UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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| AMERICAN IMMIGRATION COUNCIL, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DEPARTMENT OF HOMELAND SECURITY,<br><br>Defendant. | No. 3:12-CV-00355 (WWE) |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Plaintiffs in this case ask the Court to compel defendant United States Department of Homeland Security ("DHS") to search for and produce records in response to a preposterously broad and burdensome Freedom of Information Act ("FOIA") request. FOIA, however, does not require an agency to honor such a request. DHS is therefore entitled to summary judgment.

Plaintiffs American Immigration Council ("AIC") and the Connecticut Chapter of the American Immigration Lawyers Association ("Connecticut AILA") are sophisticated, savvy players in the national debate surrounding immigration policy. Connecticut AILA is a chapter of the American Immigration Lawyers Association, "a national not-for-profit association of more than 11,000 attorneys and law professors who practice, research, and teach immigration law." Complaint at ¶ 11. AIC is a non-profit pro-immigration advocacy organization that carries out its work through an Immigration Policy Center, a Legal Action Center, a Community Education Center, and an International Exchange Center. *Id*. at ¶¶ 3-4. In addition, plaintiffs are

represented in this matter by the Jerome N. Frank Legal Services Organization of the Yale Law School.

Plaintiffs are interested in learning more about the Criminal Alien Program ("CAP"), a major initiative of United States Immigration and Customs Enforcement ("ICE") that provides ICE-wide direction and support in the identification, processing, and removal of criminal aliens incarcerated in federal, state, and local facilities throughout the United States. Plaintiffs already know a lot about CAP, as demonstrated by the detailed allegations about the program in their complaint. *Id*. at ¶¶ 17-35. But rather than use their existing knowledge base to reasonably describe and request the particular records they seek, plaintiffs brazenly asked for every single record "related to" CAP, as well as to the series of programs that preceded CAP, created over the past 25 years. Not wanting to miss anything, plaintiffs put the burden on ICE to conduct a nationwide search for millions of records related to CAP and its predecessor programs, dating back to 1986. To make matters worse, plaintiffs refused to pay more than $100 of the cost of this massive search and processing of records, demanding that the taxpayers pay for it instead.

Plaintiffs' request is a serious abuse of the FOIA. The oft-repeated mantra that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors," *Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), could not be more apt here. Plaintiffs' request violates the bedrock requirement that a FOIA request "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). A reasonable description of records is "one that enables 'a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort.'" *Ruotolo v. DOJ*, 53 F.3d 4, 10 (2d Cir. 1995) (quoting FOIA's legislative history, H.R.

Rep. No. 93-876, 93rd Cong., 2d Sess. 6 (1974), 1974 U.S.C.C.A.N. 6271). As demonstrated below and in the attached declaration, plaintiffs' extraordinarily broad request for every record related to CAP and its predecessor programs, from 1986 to the present, would take the entire ICE FOIA staff years to process, preventing it from responding to any of the other FOIA requests it receives. Plaintiffs' request is clearly improper, and ICE should not be required to process it.

## BACKGROUND

The Criminal Alien Program and its Predecessors

This case involves an expansive FOIA request for all records related to the Criminal Alien Program, as well as its predecessor programs,—a program that plaintiffs themselves characterize as an "enormous, nationwide initiative" of ICE. Complaint at introductory paragraph. CAP is a national program that provides ICE-wide direction and support in the identification, processing, and removal of criminal aliens incarcerated in federal, state, and local facilities throughout the United States, preventing their release into the general public by securing a final order of removal prior to the termination of their sentences.[1] CAP also provides support to ICE's Office of Enforcement and Removal Operation's ("ERO") field offices in the identification and arrest of aliens identified by ERO as at-large criminal aliens. Declaration of Jamison Matuszewski at ¶ 14, attached hereto as Exhibit 1 ("Matuszewski decl."). Housed within ICE's ERO, CAP is part of ICE's comprehensive strategy to build cooperative

[1] An alien is any person who is not a citizen or national of the United States. A criminal alien is an alien who has been convicted of a crime. U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States, Report of the DHS Office of Inspector General, at 2 n.1 (Jan. 20, 2011) ("IG Report") (*see* Complaint at ¶ 27, referencing the report) (available at http://www.oig.dhs.gov/assets%5CMgmt%5COIG_11-26_Jan11.pdf) .

relationships with local law enforcement agencies. *Id*. at ¶ 15. CAP operates pursuant to a statutory mandate that requires ICE to identify and track deportable criminal aliens while they are still in the criminal justice system and to complete removal proceedings against them as promptly as possible. *Id*. at ¶ 17; *see also Demore v. Kim*, 538 U.S. 510, 530 n.13 (2003).

CAP identifies all criminal aliens in jails and prisons throughout the country and initiates removal proceedings based on their perceived threat to the community. Matuszewski decl. at ¶ 16. CAP aims to identify all foreign born nationals incarcerated in the United States by interviewing foreign born nationals and/or screening their biological information. *Id*. at ¶ 21. ERO officers and agents assigned to CAP in federal, state, and local jails and prisons screen inmates and place detainers on criminal aliens to process them for removal before they are released. Screening of foreign-born inmates at federal prisons is done by remote technology through the DEPORT Center and by CAP agents at field offices. IG Report at 15. Currently, CAP screens inmates from more than 4,300 federal, state, and local jails and prisons on a daily basis. Matuszewski decl. at ¶ 21.

After the screening process and interviews, ERO initiates proceedings to remove the criminal aliens from the United States. CAP also works with U.S. Attorney's Offices to support the aggressive prosecution of criminal offenders identified by ERO officers. ICE Fact Sheet: Criminal Alien Program (March 29, 2011) (available at http://www.ice.gov/news/library/factsheets/cap.htm). "CAP agents perform many duties, including coordinating with prisons and jails, screening foreign-born inmates, lodging detainers for removable criminal aliens, preparing prosecutions, transporting criminal aliens to ICE detention centers, pursuing at-large criminal aliens, serving as vehicle control officers or

firearms instructors, escorting criminal aliens to their native countries, and participating in temporary duty assignments." IG Report at 7.

CAP is used in all 24 ICE field offices and approximately 171 sub-offices, support centers, and response centers. Matuszewski decl. at ¶ 15. Any of ERO's 7,854 employees can conduct CAP-related activities on any given day. *Id*. at ¶ 20. Through CAP, ICE could potentially interact with every municipal, county, state, and federal facility in the country (more than 4,300 facilities). *Id*. at ¶¶ 15, 21. In just the five-year period from 2007 to the present, there were approximately 2.5 million CAP encounters, with a CAP encounter defined as an interview or a screening. *Id*. at ¶ 22.

Because plaintiffs requested all records related to CAP's predecessor programs as well as CAP, some brief history about CAP's development is necessary. In 1988, the Immigration and Naturalization Service ("INS") created the Alien Criminal Apprehension Program and the Institutional Removal Program, previously referred to as the Institutional Hearing Program, in response to the enactment of the 1986 Immigration Reform and Control Act. In 2006, ICE consolidated these two programs under one name, the Criminal Alien Program, and began to transfer CAP functions from ICE's Office of Investigations ("OI"), now called the Office of Homeland Security Investigations ("HSI"), to the Office of Detention and Removal Operations, now known as ERO. In 2007, ICE's ERO assumed responsibility for CAP. *Id*. at ¶ 17.

Plaintiffs' FOIA Request

On November 29, 2011, plaintiffs submitted a FOIA request to ICE, a component of DHS. The request was for, literally, every record related to the ICE Criminal Alien Program and any program out of which CAP was developed. Nov. 29, 2011 request letter at 1 (Exhibit 1 to

Complaint) ("We request all records related to CAP, as well as to the series of INS and ICE programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE Institutional Removal Program, and ICE National Criminal Alien Removal Plan."). Plaintiffs requested not only records of ICE, but also records of the INS "as well as any other related records which may be held elsewhere in the Department of Homeland Security." *Id*. And, to make an incredibly far-reaching request even broader, plaintiffs requested all records from 1986 to the present. *Id*. at 4.

Plaintiffs provided several categories of records included in their request but did not limit their request to those categories, opting instead to ask for every record related to CAP and its predecessor programs created during the past 26 years. *Id*. at 1-4. The categories listed as included in plaintiffs' request demonstrate the breadth of the request. Those categories are (1) Policies and Procedures, requesting "[a]ll records related to the development, implementation, and operation of CAP and its predecessors," including but not limited to all reports, memoranda, legal opinions, correspondence, audits, policies, and guidance; (2) Communications, requesting "[a]ll records of communication, whether electronic or conventional, to or from ICE or INS related to CAP and its predecessors"; (3) Program Organization, requesting, *inter alia*, all records regarding CAP and its predecessors' internal structure and relationships to other government agencies or programs, and to other ICE programs and activities, as well as all records related to CAP and its predecessors' cooperation with state and local law enforcement; (4) Statistical Data and Resource Allocation, requesting, *inter alia*, "[a]ll statistical data and analysis regarding the identification, detention, arrest, and transfer to federal custody pursuant to or in connection with CAP and its predecessors . . ." and "[a]ll statistical and other records

detailing total ICE or INS expenditures, in both personnel time and financial resources, involved in developing and implementing CAP and its predecessors, including but not limited to all records of Congressional and/or DHS appropriations, budget requests, and analyses related to CAP and its predecessors"; and (5) Individual Records, requesting, *inter alia*, "[a]ll records regarding any individual identified by, detained by, arrested by, and/or transferred to the custody of ICE, INS, or any other federal agency pursuant to or in connection with CAP and its predecessors . . . ." *Id*. With respect to this last category, dealing with individuals' records, plaintiffs said they were "prepared to negotiate the appropriate scope of these records" and were "open to discussion of sampling as an appropriate means of producing individual records." *Id*. at 3 n. 2. These examples show that plaintiffs meant what they said—they literally want every record related to CAP and its predecessor programs, back to 1986.

Plaintiffs coupled their vast FOIA request with a request for a waiver of all fees exceeding $100. According to plaintiffs, the disclosure of every single record of CAP and its predecessor programs, going back to 1986, is "likely to contribute significantly to public understanding of the operations or activities of the government . . . ." *Id*. at 4.

ICE's Response to Plaintiffs' FOIA Request

On November 30, 2011, ICE acknowledged plaintiffs' request. ICE invoked a ten-day statutory extension for responding to the request, as the request "seeks numerous documents that will necessitate a thorough and wide-ranging search." Nov. 30, 2011 acknowledgment letter at 4, attached hereto as Exhibit 2. It further stated that it would make every effort to respond to the request in a timely manner, but "there are currently 1029 open requests ahead of yours." *Id*. ICE invited plaintiffs to narrow the scope of their request, but plaintiffs declined to do so. *Id*.

In addition, ICE denied plaintiffs' fee waiver request. Nov. 30, 2011 fee waiver denial letter (Exhibit 2 to Complaint). ICE found that plaintiffs had not shown that disclosure of the requested information would contribute to the understanding of the public at large, nor had it shown that the contribution to public understanding of government operations or activities would be significant. *Id*. at 2. Plaintiffs appealed ICE's denial of their fee waiver request (Dec. 16, 2011 appeal letter (Exhibit 3 to Complaint)), and ICE acknowledged the appeal. Jan. 11, 2012 appeal acknowledgment letter, attached hereto as Exhibit 3; *see also* Complaint at ¶ 55; Answer at ¶ 55.

On January 27, 2012, ICE responded to plaintiffs' FOIA request. ICE informed plaintiffs that their "blanket request for all CAP records does not reasonably describe the records you are seeking." ICE elaborated:

> CAP is present within all 24 field offices and screens all Federal and State facilities. An unfocused search for all records of communication with those facilities, or personnel at those facilities, would not only be enormously time consuming, it would also likely produce records that would not have any value to the public with respect to explaining the operation of the agency. This request, in its current form, would likely disrupt agency operations due to the extraordinary amount of labor required to retrieve the requested information, if in fact the information could even be retrieved. CAP and its predecessors, Institutional Removal Program, Institutional Hearing Program and Administrative Criminal Alien Program (ACAP) have been part of the legacy Immigration & Naturalization Service since prior to 1986. To provide detailed information on all aliens encountered in the history of the current mission of the Criminal Alien Program is unrealistic as it crosses multiple agencies, administrations and departments.

Jan. 27, 2012 response letter at 1 (Exhibit 4 to Complaint). In summary, plaintiffs' "request seeks decades worth of information and potentially implicates millions of pages of records. This request would not only significantly impact ICE, but would effectively cripple certain ICE offices' ability to maintain current operations." *Id*.

For these reasons, ICE determined that plaintiffs' request was not a perfected FOIA request. *Id*. Plaintiffs also failed to submit documentation required to obtain the release of personal information relating to individual aliens encountered by ICE in connection with CAP activities. *Id*. at 1-2. ICE again urged plaintiffs to narrow their request and offered to help it do so. *Id*. at 2 ("If you could identify with specificity the CAP-related topics in which you would like to receive records of communications, we would be able to conduct a more focused search that is more likely to produce the records you would like to receive in an expeditious manner. We would encourage you to contact this office to discuss ways to further refine your FOIA request."). Plaintiffs again declined to do so.

Plaintiffs' Complaint

On March 8, 2012, plaintiffs filed the instant complaint against DHS, alleging that it wrongfully withheld the requested records from plaintiffs and that it erroneously denied plaintiffs' fee waiver request. The complaint does not allege any response by plaintiffs to ICE's invitation to narrow their FOIA request. In fact, on the same day that they filed their complaint, plaintiffs informed ICE that they would not narrow their request. March 13, 2012 appeal response letter at 1, attached hereto as Exhibit 4 ("You informed ICE FOIA on [March 8, 2012] that you would not narrow your request."); April 6, 2012 letter from plaintiffs to ICE FOIA at 2, attached hereto as Exhibit 5 ("On [March 8, 2012], we informed ICE FOIA that Requestors did not wish to amend or limit their request, were not seeking personally identifiable information, and were open to discussing sampling of records.").

ICE's Response to Plaintiffs' Appeal of the Fee Waiver Denial

On March 13, 2012, in response to plaintiffs' appeal of the denial of their fee waiver

request, ICE granted plaintiffs a partial fee waiver. March 13, 2012 appeal response letter. ICE found that while certain information requested by plaintiffs may contribute to the public's understanding of ICE's operations, every record related to CAP and its predecessors dating back to 1986 surely would not. ICE explained that "because your request is so broadly worded on its face, seeks hundreds of thousands, if not millions, of pages of agency records dating back to the inception of CAP and associated programs, and covers every aspect of those programs, ICE anticipates that the vast majority of the records you are seeking would not significantly aid in the public's understanding of agency operations. Finally, it is unclear to ICE what you seek to publicize about historical CAP records that are decades old and potentially obsolete and how this publication of historical records could possibly contribute significantly to the public understanding of ICE operations." *Id*. at 1.

ICE estimated that 20% of the records plaintiffs requested may contribute to the public's understanding of ICE's operations. ICE offered to waive these fees and begin processing documents in the order in which they were located, *if* plaintiffs agreed to pay the remaining fees. *Id*. at 1-2. As to the cost for the search and duplication of the remaining 80% of the requested records, ICE provided an early, initial estimate, based on other searches it had done in large FOIA cases, of $300,000. *Id*. at 2. It cautioned that "[t]he actual amount may be lower or higher than this estimate . . . ." *Id*. ICE explained that its regulations require advance payment of half of this amount before it could begin a search, but gave plaintiffs the option of paying these fees on a rolling basis and according to a rolling production schedule. Finally, ICE again encouraged plaintiffs to narrow their request to target the documents they were most interested in, which would reduce the cost of processing the request. ICE again offered to work with plaintiffs to

identify records that would be most useful to plaintiffs. *Id*.

Plaintiffs responded to ICE's March 13 letter on April 6, 2012. Plaintiffs acknowledged that ICE only granted a fee waiver for 20% of the requested records. Plaintiffs asserted that documents requested in categories one through four of their request are documents that may contribute to the public's understanding of ICE's operations and "should be produced without delay." April 6, 2012 letter from plaintiffs to ICE FOIA at 1. However, plaintiffs did not agree to pay any of the fees associated with the remaining 80% of their request, reiterating their belief that they are entitled to a full fee waiver. *Id*.

## ARGUMENT

### I. DEFENDANT IS NOT REQUIRED TO HONOR PLAINTIFFS' FOIA REQUEST BECAUSE IT WAS NEVER PERFECTED AND BECAUSE IT IMPOSES UNREASONABLE BURDENS.

FOIA requires that a request "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). A reasonable description of records is "one that enables 'a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort.'" *Ruotolo*, 53 F.3d at 10 (quoting FOIA's legislative history, H.R. Rep. No. 93-876, 93rd Cong., 2d Sess. 6 (1974), 1974 U.S.C.C.A.N. 6271). Accordingly, DHS's FOIA regulations require that a requestor "must describe the records that you seek in enough detail to enable Department personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record." 6 C.F.R. §

5.3(b).[2]

Courts have identified three ways in which a FOIA request can fail to reasonably describe the records sought. *James Madison Project v. CIA*, No. 1:08CV1323, 2009 WL 2777961, at * 3 (E.D. Va. Aug. 31, 2009). First, the description may be too vague to allow the agency to determine precisely what records are being requested. *Id*. (citing *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987) ("[A]n agency is not required to have clairvoyant capabilities to discover the requestor's need.")). Second, "'[b]road sweeping requests lacking specificity are insufficient.'" *Id*. (quoting *Dale*, 238 F. Supp. 2d at 104). Third, even where a request sufficiently describes the records sought, an agency is not required to comply with a request so broad that would impose an unreasonable burden upon the agency. *Id*. (citing *Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990)). *See also Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) ("[A]n agency need not conduct a search that plainly is unduly burdensome."); *Ruotolo*, 53 F.3d

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[2] Some courts view a requestor's failure to reasonably describe the records sought as a failure to exhaust administrative remedies. A plaintiff must exhaust its administrative remedies before filing a FOIA complaint in court. *See, e.g., Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004) (per curiam); *Spannaus v. DOJ*, 824 F.2d 52, 58 (D.C. Cir. 1987); *Manfredonia v. SEC*, No. 08-cv-1678, 2009 WL 4505510, at * 5 (E.D.N.Y. Dec. 3, 2009). In order to exhaust administrative remedies, a plaintiff must submit a valid FOIA request that complies with applicable regulations. *Dale v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002) ("An agency's obligations commence upon receipt of a valid [FOIA] request; failure to file a perfected request therefore constitutes failure to exhaust administrative remedies.") *See also Manfredonia*, 2009 WL 4505510, at * 5; *Latham v. DOJ*, 658 F. Supp. 2d 155, 159 (D.D.C. 2009). A valid FOIA request is one which "reasonably describes" the records requested and "is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed . . . ." 5 U.S.C. § 552(a)(3)(A). Thus,"[a] FOIA requestor may be deemed to have failed to exhaust administrative remedies when the requestor has, *inter alia*, failed to reasonably describe the records being sought . . . ." *Keys v. DHS*, No. 08-0726, 2009 WL 614755, at * 4 (D.D.C. Mar. 10, 2009).

at 9 ("We have no doubt that there is such a thing as a request that calls for an unreasonably burdensome search."); *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978).

FOIA requires requests to be reasonably described because "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." *Assassination Archives*, 720 F. Supp. at 219. *See also Bailey v. Callahan*, No. 3:09MC10, 2010 WL 924251, at * 4 (E.D. Va. Mar. 11, 2010) ("FOIA entitles citizens to the disclosure of documents, but does not oblige the government to answer their questions or establish a research service."). FOIA does not require agencies to search for the proverbial needle in a haystack, nor does it contemplate that requestors will ask for the entire haystack. "[I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested." *Assassination Archives*, 720 F. Supp. at 219. The reasonable description obligation relates to the subject matter of a search as well as to its location. *Bailey*, 2010 WL 924251, at * 4.

Plaintiffs' request, seeking the entire haystack of information related to CAP, fails to reasonably describe the records sought in all of the ways courts have identified. It is too vague to allow ICE to determine precisely which records are sought; it is a broad sweeping request lacking specificity; and it is so broad that it imposes unreasonable burdens on ICE. Plaintiffs' complaint itself sets out the wide expanse of CAP and its predecessor programs. In its first paragraph, the complaint alleges that CAP is "an enormous, nationwide initiative" of ICE; that it is "one of the federal government's largest . . . immigration enforcement programs"; that it "is implicated in approximately half of all removal proceedings"; that its "enforcement operations

take place in tandem with law enforcement in every state"; that it "facilitat[es] the removal of hundreds of thousands of individuals each year"; and that it serves as "ICE's bedrock enforcement initiative." Complaint at introductory paragraph. *See also* Dec. 16, 2011 appeal letter at 4 (Exhibit 3 to Complaint) (describing CAP as a "massive program"). More specifically, plaintiffs claim that as of 2008, CAP was operating in all state and federal prisons and 300 local jails (Complaint at ¶ 23); that in fiscal year 2009, 48% of the individuals charged by ICE as deportable came to ICE's attention through CAP (*id*. at ¶ 24); that since fiscal year 2004, CAP has facilitated the arrests of over 1.1 million people (*id*.); that CAP's operations "vary widely" (*id*. at ¶ 26); and that ICE and its predecessor INS created CAP "out of a panoply of overlapping programs" (*id*. at ¶ 18). Thus, plaintiffs themselves allege the enormity of the programs which they have requested every record related to, acknowledge the nationwide operation of the programs, and fail to identify any particular location where these records might be found.

The declaration of ICE's Unit Chief for the Criminal Alien Program, Jamison Matuszewski, confirms that searching for and producing all records related to CAP and its predecessor programs, created since 1986, would impose unreasonable burdens on ICE. It also demonstrates the difficulty of determining what records would be responsive to a request for all records "related to" CAP. *See Massachusetts v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (noting that a request for all documents "relating to" a subject is overbroad, as "all documents 'relate' to all others in some remote fashion."). From just 2007 to the present, there have been approximately 2.5 million CAP encounters. Matuszewski decl. at ¶ 22. A CAP "encounter" is

an interview or screening. *Id.*[3] Although ICE tracks the total number of CAP encounters, it does not have the supporting detail to be able to ascertain the identities of the individuals encountered and retrieve their records, nor are files identified as CAP files. An individual who had a CAP encounter between 1986 and the present could be any alien in any prison or jail in the country during that time. ICE does not have a database or system that designates an individual as having a CAP encounter. *Id.* at ¶ 23.[4]

A CAP encounter can generate at least 25 to 50 records, which would mean there would be approximately 64 million to 127 million records associated with the 2.5 million CAP encounters from 2007 to the present. These CAP encounter records related to an individual could be located within an individual Alien-file (known as an A-file). In order to determine which individuals had CAP encounters, ICE would have to retrieve and manually review all of the A-files. ICE does not maintain any electronic system that can be searched to determine which A-files could contain CAP-related records, nor are the A-files stored and labeled as CAP files or by year. There are over 25.1 million inactive A-files and approximately 35 million active A-files, for a total of over 60 million files that ICE would have to retrieve and review. The active files are stored in numerous locations throughout the United States. *Id.* at ¶¶ 25-27.[5]

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[3] In fiscal year 2011, there were 701,473 CAP encounters, of which 221,122 resulted in CAP arrests. *Id.*

[4] Nor is there is a typical CAP encounter in terms of records produced. CAP encounters vary based on a number of circumstances, including the alien's legal status, nationality, criminal history, and length of time in the United States, and the place of encounter and number of previous encounters. These factors determine the type of processing and forms used to initiate removal proceedings. *Id.* at ¶ 24.

[5] Additional records related to CAP arise as a result of CAP's overlap with ICE's Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS") strategy, which provides an umbrella of services to assist local law enforcement agencies in

Because the A-file is the official record system that contains information regarding transactions involving an individual as he passes through the U.S. immigration and inspection process, depending upon how lengthy that history is, an A-file could contain anywhere from 30 to 300 to 3000 records. *Id*. at ¶ 26.[6] A-files also contain biographical information that would have to be redacted. Matuszewski decl. at ¶ 27. Using an estimate of 40 hours (5 working days) to retrieve, review, redact, and copy responsive records in one file, ICE estimates that it would take 2.4 billion hours to search and process these files. *Id*. at ¶ 27.[7]

Plaintiffs' professed willingness to discuss sampling as a means of producing individual records does not significantly reduce the burden to ICE of responding to plaintiffs' mammoth request. Even if the parties could agree on a percentage of the 2.5 million CAP encounters as a sample, ICE would still have to search through the 60 million A-files to find the records for the universe of CAP encounters from which the sample would be drawn. Matuszewski decl. at ¶¶ 22-28. In addition, even a sampling of 2.5 million CAP encounters (just for the 2007-present time frame) would be a large number of encounters for which to produce records "related to."

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identifying criminal aliens in local communities. There is no way to determine which records associated with these programs are CAP-related without manually searching through the programs' records. *See Id*. at ¶¶ 29-33.

[6] Presumably, all records in an A-file for an individual who had a CAP encounter would be responsive, as opposed to just the records of the CAP encounter, given plaintiffs' request for "[a]ll records regarding any individual identified by, detained by, arrested by, and/or transferred to the custody of ICE, INS, or any other federal agency pursuant to or in connection with CAP and its predecessors . . . ." Nov. 29, 2011 request letter at 3 (Exhibit 1 to Complaint).

[7] The cost for such a search of records obviously exceeds the $300,000 estimate that ICE had provided for 80% of the fees. *See* Mar. 13, 2012 appeal response letter. At the time ICE made this estimate, it was based only on other large FOIA cases, and ICE explicitly stated that its estimate could change. *Id*. at 2. In preparing the declaration to support this motion, ICE has now had the opportunity to develop a clearer understanding of the massive undertaking that would be required to attempt to respond to plaintiffs' request.

And plaintiffs' willingness to discuss sampling for the individual records category of their request does nothing to reduce the burdensomeness of the rest of plaintiffs' request. Nor were plaintiffs willing to pay for the costs associated with searching for and processing any sampling of individual records.

Plaintiffs' request for all records of communications "related to" CAP and its predecessors is another daunting aspect of their request. Because any ERO officer can conduct CAP-related activities, because most ERO officers have, at one point in their career, been assigned to perform CAP operations, and because there is no standard form used by ERO officers to communicate about CAP, ICE would have to search, at a minimum, the email accounts and other electronic and paper files of the 7,854 current ERO officers. ICE estimates that this would take 15,000 hours. *Id*. at ¶¶ 20, 34-35. In addition, the archived files of officers previously assigned to ERO and to CAP teams would have to be searched. *Id*. at ¶ 37.[8] And ICE would, no doubt, need to make judgment calls in order to determine whether many communications by ERO officers in fact qualify as communications "related to" CAP. *See Schmidt v. Shah*, No. 08-2185, 2010 WL 1137501, at * 7 (D.D.C. Mar. 18, 2010) (where agency would need to make "complicated judgment calls" to determine what records might indicate a "possible violation" of fair opportunity provisions, request for records regarding possible violations of Federal Acquisition Regulation regarding fair opportunity was vague).

A search for all policies and procedures, reports, memoranda, legal opinions, audits, training materials, agreements, statistical data and analyses, expenditure and other resource

[8] Additional offices, such as ICE's Office of Congressional Relations, would likely have records responsive to plaintiffs' request, including records of communications. *Id*. at ¶ 36.

allocation information, and program organization information "related to" CAP and its predecessors from 1986 to the present would also be an enormous undertaking. Some policies and procedures can be found in ERO's Executive Information Reporting Unit, Policy Resource Management Section, but each field office has its own guidance, internal policies, and local standard operating procedures concerning CAP. Those materials may be stored and transmitted to the appropriate staff in any manner of ways and would require a thorough electronic and manual search of records. *Id*. at ¶¶ 38-39. Moreover, ERO has only had ownership of CAP since 2007. A search for policies and procedures prior to 2007 would be even more onerous. *Id*. at ¶¶ 40-41.

Plaintiffs' request, which would require searching through 60 million active and inactive A-files just to respond to the individual records prong of plaintiffs' request for all records "related to" CAP, is quintessentially broad and unreasonably burdensome. *See Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 892 (D.C. Cir. 1995) (a search through 23 years of the Customs Service's subject files for all records "pertaining to" H. Ross Perot, created from 1969 to 1992, would impose an unreasonable burden on the agency); *Van Strum v. EPA*, 972 F.2d 1348 (table), 1992 WL 197660, at * 1 (9th Cir. Aug. 17, 1992) (unpublished opinion) (request for all documents related to the substance dioxin was unreasonably broad); *Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir. 1977) (per curiam) (request for all records pertaining to the atrocities committed against plaintiffs was not reasonably described); *Irons v. Schuyler*, 465 F.2d 608, 612-13 (D.C. Cir. 1972) (request for all unpublished decisions of the Patent Office, which would require a search through more than 3.5 million patent files, plus other files, was unduly broad and unidentifiable); *Int'l Counsel Bureau v. DoD*, 723 F. Supp. 2d 54, 59 (D.D.C. 2010)

(enlisting a full-time staff of twelve for a year to review hundreds of thousands of unsorted images to respond to FOIA request would impose undue burden); *Schmidt*, 2010 WL 1137501, at * 7 (request for all records produced by the U.S. Agency for International Development since 1995 regarding possible violations of Federal Acquisition Regulation regarding fair opportunity was unreasonably burdensome); *Bailey*, 2010 WL 924251, at * 5 (request that would require DHS to search every component office for documents relating to DHS and component personnel or contractor travel was unreasonably burdensome); *James Madison Project*, 2009 WL 2777961, at * 4-5 (request for all CIA documents pertaining to the indexing and organizational structure of all CIA systems of records subject to FOIA was overbroad and unduly burdensome because it would require a search of every CIA office for documents associated with the agency's record systems; "FOIA was not intended to saddle agencies with this type of burden."); *Antonelli v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 04-1180, 2006 WL 141732, at * 2-3 (D.D.C. Jan. 18, 2006) (request for Department of Transportation records pertaining to plaintiff was unreasonably broad where plaintiff did not identify systems of records likely to contain responsive records); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (request for all records pertaining to contacts between two members of Export-Import Bank board and any company doing business in China was unreasonably burdensome); *Dale*, 238 F. Supp. 2d at 105 (request for all documents relating to plaintiff was too broad and "amounted to an all-encompassing fishing expedition of files at IRS offices across the country, at taxpayer expense." [maybe take out and use elsewhere]); *Hunt v. Commodity Futures Trading Commission*, 484 F. Supp. 47, 51 (D.D.C. 1979) (expanding request to include "virtually every piece of paper in [Commodity Futures Trading] Commission files nationwide" would be

improper).

Plaintiffs' expansive request is distinguishable from the request at issue in *Ruotolo*. In that case, the plaintiffs' request would have only involved searching through 803 FOIA litigation files for Vaughn indexes filed by the government. 53 F.3d at 9.[9] It is instead analogous to *Am. Fed'n of Gov't Employees*, 907 F.2d at 209, where a request for every chronological file, every correspondence file, and any file containing promotion memos would have required the Census Bureau to search virtually every file contained in over 356 branch and division offices. It was unreasonable for the requestor to request every personnel file an agency possesses "in hopes of discovering information regarding [the agency's] promotion practices." *Nation Magazine*, 71 F.3d at 891-92 (describing *Am. Fed'n of Gov't Employees*, 907 F.2d at 208-09). That is exactly what plaintiffs are doing here: they have requested every record related to CAP and its predecessor programs in hopes of discovering information about how the government implements its immigration enforcement policies. *See* Complaint at introductory paragraph.

Plaintiffs' overly broad request is also comparable to a recent decision by another judge in this district. In *Service Women's Action Network v. DoD*, Civ. Action No. 3:11cv1534 (MRK), May 14, 2012, ECF No. 32, attached hereto as Exhibit 6, the plaintiff had asked the Department of Defense ("DoD") for, *inter alia*, all records related to complaints or reports of sexual assault, equal opportunity, sexual harassment, or domestic violence for a five year period.

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[9] The plaintiffs in *Ruotolo* also offered a payment of $600 with a request that the agency begin compiling the most current material responsive to their request. 53 F.3d at 9. Here, plaintiffs only offered the de minimus amount of $100. Additionally, the agency in *Ruotolo* did not offer to assist the plaintiffs in narrowing their request, *id*. at 10, in contrast to offers made by ICE in this case. *See* Jan. 27, 2012 response letter at 2; March 13, 2012 appeal response letter at 2.

DoD estimated that the request encompassed more than 712,000 files, kept in several locations, and noted that many of the files contained private information and would therefore have to be carefully reviewed and redacted. The Court held the request imposed an unreasonable burden and did not require DoD to respond. *Id*. at 11-12. The Court also found it could not evaluate the plaintiffs' modified FOIA request, made during the course of litigation, on the record before it. *Id*. at 12.

Despite multiple opportunities from ICE, plaintiffs steadfastedly refused to narrow their request during the administrative phase of the case. *See Judicial Watch*, 108 F. Supp. 2d at 27-28. Plaintiffs were obligated to do so at that time, not after they filed the instant complaint. *Halpern*, 181 F.3d at 289 ("Because Halpern did not respond to the request for clarification until after he filed his amended complaint, he lacked any grounds on which to plead that the FBI had failed to process the files."). The dialogue associated with narrowing a FOIA request is supposed to take place between the requestor and the agency officials with knowledge of the records, not litigation counsel.

Plaintiffs' professed ignorance about CAP and its predecessor programs does not excuse the breadth of their request. Plaintiffs are in fact quite knowledgeable about the program, as the complaint amply demonstrates. *See* Complaint at ¶¶ 17-35 (detailed allegations about CAP's creation, operations, and funding). Plaintiffs surely could have framed their request more narrowly and submitted subsequent requests based on information learned. Instead, plaintiffs made their request as broad as possible to avoid missing something. Plaintiffs did it exactly backwards, asking the agency to give them every record under the sun rather than doing the work themselves to determine what to ask for. Congress did not intend for the burdens under

FOIA to be flipped in this way.

It is not an exaggeration to suggest that if ICE were required to respond to plaintiffs' request, it would grind ICE's FOIA processing to a halt and significantly interfere with ICE's operations as well. In terms of both search and processing time, it is difficult to imagine a more burdensome request. Therefore, on these grounds alone, the Court should grant summary judgment to the government.

## II. PLAINTIFFS DID NOT COMPLY WITH DHS REGULATIONS REGARDING FEES, NOR DID THEIR FOIA REQUEST WARRANT A FULL FEE WAIVER.

Along with the requirement that a FOIA request "reasonably describe" the records sought, FOIA requires that a request be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A). Plaintiffs did not comply with DHS regulations regarding fees, as they failed to agree to pay any of the fees required to process their FOIA request (above $100), nor were they entitled to a full waiver of fees.

ICE granted plaintiffs a partial fee waiver, estimating that only 20% of the records plaintiffs requested may contribute to the public's understanding of ICE's operations. ICE estimated that the cost for the search and duplication of 80% of the requested records was $300,000, based on other searches it had done across multiple offices and agency systems. Under DHS regulations, plaintiffs were required to agree to pay these fees in order for their FOIA request to be considered received and for work to process it to begin. 6 C.F.R. § 5.11(e) ("In cases in which a requester has been notified that actual or estimated fees amount to more than $25.00, the request shall not be considered received and further work shall not be done on it until the requester makes a firm commitment to pay the anticipated total fee."); § 5.3(c) (same);

§ 5.11(i)(2) ("Where a component determines or estimates that a total fee to be charged under this section will be more than $250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment."); § 5.11(i)(4) ("In cases in which a component requires advance payment, the request shall not be considered received and further work will not be done on it until the required payment is received.").

ICE's March 13, 2012 letter to plaintiffs set out three options for payment. Plaintiffs could have (1) agreed to pay the $300,000 and paid ICE half this amount within 30 days, with the other half due after all responsive documents had been produced; (2) agreed to narrow the scope of their request to target the documents they were most interested in; or (3) agreed to pay the fees according to a rolling production schedule, with plaintiffs making partial payments as the production progressed. March 13, 2012 appeal response letter at 2-3.

Plaintiffs chose none of these options. They did not agree to pay anything more than $100, reiterating their belief that they are entitled to a full fee waiver. April 6, 2012 letter from plaintiffs to ICE FOIA at 1. The approach plaintiffs proffered of ICE producing "without delay" the documents requested in categories (1) - (4) of plaintiffs' FOIA request, on the theory that those documents will enhance public understanding of ICE operations, is not authorized by the regulations, for good reason. There is no way to determine *ex ante* that all records responsive to these four categories constitute 20% (or any other percentage) of all responsive records before a search for all responsive records is conducted. Rather, what ICE proposed was waiving 20% of the fees associated with the search and processing of all responsive records if plaintiffs agreed to

pay the remaining 80% of the costs, consistent with the regulations. March 13, 2012 appeal response letter at 1-2 ("ICE is prepared to offer a partial fee waiver and will start processing documents in the order in which they are located if you agree to pay fees in accordance to your fee requester category for the documents that are not likely to significantly contribute to an understanding of specific governmental operations . . . .").

Having failed to agree to pay any of the fees ICE determined they needed to pay, plaintiffs were not entitled to have ICE perform any further work on their request. Nor were plaintiffs entitled to a full waiver of fees on their massive request. A court reviews agency determinations of fee waivers *de novo*, but this review is "limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii). The requestor bears the burden of showing that it is entitled to the waiver. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1126 (D.C. Cir. 2004); *Carney v. DOJ*, 19 F.3d 807, 814 (2d Cir. 1994). Non-profit and public interest organizations are not relieved from meeting the statutory requirements for a fee waiver. *D.C. Technical Assistance Organization, Inc. v. HUD*, 85 F. Supp. 2d 46, 48 (D.D.C. 2000).

FOIA's fee-waiver provision states that agencies must waive or reduce fees "if disclosure of the information is in the public interest because it 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). DHS regulations provide the following factors for the agency to consider in determining the public-interest prong of this test: (1) the subject of the request must concern "identifiable" operations or activities of the federal government, with "a connection that is direct and clear, not remote or attenuated"; (2) the disclosable portions of the requested records must be "meaningfully informative about

government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities"; (3) the disclosure must contribute to the understanding of a reasonably broad audience, as opposed to the understanding of the individual requester; and (4) the public's understanding of the subject in question must be enhanced by the disclosure "to a significant extent." 6 C.F.R. § 5.11(k)(2).

ICE correctly determined that plaintiffs' broad request was not entitled to a full fee waiver. ICE explained to plaintiffs that "because your request is so broadly worded on its face, seeks hundreds of thousands, if not millions, of pages of agency records dating back to the inception of CAP and associated programs, and covers every aspect of those programs, ICE anticipates that the vast majority of the records you are seeking would not significantly aid in the public's understanding of agency operations. Finally, it is unclear to ICE what you seek to publicize about historical CAP records that are decades old and potentially obsolete and how this publication of historical records could possibly contribute significantly to the public understanding of ICE operations." March 13, 2012 appeal response letter at 1. Requests for "a large volume of information . . . , much of it identified only by broad categories[,] . . . do not improve requesters' case for waiver." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). *See also Campbell v. DOJ*, 164 F.3d 20, 36 n.16 (D.C. Cir. 1998) (suggesting that something less than a full fee waiver "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."). By making their request so unreasonably broad, plaintiffs disqualified themselves from a full fee waiver. Had they instead tailored their request to particular documents that would contribute significantly to the public's understanding of CAP,

plaintiffs would have been on much stronger footing to obtain a fee waiver.

Plaintiffs' fee waiver request did not make the case with any specificity for how the multitude of records they requested would contribute significantly to the public's understanding of ICE operations. Claiming that there was little information about CAP in the public domain, plaintiffs concluded that "[t]here is therefore no doubt that the records sought by Requesters will significantly contribute to the public understanding of CAP and its predecessors." Dec. 16, 2011 appeal letter at 4. *See also* FOIA request at 6 (after alleging that CAP and its predecessors "are not well understood by advocates or the general public," conclusorily stating "[t]he requested records will shed light on CAP's organization and functioning, and will significantly contribute to the public's understanding of the program."). Even if plaintiffs' premise were right about the amount of information about CAP in the public domain—which it is not, as we show below—it does not follow that every record related to CAP and its predecessors dating back to 1986 will significantly contribute to public understanding of the government's operations or activities. Nor does it even follow that every policy or procedure, statistic, communication, or individual record—to name a few of plaintiffs' examples of responsive records—will meet this standard. Rather, only some of the records plaintiffs requested will significantly contribute to the public's understanding of ICE's operations. ICE's grant of a 20% partial fee waiver reflects this reality.

One need look no further than plaintiffs' own example of a grant of a fee waiver to plaintiff AIC by U.S. Customs and Border Patrol ("CBP"). Dec. 16, 2011 appeal letter at 3; FOIA request at Ex. A. In that case, the FOIA request was for CBP policies, directives, and guidance about the accessibility of counsel, specifically limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry. FOIA request at

Ex. A at 1. This far narrower, focused request was more likely to significantly contribute to public understanding of government operations, and was therefore deserving of a full fee waiver. That is not the case here.

Finally, to support their claim that the requested information was not in the public domain, 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 by the Office of the Inspector General." Dec. 16, 2011 appeal letter at 4 (footnotes omitted). Yet there is much more information about CAP available on ICE's website alone. For example:

CAP Statistics as of 12/12/2011:

http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf

CAP Projection Analysis by AOR 11/2010:

http://www.ice.gov/doclib/foia/reports/cappa-projected-arrests-releases-aor-level.xls

CAP Projection Analysis by County 11/2010:

http://www.ice.gov/doclib/foia/reports/cappa-projected-arrests-releases-county-level.xls

ICE public webpages on www.ice.gov:

CAP Program Webpage: http://www.ice.gov/criminal-alien-program/

ICE ACCESS Webpage: http://www.ice.gov/access/

ICE ACCESS Fact Sheet: http://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf

ICE ACCESS Fact Sheet(2): http://www.ice.gov/news/library/factsheets/access.htm

CAP Press Release/Fact Sheet 11/19/2008:

http://www.ice.gov/doclib/news/library/factsheets/pdf/cap.pdf

ICE Enforcement in Arizona Fact Sheet (details CAP enforcement in Arizona):

http://www.ice.gov/news/library/factsheets/az-enforcement.htm

**CONCLUSION**

For all the foregoing reasons, defendant Department of Homeland Security respectfully requests that the Court enter summary judgment in its favor on all of plaintiffs' claims.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2012, a copy of the within and foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Marcia Berman*
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