21-1233

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT,

Plaintiff-Appellant,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT

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INTRODUCTION

ICE concedes that it uses A-Numbers to link different enforcement records in its database and thus creates and maintains the nonexempt Relational Information that the ACLU seeks. It concedes that it can disclose nonexempt Relational Information by substituting Unique IDs for A-Numbers in the spreadsheets it produced. And it concedes—again—that segregating and producing this information through an automated process imposes no legally cognizable burden. Finally, it does not dispute that FOIA requires differing methods of segregation depending on the electronic medium at issue—including automated digital processes, like blurring faces in video—that bear little resemblance to traditional black-bar redaction.

Those concessions resolve this case. Segregating preexisting Relational Information by deleting exempt A-Numbers and replacing them with Unique IDs is an automated, nearly burdenless process. Like other methods of deletion that courts have long mandated, this process represents nothing more than an appropriate mechanism for "effectively" achieving "the deletion of exempt information." Brief for Defendant-Appellee ("Govt. Br.") 23 n.7. Contrary to ICE's suggestions, Unique IDs do not alter agency records to include new information. They merely eliminate exempt personally identifying information from A-Numbers so that

nonexempt Relational Information—information that ICE admits it creates, maintains, and uses in its database—can be disclosed.

ICE argues that it need not disclose preexisting Relational Information because doing so would require it to "create" Unique IDs. Govt. Br. 9. But FOIA segregation regularly requires the "creation" of some object that did not exist before—such as a black redaction bar or pixelated video—if doing so imposes no cognizable burden and does not alter the substance of the agency's records. Nor is ICE correct that the ACLU seeks disclosure of "information in the abstract." There is nothing "abstract" about the Relational Information at issue here: An ICE agent looking at the database can easily see what records relate to a single individual by using A-Numbers, and when individuals request all records related to themselves, the agency must, as a matter of course, produce that Relational Information. The ACLU merely seeks access to this *same* information in an anonymized form.

In the end, ICE asks this Court to permit an agency to shield from public scrutiny information that it admits it creates and maintains in its database, even where segregating and disclosing that information imposes practically no burden. This interpretation of FOIA would violate the statute's requirements and frustrate its broad transparency and accountability goals. The Court should reject ICE's attempt to eviscerate FOIA in the digital age.

ARGUMENT

I. ICE Must Segregate Preexisting Relational Information By Substituting A-Numbers With Unique IDs Because Doing So Imposes No Legally Cognizable Burden and Does Not Substantively Alter the Record.

The most straightforward way to resolve this case is to hold that segregation via substitution of A-Numbers with Unique IDs is required here.

As noted above, ICE concedes that:

(1) it creates, maintains, and uses the Relational Information that the ACLU seeks, in that "A-Numbers convey Relational Information in the IIDS Database," Govt. Br. 18 n.5;

(2) A-Numbers (and thus the Relational Information they convey) are a record subject to disclosure under FOIA except to the extent a privacy-related exemption applies, Govt. Br. 6;

(3) Relational Information can be separated from A-Numbers and disclosed by "substitut[ing]" anonymized Unique IDs for exempt A-Numbers, Govt. Br. 18; and

(4) the agency cannot raise burden as a defense to this method of segregation because applying an automated script to segregate nonexempt Relational Information from A-Numbers "would not meet the threshold applied to the burden for segregability." Govt. Br. 13 n.2.

ICE *also* does not dispute that methods of segregation required under FOIA vary, particularly when electronic records in various formats are at issue. Govt. Br. 23 n.7. Nor could it, as courts routinely order various methods of segregation appropriate to digital records, like blurring video or editing audio, that operate quite differently from black-bar redaction. Brief of Plaintiff-Appellant ("ACLU Br.") 34–37. Its defense as to segregability is thus vanishingly narrow: Although digitally manipulating a video to blur faces, for example, is a required method to preserve some information while omitting exempt personally identifying information, the substantially similar process of substituting Unique IDs is somehow beyond the pale. There is no basis for that conclusion, and the Court should reject it. Swapping in Unique IDs does nothing more than delete exempt personally identifying information in the spreadsheets ICE produced without altering their content. ACLU Br. 9 (Diagram 3).

Moreover, even if the substitution of Unique IDs were not the type of "deletion" contemplated by FOIA's original segregability provision, 5 U.S.C. § 552(b), the FOIA Improvement Act of 2016 makes clear that agencies must take additional, "reasonable steps" that go beyond straightforward "deletion" to segregate nonexempt information. Pub. L. No. 114–185, § 2, 130 Stat. 538, 539 (2016) (codified 5 U.S.C. § 552(a)(8)(A)(ii)). ICE's interpretation of the 2016

amendment as having no effect contravenes fundamental principles of statutory interpretation, and this Court should reject it.

A. Producing Unique IDs Does Not Substantively Alter the Records ICE Maintains and Is Functionally Identical to Methods of Segregation that Courts Routinely Mandate.

Replacement of A-Numbers with Unique IDs is functionally identical to other methods of segregation that courts routinely mandate, such as blurring exempt video images or blacking out exempt text, because it serves only to eliminate exempt information, without altering the responsive records. ACLU Br. 33-37. These methods, in stripping exempt information from a record, may involve various electronic techniques to produce a redacted copy of the original record, but they add no "new, substantive information" and require no analysis or research to generate. Govt. Br. 23 n.7. Contrary to ICE's assertion, Unique IDs do not "add[] new information to the data" ICE produced in its spreadsheets. *Id*. at 17 n.4. They simply allow preexisting nonexempt information to be produced.

ICE does not contest the long line of cases requiring nonprinted material to "meet the same sort of segregability standards typically applied to printed material." *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020). *See also* ACLU Br. 35–36 (collecting cases). Indeed, it agrees that "blurring a video" is an appropriate mechanism of redaction, Govt. Br. 23 n.7, and so presumably required by FOIA. But it asserts that while such video editing is

"effectively the deletion of exempt information," substituting Unique IDs is somehow fundamentally different and crosses the line into record creation. *Id*. ICE does not explain that distinction without a difference, nor could it.

Blurring images in a video is a technological tool which allows an agency to eliminate exempt information (such as, for instance, someone's face) that is comingled with nonexempt information (for instance, footage of people's bodies and other items in a prison cafeteria) by digitally manipulating pixels to "eliminate unwarranted invasions of privacy" but allowing the remainder of the nonexempt information in the video to be viewed. *Evans*, 951 F.3d at 587 (remanding to district court for agency to explain why it cannot "blur[] out faces" or deploy "some similar method of segregability" to delete exempt information). Such blurring does not involve only deletion in a literal sense—there is no way to eliminate pixels without replacing them. Instead, the digital file is manipulated to eliminate the private *information* by replacing the previous pixels with new pixels, which convey a blur where the face originally had been.

Substituting Unique IDs in the spreadsheets ICE produced works exactly the same way. That method allows the agency to delete exempt information (personally identifying information) that is comingled with nonexempt information (Relational Information) by inserting a random string of numbers (Unique IDs) that eliminate the personally identifying information conveyed by A-Numbers but

allow the nonexempt Relational Information they convey to be disclosed. ACLU Br. 33–34. No "new, substantive information" is added: A member of the public looking at a spreadsheet containing Unique IDs will be able to match records associated with a particular individual to the *exact same extent* as an ICE agent looking at the same spreadsheet containing A-Numbers. Govt. Br. 23 n.7. The only difference is that the former spreadsheet is anonymized—*i.e.,* personally identifying information has been deleted. Just like blurring images, then, substituting Unique IDs is "effectively the deletion of exempt information" so that nonexempt information that the agency has already created can be disclosed. *Id*.

Because Unique IDs serve *only* to eliminate exempt information, ICE's reliance on *ACLU v. DOJ* is misplaced. Govt. Br. 23. There, the Department of Justice ("DOJ") withheld classified information included in responsive legal memoranda, and the district court ordered that the redacted information be replaced with "a purportedly neutral phrase composed by the court" that would, in the district court's view, "preserve the meaning of the text." 681 F.3d 61, 66, 71 (2d Cir. 2012). This Court rejected that approach, which *both* parties in that case opposed, ruling that if the agency "altered or modified" the memoranda, it would "effectively be 'creating' documents—something FOIA does not obligate agencies to do." *Id*. at 71. *See also Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 319 n.9 (D.C. Cir. 1982) (segregation did not require agency to "express[] specific

information, such as a date or a city, in more general terms, such as a ten-year span or geographic region").

But editing a document to substitute new, court-crafted neutral phrases for exempt information is markedly different from running a script that automatically and without any exercise of judgment strips exempt information from nonexempt information. The insertion of purportedly neutral replacement phrases substantively alters the meaning of the document: even if the district court in that case believed the new content to be the equivalent of the original text, any such alteration of prose and analysis is necessarily subjective and debatable. Nor does it matter that, as ICE stresses, the substantive alterations in *ACLU* were authored by the district court rather than the agency. Govt. Br. 15. Indeed, such court-ordered record production would raise concerns not presented here, such as the danger of the judiciary "second-guessing the executive's judgment of harm to national security that would likely result from disclosure, by crafting text that—in its own view—would avoid the harms that could result from disclosure of the information in full." *ACLU*, 681 F.3d at 71–72.

Inserting anonymized identification numbers that have no independent meaning apart from their ability to group records associated with the same person is an entirely different matter, raising none of the same concerns as in *ACLU*. Unlike neutral phrases that change the meaning of a sentence, or date ranges that

rewrite specific dates at a higher level of abstraction, Unique IDs do not "manipulat[e] or restructur[e] [] the substantive content of a record." *Yeager*, 678 F.2d at 323. After Unique IDs are included in the spreadsheets ICE produced, the substantive content of those spreadsheets remains the same, with only the exempt personally identifying information excised. ACLU Br. 9 (Diagram 3). That is, information about which enforcement records belong to which (anonymous) individuals is unchanged, but becomes available to the public through Unique IDs.

B. ICE Concedes That Segregation Imposes No Legally Relevant Burden Here.

ICE concedes that the minimal burden that segregating nonexempt Relational Information imposes cannot justify its refusal to segregate. Govt. Br. 14 n.2. And for good reason: Substituting Unique IDs for the A-Numbers in the spreadsheets ICE produced can be accomplished in a matter of minutes using an automated process. It requires neither analysis by agency officials, nor significant time and resources. But ICE nonetheless relies on a series of cases rejecting methods of segregation on the basis of burden—which it concedes is not relevant here.

ICE has already produced spreadsheets that contain the Relational Information that the ACLU seeks. However, in redacting A-Numbers in full, it has deleted both exempt personally identifying information *and* nonexempt Relational Information. ACLU Br. 7–8. In order to segregate and disclose the nonexempt

Relational Information as required by FOIA, all the agency must do is run a simple computer script that automatically replaces A-Numbers with Unique IDs. *Id*. at 11. The script can be generated in under three hours, as demonstrated by a declarant in the proceedings below. Hausman Decl. at JA082 ¶ 28. Once an agency officer presses "run" on the script, in under 22 minutes, it will automatically delete A-Numbers from the relevant spreadsheets and replace them with randomly-generated Unique IDs. *Id*. at JA082–083 ¶¶ 30–33. This whole process, from generating the script to producing the final spreadsheets with Unique IDs, takes less than 3.5 hours—far less than the time agencies must routinely spend responding to FOIA requests in general, and using traditional redaction techniques like black redaction bars.

The automated stripping of exempt information through the substitution of Unique IDs is fundamentally different from instances where courts have held segregation to be too burdensome. *See, e.g.*, *Flightsafety Servs. Corp. v. Dep't of Lab.*, 326 F.3d 607, 613 (5th Cir. 2003) (holding that agency not required to redact exempt identifying information because "any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would *require substantial agency resources and produce a document of little*

informational value" (emphasis added));[1] *Cook v. Nat'l Archives & Recs. Admin.*, 758 F.3d 168, 179 (2d Cir. 2014) (segregation not required because compelling agency to "undertake the review and redaction of almost one thousand records to produce little of value would be a waste of time and resources"). Segregating nonexempt Relational Information from the ICE spreadsheets, by contrast, involves a quick, automated process that, as ICE admits, is nearly burden-less.

C. The 2016 FOIA Improvement Act Required Agencies to Take "Reasonable Steps" Beyond "Deletion" to Segregate Nonexempt Information.

Even assuming, incorrectly, that "deletion" of exempt information under 5 U.S.C. § 552(b) does not encompass substitution of A-Numbers with Unique IDs, the 2016 FOIA Improvement Act separately mandates agencies to "take reasonable steps" to segregate nonexempt information. *Id.* § 552(a)(8)(A)(ii)). By its plain terms, this amendment expanded FOIA segregability requirements and covers the substitution of Unique IDs. ACLU Br. 41–43. Yet ICE interprets it as having *no* effect, claiming that it merely codified existing practice and requires nothing beyond what was already required under the other, preexisting (but differently

[1] In *Flightsafety*, the burden imposed by segregation was dispositive to the court's ruling. ICE states that the Fifth Circuit "did not discuss burden in applying the rule that FOIA does not require creation of records," Govt. Br. 15, but the court's statement regarding record creation was dicta. The court's holding that the agency need not produce the requested information was predicated on its conclusion that the information could not be "reasonably *segregated*" without "requir[ing] substantial agency resources . . ." *See Flightsafety*, 326 F.3d at 613 (emphasis added).

worded) segregation requirement. Govt. Br. 25–26. That construction of new, substantively different language as doing *no work* fails to give Congress's amendment "real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995). It should be rejected.

ICE disregards the plain text of this amendment to conclude that it "did little more than codify" a memorandum authored by then-Attorney General Eric Holder that required agencies "to administer FOIA with a presumption of openness." Govt. Br. 25 (internal quotations and citations omitted). But Congress does not amend statutes to include new language when it intends to leave circumstances totally unchanged. *See Stone*, 514 U.S. at 397 (explaining that after Congress amended statute to include new provision, "[t]he reasonable construction" was that the amendment was enacted to have meaningful effect, "*not just to state an already existing rule*" (emphasis added)).

Indeed, ICE's argument renders Congress's addition of a new segregability provision "an exercise in futility" because it fails to give the new, markedly different statutory language *any* effect. *Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 145 (2003); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012) ("If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning."). To the

extent ICE is suggesting that Congress sought to codify a *narrow* interpretation of "deletion" and thus to foreclose courts from requiring additional methods of segregation, it offers no explanation of why Congress would choose do so by imposing a new, different, and facially more expansive segregability *obligation* on agencies rather than by using limiting language. *Cf. Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 527 (D.C. Cir. 2015) (finding that enactment of "broad language that was not [as] limited" as prior language expanded the scope of records covered by FOIA exemption). Ultimately, ICE's hand-waving about codification of an agency memo is just cover for reading the new segregability mandate out of the statute entirely.

Indeed, the history of this new provision underscores that Congress's goal was to *expand* disclosure, not limit it. The 2016 FOIA Improvement Act was enacted in response to agencies' overuse of exemptions to withhold information from disclosure. *See* S. Rep. No. 114-4, at 323 (2015) (identifying "growing and troubling trend" of agency reliance on discretionary exemptions "to withhold large swaths of Government information"). The Act "reaffirm[ed] the public's right to know and put[] in place several reforms to stop agencies from slowly eroding the effectiveness of using FOIA to exercise that right." 162 Cong. Rec. H3714-01, H3716 (Statement of Rep. Meadows).

One such reform was the new segregability provision, which clarified that agencies must undertake not only "deletion," 5 U.S.C. § 552(b), but other "reasonable steps" to segregate nonexempt information. *Id*. § 552(a)(8)(A)(ii)(II). Congress identified a problem—over-withholding of nonexempt information—that frustrated FOIA's fundamental goal of transparency and addressed it by amending the statute to include an additional segregability provision. *See In re Letters Rogatory Issued by Dir. Of Inspection of Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (amendment to statute "must be interpreted in terms of the mischief it was intended to rectify").

The statutory context in which section 552(a)(8)(A)(ii)(II) is embedded likewise reinforces this reading. ACLU Br. 43–44. Congress embedded the "reasonable steps" requirement in a new provision instructing agencies to specifically articulate anticipated harm from disclosure before they could withhold information. *See generally* 5 U.S.C. § 552(a)(8)(A) (noting that "[a]n agency shall withhold information under this section only if [it] reasonably foresees that disclosure would harm an interest protected by an exemption . . ."). This "foreseeable harm" provision imposed "an independent and meaningful burden" on agencies and restricted their discretion in withholding information under FOIA. *See Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 369 (D.C. Cir. 2021) (citation omitted). The new segregabilty language was

added as a subclause in this provision.[2] Thus, after the enactment of the FOIA Improvement Act, agencies claiming exemptions had to *both* (1) identify specific, foreseeable harms from disclosure, *and* (2) undertake "reasonable steps" to segregate any nonexempt information contained in the exempt record. Thus, Congress imposed two new and enforceable duties on agencies to minimize the information they would withhold and ultimately "provide for more disclosure of records." H.R. Rep. No. 114-391, at 8 (2016). Yet on ICE's interpretation, the second of those duties—taking "reasonable steps"—imposed no obligations on agencies at all beyond what was required under prior law.

The only plausible reading, and the only one that comports with principles of statutory interpretation, is that the new language emphasizes that segregation encompasses not only "deletion," but also other "reasonable steps" that facilitate maximum disclosure of nonexempt information. Here, the ACLU has sought a patently reasonable segregation procedure. ACLU Br. 45–46. Thus, even if section 552(b) standing alone did not require ICE to undertake the burden-less substitution of Unique IDs to delete exempt information, the added requirement that agencies

[2] Contrary to ICE's assertion, Govt Br. 27–28, this context is plainly relevant to determining the meaning of the new segregability provision. *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (plain meaning can be understood by "looking to the statutory scheme as a whole and placing the particular provision within the context of that statute").

take "reasonable steps" to "segregate and release nonexempt information" would require ICE to do so.

II. Relational Information, Which ICE Concedes It Maintains In Its Database, Is A Record Subject To Disclosure Under FOIA.

ICE now concedes that it maintains and uses Relational Information. Govt. Br. 9–10 (A-Numbers "appear[] in separate data sets and therefore link[] those data sets to each other"); *id*. at 18 n.5 ("A-Numbers convey relational information in the IIDS Database . . . by providing a common point of reference between two records"). Yet, it asserts that the public cannot have access to this same Relational Information because it is "an abstraction" not reduced to a "tangible data point." *Id*. 18. This misapprehends the nature of Relational Information and the case law applying FOIA's disclosure requirements to arrangements of records.

A. Relational Information is an Arrangement of Records That Conveys Information and Must Be Disclosed Under FOIA.

ICE argues that, despite being created and maintained by the agency, Relational Information is not subject to disclosure under FOIA because it is "information in the abstract." Govt. Br. 19. But there is nothing abstract about information that conveys how enforcement records are grouped in ICE's database. For example, Relational Information might convey that a particular person was arrested, and then that same person was detained but released on bond and ultimately granted a stay of removal. Analogizing to paper records, Relational

Information is akin to a folder that groups related documents together according to a person's A-Number. Knowing which enforcement records belong in which folder is important—often critical—information, and by effectively maintaining separate electronic "folders" with each noncitizen's enforcement records, ICE has created a record of this information. Govt. Br. 6 (A-Numbers "connect[]" enforcement records "uniquely to an individual"). Under longstanding FOIA precedent requiring agencies to compile and disclose preexisting records, ICE must disclose this information. ACLU Br. 27–29.[3]

ICE responds that the IIDS database is "sorted by immigration events" and not individuals, so disclosing Relational Information is like requiring an agency officer to "pull paper from two separate cabinets and match their A-Numbers." Govt. Br. 12–13. That response is doubly wrong. First, databases are infinitely more flexible than physical filing cabinets: "Unlike paper documents, which present information in a largely fixed form," databases store information that can be organized in "a multitude of different arrangements . . . each of which is in the agency's possession or control." *Ctr. for Investigative Reporting v. United States*

[3] ICE repeatedly cites *Forsham v. Harris* for the proposition that FOIA does not require disclosure of "information in the abstract." 445 U.S. 169, 185 (1980). But *Forsham* held that the requested information did not meet the threshold definition of "agency record" because it was "generated, owned, and possessed" by a *third party* and the agency had not "created or obtained" it. *Id*. at 171, 186. Here, there is no dispute that ICE creates and maintains Relational Information.

Dep't of Just., 14 F.4th 916, 939 (9th Cir. 2021) (internal quotations omitted). *See also* Media Orgs Amicus at 8–10 (describing relational databases such as the IIDS). While it may be true that the IIDS stores data in tables sorted by immigration event, the database *also* maintains the same data organized by A-Number. Govt. Br. 10–11 (A-Numbers "appear[] in separate data sets and therefore link[] those data sets to each other"). Thus, there is no need for an agency officer to "pull" and "match" records from different enforcement data sets or "create some separate index correlating" the records: ICE has already created the correlations between individual enforcement records in its database by linking enforcement records to A-Numbers. Govt. Br. 13.

Second, even if disclosing Relational Information were analogous to pulling records from separate filing cabinets—and it is not—FOIA would plainly require disclosure. In fact, FOIA routinely requires precisely such compilation of records when individuals request information concerning them. Individuals can request all records related to their A-Number, and FOIA requires ICE to gather and produce such records, whether or not they are stored in different filing cabinets. *See, e.g.*, *Gosen v. U.S. Citizenship & Immigr. Servs.*, 75 F. Supp. 3d 279, 284 (D.D.C. 2014) (releasing "498 pages of documents" in response to plaintiff's request for "all documents and information related to [his] interactions with the U.S. immigration system"); *Gonzalez v. U.S. Citizenship & Immigr. Servs.*, 475 F. Supp.

3d 334, 341 (S.D.N.Y. 2020) (similar). To be sure, it might be burdensome for the government to perform that task as to *paper* records thousands of times in response to a single request—but, as the government concedes, no such burden exists here where the records are stored in electronic databases. Millions of database records can be retrieved automatically in a matter of hours or minutes.

B. Longstanding FOIA Precedent Requiring Agencies to Compile and Arrange Records Compels the Disclosure of Relational Information Here.

Moreover, courts have long recognized that different arrangements of records convey unique, substantive information and have ordered agencies to compile records—that is, arrange or group them in a particular manner—so as to make this information available. In the context of databases in particular, a "particular arrangement of data conveys a unique set of information . . . that is distinct from what the individual data points can convey when they are arranged differently or when they are not arranged in any particular way at all." *Nat'l Sec. Couns. v. C.I.A.*, 960 F. Supp. 2d 101, 160 n.28 (D.D.C. 2013). And courts have ordered agencies to sort and compile records, holding that such sorting and compilation does not involve record creation. *See, e.g.*, *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456–57 (D.D.C. 1977) (ordering agency to "compile" personnel and financial records), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978); *Nat'l Sec. Couns. v. C.I.A.*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), *aff'd sub nom. Nat'l Sec. Couns. v. C.I.A.*, 969 F.3d 406 (D.C. Cir. 2020) (explaining that

"sorting a pre-existing database of information to *make information intelligible* does not involve the creation of a new record" (emphasis added)).

Indeed, *Center for Investigative Reporting* ("*CIR*") is squarely on point and required similar compilation of database records. Just as the plaintiffs in *CIR* sought individual weapons trace records grouped according to the category (*i.e.*, former law enforcement ownership) to which they belonged, the ACLU seeks enforcement records grouped according to the individual with whom they are associated. *See CIR*, 14 F.4th at 922. In both instances, all that is required of the agencies is to compile records according to the relevant category, and disclose those compilations. *CIR* made clear that such arrangement and compilation of preexisting records is mandated under FOIA.

In *CIR*, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") claimed it was not required to count up the "total number of weapons traced back to former law enforcement ownership" because the aggregate number did "not already exist" in its database. 14 F.4th at 937, 939. The Ninth Circuit rejected this reasoning. It explained that the "relevant information and data fields"—*i.e.*, individual weapons trace records—"already exist in [ATF's] database" and thus it was required to produce aggregate counts of this information, even if those counts did not exist prior to running a responsive search of its database. *Id*. at 939. So too here, the relevant data fields—A-Number, arrest, detention, bond, and removal—

already exist in ICE's databases. Vassilio-Diaz Decl. at JA038, JA039 ¶¶ 7, 12. As ICE concedes, "A-Numbers convey [the] [R]elational [I]nformation" that the ACLU seeks "by providing a common point of reference between two records." Govt. Br. 18 n.5. Thus, ICE is required to compile these preexisting records and disclose them.

Indeed, this case is a far easier one than *CIR*. The aggregate count requested in that case was a number the agency itself did not already maintain; here, ICE maintains enforcement records grouped according to individuals, and an ICE agent can already easily determine which records relate to the same person by searching or matching by A-Number. Moreover, in contrast to *CIR*, the burden of producing the information in this case is exceptionally low. In *CIR*, the Ninth Circuit remanded to determine whether the statistical aggregate information plaintiffs sought "could be produced by a reasonable search of the [agency's] database or would require *more significant human analysis*." 14 F.4th at 940 (emphasis added). But no such inquiry is necessary here: ICE has conceded that burden is not an obstacle here, and the undisputed evidence shows that, as explained above, Relational Information can easily be disclosed in a matter of hours.

ICE suggests that this minimal burden is "legally irrelevant" to the record creation analysis. Govt. Br. 13. But like *CIR*, other courts routinely evaluate the burden of research and analysis that disclosure would impose on an agency. *See*

Everytown for Gun Safety Support Fund v. ATF, 403 F. Supp. 3d 343,359 (S.D.N.Y. 2019) (explaining that "[a]fter the E-FOIA amendments, whether information in a database constitutes an agency record hinges . . . [on] whether generating the information requires the agency to engage in additional research or conduct additional analyses above and beyond the contents of its database"), *rev'd and remanded on other grounds*, 984 F.3d 30 (2d Cir. 2020). For instance, in *National Security Counselors* ("*NSC*"), the D.C. Circuit held that FOIA did not require disclosure of the requested information where an agency analyst would have to "individually review" responsive documents, "manually sort thousands of requests based on fee category," and "compil[e] [] lists that do not otherwise exist." 969 F.3d at 409. Rather than "briefly describe[]" the analysis the agency would have to undertake, the court's holding was premised on it. Govt. Br. 16. *See also Nat'l Sec. Couns.*, 898 F. Supp. 2d at 272 (noting that "if a FOIA request for 'aggregate data' would require an unreasonably burdensome electronic search . . . an agency need not conduct the search").

Finally, ICE claims that "[t]o be disclosed in any meaningful way," Relational Information "would have to be converted into some sort of tangible data point, like a unique identifying number." Govt. Br. 18. This is incorrect. Relational Information can be produced without Unique IDs, but the ACLU sought Unique IDs because their production is the least burdensome means of disclosure here.

Another way of disclosing Relational Information without the use of Unique IDs, for instance, is to compile all enforcement data into one consolidated spreadsheet, with each row representing one individual. Such a spreadsheet would be unwieldy: Because certain individuals have, for example, been detained in dozens of facilities, each column would need to be repeated dozens of times so that each detention incident could be recorded in each row. But the important point is that creating this (enormous) spreadsheet would require nothing more than the "filter[ing] or rearrange[ment]" of "'all non-exempt data points'" that even ICE concedes FOIA requires. Govt. Br. 19 (quoting *Inst. for Just. v. Internal Revenue Serv.*, 941 F. 3d 567, 570 (D.C. Cir. 2019)). And, critically, what the ACLU seeks through the substitution of Unique IDs is functionally equivalent: Using Unique IDs to match up various detention and other records to a single individual provides the exact same information as using a single spreadsheet row to convey the same information. And Unique IDs are much easier for the agency to produce.

C. Relational Information is a "Record" Under the 1996 E-FOIA Amendments.

Finally, ICE claims that the E-FOIA amendments "did not broaden the definition of record" to include database information, but simply "made clear that FOIA 'treat[s] electronic records the same as analog records.'" Govt. Br. 20 (quoting *Inst. for Just.*, 941 F.3d at 571). But this ignores the plain text of the statute and congressional purpose in amending it. In defining "record" as "any

information that would be an agency record . . . when maintained by an agency in any format, including an electronic format," 110 Stat. 3048, § 3 (codified at 5 U.S.C. § 552(f)(2)(A)), Congress made clear that "*information an agency has created* and is directly or indirectly disseminating" is subject to FOIA. H.R. Rep. No. 104-795, at 20 (1996) (emphasis added). Here, there is no question that Relational Information is "information" that ICE has created by linking A-Numbers to enforcement records in its database. Govt. Br. 13. And, the agency disseminates this information by, for example, responding to individual FOIA requests for records associated with a particular A-Number. What the ACLU seeks is this same information.

Congress, through the E-FOIA amendments, recognized that the widespread use of electronic databases, the massive amounts of information that they store, and the malleability of this information must be accounted for when applying FOIA's disclosure requirements to database records. ACLU Br. 21–22. By amending FOIA to define "records" as including "information" where no definition had existed before, it gave effect to the purpose behind E-FOIA: broad access to *information* stored electronically, including in databases.[4]

[4] ICE cites *Aguiar v. Drug Enf't Admin.*, 992 F.3d 1108 (D.C. Cir. 2021), in support of its interpretation of E-FOIA, but that case involved a different provision of the amendments requiring agencies to provide records "in any form or format requested" if they are "readily reproducible" in that format. *Id*. at 1111 (citing 5 U.S.C. § 552(a)(3)(B)). The D.C. Circuit held that the agency was not required to

And even if the E-FOIA amendments simply clarified that electronic records must be treated the same as analog records, disclosure of Relational Information is required here. As explained above, courts have long required the compilation and arrangement of analog records, recognizing that the groupings of records *themselves* convey information that is a record subject to disclosure. *See supra* Part II.B. Relational Information is just that: a preexisting grouping of enforcement records according to A-Number that conveys information about which records belong to which individual. The only difference is that it is maintained in a database. Even under ICE's interpretation of E-FOIA, then, Relational Information is no more "abstract" than a paper folder containing enforcement records. Therefore, it must be disclosed.

* * *

ICE has made a number of concessions in this litigation that all but resolve the narrow dispute at issue. Unique IDs, like other forms of redaction suited to digital media that ICE agrees are required under FOIA, simply delete exempt information and do not substantively alter the record. As the agency has repeatedly

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convert GPS coordinates into map images because the latter are not merely another "form or format" of the underlying location information. *Id*. at 1111. It explained that the E-FOIA amendments did not "broaden the concept of an agency record" to require agencies to use "editorial judgment" to "alter" a record's "substantive content." *Id*. at 1112–13. Here, the "information" the ACLU seeks is already maintained in ICE's databases, and no "editorial judgment" is required to produce it.

conceded, using an automated process to substitute Unique IDs for A-Numbers imposes no legally cognizable burden. And Relational Information, far from being abstract, is valuable information that ICE concedes is maintained in its database and conveys which enforcement records belong to which individual. Under longstanding FOIA precedent requiring agencies to compile and arrange records, ICE must disclose this information.

CONCLUSION

For the reasons set forth herein, and in the Opening Brief, the Court should reverse.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. R. 32 (a)(7)(B)(ii) and Local Rule 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,931 words.

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I hereby certify that on December 10, 2021, I electronically filed Plaintiff-Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's electronic CM/ECF filing system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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