UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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As detailed in Plaintiff's opening brief ("Pl. Br."), by refusing to produce Unique IDs disclosing the nonexempt information maintained as A-numbers, ICE has improperly withheld agency records.[1] *See* 5 U.S.C. § 552(a)(4)(B). Under the FOIA, ICE is obligated to replace A-numbers with Unique IDs because doing so segregates nonexempt information through the application of reasonable steps, *see id.* § 552(a)(8)(A)(ii)(II), and because Unique IDs constitute a readily reproducible format, *see id.* § 552(a)(3)(B). Even on the agency's version of the facts, there is no genuine dispute that (1) A-numbers are a person-centric unique identifier maintained in ICE's EID and IIDS databases (Vassilio-Diaz Decl. ¶¶ 12, 20),[2] (2) ICE uses A-numbers to record information about individuals' interactions with ICE during the deportation process, (*id.*)—referred to as Relational Information, (3) reformatting A-numbers as Unique IDs deletes any exempt information, leaving only Relational Information (*see generally id.* (no exemption claimed for Unique IDs); Supplemental Declaration of Donna Vassilio-Diaz ("Suppl. Decl.") (same)), and (4) complying with this request requires approximately one day (Suppl. Decl. ¶¶ 11, 13). One day—even several days—is well within the bounds of what courts have found not unduly burdensome at the summary judgment stage. *See, e.g.*, *People for the Am. Way Found. v. U.S. DOJ*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (120 hours of work not "unduly burdensome"); *Kwoka v. IRS*, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018) (2,200 hours of work not "unreasonably burdensome"). Therefore, Plaintiff is entitled to summary judgment.

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1 All capitalized terms shall have the same meaning ascribed to them in Plaintiff's opening memorandum of law.

2 In its opposition and reply brief ("ICE Opp."), ICE repeatedly states that no "person-centric unique identifiers . . . exist in ICE's IIDS database," (*E.g.*, ICE Opp. 2 (quoting *Am. Immigr. Council v. U.S. ICE*, 2020 WL 2748515, at *8 (D.D.C. May 27, 2020))). Its declarant, however, states the opposite, testifying that A-numbers are a "unique personal identifier[]" that are "stored in . . . IIDS data." (Vassilio-Diaz Decl. ¶ 20.) Here, Plaintiff seeks the nonexempt information maintained by ICE through A-numbers, regardless of whether ICE stores the A-numbers in the IIDS, EID, or any of its other databases.

Ignoring the obligations stated above, ICE attempts to create a loophole in the FOIA. ICE argues that it can withhold information about individuals' interactions with ICE during the deportation process because this information is maintained using A-numbers, which are exempt from disclosure. (ICE Opp. 1-2; *see also* Hausman Decl. ¶¶ 4-8, 17-24.) ICE further asserts that it need not segregate this information because doing so involves reformatting A-numbers as different numbers—Unique IDs—which it considers to be new records. (ICE Opp. 1-2.) This reasoning fails because it contradicts (1) the purpose of the FOIA and (2) this Court's standard for the creation of a new record. First, disclosure of Relational Information, in the form of Unique IDs, promotes the FOIA's underlying purpose: the "public disclosure of information in the possession of federal agencies." *See N.Y. Times Co. v. U.S. DOJ*, 939 F.3d 479, 488 (2d Cir. 2019) (citation omitted). ICE routinely uses A-numbers, and distributes records with A-numbers to other government agencies, because A-numbers convey Relational Information. (Pl. Br. § B.1.) Disclosure of this same information is therefore required for an informed citizenry able to hold the government accountable. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quotations omitted). And second, for requests for electronically stored data, no new record is created unless the agency must conduct research or analysis beyond the contents of its databases. *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 403 F. Supp. 3d 343, 359 (S.D.N.Y. 2019), *appeal filed*, No. 19-3438 (2d Cir. Oct. 21, 2019). Replacing A-numbers with Unique IDs involves no such research or analysis and thus no new record is created.[3] (*See infra* § C.)

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[3] Without claiming an exemption or providing any evidence, ICE asserts that Unique IDs could, theoretically, be exempt under the "mosaic theory." (ICE Opp. 6 & n.3.) This conclusory statement alone, bereft of any specificity, cannot support a FOIA exemption—let alone an unidentified FOIA exemption. *See, e.g., ACLU v.*

A. The FOIA's Segregation Mandate Applies to Electronically Stored Data Points

ICE's duty to segregate applies to electronically stored data points, including A-numbers. ICE, however, claims that "[w]here a data point is exempt . . . the Government need not create a substitute record that conveys some information that might be gleaned from exempt records (here, A-numbers)." (ICE Opp. 2.) Although the FOIA does not compel ICE to create a "substitute record" (and Plaintiff does not request that it do so), ICE cannot ignore its segregation duty where only a portion of the information conveyed by a requested "data point" is exempt. Even for an exempt data point, ICE must "take reasonable steps necessary to segregate and release nonexempt [Relational I]nformation." 5 U.S.C. § 552(a)(8)(A)(ii)(II); *see also Reclaim the Recs. v. Dep't of Veterans Affs.*, 2020 WL 1435220, at *6 (S.D.N.Y. Mar. 24, 2020) ("Even if portions of a responsive record are properly exempt, the agency must 'take reasonable steps necessary to segregate and release nonexempt information.'" (citation omitted)).

Indeed, in the FOIA Improvement Act, Congress explicitly expanded the FOIA's segregation requirements, adding an entirely new subsection with clear and unambiguous language. *See* 5 U.S.C. § 552(a)(8)(A)(ii).[4] Prior to the FOIA Improvement Act, the

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U.S. DHS, 973 F. Supp. 2d 306, 316 (S.D.N.Y. 2013) (application of mosaic theory fails because "the Government offers no support or explanation"). Further, Plaintiff has requested "millions of rows of spreadsheet data" (ICE Br. 1), which have been redacted of all identifying information (Hausman Decl. ¶ 16), making it inconceivable that any individual could be identified. *See Buzzfeed, Inc. v. U.S. Dep't of Educ.*, 2019 WL 3718928, at *2 (D.D.C. Aug. 7, 2019) ("mosaic effect" fails where "redactions hide details too general to allow for identification of individuals involved").

[4] ICE misstates the case law concerning 5 U.S.C. § 552(a)(8)(A). First, in *Rosenberg v. United States Department of Defense*, 342 F. Supp. 3d 62 (D.D.C. 2018), the court did not conclude that the *only* effect of the FOIA Improvement Act was to codify "Department of Justice practices 'for defending agency decisions to withhold information.'" (ICE Opp. 15 (citation omitted).) Rather, *Rosenberg* acknowledged that "the FOIA Improvement Act . . . amended the FOIA in *various ways*." *Rosenberg*, 342 F. Supp. 3d at 72. Second, in *Center for Investigative Reporting v. United States Customs & Border Protection*, 436 F. Supp. 3d 90 (D.D.C. 2019), the court did not determine that the segregability language added by the FOIA Improvement Act "is coextensive with § 552(b)." (*See* ICE Opp. 16.) Instead, the court merely stated that for FOIA requests for *documents*, a "line-by-line review of each document withheld in full" was sufficient to satisfy the "reasonable

Memorandum of Eric Holder (the "Memo") created "a presumption of openness," requiring that "[i]n the face of doubt, openness prevails." *See* Memo at 1 (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf. This presumption had two implications: (1) agencies were encouraged "not [to] withhold information simply because [they] may do so legally" and (2) "whenever an agency determines that it cannot make full disclosure of a requested record, [the agency] must consider whether it can make partial disclosure." *Id.* Accompanying the second implication, the Memo added that "[a]gencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information," *id.*, an apparent reference to the deletion requirement of section 552(b). Under the Memo's "presumption of openness," ICE would be expected to create and disclose Unique IDs even if doing so was discretionary. *See id.*

In passing the FOIA Improvement Act, Congress added to the FOIA the "presumption of openness" but did not adopt the Memo's discretionary language. Agencies may now withhold information from a record *only if* its (1) disclosure would harm an interest protected by an exemption or (2) "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). And if full disclosure is not possible because an exemption applies—as is the case here—the agency "*shall* . . . take reasonable steps necessary to segregate and release nonexempt information." *Id.* § 552(a)(8)(A)(ii) (emphasis added). If Congress had intended for these "reasonable steps" to require no more than deletions—as already provided by section 552(b)—this clause would have

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steps" requirement. *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 115 (citation omitted). Such reasoning does not apply here, because nonexempt information intertwined with exempt data points (which are not documents) can be segregated and produced through additional, reasonable steps. (*See* Pl. Br. § A.1.) And third, ICE erroneously cites a string of cases as evidence that courts "have analyzed record segregation under 5 U.S.C. § 552(a)(8)(A)(ii)(II) . . . using the standards developed under § 552(b)." (ICE Opp. 15-16.) None of these cases, however, involves electronically stored database information or discusses the relationship between sections 552(b) and (a)(8)(A)(ii)(II). *See, e.g.*, *Gatore v. U.S. DHS*, 327 F. Supp. 3d 76, 101 (D.D.C. 2018) (describing sections 552(b) and (a)(8)(A)(ii)(II) as imposing "the FOIA's *requirements*" (emphasis added)).

been omitted as superfluous. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("[W]e presume [Congress] intends its amendment to have real and substantial effect." (citations omitted)). Therefore, under the FOIA's "presumption of openness," unlike under the Memo, ICE *must* produce Unique IDs, even though A-numbers are exempt, because ICE can segregate the nonexempt Relational Information from A-numbers through the application of reasonable steps.

B. Extracting Database Information Necessarily Involves Reformatting

As explained in Plaintiff's Brief, ICE must produce A-numbers formatted as Unique IDs because that format is readily reproducible and not unduly burdensome. (Pl. Br. § A.2.) Claiming that a request to format A-numbers as Unique IDs does not present a "form or format" question, ICE ignores the realities of how databases operate. (ICE Opp. 19.) Extracting Relational Information from its databases involves transforming the integers used to convey that information—i.e., the A-numbers—into Unique IDs. (*See* Pl. Br. § A.2); *see also* 5 U.S.C. § 552(a)(3)(B). And, even accepting the definitions of "form" and "format" from *Sai v. Transportation Security Administration*, 2020 WL 2801188 (D.D.C. May 29, 2020), the Request is still one for a new format. Extracting any information from a database changes the "electronic 'structure for the processing, storage, or display' of [that] data." *See Sai*, 2020 WL 2801188, at *6 (citation omitted). To illustrate, data points stored in a database are generally formatted as text files. *See* Abraham Silberschatz, Henry F. Korth & S. Sudarshan, *Database System Concepts* 1222 (7th ed. 2020). When these data points are extracted, however, they are not produced as text files, but are instead—as was done here—produced in the format of Microsoft Excel spreadsheets, known as XML.[5] (*See* Hausman Decl. ¶¶ 14, 25; Wu Decl. ¶ 24); *XML File*

[5] ICE claims that the file type of the extracted data does not change, but it puts forth no evidence that, unlike most databases, the IIDS and EID store files in the XML format. (*See* ICE Opp. 19.)

Name Extension Reference for Office, https://docs.microsoft.com/en-us/deployoffice/compat/xml-file-name-extension-reference-for-office (last visited July 29, 2020). Unique IDs, therefore, reformat not only the numbers used to convey Relational Information but also the electronic structure of that information.

C. The Unique Identifiers Requested by Plaintiff Convey Discrete, Identifiable Information Maintained by ICE, Not Abstract Information

There is only one agency record at issue here: A-numbers. As explained in Plaintiff's Brief, Unique IDs are a copy of a portion of the A-number record; they delete the exempt personally identifying information ("PII") and disclose only the remaining nonexempt Relational Information. (Pl. Br. §§ B–B.1.) Deleting or otherwise stripping exempt information from an identifier, such as an A-number, does not create a new record. *See Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1026-27 (D.C. Cir. 1999) (agency must disclose "four or six digits of each [ten-digit] number, and segregate[] out the remaining digits that provide . . . confidential information").

Furthermore, this Relational Information—copied through Unique IDs—is not "information in the abstract" under *Forsham v. Harris*, 445 U.S. 169 (1980), as claimed by ICE. (*See* ICE Opp. 2-7.) Under *Forsham*, "information in the abstract" is information that is not an agency record. *See Forsham*, 445 U.S. at 186 ("[T]he FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained."). Here, Relational Information is indisputably maintained by ICE through A-numbers, which are agency records. (Pl. Br. § B.1.) And this Relational Information is not "abstract," but is instead concrete; there is no dispute about its makeup or boundaries. In fact, ICE admits that Unique IDs are for "track[ing] individual aliens throughout the immigration process," and adds that "[t]he 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.) Nowhere does ICE contend that Unique IDs would provide information other than for the tracking of individuals throughout the immigration process. Replacing A-numbers with Unique IDs, therefore, discloses only Relational Information, which is discrete and defined and thus not abstract.

Moreover, the law accounts for the parade of horribles that ICE claims will result from applying the E-FOIA's definition for "record." Under this Court's *Everytown* decision, a request for database information creates a new record only when "generating the information requires the agency to engage in additional research or conduct additional analyses above and beyond the contents of its database." *Everytown*, 403 F. Supp. 3d at 359. But if the requested information is "apparent on the face of a database when searches required by FOIA are conducted," disclosing that information does not create a new record. *Id.* Applying this standard, the requested Relational Information is apparent from the A-numbers appearing on the unredacted spreadsheets compiled by ICE after searching its databases (*see* Wu Decl. ¶ 13); therefore, disclosing that information through Unique IDs does not create a new record. In contrast, requests for records to be "translated from legalese to lay terms" (ICE Opp. 5), or for the production of the "ideas conveyed by exempt records" (*id.* at 8), neither of which Plaintiff requests, require analysis and thus create a new record.[6]

Contrary to ICE's assertions, the *Everytown* standard is consistent with the holding from *American Civil Liberties Union v. Department of Justice*, 681 F.3d 61 (2d Cir. 2012). There, the

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[6] ICE's two other hypotheticals are illogical. (*See* ICE Opp. 5-6.) A-numbers convey two types of information: Relational Information and PII. (Wu Decl. ¶ 11.) To the extent hidden codes exist in A-numbers, if the codes convey PII they would be exempt from disclosure. But if the codes disclose Relational Information, that Relational Information would need to be segregated and disclosed. Additionally, the font used to display a data point would be an agency record only if ICE retained images of the computer screens displaying the font. *See Brown v. Perez*, 835 F.3d 1223, 1237 (10th Cir. 2016) (images of computer screens are not agency records unless retained by the agency), *as amended on reh'g* (Nov. 8, 2016).

district court ordered the agency to replace exempt text with "'alternative language meant to preserve the meaning of the text,' while shielding the national security information." (ICE Opp. 9 (citation omitted).) This step can only be accomplished by analyzing the exempt text to ensure the alternative language preserves the original meaning, which constitutes the creation of a new record under *Everytown*. Likewise, *Everytown* is consistent with *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001), because declassifying a photograph requires research and analysis of the harm to national security that could result from disclosing the photograph at a different resolution. *See id.* at 837; *see also, Wilson v. McConnell*, 501 F. Supp. 2d 545, 554 (S.D.N.Y. 2007) (describing declassification analysis), *aff'd sub nom. Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009). And *FlightSafety Services Corporation v. Department of Labor*, 326 F.3d 607 (5th Cir. 2003) is no different. There, the Fifth Circuit held that "dummy codes" were not reasonably segregable from "occupational codes," which disclose confidential information and were thus exempt under Exemption (b)(4). *See FlightSafety*, 326 F.3d at 611-13; *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). Applying the deletion standard from section 552(b), the court accepted both of the rationales raised by the government: the request sought new information *and* it required an "exhaustive analysis" requiring substantial agency resources (*see* ICE Opp. 10 & n.7), stating:

> [A]ny disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require *substantial agency resources* and produce a document of little informational value. . . . We thus agree with the district court's conclusion that the documents contain no reasonably segregable information. *Further*, [plaintiff's] request[] that the [agency] be required to simply insert *new information* in place of the redacted information requires the creation of new agency records . . . .

FlightSafety, 326 F.3d at 613 (emphasis added). Accordingly, the court agreed with the argument the government had consistently put forth, namely that re-coding would create a new

record because the agency "would have to spend a significant amount of time and resources [analyzing] the recoded data to determine whether the re-coding actually prevents indirect" disclosure of exempt confidential information. *FlightSafety*, 2002 WL 368522, at *8. Unlike in *FlightSafety*, Relational Information is not "inextricably intertwined" with the exempt PII conveyed by A-numbers, because ICE can segregate the Unique IDs without analysis or undue burden (*see* Suppl. Decl. ¶¶ 11, 13; Wu Decl. ¶ 18), and it has not asserted that any FOIA exemption applies to those Unique IDs.[7]

In sum, replacing A-numbers with Unique IDs requires no "additional research or . . . analyses above and beyond the contents of [ICE's] database." *Everytown*, 403 F. Supp. 3d at 359; (*see* Wu Decl. ¶¶ 20-30; Hausman Decl. 26-34.) Thus, no new record is created.

D. ICE's Declarant Contradicts Her Prior Testimony and Adds Additional Misleading Testimony

Ms. Vassilio-Diaz's Supplemental Declaration flip-flops on her prior testimony and adds new misleading assertions, adding to the questions of candor raised in Plaintiff's opening brief. (*See* Pl. Br. 17-18). First, Ms. Vassilio-Diaz backtracks on her claim that ICE needs to "create a program"—by admitting that ICE already possesses this capability and providing time estimates, based on ICE's past experience (1) using SQL queries "to satisfy the ACLU's FOIA request in the first instance" and (2) using data analysis programs for "prior FOIA disclosures."[8] (*Compare*

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[7] Similarly, ICE cites to *Lapp v. Federal Bureau of Investigation*, 2016 WL 737933 (N.D.W. Va. Feb. 23, 2016), where the court held that the requestor sought "answer[s] [to] questions disguised as a FOIA request." *Id.* at *8 (citation omitted). And it cites to *Elkins v. Federal Aviation Administration*, 103 F. Supp. 3d 122 (D.D.C. 2015), *on reconsideration*, 134 F. Supp. 3d 1 (D.D.C. 2015), where the court held that using an algorithm to translate various data points into an aircraft's "N Number" would create a new record. *Elkins*, 102 F. Supp. 3d at 131. As discussed above, answering questions and translating information both require analysis and thus create a new record. *See Everytown*, 403 F. Supp. 3d at 359.

[8] The total time for extracting Unique IDs from its database would be much shorter if ICE queried only the EID—the master database containing all of the categories of data—instead of both the EID and IIDS. (*See* Suppl. Decl. ¶ 11 (time periods are based on running SQL queries using "5 different populations across 2 databases").) As described by Ms. Vassilio-Diaz, the IIDS "is not considered a normalized database," and thus, unlike for the EID, querying the IIDS involves "additional validation activities." (*Id.* ¶¶ 10-11.)

Vassilio-Diaz Decl. ¶ 21, *with* Suppl. Decl. ¶¶ 11, 13.) Second, she continues to claim that the EID "cannot be used to produce aggregate data" (Suppl. Decl. ¶ 9), despite the fact that ICE aggregated and produced the RCA data from the EID, (Vassilio-Diaz Decl. ¶ 13, Ex. A). Third, she raises no rebuttal to Dr. Wu's testimony concerning (1) the capabilities of the EID or (2) ICE's ability to use the EID to replace A-numbers with Unique IDs. (*See* Suppl. Decl. ¶ 7.) And fourth, she falsely implies that A-numbers are not associated with most database entries, stating: "An ERO officer is not required to record an [A-number] into the front-end applications when conducting an arrest [or] booking . . . ." (*Id.* ¶ 8.) In truth, entering A-numbers using "front-end applications" is unnecessary because the EID can automatically identify A-numbers for inclusion in arrest and/or booking records. *See* U.S. Dep't of Homeland Sec., Privacy Impact Assessment Update for the EID, DHS/ICE/PIA-015(j) (May 14, 2019), at 4, https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-eid-may2019.pdf.

CONCLUSION

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

Dated: August 13, 2020
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Respectfully submitted,

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