21-1233

To Be Argued By:
ZACHARY BANNON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 21-1233

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

BRIEF FOR DEFENDANT-APPELLEE

DAMIAN WILLIAMS,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellee.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2728

ZACHARY BANNON,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 21-1233

AMERICAN CIVIL LIBERTIES UNION
IMMIGRANTS' RIGHTS PROJECT,

Plaintiff-Appellant,

—v.—

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

The American Civil Liberties Union Immigrants' Rights Project (or the "ACLU") submitted a Freedom of Information Act ("FOIA") request to U.S. Immigration and Customs Enforcement ("ICE") seeking a large amount of spreadsheet data detailing ICE's immigration efforts. Rather than seeking the data as ICE maintained it, the ACLU requested that, within the spreadsheets, ICE replace alien numbers—unique personal identifiers assigned to noncitizens—with new "unique identifiers." Acknowledging that alien

numbers are exempt from disclosure for privacy-related reasons, the ACLU requested that the agency create these new identifiers to allow it to track individuals throughout ICE's data without revealing their identities. ICE responded to the ACLU's FOIA request by producing millions of rows of spreadsheet data on ICE enforcement actions, but did not create the new unique identifiers that the ACLU requested. The ACLU sued to force ICE to create those unique identifiers.

The district court correctly held that ICE has no obligation to create those unique identifiers. The law is clear that an agency need not create new records in response to a FOIA request. But to satisfy the ACLU's request, ICE would have to do just that: create records with unique identifiers that do not now exist. As this Court has held, FOIA does not mandate such a substitution of non-exempt information for exempt information. The district court's judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction over this FOIA matter pursuant to 5 U.S.C. § 552(a)(4)(B). On March 10, 2021, the district court entered final judgment in favor of ICE. (Joint Appendix ("JA") 191). The ACLU filed a timely notice of appeal on May 7, 2021. (JA 192). Accordingly, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Issue Presented for Review

Whether FOIA requires ICE to create new unique identifiers to replace FOIA-exempt alien numbers ("A-numbers") within its computer databases to satisfy a FOIA request.

Statement of the Case

A. Procedural History

The ACLU commenced this action in the United States District Court for the Southern District of New York on July 29, 2019. (JA 20-29). On March 30, 2020, the district court signed a stipulation and order resolving all issues raised by the ACLU's complaint apart from whether ICE was required to replace A-numbers within its spreadsheet data with unique identifiers. (JA 30-34). ICE moved for summary judgment on this remaining issue (JA 35), and the ACLU cross-moved for summary judgment (JA 74-75). On March 10, 2021, the district court granted summary judgment and entered judgment in favor of ICE. (JA 176-91). The ACLU filed a notice of appeal on May 7, 2021. (JA 192).

B. Factual History

On October 3, 2018, the ACLU submitted a FOIA request to ICE seeking "spreadsheet data on [ICE] initial apprehensions, risk classification assessments, detentions, and removals," as well as "Bond Management Information System Data" from 2003 through the time of the request. (JA 8, 11). The ACLU sought this information "in a spreadsheet format . . . with a row in the spreadsheet for each individual or case."

(JA 8). The ACLU explained that "[i]n removal data, this means one row for each removal," "[i]n detention data, this means one row for each detention period," and so on. (JA 8). About three weeks later, the ACLU agreed to limit its request to data reflecting immigration events occurring within the prior seven years. (JA 25).

The ACLU's FOIA request did not seek ICE's data as it was maintained by the agency. Rather, the ACLU requested that, "[i]n every case, alien numbers . . . should be replaced with unique identifiers, and unique identifiers should also be provided for each unit of observation." (JA 8). The ACLU sought these unique identifiers to "allow[] a single person to be tracked across more than one detention period, and a single detention period to be tracked across transfers to multiple detention centers." (JA 8). It also wished to track individuals between the separate data sets for removals, apprehensions, detentions, bond management, and risk assessment. (JA 11 (requesting within "Apprehension Data" a unique identifier that "should correspond to A-numbers and match the unique identifier provided in detention, removals, and [risk classification assessment] data: an individual's [identifier] should be the same in all spreadsheets")). It is undisputed that ICE does not maintain the unique identifiers requested by the ACLU in its records. (JA 97 (referring to "new Unique IDs")).

ICE determined that records responsive to the ACLU's FOIA request were likely housed in the ICE Integrated Decision Support System (the "IIDS Database"). (JA 41). The IIDS Database contains

information that is adapted for efficient generation of reports for third parties, like Congress, the White House, and the public. (JA 39). The IIDS Database is populated with a subset of case and enforcement-related information derived from ICE's Enforcement Integrated Database ("EID"), from which the IIDS Database extracts data three times a week. (JA 38-39). The EID is the common repository for all records created, updated, and accessed by several software applications at ICE and U.S. Customs and Border Protection ("CBP"). (JA 37). ICE and CBP law enforcement personnel access the EID to input or update law enforcement sensitive information about individuals that have been encountered or arrested by ICE or CBP officers. (JA 38). When generating reports for the White House or to respond to a FOIA request, "ICE queries IIDS instead of the EID to protect the integrity of the live data held in the EID operational environment and to prevent the performance of EID from being diminished." (JA 39).[1]

---

[1] An amicus brief authored by three media-related organizations engaged in data-focused journalism suggests that the ACLU's FOIA request could have been fulfilled through a search of the EID alone. (Amicus Brief of Center for Investigative Reporting 6 n.2). A stipulation executed by the ACLU and ICE limited the issue presented in this matter to ICE's obligation to replace A-numbers with unique identifiers. (JA 31). The functional capacity of the EID was therefore not at issue before the district court, nor is it on appeal. In any event, FOIA does not obligate an agency

The IIDS Database maintains information in distinct data sets—"[i]n other words, data related to removals, detentions, and administrative arrests[ ] are stored separately[ ] in different data sets of standardized reporting populations." (JA 39). To respond to the ACLU's FOIA request, ICE queried each of the relevant data sets—removals, detentions, apprehensions, risk assessment, and bond management. (JA 42). The query resulted in over 10 million rows of data. (JA 42). ICE determined that several columns of information within the spreadsheets were subject to withholding under FOIA's personal privacy and law-enforcement exemptions, Exemptions 6 and 7. (JA 42). Relevant here, ICE determined that the alien numbers contained in the spreadsheets must be redacted in accordance with those two exemptions. Subject to those withholdings, ICE disclosed the IIDS-derived spreadsheets to the ACLU. (JA 92-93; *see* JA 44-73 (samples of disclosed data)).

In responding to the ACLU's FOIA request, ICE did not create the unique identifiers that the ACLU had requested to replace the redacted A-numbers. (JA 42). The only piece of information stored in a row of IIDS data that connects an entry uniquely to an individual is that individual's A-number, which is exempt from disclosure pursuant to FOIA's privacy exemptions.

---

to conduct a search for records where doing so "would significantly interfere with the operation of [an] agency's automated information system." 5 U.S.C. § 552(a)(3)(C).

(JA 42). The ACLU does not contest the application of those exemptions to A-numbers. (JA 31).

C. The District Court's Order

The only disputed issue before the district court was whether ICE was required to substitute unique identifiers in place of A-numbers within its IIDS data sets. The district court granted summary judgment to the government on March 10, 2021. (JA 176-90).

The district court concluded that ICE was not required to produce unique identifiers in response to the ACLU's FOIA request because FOIA does not require agencies to create records. (JA 182). It noted that the ACLU conceded that A-numbers are exempt from FOIA disclosure. (JA 183). The court then rejected the ACLU's arguments that ICE must produce unique identifiers.

First, the district court rejected the ACLU's assertion that "the information conveyed by A-numbers is an existing record" that must be disclosed. (JA 183). The ACLU based this contention on the "function[ ]" of A-numbers to associate different records with the same individual—what the ACLU styles as "relational information." (JA 183). But as the district court observed, neither the "relational information" nor the unique identifiers actually sought by the ACLU's FOIA request were maintained in the IIDS Database. (JA 185). The ACLU therefore did not seek "the contents of the IIDS Database (such as A-numbers), but instead seemingly s[ought] information about those contents"—which constituted a request for the creation of a new record. (JA 185). Put differently, the

sought-after "relational information" and unique identifiers could not be "apparent on the face of the database" because "they are conceptual abstractions," not actual datapoints that had to be disclosed under FOIA. (JA 186).

Second, the district court rejected the ACLU's argument that the data it sought could be segregated from A-numbers and then produced. The district court noted that ICE could not segregate unique identifiers from A-numbers because "ICE would have to first create the Unique IDs and then substitute them for A-numbers." (JA 187). As for "relational information," the district court acknowledged that "[e]very datapoint in an agency database conveys a variety of information but an agency is not obligated to produce 'information in the abstract.'" (JA 187 (quoting *Forsham v. Harris*, 445 U.S. 169, 185-86 (1980))). The district court concluded: "Simply put, ICE cannot be compelled to segregate what does not already exist." (JA 188).

Third, the district court addressed the ACLU's argument that unique identifiers were a "form or format" of A-numbers that had to be disclosed because FOIA requires agencies to disclose records in "any form or format requested . . . if the record is readily reproducible by the agency in that form or format." (JA 188; 5 U.S.C. § 552(a)(3)(B)). The district court concluded that this provision was meant to address "form" as in "media," *e.g.*, "paper or thumb drive," and "format" as in "electronic structure," *e.g.*, "PDF or JPEG." (JA 189 (quotation marks omitted)). The ACLU's request to have ICE "transform A-numbers into Unique IDs" fell outside this provision. (JA 189).

Finally, the district court addressed the ACLU's argument that ICE must produce unique identifiers because it had done so in the past. (JA 189). The district court concluded that the prior practice identified by the ACLU was not analogous to their request because it involved the production of a different kind of unique identifiers. (JA 189). And, in any event, the district court concluded that ICE's prior practices did not bear on the outcome of this matter because prior decisions to make discretionary disclosures did not modify ICE's obligations under FOIA. (JA 189).

Because the ACLU's request for unique identifiers would require ICE to create new records, the district court granted summary judgment in ICE's favor. (JA 190).

Summary of Argument

As the district court correctly held, FOIA does not obligate an agency to create new unique identifiers to replace exempt information to preserve the functionality of a document. This Court has already held that FOIA does not require the substitution of newly crafted language in place of exempt information. Such a substitution would be, in effect, the creation of new documents. But FOIA only requires an agency to disclose existing records that the agency has created for its own purposes. *See infra* Point A. Even if an agency could create or modify its existing records with minimal burden, this Court and others have held that it is not obligated to do so. *See infra* Point B.

That conclusion is not changed by the characterization of information as "relational." The information at

issue here—alien numbers that were redacted under FOIA's privacy-related exemptions—appears in separate data sets and therefore links those data sets to each other. But that link is not producible standing by itself; it can only be conveyed through the A-numbers (which are exempt from disclosure) or by creating new records (which FOIA does not require). The so-called "relational information" sought in this case is thus an abstraction, and the Supreme Court has held that FOIA applies only to records, not to information in the abstract. *See infra* Point C. For similar reasons, "relational information" is not information that can be "segregated" from the exempt portions of the agency's records. FOIA's segregation provisions require the agency to delete exempt information and produce the rest; they do not require the agency to also add new information to replace the deleted portions. *See infra* Point D.

Accordingly, the district court's judgment should be affirmed.

ARGUMENT

Standard of Review

This Court "review[s] a district court's order granting summary judgment in a FOIA action *de novo*." *Center for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014).

FOIA Does Not Require ICE to Create and Produce Unique Identifiers

When the ACLU requested spreadsheet data from ICE pertaining to detainers, arrests, removals, bond management, and risk assessment, ICE satisfied the ACLU's request by identifying the database likely to store responsive records, querying that database to obtain responsive data in spreadsheet form, redacting information protected from disclosure under relevant FOIA exemptions, and then disclosing the redacted spreadsheets. The ACLU's additional request—that ICE create new unique identifiers and substitute them in place for A-numbers in the data—goes beyond what FOIA requires.

A. ICE Cannot Produce Unique Identifiers Without Creating a New Record

"[U]nder the FOIA, an agency does not rewrite a document or create informational material. It discloses existing documents, which it has already prepared." *Pierce & Stevens Chemical Corp. v. U.S. Consumer Product Safety Commission*, 585 F.2d 1382, 1388 (2d Cir. 1978); *accord Forsham*, 445 U.S. at 186 ("FOIA imposes no duty on [an] agency to create records"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975) (FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create").

And because "FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records," a district court would

"exceed[ ] [its] authority under FOIA" if it were to require the government to "substitut[e]" non-exempt information in place of exempt information. *ACLU v. DOJ*, 681 F.3d 61, 71 (2d Cir. 2012). To do so would be to require the government to "creat[e] documents," which "FOIA does not obligate agencies to do." *Id.* (quotation marks omitted); *accord Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982) ("Agencies are not, however, required to commit to paper information that does not exist in some form as an agency 'record.' ").

That rule applies here and resolves this appeal. Whether on paper or in an electronic database, FOIA does not compel an agency to create records, or to edit its records into new records by substituting non-exempt information for exempt information. A request that an agency "be required to simply insert new information in place of the redacted information requires the creation of new agency records"—and that is "a task that the FOIA does not require the government to perform," no matter what medium the records are stored in. *Flightsafety Services Corp. v. Department of Labor*, 326 F.3d 607, 613 (5th Cir. 2003) (addressing a request for electronic data).

The ACLU attempts to evade that clear and easily applied rule through a flawed analogy to paper records, arguing "it is as if ICE carefully maintained separate file folders for each individual, but chose to jumble everyone's records together when it came time to provide information to the public." (Brief of Plaintiff-Appellant ("Br.") 1-2). But unlike in that analogy, the "file folders" in the IIDS Database (that is, the data sets) are not sorted by individuals—instead, they are

sorted by immigration events: one for all removals, one for all detentions, etc. (JA 39 ("data related to removals, detentions, and administrative arrests, are stored separately, in different data sets of standardized reporting populations")). If the IIDS Database were a paper filing system, to correlate a detention record to an arrest record, an ICE officer would have to pull paper from two separate cabinets and match their A-numbers. To match the records without the A-numbers, ICE would have to either write in new identifying numbers, or create some separate index correlating all detention and arrest records. But that type of alteration or creation of records is precisely what this Court and the Supreme Court have held is not required by FOIA. *See Sears*, 421 U.S. at 161-62; *ACLU v. DOJ*, 681 F.3d at 71; *Flightsafety*, 326 F.3d at 613.

B. The Burden of Creating Unique Identifiers Is Irrelevant

While the ACLU repeatedly asserts that the burden on ICE to create unique identifiers would be minimal (Br. 26-29), that is legally irrelevant. To begin with, it is not correct that the government "concedes" that the process of substituting unique identifiers for A-numbers would be "nearly burden-less." (Br. 2). In fact, the record shows that ICE "does not maintain" a computer process to do what the ACLU seeks, and would have to "create a program" that would then process millions of entries. (JA 42-43, 182).[2]

---

[2] The government's concession was that the burden at issue would not meet the threshold applied to

Regardless, an agency's obligation does not turn on the degree of burden, but on the separate question of whether it is being required to create new records. The ACLU contends that the record-creation doctrine is implicated only when a request requires "agency personnel to add substantively to the information requested, through research or 'significant human analysis.'" (Br. 26 (quoting *Center for Investigative Reporting v. DOJ* ("*CIR v. DOJ*"), 14 F.4th 916, 940 (9th Cir. 2021))).[3] But that standard is not supported by

---

the burden for segregability, but that is different from saying there is no burden at all. (JA 129-30). As to the burden that exists, the ACLU offers speculative ideas about how ICE could accomplish the task more easily than the agency's own personnel represent. (JA 82, 98). But the agency's employees should be presumed to know the capacity and limitations of their own information systems, which is not defeated by conjecture about various "open-source" methods that may or may not be compatible with ICE's data or the requirements of its systems. *See Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009) (noting presumption of good faith accorded agency declarations). In any event, even in the ACLU's description, the agency would have to undertake a process of developing, testing, and applying a process that has never been used by the agency before. That burden may not be heavy in the context of this case, but it is not *de minimis*.

[3] The panel opinion relied upon in the ACLU's brief, *CIR v. DOJ*, 982 F.3d 668 (9th Cir. 2020), was later withdrawn and superseded on denial of

precedent and is inconsistent with the case law on record creation. For example, in *Forsham*, the Supreme Court denied a request for a record under the record-creation doctrine even though the agency could have provided it by simply exercising a right of access to a document in the possession of a third party. 445 U.S. at 186. The Supreme Court engaged in no burden analysis in reaching that conclusion. Where there is "no duty" to alter or create records, there is no need to inquire into the burden such a duty would impose. *Yeager*, 678 F.2d at 322 n.16.

While the ACLU contends that the Court in *ACLU v. DOJ* determined that "research and analysis" "cross[ed] the line between production and record creation" (Br. 38), that reasoning is nowhere in the Court's opinion, which held simply that "alter[ing] or modify[ing]" records "would effectively be 'creating' documents" and was therefore not required by FOIA. 681 F.3d at 71. There was no analysis of the degree or type of burden that such modifications would entail—the Court simply held the modifications were not required. *Id*. Indeed, the proposed neutral phrases at issue were "composed by the [district] court," with no research or analysis by the agency. *Id*. Similarly, the *Flightsafety* court did not discuss burden in applying the rule that FOIA does not require creation of records. 326 F.3d at 613. And the ACLU argues that the court in *National Security Counselors v. CIA* "emphasiz[ed]

---

rehearing en banc. The analysis of record creation and burden pertinent to this case remains the same in the superseding opinion.

the burden of *analysis* that would be imposed on the agency" (Br. 27)—but in fact, the D.C. Circuit only briefly described the process the agency would have to undertake to support its conclusion that it would "entail the creation of new records, not the disclosure of preexisting ones." 969 F.3d 406, 409 (D.C. Cir. 2020). The court's decision rested on the agency's assertion that its "database d[id] not contain the relevant field . . . in the first place." *Id.* The same is true here: the identifiers the ACLU seeks to have ICE create and insert into its records "do not otherwise exist," and the agency is therefore not obliged to create them, regardless of the burden of doing so. *Id.* ("regardless of whether a given record exists in an electronic or paper format (or both), the statute only calls for the disclosure of existing records, not the generation of new ones").

Finally, *CIR v. DOJ*, the case the ACLU primarily relies on, does not support its position. The Ninth Circuit there held that "using a query to search for and extract a particular arrangement or subset of data already maintained in an agency's database does not amount to the creation of a new record." 14 F.4th at 938. That holds true even if "the query produces a set of documents, a list, a spreadsheet, or some other form of results that the agency has not previously viewed." *Id.* Put differently, a database can be recombined into any number of different arrangements, and under the Ninth Circuit's holding, each of those possible arrangements is subject to FOIA. *Id.* at 939.

But the premise of that holding is that "the relevant information and data fields *already exist* in the

database maintained by the agency." *Id.* (emphasis added). Here, the unique identifiers the ACLU seeks do not already exist. No amount of "querying" the IIDS Database will cause those identifiers to come into existence.[4] ICE has completed what the *CIR v. DOJ* court held was required—querying its IIDS Database, arranging it as requested, and producing that aggregate data to the ACLU in spreadsheet form. Just as in *ACLU v. DOJ*, the agency was not obligated to create a process to transform that data, or to insert new information into that data, to create a new record that satisfies the ACLU's FOIA request.

C. The ACLU's "Relational Information" Theory Does Not Compel Production of Unique Identifiers

The ACLU denies that it has asked ICE to create new records by contending that it seeks "information" conveyed by A-numbers, and that such information, rather than the A-number itself, is an existing agency

---

[4] A "query," as the Ninth Circuit used the term, is simply "an instruction that tells a database management system to select a specific subset of information from a database and return it in a particular arrangement." 14 F.4th at 938 n.20 (quotation marks omitted). Creating a new unique identifier is different from "select[ing] . . . information from a database" and "return[ing]" it—it is adding new information to the data that is returned. Indeed, the ACLU's declarations specify that they seek to "transform," not merely select and rearrange, the data at issue. (JA 99).

record. In essence, the ACLU contends that because information in a data set is linked to information in a different data set by their shared A-number, that linkage constitutes "relational information," which should be treated as a "record" and therefore produced, even after the A-number itself is removed from the data.

But "relational information" is an abstraction that cannot itself be produced. "Relational information" has no independent existence in the IIDS Database apart from the A-numbers that convey it; it is simply one of the functions served by an A-number and its presence in separate data sets.[5] To be disclosed in any meaningful way, the "relational information" would have to be converted into some sort of tangible data point, like a unique identifying number, that is then substituted into the agency record. That process is precisely what this Court held is not required by FOIA in *ACLU v. DOJ*. In that case, like this one, certain parts of a

---

[5] One amicus brief suggests relational information is "explicit in the database," rather than a mere function of the existence of A-numbers. (Brief of Center for Investigative Reporting 13). That is not correct. The spreadsheets produced in response to the ACLU's FOIA request came from distinct data sets that lacked interconnectivity. (JA 39 ("[D]ata related to removals, detentions, and administrative arrests, are stored separately, in different data sets of standardized reporting populations.")). In other words, A-numbers convey relational information in the IIDS Database in the same way that they do in paper records, by providing a common point of reference between two records.

record were exempt from FOIA production and were therefore redacted. 681 F.3d at 70. The proposal to substitute new language in place of the redacted language was intended to "preserve the meaning of the text"—that is, convey the non-exempt meaning of the redacted language while simultaneously protecting the exempt meaning of that language. *Id.* at 66-67, 70. Despite the non-exempt informational function of the language at issue, and the potential ability to convey that information through substitution of different language, this Court held that FOIA does not authorize a district court to order that substitution. *Id.* at 70.

That conclusion follows from the Supreme Court's instruction that "information in the abstract" is not an agency record that must be disclosed under FOIA. *Forsham*, 445 U.S. at 185; *accord DOJ v. Tax Analysts*, 492 U.S. 136, 145-46 (1989); *Goldgar v. Office of Administration, Executive Office of the President*, 26 F.3d 32, 34 (5th Cir. 1994) (rejecting theory that FOIA requester can seek information apart from records, "because the FOIA applies only to information in record form"). Instead, only "existing documents" need be disclosed. *Pierce & Stevens*, 585 F.2d at 1388. In the context of a database, that disclosure obligation may encompass "all non-exempt data points," *Institute for Justice v. IRS*, 941 F.3d 567, 570 (D.C. Cir. 2019), and may require the agency to filter or rearrange those data points, *CIR v. DOJ*, 14 F.4th at 938-39—but it does not extend to abstractions like a "relationship."

The ACLU relies heavily on the 1996 Electronic Freedom of Information Act Amendments ("E-FOIA Amendments"), Pub. L. No. 104-231, 110 Stat. 3048

(1996), which provided that "'record' and any other term used in [FOIA] in reference to information includes any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format," 5 U.S.C. § 552(f)(2)(A). That provision did not broaden the definition of record to cover "any information." *Aguiar v. DEA*, 992 F.3d 1108, 1111-12 (D.C. Cir. 2021) (noting legislative history "explained that § 552(f)(2) 'does not broaden the concept of an agency record'"). Rather, by stating that a record can be in "any format," it made clear that FOIA "treat[s] electronic records the same as analog records." *Institute for Justice*, 941 F.3d at 571; *accord CIR v. DOJ*, 14 F.4th at 937-38 (to "stay abreast" of increasing use of electronic records, Congress enacted E-FOIA Amendments making clear that "computer database records are agency records subject to the FOIA" (quotation marks omitted)); *Aguiar*, 992 F.3d at 1111-12 (title of enactment "suggests that the primary congressional concern was to provide for public access to electronic records"); *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006) ("In 1996, Congress amended the definition of 'record' to include electronic records."); 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."). And so this provision "provides little help in understanding what is a 'record' in the first place." *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 830 F.3d 667,

678 (D.C. Cir. 2016); *see also Doyle v. DHS*, 959 F.3d 72, 76 (2d Cir. 2020) (noting that "agency record" is undefined in FOIA). The ACLU's invocation of the E-FOIA Amendment to broaden the concept of a "record" to include "information in the abstract" thus must fail. *Forsham*, 445 U.S. at 185.[6]

In short, the ACLU has not established why its concept of "relational information" requires ICE to create new unique identifiers, embodied in new records, to respond to its FOIA request. The district court correctly concluded that ICE need not do so.

D. Creation of Unique Identifiers Is Not Record Segregation

Lastly, the ACLU argues that relational information must be "segregated" from A-numbers. (Br. 29-46). That position depends, again, on the incorrect assertion that FOIA applies to the abstraction of "relational information." Regardless, nothing in FOIA

---

[6] The ACLU's own example demonstrates that FOIA does not require disclosure of the type of information it seeks. The ACLU posits that "how books are arranged on a bookshelf" is the type of "information" that is "not . . . reduced to a discrete document" but is still subject to FOIA because of the knowledge it conveys. (Br. 19-20). But even accepting the premise, to require an agency to photograph its bookshelves in response to a FOIA request, or to generate a catalog of those shelves, would (at the least) indisputably run afoul of the rule that an agency need not create new records.

supports the ACLU's claim that ICE must create unique identifiers to satisfy its obligation to delete exempt portions of a record and segregate the non-exempt information remaining.

FOIA provides 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." 5 U.S.C. § 552(b). ICE satisfied this obligation by "delet[ing]" A-numbers and other FOIA-exempt information from its IIDS spreadsheets, then segregating and disclosing what remained. The plain text of FOIA's segregation provision requires "deletion" of exempt information, not "creation" of new information to replace it.

To the contrary, Congress did not "intend[] any manipulation or restructuring of the substantive content of a record when it commanded agencies to 'delete' exempt information"—no matter how "desirable in terms of full disclosure policy" or "feasible in terms of computer technology" such a rule would be. *Yeager*, 678 F.2d at 323; *accord id.* ("The fact that the public is deprived of information that might otherwise have been available cannot be the basis for the imposition of greater duties than those required by the Act itself."). Exempt information might frequently be "altered in such a way that it no longer falls within a specific exemption," such that "the quality that made the information exempt has been 'deleted.'" *Id.* at 322. But to require that kind of alteration as part of an agency's duty to segregate would involve "conceptual gerrymandering" of the obligation FOIA imposes. *Id.* "Congress has already determined that 'deletion of (exempt)

information would provide full protection for the purposes to be served by the exemption.'" *Id.* at 323 (quoting S. Rep. 93-854 at 32 (1974)). The statute thus does not require the type of alteration of records that the ACLU demands here. *See id.* at 319 n.9, 322 (rejecting the argument that "compacting" database information by "expressing specific information, such as a date or a city, in more general terms, such as a ten-year span or a geographic region" was required by FOIA's segregation requirement).

The ACLU attempts to evade that rule by analogizing an A-number to "a single document that contains some sentences that are exempt (personally identifying information) and other sentences that are not exempt (Relational Information)," and contending that "[a]pplying a black redaction mark to the exempt sentences serves the same purpose as running a computer script that substitutes Unique IDs for A-Numbers." (Br. 33). But the accurate analogy is not to blacking out a sentence, but to replacing it with a different sentence with content newly created for the purpose of the FOIA request—in other words, what this Court has said is not required by FOIA. *ACLU v. DOJ*, 681 F.3d at 71. A-numbers are, undisputedly, exempt, and redacting them (as FOIA requires) is evidently not the same as creating new information to replace them (as FOIA does not require).[7] Unlike in *Trans-Pacific*

---

[7] The fact that redaction may be accomplished by traditional means like black marks or blurred images, or more innovative ones like "'inserting cat faces over the visages of humans'" (Br. 35 (quoting *Evans v.*

Policing Agreement v. U.S. Customs Service, an A-number cannot be divided into exempt and non-exempt digits. 177 F.3d 1022, 1024 (D.C. Cir. 1999). Rather, the ACLU's segregation theory depends on imagining that A-numbers can be divided into two (or more) abstract concepts depending on the purpose they are used for, and then—contrary to all precedent—requiring the agency to rewrite its record to reflect those abstractions. But "[a] requester must take the agency records as he finds them," and FOIA imposes no obligation to implement requesters' novel workarounds to capture "information in the abstract." *Yeager*, 678 F.2d at 323 (quotation marks omitted).

Nor did the FOIA Improvement Act of 2016, Pub. L. No. 114-85 § 2, 130 Stat. 538 (2016), change that result, contrary to the ACLU's contention. (Br. 41-46). The FOIA Improvement Act added, among other provisions, 5 U.S.C. § 552(a)(8)(A)(ii)(II), a requirement

---

BOP, 951 F.3d 578, 587 (D.C. Cir. 2020)), does not change the fact that redactions delete exempt material without replacing that material with new, substantive information. (Nor, contrary to the ACLU's suggestion (Br. 37), did the D.C. Circuit actually order the use of cat faces. 951 F.3d at 587.) While the ACLU appears to imply that because those techniques can be viewed as "editing" the video they are equivalent to the substitution of information they seek in this case (Br. 35), the "editing" involved in blurring a video is substantially the same as blacking out text—in both cases the "editing" is effectively the deletion of exempt information.

that an agency must "take reasonable steps necessary to segregate and release nonexempt information."

But ICE did just that, by deleting the exempt A-numbers and releasing the remainder of the information. Nothing in the text of the 2016 provision suggests it needed to do more. The ACLU explains at length why running a computer script could be a "reasonable step" to achieve segregation of non-exempt information. (Br. 41-43). But they ignore the fact that, at bottom, their argument depends on the idea that the 2016 amendment somehow silently overruled long-established case law that FOIA does not apply to "information in the abstract," and does not require agencies to create new records by substantively altering existing records to satisfy a requester's demands. Nothing in the text or history of the 2016 amendment supports that conclusion.

Indeed, the ACLU's position that this provision expanded FOIA's segregation requirement is untenable considering the provision's enactment history. Section 552(a)(8)(A)(ii)(II) mirrors the language in 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), http://go.usa.gov/x6tGe (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 always 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 § 552(a)(8)(A)(ii)(II).

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 (Br. 44) carries little weight. *See Sompo Japan Ins. Co. v. Union Pacific R. Co.*, 456 F.3d 54, 64 (2d Cir. 2006) (in considering a "codification" of existing laws, courts "should not 'infer that Congress . . . intended to change their effect' " (quoting *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957) (alterations omitted))), *abrogated on other grounds*, *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010). Nor is it unusual for Congress to legislate to codify existing understandings. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 n.8 (2011) ("Congress meant to codify [judge-made law], not to set forth a new [standard] of its own making"). Indeed, Congress has routinely amended FOIA to codify existing 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."). There is thus no reason to conclude that, in codifying Executive Branch practice, Congress meant to add new obligations to the segregation requirement.

The ACLU's citations of the FOIA Improvement Act's legislative history (Br. 43, 45) all detail the rationale for Congress's enactment of a separate portion of the FOIA Improvement Act—the foreseeable harm requirement. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I) ("An agency shall withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)."); *see also Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 370-71 (D.C. Cir. 2020) (discussing that requirement).[8] By contrast, the

---

[8] In a footnote, the ACLU argues that ICE violated the foreseeable harm requirement by failing to demonstrate why producing unique identifiers would harm an interest protected by a FOIA exemption. (Br. 43 n.8). This argument has been twice forfeited, as it was not raised below, *see Katel LLC v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010), and on appeal is

FOIA Improvement Act's legislative history is silent on the reason for including § 552(a)(8)(A)(ii)(II). If Congress intended to upset the longstanding rule that agencies are not required to create records in response to FOIA requests, it is not likely that it would have done so surreptitiously, by requiring record creation as a "reasonable step" to segregate records. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (the importance of a statutory change "leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure").

Although no appellate courts have analyzed the FOIA Improvement Act's effect on FOIA's segregation requirement, each district court to consider the issue has agreed with the district court's conclusion here that the old and new provisions are "coextensive." (JA 181 n.4); *accord Center for Investigative Reporting v. U.S. Customs & Border Protection*, 436 F. Supp. 3d 90, 115 (D.D.C. 2019); *Cause of Action Institute v. U.S. Dep't of Veterans Affairs*, No. 20 Civ. 997, 2021 WL 1549668, at *16 n.10 (D.D.C. Apr. 20, 2021); *Emuwa v. DHS*, No. 20 Civ. 1756, 2021 WL 2255305, at *11 n.12 (D.D.C. June 3, 2021). This Court should adopt the same interpretation.

---

presented only in a footnote, *see City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011). In any event, ICE did not withhold unique identifiers based on a FOIA exemption. It declined to create them because FOIA does not obligate an agency to create records.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
November 19, 2021

Respectfully submitted,

DAMIAN WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee.

ZACHARY BANNON,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 6828 words in this brief.

DAMIAN WILLIAMS,
United States Attorney for the
Southern District of New York

By: ZACHARY BANNON,
Assistant United States Attorney