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 OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The undisputed facts reveal a simple case. The ACLU[1] submitted a FOIA request that asked ICE for spreadsheet data concerning immigration enforcement and stated that "[i]n every case, alien numbers ('A-numbers') should be replaced with unique identifiers." Dkt. No. 1-1 at 1. However, the Government's IIDS database does not include the type of person-centric unique identifiers requested by the ACLU (hereinafter, "Unique Identifiers"), aside from A-numbers. To satisfy the request, the Government would have to create new Unique Identifiers. But "FOIA imposes no duty on [an] agency to create records." *Forsham v. Harris*, 445 U.S. 169, 186 (1980).

The ACLU waxes metaphysical but unpersuasive in an attempt to circumvent this settled principle. On its theory, A-numbers serve several purposes. They personally identify individuals and thus include personal identifying information ("PII"), which renders them exempt under FOIA. They also show whether different records are associated with the same individual, conveying what the ACLU styles as "Relational Information." The ACLU argues that each of these purposes forms a separate agency record apart from the A-number itself. As a separate record, the ACLU believes that the Government must segregate Unique Identifiers from FOIA-exempt A-numbers and produce them. It also argues that Unique Identifiers are simply a different "form or format" of an A-number under 5 U.S.C. § 552(a)(3)(B).

These conceptual semantics are inconsistent with precedent and would create unsound results if applied in the FOIA context. FOIA demands disclosure of "non-exempt data points," *Institute for Justice v. IRS*, 941 F.3d 567, 570 (D.C. Cir. 2019) (quotation marks omitted), not

[1] This brief employs the same acronyms and definitions as the Government's opening brief. *See* Dkt. No. 31 ("Gov. Br.").

"information in the abstract," *Forsham*, 445 U.S. at 185. Where a data point is exempt, as with A-numbers, the Government need not create a substitute record that conveys some information that might be gleaned from exempt records (here, A-numbers) without risking the revelation of the information that gave rise to the data point's exemption. Rather than adopting the ACLU's novel theory that agencies can and must segregate meaning from the words and data points that convey them, this matter can be resolved by applying basic FOIA principles concerning the scope of an agency's obligation to create new records. For the reasons that follow, the Court should grant the Government's motion for summary judgment and deny the ACLU's cross-motion.

ARGUMENT

The ACLU argues that the IIDS database stores Relational Information, and that Unique Identifiers must be produced because FOIA requires an agency to segregate nonexempt information from exempt records, 5 U.S.C. § 552(a)(8)(A)(ii)(II), and produce A-numbers in the "form or format" of Unique Identifiers, 5 U.S.C. § 552(a)(3)(B). These arguments fail because they ignore an antecedent point that is dispositive: "The fact that person-centric unique identifiers do not exist in ICE's IIDS database is not disputed, and the legal principle that an agency is not required to create new records is well-settled." *Am. Imm. Council v. U.S. ICE*, No. 18 Civ. 1614 (ABJ), 2020 WL 2748515, at *8 (D.D.C. May 27, 2020); *see also* Gov. Br. at 12-16; Vassilio-Diaz Decl. ¶¶ 20-21. That point alone is sufficient to resolve this case.

I. Production of Unique Identifiers Entails the Creation of a New Record.

FOIA vests the district courts with the power "to enjoin [an] agency from withholding agency records and to order the production of any agency record improperly withheld." 5 U.S.C. § 552(a)(4)(B). By contrast, "FOIA imposes no duty on [an] agency to create records." *Forsham*, 445 U.S. at 186. The ACLU argues that Relational Information exists as a record in the IIDS

database and producing new Unique Identifiers therefore discloses only existing records. This argument is incorrect for two independent reasons. First, Relational Information itself cannot be an agency record because "[t]he Freedom of Information Act deals with 'agency records,' not information in the abstract." *Forsham*, 445 U.S. at 185. Second, the ACLU never explains why the existence of Relational Information makes *Unique Identifiers* an agency record subject to disclosure. Because neither Relational Information nor Unique Identifiers are agency records, Unique Identifiers cannot be produced without their first being created, a task that FOIA does not require the Government to undertake.

A. Relational Information Cannot Be An Agency Record.

Courts apply a two-part test to determine whether materials are agency records under FOIA. "First, an agency must either create or obtain the requested materials as a prerequisite to its becoming an agency record." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989) (quotation marks omitted). "Second, the agency must be in control of the requested materials at the time the FOIA request is made." *Id*. at 145.

The ACLU argues that Relational Information "exists independently" in the Government's databases, Pl. Br. at 21, and that, as a result, "the Relational Information sought by Plaintiff . . . is maintained by ICE and is thus an existing record." *id*. at 22. But the ACLU's discussion of the *Tax Analysts* factors does little more than reiterate the uncontroverted point that the IIDS database contains A-numbers, which provide connective links between records and are themselves agency records. *Id*. at 20 (ICE "created" Relational Information "*by including A-numbers in its databases*") (emphasis added); *id*. at 22 ("Relational Information *from A-numbers* is in ICE's control") (emphasis added). Although A-numbers convey Relational Information, the ACLU

cannot establish that the Government "created" or "controlled" Relational Information apart from A-numbers, which are FOIA-exempt.

The fact that Relational Information is an *attribute* of A-numbers does not make it an agency record itself. FOIA requires the disclosure of "non-exempt data points." *Institute for Justice*, 941 F.3d at 570 (quotation marks omitted). By contrast, FOIA does not "deal[] with . . . information in the abstract." *Forsham*, 445 U.S. at 185. The ACLU argues that *Forsham* is "irrelevant" because it pre-dates the E-FOIA Amendments, Pl. Br. at 23 n.21, which defined "[r]ecord" as "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2)(A). According to the ACLU, "[u]nder this definition, a 'record' includes all 'information' maintained by an agency—not just documents, reports, or data points." Pl. Br. at 19. But the E-FOIA Amendments did not abrogate *Forsham*. They tautologically define "[r]ecord" as "any information *that would be an agency record* . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2)(A) (emphasis added).[2] Accordingly, as the D.C. Circuit recently explained, the E-FOIA Amendments "provide[] little help in understanding what is a 'record' in the first place." *AILA v. EOIR*, 830 F.3d 667, 679 (D.C. Cir. 2016). Courts continue to cite *Forsham* for the proposition that "information in the abstract" is not an agency record even after passage of the E-FOIA Amendments. *See, e.g.*, *Rubman v. U.S. Citizenship & Imm. Servs.*, 800 F.3d 381, 390 (7th Cir. 2015); *Elkins v. FAA*, 103 F. Supp. 3d 122,

[2] This is not to say that the addition of 5 U.S.C. § 552(f)(2)(A) served no purpose. "Congress amended the definition of 'record' to include electronic records." *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006); *see also* H.R. Rep. 104-795, at 18, 1996 U.S.C.C.A.N. 3448, 3461 (1996) ("Records which are subject to the FOIA shall be made available under the FOIA when the records are maintained in electronic format. This clarifies *existing practice* by making the statute explicit on this point.") (emphasis added).

130 (D.D.C. 2015).

The rule that "[t]he Freedom of Information Act deals with 'agency records,' not information in the abstract," *Forsham*, 445 U.S. at 185, is supported by sound reason. Divorcing information from the data points that convey it leads to untenable results. Take, for example, a hypothetical one-page nonexempt IRS document conveying information about a new tax proposal in technical terms and legalese difficult for a layperson to parse. Under the ACLU's theory, the information conveyed by the document, rather than the document itself, is an agency record. Accordingly, a FOIA requester could ask for that record (the information) in a new "form or format" (translated from legalese to lay terms) so long as the document was "readily reproducible" in that form. *See* 5 U.S.C. § 552(a)(3)(B). This conflicts with settled FOIA principles: "The government's responsibility under FOIA is to release specified documents unless a FOIA exemption covers the document; it is not to revamp documents or generate exegeses so as to make them comprehensible to a particular requester." *Gabel v. CIR*, 879 F. Supp. 1037, 1039 (N.D. Cal. 1994); *see also Essential Information, Inc. v. U.S. Information Agency*, 134 F.3d 1165, 1172 (D.C. Cir. 1998) (Tatel, J., dissenting) ("FOIA contains no . . . translation requirement").

Further, the ACLU's theory that the information conveyed by a data point is a record is inconsistent with the black-letter FOIA principle that disclosure "cannot turn on the purposes for which the request for information is made." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). Words are polysemous; the ideas they convey are tied to the purpose for which they are employed. A cryptographer may be interested in patterns in the digits of A-numbers and request that A-numbers be replaced by numbers that maintain those hidden codes. A typophile may be interested in the font used to display A-numbers and request that those exempted A-numbers be replaced by the phrase "`Courier New`." Innumerable ideas

or inferences may be conveyed by a single A-number, at least in the eyes of the varied individuals who may seek to use them. To make an agency's FOIA obligations turn on those reasons contradicts the settled principle that "the identity and purpose of the requesting party are *irrelevant* under FOIA." *Reed v. NLRB*, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (emphasis in original). Moreover, the ACLU's theory would impose an additional burden on an agency to determine whether specific information conveyed by a data point (*i.e.*, Relational Information) implicates the same concerns that caused the data point (*i.e.*, the A-number) to be exempt under FOIA.[3]

FOIA does not require agencies to seek deeper meanings behind their records and take on added tasks to convey some such meanings in a way that avoids disclosing exempt information that the document in question contains on its face. Rather, FOIA speaks to an agency's obligation with respect to "agency records." While this may refer to "specified documents," *Gable*, 879 F. Supp. at 1039, or, in the context of databases, "non-exempt data points," *Institute for Justice*, 941 F.3d at 570 (quotation marks omitted), it does not parse these records into the infinite concepts they may convey to requesters. In this case, the Government maintains certain "data points"—A-numbers—as agency records. The information conveyed by those A-numbers are not separate records with independent existence. *Cf. Lapp v. FBI*, No. 14 Civ. 160 (IMK), 2016 WL 737933, at *8 n.11 (N.D. W. Va. Feb. 23, 2016) ("Lapp persists throughout his filings in equating

[3] The ACLU's FOIA request highlights this point. Although the ACLU argues that A-numbers are FOIA-exempt because they convey PII, not because they convey Relational Information, Pl. Br. at 1, these functions are intertwined. If enough discrete records relating to an individual are connected, the sum of the information conveyed risks uniquely identifying that individual much the same as any other personal identifier. *See CIA v. Sims*, 471 U.S. 159, 178 (1985) ("[B]its and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself.") (quotation marks omitted). At least one court has recognized that this "mosaic theory" could be applied to support application of a FOIA privacy exemption. *ACLU v. U.S. Dep't of Homeland Sec.*, 973 F. Supp. 2d 306, 314-15 (S.D.N.Y. 2013) (discussing mosaic theory, but determining that its application was "in this case at least, unpersuasive.").

'information' with 'documents,' in that, according to him, if the information exists in some form or location that the FBI could access, they must sort it, compile it, and disclose it to him in some newly created form. This is beyond the scope of the FOIA.").

B. Unique Identifiers Are Not Agency Records.

Even accepting *arguendo* that Relational Information "exists independently," Pl. Br. at 21, in the IIDS database, that fact would not lead to the conclusion that *Unique Identifiers* are agency records subject to disclosure. As noted above, agency records must both have been "create[d] or obtain[ed]" by an agency and be within its "control." *Tax Analysts*, 492 U.S. at 144, 145. The ACLU fails to explain how the existence of Relational Information in the IIDS database establishes that "Unique IDs" are "maintained by ICE and . . . thus an existing record." Pl. Br. at 22. The ACLU's own expert repeatedly recognizes that there are no pre-exiting Unique Identifiers within the IIDS database. *See* Dkt. No. 36 ("Wu Decl.") ¶ 24 ("When an SQL query is used to search for and *transform A-numbers into Unique IDs* the resulting new file contains Unique IDs, not A-numbers.") (emphasis added); *id.* ¶ 28 ("*Creating* Unique IDs from the 21 spreadsheets should be a relatively quick process.") (emphasis added).[4] The ACLU does not contend otherwise.

Nor has the Government "creat[ed] or obtain[ed]" Unique Identifiers because it previously created identifiers for the New York Times, Human Rights Watch, and the Transactional Records Access Clearinghouse. Pl. Br. at 22. ICE created these identifiers as an exercise of discretion.[5]

[4] Although not material to this motion, the Wu Declaration contains several inaccuracies with respect to its description of how Unique Identifiers could be produced. *See* Supplemental Declaration of Donna Vassilio-Diaz ("Supp. Vassilio-Diaz Decl.") ¶¶ 10-13.

[5] Those identifiers also differed from the Unique Identifiers requested here, as they were specific to individual data populations and did not create relationships between requested populations as the ACLU has requested in this case. Supp. Vassilio-Diaz Decl. ¶ 14; *see also* Hausman Decl. ¶ 9 ("I do not know of an example in which ICE had produced Unique IDs for a similar request involving multiple categories of data.").

See Supp. Vassilio-Diaz Decl. ¶¶ 14-15; *see also* Hausman Decl. ¶ 9 ("ICE has previously created and produced Unique IDs . . . "). Its decision to do so did not change its obligations under FOIA. *See ACLU v. Dep't of Defense*, 752 F. Supp. 2d 361, 372 (S.D.N.Y. 2010) ("[T]he Government's discretionary decision to release a limited set of information does not waive FOIA protection for similar information that is not discretionarily released.").

C. Producing Unique Identifiers Requires the Creation of a New Record.

Because neither Unique Identifiers nor Relational Information are agency records, their disclosure is not required because "FOIA imposes no duty on [an] agency to create records." *Forsham*, 445 U.S. at 186. The three cases principally relied upon in the Government's opening brief—*ACLU v. DOJ*, 681 F.3d 61, 71 (2d Cir. 2012), *Students Against Genocide v. Dep't of State* ("*SAG*"), 257 F.3d 828 (D.C. Cir. 2001), and *Flightsafety Services Corp. v. Dep't of Labor*, 326 F.3d 607 (5th Cir. 2003)—confirm that FOIA does not require an agency to create substitute records, like Unique Identifiers, even when doing so would preserve nonexempt ideas conveyed by exempt records, like A-numbers. The ACLU's efforts to distinguish these cases mischaracterize their holdings—substituting the ACLU's reasoning for that employed by the courts. *See* Pl. Br. 24-26. *ACLU v. DOJ*, *SAG* and *Flightsafety* control here. Application of the ACLU's Relational Information theory to their facts definitively reveals the theory's infirmity.

In *ACLU v. DOJ*, the Government properly redacted language in several OLC memoranda for national security reasons, s*ee* 681 F.3d at 70, but the district court ordered the Government to produce "neutral phrase[s]" in place of the exempted phrases to "preserve the meaning of the text," *id*. at 66, 71. The ACLU argues that its request for Unique Identifiers is distinguishable because, unlike the "neutral phrase[s]" at issue in *ACLU v. DOJ*, Unique Identifiers "do not neuter or otherwise modify" Relational Information. Pl. Br. at 25. But the question is not whether Unique

Identifiers neuter *Relational Information*; it is whether Unique Identifiers neuter *A-numbers*. As with A-numbers, the redacted language in *ACLU v. DOJ* served multiple functions. It: (1) conveyed exempt national security information and (2) provided nonexempt sentence structure necessary to the OLC memoranda. The district court directed the Government to supply "alternative language meant to preserve the meaning of the text," while shielding the national security information. *Id*. at 66. The Second Circuit reversed, holding that the order required the Government to "creat[e] documents—something FOIA does not obligate agencies to do." *Id*. at 71 (quotation marks omitted). The district court's solution sought simply to neuter sensitive ideas conveyed by certain phrases from non-sensitive functions. *Id*. The ACLU seeks the same here, neutering Relational Information from PII. *ACLU v. DOJ* teaches that this is not required by FOIA.

In *SAG*, an agency withheld surveillance footage due to concerns that disclosure of the footage would allow an image analyst "to determine the technical capabilities of the reconnaissance system that produced it." 257 F3d at 835. The D.C. Circuit rejected a proposal that the Government "should produce new photographs at a different resolution in order to mask the capabilities of the reconnaissance systems that took them," holding that agencies "are not required to produce new documents."[6] *Id*. at 837. Again, the ACLU's Relational Information theory would have commanded a different result. Pictures are worth a thousand words, and convey as much information. On the ACLU's theory, the relevant photographs were comprised of many different records, including: (1) sensitive information conveying the technological capacity of the

[6] The ACLU claims that the D.C. Circuit reached this conclusion because producing new photographs at a different resolution "requir[es] analysis of the risk of disclosing classified information at any resolution." Pl. Br. at 26. It is unclear why the ACLU believes that the D.C. Circuit relied on this reasoning. Neither the D.C. Circuit's opinion nor the Government's brief on appeal relies on or even mentions this risk-analysis argument. *See SAG*, 257 F.3d at 837; *SAG*, Appellee's Brief, 2000 WL 35577312 (D.C. Cir. July 26, 2000).

surveillance system, and (2) non-sensitive information concerning the subjects in the photograph. The D.C. Circuit rejected the plaintiff's proposal to separate sensitive ideas from non-sensitive, holding that FOIA imposed no duty to create new records. *SAG*, 257 F.3d at 837.

Perhaps the closest analogy to this case is presented by *Flightsafety*. In *Flightsafety*, the Fifth Circuit considered whether an agency should replace "occupational codes" with "dummy codes," *FlightSafety Services Corp. v. U.S. Dep't of Labor*, 2002 WL 368522, at *8 (N.D. Tex. Mar. 5, 2002), in order to "prevent attribution of sensitive information to particular business establishments." *Flightsafety*, Appellee's Brief, 2002 WL 32174246 at *39-40 (5th Cir. Nov. 25, 2002). The Fifth Circuit ruled that "insert[ing] new information in place of redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform." *Flighsafety*, 326 F.3d at 613. The ACLU argues that *Flightsafety* is distinguishable, fixating on the Fifth Circuit's use of the phrase "*new information*." Pl. Br. at 26 (emphasis in original).[7] But the "new information" in *Flightsafety* was substitute codes designed to preserve information conveyed by a dataset while anonymizing the records from attribution to specific

[7] The ACLU also suggests that the Fifth Circuit reached its decision because "the agency would have to spend a significant amount of time and resources on in-depth analysis of the recoded data." Pl. Br. at 26 (quotation marks omitted). Again, this was not the analysis relied on by the Fifth Circuit. On appeal, the government argued that it need not produce dummy codes for two reasons:

> First, as a matter of law, the insertion of new information in place of redacted information would entail the creation of new agency records, a task that FOIA does not require the government to perform. Second, as a practical matter, BLS's declarations explained that the deletion of identifying information in conjunction with the insertion of new "dummy" occupation codes would require an inordinate amount of agency resources because it would involve an exhaustive analysis of the information in the public domain.

Flightsafety, Appellee's Brief, 2002 WL 32174246 at *40. The Fifth Circuit adopted the first rationale without addressing the second. *See Flightsafety*, 326 F.3d at 613 ("insert[ing] new information in place of redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform"). The ACLU's interpretation of *Flightsafety* is not supported by the Fifth Circuit's reasoning.

companies. These substitute codes are directly analogous to the Unique Identifiers sought here, which would preserve Relational Information while anonymizing records from attribution to specific individuals. Again, application of the ACLU's Relational Information theory in *Flightsafety* would have resulted in the opposite outcome. The Government could have disclosed dummy codes, preserving relational information while protecting commercially sensitive information. The Fifth Circuit held unequivocally that this was not required.

Agencies are under no duty to create records in response to a FOIA request. *See Forsham*, 445 U.S. at 186. When a request asks an agency to substitute new language in order to preserve nonexempt information from an exempt phrase, *ACLU v. DOJ*, 681 F.3d at 70, picture, *SAG*, 257 F.3d at 837, or data point, *Flightsafety*, 326 F.3d at 613, that request asks an agency to create records. The ACLU's request for the Government to create Unique Identifiers is no different. "The fact that person-centric unique identifiers do not exist in ICE's IIDS database is not disputed, and the legal principle that an agency is not required to create new records is well-settled." *Am. Imm. Council*, 2020 WL 2748515, at *8 (D.D.C. May 27, 2020).

II. Unique Identifiers Cannot Be "Segregated" From A-Numbers.

Nevertheless, the ACLU argues that the Government must create Unique Identifiers pursuant to FOIA's segregation provisions. Pl. Br. at 10-14. But person-centric Unique Identifiers are not contained in the IIDS and therefore cannot be segregated from A-numbers. Nor did the FOIA Improvement Act of 2016 impose a new requirement to create Unique Identifiers.

A. Unique Identifiers Are Not Contained in the IIDS.

FOIA's requirement that an agency "take reasonable steps necessary to segregate and release nonexempt information," 5 U.S.C. § 552(a)(8)(A)(ii)(II), does not impose a duty to create

Unique Identifiers, as the ACLU contends. Pl. Br. 10-14. The IIDS database does not contain Unique Identifiers. Accordingly, there is no nonexempt information to segregate from A-numbers.

The ACLU argues that Relational Information exists in the IIDS, as conveyed by A-numbers, Pl. Br. at 12, and that it can be segregated and produced in the form of Unique Identifiers through SQL queries or standard data analysis programs through the expenditure of only reasonable effort, Pl. Br. at 12-13. But even the ACLU acknowledges that, in order to segregate and produce the Relational Information conveyed by A-numbers, the Government must first create Unique Identifiers.[8] *See* Pl. Br. at 12 ("[T]hese queries can be used to search for A-numbers and *transform them* into anonymized Unique IDs.") (emphasis added); Pl. Br. at 13-14 (offering a solution that requires the Government to "*create* a program" and "*create*[] new Unique IDs") (emphasis added); *see also* Vassilio-Diaz Decl. ¶¶ 20-21. *ACLU v DOJ*, *SAG*, and *Flightsafety* teach that creating neutral substitutes to preserve a function of an exempt record entails the creation of a new record, not the application of FOIA's segregation requirement. *See*, *e.g.*, *SAG*, 257 F.3d at 837 (agency need not alter photographs to mask sensitive information because "although agencies are required to provide any reasonably segregable, non-exempt portion of an *existing* record, they are not required to create *new* documents") (quotation marks and citation omitted) (emphasis added); *Flightsafety*, 326 F.3d at 613 (rejecting the argument that an agency must produce dummy codes to preserve otherwise non-segregable information because that task "requires the creation of new agency records, a task that the FOIA does not require the government to perform"). This makes sense in light of the language of FOIA's segregation requirements. The Unique Identifiers sought do not exist in the IIDS. There is accordingly no "nonexempt

[8] The Government cannot produce Relational Information apart from Unique Identifiers or A-Numbers. Relational Information is "information in the abstract," which is not the subject of FOIA. *See Forsham*, 445 U.S. at 185-86. It cannot be produced unless it is stored in a data point.

information" to "segregate and release" from the exempt A-numbers. *See* 5 U.S.C. § 552(a)(8)(A)(ii)(II).

The ACLU argues that because the steps required to create Unique Identifiers "are essentially the same as those for a search, doing so imposes no significant burden." Pl. Br. at 12; *see also id*. at 16-18. This misconceives the Government's obligation to create records. FOIA imposes a burden to "*make reasonable efforts* to search for . . . records in electronic form or format." 5 U.S.C. § 552(a)(3)(C) (emphasis added). It imposes no burden to create records, even if doing so would require only reasonable effort. *See, e.g.*, *Aguiar v. DEA*, 334 F. Supp. 3d 130, 144 (D.D.C. 2018) ("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."). Even application of a simple algorithm involves the creation of a record if the result is a data point that was not originally maintained in the database. *See, e.g.*, *Elkins*, 103 F. Supp. 3d at 131 ("Plaintiff appears to request that the agency use a confidential algorithm in its computer system in order to translate whatever identifying information it has about the aircraft into the 'N Number.' Yet, FOIA imposes no duty on the agency to create records.") (quotation marks, citations, and emphasis omitted). The Government cannot segregate Relational Information from A-numbers without creating Unique Identifiers. It is not required to do so, even if doing so is no more burdensome than a comparable search for records.[9]

[9] Due to current staffing levels, ICE must limit returned data to what FOIA requires. *See* Supp. Vassilio-Diaz Decl. ¶ 15. Regardless of the burden imposed by this specific request, discretionary disclosures, taken together, will increase the ICE FOIA office's workload beyond capacity. *Id*.

B. The FOIA Improvement Act Imposed No New Duty to Create Unique Identifiers.

Although numerous cases hold that agencies are not required to produce substitute records to preserve potentially nonexempt ideas conveyed by exempt records, *see, e.g.*, *ACLU v. DOJ*, 681 F.3d at 71-72, the ACLU insists that the FOIA Improvement Act of 2016 abrogated those cases and imposed a duty on agencies to produce Unique Identifiers. Pl. Br. at 12; *id*. at 23 n.21. But the FOIA Improvement Act did not modify an agency's duty to segregate nonexempt information from exempt records. That duty has always existed. And even if the FOIA Improvement Act did impose new duties, those duties would not govern the creation of Unique Identifiers.

1. The FOIA Improvement Act Did Not Impose New Segregation Duties.

Prior to the FOIA Improvement Act, FOIA required (and still requires) that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The FOIA Improvement Act added to FOIA, among other provisions, 5 U.S.C. § 552(a)(8)(A)(ii)(II), which provides that an agency must "take reasonable steps necessary to segregate and release nonexempt information." The ACLU argues that this provision "added a new, expanded segregability requirement" to "produce nonexempt information using deletions *and* additional reasonable steps." Pl. Br. at 10 (emphasis in original). This position is untenable in light of the history of the FOIA Improvement Act.

5 U.S.C. § 552(a)(8)(A)(ii)(II) mirrors the language employed by a 2009 memorandum written by then-Attorney General Eric Holder, which required Department of Justice officials to administer FOIA with a "presumption of openness." *See* Memorandum of Eric Holder, Attorney Gen., U.S. Dep't of Justice, to Heads of Exec. Dep'ts & Agencies, at 1 (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf

(hereinafter, the "Holder Memo"). The FOIA Improvement Act did little more than "codif[y]" Department of Justice practices "for defending agency decisions to withhold information," as embodied in the Holder Memo. *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 72 (D.D.C. 2018). Because 5 U.S.C. § 552(a)(8)(A)(ii)(II) simply codified the Holder Memo, there is no reason to interpret it as an expansion of agencies' duty to segregate nonexempt information from records. The Holder Memo states that "[a]gencies should be mindful *that the FOIA requires them* to take reasonable steps to segregate and release nonexempt information." Holder Memo at 1 (emphasis added). In other words, the "take reasonable steps" language in the Holder Memo only reiterated that FOIA already required agencies to segregate nonexempt information pursuant to 5 U.S.C. § 552(b). That language did not impose new duties when it was written in the Holder Memo. Nor did it impose new duties when the Holder Memo was codified by 5 U.S.C. § 552(a)(8)(A)(ii)(II).[10]

Consistent with that interpretation, courts that have analyzed record segregation under 5 U.S.C. § 552(a)(8)(A)(ii)(II) have done so using the standards developed under § 552(b). *See, e.g.*, *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 780-81 (N.D. Cal. 2019) (applying § 552(b) case law); *ACLU v. Dep't of Defense*, 435 F. Supp. 3d 539, 553 (S.D.N.Y. 2020) (same); *Democracy Forward Found. v. Ctrs. for Medicare & Medicaid Servs.*,

[10] For this reason, the ACLU's argument that the court should presume that the FOIA Improvement Act made real and substantial changes to FOIA's segregation requirement, Pl. Br. at 11, carries little weight. Moreover, Congress routinely amends FOIA to codify existing FOIA precedent. *See, e.g.*, *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. In 1974, Congress expressly incorporated that requirement into the FOIA."); *Institute for Justice*, 941 F.3d at 571 ("The essence of our approach—treating electronic records the same as analog records—was later codified by the Electronic Freedom of Information Act Amendments of 1996.").

No. 18 Civ. 635 (JDB), 2019 WL 6344935, at *4 (D.D.C. Nov. 27, 2019) (same); *Gatore v. U.S. Dep't of Homeland Security*, 327 F. Supp. 3d 76, 101 (D.D.C. 2018) (analyzing subsections (a)(8)(A)(ii)(II) and (b) in tandem); *Am. Small Bus. League v. U.S. Dep't of Defense*, 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019) (same). The only court to analyze the effect of the FOIA Improvement Act on segregability analysis concluded that § 552(a)(8)(A)(ii)(II) is coextensive with § 552(b). *Ctr. For Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 115 (D.D.C. 2019). And the legislative history of the FOIA Improvement Act is silent on whether this provision was intended to abrogate FOIA segregability law as developed under 5 U.S.C. § 552(b).[11]

In short, Congress did not alter FOIA segregability law when it passed the FOIA Improvement Act. Instead, it codified the language used in a Department of Justice policy memorandum, which by its own terms did not change agencies' duty to segregate nonexempt information. If Congress intended to replace the segregability standards developed for decades under § 552(b), it would not have done so surreptitiously. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017). Indeed, the only post-FOIA Improvement Act case cited by the ACLU to support their position involved straightforward deletion of erroneously included exempt data points from a dataset containing both exempt and nonexempt data. *See Reclaim the Records v. Dep't of Veterans Affairs*, No. 18 Civ. 8449 (PAE), 2020 WL 1435220, at *10 (S.D.N.Y. Mar. 24, 2020). The same is required under § 552(b).

[11] The ACLU quotes statements of Representative Meadows and the bill's Senate Report to support its argument that "Congress added [5 U.S.C. § 552(a)(8)(A)(ii)(II)] to the FOIA to prohibit agencies from unnecessarily withholding from the public nonexempt information." Pl. Br. at 11. The cited history does not support the ACLU's interpretation. Instead, the history suggests that the amendment was designed to require disclosure of information technically covered by an exemption, when disclosure would not harm the interests protected by that exemption.

2. Creating Unique Identifiers Is Not a "Reasonable Step."

Even assuming *arguendo* that the FOIA Improvement Act imposed a new duty to take "reasonable steps" to segregate records beyond what 5 U.S.C. § 552(b) already required, creation of Unique Identifiers would not be a reasonable step.

The ACLU contends that the FOIA Improvement Act added a new requirement to employ "code or programming . . . to further segregate and release nonexempt information" from databases. Pl. Br. at 11 n.10. In some instances, code and programming may assist an agency in segregating nonexempt records. Computer code could be used to identify and segregate nonexempt data within a complex database where it is not readily apparent which lines of data are exempt. But the ACLU has more in mind. They ask the Government to segregate abstract Relational Information from A-numbers and produce newly created Unique Identifiers. These steps conflict with settled FOIA principles, discussed above, that "[t]he Freedom of Information Act deals with 'agency records,' not information in the abstract," *Forsham*, 445 U.S. at 185, and "imposes no duty on [an] agency to create records," *id*. at 186. Given this settled law, it is not likely that Congress would have viewed the creation of Unique Identifiers as a "reasonable step" to segregate records, particularly given the similarity of the language it used to that present in § 552(b). *See Lamar, Archer, & Coffrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) ("When Congress used the materially same language . . ., it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for [it] to retain its established meaning.").

As discussed above, a requirement to segregate abstract information from an exempt record by creating a new record is inconsistent with the plain language of 5 U.S.C. § 552(a)(8)(A)(ii)(II). The Government cannot "segregate and release nonexempt," *id.*, Unique Identifiers from A-numbers because those identifiers do not exist in the IIDS database.

* * *

In short, *ACLU v. DOJ*, *SAG*, and *Flightsafety* teach that creating substitute records to replace exempt records involves the creation of a new record, not the segregation of nonexempt information. The FOIA Improvement Act provides no basis to deviate from these cases.

III. Unique Identifiers Are Not a Different "Form or Format" of A-Numbers.

Finally, the ACLU contends that "ICE is obligated to honor Plaintiff's request for A-numbers formatted as Unique IDs because that format is readily reproducible." Pl. Br. at 14. FOIA, as amended by the E-FOIA Amendments, imposes a duty on agencies to provide a record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). But "[c]ourts have repeatedly reaffirmed the bar on record creation in response to FOIA requests following the enactment of the E-FOIA Amendments." *Everytown for Gun Safety Support Fund v. ATF*, 403 F. Supp. 3d 343, 356 (S.D.N.Y. 2019), *appeal filed* No. 19-3438 (2d Cir. Oct. 21, 2019). As explained in the Government's opening brief and supporting declaration, Gov. Br. at 16-19, Vassilio-Diaz Decl ¶¶ 20-21, the production of Unique Identifiers entails the creation of records rather than the production of records in a requested form or format.

The function of the E-FOIA Amendment's "form or format" requirement was recently analyzed at length in *Sai v. TSA*, --- F. Supp. 3d ---, No. 14 Civ. 402 (RDM), 2020 WL 2801188 (D.D.C. May 29, 2020). The *Sai* court rejected an individual's request for documents in distinct PDF files as opposed to a single file containing multiple documents, holding that, under 5 U.S.C. § 552(a)(3)(B) "'form' [refers] to the media—*e.g.*, paper or thumb drive—and . . . 'format' [refers] to the electronic structure for the processing, storage, or display' of data—*e.g.*, PDF or JPEG." *Id.* at *6 (quotation marks and citation omitted). The court noted that "[r]eading the E-FOIA in this

manner makes sense of the text and history of the provision" and implements Congress' intention "to increase access to electronic records in all types of media (*e.g.*, tapes, microfiche, thumb drives) and in all types of formats (*e.g.*, PDF, JPEG)." *Id.* The *Sai* court's interpretation is in line with the prevailing interpretation of the E-FOIA's form or format requirement. *See, e.g.*, *Institute for Justice*, 941 F.3d at 571. By contrast, courts have held that production of a data visualization entails creation of a new record rather than a different "form or format," *see Aguiar*, 334 F. Supp. 3d at 144, *Brown v. Perez*, 835 F.3d 1223, 1237 (10th Cir. 2016), and noted that "there is no FOIA requirement to translate a record into a different language," *Aguiar*, 334 F. Supp. 3d at 144.

Applying these principles, the ACLU's request to receive "A-numbers formatted as Unique Identifiers," Pl. Br. at 14, does not present a "form or format" question. The ACLU does not seek A-numbers in a different medium, nor in a different file type. *Cf. Sai*, 2020 WL 2801188, at *6. Instead, as even the ACLU's expert admits, the ACLU wants the Government to use SQL queries "to search for and transform A-numbers into Unique IDs" or to "writ[e] a script" that "read[s] . . . Excel files into memory," "assign[s] Unique IDs for each A-number," "insert[s] those Unique IDs in place of each A-number," and "write[s] the Unique IDs into the Excel files." Wu Decl. ¶¶ 24, 28. This type of data transformation creates new records. *See Aguiar*, 334 F. Supp. 3d at 144 ("The multiple steps between the spreadsheets and the requested images . . . strongly suggests that the output would not be a straightforward reproduction of the spreadsheets, but a new record with significant added meaning."); *Brown*, 835 F.3d at 1237 ("[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.").

In any event, the ACLU does not seek a "reproduction" of A-numbers at all. Its FOIA

request seeks Unique Identifiers that "segregate[] . . . personally identifying information" from A-numbers. *See* Pl. Br. at 1. The result of this segregation is a record that is substantively different from A-numbers. Production of altered records falls squarely within FOIA's prohibition on the creation of records. *ACLU v. DOJ*, 681 F.3d at 71 ("If 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.").

Replacement of A-numbers with Unique Identifiers entails the creation of records rather than the reproduction of A-numbers in a new form or format. As such, the ACLU's argument that creating Unique Identifiers "is not burdensome," Pl. Br. at 14, 16-18, is irrelevant. *Aguiar*, 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."). Again, the Government is under no obligation to create new records, even when doing so would not be burdensome.

CONCLUSION[12]

"The fact that person-centric unique identifiers do not exist in ICE's IIDS database is not disputed, and the legal principle that an agency is not required to create new records is well-settled." *Am. Imm. Council*, 2020 WL 2748515, at *8. Accordingly, the Government's motion for summary judgment should be granted, and the ACLU's cross-motion should be denied.

[12] The ACLU does not respond substantively to the Government's argument that FOIA provides an alternative, adequate remedy to review its response to the ACLU's FOIA request. *See* Gov. Br. at 9; Pl. Br. at 9 n.7. Its APA claims should accordingly be dismissed for that reason, or as abandoned. *See Lipton v. Cty. of Orange, NY*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004).

Further, the ACLU appears to concede that if the Court rules in the Government's favor on the issue of the production of Unique Identifiers, it need not address the adequacy of the Government's search. Pl. Br. at 9 n.8. This concession is required by the terms of the parties' earlier stipulation. Dkt. No. 29 ¶ 1 ("arguments . . . shall be limited to the issue of Unique Identifiers in place of A-numbers"); *id.* ¶ 2 ("Plaintiff agrees to waive its right to challenge: . . . (b) any absence of certain columns or fields, other than Unique Identifiers, from the spreadsheets produced . . . .").

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Respectfully submitted,

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