the time period of the FOIA requests. Responding further, Defendant states that the requested documents are irrelevant to the question before the Court, which is did ICE make a reasonable search for responsive documents? Courts have consistently denied enforcing FOIA requests that seek broad discovery. Moreover, the policy relating to the creation, preservation and deletion of cellular device content that was in effect at the time specified in the FOIA request has been provided.

8. Records of how ICE promulgated the November 2017 "IOS Device Data Wiping Quick Reference Guide" to its employees, such as any cover memorandum or instructions that accompanied the guide;

Response: See response to item number 7. Responding further, Defendant states that Plaintiffs now seek to greatly expand, and transform, their FOIA request through the motion for discovery. That is inappropriate.

9. Any orders, logs, correspondence, and other documents that record the issuance, return, and/or deactivation of the relevant mobile devices, and the deletion of any data contained on them;

Response: See response to item numbers 7 and 8. This has nothing to do with whether a reasonable search was made.

10. Communications and other records documenting the reasons for any deactivation or deletion of the relevant devices and/or data contained on them;

Response: See response to item numbers 7 and 8.

11. Records, if any, of the processing of this FOIA request prior to the filing of this lawsuit;

Response: See response to item numbers 7 and 8. An agency's internal processing records are never required in FOIA litigation, to the government's knowledge. The declarations filed in this case fully describe the agency's search. What occurred prior to filing the complaint is irrelevant.

12. ICE's recent communications with its former employee Jon Feere about accessing his government-issued mobile device.

Response: There is no basis in the record before the Court to question the efforts of ICE to access Mr. Feere's device. This is also a type of record that courts do not order produced.

13. A deposition of up to four (4) hours of ICE's declarant Richard Clark, to be held at a mutually convenient location in Washington, D.C. regarding his declarations, methodology, ICE's policies and procedures; and ICE's technical capabilities to access, search, and preserve mobile device data.

Response: There is nothing before the Court to suggest any issues with Mr. Clark's declarations. The level of detail sought by Plaintiffs is, frankly, astounding for a FOIA case. As numerous courts have held, a FOIA defendant's declarations are entitled to a presumption of accuracy and legitimacy. Plaintiffs have no basis for suggesting that the core factual assertions of Mr. Clark's declarations regarding the seven mobile devices is inaccurate. Nor is it appropriate or productive to question Mr. Clark on ICE's policies or its technical abilities. The technical abilities apply, at most, to one device – Mr. Feere's – which ICE tried unsuccessfully to unlock using the best technology available to it.

The discovery motion is also premature. Plaintiffs have received 388 pages in mid-December following the voluntary lift of the 7A exemption by Defendant. They have not explained to the Court why they think there is more out there to be produced but only raised a number of questions they find interesting. Most of these, as stated, have been answered. And the rest would not lead to additional documents, so they are pointless in a FOIA action.

IV. SUMMARY JUDGMENT SHOULD BE ENTERED FOR DEFENDANT

This litigation has run its course. Under FOIA, the sole issue is whether an agency has made a reasonable search for responsive documents (and, in some cases but not this one) whether redactions or withholding is appropriate. Nothing in Plaintiffs' filing undermines the fact that ICE made an extensive search for documents ***and*** produced hundreds of pages of responsive documents. The Court ought not allow the tail to wag the dog; this is not a criminal case nor should the agency's actions be judged by civil discovery standards. As stated by the District of Columbia (which handles more FOIA cases than most other districts combined), "[the fact that]

an agency once possessed responsive documents but does not at the time of the FOIA request does not preclude summary judgment in the agency's favor. FOIA does not impose a document retention requirement on agencies." *Wadelton v. Dep't of State*, 208 F. Supp. 3d 20, 27–28 (D.D.C. 2016). And, in this case, there is no evidence that ICE possessed responsive documents at any time, much less that it destroyed responsive documents; as stated, it deactivated five cell phones which should not, and, as far as anyone knows did not, contain responsive documents.[19]

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[19] *See generally Kohake v. Dep't of Treasury*, 630 F. App'x 583, 588 (6th Cir. 2015) (finding that "the fact that the IRS may have destroyed certain records pursuant to its policy does not render the search at issue unreasonable"); J*udicial Watch v. DOT*, No. 02-566, 2005 WL 1606915, at *7 (D.D.C. July 7, 2005) (upholding search even though some responsive records, which once existed, were destroyed prior to plaintiff's request); *cf. Santana v. DOJ*, 828 F. Supp. 2d 204, 209 (D.D.C. 2011) (determining FOIA provides no remedy in situation where records sought are no longer within government's possession); *Callaway v. U.S. Dep't of the Treasury,* 824 F. Supp. 2d 153, 157 (D.D.C. 2011) (noting that Court's "authority is limited to the release of non-exempt agency records in existence at the time the agency receives the FOIA request"). *West v. Spellings*, 539 F. Supp. 2d 55, 62 (D.D.C. 2008) ("While four files were missing, FOIA does not require [the agency] to account for them, so long as it reasonably attempted to located them"); *Ferranti v. DOJ*, No. 03-2385, 2005 WL 3040823, at *2 (D.D.C. Jan. 28, 2005) (rejecting plaintiff's "contention that EOUSA should account for previously possessed records"); *Maynard*, 986 F.2d at 564 ("The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it," *quoting Miller*, 779 F.2d at 1385); *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys*., 762 F. Supp. 2d 123, 134 (D.D.C. 2011) (determining search adequate even though agency's search failed to locate responsive record previously posted on agency's website); *McGehee v. DOJ*, 800 F. Supp. 2d 220, 230 (D.D.C. 2011) (determining that although some enclosures and attachments are missing from production it is not enough "in the context of the FBI's search and the size of its production . . . to render the FBI's search inadequate"); *Dorsey v. EEOC*, No. 09-519, 2010 WL 3894590, at *3 (S.D. Cal. Sept. 29, 2010) (finding that plaintiff's "conclusory statement" that EEOC "lost or destroyed" responsive records "does not raise an issue of fact precluding summary judgment" in favor of agency), appeal dismissed, 481 F. App'x 417 (9th Cir. 2012); *Elliott v. NARA*, No. 06-1246, 2006 WL 3783409, at *3 (D.D.C. Dec. 21, 2006) ("An agency's search is not presumed unreasonable because it fails to find all the requested information.").

CONCLUSION

While Plaintiffs are free to waste their resources on their quest to ensnare a wild goose, there must be a rational limit on the extent to which they waste the government's resources. The discovery proposed by Plaintiffs is unjustified, unnecessary and will prolong this litigation without any benefit to Plaintiffs. ICE conducted reasonable searches for responsive documents, as soon as it had the resources to direct to Plaintiffs' request. There is no evidence that any documents were destroyed nor any basis to think that discovery will lead to additional documents.

Because ICE's declarations establish that it made a more than reasonable search for responsive documents, and that its search was launched within a reasonable period in light of the enormous number of FOIA requests it received, the Court should deny Plaintiffs' motion for discovery and enter summary judgment for Defendant.

Respectfully submitted,

MARY M. MURRANE
Chief, Civil Division

Dated: January 20, 2023

By: */s/ Thomas E. Kanwit*

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CERTIFICATE OF SERVICE and L.R. 7.1 COMPLIANCE

I, Thomas E. Kanwit, Assistant United States Attorney, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

I further certified that I have consulted with counsel for Plaintiffs in an attempt to narrow the issue presented herein.

Dated: January 20, 2023

By: */s/ Thomas E. Kanwit*
Thomas E. Kanwit
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS and AMERICAN OVERSIGHT Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT Defendant.	D. Mass No. 21-10761-NMG

SECOND SUPPLEMENTAL DECLARATION OF RICHARD CLARK

I. INTRODUCTION

I, Richard J. Clark, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am employed as the Chief Technology Officer (CTO) in the Office of the Chief Information Officer (OCIO) for the U.S. Immigration and Customs Enforcement (ICE). I have held this position since January 28, 2019. Prior to this position, I was the Chief Enterprise Architect (CEA) in OCIO for ICE. I have over twenty-five years of experience in Information Technology (IT). I have a degree in Electrical and Computer Engineering from Clarkson University.

2. ICE OCIO is responsible for providing information technology services and products that enable ICE to meet its mission. Services that the OCIO provides include the purchasing and contracting of mobile devices, their supporting services, mobile device

management infrastructure, electronic mail (e-mail) and supporting infrastructure for e-mail operations for all ICE employees.

3. As the CTO and CEA, I have specific knowledge of the policies, procedures and capabilities of the ICE infrastructure and contracted services pertaining to email and mobile devices issued by ICE to its employees.

4. I make this second supplemental declaration in my official capacity in support of ICE's Opposition to Plaintiffs' Motion for Discovery in the above captioned Freedom of Information Act (FOIA) action. The statements contained in this supplemental declaration are based upon my personal knowledge and experience, information provided to me in my official capacity, and upon conclusions and determinations made in accordance therewith.

5. This declaration supplements and incorporates by reference my previous declarations dated February 9, 2022, and August 18, 2022.

6. As an initial matter, I am providing the Court below with supplemental information as to when the former agency employees at issue left the agency and when their devices were deactivated.

Former Employee	Agency Departure Date	Deactivation Date
Thomas Homan	7/25/2018	2/26/2019
Matthew Albence	8/29/2020	9/3/2020
Thomas Blank	6/21/2019	5/21/2020
Tracy Short	6/27/2020	1/19/2021
Ronald Vitiello	4/26/2019	12/16/2020
Jon Feere	1/20/2021	N/A
Nathalie Asher	12/31/2021	N/A

7. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "Why did ICE order the deletion of text messages in 2017?"

8. Response: ICE did not order the deletion of text messages and other mobile device data in 2017. ICE's policy, as explained in my prior declarations, was that employees were not to use their cellular telephones for text messaging for work-related purposes. However, in the event work-related text messages were created, employees were responsible for reducing them to another medium that was preserved, such as a written memorandum to the file or screenshots of the text messages that were later forwarded to the employee's work e-mail account. ICE's policy is (and was at all relevant times to the FOIA requests and subsequent litigation) that individual employees are responsible for removing all data from their mobile telephones upon leaving ICE employment. *See* Supplemental Declaration of Richard Clark, ¶¶ 10-13. There is no reason to believe that the employees that are the subject of this request did not do that.

9. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "Does any data remain on the five devices where the 'lines were confirmed deactivated?' Has ICE looked at those devices to check?"

10. Response: Pursuant to ICE policy, the five devices were securely deleted (i.e., wiped clean of all data) before being turned over to an ICE vendor for recycling. If the employee did not securely delete the data on the device, a property custodian would have securely deleted the data on the device before being turned over to an ICE vendor for recycling. I cannot make an affirmative statement as to whether or not the five former employees reviewed the content on their devices before they, or before an ICE property custodian, securely deleted those devices. OCIO was tasked by the ICE FOIA Office to conduct a search for this FOIA Request on June 4, 2021. All five (5) of the devices at issue were no longer in the agency's possession at that time.

11. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "How can ICE contend that these devices were deactivated in connection with personnel leaving the agency when none of the devices were deactivated within six months of its custodian's departure? Why, in fact, were these devices deactivated and/or deleted?"

12. Response: These devices would have been wiped clean by the individual employees upon leaving ICE employment. These devices would also have been deactivated pursuant to agency policy in the normal course of processing the devices post-employment. For efficiency purposes, it would not be unusual for the agency to batch up multiple devices for recycling, and not to process a single device at a time.

13. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "Where is the device that Mr. Albence used during his last six months at ICE, and does it contain data from the prior time period?"

14. Response: In my previous declaration, dated August 18, 2022, paragraph fourteen (14) contained an error. That paragraph stated that Mr. Albence's device was deactivated on "February 19, 2020," but this should have said September 3, 2020. Mr. Albence left the agency effective on August 29, 2020.

15. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "What types of text messages are preserved on Ms. Asher's device, what texting applications did ICE search, and why did it search only for messages exchanged with the other six named custodians?"

16. Response: With respect to Ms. Asher's phone, Ms. Asher's phone was given to an ICE property custodian on 1/4/2022. ICE conducted a search of the phone on July 8, 2022, and did not find *any* communications on the device for the time period between March 15, 2018 through April 25, 2019 (the FOIA request period).

17. On page nineteen (19) of Plaintiff's Memorandum in Support of Renewed Motion for Discovery, filed on December 12, 2022, Plaintiff stated: "Why is ICE unable to unlock Mr. Feere's government-issued phone without his cooperation?"

18. Response: As reported to the Court on October 3, 2022 (dkt. # 65), Defendant reports that it contacted Mr. Feere to seek the passcode to his mobile device. Mr. Feere indicated that he was unsure of the code and was generally unwilling to assist ICE absent concessions from ICE in unrelated matters with which Mr. Feere is involved. As of November 3, 2022, ICE had made over 5,000 attempts to unlock Mr. Feere's device without success and informed Plaintiffs' counsel that it did not intend to continue these efforts.

19. Based on the above information, and my knowledge of the facts surrounding this case, there are no additional steps that ICE could feasibly take to search for content responsive to the FOIA request on any of the seven mobile devices at issue.

I declare under pains and penalties of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this 20th day of January 2023.

RICHARD J CLARK

Digitally signed by RICHARD J CLARK
Date: 2023.01.20 15:22:23 -05'00'

Richard J. Clark
Chief Technology Officer
Technology Transformation Office
Office of the Chief Information Officer
U.S. Immigration and Customs Enforcement
Department of Homeland Security

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS and AMERICAN OVERSIGHT	)	D. Mass No. 21-10761-NMG
Plaintiffs,	)	
v.	)	
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT	)	
Defendant.	)	

SUPPLEMENTAL DECLARATION OF RICHARD CLARK

I. INTRODUCTION

I, Richard J. Clark, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am employed as the Chief Technology Officer (CTO) in the Office of the Chief Information Officer (OCIO) for the U.S. Immigration and Customs Enforcement (ICE). I have held this position since January 28, 2019. Prior to this position, I was the Chief Enterprise Architect (CEA) in OCIO for ICE. I have over twenty-five years of experience in Information Technology (IT). I have a degree in Electrical and Computer Engineering from Clarkson University.

2. ICE OCIO is responsible for providing information technology services and products that enable ICE to meet its mission. Services that the OCIO provides include the purchasing and contracting of mobile devices, their supporting services, mobile device management

infrastructure, electronic mail (e-mail) and supporting infrastructure for e-mail operations for all ICE employees.

3. As the CTO and CEA I have specific knowledge of the policies, procedures and capabilities of the ICE infrastructure and contracted services pertaining to email and mobile devices issued by ICE to its employees.

4. Pursuant to the Court's opinion, dated June 3, 2022, I make this supplemental declaration to address the Court's concerns relating to data preservation on mobile phones and the process of deactivation of mobile phones. Specifically (1) the process by which it, as a general matter, deactivates and replaces employee mobile devices; (2) what, if any, steps it takes to preserve data located on mobile devices at the time they are deactivated; and (3) the dates on which each of the seven named custodians have had a mobile device deactivated since the first day of the Request period, and what steps, if any, were taken to preserve data located on each of those devices.

5. The statements contained in this supplemental declaration are based upon my personal knowledge and experience, information provided to me in my official capacity, and upon conclusions and determinations made in accordance therewith.

II. INFORMATION REGARDING DATA PRESERVATION ON MOBILE DEVICES

6. My previous declaration states that ICE OCIO does not have the capability or the supporting technological infrastructure to search mobile devices for messages.[1]

7. In its memorandum of opinion, the Court instructed ICE to provide a supplemental declaration describing the process by which ICE, as a general matter, 1) deactivates and replaces employee devices 2) what steps, if any, are taken to preserve data located on mobile devices at the time they are deactivated and 3) the dates on which each of the seven named custodians have

[1] *See* Defendant's Reply and Opposition to Plaintiffs' Cross-Motion for Summary Judgment, Declaration of Richard Clark, Doc. 37-2, February 14, 2022, ¶ 11-14.

had a mobile device deactivated since the first day of the Request period, and what steps, if any, were taken to preserve data located on each of those devices. ICE OCIO does not have a policy to preserve data on mobile phones nor does ICE OCIO have an infrastructure capability to preserve and/or store data from employees' cell phones.

8. As previously noted in my declaration, DHS Directive 141-03 provides a step-by-step guide of how individuals should preserve and maintain records, should any records be inadvertently created using chat, text, or instant messaging. The directive states that the [individual][should] "write a memo to the file. Be sure to include Date and time of the communication; Type of communication (e.g., text, voicemail, telephone call); Context of the message or conversation (electronic messages); Participants; Subject; Details on any decisions or commitments (verbal communications); Corresponding threads that precede a communication and provide more background."[2]

9. OCIO provides instructions to all ICE custodians of mobile devices on how to administratively reset and or wipe the mobile device before the mobile device is returned to its property custodian. The document with instructions is entitled "Steps to Erase All Data from iPhone_iPad.pdf," and provides a step-by-step guide to demonstrate how to erase data from mobile devices. *See* Exhibit 1.

10. Specifically, the instructions state the following: 'Log into your iOS device with your user passcode then tap on settings; Select the ">" to the right of your name and under your Apple ID account information select "iCloud" and turn off any iCloud services, then tap on "Find my iPhone"; Slide the "Find my iPhone" button to the off position and enter your Apple ID when prompted. Finally you will see the device disconnecting from the cloud; Tap <iCloud <Apple ID

[2] *Id.*at ¶ 14-15.

and scroll to the bottom of the screen and tap Sign Out; Press the home button and Select Settings then General and tap on Reset; Select "Erase All Content and Settings" and enter your passcode then tap on Erase iPhone Tap Sign Out to remove data from this iPhone; Tap on Erase iPhone again and the iOS device will reboot and wipe all the contents and then you will see the factory welcome screen; Turn your iPhone off and return to your property custodian.'[3]

11. Pursuant to OCIO instructions listed above, ICE mobile devices are reset by the employee to whom the ICE mobile device was assigned. This ensures that all content of the device has been securely erased prior to the device being e-cycled. OCIO provides further detailed instructions in its guidance document entitled: "IOS Device Data Wiping: Quick Reference Guide, Department of Homeland Security, Immigration Customs Enforcement OCIO."[4] This guidance is provided to all ICE personnel with mobile devices and identifies the steps ICE employees need to take to wipe and or erase all data from their mobile device prior to returning the device to an ICE Property Custodian or their supervisor. *See* Exhibit 2.

12. Per the instructions listed in IOS Device Data Wiping Quick Reference Guide, it is the ICE employee's responsibility to take appropriate steps to establish and maintain separate records if the employee had conducted official business on his or her cell phone utilizing applications with a messaging component other than e-mail.

13. Therefore, per DHS policy 143-01 and IOS Device Data Wiping Quick Reference Guides, it was the responsibility of the seven (7) custodians to take appropriate steps to maintain and preserve any data that may have inadvertently been stored or created on their individual assigned mobile devices that would be considered official business records.

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[3] Steps to Erase All Data from iPhone guide, Quick Reference Guide, Department of Homeland Security, Immigration and Customs Enforcement OCIO. *See* Exhibit 1.

[4] IOS Device Data Wiping: Quick Reference Guide, Department of Homeland Security, Immigration Customs Enforcement OCIO," (November 1, 2017).[4] *See* Exhibit 2.

14. Pursuant to the Court's Order dated June 3, 2022, ICE provides the following with respect to the seven (7) custodians' mobile devices: 1) Thomas Homan's line of service was deactivated on February 26, 2019; 2) Matthew Albence's line of service was deactivated on February 19, 2020; 3)Tracey Short's line of service was deactivated on January 19, 2021; 4) Jon Feere's mobile was returned to the property custodian on January 1, 2021; 5) Ronald Vitiello's line of service was deactivated on December 16, 2020; 6) Thomas Blank's line of service was deactivated on May 21, 2020; and 7) Nathalie Asher's mobile was returned to the property custodian in December 2021.

15. All lines were confirmed deactivated[5] with the exception of Nathalie Asher and Jon Feere's mobile devices. However, regarding Jon Feere's mobile device, it was determined that the cellphone that Mr. Feere used during his employment with ICE, was issued outside of normal procedures i.e. carried over from a previous agency. OCIO became aware of this matter after the Court's June 3, 2022, Order. Since this new development, ICE has not yet been able to unlock this device and respectfully requests the court to allow it 30-days to provide an update. This will provide an ample time for ICE to work extensively on unlocking this device if it is possible.

JURAT CLAUSE

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this 18th day of August 2022.

[5] Upon completion of employment at ICE, employees with mobile devices are instructed to deactivate their mobile devices. Deactivation of mobile devices signals that the mobile phone data has been wiped clean according to OCIO instructions outlined in the quick reference guide: IOS Device Data Wiping: Quick Reference Guide, Department of Homeland Security, Immigration Customs Enforcement OCIO," (November 1, 2017).[5]

RICHARD J CLARK

Digitally signed by RICHARD J CLARK
Date: 2022.08.18 16:07:52 -04'00'

Richard J. Clark
Chief Technology Officer
Technology Transformation Office
Office of the Chief Information Officer
U.S. Immigration and Customs Enforcement
Department of Homeland Security

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS and AMERICAN OVERSIGHT	)	D. Mass No. 21-10761-NMG
Plaintiffs,	)	
v.	)	
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT	)	
Defendants.	)	

DECLARATION OF RICHARD CLARK

In Support of The United States Immigration Customs Enforcement Motion For Summary Judgment

I. INTRODUCTION

I, Richard Clark, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am employed as the Chief Technology Officer (CTO) in the Office of the Chief Information Officer (OCIO) for the U.S. Immigration and Customs Enforcement (ICE). I have held this position since January 28, 2019. Prior to this position, I was the Chief Enterprise Architect (CEA) in OCIO for ICE. I have over twenty-five years of experience in Information Technology. I have a degree in Electrical and Computer Engineering from Clarkson University.

2. ICE OCIO is responsible for providing information technology services and products that enable ICE to meet its mission. Services that the OCIO provides include the purchasing and contracting of mobile devices, their supporting services, mobile device management

infrastructure, electronic mail (e-mail) and supporting infrastructure for e-mail operations for all ICE employees.

3. As the CTO and CEA I have specific knowledge of the policies, procedures and capabilities of the ICE infrastructure and contracted services pertaining to email and mobile devices issued by ICE to their employees.

4. I make this declaration in my official capacity in support of Defendant in the above captioned Freedom of Information Act ("FOIA") action. The statements contained in this declaration are based upon my personal knowledge and experience, upon information provided to me in my official capacity, and upon conclusions and determinations made in accordance therewith.

II. ICE'S Enterprise Vault (EV) Email Journaling System

5. Beginning in December 2008, ICE implemented a system for journaling email known as the Enterprise Vault (EV). Through this system, agency emails are maintained in accordance with applicable record retention schedules. Under this system, emails from December 2008 through July 2018 were backed up in such a way as to be searchable and recoverable.

6. Starting July 2018, ICE OCIO stores email in Microsoft 0365 system. Under this system, emails from July 2018 to present are backed up in such a way as to be searchable and recoverable.

7. In order for OCIO to conduct a search of email communications after 2008, a request should be made, via the Request for Electronic Documentation (RED) system. The RED system is where request for electronic data such as old emails, here post-2008, are submitted. This request should contain names of custodians identified by the requester and the time frame for archived emails. The OCIO team will use the Symantec Discovery

Accelerator tool to perform retrieval of the email from our Enterprise Vault (EV) based on the time frame and custodian name(s).

8. On June 4, 2021, The ICE FOIA office tasked OCIO, which is the office that stores all electronic data including emails, and thus the office most likely to have responsive records relating to the requested information. Plaintiffs requested all emails of the following individual(s): Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello from March 15, 2018, through April 25, 2019 as set forth in Plaintiffs FOIA request.

9. OCIO collected all email communications of Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello; who were identified by Plaintiffs' FOIA request.

10. These documents were then transferred to ICE FOIA paralegal, who was in charge of processing this data through ICE's "Relativity" platform. Relativity is an eDiscovery tool which was used to process and narrow-down the results by using search terms most relevant/likely to produce records from Plaintiffs' Request.

III General Information Regarding ICE's Short Message Service System (SMS) Backup

11. For the purposes of this discussion, the term "text messages" will refer to those conveyed by carrier-based services known as Short Message Service (SMS), Multimedia Message Service (MMS) as well as Apple's Messages. Text messages are not systematically archived and journaled by ICE.

12. Due to the significant technological differences in the management and transport of text messages, as compared to e-mails, there are challenges which organizations face when it comes to meeting federal records keeping requirements of text messages. The only means

through which ICE can access an employee's text messages is with the cooperation of the employee or through a forensic analysis of the specific device.

13. ICE has an archive and journaling system which allows us to retain and search e-mails. ICE discourages employees from utilizing text messages for the creation of records and provides instructions to employees on how to appropriately retain text messages, in the event that they inadvertently do.

14. ICE practices when it comes to text messages are consistent with DHS guidance. DHS Policy Directive 141-03 issued on February 23rd, 2018, is attached. *See EXHIBIT A*.

15. DHS Policy Directive 141-03 reminds employees that records exist independent of their means of creation. Policy further indicates that, for in-person communications or telephonic conversations of substance, the best way to memorialize transactions which would meet the definition of a "record" if in written form is to create a memorandum to file to capture the exchanges. Given the overarching policy that discourages the creation of records via text message, coupled with instructions on how to appropriately preserve them should they coincidentally be created, federal records would only exist on employee phones for a brief and transitory amount of time.

16. Additionally, during the timeframe in question, to prevent the possibility of a data breach resulting from residual information which may have temporarily resided upon a mobile phone, 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.

17. Short Message Service (SMS) and Multimedia Message Service (MMS) are telephone company/carrier services. None of the carriers keep the contents of SMS or MMS messages beyond a very brief period of time, less than 30 days. Apple messages/iMessages are

not telephone company/carrier services, but provided by Apple. Apple may store SMS or MMS messages within iCloud in addition to iMessages; however, all information stored within iCloud is encrypted, and Apple will only provide iCloud content in response to a search warrant issued with probable cause or customer consent. Apple considers the end user/ICE employee, not ICE the agency, the customer who needs to consent. Apple does not retain iCloud content after it is deleted, or the associated account is deactivated.

18. In summary, ICE has no means by which to systematically search mobile phones for text messages. ICE expects employees to move relevant text messages from their phones to a more appropriate system which meets federal records keeping requirements. There would no longer be any copies of text messages within the telephone carriers or mobile device equipment providers infrastructure.

19. Thus, should any records exist, OCIO's email search of the seven custodians on June 4, 2021, would have located them. Since there is no evidence to indicate additional records exist, further searches of email records are unnecessary and, given ICE's inability to search for text messages, Plaintiff's insistence that ICE does so is unreasonable.

JURAT CLAUSE

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this __9th__ day of February 2022.

_____

Richard J. Clark
Chief Technology Officer
Technology Transformation Office
Office of the Chief Information Officer
U.S. Immigration and Customs Enforcement
Department of Homeland Security

RICHARD J CLARK

Digitally signed by RICHARD J CLARK
Date: 2022.02.09 16:38:58 -05'00'

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS and AMERICAN OVERSIGHT	D. Mass No. 21-10761-NMG
Plaintiffs,	
v.	
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT	
Defendants.	

DECLARATION OF LYNNEA SCHURKAMP

I, Lynnea Schurkamp, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy FOIA Officer of the Freedom of Information Act Office (the "ICE FOIA Office") at U.S. Immigration and Customs Enforcement ("ICE"). The ICE FOIA Office is responsible for processing and responding to all Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. I have held this position since August 1, 2021. I am the ICE official responsible for supervising ICE responses to requests for records in litigation as well as incoming FOIA requests to ICE under the FOIA, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a (the "Privacy Act") and other applicable records access statutes and regulations. Prior to this position, I was the Assistant Disclosure Officer of the U.S. Secret Service FOIA Intake Team from July 21, 2019 until July 31, 2021. Prior to that I was the FOIA Program Manager/Litigation Coordinator for the National Organic Program in the Agricultural Marketing Service, U.S. Department of Agriculture ("USDA") for one year.

2. My official duties and responsibilities include the oversight and supervision of the ICE FOIA Litigation and Intake Teams. The Intake Team is responsible for acknowledging the receipt of all FOIA and Privacy Act requests at ICE (5 U.S.C. § 552 and 5 U.S.C. § 552a). This team also conducts searches for responsive records. The Litigation Team is responsible for picking up the case when a complaint is filed and seeing it through to completion. Depending on what is alleged in the complaint, the Litigation Team will conduct a search, gather responsive records, go through the records for responsiveness, process productions, and release records with applicable withholdings to the plaintiff or plaintiff's counsel. I manage and supervise the supervisors of the Intake and Litigation Teams. These teams are comprised of FOIA Assistants and Paralegal Specialists. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act.

3. I make this declaration in support of ICE's Motion for Summary Judgment in the above-captioned action. The statements contained in this declaration are based upon my personal knowledge, my review of documents kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties.

4. This declaration describes how ICE responded to Plaintiffs' FOIA request. In addition, in accordance with the requirements set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), this declaration explains the basis for withholding portions of the requested information pursuant to FOIA Exemptions 5 U.S.C. § 552 (b)(7)(A).[1] **ICE's *Vaughn* Index is attached hereto as Exhibit A**.

[1] ICE had additionally withheld portions of the requested information pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), however, the parties have agreed that these withholdings, and

I. PROCEDURAL HISTORY OF THE PLAINTIFFS' FOIA REQUEST AND THE INSTANT LITIGATION

5. This suit stems from a FOIA request Plaintiffs sent to ICE on November 19, 2019. The FOIA request was processed by the ICE FOIA Office and contained a request for the following records:

> " 1. All communications (including emails, email attachments, calendar invitations, text messages, letters, memoranda, or other communications) of the following ICE officials concerning Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment:
>
> a. Thomas Homan, Former Acting Director, or anyone communicating on his behalf, such as an assistant or scheduler
>
> b. Matthew Albence, Acting Director, Former Deputy Director, and Former Executive Associate Director for ERO, or anyone communicating on his behalf, such as an assistant or scheduler.
>
> c. Ronald Vitiello, Former Acting Director and Former Deputy Director, or anyone communicating on his behalf, such as an assistant or scheduler
>
> d. Thomas Blank, Former Chief of Staff
>
> e. Tracy Short, Principal Legal Advisor
>
> f. Jon Feere, Senior Advisor
>
> g. Nathalie Asher, Executive Associate Director of ERO
>
> h. All records concerning any investigation by ICE of Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment, including but not limited to any notes, reports, and memoranda.
>
> i. All records of final guidance, directives, or instructions provided by ICE to Mr. Lelling or his staff concerning Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment. Please provide all responsive records from March 15, 2018, through April 25, 2019."

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other withholdings identified by the Plaintiffs would not be challenged and so they have been excluded from the *Vaughn* Index.

6. By email dated November 19, 2019, the ICE FOIA Office acknowledged receipt of Plaintiffs' FOIA Request and assigned it ICE FOIA case number 2020-ICFO-08860.

7. No records were produced prior to Plaintiffs filing suit on May 20, 2021.

II. ICE'S STANDARD PROCEDURE FOR INITIATING SEARCHES IN RESPONSE TO FOIA REQUESTS

8. When the ICE FOIA Office receives a FOIA request, the intake staff evaluates it to determine if it is a proper FOIA request per DHS FOIA regulation 6 C.F.R. § 5.3. Generally, a FOIA request is considered proper and in compliance with DHS regulations if it reasonably describes the records sought and the records are under the purview of ICE.

9. If a FOIA request does not reasonably describe the records sought, the ICE FOIA Office will seek clarification from the requester. If the requested information is under the purview of a DHS component other than ICE, the ICE FOIA Office will refer the request to the appropriate DHS component for processing and direct response to the requester. If the FOIA request seeks records under the purview of a government agency other than DHS, ICE FOIA informs the requester to contact the other government agency directly and ICE FOIA administratively closes the FOIA request.

10. Proper FOIA requests are entered into a database known as FOIAXpress and assigned a case tracking number. Based upon the requester's description of the records being sought and ICE FOIA's knowledge of the various program offices' missions, the ICE FOIA Office identifies the program office(s) likely to possess responsive records and tasks the appropriate program office(s) to conduct the necessary searches.

11. Upon receipt of a proper FOIA request, the ICE FOIA Office will identify which program offices, based on their experience and knowledge of ICE's program offices, within ICE are reasonably likely to possess records responsive to that request, if any, and initiates searches within those program offices. Once the ICE FOIA Office determines the appropriate program

offices for a given request, it provides the FOIA point of contact (POC) within each of those program offices with a copy of the FOIA request and instructs them to conduct a search for responsive records. The POCs then review the FOIA request, along with any case-specific instructions that may have been provided, and based on their experience and knowledge of their program office practices and activities, forward the request and instructions to the individual employee(s) or component office(s) within the program office that they believe are reasonably likely to have responsive records, if any. In conformity with the ICE FOIA Office's instructions, the individuals and component offices are directed to conduct searches of their file systems, including both paper files and electronic files, which in their judgment, based on their knowledge of the way they routinely keep records, would most likely be the files to contain responsive documents. Once those searches are completed, the individuals and component offices provide any potentially responsive records to their program office's POC, who in turn, provides the records to the ICE FOIA Office. The ICE FOIA Office then reviews the collected records for responsiveness and application of appropriate FOIA Exemptions.

12. ICE employees maintain records in several ways. ICE program offices use various systems to maintain records, such as investigative files, records regarding the operation of ICE programs, and administrative records. ICE employees may store electronic records on their individual computer hard drives, their program office's shared drive (if the office uses one), DVDs, CDs, and/or USB storage devices. The determination of whether or not these electronic locations must be searched in response to a particular FOIA tasking, as well as how to conduct any necessary searches, is necessarily based on the manner in which the employee maintains his/her files.

13. Additionally, all ICE employees have access to email. ICE uses the Microsoft Outlook email system. Each ICE employee stores his/her files in the way that works best for that

particular employee. ICE employees use various methods to store their Microsoft Outlook email files: for example, some archive their files monthly, without separating by subject; others archive their email by topic or by program; still others may create PST files of their emails and store them on their hard drive or shared drive.

14. The ICE FOIA office notes that DHS Policy Directive 141-03 (Electronic Records Management Updates for Chat, Text, and Instant Messaging) that was issued on February 23, 2018 explicitly forbids ICE from using technology platforms (i.e. chats, apps, SMS etc.) as repositories for retaining federal records as a matter of practice.

15. DHS Directive 141-03 also notes that, "All internal DHS chat/messaging systems (i.e., Lync, Skype, or other tools) must display a banner/disclaimer prohibiting the system to be used to formally transact agency business or to document the activities of the organization.

16. However, if business is transacted using one of these platforms, individuals must take appropriate steps to establish and maintain a separate record of the communication.

17. Records received by the ICE FOIA Office from the program office POCs are assigned to a FOIA processor who makes a determination whether the records are responsive to the FOIA request, or not. If the records are responsive, the FOIA processor will redact information pursuant to the FOIA or the Privacy Act, as appropriate, while simultaneously ensuring that all reasonably segregated non-exempt information is released.

18. Frequently, the ICE FOIA Office must coordinate between multiple program offices to ensure the program office records are properly redacted and information is correctly segregated. Once the ICE FOIA Office completes its coordination efforts and all responsive records have been processed, the ICE FOIA Office releases the responsive records to the requester.

III. DESCRIPTION OF PROGRAM OFFICES TASKED WITH SEARCHING FOR RECORDS IN RESPONSE TO PLAINTIFFS' FOIA REQUEST

19. ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now employs more than 20,000 people in offices in every state and in 48 foreign countries.

20. The ICE FOIA Office determined that because of the subject matter of Plaintiffs' FOIA Request, and the ICE FOIA Office's experience and knowledge of what types of records each Office maintains, the following offices would likely have records responsive to Plaintiff's FOIA request: Office of Chief Information Office (OCIO), Office of Enforcement and Removal Operations ("ERO"), Office of Executive Secretariat (OES) and the Office of Chief of Staff. The ICE FOIA Office instructed each office to conduct a comprehensive search for records and to provide all records located during that search to the ICE FOIA Office for review and processing.

IV. OFFICE OF THE CHIEF INFORMATION OFFICE'S SEARCHES AND RESPONSE TO PLAINTIFFS' FOIA REQUEST

21. ICE's Office of the Chief Information Office (OCIO) is responsible for providing information technology services and products that enable ICE to meet its mission. Services that the OCIO provide include hardware and software support, share-point and web services, mobile device support, and cyber security education. Specifically, the Enterprise Services Branch serves a key function for ICE as it provides centralized management and comprehensive support to information technology (IT) operations across the agency such as Service Desk support, Network Infrastructure, Active Directory and Exchange, Change Management, and Investigation and

Litigation support to achieve IT efficiency and effectiveness for the more than 26,000 ICE users across the globe.

22. Beginning in December 2008 until June 2018, ICE OCIO implemented a new server-based disaster recovery system for email servers known as the Enterprise Vault (EV). Through the EV system, agency emails are maintained in accordance with applicable record retention schedules, and for data backup purposes. Under this system, emails from 2008 to June 2018 were backed up in such a way as to be searchable and recoverable. Beginning in June 2018 to present all email messages are backed up in the Microsoft O365 system.

23. In order for OCIO to conduct a search for requested information, a request is submitted to the Electronic Data System (RED system). Requests for electronic data including emails are submitted to the RED system. This request will contain names of custodians identified by the requester and the time frame for archived emails. The team will use the Symantec Discovery Accelerator or O365 tools to perform retrieval of the email from our EV or O365 system based on the time frame and custodian name(s).

24. On June 4, 2021, The ICE FOIA office tasked OCIO, which is the office that stores electronic data including emails, and thus the office most likely to have responsive records relating to the requested information. Plaintiffs requested all emails of the following individual(s): Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello from March 15, 2018, through April 25, 2019 as set for in Plaintiffs FOIA request.

25. In response to the FOIA tasking, the OCIO FOIA POC reviewed the substance of the FOIA request and relying upon subject matter expertise and knowledge of the OCIO's activities, conducted a search based on search terms that would locate records responsive to the FOIA request.

26. Based on the names and time frame (3/15/18 to 4/25/19) noted above in paragraph 24, the Symantec Discovery Accelerator tool was used to retrieve email data from EV and used the Microsoft O365 tool for those emails captured in Microsoft O365 system.

27. OCIO collected all email communications of Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello; who were identified by Plaintiffs' FOIA request.

28. These documents were then transferred to ICE FOIA paralegal, who was in charge of processing this data, through ICE's "Relativity" Platform. Relativity is an eDiscovery tool which was used to process and narrow-down the results by using search terms most relevant/likely to produce records from Plaintiffs' Request.

29. The ICE FOIA office conducted a search of the emails retrieved by OCIO using the following search terms: "Judge Shelley M. Richmond Joseph"; "Judge Joseph" "Officer Wesley MacGregor" "Officer MacGregor"; "Andrew Lelling" "Mr. Lelling" "Case No. 19-10141-LTS." The search terms were applied to data in different variations likely to produce any potentially responsive records, should they exist.

30. The ICE FOIA paralegal located 66 responsive, non-exempt pages were processed and produced to Plaintiffs on August 9, 2021.

31. After a telephonic meet and confer with Plaintiffs on September 9, 2021 to discuss possible additional searches and/or search terms, ICE FOIA agreed to conduct additional searches using mutually agreed upon search terms on the data collected from OCIO's initial email search.

32. The ICE FOIA paralegal further applied mutually agreed upon search terms to the OCIO's collected email data. The additional search terms agreed upon were: "Wesley MacGregor," "Shelley Joseph"; "Newton district Court", "Jose Medina-Perez", "Medina-

Perez". The search terms were applied to data in different variations likely to produce any potentially responsive records, should they exist. The ICE FOIA paralegal located additional records which were processed and produced to Plaintiff on October 6, 2021.

V. ENFORCEMENT AND REMOVAL OPERATIONS SEARCHES AND RESPONSE TO PLAINTIFFS' FOIA REQUEST

33. The mission of Enforcement and Removal Operations (ERO) is to identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of immigration laws and border control efforts. ERO upholds federal immigration laws at, within, and beyond the nation's borders, through efficient enforcement and removal operations. ERO prioritizes the apprehension, arrest, and removal of convicted criminals, those who pose a threat to national security, fugitives, and recent border entrants. Individuals seeking asylum also work with ERO. ERO transports removable aliens from point to point, manages aliens in custody or in an alternative to detention program, and removes individuals from the United States who have been ordered deported.

34. When ERO receives a FOIA tasking from the ICE FOIA Office, the request is submitted to ERO's Information Disclosure Unit ("IDU"). The IDU office reviews the substance of the request. Based on subject matter expertise and knowledge of the program offices' activities within ERO, IDU forwards the FOIA request to specific individuals and component offices, and directs specific employees to conduct searches of their file systems (including both paper files and electronic files) which in their judgment, based on their knowledge of the manner in which they routinely keep records, would be reasonably likely to have responsive records, if any.

35. In response to the FOIA tasking, ERO IDU reviewed the substance of the FOIA request and, relying upon subject matter expertise and knowledge of the ERO's activities, tasked the Office of the Field Director, Natalie Asher, who based on her duties, would be the person most likely to have responsive records relating to the requested information. The Field Office Director conducted a manual search of her computer as well as advanced search in Outlook using search terms responsive to the Plaintiffs' FOIA Request. The search terms used were "Judge Joseph, Joseph, Officer MacGregor, MacGregor."

36. The Field Director's search resulted in no records being located. In other words, ERO had no records relating to Judge Joseph or Officer MacGregor.

VI. OFFICE OF THE EXECUTIVE SECRETARIAT SEARCHES AND RESPONSE TO PLAINTIFFS' FOIA REQUEST

37. The U.S. Immigration and Customs Enforcement (ICE) Office of the Executive Secretariat (OES) provides professional, timely, and accurate responses to all public, governmental, and congressional correspondence addressed to the agency. OES also maintains a repository for incoming letters and official responses, and internally generated communications, Questions for the Record (QFRs).

38. When OES receives a FOIA tasking from the ICE FOIA Office, the request is submitted to OES's QFR Unit. The QFR Unit reviews the substance of the request and based on the subject matter expertise and knowledge of the program offices' activities within OES, the QFR forwards the FOIA request to specific individuals and component offices and directs specific employees to conduct searches of their file systems (including both paper files and electronic files) which in their judgment, based on their knowledge of the manner in which they routinely keep records, would be reasonably likely to have responsive records, if any.

39. On September 2, 2021, the ICE FOIA Office tasked an additional search to OES QFR Unit. In response to this FOIA tasking, the QFR unit tasked the search to a management and program analyst, who based on his duties, would be the person in the office most likely to have responsive records, should any exist. The QFR analyst conducted a manual search through the analyst's computer files, sharepoint database, as well as advanced search in Outlook using search terms responsive to the Plaintiffs' FOIA Request.

40. The search terms used by the analyst were: "Shelley M. Richmond Joseph; Shelley Joseph; Judge Joseph; Officer MacGregor; Weseley MacGregor; Newton District Court; Andrew Lelling;"

41. The QFR analyst located four potentially responsive records and forwarded those pages to the ICE FOIA Office for processing. The ICE FOIA office reviewed and produced all responsive non-exempt records on October 06, 2021 to Plaintiff.

VII. OFFICE OF THE CHIEF OF STAFF SEARCHES AND RESPONSE TO PLAINTIFFS' FOIA REQUEST

42. The mission of the Office of the Chief of Staff is to provide the ICE Director with the most current, accurate and comprehensive information available, and to facilitate a seamless exchange of information between all of the agency's program offices and the ICE Director.

43. The Office of the Chief of Staff provides a wide range of support services to the ICE Director in an effort to advance the agency's objectives as identified in the U.S. Immigration and Customs Enforcement strategic plan. This includes both administrative and operational support to meet day-to-day organizational needs as well as long-term agency goals.

44. On August 30, 2021, The ICE FOIA office tasked Office of the Chief of Staff, who based on his duties, would be the person most likely to have responsive records relating to the

requested information. The former ICE Acting Chief of Staff conducted a manual search of his computer as well as advanced search in Outlook using search terms responsive to the Plaintiffs' FOIA Request.

45. The search terms used were "Judge Joseph, Joseph, Officer MacGregor, MacGregor." The Former Acting ICE Chief of Staff's search resulted with no records being located.

VIII. ORGANIZATION OF THE *VAUGHN* INDEX

46. Pursuant to the requirements set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), a *Vaughn* Index accompanies this declaration; the *Vaughn* Index provides a description of each redaction and the corresponding FOIA exemption being applied.

47. The *Vaughn* index is in a table format. The first column contains the bates number prefix for the records produced. The second column contains the bates stamp suffix (page numbers) of the responsive records. The third column describes the category of withholdings taken on the documents (full or partial). The fourth column describes the redaction codes, which are citations to the sections of the FOIA Exemptions. The fifth column describes the underlying records and provides justifications for the asserted exemptions. The *Vaughn* index encompasses the responsive records produced by the program office. During the course of the litigation, ICE made three productions producing eight-five pages of records subject to withholdings pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(A).

48. During the course of litigation, ICE determined that redactions on three pages of records should be withheld in full and the remaining five pages were only partially withheld.

IX. DESCRIPTION OF FOIA WITHHOLDINGS APPLIED TO RECORDS PROVIDED TO PLAINTIFFS

49. The ICE FOIA Office processed and produced the 85 pages to the Plaintiffs subject to withholdings pursuant to FOIA Exemptions (b)(5)(b)(6) (b)(7) and (b)(7)(A).[2] .

50. However, through further discussions with Plaintiff, ICE agreed to remove all Exemption 5 withholdings and provided plaintiff with supplemental productions with unredacted portions on October 25, 2021.

51. Exemption 7 establishes a threshold requirement that, in order to withhold information on the basis of any of its subparts, the records or information must be compiled for law enforcement purposes.

52. The information for which FOIA Exemption 7 has been asserted in the instant matter satisfies this threshold requirement. Pursuant to the Immigration and Nationality Act codified under Title 8 of the U.S. Code, the Secretary of Homeland Security is charged with the administration and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. *See* 8 U.S.C. § 1103. ICE is the largest investigative arm of the DHS and the second largest investigative agency in the federal government. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now has more than 20,000 employees and offices in all 50 states and 48 foreign countries, and is responsible for enforcing the nation's immigration laws, and identifying and eliminating vulnerabilities within the nation's borders. The records at issue were collected/generated as part of the law enforcement mission.

A. FOIA Exemption (b)(7)(A)

[2] Additionally, there were withholdings that Plaintiffs have agreed not to challenge under FOIA Exemptions (b)(5), (b)(6), and (b)(7)(C). These withholdings have not been included in the *Vaughn* Index.

53. FOIA Exemption (b)(7)(A), 5 U.S.C. §552(b)(7)(A), protects from disclosure records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with pending and ongoing law enforcement proceedings.

54. First, ICE applied FOIA Exemption (b)(7)(A) to an internal Homeland Security Investigation (HSI) memo, and email chains from ICE personnel to upper management, regarding ongoing law enforcement investigation involving Judge Shelley Joseph and Officer MacGregor.

55. HSI is a critical asset in the ICE mission, responsible for investigating a wide range of domestic and international activities including workplace enforcement, national security threats, financial and smuggling violations (including illegal arms exports), financial crimes, commercial fraud, human trafficking, narcotics smuggling, child pornography/exploitation and immigration fraud. HSI uses its legal authority to investigate issues such as immigration crime, human rights violations and human smuggling; smuggling of narcotics, weapons and other types of contraband; and financial crimes, cybercrime and export enforcement issues.

56. The information contained in the HSI memorandum contain specific names of law enforcement personnel, and/or identifying potential witnesses, (including non-ICE personnel), interviewed in the investigation of Judge Joseph and Officer MacGregor, which have not been publicly released, as well as information gathered from these interviews.

57. Release of these records could potentially disclose information that discusses, describes, or analyzes evidence. Release of these records would undermine any pending or prospective prosecutions by disclosing confidential information to the public, identifying investigation law enforcement personnel, and/or identifying potential witnesses. Additionally, disclosure of documentary evidence and/or information concerning evidence could reasonably impact the ongoing investigation and any pending or prospective prosecutions, because it could

endanger the witnesses or sources, or at a minimum expose them to intimidation or harm. Additionally, evidence, and information about evidence in documents, is pertinent and integral to potential investigations and any resulting prosecutions, and premature disclosure of such evidence would adversely affect the Government's ability to prepare for trial and prosecute offenders.

X. SEGREGABILITY

58. 5 U.S.C. § 552(b) requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."

59. A line-by-line review was conducted to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied.

60. With respect to the records that were released, all information not exempted from disclosure pursuant to the FOIA exemptions specified above was correctly segregated and non-exempt portions were released. ICE did not withhold any non-exempt information on the grounds that it was non-segregable.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Signed this _th day of December, 2021.

LYNNEA A SCHURKAMP

Digitally signed by LYNNEA A SCHURKAMP
Date: 2021.12.08 16:19:43 -05'00'

Lynnea Schurkamp, Deputy FOIA Officer
Freedom of Information Act Office
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Stop 5009
Washington, DC 20536-5009

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS and AMERICAN OVERSIGHT Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT Defendant.	D. Mass No. 21-10761-NMG

SECOND SUPPLEMENTAL DECLARATION OF LYNNEA SCHURKAMP

I. INTRODUCTION

I, Lynnea Schurkamp, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Deputy FOIA Officer in the Freedom of Information Act Office (the "ICE FOIA Office") at U.S. Immigration and Customs Enforcement ("ICE"). The ICE FOIA Office is responsible for processing and responding to all requests for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, received at ICE. I have held this position since August 1, 2021. I am the ICE official responsible for supervising ICE responses to requests for records in litigation that fall under the FOIA, 5 U.S.C. § 552. Prior to this position, I was the Assistant Disclosure Officer of the U.S. Secret Service FOIA Office from July 21, 2019 to July 31, 2021. Prior to that I was the FOIA Program Manager/Litigation Coordinator for the National Organic Program in the Agricultural Marketing Service, U.S. Department of Agriculture ("USDA") for one year.

2. My official duties and responsibilities include the oversight and supervision of the ICE FOIA Litigation Team, which is responsible for reviewing and producing records for ICE FOIA requests when a complaint has been filed with a court. The Litigation Team will conduct a search, gather responsive records, review records for responsiveness, process productions, and release records with applicable withholdings to the plaintiff or plaintiff's counsel. The team is comprised of a Supervisory Paralegal and Paralegal Specialists. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act.

3. The ICE FOIA Office has been responsible for processing and responding to all Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received by ICE since January 17, 2010.

4. The purpose of this second supplemental declaration is to provide the Court with additional information regarding ICE's searches in the instant lawsuit. Specifically, the Court stated that "ICE alleges that it sent a records retention notice upon receipt of the Request, but the affidavit otherwise does not provide the level of detail required for the Court to conclude that ICE was reasonable in declining to collect text messages from the mobile devices of the named custodians."[1]

5. Further, the Court instructed ICE to (1) file a supplementary affidavit explaining in detail its retention practices for Homeland Security Investigations (HSI) records and the basis for its decision not to conduct additional searches for HSI records, or (2) conduct a search of HSI records with the terms of this Order and 3) to conduct additional Relativity searches with the

[1] *See* Memorandum and Order on Cross Motions for Summary Judgment, Doc..48, LR, D. Mass., 21-cv-10761-AK, June 3, 2022, at p.14.

terms "judge w/5 Newton" and "court w/5 Newton," applied to the population of documents collected from the Office of the Chief Information Officer (OCIO).

6. The statements contained in this declaration are based upon my personal knowledge, my review of documents kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties.

II. ICE'S EXPLANATIONS RELATING TO RECORDS RETENTION NOTICE

7. This Court's Order specifically stated that "ICE alleges that it sent a records retention notice upon receipt of the Request."[2] To clarify, to the extent the term "records retention notice" is used in the opinion to mean the type of litigation holds that are routinely issued in other types of non-FOIA civil litigations prior to discovery, ICE does not have a policy or practice of issuing litigation holds in FOIA litigations. Rather, as explained in paragraph 24 of my initial Declaration dated December 14, 2021, upon the filing of the instant lawsuit, ICE FOIA issued a "search tasker" to OCIO, directing it to retrieve the electronic inboxes of the specified custodians during the relevant timeframe.[3] This "search tasker" alerts the program office that records are being requested under the FOIA.

III. ICE'S EXPLANATION RELATING TO SEARCH OF TEXT MESSAGES

8. In addition to the two previously filed declarations addressing the DHS policy regarding the text messages, ICE simultaneously provided a separate declaration from Richard

[2] *Id*. at p.14.)

[3] OCIO, is the office that stores electronic data including emails, and thus the office most likely to have responsive records relating to the requested information. *See* In Defendant's Statement of Material Facts in Support of Defendant's Motion for Summary Judgement, Declaration of Lynnea Schurkamp, Doc.27-1, December 14, 2021, at ¶24.

Clark, Chief Technology Officer (CTO) within OCIO to address why ICE was unable to conduct searches for text messages.

9. My previous declarations both referenced the DHS Policy Directive 141-03 (Electronic Records Management Updates for Chat, Text, and Instant Messaging) that was issued on February 23, 2018, which explicitly prohibits ICE employees from using technology platforms (i.e. chats, apps, SMS etc.) as repositories for retaining federal records. *See* Exhibit A

10. DHS Policy Directive 141-03 provides instructions on how individuals can preserve data should any records be created inadvertently using chat, text, or instant messaging. Specifically, the directive states that the [individual][should] "Write a memo to the file. Be sure to include Date and time of the communication; Type of communication (e.g., text, voicemail, telephone call); Context of the message or conversation (electronic messages); Participants; Subject; Details on any decisions or commitments (verbal communications); Corresponding threads that precede a communication and provide more background."[4]

11. Below, I explain in detail ICE's attempts to locate text messages, should they exist, of two of the devices assigned to two of the named custodians in Plaintiffs' FOIA Request.

IV. SEARCH OF NATHALIE ASHER AND JON FEERE CELL PHONES

12. Pursuant to the Court's June 3, 2022 Order, it was determined that the Office of Professional Responsibility (OPR) was in possession of Nathalie Asher's device.

13. OPR promotes public trust and confidence in ICE by ensuring organizational integrity is maintained through a multi-layered approach utilizing security, inspections, and investigations. OPR is responsible for investigating allegations of employee misconduct impartially, independently, and thoroughly. OPR prepares comprehensive reports of

[4] *See* DHS Policy Directive 141-03 Electronic Records Management Updates for Chat, Text, and Instant Messaging, February 03, 2018, Page 2.

investigation for judicial or management action. OPR inspects and reviews ICE offices, operations, and processes in order to provide executive management with an independent review of the agency's organizational health and assess the effectiveness and efficiency of the overall ICE mission. Additionally, OPR screens potential ICE employees for character and suitability.

14. OPR conducted a manual search of Nathalie Asher's mobile phone, using the date range of March 15, 2018, through April 25, 2019, and searched for any text messages between Natalie Asher and other custodians named in Plaintiffs' FOIA Request concerning any investigation by ICE of Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment. The search did not locate any potentially responsive records.

15. Regarding Jon Feere's mobile device, ICE has not yet been able to unlock it and respectfully requests 30 days to try and remedy the issue, after which time it will provide the Court with an update.

V. ICE'S ADDITIONAL SEARCHES OF HSI AND RELATIVITY PURSUANT TO THE COURT'S JUNE 3, 2022, ORDER

16. Pursuant to the Court's order dated June 3, 2022, the ICE FOIA office tasked HSI to search for any potentially responsive, non-exempt records relevant to your request.

17. ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now employs more than 20,000 people in offices in every state and in 48 foreign countries.

18. According to DHS website, as a component of ICE, HSI is responsible for investigating a wide range of domestic and international activities arising from the illegal movement of people and goods in, within, and out of the United States. HSI uses its legal

authority to investigate issues such as immigration crime, human rights violations and human smuggling, weapons, and other types of contraband, and financial crimes. In addition to ICE criminal investigations, HSI oversees the agency's international affairs operations and intelligence functions. HSI consists of more than 10,000 employees, of which 6,700 are special agents, assigned to offices at ICE Headquarters in Washington, DC, and more than 200 cities throughout the United States and 48 countries around the world.

19. When HSI receives a FOIA tasking from the ICE FOIA Office, the request is submitted to HSI's Records Disclosure Unit (RDU). Points-of-contact (POCs) in RDU review the substance of the request. Based on the subject matter expertise and knowledge of the program offices' activities within HSI, RDU determines whether it can search for records, or whether it is necessary to forward the FOIA request to specific individuals and component offices to conduct searches of their file systems which in their judgment, based on their knowledge of the manner in which they routinely keep records, would be reasonably likely to have responsive records, if any.

20. Upon receipt of the FOIA request in this case and based on the nature of the Plaintiffs' FOIA request, the RDU POC, relying upon subject matter expertise and knowledge of HSI's activities, tasked the Special Agent (SA) from HSI Boston Field Office, who based on his duties, would be the person most likely to have responsive records relating to the requested information. The SA conducted a search of the information technology (IT) system known as Investigative Case Management (ICM) using search terms responsive to the Plaintiffs' FOIA Request. ICM serves as the core law enforcement case management tool for ICE Homeland Security Investigations (HSI) agents and personnel supporting the HSI mission.

21. The SA conducted a manual search of his computer as well as advanced search in Outlook using search terms responsive to the Plaintiffs' FOIA Request. The search terms used were: Shelley Joseph; Wesley MacGregor: Thomas Homan; Matthew Albence; Ronald Vitiello; Thomas Blank; Tracy Short; Jon Feere and Nathalie Asher. The SA located 368 pages of potentially responsive records and referred them to the ICE FOIA office for review and processing.

22. The ICE FOIA office reviewed the 368 potentially responsive records and further determined that all documents will be withheld pursuant to exemption 7(A) of the FOIA. The ICE FOIA Office issued the final response via email on July 11, 2022.

23. In addition, pursuant to the Court's order addressed above, the ICE FOIA office conducted additional Relativity searches with the terms "judge w/5 Newton" and "court w/5 Newton," which were applied to the population of documents collected from OCIO. The ICE FOIA office located 2,836 pages of potentially responsive records. Upon review, the ICE FOIA office determined that all pages were non-responsive and/or duplicative. A final response was issued to Plaintiffs via email on July 11, 2022.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Signed this __18th_ day of August 2022.

MERONICA D STONEY

Digitally signed by MERONICA D STONEY
Date: 2022.08.18 17:07:49 -04'00'

Meronica Stoney, Supervisory Paralegal Specialist
On behalf of
Lynnea Schurkamp, Deputy FOIA Officer
Freedom of Information Act Office
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Stop 5009
Washington, DC 20536-5009

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I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Signed this 18th day of August 2022.

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Meronica Stoney, Supervisory Paralegal Specialist
On behalf of
Lynnea Schurkamp, Deputy FOIA Officer
Freedom of Information Act Office
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Stop 5009
Washington, DC 20536-5009

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DECLARATION OF FERNANDO PINEIRO

I, Fernando Pineiro, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the FOIA Director of the U.S. Immigration and Customs Enforcement ("ICE") Freedom of Information Act Office (the "ICE FOIA Office"). I have held this position since August 14, 2022, and I am the ICE official immediately responsible for supervising ICE responses to requests for records under the Freedom of Information Act, 5 U.S.C § 552 (the FOIA), the Privacy Act, 5 U.S.C. § 552a (the Privacy Act), and other applicable records access statutes and regulations. Prior to this position, I was the Deputy FOIA Officer of the ICE FOIA Office from December 29, 2013, to August 13, 2022, and prior to that I was the FOIA Officer for three years at the Office for Civil Rights and Civil Liberties ("CRCL") at the U.S. Department of Homeland Security ("DHS"). The ICE FOIA office mailing address is 500 12th Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

2. As the FOIA Director my official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office regarding the processing of FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. In connection with my official duties and responsibilities, I am familiar with ICE's procedures for responding to requests for information pursuant to the FOIA and the PA.

3. I make this declaration in support of ICE's Opposition to Plaintiff's Motion for Temporary Restraining Order. The statements contained in this declaration are based upon my personal knowledge, my review of documents kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties.

II. RECENT STATISTICS REGARDING FOIA REQUESTS SUBMITTED TO ICE

4. As of June 23, 2022, the ICE FOIA Office is processing approximately 15,820 open FOIA requests addressing a backlog of 13,284 requests.[1] There are approximately 160 open federal district court cases, and 75 cases in active record production.

5. Beginning in fiscal year ("FY") 2018, the ICE FOIA Office experienced a substantial and dramatic increase in the number of FOIA requests received by ICE compared to previous years. In FY 2015, the ICE FOIA Office received 44,748 FOIA requests; 63,385 FOIA requests were received in FY 2016. The number of requests received briefly decreased in FY 2017 to 47,893 but was then followed by a spike of 70,267 FOIA requests in FY 2018. In FY 2019, that number climbed to a total of 123,370 requests received and in FY 2020 the ICE FOIA Office received 114,475 FOIA requests.

6. Between FY 2017 and FY 2020, the ICE FOIA Office experienced approximately a 240% increase in FOIA requests. This dramatic increase in ICE FOIA's workload is attributed to an increase in the number of referrals ICE received from USCIS and the increased public

[1] Backlog case are those that have been pending for over 20 days.

interest in the Department's operations as they pertain to recent Presidential and/or Executive Orders and subsequent guidance from the Secretary of Homeland Security. According to Syracuse University's FOIA Project, during the month of November 2021, federal district courts saw a total of 56 new FOIA lawsuits filed under 5 U.S.C. 552. As of December 14, 2021, the total overall reported FOIA filings for the last 12 months were 652.[2]

III. ICE FOIA OFFICE'S STAFF LEVELS AND WORKLOAD

7. In addition to the increasing volume of FOIA requests, ICE has also experienced an increase in the complexity of FOIA requests, both in terms of volume and substance. For example, it is now not uncommon to see FOIA requests with 50 to 60 sub-parts comprising several pages, searches of numerous program offices, and a universe of records that has thousands of pages to review and process. These FOIA requests take considerably longer to process due to extensive searches and the intricacy of the documents and/or data produced. In FY 2019, one FOIA requester alone – a data clearing house – filed more than 370 FOIA requests seeking extensive data extracts. In FY 2020, the same requester filed more than 480 similar FOIA requests.

8. All these factors have nearly doubled the ICE FOIA Office's overall workload since FY 2017. In response to the increasingly heavy workload, the ICE FOIA Office has adopted the court-sanctioned practice of generally handling backlogged requests on a "first-in, first-out basis," which ensures fairness to all FOIA requestors by not prioritizing one request over another. This practice applies to requests that are in litigation. The reason for this is that the principle of fairness to all requestors would be jeopardized were a requestor permitted to "jump the line" simply by virtue of filing a case in U.S. District Court. Generally, the only exception to this is where a court order processing at rates above the ICE FOIA Office's current processing rate for all cases. In FY 2020, the ICE FOIA Office closed 79,081 cases and 17,060 referrals from USCIS.

[2] The FOIA Project Freeing Information through Public Accountability (December 14, 2021) http://foiaproject.org/2021/12/14/november-2021-foia-litigation-with-five-year-monthly-trends/.

IV. CURRENT WORKLOAD OF THE ICE FOIA LITIGATION PROCESSING UNIT

9. Additionally, the ICE FOIA Office has the Litigation Processing Unit comprised of experienced paralegal specialists who process records in litigation under the FOIA and the Privacy Act.

10. The increasing complexity and volume of ICE FOIA's workload and backlog (*see* paragraphs 4-9) creates the potential that some FOIA requests could become subject to litigation in the U.S. District Court.

11. The ICE FOIA Litigation Processing Unit's workload has increased such that it is currently processing approximately 160 active FOIA litigations as of the date of this declaration and of which approximately 75 have rolling productions. ICE's normal processing rate for cases in litigation is 500 pages per month. This yields a monthly litigation review of approximately 32,500 pages and an average of 13,500 pages released every month. Based on this workload, each paralegal reviews approximately 10,800 pages per month.

12. The ICE FOIA Litigation Processing Unit also drafts, assigns, and tracks all searches for responsive documents concerning FOIA litigations. The FOIA litigation search taskings frequently span dozens of ICE program and field offices and require the Unit to keep track of hundreds of thousands of responsive records, as well as the documentation from searches of the program offices and field offices.

13. The ICE FOIA Litigation Processing Unit has collateral duties, in addition to processing documents pursuant to litigation. For example, the processing unit prepares various reports for statistical tracking, responds to Congressional inquiries and requests for records, redacts Prison Rape Elimination Act reports, sends out FOIA Exemption (b)(4) submitter notices, and manages litigation consults and referrals from other agencies. Additionally, the processing unit supports attorneys in the ICE Office of the Principal Legal Advisor with federal FOIA litigation, by assisting in first level review of records which include reviewing incoming

consults and referrals from other agencies in concurrent FOIA litigations. These collateral duties are within the scope of the FOIA and are required.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 25, 2022, at Washington, D.C.

FERNANDO PINEIRO JR

Digitally signed by FERNANDO PINEIRO JR
Date: 2022.08.25 11:05:59 -04'00'

Fernando Pineiro

FOIA Director

Freedom of Information Act Office

U.S. Department of Homeland Security

U.S. Immigration and Customs Enforcement

500 12th Street, S.W., Stop 5009