UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AMERICAN IMMIGRATION COUNCIL, et al.,	No. 3:12-CV-00355 (WWE)
Plaintiffs,	September 21, 2012
v.	
DEPARTMENT OF HOMELAND SECURITY ,	
Defendant.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Freedom of Information Act ("FOIA") promotes accountability and transparency by bringing even shadowy and opaque government activities into public view. In enacting FOIA, Congress' fundamental objective was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal citation and quotation omitted); see also id. ("[D]isclosure, not secrecy, is the dominant objective of the Act"). In his first day in office, President Barack Obama himself declared, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683. At its core, the Act is a means to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

This scheme of government accountability demands public access to information, often achieved through the research and analysis of knowledgeable non-governmental organizations. See Inst. For Wildlife Prot. v. U.S. Fish & Wildlife Serv., 290 F. Supp. 2d 1226, 1232 (D. Or. 2003) ("Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society"); Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 89 (D.C. Cir. 1986) (FOIA fee waiver provision was added in part to protect "nonprofit public interest groups" from abusive fee practices) (citations and internal quotations omitted).

Plaintiffs are non-profit organizations dedicated to public engagement, education, and advocacy regarding immigration law and policy. They are precisely the type of external groups

contemplated by the FOIA and critical to its proper functioning. And the subject of the request at issue in this case, the Criminal Alien Program ("CAP"), is precisely the kind of ill-understood government initiative that Congress intended be subject to FOIA's bright light. Indeed, it is telling that Plaintiffs, sophisticated immigration non-profit organizations, learned key facts about CAP for the first time from the declaration accompanying the government's Motion for Summary Judgment.

Yet, Defendant Department of Homeland Security ("DHS") and its component Immigration and Customs Enforcement ("ICE") have resisted disclosing even a single piece of paper from the moment that Plaintiffs submitted their request. Instead, DHS has misused the reasonable tools Congress provided to agencies to facilitate the orderly processing of FOIA requests – including the ability to fight amorphous requests and to deny fee waivers to self-interested requesters – and turned them against a bona fide public interest request that seeks nothing more than to understand, and help the nation understand, what is by all accounts a mammoth program and central element of immigration enforcement in the United States.

Plaintiffs respectfully submit this memorandum in opposition to Defendant's motion for summary judgment and request that this Court deny Defendant's motion and order that DHS disclose responsive, non-exempt records in a timely manner and that Plaintiffs be granted a full public interest fee waiver.

FACTS AND PROCEEDINGS

The Criminal Alien Program

CAP, the subject of the FOIA request in this matter, is an enormous, poorly understood, and controversial immigration enforcement program. Its scope is massive and expanding, whether measured by its budget request of $216 million for fiscal year 2013, Complaint at ¶ 25;

the 1.1 million arrests it has facilitated since fiscal year 2004, id. at ¶ 24; or its unprecedented reach, "potentially interact[ing] with every municipal, county, state and federal [detention] facility in the country." Declaration of Jamison Matuszewski, ECF No. 27-2 ("Matuszewski Decl.") at ¶ 15. Its contact with local jails is not incidental or periodic; rather, CAP "screens" every single inmate in every single federal prison and in 99.6% of county jails. Id. at ¶ 21.

Given its size and importance to DHS' enforcement strategy, one might assume that CAP was authorized and constrained by statute; governed by duly promulgated regulation; and subject to robust internal and publicly available audits. But the reality is that almost nothing is known about the structure, operation, or internal regulation of CAP, stifling open debate that might help to identify and resolve problems inherent to the program. See Complaint at ¶ 27. Congress never explicitly authorized the program as a whole, and so its structure never received the American public's approval. Id. at ¶ 17; cf. Matuszewski Decl. at ¶ 17 (citing general language in Immigration Reform and Control Act of 1986 as impetus for creation of CAP predecessors). Nor has DHS or any other agency promulgated regulations specifically to govern the activities of CAP. See Complaint at ¶ 17. Instead, it appears that whatever internal oversight DHS has over the program is exercised at the sub-regulatory level, by a variety of manuals and policies. See Matuszewski Decl. at ¶ 38. Plaintiffs specifically requested such policies and procedures, which have never been publicly disclosed to Plaintiffs' knowledge. See Plaintiffs' FOIA Request, ECF No. 1-1 ("FOIA Request") at 1, request I(1)(f).

Rather, it appears that CAP was, as Plaintiffs allege, "stitched … together" from a "panoply of overlapping programs" overseen by an ever-changing alphabet soup of agencies, components, and initiatives. See Complaint at ¶ 17-18; Matuszewski Decl. at ¶ 17. This constant shifting of responsibility within DHS, and its predecessor agency the Immigration and

Naturalization Service ("INS"), has made an already opaque program all the more difficult for the public to understand. In an effort to learn even the rudimentary facts of CAP's operations, Plaintiffs requested information about the number, structure, and organization of CAP teams. See FOIA Request at 2, request III(1)(b). However, Plaintiffs learned for the first time in Defendant's filing in this matter that once again the supervisory structure of CAP has shifted, eliminating the team structure entirely. See Matuszewski Decl. at ¶ 20; cf. Defendant's Summary Judgment Motion at 2 (asserting that "Plaintiffs already know a lot about CAP").[1]

What is clear, however, is that CAP operations have raised serious concerns. In its limited study of CAP's operations in just one county, Plaintiff American Immigration Council ("AIC") found that local officials did not understand what participation in CAP entailed. See Complaint at ¶ 29. Even more troubling, AIC's report concluded that the program was likely leading to racial profiling and fostering distrust of local law enforcement agencies among immigrant communities. See id. at ¶ 31, 32.[2] Yet, there is no systematic public information with which Plaintiffs, and the public at large, can determine whether the patterns observed in Travis

[1] Examination of similar "team" structures of other DHS programs has uncovered flawed programs and widespread illegality. In one recent and notorious example, the Migration Policy Institute determined that the approximately 100 ICE "Fugitive Operations Teams" (FOTs) established in the past decade received little training or supervision and were pressured to achieve annual arrest quotas. See ICE Fishing?, L.A.Times., Mar. 3, 2009 (noting study found "almost three-quarters of those arrested by ICE's fugitive operations teams did *not* have criminal records. In other words, the agency, brawny with hundreds of millions of dollars in additional funding and a 1,300% increase in staffing, was nabbing lots of waiters and car-washers . . ."); MPI, Collateral Damage: An Examination of ICE's Fugitive Operations Program (MPI 2009) (analyzing growth and poor oversight of ICE's Fugitive Operation Teams), available at http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf. These poorly trained, under-supervised, quota-driven ICE teams were involved in numerous controversial actions. See id.; Diaz-Bernal v. Myers, 758 F. Supp. 2d 106 (D. Conn. 2010) (denying motion to dismiss by defendants in civil rights suit arising from 2007 New Haven immigration raids led by local FOT); Barrera v. Boughton, No. 07-01436 (D. Conn. filed Sept. 26, 2007) (civil rights action arising from 2006 arrest of day laborers in Danbury involving local FOT). Greater public understanding of CAP is vital to ensuring adequate training and supervision of CAP agents in this program.

[2] A separate study of CAP found that after the introduction of 24-hour CAP availability in Irving, Texas, arrests of Latinos for minor offenses grew enormously: from 102 class C misdemeanors per month to a high of nearly 250, and from 48 traffic arrests per month to a high of nearly 160. Trevor Gardner II and Aarti Kohli, The CAP Effect: Racial Profiling in the ICE Criminal Alien Program, Warren Institute on Race, Ethnicity, & Diversity, September 2009, available at: http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf, at 5-6. Latinos were arrested far more than other racial groups for such minor crimes after this full implementation of CAP, while they remained a much lower proportion of total arrests. Id.

County are an exception or the rule in CAP operations. Much of Plaintiffs' request specifically sought just such information regarding DHS communications and agreements with local law enforcement see, e.g., FOIA Request at 2, request II(1)(b), id. at 3, request III(5), and CAP's potential to encourage racial profiling, see, e.g., id. at 2, request I(2)(a), id. at 3, request IV(1).

The FOIA Request

On November 29, 2011, Plaintiffs submitted a FOIA request to ICE for records relating to the development, implementation, and operation of CAP and its agency predecessors. See FOIA Request. To assist DHS in locating records, Plaintiffs specified five categories of records that Plaintiffs anticipated would be responsive. Id. Within those categories, Plaintiffs indicated particular sub-categories and sub-sub-categories to further aid DHS in its search. Id. For example, Plaintiffs requested all documents related to the organization of CAP, id. at 2, request III, but specifically all records regarding the internal structure of CAP and its predecessors, id. at 2, request III(1), and even more specifically organizational charts and similar documents. Id. at 2, request III(1)(a).

Plaintiffs further acknowledged that the documents described in Part V of the request, regarding individuals with whom CAP came into contact, were likely voluminous, and therefore suggested random sampling as an alternative method to draw statistical conclusions without requiring the production of every piece of paper. See id. at 3 n.2. Defendant never offered to engage in any such sampling, or even to identify the universe of records from which plaintiffs, aided by statistics experts, could calculate the minimum sample necessary to generate a valid result. See Declaration of Michael Wishnie, Attachment 1 hereto ("Wishnie Decl.") at ¶ 9.

ICE acknowledged receipt of the request on November 30, 2011, and invoked a ten-day extension to the normal 20-day deadline to respond. See Complaint at ¶ 49; ICE letter dated

November 30, 2011, ECF No. 1-2. ICE did not further respond to the merits of the document request until January 27, 2011, nearly a month past the statutory deadline. See Complaint at ¶ 56; ICE letter dated January 27, 2012, ECF No. 1-4. Despite the agency's duty to either produce requested documents or deny the request, ICE's letter claimed that Plaintiffs' request was "not perfected," but also claimed that the agency's own letter was "not a denial." Id. Ignoring Plaintiffs' numerous categories, sub-categories, and sub-sub-categories of specific document requests, ICE asserted that the request did not reasonably describe the records sought. Id.

Though it claimed that its response was not a denial, ICE demanded that requesters submit a re-written FOIA request before the agency would undertake any kind of search. See id. at 2 ("Upon receipt of a perfected request, you will be advised as to the status of your request"). Because the original request was proper under the FOIA, Plaintiffs declined ICE's ultimatum to replace their chosen valid request with one that ICE might prefer. Counsel for Plaintiffs contacted Defendant on January 4, March 1, and again on March 8.[3] See April 6 letter at 2; Wishnie Decl. at ¶¶ 4-5. Plaintiffs addressed ICE's misapprehension that they seek personally identifying information regarding individuals contacted by CAP – Plaintiffs do not seek such information – and reiterated that they viewed random sampling as a reasonable method to limit the total size of the request. Id.

Contrary to Defendant's portrayal of the parties' interactions, Plaintiffs reached out affirmatively to DHS at every opportunity, and attempted to engage the agency in good faith negotiations, even after filing suit. See Wishnie Decl. at ¶ 2, 4, 5, 7. At all times, Plaintiffs maintained that they were open to sampling and that they did not seek personally identifying information. Id. Counsel for Plaintiffs also noted that further knowledge about what kind of

[3] ICE claims to have contacted Plaintiffs on March 8, 2012, ICE Resp. to Fee Waiver Appeal, March 13, 2012, ECF No. 27-4 ("Appeal Response Letter") at 1, but it was Plaintiffs' counsel that initiated the call. Plaintiffs' letter dated April 6, ECF No. 27-6 ("April 6 Letter") at 1-2. .

documents existed and how they were organized would assist in identifying feasible means of sampling and in narrowing their request. Id. at ¶ 7. DHS did not provide such information. Id. at ¶ 8.

Having received ICE's rejection of a valid request – albeit in a form that purported not to be a denial – Plaintiffs determined that recourse to judicial review was appropriate in this case. Because ICE neither granted nor denied the request within the statutorily required time, Plaintiffs had duly exhausted their administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i); Ruotolo v. Dep't of Justice, 53 F.3d 4, 8 (2d Cir. 1995) (administrative remedies are "deemed exhausted" if the agency fails to comply with the "applicable time limit" provisions of the FOIA); Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 62 (D.C. Cir. 1990) ("If an agency has not responded within the statutory time limits . . . the requester may bring suit."); Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987) (same). They commenced this action on March 8, 2012.

Defendant answered, ECF No. 24, and moved for summary judgment. ECF No. 27. As to the merits of the document request, the government maintains, and Plaintiffs contest, that the request "fails to reasonably describe the records sought," Defendant's Summary Judgment Motion at 13, and is therefore overly burdensome. Id. at 22.

The Fee Waiver

In their request, Plaintiffs sought a fee waiver for search and duplication fees in excess of $100. FOIA Request at 4. The initial request included detailed explanation and documentation of Plaintiffs' eligibility for such a waiver, highlighting the public interest purpose of the request and Plaintiffs' ability to disseminate information they learn about CAP to the public. See id. at 4-7 and Exhibit A thereto. ICE denied the fee waiver request in full. ECF No. 1-2, at 2. After reciting the regulatory factors DHS uses to determine whether a requester qualifies for a fee

waiver, the letter summarily and without further explanation concluded that Plaintiffs failed to meet two of the factors: whether disclosure would "contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons;" and whether such contribution would be "significant." Id.

Plaintiffs timely appealed, see Fee Waiver Appeal dated December 16, 2011, ECF No. 1-3 ("Fee Waiver Appeal"), at 3-4, explaining and documenting the ways in which they are well situated to educate broad swaths of the general population about the CAP program. Id. ICE acknowledged, but did not substantively respond to, the administrative appeal on January 11, 2012. See Complaint at ¶ 55. Having received no substantive response to this appeal for nearly three months, Plaintiffs sought judicial review. See Complaint at ¶ 67; 5 U.S.C. § 552(a)(6)(C)(i); Ruotolo, 53 F.3d at 8; Oglesby, 920 F.2d at 62; Spannaus, 824 F.2d at 58.

Subsequent to the filing and service of the complaint in this matter, see Certificate of Service, ECF Nos. 5, 6, ICE responded to the fee waiver appeal. In its March 13, 2012 letter, ICE again claimed that Plaintiffs had not documented that the records sought were in the public interest or how Plaintiffs would publicize what they uncovered about the program. See Appeal Response Letter at 1; cf. FOIA Request at 3-5 (addressing at length why records requested will significantly contribute to public understanding, how Plaintiffs intend to publicize their findings, and why they are well situated to do so effectively). ICE also found the size of the request to be relevant to Plaintiffs' eligibility for a waiver. Appeal Response Letter at 1. However, ICE estimated – without any articulated basis – that 20% of the documents requested would significantly contribute to public understanding. Id. at 2. ICE estimated that the remaining 80% of responsive documents would not qualify for a fee waiver and that production of these documents would incur costs of approximately $300,000. Id. ICE did not specify *which*

documents it anticipated would significantly contribute. Id. Nor did it offer to identify and produce those documents that it estimated *would* merit a fee waiver. Id.

Rather, ICE invented a three-part Hobson's choice out of whole cloth. Its "compromise" was that Plaintiffs could: 1) pay $150,000 down with another $150,000 due when document production was complete, with the total to be adjusted depending on what ICE found; 2) rewrite a different FOIA request, without any indication that even a narrower request would in ICE's estimation qualify for a fee waiver (and, presumably, rewrite the request a third time if the second were rejected, and so on); or 3) pay fees, presumably totaling the same estimated $300,000, on some other "rolling" payment plan. Id. That is, ICE demanded that Plaintiffs must either pay a fee it that was beyond their means as independent non-profit organizations, or must rewrite their request to conform to ICE's preferences.

Plaintiffs – with opposing counsel's permission – responded, expressing their understanding that ICE had determined that some of the documents requested qualified for a fee waiver, suggested what categories of the original request ICE might have had in mind, and asked that those uncontroversial records be produced without delay. See April 6 Letter at 1. Plaintiffs also declined ICE's false choice to pay fees that ought to be waived or write a new request, but again offered to discuss by telephone methods of producing a small random sample that could cut down dramatically on the total volume of records. Id. DHS has declined to discuss of its relevant record keeping systems, and no records have been produced. Wishnie Decl. at ¶ 8.

In its summary judgment briefing, Defendant claims that ICE's determination that Plaintiffs were entitled to only a 20% fee waiver was correct, and that Plaintiffs failed to abide by DHS regulations in refusing to pay fees they argue must be waived. See Defendant's Summary Judgment Motion at 22-28. DHS is mistaken.

STANDARD OF REVIEW

Summary judgment shall be granted when it can be shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); White v. ABCO Engineering Corp., 221 F.3d 293, 300 (2d Cir. 2000). In a FOIA case, the agency bears the burden of justifying nondisclosure. See 5 U.S.C. § 552 (a)(4)(B); El Badrawi v. Dep't of Homeland Sec., 583 F. Supp. 2d 285, 292 (D. Conn. 2008) ('to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to FOIA') (quoting Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)).

The agency is required to submit detailed declarations identifying the documents at issue and explaining why they qualify for the claimed exemptions. Nat'l Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973) (in FOIA case, agency must demonstrate "that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements"); see also Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992). Declarations that are conclusory and nonspecific cannot justify an agency's decision to withhold the requested records. See El Badrawi, 583 F. Supp. 2d at 298 (reliance on declarations "is only appropriate" when declarations are "'... relatively detailed and nonconclusory, and submitted in good faith'") (quoting Grand Cent. P'ship., Inc. v. Cuomo, 166 F.3d 473, 488-9 (2d Cir. 1999)); Public Citizen Health Research Group v. FDA, 185 F.3d 898, 906 (D.C. Cir. 1999). Such a declaration must describe "*what records* were searched, *by whom,* and through *what process*." Steinberg v. U.S. Dep't of Justice, 23 F.3d 548, 551-52 (D.C. Cir. 1994) (emphasis added).

The FOIA statute is unique in administrative law in that it places the burden of justifying withholding on the defendant agency and mandates *de novo* judicial review rather than the usual deferential standard of review. See Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); see also Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989) ("the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld"). Consistent with the Act's dominant policy of disclosure rather than secrecy, the exemptions to FOIA are to be narrowly construed. See Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

ARGUMENT

I. PLAINTIFFS' REQUEST WAS PROPER AND MUST BE HONORED.

A. Plaintiffs' Request Was as Specific as Was Possible Given the Information Available to Them.

Defendant claims that Plaintiffs' request was "not a perfected FOIA request," because it did not "reasonably describe the records" that it sought, and that it was overly burdensome as it "would likely disrupt agency operations." Defendant's Summary Judgment Motion at 9, 13, 8. The second claim contradicts the first, as ICE could not reasonably determine that the request was overly burdensome if, as it insisted, it could not infer which records the request sought. The more logical conclusion would be that the agency determined that it could, in fact, locate at least some records responsive to Plaintiffs' request, but that it found that responding to *some portions* of the request, due to their apparent breadth, would be overly burdensome. Defendant refused to produce any of the records responsive to even the most specific portions of the request, such as I(2)(c), which requests "[r]ecords, policies and procedures related to the issuance of civil immigration detainers (Form I-247) by CAP agents." See FOIA Request at 2. Instead, Defendant chose to issue a blanket refusal to disclose even a single page.

Agencies must promptly disclose records when receiving a FOIA request that "reasonably describes such records . . ." Ruotolo, 53 F.3d at 9; 5 U.S.C. § 552(a)(3)(A); El Badrawi, 583 F. Supp. 2d at 292 (noting strong presumption in favor of agency disclosure); Halpern v. F.B.I., 181 F.3d 279, 286 (2d Cir. 1999) (same). FOIA's legislative history defines a "reasonable description" as one that allows "a professional employee of the agency who [is] familiar with the subject area of the request [to] locate the record[s] with a reasonable amount of effort." Ruotolo, 53 F.3d at 10 (quoting H.R. Rep. No. 83-876, 93rd Cong., 2d Sess. 6 (1974), 1974 U.S.C.C.A.N. 6271). The "reasonable" standard is further defined by what information the agency makes public regarding the organization of their records; once a requester has "phrased its request as specifically as the [agency's] public notices reasonably permi[t]," the agency is required "to identify, at least by relevant classes and subclasses, all the documents" that respond to the request. Nat'l Cable Television, 479 F.2d at 193. In this case, Defendant has not used Plaintiffs' own detailed categories and sub-categories to search for documents. Instead, Defendant has simply alleged that Plaintiffs seek "all" documents – ignoring Plaintiffs' attempts, both in their initial request and in their subsequent discussions, to indicate their thematic focus, see Wishnie Decl. at ¶ 7 – and detailed the many locations in which responsive documents to such a broad request might be found. See Matuszewski Decl. at 2-5.

None of the information published by either ICE or DHS in the Federal Register regarding how their files are organized, see Privacy Act of 1974, 5 U.S.C. §552a(e)(4), nor any of the information published on their websites, would have allowed Plaintiffs to deduce that records are not organized by enforcement program or coded accordingly. Nor does the information publicly available suggest, as Defendant claims, that Plaintiffs' request would require the search of 195 separate field offices and sub-offices. Compare Matuszewski Decl. at 5

(noting 24 field offices and 171 sub-field offices) with Notice of Privacy Act System of Records, 76 Fed. Reg. 212 67751-55 (Nov. 2, 2011); Notice of Update and Reissuance of Privacy Act System of Records, 76 Fed. Reg. 113 34233-40 (Jun. 13, 2011); Notice of Privacy Act System of Records, 71 Fed. Reg. 62 16326-28 (Mar. 31, 2006). Where Plaintiffs were aware of the structure of CAP, they indicated which particular implementing bodies of the organization the agency should search in order to produce responsive documents. See, e.g., FOIA Request at 2, III(1)(b) (seeking information related to the number and locations of CAP "Teams"). Where Plaintiffs were aware of the specific names of the records and forms used in implementing CAP, they so indicated. See FOIA Request at 3,V(1) (specifying the I-247, the I-213, the I-286, and the I-862). Where they were aware of the existence and numerosity of such forms, they indicated their openness to sampling. See id. at 3 n.2; Wishnie Decl. at ¶ 2, 4, 5, 7. Furthermore, Plaintiffs expressed to Defendant that greater knowledge of what records were actually available would assist Plaintiffs in narrowing their request. Wishnie Decl. at ¶ 7.

Now that Plaintiffs have filed a complaint, Defendant has submitted a declaration indicating that A-files are not coded for interactions with CAP. See Matuszewski Decl. ¶ 26. This claim is contradicted by the existence an integrated electronic database maintained by Defendant, the ENFORCE Alien Removal Module ("EARM"). See Wishnie Decl., Ex. B (DHS Privacy Impact Assessment, providing an overview of EARM); id., Ex. D at 17 (describing the use of EARM to track CAP screening and identification activities). EARM can produce a record titled "Encounter Summary," which includes discrete pages called "Encounter Details." See Wishnie Decl., Ex. A (example of "Encounter Details" printout). Within "Encounter Details" is a field labeled "Event Type," and officers can populate this field with "ERO Criminal Alien Program." Id. The Matuszewski Declaration does not advise the Court of this database, nor the

specific field coded for a CAP encounter. See Matuszewski Decl. Nor does the Declaration anywhere state that this field in EARM cannot be searched to identify and retrieve electronic files of CAP encounters. Id.

Additionally, Defendant has indicated that control over CAP is no longer divided into discrete teams, but rather that any of 7,854 employees may conduct some task related to CAP on any given day. Id. at 7. None of this information was available to Plaintiffs at the time of their request, nor during any subsequent discussion of the request, nor at the time at which they filed their complaint. Defendant lists several websites at the end of its Memorandum, suggesting that there is a wealth of information available regarding CAP. However, these websites, familiar to Plaintiffs, contain only brief text explaining that CAP is an enforcement program, or summary statistics of total number of arrests or projected arrests. See Defendant's Motion for Summary Judgment at 27; see also, e.g. CAP Program Webpage, http://www.ice.gov/criminal-alien-program/.

It is unreasonable to require that Plaintiffs have the clairvoyance necessary to intuit the organizational structure of CAP beyond the public record and to offer tailor-made guidance on where to search for specific records. Plaintiffs were as specific and their request as narrow as the information available to them permitted.

B. Plaintiffs' Request Is Much Narrower than DHS Alleges.

Plaintiffs made their FOIA request regarding CAP in order to better understand how the program functions nationally and as a whole. But whereas Plaintiffs request a large variety of *types* of records, their request is considerably narrower *thematically*. With respect to parts I-IV, Plaintiffs require only records that directly relate to policies, procedures, organization and implementation of CAP.

Plaintiffs begin their request by asking for "all records related to CAP," but then explain what they meant by "related to CAP" by providing five main categories, fifteen subcategories, and fifteen additional sub-subcategories of responsive records. These categories and subcategories are explications and divisions intended to guide the agency in its search for documents relating to the policies, procedures, organization and implementation of CAP and should be read as severable. That is, the impossibility of producing one subcategory or sub-subcategory of documents should not permit DHS to refuse to produce any records responsive to any subcategory at all. See Nation Magazine, Wash. Bureau v. U.S. Customs Servs., 71 F.3d 885, 892 (D.C. Cir. 1995) (court's finding that portions of a request were overly burdensome did not excuse agency from either disclosing or providing reasoning for withholding other non-burdensome portions of request).

To understand how CAP actually functions, Plaintiffs seek a sample of individual records of persons who have come into contact with DHS through CAP. Plaintiffs recognize that this part of their request implicates a large number of records. With respect to Part V, Plaintiffs have indicated their willingness to accept a small, random sample of these records – depending on the size of the universe of records – at every stage of this process to date (which DHS has not disclosed), in all likelihood a random sample of 1% or less. See FOIA Request at 3 n.2; Wishnie Decl. at ¶ 2, 4, 5, 7. Although Plaintiffs do not have enough information about ICE's record keeping to know how best to identify such a sample, see Wishnie Decl. at ¶ 9, there is evidence that at least some ICE databases are searchable electronically for CAP records. See, e.g., id. Ex. A (example of an EARM database "Encounter Details" printout in which the field "Event Type" has been populated with the words "ERO Criminal Alien Program"); id. Ex. D at 17 ("CAP screening and identification activities are tracked in the ENFORCE Alien Booking Module,

which contains information relating to individual aliens, such as the alien identification number, primary citizenship, detainer details, and the severity level of the crime committed or charged as designated by the NCIC").

Defendant relies on Plaintiffs' usage of the phrase "including but not limited to" to claim that Plaintiffs seek all records that CAP ever produced. See Defendant's Summary Judgment Motion at 7. Plaintiffs did not use the phrase "included but not limited to" to indicate that they wanted all documents that CAP has ever produced, no matter how insignificant. Rather, because Plaintiffs have so little information regarding the types of records that might provide insight into the overall workings of CAP, they did not want their efforts at specificity to be used to exclude documents based on technical classifications. Plaintiffs made clear to Defendants during subsequent discussions that they did not, in fact, want every document, however tangentially related to CAP. See Wishnie Decl. at ¶ 7.

Given that an agency will always have more information about its own records than will a person or organization submitting a FOIA request, an agency has a duty to construe a FOIA request liberally. See Serv. Women's Action Network v. Dep't of Def., ___F.Supp.2d ___, 2012 WL 1067670 (D. Conn. Mar. 30, 2012), at *10; Truitt v. Dep't of State, 897 F.2d 540, 543 (D.C. Cir. 1990) (citing Senate Report accompanying relevant provision of FOIA). Defendant in this case did not fulfill its duty. DHS ignored Plaintiffs' 35 sub-divisions of records intended to define "related to CAP," and instead chose to read the request such that its scope became absurd. Cases cited by Defendant to argue that the request is overbroad and therefore overly burdensome can thus be distinguished based on the nature of the request at issue, or demonstrate that, even if portions of a request are overly burdensome, the government still must disclose those documents that it can reasonably identify and produce.

Defendant cite several cases in which the requests that plaintiffs submitted were significantly less specific than Plaintiffs' request in this case. For example, in Mason v. Callaway, plaintiffs sought "all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs . . . including, but not limited to, the files of (various government offices)." 554 F.2d 129, 131 (4th Cir. 1977) (internal quotation and citation omitted). Plaintiffs did not define "atrocities," specify particular categories of records they sought, or limit their request to one government agency, let alone one enforcement program. This case is inapposite. Similarly, in Irons v. Schuyler, the plaintiff requested "all" unpublished patent decisions without making any further specifications in her request. 465 F.2d 608, 611 (D.C. Cir. 1972). The plaintiff refused any kind of narrowing or sampling upon being informed that his request would turn up more than 3.5 million files, but rather insisted that the government produce every one of the millions of records. Id.[4]

DHS also relies on James Madison Project v. C.I.A., 2009 WL 2777961 (E.D. Va. Aug. 31, 2009), but this case, too, is distinguishable. In James Madison Project, plaintiffs made six broad separate requests, none of them explanatory. See id. at *1. Plaintiffs requested all documents "pertaining to" the records systems of every individual CIA office, and then argued that "pertaining to" was intrinsically more specific than "relating to." Id. at *4. They provided no explication of what they meant by "pertaining to," either within that portion of the request or,

[4] Another case cited by the Defendant suggests that there is a relationship between appropriate breadth of a request and the importance of the underlying subject matter. In Bailey v. Callahan, the plaintiff submitted a request, with no further clarification, seeking records of which DHS personnel were present in various locales at various dates (including one for the "the total number of Homeland Security personnel and private subcontractors working in the cities/suburbs of New Orleans, Atlanta, and Richmond, VA on March 8, 2009"). No. 3:09MC10, 2010 WL 924251 (E.D. Va. Mar. 11, 2010) at *1. Apparently, the request was submitted because the TSA had "'ruined every vacation (even [their] honeymoon) that [the plaintiff] and [his] wife have paid good money for.'" Id. Needless to say, such a request is significantly different from the instant case. In more weighty cases, courts have not hesitated to order the disclosure of large numbers of documents. See, e.g., Am. Civil Liberties Union v. Dep't of Justice, 681 F.3d 61, 66 (2d Cir. 2012) (reviewing history of FOIA suit for torture records); ACLU, ACLU v. Department of Defense: Torture FOIA, available at http://www.aclu.org/national-security/aclu-v-department-defense (noting that over 100,000 pages had been disclosed).

as Plaintiffs do here, by providing carefully crafted sub-divisions intended to tailor one thematic request. Furthermore, plaintiffs filed their complaint before they heard any response from the agency, and did not attempt any negotiations regarding the request. Id. at *1. Plaintiffs' request and conduct in this case stand in stark contrast.

Indeed, if anything, Defendant's cases demonstrate what DHS ought to have done if it truly believed the FOIA request was overbroad. For example, in Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dept. of Commerce, the agency, when faced with a broad request, did not issue a blanket denial and refuse to disclose any records. 907 F.2d 203, 205 (D.C. Cir. 1990). Instead, the Commerce Department withheld only specific portions of the responsive documents on the basis of FOIA statutory exemptions, described exactly the locations of the records and why they would be difficult to access, and fully explained the basis for the *reasonable* fee it would have imposed ($3,560 total), all before the initiation of litigation.[5] Id. at 205-6. Similarly, in Antonelli v. Bureau of Alcohol, Tobacco, Firearms & Explosives, the agency confronted with a request it deemed overbroad produced a thorough list of all of the more than 150 locations where records might be located and asked plaintiff to indicate where he would like the agency to search. 2006 WL 141732 (D.D.C. Jan. 18, 2006), at *2. That is, the agency explained why the request was overbroad and helped the plaintiff to refine his request *before* the plaintiff filed suit.[6]

[5] Defendant cites another similar case, Int'l Counsel Bureau v. U.S. Dept. of Def., as an example of an overly burdensome request; however, in this case, the dispute was whether or not the agency was obligated to undertake the separation of FOIA-exempt data from disclosable data, not whether or not it could decline to search for or produce records at all. 723 F. Supp. 2d 54, 59 (D.D.C. 2010). Indeed, the agency twice searched for records, and twice provided a detailed explanation of why segregating the data would be overly burdensome. Id.

[6] Defendant's other cases similarly illustrate what conduct is proper when an agency acts in accordance with the FOIA's presumption in favor of disclosure whenever possible. See Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 48 (D.D.C. 1979) (agency produced some records *and* a "17-page inventory of the [potentially responsive] documents in its possession"); Van Strum v. U.S. E.P.A., 972 F.2d 1348, 1348-9 (9th Cir. 1992) (plaintiff sought judicial review after negotiations, a prior agreement with the agency on the scope of the request, and production of significant volume of documents); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 23-24 (D.D.C. 2000) (plaintiff sought disputed documents after defendant disclosed thousands of pages); Schmidt v. Shah, 2010 WL 1137501 (D.D.C. Mar. 18, 2010), at *4 (same).

In contrast, Defendant and ICE provided essentially no information about the universe of responsive documents and its recordkeeping practices until it filed for summary judgment.

None of DHS's authority supports its assertion that the request in this case is too broad and that, as such, Congress intended to permit DHS simply to ignore it. Rather, collectively, they demonstrate the opposite: where an agency can determine which records a requester seeks and where producing those records would not be overly burdensome, the agency must disclose them. Where an agency cannot produce them, it bears the burden of fully explaining why.

C. Defendant Did Not Disclose Information Sufficient to Allow Meaningful Narrowing or Negotiations.

Negotiations in which one side has all of the information are not real negotiations. In this case, DHS consistently failed to provide Plaintiffs with any information that would permit meaningful narrowing or negotiations.

Defendant's response to Plaintiffs' request based its demand that Plaintiffs narrow their request before receiving any agency determination on conclusory statements regarding the size of CAP. See ICE letter dated January 27, 2012, ECF No. 1-4. These statements provided no information that would actually assist in the narrowing of the request or in understanding why a sample of the kind Plaintiffs suggested might be impracticable. Instead, they merely asserted that CAP has a nationwide presence and complicated organizational history, see id. at 1, facts of which Plaintiffs were aware and which prompted them to make their request in the first place. Defendant did not assert that files are not coded by enforcement program, or that there was no central database for all files produced by CAP, or any other information that might have allowed Plaintiffs to propose alternative search methods. Cf. Matuszewski Decl. Instead, Defendant merely claimed that an "unfocused" search would be "enormously time consuming" and would "likely produce records that would not have any value to the public with respect to explaining the

operation of the agency." See ICE letter dated January 27, 2012, ECF No. 1-4. This response gave Plaintiffs had no reason or ability to narrow their request. With respect to individual records, the agency's response indicated only that each individual's permission would be required to release those documents because they contained personal information. See id. at 2. Because Plaintiffs did not seek personally identifying information, they saw no basis for changing this portion of their request either other than to clarify that fact. See Wishnie Decl. ¶ 4,5.

Not until Plaintiffs filed suit did Defendant provide any organizational insights that might have assisted in identifying the locations and types of records that Plaintiffs seek. In this way, the instant case is analogous to New York Times Co. v. U.S. Dept. of Labor, in which the DOL "neither granted nor denied the Times's request," claiming that request was overly burdensome 340 F. Supp. 2d 394 (S.D.N.Y. 2004). The court found that, despite DOL's assertions that it had not denied the NY Times' request, "[i]n effect, the DOL told the Times, 'We may have an obligation to give you these documents, but the process of determining that is too hard, and we are not going to figure out a way to do it.'" Id. The court further held that DOL's invitations to negotiate in order to "narrow" the request were "irrelevant," and that "the DOL cannot avoid court intervention by neither granting nor denying a request, but rather seeking to alter it." Id. Similarly, in this case Defendant sought to trap Plaintiffs in an administrative purgatory by inviting them to rewrite their request, but failing to provide any information about the program or records. Rather than determining a reasonable way to locate documents responsive to Plaintiffs' request, or providing real information and constructive proposals for alternative search methods, Defendant dismissed Plaintiffs' attempts to communicate with conclusory statements about the enormity of the CAP program and the agency's duties under the Privacy Act.

Offers to negotiate cannot be taken as genuine gestures of cooperation or goodwill if unaccompanied by information that would allow Plaintiffs to engage in an informed manner. Otherwise, they are no more than evasive maneuvers designed to keep Plaintiffs in the dark.

D. Defendant Has the Obligation to Disclose Those Records That They Can Identify as Responsive to the Request and That Are Not Overly Burdensome.

Despite their assertions that Plaintiffs did not reasonably describe the records they seek, Defendant nonetheless located offices storing records that could be responsive to Plaintiffs' request. See Matuszewski Decl. at 3-4 (describing offices with responsive files); see generally id. at 7-15 (describing responsive records). Though a complete record search for all documents even tangentially related to CAP in 195 field and sub-field offices and 4,300 separate jails and prisons would be undeniably overbroad and burdensome, see id. at 5, Mr. Matuszewski does not explain why a search of the five national coordinating offices (the ICE Offices of the Principal Legal Advisor, Congressional Relations, State, Local, and Tribal Coordination, Policy Planning, and Homeland Security Investigations) for, to take just one example, item III(1)(a) of the request, "[o]rganizational charts, and other such diagrams and schematics," would "grind ICE's FOIA processing to a halt and significant[ly] interfer[e] with ICE's operations." Defendant's Summary Judgment Motion at 22.

This is contrary to FOIA's strong presumption in favor of disclosure. "Importantly, the Act is to be construed broadly to provide information to the public." Grand Cent. P'ship,, 166 F.3d at 478 (internal quotations and citations omitted). The statute was intended to advance "a general philosophy of full agency disclosure." Id. (internal quotations and citations omitted). The strong presumption in favor of disclosure extends to all stages of the FOIA process, and all circumstances in which an agency seeks to avoid the release of documents. See, e.g. Serv. Women's Action Network, ___F.Supp.2d ___, 2012 WL 1067670 (D. Conn. Mar. 30, 2012)

(agency has duty to construe request liberally); Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 827 F. Supp. 2d 242, 258 (S.D.N.Y. 2011) (agency has burden to prove any exemption from disclosure).

These principles imply that Defendant must disclose all records that can be identified as responsive and produced without undue burden. More specifically, where a request is divided into separate sub-requests, as is Plaintiffs', defendants must either produce responsive records or demonstrate why disclosing documents answering that particular portion would be overly burdensome *for each portion of the request*. See Nation Magazine, 71 F.3d at 892. "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of *any* requested documents." United States Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (emphasis added). Therefore, while a manual search of 60.1 million A-files (which Plaintiffs deny their request ever implicated), requiring 2.4 billion hours would indeed be overly burdensome, Defendant should not be able to use this hypothetical prospect to evade, for example, the disclosure of the "five responsive documents" that a word search of the call log of the ICE Office of Congressional Relations produced, see Matuszewski Decl. at 13, or of the identified "19 policy memos, handbooks, or manuals that had some nexus with the CAP." Matuszewski Decl. at 13. Similarly, if Plaintiffs specify particular forms (e.g. an I-213, Record of Deportable Alien, see, e.g., Wishnie Decl., Ex. E) in their request, it is unclear why a random sample, producing perhaps 1% of all such forms, which could then be searched for reference to CAP, would be burdensome. Nor has Defendant shown why a search requiring three employees each working eight hours, or one requiring a single employee working six hours (each in order to effectively search for training materials responsive to the request) *see* Matuszewski Decl. at 15, or a basic search for "[o]rganizational charts," see FOIA Request at 2, would "effectively cripple

certain ICE offices' ability to maintain current operations." Defendant's Summary Judgment Motion at 8.

Furthermore, as previously noted, Defendant maintains an integrated database, EARM. See Wishnie Decl. at Exhibit B (DHS Privacy Impact Assessment of EARM, providing an overview of EARM). This database is used to generate individual records that, in turn, include an "Event Type" field which officers can code "ERO Criminal Alien Program." See id.; Ex. A (example EARM printout containing "ERO Criminal Alien Program"). Defendant has failed to show why, for example, a simple electronic search of this field in EARM for all files indicating "Criminal Alien Program" as the Event Type would not yield a set of files from which a small, randomized sample could be drawn. See id., Ex. D (describing CAP activities tracked in EARM).

Defendant may not misconstrue Plaintiffs' request so as to evade its obligations under FOIA. Even should this Court hold that portions of the request are unduly burdensome, which Plaintiffs contest, this does not excuse Defendant from its duty to release those records which it can identify and produce with reasonable effort.

II. PLAINTIFFS ARE ENTITLED TO A FULL FEE WAIVER, AND DHS VIOLATED FOIA IN REFUSING TO PRODUCE RECORDS IT CONCEDES QUALIFY FOR A FEE WAIVER.

A. Legal Standard.

A request seeking information that is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester," 5 U.S.C. § 552(a)(4)(A)(iii), is entitled to a waiver of all fees. According to its regulations, DHS must consider four factors in determining whether disclosure of the requested records is in the public interest:

1. Whether the subject of the requested records concerns "identifiable operations or activities of the government, with a connection that is direct and clear;"

2. Whether the requested records are meaningfully informative about governmental operations or activities such that they are "likely to contribute to an increased understanding of those operations or activities;"

3. Whether the disclosed records will increase the public's understanding of those operations or activities rather than solely that of the individual requester, with the presumption that representatives of the news media meet this criterion; and

4. Whether the public's understanding of those operations or activities will be enhanced "to a significant extent" by disclosure of the requested records.

6 C.F.R. § 5.11(k)(2). DHS must also consider the following two factors to determine whether disclosure of the requested records is not primarily in the commercial interest of Plaintiffs:

5. Whether Plaintiffs have a commercial interest "that would be furthered by the requested disclosure;" and

6. Whether disclosure of the requested records is "primarily in the commercial interest" of Plaintiffs.

6 C.F.R. § 5.11(k)(3).

As Defendant correctly notes, the court's review of ICE's fee waiver determination is *de novo* but "limited to the record before the agency." Defendant's Summary Judgment Motion at 24 (quoting 5 U.S.C. § 552(a)(4)(A)(vii)). Congress intended that the public interest fee waiver be liberally construed in order to prevent agencies from using fees to "discourag[e] requests for information or as obstacles to disclosure of requested information." Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass. 1984). Congress passed the fee-waiver provision because it was concerned that "excessive fee charges . . . and refusal to waive fees in the public interest remain . . . 'toll gate[s]' on the public access road to information." Id. at 873 (quoting Subcomm. on Admin. Practice and Procedure, S. Comm. on the Judiciary, 95th Cong., 2d Sess., Agency Implementation of the 1974 Amendments to the Freedom of Information Act: Rep. on Oversight

Hearings 78 (Comm. Print 1980)). Indeed, Congress added the provision to "prevent government agencies from using high fees to discourage certain types of requesters, and requests, in particular those from journalists, scholars and *nonprofit public interest groups*." Better Gov't Ass'n, 780 F.2d at 89 (emphasis added) (citations and internal quotations omitted).

B. Plaintiffs Are Entitled to a Full Fee Waiver.

ICE's determination that Plaintiffs were eligible for a mere 20% fee waiver is unsupported and undermines the purposes of the FOIA. On the contrary, these requesters and this request are the very sort Congress enacted FOIA to facilitate.

As an initial matter, not all of the above-listed regulatory factors have been contested in this case. At no time in its communications at the administrative level or in its summary judgment briefing has the government denied that the request concerns government activity (DHS' factor 1) or that the records requested are likely to contribute to an increased understanding of that activity (DHS' factor 2). Nor has the government at any time asserted that disclosure of these records is primarily in Plaintiffs' commercial interest (DHS' factors 5 and 6). See 6 C.F.R. § 5.11(k)(3). In its November 30, 2011 fee waiver denial, ICE cited only factors 3 and 4: whether the understanding of the public at large (rather than just that of the requesters) would benefit and whether the increase in public understanding would be significant.[7]

Therefore, as DHS has relied only on factors 3 and 4, listed above, Plaintiffs will address only these two factors of the six enumerated. However, because DHS also argues in in the face

[7] Subsequent to commencement of this suit, ICE further attempted to justify its decision to grant only a 20% fee waiver in correspondence claiming that a) Plaintiffs offered only "general statements" regarding their intent to provide information to the public; b) the request is broad, and so ICE anticipates most of the records would not significantly aid in understanding operations; and c) it was "unclear" what documents related to past activities of CAP and its predecessors would contribute significantly to the public understanding of current operations. Appeal Response Letter at 1; see also Defendant's Summary Judgment Motion at 25. Because this post-litigation letter is not part of the administrative record, arguments raised here are not before the Court. In any event, while DHS did not explicitly categorize these concerns, it appears that they also relate to DHS' factors 3 and 4.

of the regulatory language that the scope of the request itself is a sufficient reason to deny a fee waiver, Defendant's Summary Judgment Motion at 25, Plaintiffs will address that issue below.

1. Disclosure of Plaintiffs' Requested Records is Likely to Contribute to a Public Understanding of Activities or Operations of the Government.

Plaintiffs meet the third DHS factor because disclosure of Plaintiffs' requested records is "likely to contribute to a public understanding of activities or operations of the government." 6 C.F.R. § 5.11(k)(2)(iii). This is so for several reasons. First, Plaintiffs qualify as members of the news media as defined by the FOIA, and therefore presumptively satisfy factor 3. Second, Plaintiffs are well equipped to distribute information they learn among the interested public. Third, Plaintiffs have every intention of widely disseminating all information they learn.

a. Plaintiffs are Members of the News Media under FOIA.

DHS presumes Plaintiffs satisfy this third factor if they are "representatives of the news media." 6 C.F.R. § 5.11(k)(2)(iii). A "representative of the news media" is any "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also 6 C.F.R. § 5.11(b)(6). Examples of representatives of the news media include "publishers of periodicals . . ." Id. Representatives of the news media may not seek records for commercial use, id., and may not be charged search fees. See 5 U.S.C. § 552(a)(4)(A)(ii)(III); 6 C.F.R. § 5.11(c)(1)(i) ("Search fees shall be charged for all requests other than requests made by . . . representatives of the news media . . ."); id. § 5.11(d)(1) ("No search fee will be charged for requests by . . . representatives of the news media").

AIC and Connecticut AILA are both entities that gather "information of potential interest to a segment of the public, use [their] editorial skills to turn raw materials into distinct work, and distribute[] that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also Nat'l Sec.

Archive v. Dep't of Def., 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, courts have frequently determined that public interest non-profit organizations like Plaintiffs are members of the news media for purposes of FOIA. See ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information"); Elec. Privacy Info Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA); Serv. Women's Action Network, 2012 WL 1067670 at *6 (finding non-profit groups that displayed intent and ability to publish information obtained from requested FOIA records to be "representatives of the news media").

AIC's mission is to "strengthen America by . . . shaping how Americans think about and act toward immigration now and in the future." See Complaint at ¶ 3. AIC distributes numerous fact sheets, newsletters, and other publications available to the public. See FOIA Request at 6; Complaint at ¶¶ 4-8; Fee Waiver Appeal at 3-4. In 2010 alone, AIC issued 74 such publications and more than 270 blog posts concerning immigration issues. See FOIA Request at 6; Attachment C to Fee Waiver Appeal (listing 2010 publications of AIC's Immigration Policy Center, including 14 Special Reports and 67 Fact Sheets published in 2010). Indeed, AIC not only regularly publishes regarding immigration generally, but published a report specifically on CAP activities in Travis County, TX. See Complaint at ¶ 29. AIC is plainly a "publisher of periodicals," and a member of the news media more generally. See 6 C.F.R. § 5.11(b)(6).

Connecticut AILA is a chapter of the national not-for-profit American Immigration Lawyers Association. Complaint at ¶ 11. Its mission is to promote justice and advocate for fair and reasonable immigration law and policy. Id. at ¶ 13. Connecticut AILA provides a forum for

discussion of relevant issues affecting the immigration system and acts to disseminate that information to a broader audience. See FOIA Request at 7; see also, e.g., Rebecca Kidder, Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees, 106 Yale L.J. 389, 394 n.34 (1996) (citing remarks of INS district director at Connecticut AILA forum). In addition, AILA National distributes newsletters, e-magazines, and print and electronic publications on matters concerning immigration, including *VOICE: An Immigration Dialogue.* See Complaint at ¶¶ 13-14. Thus, both Connecticut AILA and its parent organization collect information, editorialize, and distribute that information to a wider audience. Like AIC, Connecticut AILA is a member of the news media as defined in the FOIA.

b. Plaintiffs are Equipped to Widely Distribute Information they Learn.

Even apart from satisfying the statutory definition of members of the news media, Plaintiffs possess the capabilities to examine, compile, and distribute the information extracted from the requested records to the public. Indeed, Plaintiffs seek the requested records for the precise purpose of increasing the public's understanding of an under-scrutinized program whose actions have national implications for millions of families in the United States.

AIC and Connecticut AILA are well situated to distribute information they learn from the requested records to educate the public at large. As noted above, AIC is largely in the business of collecting and distributing information about issues of concern to immigrant communities, advocates, and the public. See section II.B.1.a, supra. Courts have highlighted such an ability to distribute information to the public as a key factor in satisfying the public understanding requirement for a fee waiver. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003); see also Judicial Watch, Inc. v. General Services Admin., No. 98-2223(RMU), 2000

WL 35538030, at *8 (D.D.C. Sept. 25, 2000). In addition, as described above, much of Plaintiffs' distribution would be electronic, and some courts have noted that a requester's ability to disseminate information electronically can be particularly indicative of their ability to widely distribute the information to the public. See Judicial Watch, 2000 WL 35538030, at *9. ("A web-site . . . is readily accessible . . . and can be designed to allow easy navigation through voluminous quantities of information . . . [A] web-site . . . can serve as an electronic clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources, such as past newspaper articles, congressional hearing transcripts, court records and government agency reading rooms").

However, as noted in Plaintiffs' fee waiver appeal, even if AIC were not able to point to such a clear track record and commitment to wide distribution of information, it would still satisfy the "public understanding" requirement of the fee waiver provision. See Fee Waiver Appeal at 3. Courts have emphasized that "[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large." Carney, 19 F.3d at 815; see also Manley v. Dep't of Navy, 1:07-CV-721, 2008 WL 4326448 (S.D. Ohio, Sept. 22, 2008). Indeed, the legislative history of the FOIA makes it clear that "[a] request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." Manley, 2008 WL 4326448 at *6 (quoting 32 Cong. Rec. S14, 270-01 (daily ed. Sept. 30, 1986) (comments of Senator Leahy)). In Carney, the Second Circuit rejected as "not realistic" the notion that FOIA requesters must "shoulder the formidable burden of demonstrating that any records released actually will be disseminated to a large cross-section of the public." 19 F.3d at 814 (finding that doctoral student intending to publish "scholarly"

articles satisfied "public understanding" requirement for fee waiver). Plaintiffs are, in fact, very well positioned to reach a broad cross-section of the public; however, to qualify under the "public understanding" consideration they need only show that they will disseminate the information among those who are most concerned and interested in immigration issues. Plaintiffs have made this showing.

Indeed, in considering another recent FOIA request, DHS acknowledged that Plaintiff AIC has expertise in immigration matters "and the ability to effectively disseminate [immigration-related information] to the public." Attachment A to FOIA Request, Decision on CBP FOIA Appeal, ECF No. 1-1 at 6-7. Customs and Border Protection, another DHS component, concluded that disclosure of requested records to AIC would "contribute to the understanding of a reasonably broad audience of persons interested in immigration issues." Id. The correct conclusion is the same in this case.

c. Plaintiffs Intend to Widely Publicize their Findings.

Finally, contrary to Defendant's suggestion, Plaintiffs have every intention of publicizing all findings they make based on documents disclosed in this matter as widely as possible. In its response to Plaintiffs' fee waiver appeal, ICE claimed that Plaintiffs "merely make general statements that you intend to provide information to the public regarding immigration matters." Appeal Response Letter at 1. This is incorrect. Plaintiffs specifically informed ICE that "[i]n addition to providing all released information on its website, AIC plans to draft one or more summary reports of the records received in response to the FOIA request." FOIA Request at 5; see also Fee Waiver Appeal at 2; Complaint at ¶ 29 (describing previously published AIC report on CAP in Travis County, Texas). Plaintiffs further detailed the media through which it would make the primary documents and secondary analyses available to a wide audience: (a) its

website, which receives over 58,000 monthly visitors; (b) a mailing list containing over 33,000 subscribers; and (c) the Legal Action Council (LAC) newsletter, which has 12,000 direct subscribers and is also available through its website. See Fee Waiver Appeal.

2. Disclosure of the Requested Records is Likely to Significantly Contribute to a Public Understanding of Activities or Operations of the Government.

As Plaintiffs explained in their original FOIA request and their subsequent fee waiver appeal, essentially *any* information about the structure, activities, strengths, and failings of CAP would *significantly* contribute to the public's understanding precisely because there is next to no information about any of these questions available to the public. See FOIA Request at 6; Fee Waiver Appeal at 3-4. There is no statute authorizing the program, no regulations structuring the program, and no public sub-regulatory guidance to elucidate what CAP is doing. See Complaint at ¶¶ 17, 27. There is next to no publicly available information concerning, *inter alia*, the terms of agreements with state and local law enforcement authorities; the incidence of racial profiling in connection with CAP; CAP's organizational and supervisory structure; its relationship to other DHS programs; and a number of other issues raised in the FOIA request.

Plaintiffs never have claimed that there is *no* information in the public domain about CAP. Of course there is some. See Fee Waiver Appeal at 3-4 (listing publicly available sources that Plaintiffs had located). Nor did Plaintiffs ever suggest, as Defendant's brief implies, that only two documents were available to the public. Compare Defendant's Summary Judgment Motion at 27 ("plaintiffs asserted that '[a]t the moment, an interested member of the public could easily locate only scant official materials on CAP: a single 'fact sheet' and one brief audit'") with Fee Waiver Appeal at 3-4 (listing immediately after that quote other publicly available sources regarding CAP, and appending list of 12 Government Accountability Office reports).

But how many discrete documents DHS can list – apparently 11, in its briefing – is beside the point. The core question in assessing whether a record will make a significant contribution to public understanding is not whether there is *any* information about the topic in the public domain, but whether the specific records and types of records requested are themselves in the public domain. See Carney, 19 F.3d at 815; Manley, 2008 WL 4326448 at *7; Judicial Watch, 2000 WL 35538030 at *10. And while Plaintiffs located and listed *some* information (much of it of limited value in understanding the functioning of CAP) and DHS has identified a handful of additional sources (most of which consist of the cursory public face ICE's website puts on its enforcement programs), even DHS does not appear to dispute that the documents Plaintiffs specified in the categories, sub-categories, and sub-sub-categories of their request are *not* in the public domain. A denial of a fee waiver on this basis is to be reserved for those exceptional cases in which *the records requested* are "easily accessible and available to everyone," Durham v. DOJ, 829 F. Supp. 428, 434-35 (D.D.C. 1993), and cannot be justified in a case like this one where the agency has "never explained where in the 'public domain' [the requested] materials reside." Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 36 (D.C. Cir. 1998).

It may be that DHS expects Plaintiffs to prove a negative: namely that next to nothing is known publicly about this program. But this is not possible, and not what Congress envisioned when it enacted the FOIA. However, as to this request, it may be sufficient to observe that when Plaintiff AIC undertook the task of preparing one of the few limited outside reports on the workings and problems associated with CAP, it discovered the task was possible only because the state of Texas – not the federal government – made records available. See Complaint at ¶ 29.

Rather than engaging with the specifics of the types of documents Plaintiffs have requested, and indicating where – if anywhere – in the public domain those document reside, Defendant summarily concludes that "only some of the records plaintiffs requested will significantly contribute to the public's understanding." Defendant's Summary Judgment Motion at 26; see also id. ("ICE's grant of a 20% partial fee waiver reflects this reality"). The unsupported claim that "only some" of the requested documents would satisfy the test, coupled with a total lack of explanation of how DHS determined that "some" in this instance is 20%, renders Defendant's position empty. It asks the Court to "accept on faith" its assessment of the contribution of the requested records and its estimation of the percentage. Samuel Gruber Educ. Project v. U.S. Dept. of Justice, 24 F. Supp. 2d 1, 11 (D.D.C. 1998). This is insufficient to overcome Plaintiffs' showing that their request satisfies the legal standard for a full fee waiver.

3. Plaintiffs are Entitled to a Full Fee Waiver Despite the Number of Potentially Responsive Documents.

Finally, DHS claims that by virtue of the breadth of Plaintiffs' request, "plaintiffs disqualified themselves from a full fee waiver." Defendant's Summary Judgment Motion at 25. DHS appears to argue that a broad request could never satisfy the statutory test of seeking records "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii). This conclusion is incorrect.

The breadth of the request is not, of course, one of the six factors specified as relevant to the consideration of a fee waiver request by DHS regulations. See 6 C.F.R. § 5.11(k). Defendant cites some authority to support its contention that by submitting a broad request Plaintiffs have automatically forfeited their claim on a public interest fee waiver, but its cases are inapposite. For example, in McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) ("MESS"), the court did mention the size of the request. However, the

Court's analysis in fact turned on the likely pretextual nature of requesters' public interest façade, which the Court noted might "serve as a stalking horse for private claimants"; and the Court's skepticism that the requesters had the means or intention to actually use the information gained in the public interest at all. Id. That is, the MESS requesters' claim for a complete fee waiver was rejected because in the Court's opinion they were pursuing private profit and therefore did not qualify for a *public interest* fee waiver.[8]

In fact, there is no authority to support Defendant's position. Congress intended that the fee waiver provision be liberally construed in order to prevent agencies from using fees to "discourag[e] requests for information or as obstacles to disclosure of requested information." Ettlinger, 596 F. Supp. at 872. DHS is attempting to misuse the fee waiver as a "'toll gate' on the public access road to information." Id. at 873 (citation omitted). And this legislative concern was specifically intended to protect "nonprofit public interest groups" like Plaintiffs from such government tactics. Better Gov't Ass'n, 780 F.2d at 89 (citations and internal quotations omitted). DHS has offered no evidence that Congress was concerned about public interest organizations using the fee waiver to achieve too much public knowledge and too much accountability through large scale FOIA requests regarding nationwide government programs. While Defendant argues that the request is overbroad and therefore burdensome, that is not a reason to deny the legitimate fee waiver request in this case.

[8] The only other case cited by Defendant is Campbell, 164 F.3d at 36. The relevant part of Campbell actually held that, in considering a given record, a fee waiver applies to the entire record even if some portions of the record are irrelevant to public understanding. Id. "Congress presumably did not intend agencies to pick through responsive records to determine the percentage of the record that contains interesting morsels and to deem the remainder of the record irrelevant to public understanding." Id. Defendant relies on this case for its dictum: "A different standard might apply to records or files that are uncommonly large or that contain only a few substantive documents relative to the volume of administrative information." Id. at 36 n.16. Of course, Campbell does *not* say that requests for large numbers of documents automatically forfeit any claim on a fee waiver. Rather, its dictum can be read – at most – to mean that not every page of large or mixed records is necessarily covered by a fee waiver just because some pages are eligible. That is a far cry from Defendant's contention that the public interest requesters in this case must pay huge sums for the privilege of helping the public understand a major government program.

Finally, it appears that Defendant cannot even rely on this reasoning in defense of its denial of the fee waiver in this case. At the time this case was filed, the only justifications for denial of the fee waiver were those found in ICE's November 30 letter. See ICE letter dated November 30, 2011, ECF No. 1-2 (finding that the fee waiver request "failed to meet factors 3 and 4," i.e. whether the information would contribute to the understanding of the public at large, and whether the contribution would be significant). That letter made no mention of the breadth of the request as a justification for denying the fee waiver. Id. ICE's subsequent response to the administrative appeal was sent only after the instant action was filed and served. See Certificate of Service, ECF Nos. 5, 6 (Complaint served on March 9); Appeal Response Letter (letter dated March 13); Wishnie Decl. at ¶ 6 (ICE letter received March 20). Similarly, Defendant's summary judgment motion was, of course, filed after the initiation of this case.

Judicial review of a fee waiver determination is limited by statute to the record before the agency. 5 U.S.C. § 552(a)(4)(A)(vii). This rule equally precludes the requester and the agency from moving beyond the record at the administrative stage once litigation has begun, and "this applies just as much to the reasons the agency offered for denial as it does to the evidence the agency offered." Friends of the Coast Fork v. U.S. Dept. of the Interior, 110 F.3d 53, 55 (9th Cir. 1997). Thus, "on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order." Id.; see also MESS, 835 F.2d at 1286 n.3 (refusing to consider affidavits submitted by requesters because they were not part of record before agency).

Because this final reason for denying the fee waiver, namely that the request is too broad, was never articulated in the original denial or during the period the FOIA granted to DHS to

respond to the administrative appeal, it cannot now rely on this rationale to justify the denial. DHS is limited to the reasoning articulated in ICE's November 30 letter. Of course, that letter included essentially *no* reasoning at all, but only a recitation of the regulatory factors and a summary conclusion that Plaintiffs did not satisfy factors 3 and 4. ECF No. 1-2. As they must be held to those conclusions devoid of reasoning, in essence DHS has waived any objection it might have made to the fee waiver request. See Pub. Citizen, Inc. v. Dep't of Educ., 292 F. Supp. 2d 1, 4 (D.D.C. 2003); Lawyers Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dept. of Treasury, C 07-2590 PJH, 2009 WL 2905963 (N.D. Cal. Sept. 8, 2009). However, as argued above, even if DHS can rely on its post-filing arguments, there is no authority to support the denial on the basis of the request.

C. DHS Must Produce Documents it Concedes Qualify for a Fee Waiver.

Finally, Defendant argues that Plaintiffs were not entitled to production of any of the documents because, Defendant claims, they failed to abide by DHS regulations governing fee waivers. See Defendant's Summary Judgment Motion at 22-25. Here, as well, DHS is incorrect.

As an initial matter, and as argued above, Plaintiffs were entitled to a full fee waiver. DHS' grant of a mere 20% waiver, and its demand that Plaintiffs pre-pay its exorbitant fee estimates, violated the FOIA's fee waiver provisions as well as DHS' own six-factor analysis for eligibility for fee waivers. See section II.B, supra.

Even if the Court determines that Plaintiffs are not entitled to a full fee waiver, ICE was wrong to apply the same blanket fee waiver analysis to the entire request. Plaintiffs divided their request into five categories, and numerous sub-categories, each describing a different type of record. Not only has DHS offered no real information about how it arrived at its 20% estimate, it has offered no explanation of why that estimate applies as equally to relatively small and discrete

categories, see, e.g., FOIA Request section III.1.a (organizational charts) as to larger categories. See, e.g., id. section V.1 (individual records). Lumping together such different categories for the purposes of the fee waiver is a transparent effort by DHS to convert its overbreadth argument into a fee waiver denial even as to records of limited size and obvious public interest.

The appropriate method for assessing a request involving multiple categories for a fee waiver is to assess each category on its own merits. See, e.g., Samuel Gruber Educ. Project, 24 F. Supp. 2d at 10 (noting that agency "took the subdivisions of the … FOIA request and treated each of them as a distinct category for fee waiver purposes"). This approach – examining each category to determine if it is eligible for a full fee waiver, and then beginning to produce records from concededly eligible categories – is precisely what Plaintiffs suggested in their April 6 letter. See April 6 Letter at 1. Defendant refused to assess the request in this manner, apparently under the incorrect assumption that it could apply a blanket waiver of only 20% to the entire request. See Defendant's Summary Judgment Motion at 23 (suggesting decision to not waive fees for any of the categories or subcategories was proper because "what ICE proposed was waiving 20% of the fees associated with the search and processing of *all* responsive records") (emphasis added).

Defendant's approach, if allowed to stand, will achieve exactly what the FOIA seeks to prohibit: it will use the threat of overwhelming fees to keep a large federal government program hidden from the public's view. Plaintiffs qualify for a full fee waiver; but, in the alternative, their fee waiver request must be addressed for each category of documents they request, and DHS' denial of a waiver for any of those categories must be sufficiently supported by the administrative record.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion for summary judgment and hold that Plaintiffs are entitled to a full waiver of search and duplication fees.

_____/s/_____

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2012, a copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and attachments thereto were filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

Dated: September 21, 2012

_____/s/_____
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