



June 18, 2014

**Via ECF**

The Honorable Lorna G. Schofield  
United States District Court  
Southern District of New York  
40 Foley Square  
New York, NY 10007-1312

RE: *Detention Watch Network, et al., v. ICE, et al.*, 14-cv-0583

Dear Judge Schofield:

In accordance with Your Honor's Order dated May 16, 2014 (Dkt. 40), and in response to Defendants' woefully inadequate production of documents on June 16, 2014, Plaintiffs respectfully write to request a conference at the Court's earliest convenience. Plaintiffs further seek a court order directing Defendants DHS and ICE to produce 1000 pages each within one week; *Vaughn* indices describing redacted documents; 5000 pages per month from each agency to satisfy future monthly production deadlines; and documents explaining how searches are being tasked, executed and processed.

**Background**

On November 25, 2013, almost seven months ago, Plaintiffs Detention Watch Network ("DWN") and the Center for Constitutional Rights ("CCR") filed a Freedom of Information Act ("FOIA") Request with Defendants Department of Homeland Security ("DHS") and Immigration and Customs Enforcement ("ICE"). The Request sought documents related to the highly controversial Detention Bed Quota, a provision of the annual federal appropriations bill that requires the detention of 34,000 immigrants per day, and sought expedited processing in view of the imminent legislative debate surrounding its renewal. (Dkt. 1, Ex. A). Defendants failed to respond within statutory time frames to Plaintiffs' Request, and Plaintiffs filed the instant lawsuit on January 30, 2014. (Dkt. 1). On February 11, 2014, Plaintiffs filed a motion for a preliminary injunction (Dkts. 6-7), arguing that Defendants' withholding of documents prevented Plaintiffs from engaging the public during legislative debate on the Detention Bed Quota, thus causing irreparable harm. *See, e.g., Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008) (finding irreparable harm where information sought through FOIA pertained to imminent legislative debate).

While the motion was pending before this Court, Plaintiffs engaged in extensive negotiations with Defendants, limiting portions of the request and offering to resolve the preliminary injunction motion if Defendants agreed to produce documents responsive to just three portions of the Request (categories (f), (g) and (h)). Defendants rejected Plaintiffs' offer, continued to withhold documents, and refused to provide a timeline for production. *See* Dkt. 35 (April 17, 2014 Joint Letter to Judge Schofield).

During the conference before the Court on May 13, 2014, the Court ordered Defendants to comply with a monthly production deadline, beginning on June 15, 2014. *See* Dkt. 40. The Court further advised the parties that “should Defendants fail to produce a satisfactory number of documents with each production, Plaintiffs are directed to request a conference with the Court immediately.” *Id.*

**Defendants’ Minimal and Irrelevant Production of June 16, 2014**

Beginning at 5:00 p.m. on Monday, June 16, 2014, Assistant U.S. Attorney Jean-David Barnea emailed the entirety of DHS’ production to Plaintiffs’ counsel: 227 pages. ICE did not produce a single document in response to the Court’s order.

DHS claims, without any explanation, that of 2243 records processed, it unilaterally determined that 2235 – all but eight – were “non-responsive.” (Dkt. 41-1 at 1). Of the 227 pages produced by DHS, 56 were redacted in full, with no Vaughn index to indicate the nature of the document so that Plaintiffs could evaluate the merits of Defendants’ exemption claims. Of the remaining 171 pages, one is an email entitled “The Homeland Security News Briefing for Friday, March 15, 2013,” second (DHS-001-000060) to which that day’s News Briefing and News Clips were attached. Those two attachments comprise 167 pages, which consist of excerpts and summaries of 202 news articles, all of which are publicly available, as well as a roundup of that day’s front-page headlines, TV and radio news story lineups, scheduled events in Washington D.C., and jokes from the David Letterman and Jay Leno shows. Of the 202 articles included in the News Briefing, a total of 23 touch on immigration, and only nine concern immigration detention. This portion of DHS’ production is thus comprised entirely of filler: news articles or summaries of articles on a range of topics, all available to anyone with access to the internet.

The three remaining pages of DHS’ production consist of a one-page email summarizing talking points related to an article about California’s Trust Act (DHS-001-000001); a publicly available letter from Representative Raul Grijalva (D-NM) seeking documents related to costs of private prison detention facilities (DHS-001-000059), and a January 3, 2014 email asking DHS staff to provide Representative Grijalva with requested documents (DHS-001-000057). Although Plaintiffs’ FOIA request sought attachments to emails and requested that “parent-child” relationships between emails and attachments be maintained, (Dkt. 1, Ex. A at 5), the attachments were not included with this production. Viewed as a whole, DHS’ production – almost seven months after the Request was filed – is egregiously thin and almost completely irrelevant to Plaintiffs’ Request. Moreover, although the government represented to the Court that DHS and ICE would first process documents from offices likely to have records responsive to categories (f), (g) and (h), with the exception of the publicly available letter from Rep. Grijalva and the one-page email response, the production has no connection to these categories. Given the time DHS has had to do a good-faith search and processing of responsive documents, the production falls far short of a satisfactory response to the Court’s May 16, 2014 Order.

If DHS’s response is minimal, ICE’s is non-existent, and ICE has offered no acceptable explanation for flouting the Court’s Order entirely. *See* Dkt. 41-1. ICE’s vague and generalized reasons for neglecting to produce a single document by the June 15 deadline – heavy workload and limited reviewing capacity – do not excuse ICE’s failure to comply with this Court’s order or

under FOIA's standard of "exceptional circumstances." Under 5 U.S.C. §5(a)(6)(C)(ii), "the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." Defendants' letter fails to show that ICE's workload has created a backlog so unpredictable as to relieve ICE of its obligation to meet Court's deadline, particularly since the agency has been in possession of Plaintiffs' request for months.

**Defendants' Inadequate Plan for Production and the Urgent Need for Disclosure**

Defendants' statements regarding their plans for the disclosure due on July 15, 2014 strongly suggest they will continue to evade their obligations for timely and substantive production of responsive material. DHS anticipates *processing* 3000 records, an amount similar to the number processed for this month's deadline, which resulted in a production of 227 pages, the vast majority of which consisted of news articles generated outside DHS. ICE promises even less – a review of just 1000 pages, and "cannot guarantee" the substance or number of documents that will be produced. (Dkt. 41-1 at 3). This is an unacceptable derogation of the agencies' responsibilities under FOIA. "The glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires." *ACLU v. DOD*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). It is plain that absent Court intervention, Defendants will not produce responsive information in a timely way.

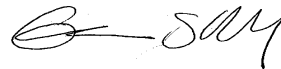
Plaintiffs' need for the information sought in the FOIA Request is increasingly urgent. The appropriations debate is well underway, and as a result of Defendants' dilatory conduct, Plaintiffs have been unable to access information that could have been used to inform the public in advance of crucial Congressional hearings. For example, on May 29, 2014, the House Judiciary Committee held an Oversight Hearing on DHS, during which DHS Secretary Johnson was questioned about the Detention Bed Quota, and on June 11, the House Appropriations Committee debated an amendment to the appropriations bill that would eliminate the Detention Bed Quota. Advocates anticipate that discussion over such an amendment will reach the full House in a matter of weeks, and similar discussions are underway in the Senate. Defendants' continuing delays thus cause the public and Plaintiffs concrete harm. "[S]tale information is of little value," particularly in cases involving ongoing legislative debate. *Elec. Private Info. Ctr. v. Dep't of Justice* 416 F. Supp. 2d 30, 40 (D.D.C. 2006).

Given Plaintiffs' urgent need for responsive documents and Defendants' pale attempt to comply with FOIA time frames thus far, it is appropriate and necessary for the Court to order DHS and ICE to produce, not just process, a minimum number of responsive pages immediately and to require similar page minimums going forward. For example, in *Nat'l Day Laborer Organizing Network v. ICE*, No. 10 CV 3488, Judge Scheindlin ordered the FBI to produce 5000 pages of responsive documents every two weeks, and ICE to produce 5000 pages of responsive documents within 17 days. *See NDLO v. ICE*, July 29, 2011 Order (Dkt. 104), attached as Exhibit 1. *See, also, e.g., ACLU v. DOD*, 339 F. Supp. at 504-05 (despite the fact that national security issues were raised by the FOIA request at issue, ordering production of all responsive documents within one month); *NRDC v. Dep't of Energy*, 191 F. Supp. 2d 41, 43 (D.D.C. 2002) (ordering the "vast majority" of the processing of 7500 pages determined to be responsive to be completed within 32 days).

Plaintiffs therefore respectfully request that the Court (1) impose a one-week deadline that requires ICE and DHS to produce 1000 pages each of responsive documents as well as Vaughn indices that describe the nature of the 56 pages of documents redacted thus far; (2) require ICE and DHS to produce 5000 pages each for each monthly deadline, along with Vaughn indices; and (3) order Defendants to provide any documents or memoranda describing how searches are being tasked and executed, including information regarding search terms, locations of searches, and determinations regarding the purported non-responsiveness of withheld records and authority for withholding such records.

We thank the Court for its consideration of this request.

Respectfully submitted,



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