UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT, Plaintiff, v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	:	Case No. 19-cv-07058 (GBD)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff American Civil Liberties Union Immigrants' Rights Project (the "ACLU" or "Plaintiff") respectfully submits this memorandum of law (1) in support of its motion for summary judgment and (2) in opposition to the motion for summary judgment filed by Defendant United States Immigration and Customs Enforcement ("ICE" or "Defendant") (together, the "Parties").

PRELIMINARY STATEMENT

The ACLU submitted a Freedom of Information Act ("FOIA") request (the "Request") to ICE seeking, among other things, information on the relationships between records, which discloses an individual's interactions with ICE during the deportation process ("Relational Information").[1] ICE creates, uses, and distributes this Relational Information through Alien Numbers ("A-numbers"), personally identifying numbers assigned to each noncitizen (and thus exempt under the FOIA). To obtain this Relational Information—which is not exempt from disclosure—Plaintiff requested that ICE replace A-numbers with anonymized unique identifiers ("Unique IDs"), a process that segregates the personally identifying information ("PII"). ICE, however, refuses to comply with the sections of the FOIA requiring it to segregate and disclose Relational Information from A-numbers, erroneously claiming that doing so creates a new record. (*See* ICE Br. 11).

ICE must segregate and disclose Relational Information by formatting A-numbers as Unique IDs because doing so requires only reasonable—and possibly no—additional steps. In 2016, Congress expanded the scope of the FOIA's segregability mandate, requiring that, in addition to deleting exempt information, agencies "consider whether partial disclosure of information is possible" and "take reasonable steps necessary to segregate and release *nonexempt*

[1] The deportation process includes an initial arrest and detention and, where applicable, deportation. (Hausman Decl. ¶ 4.)

information." FOIA Improvement Act of 2016, Pub. L. No. 114-185, June 30, 2016, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)) (emphasis added). Here, partial disclosure of information is possible—ICE has previously disclosed Unique IDs for other FOIA requests (a fact ICE conceals from the Court)—and the steps are reasonable. ICE, however, manufactures a burden where none exists, claiming that five steps are necessary to replace A-numbers with Unique IDs. But as Plaintiff's declarations conclusively demonstrate, these steps need not be taken. ICE's databases can run Standard Query Language ("SQL") queries, which can extract Unique IDs in the process of searching for requested information, a step the FOIA requires for every request. (*Infra* § A.1.) Even using the five steps asserted by ICE, segregating nonexempt information imposes a *de minimis* burden, because it can be performed in a matter of hours using any standard data analysis program. (*Infra* § A.1.)

Furthermore, ICE must format A-numbers as Unique IDs because that format is readily reproducible. The FOIA requires that agencies disclose records in "any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Because A-numbers are records, and, as described above, A-numbers are readily reproducible as Unique IDs, ICE must honor Plaintiff's requested format. (*Infra* § A.2.)

Attempting to shirk its obligations under the FOIA, ICE argues that replacing A-numbers with Unique IDs creates a new record. This argument is a red herring; the FOIA requires that agencies segregate nonexempt information unless doing so is burdensome. But, regardless, ICE is wrong—no new record is created. Because the FOIA defines a "record" to include information conveyed by a record, the creation of a new record requires the creation of information not already in ICE's control. *See* 5 U.S.C. § 552(f)(2). Here, although Unique IDs

take the form of a new number, they do no more than segregate, or copy, the existing, nonexempt information from A-numbers. (*Infra* § B.1.)

In short, ICE has unlawfully withheld the nonexempt Relational Information created by A-numbers, and thus ICE's production of records subsequent to the complaint does not render Plaintiff's claims moot. (*See* ICE Br. 8-9.) Accordingly, ICE's motion for summary judgment should be denied, Plaintiff's cross-motion should be granted, and the Court should order ICE to produce A-numbers in the form of Unique IDs.

PROCEDURAL BACKGROUND

On October 3, 2018, Plaintiff submitted the FOIA Request to ICE. (Hausman Decl. Ex A.) Plaintiff filed this lawsuit, on July 29, 2019, alleging that ICE violated 5 U.S.C. § 552 (FOIA) and 6 C.F.R. § 5.6(c), by failing to timely search its records and produce those records responsive to its request, and that ICE also violated the Administrative Procedure Act, 5 U.S.C. § 706. (*See generally* Compl.)

In a letter, dated September 27, 2019, ICE finally responded to the Request (the "Response Letter"), providing 21 Excel spreadsheets of data. (Hausman Decl. Ex. E.) Three days later ICE answered the complaint. (ECF No. 16.)

On March 27, 2020, the Parties reached a partial settlement on the issues, agreeing to limit their arguments on summary judgment to ICE's obligation to disclose "Unique Identifiers in place of A-numbers, as requested by Plaintiff in the FOIA Request." (ECF No. 29 ¶ 1.)

On May 7, 2020, ICE filed its motion for summary judgment, memorandum of law ("ICE Br."), and a declaration from Donna Vassilio-Diaz, the Unit Chief of the Statistical Tracking Unit within the Enforcement and Removal Operations Law Enforcement and Systems Analysis at ICE (the "Vasilio-Diaz Decl."). (ECF Nos. 30-32.)

FACTUAL BACKGROUND[2]

Plaintiff's FOIA Request sought data for five categories of records: (1) removals (or deportations), (2) detentions, (3) apprehensions, (4) risk classification assessments ("RCAs"), and (5) bonds. (Hausman Decl. ¶ 3, Ex. A.) The Request specified the format, asking for "data in a spreadsheet format . . . with a row in the spreadsheet for each individual or case" and for every A-number to be replaced with Unique Identifiers that "match the unique identifiers provided in the [other categories of data]." (*Id.* Ex. A.) These Unique IDs are created by uniquely substituting a new number for each A-number.[3] (*See* Vassilio-Diaz Decl. ¶ 21.) Plaintiff specified this format so it, and the public, could analyze the data in the context of the entire deportation process, by tracking individuals within and between the categories of data. (Hausman Decl. ¶¶ 4, 6.)

ICE has previously created Unique IDs in response to multiple FOIA requests. ICE has created Unique IDs for data on detentions, which it produced to Human Rights Watch ("HRW"); for data on detainers, which it produced to the Transactional Records Access Clearinghouse (the "TRAC");[4] and for data on removals, which it produced to the New York Times (the "NYT").[5] (*Id.* ¶¶ 10-12.) And other government agencies routinely release data that includes Unique Identifiers; for example, the Executive Office for Immigration Review releases data with identifiers linking data associated with the same case. (*Id.* ¶ 8.)

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2 Plaintiff, like ICE, relies on declarations to support its motion for summary judgment. (*See* ICE Br. 4 n.1 (citing *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012)).) Plaintiff will file a Rule 56.1 statement if requested by the Court or if one is filed by ICE.

3 Plaintiff does not know which identifier ICE used to create Unique IDs in response to the HRW, TRAC, or NYT requests. But no matter the identifier used by ICE to create previous Unique IDs, the process is still the same. (Wu Decl. Ex. ¶¶ 21, 28; Hausman Decl. Ex. ¶ 30.)

4 The Request cited ICE's productions to TRAC as an example of data containing Unique IDs, but it did not ask for data on detainers. (Hausman Decl. ¶ 12.)

5 The Request specifically asked for updated versions of the spreadsheets produced to the NYT. (Hausman Decl. ¶ 10, Ex A.)

The ACLU made the Request to obtain information that would allow researchers, advocates, and the public to better understand how people move through the deportation process. (Hausman Decl. ¶ 4.) Specifically, the Request cited the "compelling and urgent need to inform the public about new directives regarding detention, detainers, and removals" and the need to understand the objectives "of increasing detention, eliminating the 'catch and release' policy, increasing removals of noncitizens without criminal records, and expanding the use of detainers [which] alter long-standing policies adopted by prior administrations." (*Id.* Ex. A.) Meaningful analysis of these issues requires that ICE disclose the Relational Information created by A-numbers. (*Id.* ¶ 16.)

ICE did not provide Unique IDs with the spreadsheets disclosed with the Response Letter. (Vassilio-Diaz Decl. ¶ 20.) It did not provide an explanation, nor did it claim that Unique IDs replacing A-numbers were exempt from disclosure. (Hausman Decl. Ex. E.) ICE's refusal to provide Unique IDs strips the data produced by ICE of Relational Information, preventing Plaintiff and the public from analyzing how ICE has implemented the nation's immigration policies. (Hausman Decl. Ex. ¶¶ 16-22, 24; Wu Decl. ¶ 17.)

In the process of responding to the Request, ICE searched two databases: (1) the Enforcement Integrated Database (the "EID") and (2) the Integrated Decision Support System (the "IIDS"). (Vassilio-Diaz Decl. ¶¶ 6, 10.) The EID is used by ICE "to manage cases from the time of an alien's arrest . . . through the final case disposition." (*Id.* ¶ 6.) When an "ICE law enforcement action occurs, officers input information . . . into the system and it is stored in the EID." (*Id.* ¶ 12.) The IIDS is used by ICE to create reports for "the Agency [and] external stake holders such as Congress [and] the White House." (*Id.* ¶ 10.) A subset of the information in the EID is periodically copied to the IIDS. (*Id.* ¶ 9.)

ICE searched the IIDS for all of the categories of data, except for RCA data. (*Id.* ¶¶ 9, 13.) ICE's search identified A-numbers for each category, except for bonds where the IIDS database is incomplete. (*Id.* ¶ 13, Ex. A.) A complete set of bonds data is available in a separate database, called the Bond Management Information System, but ICE did not search that database. (*Id.* ¶ 13.) ICE searched the EID for RCA data because RCA data is not stored in the IIDS database. (*Id.*)

For the IIDS, A-numbers are the only data point that uniquely identifies an individual. (*See id.* ¶ 20.) For the EID, A-numbers are one way ICE officers access Relational Information. (*See id.* ¶ 12.) ICE officers also access Relational Information by viewing Alien Files ("A-Files"), files created by ICE's predecessor agency using A-numbers "to create one file . . . containing the entire agency's records for [each alien]."[6] U.S. Dep't of Homeland Sec., Privacy Act of 1974; System of Records, 82 Fed. Reg. 43556, 43557 (Sept. 18, 2017); (*see also* Vassilo-Diaz Decl. ¶ 20).

ICE now states that it did not produce Unique IDs replacing A-numbers because anonymized unique identifiers in place of A-numbers do not exist in the IIDS and it "does not maintain a computer program by which it can replace A-numbers from the IIDS database with other, unique identifiers." (Vassilo-Diaz Decl. ¶ 21.) ICE does not assert (nor could it) that producing Unique IDs would be unduly burdensome. ICE does claim, however, that it would need to perform five steps:

> (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 . . .

[6] ICE implies that it can access paper but not electronic A-Files. (*See* ICE Br. 5; Vassilio-Diaz Decl. ¶ 12.) A-Files, however, are maintained in electronic and paper format, and the stated purpose of electronic A-Files is "to share the A-Files more efficiently within DHS and with external agencies." U.S. Dep't of Homeland Sec., Privacy Act of 1974; System of Records, 82 Fed. Reg. 43556, 43559 (Sept. 18, 2017). Of note, the systems supporting A-Files can automatically aggregate and link according to A-numbers records from multiple DHS agencies, including ICE, which is a named agency for the A-File system of record. *See id.* at 43556, 43560-61.

> 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.

(*Id.* ¶ 21.) Any standard data analysis program can accomplish these steps using the unredacted versions of the spreadsheets already produced by ICE. (Hausman Decl. ¶¶ 25-34; Wu Decl. ¶¶ 27-30.) Alternatively, ICE can perform these steps even more quickly—and without the need for a new program—through SQL queries, which can anonymize A-numbers as Unique IDs in the process of searching the databases. (Wu Decl. ¶¶ 20-21.)

LEGAL STANDARD

"Congress enacted FOIA 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Det. Watch Network v. U.S. Immigration & Customs Enf't,* 215 F. Supp. 3d 256, 261 (S.D.N.Y. 2016) (quoting *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 173 (2d Cir. 2014)). The FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies," *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999), and "'seeks to permit access to official information long shielded unnecessarily from public view . . . .'" *N.Y. Times Co. v. U.S. Dep't of Justice*, 939 F.3d 479, 488 (2d Cir. 2019) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

Under the FOIA, federal agencies must make records available to the public upon request. *See* 5 U.S.C. § 552(a). "Records" include "any information that would be an agency record . . . when maintained by an agency in any format . . . ." *Id.* § 552(f)(2). Upon receipt of a request for records, the agency shall "take reasonable steps necessary to segregate and release nonexempt information," *id.* § 552(a)(8)(A)(ii)(II), and may "withhold information . . . only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law," *id.* § 552(a)(8)(A)(i). The agency must produce a "record in any form or format requested . . . if the record is readily reproducible by the agency in that format." *Id.* § 552(a)(3)(B). When

there is a dispute about the agency's obligation to disclose records, the agency bears the burden of proof required to sustain the motion for summary judgment. *See id.* § 552(a)(4)(B); *see also Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) ("[T]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' . . . ." (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989))). An agency's decision not to produce requested records is subject to *de novo* review. *See A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994) (citing 5 U.S.C. § 552(a)(4)(B)).

FOIA litigations are generally resolved at the summary judgment stage, without discovery. *See Knight First Amendment Inst. at Columbia Univ. v. U.S. Dep't of Homeland Sec.*, 407 F. Supp. 3d 334, 342 (S.D.N.Y. 2019). A court may grant summary judgment only if the parties' submissions, taken together, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

An agency may carry its burden of proof by submitting affidavits or declarations, which are "accorded a presumption of good faith." *Grand Cent. P'ship*, 166 F.3d at 489 (citation omitted). But the agency's motion can be granted on the basis of its affidavits only "if they contain *reasonable specificity* of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Id.* at 478 (emphasis in original) (citations omitted). Conversely, the FOIA plaintiff is entitled to summary judgment where even on the agency's version of the facts the requestor seeks records and no exemption applies. *See Bloomberg L.P. v. Bd. of Governors of Fed.*

Reserve Sys., 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009) (citation omitted), *aff'd sub nom. Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010).

ARGUMENT[7]

A. The FOIA Requires That ICE Format A-numbers as Unique IDs to Segregate and Produce the Nonexempt Relational Information From Those A-numbers.

ICE is required to replace A-numbers with Unique IDs because the required steps are reasonable and not unduly burdensome. Two sections of the FOIA independently require ICE to honor Plaintiff's request for Unique IDs.[8] Section 552(a)(8)(A)(ii)(II) requires that agencies take reasonable steps to segregate and produce nonexempt information. And, section 552(a)(3)(B) requires that agencies honor the requested form or format when that form or format is readily reproducible. ICE, however, refuses to comply with either provision. Attempting to manufacture an unreasonable burden, ICE purports to identify five allegedly distinct steps it would need to undertake: (1) create a program, (2) copy all of the A-numbers from the IIDS into the program, (3) run the program, (4) extract and produce the Unique IDs, and (5) maintain and store the new computer program and Unique IDs. As Plaintiff's declarations conclusively establish, these steps need not be taken: ICE can extract Unique IDs in the process of searching

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[7] For the reasons stated herein, ICE continues to violate the Administrative Procedure Act. ICE has unlawfully withheld agency action and unreasonably delayed a complete response to the Request; such delay is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. *See* 5 U.S.C. § 706; (*see also* ECF No. 1 ¶¶ 34-36).

[8] ICE should be required to replace A-numbers for all five categories of data, including for bonds data—the one category for which ICE did not produce A-numbers. Bond records in ICE's control include A-numbers. *See* Privacy Act of 1974; U.S. Immigration and Customs Enf't, DHS/ICE-004 Bond Management Information System (BMIS) System of Records, 74 Fed. Reg. 67891, 67892 (Dec. 21, 2009) (A-number listed as one of the "[c]ategories of records in the system"); (*see also* Hausman Decl ¶ 23). And ICE admits that it did not search "a complete set of bond . . . information." (Vassilio-Diaz Decl. ¶ 13 ("The IIDS database does not contain a complete set of bond . . . information; therefore . . . bond reporting is limited to pre-configured reports that are available in the system. A complete set of bond related information can be found in a separate database called the Bonds Management Information System.").) Thus, this Court should not reward ICE's improper search by limiting judgment to only those categories of data for which ICE produced A-numbers. *See Am. Immigration Council v. U.S. Immigration & Custom Enf't*, 2020 WL 2748515, at *7 (D.D.C. May 27, 2020) ("[The agency] has not shown that its search was adequate, because it is undisputed that it did not search other databases where the identifiers were reasonably likely to be found.").

its databases. But even if these steps were required, they are *de minimis*, perfunctory tasks that can be quickly completed with an elementary level of technical sophistication, which ICE indisputably possesses.

1. The FOIA Improvement Act of 2016 requires that ICE replace A-numbers with Unique IDs because the steps are reasonable and impose a *de minimis* burden.

Even where responsive records are exempt from disclosure, an agency must "take reasonable steps necessary to segregate and release nonexempt information." FOIA Improvement Act of 2016, Pub. L. No. 114-185, June 30, 2016, 130 Stat. 538, 539 (codified at 5 USCA § 552(a)(8)(A)(ii)(II)). This mandate is clear and unambiguous: where information is not exempt from disclosure, agencies must take reasonable steps to produce that information, even when that information is intertwined with an exempt data point. *See U.S. v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) ("Our starting point in statutory interpretation is the statute's plain meaning . . . ." (citation omitted)). Here, ICE can easily extract and produce Unique IDs from A-numbers using the same steps for searching for records responsive to the Request or using the five steps outlined in the Vassilio-Diaz Declaration. Both methods are reasonable.

As part of the FOIA Improvement Act of 2016, Congress added a new, expanded segregability requirement, mandating that agencies segregate and produce nonexempt information using deletions *and* additional reasonable steps. Prior to that, section (b) required (as it still does) production of "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt . . . ."[9] 5 U.S.C. § 552(b) (after subsection 7). The new requirement, codified as section (a)(8)(A), added the following language: "An agency shall . . .

[9] Even under this provision, agencies are required to segregate and disclose nonexempt information contained in data points or numbers when the exempt information can be segregated through deletions. *See Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027-28 (D.C. Cir. 1999) (agency must segregate out the exempt portions of Harmonized Tariff Numbers).

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information" contained within that record. FOIA Improvement Act of 2016, 130 Stat. at 539; *see also Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Congress added this section to the FOIA to prohibit agencies from unnecessarily withholding from the public nonexempt information. *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2019 WL 4644029, at *3 (D.D.C. Sept. 24, 2019) ("Congress passed the FOIA Improvement Act of 2016 . . . out of concern that 'agencies [we]re overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure.'" (alteration in original) (quoting S. Rep. No. 114-4, *as reprinted in* 2016 U.S.C.C.A.N. 321, 322)); 162 Cong. Rec. H3714, H3717 (June 13, 2016) (statement of Rep. Meadows) ("[A]gencies may no longer withhold information that is embarrassing or could possibly paint the agency in a negative light simply because an exemption may technically apply."). For records stored in a database, if full disclosure of a data point is not possible but the steps for segregating nonexempt information from that data point are reasonable, the nonexempt information must be produced in its segregated form.[10] *See Trans-Pac. Policing Agreement v.*

[10] In *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 2019 WL 7372663, at *15 (D.D.C. Dec. 31, 2019), the court acknowledged that "the FOIA Improvement Act of 2016 added another provision that concerns segregability," but concluded that for information in a document the requirements of sections (b) and (a)(8)(A)(ii) are coextensive. *See also id.* at *15 ("[S]ubsection (b) of FOIA [is] satisfied by affidavits attesting to the agency's 'line-by-line review of each *document* withheld in full' and the agency's determination 'that no *documents* contained releasable information which could be reasonably segregated from the nonreleasable portions.' . . . The FOIA Improvement Act appears to require no more than that . . . ." (emphases added) (citation omitted)). For information stored in a database, however, that is not the case—reasonable steps using code or programming can be used to further segregate and release nonexempt information. *See* H.R. Rep. 104–795, at 22 (1996), 1996 U.S.C.C.A.N. 3448, 3465 (Access to information contained in an agency "database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. . . . Otherwise, it would be virtually impossible to get records maintained completely in an electronic format, like computer database information . . . .").

U.S. Customs Serv., 177 F.3d 1022, 1027 (D.C. Cir. 1999); *see also Reclaim the Records v. Dep't of Veterans Affairs*, 2020 WL 1435220, at *10-11 (S.D.N.Y. Mar. 24, 2020) (database records comingling exempt and nonexempt information were not exempt from disclosure); *compare* 5 U.S.C. § 552(a)(8)(A)(ii)(II) *with, e.g., Flightsafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 612 (5th Cir. 2003) (pre-FOIA Improvement Act); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (same); *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 323 (D.C. Cir. 1982) (same).

Here, full disclosure of A-numbers is not possible—because they convey PII—but the nonexempt Relational Information from A-numbers can be segregated using at least two relatively simple methods. *See* 5 U.S.C. § 552(a)(8)(A)(ii). First, ICE can segregate Relational Information by extracting Unique IDs from its databases using SQL queries.[11] (Wu Decl. ¶¶ 20-26.) SQL queries not only search for data *but also* transform data during the extraction process, and can be written by a person with only basic programming skills. (*Id.* ¶¶ 21-22); *see Long v. Immigration & Customs Enf't*, 2020 WL 2849904, at *8 (D.D.C. June 2, 2020) (SQL queries capable of changing data). Accordingly, these queries can be used to search for A-numbers and transform them into anonymized Unique IDs. ICE needs only to alter the code used to extract A-numbers; no new program or additional steps are required. (Wu Decl. ¶ 20.) Because the steps for running SQL queries to extract Unique IDs from A-numbers are essentially the same as those for a search, doing so imposes no significant burden. *See Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 403 F. Supp. 3d 343, 356 (S.D.N.Y. 2019), *appeal filed*, *Everytown for Gun Safety Support Fund v. Bureau of Alcohol,*

[11] The EID and IIDS are relational databases, which are capable of running SQL queries. (Wu Decl. ¶ 23); *see Long v. Immigration & Customs Enf't*, 2020 WL 2849904, at *8 (D.D.C. June 2, 2020) (ICE's EID and IIDS databases run SQL).

Tobacco, Firearms and Explosives, No. 19-3438 (2d Cir. Oct. 21, 2019) ("[C]onducting . . . a search cannot constitute creating new records . . . . Nor does it constitute creating a record . . . to create the computer programming necessary to conduct a search."); *see also, e.g.*, *Public.Resource.org v. IRS*, 78 F. Supp. 3d 1262, 1266 (N.D. Cal. 2015) (granting summary judgment to plaintiff because cost of $6,200 for one-time expenses and the time required for setting up a protocol and training staff was not significantly burdensome); *People for the Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (granting partial summary judgment to plaintiff because 120 hours of work was not unduly burdensome); *Kwoka v. IRS*, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018) (granting partial summary judgment to plaintiff because 2,200 hours for reviewing and redacting documents was not unreasonably burdensome).

Second, ICE can use any standard data analysis program to replace with Unique IDs the A-numbers in the spreadsheets ICE has already compiled, thereby segregating the nonexempt Relational Information without the need to return to its databases. This option tracks the five steps ICE claims are required for replacing A-numbers with Unique IDs. (*See* ICE Br. 12; Vassilio-Diaz Decl. ¶ 21.) As described by Dr. Hausman and Dr. Wu, these steps are reasonable. Step 1, create a program, requires a program capable of data analysis, such as R or Python (which are free), and using it to write a script capable of performing steps 2 through 4. (Hausman Decl. ¶¶ 28, 30-33; Wu Decl. ¶¶ 27-30.) Depending on the program used and experience of the person writing the script, this step could require anywhere from approximately twenty minutes to three hours. (Wu Decl. ¶ 29; Hausman Decl. ¶ 28.) But as Plaintiff has provided a script to ICE, no time is needed. (*Id.* ¶ 29.) Upon running the script, at steps 2 and 3, the script automatically inputs each A-number into the computer's memory and creates new

Unique IDs. (Hausman Decl. ¶¶ 30-31; Wu Decl. ¶ 28.) At step 4, the script inserts the Unique IDs into the existing spreadsheets. (Hausman Decl. ¶ 32; Wu Decl. ¶ 28.) No new document is created, so no additional documents need to be retained. (*Id.*) And storing the script is not burdensome, since it requires about 25-kilobytes of memory, less than a typical email. (Hausman Decl. ¶ 33.) In combination, these steps are well inside the bounds of what is reasonable. *See, e.g.*, *Public.Resource.org*, 78 F. Supp. 3d at 1266; *People for the Am. Way Found.*, 451 F. Supp. 2d at 15; *Kwoka*, 2018 WL 4681000, at *5.

Thus, even if ICE follows the five steps it alleges—rather than extracting the Unique IDs by querying its databases—Plaintiff's declarations affirmatively demonstrate that those steps are reasonable. Accordingly, the FOIA requires that ICE produce Unique IDs.

2. Under the E-FOIA Amendments, ICE must produce A-numbers formatted as Unique IDs because that format is readily reproducible.

ICE is obligated to honor Plaintiff's request for A-numbers formatted as Unique IDs because that format is readily reproducible. ICE admits that A-numbers are records maintained in its databases. (*See* Vassilio-Diaz Decl. ¶¶ 12, 20.) And, ICE has previously demonstrated its ability to transform identifiers (i.e., data points) into Unique IDs. Because creating these Unique IDs—even for multiple categories of data—is not burdensome, the FOIA requires that ICE do so.

As part of the E-FOIA Amendments, Congress mandated that agencies disclose records in "*any* form or format requested . . . if the record is readily reproducible by the agency in that form or format,"[12] E-FOIA Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, 3050

[12] Although cases analyzing the "form of format" provision of section (a)(3)(B) typically consider an agency's obligation to produce records in the medium specified by the requestor (e.g., paper or electronic format), courts—both before and after the E-FOIA Amendments—have considered whether the FOIA requires agencies to comply with requests for information in a specified format. *See Aguiar v. Drug Enf't Admin.*, 334 F. Supp. 3d 130, 143-44 (D.D.C. 2018) (considering whether the "form or format" provision required the agency to produce map images depicting GPS coordinates rather than just a list of GPS coordinates); *McDonnell v. U.S.*, 4 F.3d 1227, 1244 (3d Cir. 1993) (honoring a request for translations of coded documents would not "be

(cont'd)

(codified at 5 U.S.C. § 552(a)(3)(B)) (emphasis added), regardless of whether "the record is maintained by the agency in that format," *Scudder v. Cent. Intelligence Agency*, 25 F. Supp. 3d 19, 38 (D.D.C. 2014). Records are "readily reproducible" when production of those records in the requested format is (1) technically feasible and (2) not unreasonably burdensome. *See SAI v. Transp. Sec. Admin.*, 315 F. Supp. 3d 218, 239 (D.D.C. 2018); *see also Scudder*, 25 F. Supp. 3d at 31-38. When evaluating burden, courts often consider the amount of time, expense, and personnel. *See, e.g.*, *Pinson v. U.S. Dep't of Justice*, 80 F. Supp. 3d 211, 216 (D.D.C. 2015). Declarations demonstrating that an agency has previously produced records in the requested format are evidence of the government's ability to provide the information in that format. *See TPS, Inc. v. U.S. Dep't. of Def.*, 330 F.3d 1191, 1196-97 (9th Cir. 2003) (a declaration that an agency previously provided information in a particular electronic form was evidence of the agency's ability to produce information in that form); *Scudder*, 25 F. Supp. 3d at 40 (same).

Here, replacing A-numbers with Unique IDs is technically feasible. ICE has previously created and produced Unique IDs for at least individual categories of data. *Am. Immigration Council v. U.S. Immigration & Custom Enf't*, 2020 WL 2748515, at *8 (D.D.C. May 27, 2020) ("[A]t one point, ICE provided [anonymized] unique identifiers 'as a[n] . . . exercise of discretion' . . . ."); (Hausman Decl. ¶¶ 10-12 (ICE has created Unique IDs in response to requests from the NYT, HRW, and the TRAC)). Where, as here, Unique IDs are requested for multiple categories of data, the process for creating those Unique IDs is essentially unchanged: all that is required is code telling the computer where to look for the records. (*See* Hausman Decl. ¶ 30;

tantamount to imposing . . . the burden of creating records"). Given the expansive meaning of the word "any": "one or some indiscriminately of whatever kind . . . [t]here is no basis in the text for limiting" the forms and formats available to a requestor. *See U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted); *see also Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("'Any,' after all, means any.").

Wu Decl. ¶¶ 21, 28.) Thus, ICE's prior admissions, reinforced by Plaintiff's declarations, establish that ICE has the technical ability to format A-numbers as Unique IDs.

This formatting, as explained in Plaintiff's declarations, can be performed in at least two ways, both of which use existing, available technology and require negligible expense, time, and training. ICE can extract anonymized Unique IDs from its databases using SQL queries. (Wu Decl. ¶¶ 20-26.) Using this option, ICE needs only to adjust the code used to search for and extract A-numbers. (*Id.* ¶ 21.) Assuming its databases are relatively modern, ICE can extract Unique IDs for each category of data in a matter of minutes. (*Id.* ¶ 26.) Or ICE can use a standard data analysis program to automatically reformat the unredacted A-numbers from the spreadsheets it has already created for the Request. (Hausman Decl. ¶¶ 28-33; *see also* Wu Decl. ¶ 27.) Writing a script requires anywhere from approximately twenty minutes to three hours (Hausman Decl. ¶ 28; Wu Decl. ¶ 29), and requires no formal computer training, (Hausman Decl. ¶ 28).

Therefore, as Plaintiffs' declarations conclusively demonstrate, Unique IDs constitute a readily reproducible format that ICE must produce.

3. ICE has failed to meet its burden of showing that the steps required to replace A-numbers with Unique IDs are unreasonable or unduly burdensome.

ICE makes only one conclusory, throwaway statement about burden, which clearly fails to demonstrate that providing Unique IDs would be burdensome. ICE claims that it "does not maintain a computer program to produce such identifiers and [that] creating and utilizing such a program would be cumbersome." (ICE Br. 18.) It makes no attempt to explain the amount of time, expense, and personnel that would be required to replace A-numbers with Unique IDs. (*See* Vassilio-Diaz Decl. ¶ 21.) Without these details, the Court cannot conclude that ICE has

carried its burden of showing that producing Unique IDs is unduly burdensome. *See Grand Cent. P'ship*, 166 F.3d at 478 (2d Cir. 1999); *see also N.Y. Times Co. v. FCC*, 2020 WL 2097623, at *8 (S.D.N.Y. Apr. 30, 2020) (denying summary judgment where the agency "made no showing that creating and running . . . a script would require more than reasonable efforts to search or would significantly interfere with the operation of the agency's automated information system"); *Seife v. U.S. Dep't of State*, 298 F. Supp. 3d 592, 612 (S.D.N.Y. 2018) ("[Declarant] provide[d] no information regarding the total number of email accounts that would need to be searched, or the level of difficulty of, or amount of time required by, the search process itself.").

Moreover, the evidence in the record calls into question the candor of Ms. Vassilio-Diaz's declaration. First, Ms. Vassilio-Diaz's declaration falsely states that ICE's search for responsive records was "consistent with the approach followed by [ICE] in response to the [NYT's] FOIA request 12-03290 [sic][13] and [HRW's] FOIA request 15-06191." (Vassilio-Diaz Decl. ¶ 17; *see also* ICE Br. 4.) For those requests ICE created and produced Unique IDs, meaning it substituted a new number for a pre-existing number. (Hausman Decl. ¶¶ 10-11.) But here, Ms. Vassilio-Diaz claims that ICE has no such capability, and so it must "create a program capable of uniquely substituting a new number for a pre-existing number." (Vassilio-Diaz Decl. ¶ 21; *see also* ICE Br. 7, 12, 17.)

Second, Ms. Vassilo-Diaz misleadingly asserts that ICE "does not maintain a computer program by which it can replace A-numbers from the IIDS database with other, unique identifiers." (Vassilio-Diaz Decl. ¶ 21; *see also* ICE Br. 18.) She omits any discussion about the ability of the EID to create those Unique IDs, or the ability of either database to run SQL queries. These omissions are glaring. As Dr. Wu explains, and as ICE has admitted in another FOIA

[13] The Request referenced request 14-03290. (Compl. Ex. A.)

litigation, ICE can run SQL queries on the IIDS and EID to transform data into the Unique IDs requested by Plaintiff. (Wu Decl. ¶ 23); *Long*, 149 F. Supp. 3d at 52 (D.D.C. 2015) (EID and IIDS databases run SQL queries). If Ms. Vassilio-Diaz had informed the Court about the capabilities of the EID or SQL queries, her declaration would no longer support ICE's motion.

Third, Ms. Vassilio-Diaz's declaration also makes no mention of ICE's prior experience using standard database programs or the burden imposed by using such programs to replace A-number with Unique IDs. (*See generally* Vassilio-Diaz Decl.) The evidence in the record demonstrates that using these programs to replace A-numbers with Unique IDs imposes only a *de minimis* burden. (Wu Decl. ¶¶ 29-30; Hausman Decl. ¶ 34.)

Therefore, this Court should deny ICE's motion for summary judgment because the Vassilio-Diaz Declaration makes only conclusory statements about the burden of replacing A-numbers with Unique IDs and contains incomplete and conflicting evidence about ICE's needs to create a program.

B. Contrary to the Government's Assertions, Replacing A-numbers With Unique IDs Does Not Create a New Record

Sections 552(a)(8)(A)(ii)(II) and 552(a)(3)(B) require ICE to replace A-numbers with Unique IDs; the inquiry ends there. Attempting to avoid this obligation, ICE erroneously claims that producing these Unique IDs creates a new record. The FOIA, however, requires disclosure of "information, not documents." *See People for the Ethical Treatment of Animals v. U.S. Dep't of Agric. & Animal & Plant Health Inspection Serv.*, 918 F.3d 151, 156 (D.C. Cir. 2019) (citation omitted). ICE does not cite to a single analogous case where, like here, the request seeks segregation of the exact same nonexempt information already in the agency's control.

Congress defined a "record" for the purposes of the FOIA as "any *information* that would be an agency record . . . when maintained by an agency in any format, including an electronic

format."[14] E-FOIA Amendments of 1996, 110 Stat. at 3049 (emphasis added) (codified at 5 U.S.C. § 552(f)(2)); *Inst. for Justice v. IRS*, 941 F.3d 567, 571 (D.C. Cir. 2019) (citing E-FOIA Amendments of 1996, 110 Stat. at 3049). Under this definition, a "record" includes all "information" maintained by an agency—not just documents, reports, or data points. *See* E-FOIA Amendments of 1996, 110 Stat. at 3048-49 (The purpose of the E-FOIA Amendments was to "foster democracy by ensuring access to agency *records and information*"; . . . to "improve public access to agency *records and information*"; . . . and to "maximize the usefulness of agency *records and information* collected, maintained, used, retained, and disseminated by the Federal Government." (emphases added)). Accordingly, an agency may be obligated to produce information in its control "even if 'the net result . . . will be a document the agency did not previously possess.'" *Everytown*, 403 F. Supp. 3d at 356 (citation omitted); *accord N.Y. Times*, 939 F.3d at 488 (FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." (citation omitted)).

There are only two requirements for "information" to be an "agency record": (1) the agency must "either create or obtain" the requested information and (2) that "agency must be in control of the requested materials at the time the FOIA request is made."[15] *Grand Cent. P'ship*, 166 F.3d at 479 (citing *Tax Analysts*, 492 U.S. at 145-45). So long as those two requirements are satisfied, a record exists regardless of its form. H.R. Rep. 104-795, at 20 (1996), 1996 U.S.C.C.A.N. 3448, 3463 ("When determining whether information is subject to the FOIA, the

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[14] Congress adopted this definition, in part, to reverse judicial interpretations that too narrowly defined a "record" under the FOIA. *See* H.R. Rep. 104-795, at 20, 1996 U.S.C.C.A.N. 3448, 3463 (rejecting judicial precedent applying the Records Disposal Act's definition of a record as inconsistent with the purposes of the E-FOIA Amendments).

[15] Unlike the information in ICE's databases, the 21 spreadsheets produced by ICE are not records because they did not exist "at the time the FOIA request [was] made." *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

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form or format in which it is maintained is not relevant to the decision."). For requests for database information, the FOIA requires disclosure of any nonexempt information maintained by an agency, including all of the information conveyed by the data points.[16] *See Everytown*, 403 F. Supp. 3d at 359 ("aggregate counts of entries in a database" constitute a record—not a new record—even though those counts did not exist as a data point in the database); *Inst. for Justice*, 941 F.3d at 570 ("data not specific to individual [records], such as statistical and reporting data" constitute records); *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027-28 (D.C. Cir. 1999) (agency must segregate out the exempt portions of Harmonized Tariff Numbers).

1. All of the information conveyed by an A-number is an existing record.

All of the information conveyed by an A-number is a "record," because it satisfies the two requirements for an "agency record": it was (1) created by ICE and (2) in ICE's possession at the time the Request was made. *See Grand Cent. P'ship*, 166 F.3d at 479 (quoting *Tax Analysts*, 492 U.S. at 144-45). Thus, segregating nonexempt information from or reformatting an A-number produces an existing record, because it produces information from a record. *See* 5 U.S.C. § 552(f)(2) (a "record" is information "maintained by an agency in any format"); *Kwoka v. IRS*, 2018 WL 4681000, at *4 (D.D.C. Sept. 28, 2018) (creating a new document consisting of only segregated nonexempt information did not create a new record).

Plaintiff seeks the Relational Information conveyed by A-numbers, which ICE created by including A-numbers in its databases[17]—thus satisfying the first requirement for an "agency

[16] In fact, information constituting a record can be automatically created and stored by a database or computer. *See N.Y. Times Co. v. FCC*, 2020 WL 2097623, at *7 (S.D.N.Y. Apr. 30, 2020) (Electronically created "API proxy server log" constituted "information . . . in any format." (citing 5 U.S.C. § 552(f)(2)(A))).

[17] Any identifier that is unique to a specific person creates two types of information: PII and Relational Information. (Wu Decl. ¶ 11.) The Request seeks Relational Information from A-numbers because, as stated *(cont'd)*

record." This Relational Information exists independently from the PII from A-numbers, as evidenced by ICE's (1) use of A-numbers, (2) distribution of A-numbers, and (3) prior FOIA productions.[18] *See* H.R. Rep. 104-795, at 20, 1996 U.S.C.C.A.N. at 3463 ("[I]nformation an agency . . . is directly or indirectly disseminating remains subject to the FOIA in any of its forms or formats."); *N.Y. Times*, 939 F.3d at 488 (The FOIA "'strongly favor[s] public disclosure of information in the possession of federal agencies.'" (quoting *Halpern*, 181 F.3d at 286)). First, ICE admits that its officers use A-numbers to view Relational Information. (Vassilio-Diaz Decl. ¶¶ 7-8; *id.* ¶ 12 ("ICE officers can also pull data related to an individual from the EID . . . [but] the ICE officer must have a specific personal identifier, such as an A-number.").) Second, ICE shares Relational Information from A-numbers with other government agencies. For example, ICE sends Relational Information from A-numbers to the DHS Office of Immigration Statistics, for it to analyze "the broad movement of individuals through the immigration enforcement system," U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the Office of Immigration Statistics (OIS) Statistical Data Production and Reporting, DHS/ALL/PIA-071 (Dec. 7, 2018), at 5, https://www.dhs.gov/sites/default/files/publications/privacy-pia-dshall-071-immigrationstatistics-december2018.pdf—which is the *same* reason Plaintiff submitted the FOIA Request, (Hausman Decl. ¶ 4). ICE's databases also provide Relational Information to the Central Index System, an electronic data repository that uses A-numbers to associate records

by ICE: "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." (ICE Br. 13.)

[18] To illustrate the independent nature of Relational Information, if, while flipping through unredacted spreadsheets, one observed the same Unique ID in multiple rows of the same column on one or more spreadsheets, it would be apparent that those rows were associated with the same person. (Wu Decl. ¶ 13.) Because the specific value of the Unique ID does not matter, randomly assigning new identifiers does not change these observations. (*Id.* ¶ 14.)

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about individuals.[19] U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the Central Index System (CIS), DHS/USCIS/PIA-009(a) (Apr. 7, 2017), at 2, 5, https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-09-a-cis-april-2017.pdf. And third, ICE has provided anonymized Unique IDs disclosing Relational Information in response to multiple prior FOIA requests. *Am. Immigration Council v. U.S. Immigration & Custom Enf't*, 2020 WL 2748515, at *8 (D.D.C. May 27, 2020) ("[A]t one point, ICE provided unique identifiers 'as a[n] . . . exercise of discretion' . . . ."); (Hausman Decl. ¶¶ 10-12 (ICE provided Unique IDs for individual categories of data requested by the NYT, HRW, and the TRAC)).

Satisfying the second requirement for an "agency record," Relational Information from A-numbers is in ICE's control. In response to the Request, ICE identified and redacted A-numbers—the data point that creates and conveys the requested Relational Information.[20] (*See* Vassilio-Diaz Decl. ¶¶ 13, 17; Wu Decl. ¶¶ 11, 16.)

Thus, the Relational Information sought by Plaintiff—in the form of Unique IDs—is maintained by ICE and is thus an existing record.

2. Neither transforming nor reformatting A-numbers into Unique IDs creates a new record because the information in ICE's control remains unchanged.

In arguing that the production of Unique IDs requires the creation of a new record, ICE relies on cases predating the E-FOIA Amendments and the FOIA Improvement Act of 2016. These cases rely on the outdated understanding of a record as a "document," rather than as

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[19] ICE is able to access electronic person-centric records through CIS 2, "a DHS-wide index system to track the location of case files, including Alien Files (A-File)." U.S. Dep't of Homeland Sec., Privacy Impact Assessment Update for the Central Index System, DHS/USCIS/PIA-000(b) (December 17, 2018), at 2, https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-cis2-december2018.pdf.

[20] Unlike in *Brown v. Perez*, 835 F. 3d 1223 (10th Cir. 2016), where the court held that screenshots of scheduling software run on a user's computers were not agency records because such screenshots were not retained by the agency, *id.* at 1229, here ICE maintains A-numbers, and all associated information, in its databases.

"information," as the FOIA currently provides. C*ompare* 5 U.S.C. § 552(f)(2)(A) (A "record" includes "any *information* that would be an agency record . . . when maintained . . . in any format . . . ." (emphasis added)) *with* (ICE Br. 12 ("[U]nder the FOIA, an agency . . . discloses existing *documents*, which it has already prepared." (quoting *Pierce & Stevens Chem. Corp. v. U.S. Cons. Prod. Safety Comm.*, 585 F.2d 1382, 1388 (2d Cir. 1978)) (emphasis added)); *id.* at 13 ("The government's responsibility under FOIA is to release specified *documents* unless a FOIA exemption covers the document . . . ." (citing *Gabel v. C.I.R.*, 879 F. Supp. 1037 (N.D. Cal. 1994)) (emphasis added)).)[21] ICE has not, and cannot, point to any court that has determined that a request requires creation of a new record where the request seeks the same nonexempt information maintained in the agency's database. Unlike here, where the requested Relational Information exists in ICE's databases, courts have concluded that a new record is created only when (1) the requested format adds to or modifies the meaning of the information in the agency's control or (2) responding to the request requires that the agency perform additional research or analysis, neither of which is implicated by the creation of Unique IDs.

For electronically stored data, unlike for "documents," the FOIA requires that agencies manipulate information and create documents that the agency did not previously possess. *See Everytown*, 403 F. Supp. 3d at 357.[22] Where an agency already possesses in its databases the

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[21] ICE cites to another irrelevant pre-E-FOIA Amendments case, *Forsham v. Harris*, 445 U.S. 169 (1980) (ICE Br. 8, 12), where unlike here, the request required a new "agency record" because the information was not in the control of the agency. 445 U.S. at 186 (agency had only a right of access). Even ICE's citations to more recent cases predate the FOIA Improvement Act, and thus do not reflect its expanded segregability provision. (*See* ICE Br. 13-15 (citing *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61 (2d Cir. 2012), *Students Against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001), *Flightsafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607 (5th Cir. 2003); *Ctr. for Pub. Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007)); *see also infra* § B.2).

[22] In *Everytown*, this Court rejected the holding from *Nat'l Sec. Counselors v. C.I.A.*, 898 F. Supp. 2d 233 (D.D.C. 2012), that requests for database records are limited to documents that an agency has "in fact chosen to create and retain," (*see* ICE Br. 19), stating: "[T]he narrow interpretation offered by . . . *National Security Counselors* . . . —placing emphasis on the form in which the data is stored—is not what Congress intended . . . ." 403 F. Supp. 3d at 360. Instead, as with records from a file cabinet, the scope of database records extends beyond *(cont'd)*

information sought by the requestor, "extracting . . . that [information] does not amount to the creation of a new record." *Schladetsch v. U.S. Dep't of Housing & Urban Dev.*, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000). And creating a new document for the segregated nonexempt information does not create a new record either. *See Kwoka*, 2018 WL 4681000, at *4 (citing *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982)).

Here, ICE's actions belie its claim that it need only "disclose[] existing documents, which it has already prepared." (*See* ICE Br. 8 (citation omitted).) ICE admits to creating new documents in response to this Request, stating that it produced spreadsheet data "in the format sought" by the Request—and thus not the format in which it exists in the database. (ICE Br. 10 ("ICE's search resulted in production of spreadsheets for each population of data sought, in the format sought."); *see also* Vassilio-Diaz Decl. ¶¶ 17-19; *id.* Ex. A.) And in another litigation, ICE admitted to changing the labeling of spreadsheets it produced in response to FOIA requests. *See Long v. Immigration & Customs Enf't*, 2020 WL 2849904, at *11 (D.D.C. June 2, 2020). Therefore, as ICE's actions demonstrate, the FOIA requires the creation of any document necessary to disclose nonexempt database records.

Further, no new record is created because the requested format does not add to or modify the meaning of the information controlled by ICE. *See Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 66 (2d Cir. 2012); *Aguiar v. Drug Enf't Admin.*, 334 F. Supp. 3d 130, 144 (D.D.C. 2018), *appeal filed*, No. 18-5356 (D.C. Cir. Dec. 12, 2018). ICE denies this reality, citing to *American Civil Liberties Union*, where the district court exceeded its authority under 5 U.S.C. § 552(a)(3)(B) when it ordered that "the Government . . . avoid public disclosure of the

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individual datapoints and includes Relational Information. *See id.* at 359 ("[I]f an agency stored . . . database information in physical file cabinets, collating trace results into drawers and subfolders by every possible set of criteria, it would be required to answer a request for the number of documents stored in each subfolder."). *(cont'd)*

redacted information by substituting a *purportedly neutral phrase* composed by the court."[23] 681 F.3d at 71 (emphasis added). In contrast, anonymous Unique IDs do not neuter or otherwise modify the nonexempt information conveyed by the records. As Dr. Wu explains, Unique IDs can be extracted directly from ICE's databases, because the information they convey exists entirely in those databases. (Wu Decl. ¶¶ 15-16, 20-21, 23.) Although Unique IDs take the form of a new number—unlike in *American Civil Liberties Union*—this method of segregation copies, without altering, the nonexempt information maintained by ICE through A-numbers. (Wu Decl. ¶¶ 14, 18.)

ICE's citations from outside this Circuit are no different. ICE cites to a state-law case, *Sander v. Superior Court*, 237 Cal. Rptr. 3d 276 (Ct. App. 2018), *review denied* (Nov. 14, 2018), for a proposition rejected by the California Supreme Court. That court explained that *Sander* is "not a general prohibition on constructing records" but prohibits only the creation of "new substantive content."[24] *Nat'l Lawyers Guild, S. F. Bay Area Chapter v. City of Hayward*, 2020 WL 2761057, at *8 (Cal. May 28, 2020); *id.* (providing the following examples of new substantive content: "summary or explanatory material, . . . calculations on data, [and] inventories of data"; none of these apply here). And in *Aguiar*, the requested map images would contain entirely new visual information, far beyond the information conveyed by the GPS coordinates maintained in the agency's database. 334 F. Supp. 3d at 144 (map images would provide "significant added meaning"). Here, no new substantive content or information is

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[23] *See Neutral*, Merriam-Webster's Dictionary ("not decided or pronounced as to characteristics"), https://www.merriam-webster.com/dictionary/neutral#h2 (last visited May 18, 2020); *see also Neutral–Subject-Matter-Neutral*, Black's Law Dictionary (11th ed. 2019) ("(Of a regulation or discrimination) not based on the topic or subject of speech.").

[24] In *Sander* the request "chang[ed] the substantive content of an existing record" and added "new data" because, unlike here, it involved "adding 'random noise,' scrambling data or generalizing fields of information, . . . swapping values for generalized values," "assign[ing] new or different values to existing data, replac[ing] groups of data with median figures or variables, and collaps[ing] and band[ing] data into newly defined categories." 237 Cal Rptr. 3d at 283, 291.

created because the Relational Information from A-numbers already exists in ICE's databases. (Wu Decl. ¶¶ 14, 18.)

Moreover, ICE does not claim that the Request requires additional research or analysis, but cites to multiple cases where the request required the agency to perform research or analysis. *See Everytown*, 403 F. Supp. 3d at 359; (*see generally* ICE Br). In *Students Against Genocide*, the requestor asked the agency to "produce new photographs at a different resolution . . . to mask the capabilities of the reconnaissance systems that took them," 257 F.3d 828, 837 (D.C. Cir. 2001), a task requiring analysis of the risk of disclosing classified information at any resolution. In *Flightsafety*, the request required the "insert[ion] of *new information*," *id.* at 613 (emphasis added), because the agency "would have to spend a significant amount of time and resources on in-depth analysis of the recoded data," *FlightSafety Servs. Corp. v. U.S. Dep't of Labor*, 2002 WL 368522, at *8 (N.D. Tex. Mar. 5, 2002), *aff'd sub nom. Flightsafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607 (5th Cir. 2003). And in *Ctr. for Pub. Integrity v. FCC*, the requester asked for the agency to select and disclose (1) "ranges (the precise contours of which could be determined by the [agency])" or (2) notations indicating "whether . . . deleted responses were zero or greater than zero," forcing the agency to *analyze* the data—to produce an appropriate range or notation for each category of data. 505 F. Supp. 2d at 114. Here, however, ICE admits that none of the steps for replacing A-numbers with Unique IDs involves any analysis whatsoever. (Vassilio-Diaz Decl. ¶ 21.)

ICE's remaining cases apply the burden-based standard discussed above, and *support* Plaintiff's claim that ICE must produce Unique IDs unless doing so is burdensome. In *Hearst Corp. v. New York*, 24 Misc. 3d 611 (N.Y. Sup. Ct. 2009), the court considered whether, under New York's Freedom of Information Law, the records were "retrievable with reasonable effort."

Id. at 617 (citation omitted). The government admitted that producing complete database tables in the form requested, with "substitute keys" replacing Social Security numbers, was technically feasible, but claimed that the process "would take 85 to 90 hours of actual staff time" plus "400 to 565 hours [for] . . . three other major steps." *See id.* at 618. The court held that this process was too burdensome, and instead ordered the agency to perform a "'far simpler' but 'inferior' method of using a simple query to extract and join together all of the . . . data [in the requested tables], other than Social Security numbers." *Id.* at 625. And in *In re Nicholas Confessore*, 33 F.C.C. Rcd. 11808 (2018) the agency concluded that under section 552(a)(8)(A)(ii)(II), discussed above, creating the requested data logs and unique identifiers was too burdensome because it "would have to devote significant resources to developing and executing a new computer program . . . to modify[] or extract[] certain sensitive elements from [the] logs."[25] *Id.* at 11817-18. Here, in contrast, ICE concedes that replacing A-numbers with Unique IDs is not burdensome, calling the process doable but "cumbersome." (ICE Br. 18 (citing Vassilio-Diaz Decl. ¶ 21).) But as the declarations of Dr. Wu and Dr. Hausman explain, A-numbers can be replaced with Unique IDs in a matter of minutes or a few hours, depending on the method, and thus doing so is not unduly burdensome. (*See* Wu Decl. ¶¶ 26, 29-30; Hausman Decl. ¶ 34.)

In sum, ICE has failed to satisfy its burden of demonstrating that the information sought is not an "agency record." As Plaintiff's declarations conclusively demonstrate, replacing A-numbers with Unique IDs copies nonexempt Relational Information maintained by ICE. Under the FOIA, a replication of nonexempt information from a record is still an existing record.

[25] This Court rejected the agency's decision in *In re Nicholas Confessore*, because the exemptions claimed by the agency did not apply. *N.Y. Times Co. v. FCC*, 2020 WL 2097623, at *7 (S.D.N.Y. Apr. 30, 2020). In that litigation, the FCC had abandoned its position that responding to the request created a new record "after [it] discovered the [requested] API proxy server log." *Id.* at *3 n.1.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that its cross-motion for summary judgment be granted and Defendant's motion be denied.

Dated: June 18, 2020
New York, New York

Respectfully submitted,

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