UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT,

Plaintiff,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendant.

No. 19 Civ. 7058 (GBD) (JLC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In October 2018, the American Civil Liberties Union, Immigrants' Rights Project (the "ACLU") submitted a Freedom of Information Act ("FOIA") request to U.S. Immigration and Customs Enforcement ("ICE") seeking millions of rows of spreadsheet data related to ICE law-enforcement activity, including data on apprehensions, risk classification assessments, detentions, removals, and bond management. Dkt. No. 1-1 (the "Request"). As the ACLU's FOIA request noted, ICE has provided information that was in some respects similar, albeit more limited, in response to several other FOIA requests. *See id.* at 2, 3. But the ACLU's request materially differed from those previous requests. In an effort to obtain information that would allow it to track specific cases despite the need for privacy-protective withholding of personally identifying information, the ACLU requested that, within the spreadsheets, "alien numbers"—a unique personal identifier assigned to a noncitizen—"should be replaced with unique identifiers." *Id.* at 1. It further requested that those "unique identifiers . . . should be the same" across the spreadsheets (i.e., an alien should have the same identifier in the removal data and the detention data). *Id.* at 3.

In September 2019, ICE provided the ACLU with the requested spreadsheet data. However, ICE did not replace alien numbers ("A-numbers") within the data with unique identifiers, instead redacting them pursuant to 5 U.S.C. § 552(b)(6) and (7)(C). Following several months of negotiation, ICE and the ACLU have agreed that "the issue of Unique Identifiers in place of A-numbers" is the sole issue to be resolved during the summary-judgment phase of this litigation. Dkt No. 29 ¶ 1. It is beyond dispute that ICE does not maintain within its database "unique identifiers" to stand in place of FOIA-exempt alien numbers when a FOIA requester seeks to track individuals between ICE's datasets. Because it is axiomatic that FOIA does not compel

an agency to create new records at the behest of a requester, summary judgment should be granted in favor of ICE.

BACKGROUND

I. The ACLU's FOIA Request

On October 3, 2018, the ACLU submitted a FOIA request seeking "spreadsheet data on [ICE] initial apprehensions, risk classification assessments, detentions, and removals," from 2003 through the present. Request at 1, 2, 3. The request also sought "Bond Management Information System Data" for the same time period. *Id.* at 4-5. It sought this data "to inform the public about the government's current enforcement policies." *Id.* at 5. The ACLU's FOIA request was granular with respect to the form in which it sought the data. It requested "data in a spreadsheet format . . . with a row in the spreadsheet for each individual or case." *Id.* at 1. "In removal data, this means one row for each removal. In detention data, this means one row for each detention period. In apprehension data, this means one row for every apprehension. In the risk classification data, this means a row for each assessment." *Id.* Within each category of data, the ACLU explicated what data fields it expected to be reflected within the data. *See, e.g. id.* at 2, 3, 4, 5.

With respect to removal and detention data, the ACLU was even more specific. For the removal data, the ACLU explained that "[t]his part of the request seeks an updated version of the information provided to the New York Times in response to request 12-03290." Request at 2. Put another way, the ACLU's request for removal data sought "a rerun/extract of that data for removals that occurred between 2003 and the date of this request or any later date." *Id.* Within detention data, the ACLU sought "a longer-term set of data that was released to Human Rights Watch as part of request 15-06191." *Id.* at 3.

The ACLU's FOIA request did not seek the data "as is." Instead, the ACLU requested that, "[i]n every case, alien numbers . . . should be replaced with unique identifiers, and unique identifiers should also be provided for each unit of observation." Request at 1. The ACLU sought randomized unique identifiers that would "allow[] a single person to be tracked across more than one detention period, and a single detention period to be tracked across transfers to multiple detention centers." *Id.* The ACLU requested that the same unique identifier be provided in place of A-numbers within each dataset, so that an individual could be tracked between datasets. *See, e.g.*, *id.* at 4 (requesting within "Apprehension Data" a unique identifier that "should correspond to A-numbers and match the unique identifier provided in detention, removals, and [risk classification assessment] data: an individual's case ID should be the same in all spreadsheets.").

On October 25, 2018, the ICE FOIA office emailed the ACLU to inform it that its "request as written is too broad in scope" because "most data is saved for a maximum of 7 years." Dkt. No. 1-2. The ACLU responded on the same day that it "agree[d] to limit the scope of [its] request to completions from the seven years before the date of the response to our request." *Id.*

ICE did not respond within twenty business days, and the ACLU commenced this lawsuit on July 29, 2019. Dkt. No. 1 ("Compl.") ¶¶ 20-23. The ACLU's complaint alleges that ICE violated 5 U.S.C. § 552 (FOIA) and 6 C.F.R. § 5.6(c) (a FOIA implementing regulation) by failing to timely search its records and produce those records responsive to its request. Compl. ¶¶ 24-33. The Complaint also alleges that ICE violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, by failing to timely respond. Compl. ¶¶ 34-36. The ACLU requested that this Court declare that ICE's failure to timely respond violates FOIA and the APA, compel ICE to conduct a search of its records and produce all responsive records, enjoin ICE from withholding non-exempt records, and award the ACLU attorney's fees. *Id.* at 9.

II. ICE's Search and Production

When the ICE FOIA Office receives a request for spreadsheet data related to immigration enforcement, it forwards the request to the Enforcement Removal Operations department ("ERO"), where someone within the Information Disclosure Unit ("IDU") reviews the request and determines the appropriate division to respond to the request. Declaration of Donna Vassilio-Diaz ("Vassilio Decl.") ¶ 15.[1] The ICE FOIA Office forwarded the ACLU's FOIA request to ERO's IDU on October 24, 2018. *Id.* ¶ 16. From there, the request was sent to the Law Enforcement and Systems Analysis division, which tasked its Statistical Tracking Unit ("STU") with identifying responsive records. *Id.* ¶ 17. An analyst in STU determined that all available responsive information was located within ICE's Integrated Decision Support System ("IIDS"), *id.*, and consulted those databases to query responsive information. This approach was consistent with that followed by ICE in response to the New York Times' request 12-03290 and Human Rights Watch's request 15-06191, from which the ACLU's FOIA request was modeled. *Id.*

The IIDS provides snapshots of information from ICE's Enforcement Integrated Database ("EID"), ICE's common database for all records created, updated, and accessed by a number of applications that capture and maintain information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and law enforcement investigations and operations conducted by ICE. *Id.* ¶¶ 6-13. The IIDS maintains information in different datasets of standard populations. *Id.* ¶ 12. In other words, data related to removals, detentions, apprehensions, risk classification assessment, and bond management are stored

[1] Pursuant to the usual practice in this district in FOIA cases, ICE relies on agency affidavits to support its motion for summary judgment and has not submitted a Local Civil Rule 56.1 statement. *See New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). ICE reserves the right to provide a Rule 56.1 statement should the Court deem one appropriate.

separately. *Id.*[2] When an ICE law enforcement action occurs, officers input information related to that event into the system. *Id.* ¶¶ 6, 8, 12. Those entries are input into the relevant modules, but are not necessarily connected with other data points which may relate to the same individual. *Id.* ¶ 12. ICE uses the IIDS to prepare and publish regular population-based summary reports regarding law enforcement actions for the public, ICE leadership, Congress, and the President. *Id.* ¶¶ 10, 12. ICE officers can also pull data related to an individual from the EID by using a software application. *Id.* ¶¶ 7, 12. However, these data pulls can be performed only on an ad-hoc basis, one at a time. *Id.* This software application does not give ICE the capability to create reports of data on a person-centric basis (*i.e.*, with each row corresponding to an individual and showing that individual's removals, detentions, etc.). *Id.* ¶¶ 10, 12. ICE officers can view an individual's immigration history by consulting his or her paper "Alien File." *Id.* ¶¶ 7, 12.

In response to the ACLU's FOIA request, STU searched the IIDS database and located 13 spreadsheets (containing 32 spreadsheet tabs) of responsive data related to removals, detentions, apprehensions, and bond management on February 27, 2019. Vassilio Decl. ¶ 18. After the ACLU filed this lawsuit, ICE's Office of the Principal Legal Advisor reviewed this data and determined that certain risk classification assessment data was missing. *Id.* ¶ 18 n.2. Accordingly, the IDU tasked the Law Enforcement Statistical Analysis division to obtain the missing risk classification assessment data. *Id.* A support contractor in that division conducted a search on September 10, 2019, and provided eight additional spreadsheet tabs to the IDU. *Id.* On September 12, 2019, the 32 initial spreadsheets tabs were supplemented with 8 additional tabs of risk classification assessment data. *Id.* On September 30, 2019, ICE produced the following spreadsheet data to the

[2] The IIDS database does not contain a complete dataset of bond or risk classification assessment-related information, but does allow for reporting of pre-configured reports which are available within the system. *Id.* ¶ 13.

ACLU: 8 spreadsheet tabs of removal data dating from 2012 to 2019 including approximately 400,000 rows of data per year; 8 spreadsheet tabs of detention data dating from 2012 to 2019 including approximately 1,000,000 rows of data per year; 8 spreadsheet tabs of apprehension data dating from 2012 to 2019 including approximately 100,000 rows of data per year; 8 spreadsheet tabs of risk assessment classification data dating from 2012 to 2019 including approximately 2,000 rows of data per year; and 8 spreadsheet tabs of bond management data[3] dating from 2012 to 2019 including approximately 75,000 rows of data per year. *Id.* ¶¶ 19, 22. Sample spreadsheet pages from each dataset have been attached to the Declaration of Donna Vassilio-Diaz. *Id.*, Ex. A.

ICE determined that several categories of information within the spreadsheets were subject to withholding under FOIA. For example, ICE relied upon FOIA exemptions related to personal privacy, 5 U.S.C. § 552(b)(6) and (b)(7)(C), to withhold birthdates, names, A-numbers, Subject IDs, User IDs, Officer IDs, Supervisor IDs, Detention IDs, Bond IDs, and bond numbers. Vassilio Decl. ¶ 20 n.3; *see also id.*, Ex. A. ICE relied upon a FOIA exemption related to law-enforcement techniques, 5 U.S.C. § 552(b)(7)(E), to withhold certain information generated to connect events within the IIDS databases for law-enforcement purposes, including Case IDs and bond numbers. *Id.* These withholdings are not at issue. *See* Dkt. No. 29 ¶ 2(d) ("Plaintiff agrees to waive its right to challenge . . . Defendant['s] application of FOIA exemptions 5 U.S.C. § 552(b)(6) and (b)(7), except to the extent that Defendant claims those exemptions apply to Unique Identifiers.").

ICE's disclosures did not include newly created, randomized unique identifiers in place of A-numbers, as the ACLU had requested. Request at 1. The only piece of information stored in a row of IIDS data that connects an entry to an individual uniquely is that individual's A-number.

[3] One of the bond management spreadsheets was released subject to improper redaction. It was re-released around October 24, 2019. *See* Dkt. No. 29 at 1.

Vassilio Decl. ¶ 20. As noted above, an A-number is a unique personal identifier assigned to a noncitizen. *Id.* A-numbers are personally identifying information that are protected from disclosure under FOIA.[4] *Id.*

ICE does not maintain a computer program by which it can replace A-numbers from the IIDS database with other, unique identifiers. Vassilio Decl. ¶ 21. In order to replace A-numbers with new, unique identifiers, ICE would have to: (1) create a program capable of uniquely substituting a new number for a pre-existing number; (2) input each A-number from each dataset within the IIDS (millions of entries in total) into the program; (3) run the program to create new unique identifiers; (4) replace all A-numbers within the IIDS datasets with the new unique identifiers; and (5) maintain and store the new computer program and new unique identifiers, for which ICE has no operational use. *Id.*

Pursuant to an agreement between the parties, ICE's determination that it need not create these unique identifiers under the FOIA is the sole issue remaining for summary judgment. Dkt. No. 29 ¶ 1 ("The Parties agree that arguments asserted during the summary judgment phase of the above-captioned action shall be limited to the issue of Unique Identifiers in place of A-numbers, as requested by Plaintiff in the FOIA Request.").

STANDARD OF REVIEW

"Summary judgment is the procedural vehicle by which most FOIA actions are resolved." *NRDC v. Dep't of Interior*, 73 F. Supp. 3d 350, 355 (S.D.N.Y. 2014) (internal quotation marks omitted). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents

[4] The ACLU did not ask ICE to disclose A-numbers, instead asking for them to be replaced by "unique identifiers." Request at 1. In any event, the ACLU does not challenge ICE's application of 5 U.S.C. § 552(b)(6) and (7) to exempt A-numbers from disclosure. Dkt. No. 29 ¶ 2(d).

fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). In addition, "under the FOIA, an agency does not rewrite a document or create informational material. It discloses existing documents, which it has already prepared." *Pierce & Stevens Chem. Corp. v. U.S. Cons. Prod. Safety Comm.*, 585 F.2d 1382, 1388 (2d Cir. 1978).

A "district court may forgo discovery and award summary judgment on the basis of affidavits" if those affidavits "supply[] facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption.". *Carney*, 19 F.3d at 812 (internal quotation marks omitted). "Affidavits submitted by an agency are accorded a presumption of good faith," and support an award of summary judgment if they are "adequate on their face." *Id.* (internal quotation marks omitted).

ARGUMENT

In response to the ACLU's FOIA request, ICE performed a search tailored to that request's specifications and disclosed all responsive records that the search revealed. ICE's search and disclosure were adequate and rendered moot the ACLU's claims related to ICE's failure to timely respond to its FOIA request. The only "withholding" at issue in this case—ICE's decision not to create unique identifiers in place of A-numbers in its disclosure—is supported by settled FOIA law: "FOIA imposes no duty on the agency to create records." *Forsham v. Harris*, 445 U.S. 169, 186 (1980). Accordingly, and for the reasons detailed below, ICE's motion for summary judgment should be granted.

I. The ACLU's Claims Related to ICE's Failure to Respond to the ACLU's FOIA Request Are Either Moot or Procedurally Improper.

Each of the claims stated in the ACLU's complaint relate to ICE's failure to timely respond to the ACLU's FOIA request or timely search its records. Compl. ¶¶ 24-28 (failure to provide timely response violates FOIA); *id.* ¶¶ 29-33 (failure to timely search records violates FOIA); *id.*

¶¶ 34-36 (failure to provide timely response violates the APA). These claims became moot when ICE disclosed its responsive, non-exempt records on September 30, 2019. Vassilio Decl. ¶ 22; Dkt. No. 29 at 1.

"[H]owever fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform." *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982). As such, courts dismiss FOIA claims related to the timeliness of an agency disclosure as moot once the agency has disclosed responsive records. *See, e.g. Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007) ("[B]ecause the report was located in the work file and subsequently disclosed, the issue is moot for purposes of this FOIA action."); *Andrus v. Dep't of Energy*, 200 F. Supp. 3d 1093, 1102 (D. Id. 2016) (holding that a claim for "failure to timely respond to [a] FOIA Request" was moot subsequent to disclosure). Because ICE disclosed records responsive the ACLU's request, the ACLU's claims related to the timeliness of ICE's search and disclosure should be dismissed.

The ACLU's APA claim should be dismissed for the additional reason that it is procedurally improper. Agency action is reviewable under the APA only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. Because "FOIA provides an alternative, adequate remedy" to review an agency's response to a FOIA request, courts routinely dismiss APA claims challenging agency action that is subject to review under FOIA. *N.Y. Legal Assistance Group v. Bd. of Imm. Appeals*, No. 18 Civ. 9495 (PAC), 2019 WL 3802179, at *5 (S.D.N.Y. Aug. 13, 2019); *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) ("[W]e have little doubt that FOIA offers an 'adequate remedy' within the meaning of section 704"); *Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012); *Central Platte*

Natural Res. Dist. v. USDA, 643 F.3d 1142, 1148 (8th Cir. 2011); *Walsh v. Dep't of Veterans Affairs*, 400 F.3d 535, 537-38 (7th Cir. 2005).

In short, "[t]he only question for summary judgment is whether the agency finally conducted a reasonable search, and whether its withholdings are justified. When exactly a reasonable search was conducted is irrelevant." *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59, 62 (D.D.C. 2003).

II. ICE's Search for Records Was Adequate.

An agency's search for records is "adequate" if it is "reasonably calculated to discover" documents responsive to a FOIA request. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). "The adequacy of a search is not measured by its results, but rather by its method." *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 124 (2d Cir. 2014). "If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue." *Garcia v. DOJ*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). ICE's search for records satisfies this standard.

The ACLU requested spreadsheet data on specific ICE activities, seeking separate spreadsheets for each population of data (e.g., removals, detentions), and with "a row in the spreadsheet for each individual or case" (e.g. "one row for each removal"). Request at 1. The ACLU explained that its request sought, in part, "a rerun/extract" of data previously provided to another FOIA requester. *Id.* at 2, 3. The ICE FOIA Office forwarded the ACLU's FOIA request to the appropriate division, STU, which searched the IIDS database for the requested information, as it had done in response to the FOIA requests that the ACLU referenced as exemplars. Vassilio Decl. ¶ 17. ICE's search resulted in production of spreadsheets for each population of data sought, in the format sought. *Id.* ¶¶ 18, 19; *see also id.*, Ex. A. While the ACLU initially requested several

categories of information that did not appear in the disclosed spreadsheets, that information is no longer at issue. Dkt. No. 29 ¶ 2(b) ("Plaintiff agrees to waive its right to challenge . . . any absence of certain columns or fields, other than Unique Identifiers, from the spreadsheets produced."). And while the ACLU also requested "any explanatory notes needed to make the data intelligible," Request at 1, that, too, is no longer at issue. Dkt No. 29 ¶ 2(a) ("Plaintiff agrees to waive its right to challenge any absence of look-up tables, codebooks or explanatory notes.").

The only remaining manner in which ICE's disclosure did not conform to the ACLU's FOIA request concerns the absence of unique identifiers in the disclosed records. Dkt No. 29 ¶ 1. But ICE's records do not contain unique identifiers apart from A-numbers, which the ACLU's FOIA request did not seek. Vassilio Decl. ¶ 20; *see also* Request at 1 ("alien numbers . . . *should be replaced with* unique identifiers") (emphasis added). The non-disclosure of unique identifiers does not implicate the adequacy of ICE's search.

In short, ICE conducted an adequate search of the databases that were likely to contain the records the ACLU requested. Indeed, ICE's search identified all records requested by the ACLU.

III. ICE Is Not Obligated to Produce Unique Identifiers.

The ACLU's FOIA request asked that "alien numbers . . . be replaced with unique identifiers" within the disclosed spreadsheet data in such a manner that "the unique identifier provided in detention, removal, [risk assessment, and apprehension] data" match one another. Request at 1, 4. ICE disclosed the relevant spreadsheet data without creating the requested identifiers. Vassilio Decl. ¶ 20. The sole issue related to ICE's production of records remaining before this Court at summary judgment is whether ICE was required to create the requested unique identifiers. Dkt. No. 29 ¶ 1. Because FOIA does not compel ICE to create new records in response to a FOIA request, ICE's motion for summary judgment should be granted.

A. FOIA Does Not Compel the Creation of Records.

FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975). By contrast, "FOIA imposes no duty on the agency to create records." *Forsham*, 445 U.S. at 186; *see also Pierce & Stevens Chem. Corp.*, 585 F.2d at 1388 ("[U]nder the FOIA, an agency does not rewrite a document or create informational material. It discloses existing documents, which it has already prepared."). The ACLU's request for randomized unique identifiers in place of A-numbers within the IIDS data it requested asks ICE to create records that it has not already prepared, an act which is not required by FOIA.

The facts which lead to this conclusion are straightforward. The ACLU's FOIA request asks for unique identifiers to be disclosed in place of A-numbers within the spreadsheet data it requested. Request at 1. But ICE does not maintain any unique identifiers which it could substitute for A-numbers within the data. Vassilio Decl. ¶ 20. Nor does it maintain a computer program which could substitute new, randomized unique identifiers in place of A-numbers. *Id.* ¶ 21. Thus, in order to satisfy the ACLU's request, ICE would need to: (1) create a computer program capable of accurately producing randomized, unique identifiers; (2) input millions of A-numbers from across the datasets into that program; (3) run the program; (4) take the new unique identifiers and substitute them in place of A-numbers within the datasets; and (5) maintain the new computer program and identifiers. *Id.* Compelling these acts of creation would contradict settled law. An agency need only "disclose[] existing documents, which it has already prepared." *Pierce & Stevens Chem. Corp.*, 585 F.2d at 1388. It need not "rewrite a document," as ICE would have to in order to replace A-numbers with unique identifiers. *Id.*

The reason the ACLU desires unique identifiers in ICE's datasets is understandable. Although ICE uses the IIDS database to do population-based reporting to ICE leadership, Congress, the President, and the public (e.g., reports on the number of individuals detained in Texas in 2015 compared to 2020), the ACLU appears to seek the requested data, at least in part, to track individual aliens throughout the immigration process. *See* Request at 4 (noting that unique identifiers "should be the same in all spreadsheets"). The only data point available in most of the spreadsheets that would allow an individual to be tracked from one dataset to another is that individual's A-number. Vassilio Decl. ¶ 20.[5] But courts have held that A-numbers are exempt from disclosure under FOIA. *See, e.g.*, *Gelb v. U.S. Dep't of Homeland Sec.*, No. 15 Civ. 6495 (RWS), 2017 WL 4129636, at *5-7 (S.D.N.Y. Sept. 15, 2017).[6] Without these A-numbers, the ACLU cannot use ICE's data to track individuals between the separate IIDS datasets (which would also be a use inconsistent with ICE's use of the IIDS). But the manner in which the ACLU desires to use ICE's data does not impact the agency's obligations under FOIA. "The government's responsibility under FOIA is to release specified documents unless a FOIA exception covers the documents; it is not to revamp documents or generate exegeses so as to make them comprehensible"—or, here, more useful—"to a particular requester." *Gabel v. C.I.R.*, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994).

In a similar case, the Second Circuit held that this is true even when proper redactions pursuant to FOIA exemptions limit the way existing documents may be used. In *ACLU v. DOJ*, 681 F.3d 61 (2d Cir. 2012), the ACLU sought two memoranda prepared by the Office of Legal

[5] The bond management data does not include A-numbers. *See* Vassilio Decl., Ex. A.

[6] The ACLU does not challenge whether A-numbers were properly withheld here. *See* Dkt. No. 29 ¶ 2(d).

Counsel ("OLC") which the Government disclosed subject to redaction of information pertaining to a "highly classified, active intelligence method." *Id.* at 65. The district court recognized that there were "national security concerns potentially raised by the disclosure of some of the classified information," but nonetheless presented the Government with a choice: disclose the information or "replace references to the classified information with alternative language meant to preserve the meaning of the text." *Id.* at 66, 67. The Second Circuit concluded that the Government had properly redacted the classified information from the memoranda pursuant to FOIA Exemption 1. *Id.* at 70. With respect to the district court's proposed alternative, the Second Circuit agreed with the Government that the district court "exceeded [its] authority under FOIA" by ordering the Government to "substitut[e] a purportedly neutral phrase composed by the court" in place of the redacted information. *Id.* at 71. The Second Circuit concluded that "[i]f the Government altered or modified the OLC memoranda in accordance with the compromise, the Government would effectively be 'creating' documents—something FOIA does not obligate agencies to do." *Id.*

Cases from other circuits are in accordance. In *Students against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001), the United States Court of Appeals for the District of Columbia concluded that the Central Intelligence Agency had properly withheld certain photographs because of "the risk that professional image analysts would be able to combine a photograph with other known information to determine the technical capabilities of the reconnaissance system that produced it," allowing foreign governments to adopt counter-measures. *Id.* at 835. Plaintiffs contended "that even if the agencies do not want to disclose the photographs in their present state, they should produce new photographs at a different resolution in order to mask the capabilities of the reconnaissance systems that took them." *Id.* at 837. In other words, as in *ACLU v. DOJ*, plaintiffs proposed modifying documents to protect sensitive information while preserving as

much of the document's meaning as possible. The D.C. Circuit rejected this proposal because agencies "are not required to create new documents." *Id.*

Similarly, in *Flightsafety Services Corp. v. Dep't of Labor*, 326 F.3d 607 (5th Cir. 2003), the United States Court of Appeals for the Fifth Circuit concluded that a document containing confidential commercial information did not include any "reasonably segregable non-exempt data" because "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value." *Id.* at 612, 613. As in *ACLU v. DOJ* and *Students Against Genocide*, the *Flightsafety* plaintiffs "request[ed] that the [agency] be required to simply insert new information in place of the redacted information," so that some informational value could be preserved within the document. *Id.* at 613. Like the Second Circuit and the D.C. Circuit, the Fifth Circuit concluded that this request "requires the creation of new agency records, a task that the FOIA does not require the government to perform." *Id.*

ACLU v. DOJ, *Students Against Genocide*, and *Flightsafety* govern here. The ACLU asks ICE to replace properly redacted information (A-numbers) with "a purportedly neutral phrase" (new, randomized unique identifier) in order to "preserve the meaning of the text" (the ability to track individuals between datasets by reference to a unique identifier). *See ACLU*, 681 F.3d at 66, 71. But if ICE "altered or modified" the IIDS data in this way, it "would effectively be 'creating documents'—something FOIA does not obligate agencies to do." *Id.* at 71.

Courts and other adjudicative bodies that have addressed whether FOIA and similar state laws require the replacement of properly withheld electronic spreadsheet data with neutral unique identifiers at the behest of a requester have held that they do not. *See Sander v. Superior Court*, 26 Cal. App. 5th 651, 659, 666 (Cal. App. 1st 2018) (petitioners proposals "for rendering data

anonymous" entailed creation of records not required under California Public Records Act); *In the Matters of Nicholas Confessore*, 33 F.C.C.R. 11808, 11817-18 (FCC 2018) (FOIA did not require the Federal Communication Commission to link two datasets with a "unique identifier"); *Hearst Corp. v. State, Office of State Comptroller*, 882 N.Y.S.2d 862, 871 (N.Y. Sup. Ct. 2009) ("the replacement of social security numbers with non-sensitive, unique identifiers . . . requires the creation of new records" under New York Freedom of Information Law); *see also Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106, 114 (D.D.C. 2007) (proposal that "the FCC replace filers' numerical responses with" neutral information "would amount to requiring the creation of new records, which . . . is not authorized by FOIA"). For the same reason, ICE is not obligated under FOIA to create the unique identifiers that the ACLU requested.

B. The E-FOIA Amendments Did Not Alter Agencies' Obligation to Create Records.

Courts have recognized that "there is a tension between the well-settled prohibition against requiring agencies to conduct research and create records, and the policy of the E-FOIA Amendments to bring the contents of electronic databases within the FOIA's reach." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012). This tension, however, is not implicated by the ACLU's request for ICE to create randomized unique identifiers.

For context: in 1996, Congress passed the Electronic Freedom of Information Act Amendments ("E-FOIA Amendments"), Pub. L. No. 104-231, 110 Stat. 3048 (1996), "to accommodate the increased use of computer technology in managing agency business." *Everytown for Gun Safety Support Fund v. ATF*, 403 F. Supp. 3d 343, 348 (S.D.N.Y. 2019). The E-FOIA Amendments require agencies to "make reasonable efforts to search for the records in electronic form or format," 5 U.S.C. § 552(a)(3)(C), and to "provide [a] record in any form or

format requested by [a] person if the record is readily reproducible by the agency in that form or format," *id.* § 552(a)(3)(B).

The E-FOIA Amendments "require agencies to sort 'a pre-existing database of information to make information intelligible' so that it may be transmitted to the public." *Everytown*, 403 F. Supp. 3d at 356 (quoting *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270). ICE satisfied this obligation when it reduced the data points contained in the IIDS database to the spreadsheet format requested by the ACLU. *See Sample. v. Bureau of Prisons*, 466 F.3d 1086, 1088-89 (D.C. Cir. 2006) (requiring agency to produce electronic records where it had already produced the records in paper form); *see also Aguilar v. DEA*, 334 F. Supp. 3d 130, 143 (D.D.C. 2018) ("On the whole, the 'form or format' provision of § 552(a)(3)(B) appears to have been crafted with these types of electronic-versus-paper distinctions in mind."). By contrast, the E-FOIA Amendments' requirement that agencies "provide [a] record in any form or format requested by [a] person if the record is readily reproducible by the agency," 5 U.S.C. § 552(a)(3)(B), did not require ICE to: (1) create a program that could substitute new randomized identifiers for a pre-existing number; (2) input each of the millions of A-numbers from the datasets into the program; (3) run the program to create new unique identifiers; (4) replace all A-numbers within the datasets with the new unique identifiers; and (5) maintain and store the new computer program and new unique identifiers, as ICE would need to in order to produce the identifiers requested by the ACLU. Vassilio Decl. ¶ 23; *cf. Aguilar*, 334 F. Supp. 3d at 144 ("The multiple steps between the spreadsheets and the requested images—opening some sort of mapping software, inputting the data from 351 pages of spreadsheets, and generating a new map image for each 'ping'—strongly suggests that the output would not be a straightforward reproduction of the spreadsheets, but a new record with significant added meaning."); *Brown v. Perez*, 835 F.3d 1223, 1237 (10th Cir. 2016) ("[F]or the government

to produce the requested printouts, it would have to open the software, input the relevant data, and recreate a screen image that could be captured and produced. Because FOIA does not require an agency to create records, the agency need not undertake that process.").

The E-FOIA Amendments were not meant to alter an agency's obligation with respect to the creation of records. *Everytown*, 403 F. Supp. 3d at 356 ("Courts have repeatedly reaffirmed the bar on record creation in response to FOIA requests following the enactment of the E-FOIA Amendments."). Agencies have no obligation to produce records that "would not necessarily have existed prior to a given FOIA request." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271. Here, ICE does not maintain randomized unique identifiers in the IIDS database, Vassilio Decl. ¶ 20, and so those identifiers did not "exist[] prior to a given FOIA." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271. Because the production of randomized unique identifiers would constitute the creation of a new record rather than the production of the same record in a new "form or format," the court need not inquire into whether the records would be "readily reproducible" in the manner the ACLU seeks them. *See* 5 U.S.C. § 552(a)(3)(B). An agency is under no obligation to create new records even if doing so would not be burdensome. *See Aguilar*, 334 F. Supp. 3d at 144 ("The Court need not reach the question of whether the requested map images are 'readily reproducible,' because they are not 'reproducible' at all—they are not a different form or format of the GPS coordinates, but would constitute new records, or at least augmented records with new explanatory information."). In any event, ICE does not have capability to readily reproduce documents with unique identifiers because ICE does not maintain a computer program to produce such identifiers and because creating and utilizing such a program would be cumbersome. Vassilio Decl. ¶ 21; *TPS, Inc. v. U.S. Dep't of Defense*, 330 F.3d 1191, 1195 (9th Cir. 2003) (An agency need only

"satisfy a FOIA request when it has the capability to readily reproduce documents in the requested format.").

* * *

In sum, an agency's obligation to create digital records is no more expansive than its obligation with respect to paper records. *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271 (noting, when analyzing whether a request entailed creation of electronic records, that "[t]he same would be true of paper, rather than electronic, records"). This underscores the applicability of *ACLU v. DOJ* to this matter. In that case, a lawyer would have had to put pen to paper in order to produce a "neutral phrase" to "preserve the meaning of the text." 681 F.3d at 66, 71. In this case, a computer scientist would have to write code to create a computer program, input millions of data entries into the program, then use the program to create neutral identifiers in order to preserve the ability to track individuals between datasets. In both cases, the agency would be left with a document that it has not "in fact chosen to create and retain." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271 (quoting *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982)). FOIA does not compel the creation of such a document. *Everytown*, 403 F. Supp. 3d at 356.

CONCLUSION

For the reasons explained above, ICE's motion for summary judgment should be granted.

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Respectfully submitted,

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